

FEDERAL COURT

BETWEEN:

**ROBERT T. STRICKLAND, GEORGE CONNON, ROLAND AUER,
IWONA AUER-GRZESIAK, MARK AUER, AND VLADIMIR AUER BY
HIS LITIGATION REPRESENTATIVE ROLAND AUER**

Applicants

- and

ATTORNEY GENERAL OF CANADA

Respondent

AFFIDAVIT

I, Andrew H. Heft, of the City of Montreal, in the Province of Quebec, SWEAR THAT:

1. I am a member of the Barreau du Quebec and have practiced family law in the province of Quebec for over 35 years. I have personal knowledge of the matters deposed to in this Affidavit unless stated to be based on information, in which case I believe that information to be true.
2. I have been asked to provide a report on certain aspects of child support law in the province of Quebec. A true copy of my report in that regard is attached to my Affidavit as Exhibit "A".
3. I am advised by Yusuf Nurdin, with the firm of Kapsi & Associates Chartered Accountants,, that the firm reviewed the figures and calculations underlying Table 1 and Figure 1 in Exhibit "A" and has verified that they are correct.

4. I make this Affidavit in support of an anticipated application for a declaration that the *Federal Child Support Guidelines* are *ultra vires* the federal *Divorce Act*.

SWORN BEFORE ME at the City of)
Montreal, in the Province of Quebec, this)
1 day of august, 2012.)

Claudia Anna Bergasino)
A Notary Public in and for the Province of)
Quebec)
#180850



ANDREW H. HEFT

ANDREW H. HEFT

AVOCATS— ATTORNEYS

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Andrew H. Heft B.A., B.C.L.
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August 1, 2012

BY FAX

Ronald J. Robinson
Barrister & Solicitor
Suite 200, 1210-11th Avenue SW
Calgary, Alberta
T3C 0M4

This is Exhibit “ A ” referred to in
the Affidavit of

Andrew H. Heft

Sworn before me this 1st

day of AUGUST A.D., 2012

Claudia Quia Bergantino
A Notary Public in and for
The Province of Quebec #180087

RE: QUEBEC CHILD SUPPORT GUIDELINES

Dear Colleague,

Professional Background

I have practiced family law in the province of Quebec for the last thirty-four (34) years. I graduated from McGill University with a Bachelor of Arts in 1972 and a Bachelor of Civil Law in 1976. I have written extensively about Quebec family law in simple language for lay people on my website - www.quebecdivorcelawyer.com. On a daily basis I answer questions that are addressed to me by people visiting my site.

My practice consists of litigious family law and divorce related matters, including pleading numerous cases before the Quebec Superior Court and Court of Appeal in connection with custody, division of property, and support, including a variety of issues that have arisen regarding the application of the Quebec child support guidelines legislation (the “Quebec Guidelines”).

You have asked me for information on the law in the province of Quebec dealing with the determination of child support.

In response to your questions I would respond as follows:

1. Do the Quebec Guidelines consider the incomes of both the custodial and non-custodial parents?

The gross incomes of both the custodial and non-custodial parents are considered in determining the respective percentage contributions of the parties towards the child support obligation. In other words, the gross incomes of both parents are considered in assessing both the quantum of child support and the distribution of that obligation pursuant to the formula used under the Quebec Guidelines.

The formula used under the Quebec Guidelines results in a basic table amount payable in child support (to which certain other expenses, discussed below, may be added).

2. How do the Quebec Guidelines treat situations where the children spend residential custodial time with each parent?

Under the Quebec Guidelines, the "time of custody" (and, of course, the number of children), are used to determine the amount of child support payable.

It should be noted that the time of custody is measured in days, but calculated in hours, and is broken down into three categories:

"sole custody" - the children spend up to 20% of their time with the non-custodial parent

"prolonged access" - the children spend between 20% and 40% of their time with the non-custodial parent

"Shared custody" - the children spend between 40% to 60% of their time with each parent

The Quebec Guidelines factor in one of the above custodial scenarios in distributing the child support obligations to each of the parents. Accordingly, child care costs are recognized by a parent where that parent has at least 20% residential custodial time.

The Quebec Guidelines also take into account hybrid situations where, for example, there is more than one child, and where the "time of custody" with each parent varies based on the three categories referred to above; for example each parent may have custody of one child, or one child may be in a shared custody situation while another may be subject to a "prolonged access" arrangement, etc.

3. Are there any deductions to the gross income of the parents utilized in determining their respective child support obligations?

You will note from the second page of the "Child Support Determination Form" used by the Court (Schedule 1 to the "Regulation respecting the determination of child support payments", c.C-25, r.1.2., and attached as Appendix "A"), and supported by the "Aliform" software widely used in Quebec to calculate child support (www.cch.ca/produit.aspx?webid=1021), that the contribution of each party to supporting the children is based on a percentage (called the distribution factor) of the total "disposable" income of the parties.

The "disposable" income of each party (pursuant to the Child Support Determination Form) is his/her gross income less:

- -line 301 - basic deduction (i.e. \$10,100 as a self-support reserve)
- -line 302 - deduction for union dues
- -line 303 - deduction for professional fees

4. Under the Quebec Guidelines, does the percentage of after tax income devoted to child support decrease as income increases?

The percentage of after tax income devoted to child support under the Quebec Guidelines is on a declining percentage. In other words, the child support paid, as represented by the percentage of after tax income, decreases as after tax income increases (although the overall amount of child support, of course, increases). This declining percentage is illustrated in Table 1 and Figure 1 (below).

The figures presented in Table 1 and Figure 1 assume that one parent has sole custody of one or two children (i.e. over 80% of residential custodial time), and that both parents earned equal incomes (for child support purposes) resulting in equal proportions of contribution to the child support. The figures presented in Table 1 and Figure 1 represent the non-custodial parent's 50% share (as each parent is paying half) of the Quebec Guidelines child support basic table amount. The basic table amount payable is derived from a calculation that includes a "Basic Deduction" of a self support reserve of \$10,100 for each parent, and the deduction reduces the total income deemed available to each parent for the purposes of calculating child support, and below which amount no child support would be payable by a parent.

Appendix "B", also attached hereto, sets out the detailed input numbers for the figures used in Table 1 and Figure 1.

Table 1

BASIC CHILD SUPPORT

FOR NON-CUSTODIAL PARENT (i.e. includes no extra support for extra expenses)

(assumes one parent has sole residential custody of the children for more than 80% of the time)

Non Custodial Parent		Basic Child Support				
Income Level (1)	AIT Income (2)	Combined Disposable Income of Parents for Child Support Purposes (3)	1 Child (4)	As % AIT Income (5)	2 Child (4)	As % AIT Income (5)
\$ 30,000	\$ 22,886	\$ 39,800	\$ 2,970	12.98%	\$ 4,440	19.40%
\$ 40,000	\$ 29,421	\$ 59,800	\$ 3,960	13.46%	\$ 5,765	19.59%
\$ 50,000	\$ 35,246	\$ 79,800	\$ 4,740	13.45%	\$ 6,820	19.35%
\$ 60,000	\$ 41,365	\$ 99,800	\$ 5,240	12.67%	\$ 7,455	18.02%
\$ 70,000	\$ 47,517	\$ 119,800	\$ 5,645	11.88%	\$ 7,965	16.76%
\$ 80,000	\$ 53,607	\$ 139,800	\$ 6,015	11.22%	\$ 8,445	15.75%
\$ 90,000	\$ 59,101	\$ 159,800	\$ 6,395	10.82%	\$ 8,930	15.11%
\$ 100,000	\$ 64,530	\$ 179,800	\$ 6,775	10.50%	\$ 9,420	14.60%
\$ 110,000	\$ 69,959	\$ 199,800	\$ 7,155	10.23%	\$ 9,910	14.17%
\$ 120,000	\$ 75,388	\$ 219,800	\$ 7,505	9.96%	\$ 10,360	13.74%
\$ 130,000	\$ 80,745	\$ 239,800	\$ 7,855	9.73%	\$ 10,810	13.39%
\$ 140,000	\$ 85,921	\$ 259,800	\$ 8,205	9.55%	\$ 11,260	13.11%
\$ 150,000	\$ 91,099	\$ 279,800	\$ 8,555	9.39%	\$ 11,710	12.85%
\$ 160,000	\$ 96,278	\$ 299,800	\$ 8,905	9.25%	\$ 12,160	12.63%
\$ 170,000	\$ 101,456	\$ 319,800	\$ 9,255	9.12%	\$ 12,610	12.43%
\$ 180,000	\$ 106,635	\$ 339,800	\$ 9,605	9.01%	\$ 13,060	12.25%
\$ 190,000	\$ 111,813	\$ 359,800	\$ 9,955	8.90%	\$ 13,507	12.08%
\$ 200,000	\$ 116,992	\$ 379,800	\$ 10,305	8.81%	\$ 13,960	11.93%
\$ 210,000	\$ 122,170	\$ 399,800	\$ 10,655	8.72%	\$ 14,410	11.80%
\$ 220,000	\$ 127,349	\$ 419,800	\$ 11,005	8.64%	\$ 14,860	11.67%
\$ 230,000	\$ 132,527	\$ 439,800	\$ 11,355	8.57%	\$ 15,310	11.55%
\$ 240,000	\$ 137,706	\$ 459,800	\$ 11,705	8.50%	\$ 15,760	11.44%
\$ 250,000	\$ 142,884	\$ 479,800	\$ 12,055	8.44%	\$ 16,210	11.34%
\$ 260,000	\$ 148,063	\$ 499,800	\$ 12,405	8.38%	\$ 16,660	11.25%
\$ 270,000	\$ 153,241	\$ 519,800	\$ 12,755	8.32%	\$ 17,110	11.17%
\$ 280,000	\$ 158,420	\$ 539,800	\$ 13,105	8.27%	\$ 17,560	11.08%
\$ 290,000	\$ 163,598	\$ 559,800	\$ 13,455	8.22%	\$ 18,010	11.01%
\$ 300,000	\$ 168,777	\$ 579,800	\$ 13,805	8.18%	\$ 18,460	10.94%

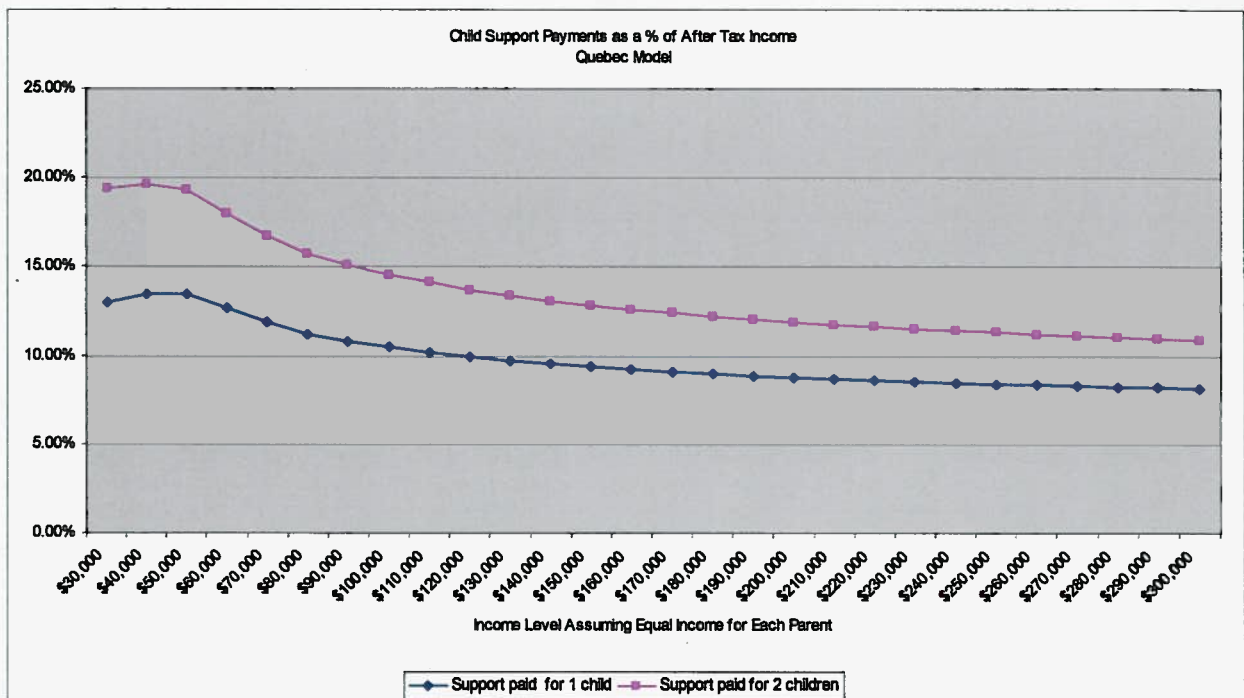
Notes:

- (1) "Income Level" represents gross income before any taxes or deductions.
- (2) "AIT Income" represents the after tax income available to a parent following requisite federal and provincial taxes, Unemployment Insurance ("EI"), Canada Pension Plan ("CPP") and the Quebec Provincial Parent Insurance Plan ("PPIP"). The maximum payable on CPP is \$2,163, the EI maximum in Quebec is \$588 and the PPIP maximum is \$316.
- (3) For "Combined Disposable Income of Parents for Child Support Purposes" ("Combined Income for Support") in Table 1, it is assumed that each parent earns an equal amount, which amount is specified in the first column as "Income Level". From Income Level, for establishing income for child support purposes, each parent is allowed a "Basic Deduction",

as a self support reserve, of \$10,100. Accordingly, the Combined Income for Support for the assessment of the basic table child support is the Non Custodial Parent Income Level times 2 minus \$20,200 (\$10,100 x 2).

- (4) The child support amount utilizes the 2010 table and then the amount is reduced by 50% to reflect the non-custodial parent's share, pursuant to the equal income assumption.
- (5) The child support payable as a percentage of AIT Income.

Figure 1.



5. Do the Quebec Guidelines allow for child support payable beyond the basic table amounts?

An additional factor which may increase the amount of support are certain specified expenses (called "special" or "particular" expenses) relating to the child which are not considered to be part of and calculated in the base amount of support. Such expenses include net child care expenses, net post secondary education expenses, and net special expenses.

The calculation of both the net child care and post secondary education expenses require the deduction of any benefit, subsidy, or income tax credit applicable before the net cost is allocated between the parents. In addition, the parents' contribution to post secondary education expenses is also net of any student loans or bursaries the child receives.

Net special expenses are expenses other than child care or post secondary education costs necessary to meet a particular child's situation. This can include expenses for medical issues, elementary or secondary education, and extra-curricular activities. Related benefits, deductions or income tax credits are deducted from such expenses before being allocated to the parents.

If the parents cannot agree on the add-ons to the basic table amount, then they must be approved by the Court on the basis that the expenses are reasonable given the needs and resources of each party.

Special or particular expenses are routinely added to the base amount of support to obtain the total amount of support payable, if the support creditor satisfies the Court that the expense claimed falls within what has been accepted. For example day care required for work is always accepted. Private school expenses are accepted if the parties had agreed on private school - if there is a disagreement then the Court must determine if private school is reasonable based on the circumstances of the parties. If the Court concludes in the affirmative then what is acceptable as a private school expense will be added on. It should be pointed out that not all school expenses are accepted 100% of the time. I have seen decisions where, for example, uniforms are accepted by one judge because they are required by the school, but not accepted by another because it was determined that they are covered by the base amount that provides for clothing. The same can be said about activities. Some judges accept the addition of expenses associated with activities. Others find that activities are covered by the base amount and only the participation in sports at an elite level will allow the addition of expenses associated with the practice of that sport as a special expenses. In my practice I have found that judges are less generous when it comes to discretionary add-ons when the parties are less fortunate and do not have the financial capacity to sustain the additional costs.

6. May the Court vary the child support payable pursuant to the Quebec Guidelines formula?

The Court does have defined discretion to vary the child support otherwise payable under the Quebec Guidelines formula. That discretion appears in two places. First, under s.10 of the "Regulation respecting the determination of child support payment" which provides:

The percentage in the table in Schedule II for the part of the parents' disposal income exceeding 200 000 \$ is given for information purposes only; therefore, the Court may, if it deems it appropriate, fix for that party of the disposable income an amount

different from the amount that would be obtained using that percentage.

Accordingly, the Court may depart from the Quebec Guidelines formula percentage where it deems it appropriate where the combined disposable income of the parents exceeds \$200,000. The Court will normally exercise that discretion, based on my experience, when the evidence clearly shows that the payer's capacity to pay is exceptional - in other words where his/her income is at a level where the amount determined by using the Guidelines would be substantially less than what would be ordered if the old test consisting of balancing needs and means were to be applied.

Second, that discretion is also defined in article 587.2 of the Civil Code of Quebec (attached as Appendix "C"). In relation to derogating from the Quebec Guidelines amount, the rule is that the Guidelines amount will apply unless the parties show cause why it should not apply. In practice, the parties can always agree to an increase over the Quebec Guidelines amount which the Court will not hesitate to accept, but cannot bind the Court by an agreed decrease unless certain conditions are satisfied. The same conditions will apply if the parties do not agree and one of them requests an increase or decrease of the Guidelines amount.

Article 587.2 (second and third paragraphs) of the Civil Code of Quebec indicates when and why the Court may, **on a discretionary basis alone** (there being no formula to apply), increase or reduce the level of support determined by the Guidelines. Article 587.2(2) allows a deviation from the formula amount based on simple hardship. The situations where simple hardship is sufficient to displace the formula amount includes where the parent seeking the variation has an obligation to support other children. Article 587.2(3) allows a deviation from the formula amount only where there is "undue hardship". The situations in which undue hardship must be shown includes where there are high costs of exercising visiting rights with the children or where there are obligations to support persons other than children.

Article 587.2(2) and (3) specifically state:

.....

587.2(2) The court may, however, increase or reduce the level of support where warranted by the value of either parent's assets or the extent of the resources available to the child, or to take account of either parent's obligation to provide support to children not named in the application, if the court considers the obligation entails **hardship** for that parent.

587.2(3) The court may also 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 either parent. Such hardship may be due, among other reasons, to the costs involved in exercising visiting rights in respect of the child, an obligation to provide support to persons other than children or reasonable debts incurred to meet family needs.

(emphasis added)

It has also been established by the jurisprudence that the Quebec Guidelines amount may be increased (the French term being *majoré*) if the non-custodial parent does not exercise access, provided that the custodial parent is able to show that such non-exercise of access imposes additional costs for him/her.

Regarding simple "hardship", based on my experience, the Court will look at the payer's income and expenses, including those associated with other children, (either from his new family or those that he must support by virtue of a previous child support order) and determine whether, taking into account the Guidelines amount obtained, there is enough income left over for the payer to meet his obligations to the other children that he must provide for. The Court will exercise its discretion based on the principle none of the payer's children should receive preferential treatment in relation to the others.

"Undue hardship" as the term suggests relates to more than simple financial difficulty. It must be demonstrated that the imposition of the amount obtained by applying the Guidelines will for example clearly leave the payer without sufficient means to pay the costs associated with the exercise of his access, rendering his access rights illusory (particularly where the child resides at a considerable distance necessitating exorbitant travel costs), or where the payer is the sole source of support for an elderly parent, a handicapped wife etc., or where the termination of the marriage has left the debtor with the responsibility for the payment of debts that have their origin in family expenses of a reasonable nature. In these cases there would appear to be a requirement to show that the payment of the Guidelines amount of support in addition to the payer's other obligations referred to will leave him without sufficient means to support himself and meet his current obligations.

7. Are the Quebec Guidelines Workable and not Complex?

In my experience, the Quebec Guidelines have proven to be very workable on a practical level since they were introduced in 1997. There is software available (Aliform, referred to above) that calculates the amount of support payable once the necessary information as to income, the custodial arrangement, and any

special expenses is properly entered. This software is widely used in Quebec, and has proven to make the calculation of child support and the distribution of that obligation between the parents quite simple. In any event, it is my view that Quebec Guidelines and their application have not been complex for either the parties involved, their counsel, or the Court. I am enclosing a copy of the form used to make the calculation, taken directly from the Aliform program. (Appendix "D").

The litigation that has ensued in the application of the Quebec Guidelines mostly concerns determining income (particularly when one of the parties is self-employed or earns undeclared income), making the calculation of the time of custody (in hours and then days) when the exact periods of access are unclear, calculating special expenses (which ones apply and what are the net amounts applicable), and claims regarding derogating from the Guidelines amount - not to mention, of course, custody litigation itself which is often required before a determination of the "time of custody" can be made.

I hope that the above is of help and answers your questions.

Please let me know how I can be of additional assistance.

Yours very truly,

(S) ANDREW H. HEFT

ME ANDREW H. HEFT