

COURT FILE NUMBER	4803 156019
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	EDMONTON
PLAINTIFF/APPLICANT	ROLAND NIKOLAUS AUER
DEFENDANT/RESPONDENT	AYSEL IGOREVNA AUER
INTERVENOR	ATTORNEY GENERAL OF CANADA
DOCUMENT	AFFIDAVIT OF D.A. ROLLIE THOMPSON
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Attorney General of Canada Department of Justice Canada Edmonton Regional Office EPCOR Tower 300, 10423 – 101 Street NW Edmonton, Alberta T5H 0E7 Attention: Cameron Regehr Tel: (780) 495-1048 Fax: (780) 495 – 8491 Counsel for the Deputy Attorney General of Canada

AFFIDAVIT OF D.A. ROLLIE THOMPSON

SWORN ON JUNE 11th, 2020

I, D.A. Rollie Thompson, of the City of Halifax, in the Province of Nova Scotia, SWEAR AND SAY THAT:

1. I am a Professor of Law at the Schulich School of Law, Dalhousie University, in Halifax, Nova Scotia. I will become Professor Emeritus in July 2020. 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. Attached as **Exhibit "A"** is my current *curriculum vitae*.

3. Attached as **Exhibit "B"** is a copy of my Report dated June 10, 2020 prepared for the Intervenor, the Attorney General of Canada.

4. I make this Affidavit in support of the Attorney General of Canada's intervention in the application by Roland Nikolaus Auer to have the *Federal Child Support Guidelines* found *ultra vires* and for no other purpose.

SWORN BEFORE ME at the City of Halifax,)
in the Province of Nova Scotia, this 11th day of)
June, 2020.)


_____)
A NOTARY PUBLIC IN AND FOR THE)
PROVINCE OF NOVA SCOTIA)

DONNA D. FRANEY
A Notary Public in and for
the Province of Nova Scotia


_____)
D.A. ROLLIE THOMPSON

This is **Exhibit "A"** referred to in the
Affidavit of

D.A. ROLLIE THOMPSON

Sworn before me this 11th day
of June, A.D., 2020



A NOTARY PUBLIC IN AND FOR THE
PROVINCE OF NOVA SCOTIA

DONNA D. FRANEY
A Notary Public in and for
the Province of Nova Scotia

CURRICULUM VITAE

D.A. ROLLIE THOMPSON

ADDRESS: Schulich School of Law, Dalhousie University
6061 University Avenue
Halifax, Nova Scotia
(902) 494-1033
Fax (902) 494-1316
e-mail: rollie.thompson@dal.ca

MAILING ADDRESS:
P.O. Box 15000
Halifax, Nova Scotia
B3H 4R2

LANGUAGES: English, French

EDUCATION

LL.B.: DALHOUSIE LAW SCHOOL, Halifax, Nova Scotia
1975-78, degree granted 1978
Second Year: Alistair Fraser Scholarship, G.O. Forsyth Prize, Carswell Prize
(second highest average)
Third Year: Alistair Fraser Scholarship

M.A.: DALHOUSIE UNIVERSITY, Halifax, Nova Scotia, 1972-74
CARLETON UNIVERSITY, Ottawa, Ontario, 1971-2
Not completed, part-time graduate student in Economics. Two courses in Public
Finance, one at Carleton and one at Dalhousie, one in Applied Development Economics.

B.A.: MCGILL UNIVERSITY, Montreal, Quebec, 1968-71
B.A. (First Class Honours in Economics and Political Science).
Allan Oliver Gold Medal and Memorial Fellowship (for graduating first in Departments of
Economics and Political Science), Cherry Prize in Political Science and first in class in third
year, University Scholar in second year.

AWARDS

- 2018 Association of Family and Conciliation Courts, Ontario, “10 in 10” 10th Anniversary Award of Excellence in Family Justice (with Carol Rogerson)
- 2016 Osgoode Professional Development, Professional LL.M. Teaching Award, Osgoode Hall Law School
- 2011 Queen’s Counsel, Nova Scotia
- 2005 Vincent J. Pottier Award for Exceptional and Outstanding Contribution to Dalhousie Legal Aid Service
- 2002 Dalhousie Law Alumni Association and Dalhousie Law Students Society Award for Teaching Excellence

EMPLOYMENT, TEACHING AND CONSULTING

- July 2020: Professor Emeritus, Schulich School of Law
- 1992-2020: Professor of Law, Schulich School of Law
 Half-time Post-Retirement 2017-20: Family Law, Advanced Issues in Family Law.
 Child Protection Law (2019-20)
 Full Sabbaticals: 2013-14, 2006-07 (taught Evidence at University of Toronto),
 1999-2000
 Course Taught from 1999-2016: Supreme Court (Family Division) Clerkship
 Course Taught from 1998-2003: Family Law Dispute Resolution
 Courses Taught from 1996-97 to 2016-17: Civil Procedure, Evidence, Family Law
 Courses Taught in 1995-96: Civil Procedure, Evidence, Children and the Law
 Courses Taught in 1994-95: Evidence, Children and the Law,
 Half-Sabbatical (Fall Term 1994)
 Executive Director, Dalhousie Legal Aid Service, 1992-1994
 Courses Taught in 1992-93, 1993-94: Evidence, Clinical Law
- 2007-15: Osgoode Professional Development, Toronto, Ontario
 Advanced LL.M. in Family Law
 Course on Child and Spousal Support
 Taught April-June: 2007, 2009, 2011, 2013, 2015
- 2006 on Editor, Canadian Family Law Quarterly (Thomson Reuters)

- 2001-08 Federal Department of Justice
Co-director (with Carol Rogerson), Spousal Support Advisory Guidelines Project
Final report: *Spousal Support Advisory Guidelines* (July 2008)
Guidelines applied across Canada by lawyers, mediators and judges to determine the amount and duration of spousal support
- 2004 Consultant, Supreme Court (Family Division)
Revision and redrafting of family law rules and forms for judges
- 1997-99 Consultant, Department of Justice, Government of Nova Scotia
Implementation of Child Maintenance Guidelines
Member, Implementation Team, Supreme Court (Family Division)
Prepared family law rules and forms for new Division
- Oct. 1989 to Aug. 1991: Consultant, Department of Community Services, Government of Nova Scotia
Responsible in part for drafting Report of Legislation Committee to Minister of Community Services, January 1990. Preparation of draft Children and Family Services Act and subsequent revisions to Bill No. 55. Preparation of Rule 21 of Family Court Rules. Member of Implementation Team, Children and Family Services Act, Family and Children's Services Division, Dept. of Community Services. Education for social workers, lawyers and judges.
- July 1986 to June 1992: Associate Professor of Law, Dalhousie Law School
Courses Taught in 1991-92: Evidence, Regulated Industries, Clinical Law
Courses Taught in 1990-91: Evidence, Children and the Law, Regulated Industries
Full Sabbatical, 1989-90
Tenure Granted, 1989
Courses Taught in 1988-89: Children and the Law, Evidence, Regulated Industries
Courses Taught in 1987-88: Children and the Law, Evidence
Courses Taught in 1986-87: Children and the Law, Evidence, Regulated Industries, Business Associations
- July 1985 to June 1986: Assistant Professor of Law, Dalhousie Law School
Courses Taught in 1985-86: Children and the Law, Evidence, Public Law, Clinical Law
- July 1982 to June 1985: Executive Director, Dalhousie Legal Aid Service, and Assistant Professor of Law
Dalhousie Law School

As Director of DLAS, responsible for the management and direction of a community law office with 11 employees (including 5 lawyers and 2 community legal workers) with a total budget of \$360,000 and an annual caseload of 1800. Responsibilities included: reporting to a Board of legal and community members; liaison with various funding bodies, including the Nova Scotia Legal Aid Commission and the Law Foundation of Nova Scotia; representing DLAS in relations with professional bodies, government and community groups; preparing and teaching Clinical Law to third-year law students; supervision of student casework; acting on behalf of clients in criminal, family, administrative and other civil cases (including test case litigation); developing and executing (with other staff) community legal education, law reform and community development programs; and teaching one course per year at the Law School in Law and the Family (1982-84) and Children and the Law (1984-85).

March 1980 to June 1982: Associate at Kitz, Matheson, Green and MacIsaac, Halifax
Litigation practice specialising in family law, municipal law and regulated industries.

Sept. 1979 to Feb. 1980: Articled Clerk at Kitz, Matheson, Green and MacIsaac, Halifax
Admitted to Nova Scotia Bar in March 1980.

Sept. 1978 to Aug. 1979: Clerk to Justice Brian Dickson, Supreme Court of Canada

Summer 1977: Articled Clerk at Dalhousie Legal Aid Service, Halifax

Summer 1976: Personal contract with Planning Secretariat of Cabinet, Government of Manitoba
Responsible for community economic development work with the Communities Economic Development Fund, a provincial Crown corporation lending to northern and native communities and for assessment of the Northern Economic Development Strategy for the Resources and Economic Development Committee of Cabinet.

Sept. 1975 to Dec. 1977: Economic and policy consultant, on part-time basis, on various contracts:

- (i) Habitat Secretariat, Ministry of State for Urban Affairs, Government of Canada, to write discussion paper on GNP as a measure of economic welfare (spring 1976);
- (ii) Community Employment Strategy Office, Canada Employment and Immigration Commission, Government of Canada, to take part in national conference and to assess community participation in the C.E. Strategy (fall 1976);
- (iii) Nova Scotia Government Employees Association, to draft collective bargaining legislation and a brief in support to the Nova Scotia government (fall 1977);

(iv) Department of Development, Government of Nova Scotia, to provide services for 1 day per week similar to those previously provided as a full-time employee (1975-76).

Summer 1975: Personal Contract with Habitat Secretariat, Ministry of State for Urban Affairs, Government of Canada, to write a paper on alternative forms of enterprise and community economic development.

July 1972 to June 1975: Development Planner and Economist, Planning and Programs Division, Planning and Economics Branch, Department of Development, Government of Nova Scotia
Responsible for providing services on a broad range of policy matters, including macroeconomic forecasting, drafting the annual budget speech, delivery of social services, service industry policy, labour markets analysis and employment training, municipal development planning in Victoria County, and numerous topics of industrial and economic development.

Sept. 1971 to June 1972: Research Economist, Government Finance and Corporate Financial Markets Section, Department of Banking and Financial Analysis, Bank of Canada, Ottawa, Ontario
Responsible for forecasting and monitoring provincial and municipal government financial requirements and borrowing.

1968 to 1971: Various summer jobs, including research assistant to professors of political sociology and history, computer operator for IBM, busboy and factory labourer, and teaching assistant in Quantitative Methods in Political Science, Dept. of Political Science, Sir George Williams University (1970-71).

PUBLICATIONS AND PAPERS

- “Post-Separation Increases in Payor Income and Spousal Support” (2020), 39 Can.Fam.L.Q., Issue No. 2 (June 2020)
- “Hearsay and Exceptions to Hearsay Rule”, revised (2020) Chapter 9 in Niman, ed., *Evidence in Family Law* (loose-leaf, Canada Law Book, 2020)
- “Legislating About Relocating: Bill C-78, N.S. and B.C.” (2019), 38 Can.Fam.L.Q. 219-258.
- “Spousal Support, Eh? Sorry, Not Your American Alimony” (2019), 41 Houston J. of Int’l Law 641-670.
- Editor, *Nova Scotia Civil Procedure Rules*, 2nd ed. (LexisNexis, looseleaf), 3-4 issues per year
- “The Retreat from ‘Least Intrusive Intervention’ in Canadian Child Protection Law” (2018), 37 Can.Fam.L.Q. 99-120.
- “The Year in Spousal Support: Appeals, Material Changes and More” in Law Society of Ontario, *12th Annual Family Law Summit*, Toronto, April 9-10, 2018.
- “What’s Past Parenting Is Prologue: Past Parenting Evidence in Ontario” (September 2017, under revision for CFLQ)
- “Evidence” in Nova Scotia Barristers’ Society, *2020 Bar Review Materials* (May 2020), updated annually since 2004.
- “The Ten Evidence ‘Rules’ That Every Family Law Lawyer Needs to Know” (2016), 35 Can.Fam.L.Q. 285-322.
- (with Carol Rogerson) *The Revised User’s Guide to the Spousal Support Advisory Guidelines* (Justice Canada, April 2016), 114 pages.
- “Ideas of Spousal Support Entitlement” (2015), 34 Can.Fam.L.Q. 1-33.
- “6 Errors That You Could Make Using the SSAG (But Shouldn’t and Now Won’t)” (2015), 35 Can.Fam.L.Q. 91-99.
- “Presumptions, Burdens and Best Interests in Relocation” (2015), 53 Fam.Ct.Rev. 40-55.
- “Child Hearsay in Criminal and Family Cases: A Comparison” in Ontario Court of Justice, *Education Seminar*, Deerhurst, May 21, 2014.
- “The TLC of Shared Parenting: Time, Language and Cash” (2013), 32 Can.Fam.L.Q. 315-351.

- “Annotation: *Droit de la famille – 091768*” (2013), 21 R.F.L. (7th) 325-35.
- “The Contribution of Spousal Support Guidelines to Equality in Parenting”, [2013] 4 F.L.P. 1.
- “To Vary, to Review, Perchance to Change: Changing Spousal Support” (2012), 31 Can.Fam.L.Q. 355-382.
- “*Berry v. Berry*: Recent Ontario Relocation Trends” (2012), 7 R.F.L. (7th) 10-28.
- “Annotation: *Droit de la famille – 091889* and *Droit de la famille -- 09668*” (2012), 6 R.F.L. (7th) 97-105.
- “Lovers in a Dangerous Time: Loose Ends After *Kerr v. Baranow*” in *Unmarried and Unjust (Enrichment) SuperConference*, Edmonton and Calgary, Alta., November 29-30, 2012.
- “Fifteen Spousal Support Errors, and Fifteen ‘Corrections’: How to Avoid SSAG Screwups, *Miglin* Moments and Changing Variations” in Ontario Bar Association *Institute 2012* (Toronto, February 10, 2012).
- “Annotation: *Children & Family Services of Colchester (County) v. T.(K.)* (2011), 98 R.F.L. (6th) 299-308.
- “Where Is B.C. Law Going? The New Mobility” (2011), 30 Can.Fam.L.Q. 235-269.
- “Annotation to *Droit de la famille – 102866*” (2010), 89 R.F.L. (6th) 63-68.
- (with Carol Rogerson) “The Canadian Experiment with Spousal Support Guidelines” (2011), 45 Fam.L.Q. 241-269.
- “Heading for the Light: International Relocation from Canada” (2011), 30 Can.Fam.L.Q. 1-37.
- “Hearsay and Exceptions to Hearsay Rule”, Chapter 9 in Niman, ed., *Evidence in Family Law* (Toronto: Canada Law Book, 2010).
- (with Carol Rogerson) “The Spousal Support Advisory Guidelines: A New and Improved User’s Guide to the Final Version” (Ottawa, Canada Department of Justice, March 31, 2010) and in Federation of Law Societies of Canada, *National Family Law Program* (Victoria, July 11-15, 2010).
- “All Guidelines, All the Time: Spousal Support in Ontario 2009-10” (2010), 29 Can.Fam.L.Q. 201-222.

- “Forgotten? The SSAG Exceptions” *The Lawyers Weekly*, Vol. 29, No. 45 (April 9, 2010).
- “Canada’s Spousal Support Advisory Guidelines”, [2010] *International Family Law* 106 (March 2010).
- “Annotation: *Taylor v. Taylor*” (2010), 72 R.F.L. (6th) 263.
- “Case Comment: *Droit de la famille – 091768*, the Quebec Common Law Case: Liberty vs. Equality, Part Deux” (2010), 71 R.F.L. (6th) 337.
- “Past Parenting Evidence: A Refresher and An Update” and “A Refresher on Child Hearsay” in National Judicial Institute, *Family Law Seminar* (Toronto, Feb. 3-5, 2010).
- (with Carol Rogerson) “Spousal Support Advisory Guidelines: Report on Revisions” (2009), 28 Can.Fam.L.Q. 193-208.
- (with Carol Rogerson) “The Spousal Support Advisory Guidelines: A User’s Guide to the Final Version” (2009), 28 Can.Fam.L.Q. 209-240.
- “Following *Fisher*: Ontario Spousal Support Trends 2008-09” (2009), 28 Can.Fam.L.Q. 241-261.
- (with Carol Rogerson) “Complex Issues Bring Us Back to Basics: The SSAG Year in Review in B.C.” (2009), 28 Can.Fam.L.Q. 263-337.
- “An Overview of the New Rules”, *Nova Scotia Civil Procedure Rules*, 2nd ed. (LexisNexis, looseleaf), pp. i-xxi.
- (with Carol Rogerson) “A New Frontier in Post-Divorce Financial Obligations: Canada’s Experiment with Spousal Support Advisory Guidelines” at International Society of Family Law, 13th *World Conference* (Vienna, Austria, September 16-20, 2009).
- “Spousal Support in Nova Scotia 2007-2008: Mostly Advisory Guidelines, Sometimes Not” in Canadian Bar Association Nova Scotia, 2009 *Professional Development Conference* (Halifax, January 9, 2009) and CBANS Online CLE (June 5, 2009).
- “Myths and tips about the spousal support guidelines”, *The Lawyers Weekly*, Vol. 28, No. 45 (April 10, 2009).
- (with Carol Rogerson) *Spousal Support Advisory Guidelines* (Ottawa: Department of Justice, July 2008), 166 pages.
- (with Carol Rogerson) *Spousal Support Advisory Guidelines: Report on Revisions* (Ottawa: Department of Justice, July 2008), 12 pages.

(with Carol Rogerson) “The Spousal Support Advisory Guidelines: A User’s Guide to the Final Version” in Federation of Law Societies of Canada, *National Family Law Program 2008* (Deerhurst, Ontario, July 13-17, 2008).

(with Carol Rogerson) “The Spousal Support Advisory Guidelines Three and a Half Years (Almost) Later” in Federation of Law Societies of Canada, *National Family Law Program 2008* (Deerhurst, Ontario, July 13-17, 2008).

(with Carol Rogerson) “*Fisher* and After: The Spousal Support Advisory Guidelines in Ontario” in Law Society of Upper Canada, *2nd Annual Family Law Summit* (Toronto, June 10-11, 2008).

“Child Protection Practice and Procedure: “Too Much, Too Soon, Too Little, Too Late”, paper prepared for National Judicial Institute on-line education program, February-March and April-June 2008.

(with Carol Rogerson) “The Advisory Guidelines Three Years Later” in National Judicial Institute, *Family Law Seminar* (Quebec, February 13-15, 2008).

“Five Vexing and Vexatious Issues in Family Law Evidence and Procedure” in Shaffer, ed., *Contemporary Issues in Family Law: Engaging with the Legacy of James G. McLeod* (Toronto: Thomson-Carswell, 2007) at 3-63.

(with Carol Rogerson) “The Advisory Guidelines 31 Months Later” (Toronto: September 20, 2007, published widely in the materials for various judicial and CLE conferences).

“Rounding Up the Usual Criminal Suspects, and a Few More Civil Ones: Section 7 After *Chaoulli*” (2007), 20 N.J.C.L. 129-182.

“Annotation: *Stewart v. Stewart*” (2007), 40 R.F.L. (6th) 1.

“An Evidence Update for the 2003 Articles, ‘Are There *Any* Rules of Evidence in Family Law?’ and ‘The Cheshire Cat, or Just His Smile? Evidence Law in Child Protection’” in National Judicial Institute, *Evidence Workshop* (July 15-19, 2007, Halifax, N.S.). (Earlier versions of this paper were published in Law Society of Upper Canada, *The Family Law Summit: A Multidisciplinary Perspective* (May 10-11, 2007, Toronto) and National Judicial Institute, *Family Law Seminar* (February 7-9, 2007, Victoria, B.C.).)

“Ten Years After *Gordon*: No Law, Nowhere” (2007), 35 R.F.L. (6th) 307-331.

(with Carol Rogerson) “The Spousal Support Advisory Guidelines in B.C.: The Next Generation” in Continuing Legal Education Society of B.C., *Family Law Conference 2007* (July 5-6, 2007, Vancouver, B.C.).

- “The Spousal Support Advisory Guidelines in the Courts of Nova Scotia 2005-2007” in Canadian Bar Association Nova Scotia, *Marital Bliss(ers): Family Law Conference* (May 4, 2007, Halifax, N.S.).
- “Slackers, Shirkers and Career-Changers: Imputing Income for Under/Unemployment” (2007), 26 Can.Fam.L.Q. 135-177. (An earlier version of this paper was published in *Law Society of Upper Canada Special Lectures 2006: Family Law* (Toronto: Irwin Law, 2007) at 153-182.)
- “The Chemistry of Support: The Interaction of Child and Spousal Support” (2006), 25 Can.Fam.L.Q. 251-289.
- “Case Comment: *Lewi v. Lewi*” (2006), 30 R.F.L. (6th) 17-24.
- (with Carol Rogerson) “The Spousal Support Guidelines 16 Months Later: Cases, Criticisms and Responses, Revisions” (May 2006) (most recent version of regularly published monthly update, posted on QuickLaw, WestlaweCarswell, CBA National Family Law Section website and Judicom).
- “Do the Spousal Support Advisory Guidelines Formulas Reflect the Nova Scotia Case Law, 2003-05?” (Halifax, November 2005)(published and distributed at various programs to judges and lawyers in Nova Scotia).
- “An Expedition to Hearsay’s North Pole” in Nova Scotia Barristers’ Society and Criminal Lawyers Association of Nova Scotia, *Anatomy of a Murder Case* (Halifax, December 2, 2005).
- “Annotation: *Contino v. Leonelli-Contino*” (2006), 19 R.F.L. (6th) 277.
- “Do the Spousal Support Advisory Guidelines Reflect the New Brunswick Case Law, 2003-06?” in Canadian Bar Association, New Brunswick, *Mid-Winter Meeting* (Moncton, February 11, 2006).
- “A Note on Pension Division in Nova Scotia” in Nova Scotia Barristers’ Society, *2006 NSBS Family Law Pensions Conference* (Halifax, April 7, 2006).
- “Dedication and Introduction” (2006), 25 Can.Fam.L.Q. iii.
- (with Carol Rogerson) “Issues for Discussion: Revising the Spousal Support Advisory Guidelines” (Ottawa: Department of Justice, June 2006).
- (with Carol Rogerson) *Spousal Support Advisory Guidelines: A Draft Proposal* (Ottawa: Department of Justice, January 2005), 125 pp.

- (with Carol Rogerson) "Authors of spousal support advisory guidelines look back after 3 months" *25 The Lawyers Weekly* 9 (July 1, 2005).
- "Spousal support advisory guidelines: new help for lawyers" *LAWPRO Magazine* (July 2005), p. 17.
- "The Judge as Counsel" in Canadian Forum on Civil Justice, *News and Views on Civil Justice Reform*, Issue No. 8 (Spring 2005), p. 3.
- "Are There *Any* Rules of Evidence in Family Law?" (2003), 21 *Can.Fam.L.Q.* 245-318.
- "The Cheshire Cat, Or Just his Smile? Evidence Law in Child Protection" (2003), 21 *Can.Fam.L.Q.* 319-378.
- "Case Comment: *Contino v. Leonelli-Contino*" (2003), 42 *R.F.L.* (5th) 326-333.
- "Special Evidentiary Issues in Child Protection Matters" in Law Society of Upper Canada, *Best Practices for the Conduct of a Child Protection File* (Toronto: March 9, 2004).
- "Movin' On: Parental Relocation in Canada" (2004), 42 *Fam.Ct.Rev.* 398-410.
- "Annotation: *E.(C.R.H.) v. E.(F.G.)*" (2004), 1 *R.F.L.* (6th) 173.
- "Annotation: *Morash v. Morash*" (2004), 48 *R.F.L.* (5th) 312.
- "Rules of Evidence and Preparing for Court" in Bala, Hornick and Vogl, eds., *Canadian Child Welfare Law*, 2nd ed. (Toronto: Thompson Educational Publishing, 2003).
- "The Evolution of Modern Canadian Family Law Procedure: The End of the Adversary System? Or Just the End of the Trial" (2003), 41 *Fam.Ct.Rev.* 155-181.
- "Annotation: *Young v. Young*" (2003), 34 *R.F.L.* (5th) 214.
- "Annotation: *Walsh v. Bona*" (2003), 32 *R.F.L.* (5th) 81.
- "Child Custody Law and Practice in Nova Scotia" in J. McLeod and A. Mamo, eds., *Child Custody Law and Practice* (Toronto: Carswell, looseleaf) (released October 2002).
- "The Second Family Conundrum in Child Support" (2002), 18 *Can.J.Fam.L.* 229.
- "No Lawyer: Institutional Coping with the Self-Represented" (2002), 19 *Can.Fam.L.Q.* 455-495.
- (with Lynn Reiersen) "A Practising Lawyer's Field Guide to the Self-Represented" (2002), 19 *Can.Fam.L.Q.* 529-546.

- "No Two Cases...: No Tranquillity on Mobility" in National Judicial Institute, Ontario Superior Court of Justice Family Law Conference (Toronto, December 6-7, 2001).
- "When Is a Family Law Contract *Not* Invalid, Unenforceable, Overridden or Varied?" (2001), 19 Can.Fam.L.Q. 399.
- "Case Comment: *Gaetz v. Gaetz*" (2001), 15 R.F.L. (5th) 82.
- "Who Wants to Avoid the Guidelines? Contracting Out and Around" (2001), 19 Can.Fam.L.Q. 1.
- "Everything is Broken: No More Spousal Support Principles?" in Continuing Legal Education Society of British Columbia, Family Law Conference 2001 (Vancouver, July 12-13, 2001).
- "Why Do Undue Hardship Claims Fail?", policy paper for Child Support Team, Justice Canada, April 10, 2001.
- "Status' As a Haven in Ruleless, Heartless World? A Family Law Update" in National Judicial Institute, Supreme Court of Nova Scotia Education Seminar (Halifax, February 22-23, 2001).
- "No Longer 'Anything but the Charter': The New ABC's of the Charter" in National Judicial Institute, Family Law Seminar (Halifax, February 14-17, 2001).
- "Case Comment: *Winnipeg Child and Family Services v. W.(K.L.)*" (2000), 10 R.F.L. (5th) 221.
- "Rules and Rulelessness in Family Law: Recent Developments, Legislative and Judicial" (2000), 18 Can.Fam.L.Q. 25.
- "The rap on the Supreme Court, or, what about the interests of all children?" in Law Society of Upper Canada, Special Lectures 2000: Family Law: "Best Interests of the Child" (Toronto: Law Society of Upper Canada, 2001), 201.
- "Relocation and relitigation: after *Gordon v. Goertz*" and "An addendum: twenty months later" in Law Society of Upper Canada, Special Lectures 2000: Family Law: "Best Interests of the Child" (Toronto: Law Society of Upper Canada, 2001), 287 and 352.
- "Annotation: *New Brunswick (Minister of Health & Community Services) v. G.(J.)*" (1999), 50 R.F.L. (4th) 62.
- "Relocation and Relitigation: After *Gordon v. Goertz*" (1999), 16 Can.Fam.L.Q. 461.
- "Of Camels and Rich Men: Undue Hardship, Part II" in Canada, Department of Justice, Federal Child Support Guidelines Reference Manual (Ottawa, September 1998), H23-H57.
- "Spousal Support In, Around and After the Child Support Guidelines" in National Judicial Institute, Family Law Seminar (Toronto, 1998) and Atlantic Courts Seminar (Halifax, 1997).

- "Legal Aid Without Conflict: Nova Scotia" (1998), 16 Windsor Yearbook of Access to Justice 306-324.
- "Undue Hardship" in Canada, Department of Justice, Federal Child Support Guidelines Reference Manual (Ottawa, July 1997), H1-H22.
- "Revenge of the Charter: Public and Private in Family Law" in Federation of Law Societies and Canadian Bar Association, 1996 National Family Law Program (Ottawa, July 15-18, 1996).
- "Beam Us Up Scotty': Parents and Children on the Trek" (1996), 13 Can.Fam.L.Q. 219-47.
- "Case Comment: *B.(R.) v. C.A.S. of Metro Toronto*" (1995), 9 R.F.L. (4th) 345-8.
- "The Supreme Court Goes Hunting and Nearly Catches a Hearsay Woozle" (1995), 37 C.R. (4th) 282-312.
- "Getting Blood From a Stone, or How to Find Ability to Pay When There 'Isn't' Any" (1995), 12 Can.Fam.L.Q. 117-186.
- "Custody and Access Practice and Procedure in Nova Scotia", Chapter 19 in McLeod, ed., Child Custody Law and Practice (Toronto: Carswell, 1992).
- "Case Comment: *C.C.A.S. of Metropolitan Toronto v. M.(C.)*" (1995), 12 Can.Fam.L.Q. 91-99.
- "Is Character Always (Sometimes? Never?) Relevant in Custody Cases?" in Federation of Law Societies of Canada and Canadian Bar Association, 1994 National Family Law Program, Victoria, B.C., July 18-21, 1994.
- "Annotation: *B.C. (Superintendent of Fam. & Child Service) v. A.(L.D.)*" (1991), 32 R.F.L. (3d) 209-212.
- The Annotated Children and Family Services Act (Halifax: Department of Community Services, 1991), 346 pp.
- "Children Should Be Heard, But Not Seen: Children's Evidence in Protection Proceedings" (1991), 8 Can.Fam.L.Q. 1.
- "The New Children and Family Services Act: An Iceberg Alert for Practitioners" (1990), 16 N.S.L.N. 197, 221-223.
- The New Children and Family Services Act: An Overview" and "The New Children and Family Services Act: Philosophy, Principles and Services" (Department of Community Services, August 1990).

- "Annotation: *H.M. and M.M. v. Director of Child Welfare*" (1990), 22 R.F.L. (3d) 400.
- "Rules of Evidence and Preparing for Court", Chapter 13 in Bala, Hornick and Vogl, eds., Canadian Child Welfare Law: Children, Families and the State, (Toronto: Thompson Educational Publishing, 1991), 263-304.
- "Why Hasn't the Charter Mattered in Child Protection?" (1989), 8 Can.J.Fam.L. 133-163.
- "Annotation: *C.C.A.S. of Metro Toronto v. T.S. et al.*" (1989), 20 R.F.L. (3d) 337.
- "Annotation: *C.A.S. of Halifax v. L.T.H.*" (1989), 19 R.F.L. (3d) 172.
- "Taking Children and Facts Seriously: Evidence Law in Child Protection Proceedings, Part I" (1988), 7 Can.J.Fam.L. 11-78.
- "Taking Children and Facts Seriously: Evidence Law in Child Protection Proceedings, Part II" (1989), 7 Can.J.Fam.L. 223-312.
- "A Family Law Hitchhiker's Guide to the Charter Galaxy" (1988), 3 Can.Fam.L.Q. 315-389.
- "Annotation: *C.A.S. of Halifax v. L.T.H. and B.S.R.*" (1988), 12 R.F.L. (3d) 456.
- "Changes in Child Protection Proceedings" (1988), 14 N.S.L.N. 98-99.
- "Annotation: *Family & Children's Services of Kings Co. v. E.D.*" (1988), 12 R.F.L. (3d) 104.
- Legal Aid Delivery Models: A Discussion Paper (November 1987), a 300-page report prepared for the National Legal Aid Liaison Committee, a joint committee of the Canadian Bar Association and the Federation of Law Societies of Canada, circulated to some 250 individuals and organisations active in legal aid and Bar affairs.
- "Annotation: *G.F.T. v. G.J.A. et al.*" (1987), 15 C.P.C. (2d) 182.
- "What, Me Worry? A Smaller Corporation's Guide to the New Competition Act", in Company Law II, Materials prepared for a Continuing Legal Education Seminar, C.L.E. Society of N.S., March 28, 1987, 33 pp.
- "Annotation: *R. v. B.M.*: Out-of-province treatment orders" in Bala and Lilles, eds., Young Offenders Service (Butterworths), pp. 3471-5 to 3471-9.
- "Editorial: Family Law Reform and Social Change" (1986), 5 Can.J.Fam.L. 11.
- "The Charter and Child Protection: The Need for a Strategy" (1986), 5 Can.J.Fam.L. 55-78.
- Dalhousie Legal Aid Service, Annual Report, 1984-85

Dalhousie Legal Aid Service, Annual Report, 1983-84

"Sections 36A and 36B: Recent Amendments to the Family Maintenance Act", Paper presented to the Nova Scotia Barristers Society Semi-Annual Meeting and Bar Refresher, February 17, 1984.

Dalhousie Legal Aid Service, Annual Report, 1982-83

No Ordinary Concern: The Law and Practice of Credit Unions. Nanaimo, B.C.: Creduco Services Ltd., May 1978. 50 pp.

"Does a Dual Labour Market Exist in Nova Scotia?" Atlantic Canada Economics Association, Papers and Proceedings of the 1975 Conference, Fredericton, N.B., October 24-26.

People Do It All the Time, or How community-based enterprises across Canada are successfully meeting the needs of their communities. Urban Prospects Papers. Macmillan/Ministry of State for Urban Affairs, 1976. 80 pp.

RESEARCH SUPERVISION

- 2017- Cassandra Armsworthy, LL.M. on Europe's Unaccompanied Migrant Children and International Child Protection under the *Hague Convention on Child Protection*
- 2009-2015 Ilana Luther, Ph.D., thesis "On the 'Poverty of Responsibility': A Study of the History of Child Protection Law and Jurisprudence in Nova Scotia"
- 2013 Cassandra Armsworthy, Independent Research Paper on Hague Convention on Child Abduction
- 2011-12 Martin Twigg, Independent Research Paper on Costs Immunity in Public Interest Litigation (won Tory Prize for best paper)
- 2003-04 Elana Liberman, LL.M. on Age Discrimination in Child Protection Laws
- 2001-02 Elizabeth Hughes, LL.M. Thesis on Shared Parenting and Gender
- 1999-2003 Glenn Anderson, LL.M. Thesis on Expert Evidence in Civil Litigation
- 1988-90 Brian Norton, LL.M. Thesis on "Domestic Violence: Law and Its Administration"
- 1988-89 Esme Lall, Independent Research Paper, (with Vaughan Black) on Sex Discrimination in Legal Aid Funding
- 1986-87 Linda Zambolin, Independent Research Paper on Mental Handicap and Charter Rights to Community Living
- 1985 Dieter Hoehne, Reader for Ph.D. Thesis Defence, "From Charity to Policy -- Legal Aid in Canada", Department of Political Science, Dalhousie University, August 1985

PROFESSIONAL AND COMMUNITY ACTIVITIES

- 2020 Member, Advisory Group on Family Property Act, N.S. Department of Justice
- 2018- Member, Legal Review Committee, Child Protection, Mi'kmaq Rights Initiative
- 1997- Member, Civil Procedure Rules Committee, N.S. Barristers Society
- 1991- Member, Board of Trustees, Dalhousie Legal Aid Service (except 2006-07)
Several terms as Chair and Vice-Chair
- 2017-18 Member, Research Advisory Group for Developing Financial Guidelines for Divorcing Couples, U.K. Ministry of Justice
- 2017 Motherisk Commission, Expert Evidence Panel (June 13) and Symposium (September 12-13)
- 2015 Member, Advisory Group on Estate Planning and Succession Issues in Division of Family Property, Law Reform Commission of Nova Scotia
- 2013-14 Member, Advisory Group on Division of Family Property, Law Reform Commission of Nova Scotia
- 2012-13 Member, Family Justice Working Group, National Action Committee on Access to Justice in Civil and Family Matters (established by the Chief Justice of Canada)
- 2011-15 Member, Family Law Expert Panel, Department of Justice, Government of Nova Scotia, providing advice on revision of family law statutes
- 2011-18 Member, Board of Nova Scotians for Tax Fairness
- 2010-12 Member, Advisory Group on Enforcement of Civil Judgments, Law Reform Commission of Nova Scotia
- 2009- Member, Selection Committee, John VanDuzer Scholarship Award in Family Law
One of three committee members selecting the best family law paper annually from an Ontario law school
- 2008- Member, Organizing Committee, National Family Law Program
Held every two years under auspices of Federation of Law Societies of Canada
- 2006- Newly-Appointed Federal Judges, Family Law Teaching Team
Annually for one full day in October each year, teaching family law to newly-appointed superior court judges outside of Quebec

- 2006-08 Member, Steering Committee, PLANC (Poverty Law Advocates Network of Canada)
- 2006-07 Member, Advisory Group on Grandparent-Grandchild Access, Law Reform Commission of Nova Scotia
- 2005-11 Member, Board of Vanier Institute of the Family
Served as Program Committee Chair, Member of Executive Committee 2010-11
Made Honorary Life Member, 2011
- 1999-2003 Member, Devonshire Family Division Bench and Bar Committee
- 1998-2006 Member, Cable Television Standards Council (appointed to represent the consumer interest on the tripartite Canadian body that resolved disputes between cable companies and their customers)
- 1997-99 Consultant, Nova Scotia Department of Justice, respecting implementation of Child Support Guidelines and the unified Family Division of the Supreme Court of Nova Scotia
- 1998-99 Member, Rules Sub-Committee and Child Welfare Sub-Committee, Family Division Project, Nova Scotia Department of Justice
- 1996-98 Member, Residential Tenancies Review Committee, Department of Business and Consumer Services, Government of Nova Scotia.
- 1995-96 Member, Nova Scotia Working Group and National Conference Delegate, Canadian Bar Association, Civil Justice Reform Task Force
- 1995-98 Member, Child Support Guidelines Steering Committee, Nova Scotia Department of Justice
- 1994 Legal Counsel, Review of Lunenburg Family & Children's Services, an independent review by two senior social workers appointed by the Minister of Community Services to inquire into the agency's handling of the Stevens and Craig cases
- 1994-95 Member, Ad Hoc Committee on Family Law Dispute Resolution, Nova Scotia Barristers Society, appointed to look into difficulties in the development of a unified family court in Nova Scotia
- 1993 Member, Advisory Committee on the Legal Status of the Child Born Outside of Marriage in Nova Scotia, Law Reform Commission of Nova Scotia, to provide advice in the preparation of the Commission's Discussion Paper

- 1991-92 Member, Resource Committee on the Enforcement of Maintenance Obligations, Law Reform Commission of Nova Scotia, to provide advice in the preparation of the Commission's Discussion Paper
- 1991-2003 Member, Legal Aid Committee, Nova Scotia Barristers' Society
- 1990-94 Member, Family Court Rules Committee, responsible under s. 11 of the Family Court Act, R.S.N.S. 1989, c. 159, for preparation and revision of Family Court Rules
- 1990-91 Member, Court Structure Task Force Sub-Committee on the Unified Family Court, Government of Nova Scotia, responsible for preparing recommendations to the Task Force on unification of the Family Court
- 1990-91 Member, Children and Family Services Act Implementation Committee, Department of Community Services, Government of Nova Scotia, responsible for advising the Department on the implementation of the new Act, and member of Sub-Committees on Access, Regulations
- 1989 Member, Legislation Committee, Department of Community Services, Province of Nova Scotia, responsible for drafting a new Children and Family Services Act
- 1989-2008 Member, Board of Directors, Public Interest Advocacy Centre, Ottawa, Ontario
President (for number of years)
- 1989-91 Board Member, Canadian Council on Children and Youth, a national organisation that identifies, researches and advocates on issues affecting children and youth
- 1988-92 Member, Board of Directors, Secretary (1990-91) and Chair, Policy and Programs Committee, Children's Aid Society of Halifax
- 1988-90 Member, Special Metro Committee on Child Sexual Abuse, an inter-agency committee established to address child sexual abuse issues
- 1987-88 Member (representing the Canadian Bar Association), Legal Aid Program Advisory Committee, Canadian Centre for Justice Statistics, Statistics Canada
- 1988-91 Member, Board of Directors, Gateway Homes Inc., a community-based non-profit corporation, providing homes and day activities programming for a group of formerly-institutionalised mentally-handicapped adults
- 1987-91 Member, Deputy Ministers' Steering Committee, Departments of Community Services and Health, a Committee responsible for managing the move of a group of mentally-handicapped adults into the community and developing an operating agreement amongst the Department of Community Services, the City of Halifax and Gateway Homes Inc.

- 1986-88 Counsel, Support Group for Former Residents of 8-West, Abbie Lane Hospital, a group of parents, relatives and citizen advocates organised by Citizen Advocacy and the Canadian Association for Community Living, for the purpose of moving a group of mentally-handicapped adults out of the Halifax County Regional Rehabilitation Centre and into the community
- 1985-87 Senate Academic Appeals Committee, Dalhousie University, Member and Co-Chair (1986-87)
- 1985-87 Member, Legislation Panel, Task Force on Family and Children's Services, Government of Nova Scotia
- 1985-87 Member, Provincial Board, PLURA, an inter-church funding body for low-income social action
- 1984-90 National Legal Aid Liaison Committee, Canadian Bar Association, Member (1984-90), Vice-Chair (1986-88) and Chair (1988-90)
- 1983-85 Member, Board of Directors, Public Legal Education Society of Nova Scotia
- 1982-85 Member, Board of Trustees, Dalhousie Legal Aid Service
- 1982-89 Regulated Industries Program, Consumers Association of Canada, Member (1982-89), Vice-Chair (1984-85) and Chair (1985-89) and Member of CAC National Board of Directors (1985-89)
- 1981-82 Member, Board of Directors, Community Planning Association of Canada, Nova Scotia Division
- 1980-82 Member, Board of Directors, Ecology Action Centre
- 1977-78 Student member and Vice-Chair, Board of Trustees, Dalhousie Legal Aid Service
- 1975-82 Halifax Metro Credit Union, President (1981-82), Director and Secretary (1975-78 and 1979-81), and various representative positions within the Credit Union Central of Nova Scotia
- 1973-75 Nova Scotia Government Employees Union, various representative positions and annual convention delegate, candidate for presidency 1975

This is **Exhibit "B"** referred to in the
Affidavit of

D.A. ROLLIE THOMPSON

Sworn before me this 11th day
of June, A.D., 2020



A NOTARY PUBLIC IN AND FOR THE
PROVINCE OF NOVA SCOTIA

DONNA D. FRANEY
A Notary Public in and for
the Province of Nova Scotia

REBUTTAL REPORT
FEDERAL CHILD SUPPORT GUIDELINES
Auer v Auer

D.A. Rollie Thompson, Q.C.

1. Criticisms of the *Federal Child Support Guidelines*

1. The affidavits and reports of Professors Chris Sarlo and Douglas Allen set out a series of criticisms of the *Federal Child Support Guidelines* and the formula used to determine the table amounts under the *Guidelines*. The tables are Schedule I to the *Guidelines*. The official explanation of the table amount formula is found in the document, *Formula for the Table of Amounts Contained in the Federal Child Support Guidelines: A Technical Report* (Child Support Team, Research Report, Department of Justice Canada, CSR-1997-1E, December 1997) (“*Technical Report*”).

2. The Applicant challenges the legality or *vires* of the *Federal Child Support Guidelines* as inconsistent with section 26.1(2) of the *Divorce Act*, in two respects. The two main criticisms can be summarised, as elaborated by Sarlo and Allen:

- (a) The *Guidelines* fail to consider the “relative abilities to contribute” of both spouses, as the Revised Fixed Percentage model used in the *Guidelines* looks only at the income of the payor; and
- (b) the amounts determined “to maintain the children of the marriage” are not reasonably calculated under the *Guidelines*.

The general criticism in (b) above is elaborated, as a series of more specific criticisms:

- (b.1) the choice of the Statistics Canada “40/30 Equivalence Scale” to estimate child expenditures is arbitrary and too high;
- (b.2) the use of a fixed percentage of payor income under the formula fails to recognise that child expenditures are a declining percentage of income at higher income levels;
- (b.3) the costs of parenting time for the non-custodial parent (NCP) are ignored under the formula;
- (b.4) the exclusion of government benefits for children from the formula further skews the formula in favour of the custodial parent (CP);
- (b.5) the table formula produces a net wealth transfer to the custodial parent;
- (b.6) the *Guidelines* fail to adjust for multiple families;
- (b.7) the table formula does not recognise that children are a benefit to custodial parents.

3. Sarlo and Allen relate their criticisms of the *Federal Child Support Guidelines* to the wording of section 26.1(2) of the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.):

(2) The guidelines shall be based on the principle that spouses have a joint financial obligation to maintain the children of the marriage in accordance with their relative abilities to contribute to the performance of that obligation.

The *Federal Child Support Guidelines* are regulations made pursuant to s. 26.1(1) of the *Divorce Act*: SOR/97-175 as amended. The table amounts for each province and territory are found in Schedule I to the *Guidelines*. The table amounts have been revised three times since the May 1, 1997 advent of the *Guidelines*: May 1, 2006; December 31, 2011, and November 22, 2017. These changes reflected ONLY differences in federal and provincial tax rates and tax brackets over time. There has been no change in the underlying table formula since its adoption in 1997.

4. The table amounts are only a part of the *Guidelines*, an important distinction. Under s. 3(1) of the *Child Support Guidelines*, the presumptive amount of child support for a minor child is the table amount plus any contribution for section 7 “special or extraordinary expenses”. Further, there are many sections in the *Guidelines* that provide for amounts of child support that depart from the table formula: sections 3(2)(b)(adult children), 4 (incomes over \$150,000), 5 (spouse in place of parent, or step-parent), 9 (shared custody) and 10 (undue hardship). When one speaks of “the *Guidelines*”, they are much more than just the table amount or the table formula. It is incorrect to conflate the two terms, as do Sarlo and Allen. The table formula is only a part, albeit an important part, of “the *Guidelines*”.

5. The *Child Support Guidelines* themselves only address the *amount* of child support to be paid, once entitlement or liability to support is established. Entitlement is determined by the *Divorce Act*, notably s. 2(1) which defines “child of the marriage” and s. 2(2) which further elaborates who can stand “in the place of a parent” to a “child of the marriage”. The two most common entitlement issues thus involve: (i) “adult children” and when they cease to be “children of the marriage”; and (ii) when an individual stands “in the place of a parent” and is required to pay child support.

6. The challenge in this case is to the *Federal Child Support Guidelines*, those that apply to “spouses” under the *Divorce Act*. The *Guidelines* were a joint project of the federal, provincial and territorial governments, culminating in a report, *Federal/Provincial/Territorial Family Law Committee’s Report and Recommendations on Child Support* (January 1995)(“*F/P/T Report*”). Most provinces adopted their own version of the *Federal Guidelines* in 1997-98.

7. Provincial family laws apply to everyone else, i.e. married couples who separate but don’t seek a divorce, common-law spouses or adult interdependent partners, or unmarried parents who didn’t cohabit. Except for Quebec, all the provinces and territories have legislated and promulgated similar *Child Support Guidelines* and the same table formula as is found in the *Federal Guidelines*. These provincial *Guidelines* simply substitute the term “parent” for “spouse”, but are otherwise generally the same. For example, see *Alberta Child Support Guidelines*, Alta. Reg. 147/2005, regulations made under the *Family Law Act*, S.A. 2003, c. F-4.5 (in force October 1, 2005). Alberta was the last province or territory to adopt the *Federal Guidelines*.

8. In this report, I will refer to the *Federal Child Support Guidelines* as “the *Child Support Guidelines*” or “the *Guidelines*”, or occasionally “the *Federal Guidelines*” (as distinct from the provincial *Guidelines*).

9. Pursuant to s. 28 of the *Divorce Act* (in the 1997 amendments), the Minister of Justice was required to “undertake a comprehensive review of the provisions and operation of the Federal Child Support Guidelines” and report back to both Houses of Parliament by 2002: *Children Come First: A Report to Parliament Reviewing the Provisions and Operation of the Federal Child Support Guidelines*, 2 volumes (2002).

2. Professors Sarlo and Allen

10. Professor Sarlo has written a long and detailed report, entitled *An Assessment of the Federal Child Support Guidelines*, which is Exhibit “B” to his 2012 Federal Court affidavit, cited as “*Assessment*” here. In February 2020, Professor Sarlo provided an updating affidavit, with some more recent child support calculations (“February 2020 Affidavit”).

11. In referring to Professor Allen’s work, I will refer to his “Supplementary Report”, attached as Exhibit “A” to his 2012 Federal Court affidavit (“Supplementary Report”). At paragraph 10 of his Supplementary Report, Allen states: “I agree with both the general and specific claims made in Professor Sarlo’s report.”

3. The Choice of Guidelines Model

12. In order to address the criticisms of Sarlo and Allen, it is first important to understand the fundamentals of child support guidelines design.

13. There are three steps in designing child support guidelines:

- (i) determine a formula to estimate the “cost” of the child or children;
- (ii) adopt a formula to allocate those amounts between the parents or to the payor parent; and
- (iii) set out rules or principles to govern departures from the formulaic amounts.

Once a cost for a child or children has been estimated, it is necessary to distribute that cost as between the parents, based upon the model chosen to do so and the parenting arrangements for the children.

14. There are three common models used to determine the basic amount of child support, using the American terms here: (1) percentage-of-obligor income (or “POOI”); (2) income shares (“IS”); and (3) the Melson model, a hybrid model. There is a fourth model, known as the Cassetty or “Equal Living Standards” model, never implemented anywhere. More recently, Arizona explored something called the “COBS” model (the “Child-Outcome Based Support”

model), but ultimately rejected it.¹ The first two models dominate, in the United States and in other countries.²

15. I will use the terms “custodial parent” (CP) and “non-custodial parent” (NCP), the terms used frequently in the literature and also by Sarlo and Allen.³ Technically, the *Child Support Guidelines* do not use the term “custody”, except in sections 8 (split custody) and 9 (shared custody). Further, the term “custody” here is not “legal custody”, but “physical custody”, sometimes called “care”. For the most part these days, legal custody is joint, but one parent usually has “primary care”. When we say “custodial parent”, we mean “parent with primary care” and, to be precise, primary care more than 60 per cent of the time (as those with 40 to 60 per cent “care” will fall under s. 9). The term “parent” is a more appropriate generic term than “spouse”, as the *Federal Guidelines* model is also applied under provincial family laws to common-law or unmarried parents (as well as to married spouses who separate but don’t seek divorce).

16. The *percentage-of-obligor-income model* determines the base amount of child support by taking a percentage of the non-custodial payor’s income, based upon the number of children supported. (The Americans usually refer to the payor as the “obligor”.) The percentage can be fixed across incomes or can vary. Income can be gross or net. There will usually be a “self-support reserve” for low-income payors, to meet their own basic needs. The percentage-of-income formula only applies to income above that reserve amount. For the leading American article on the rationale for this model, see Garfinkel and Melli, “The Use of Normative Standards in Family Law Decisions: Developing Mathematical Standards for Child Support” (1990-1991), 24 Fam.L.Q. 157. (Garfinkel was one of the architects of the POOI model.)

17. The *income shares model* starts with a percentage applied to the combined incomes of both parents, to derive their joint child support obligation. That figure is then prorated between the parents based upon their incomes. The non-custodial parent pays their share by way of child support. Again, the child support obligation percentage can be fixed or varying, income can be gross or net, and there will usually be a self-support reserve.

¹ For an enlightening discussion of the Arizona experience by one of the proponents of the COBS model, see Ellman, “A Case Study in Failed Law Reform: Arizona’s Child Support Guidelines” (2012), 54 Arizona L.Rev. 137.

² For helpful reviews of the U.S. guidelines models and their history, see Venohr, “Differences in State Child Support Guidelines Amounts: Guidelines Models, Economic Basis, and Other Issues” (2017), 29 Journal of American Academy of Matrimonial Lawyers 377; Venohr, “Child Support Guidelines and Guidelines Reviews: State Differences and Common Issues” (2013), 47 Fam.L.Q. 327; and Venohr and Williams, “The Implementation and Periodic Review of State Child Support Guidelines” (1999), 33 Fam.L.Q. 7 (Venohr and Williams were the economists most frequently-used in constructing and updating U.S. child support guidelines. Venohr continues to work as a consultant in many states.)

³ These terms and some of the language in the *Child Support Guidelines* will change when Bill C-78, the parenting amendments to the *Divorce Act*, come into effect on March 1, 2021. The terms “custody” and “access” will no longer be used. Instead, the new terms will be “the spouse who exercises the majority of the parenting time” (i.e. more than 60% of the time) (in ss. 7(1)(a) and 8), or “each spouse exercises not less than 40% of parenting time” (in s. 9): “Guidelines Amending the Federal Child Support Guidelines”, *Canada Gazette*, Part I, Vol. 154, No. 12 (March 21, 2020).

18. Three American states⁴ have adopted a hybrid model, combining the above two models, in what is often called “the Melson model” (named after the Delaware judge who created it). In this model, after deducting a self-support reserve, the child’s primary or subsistence needs are determined on an income shares formula, to which amount is then added a standard of living allowance (SOLA) which is a percentage of the payor’s remaining income (after deducting the primary support amount).

19. In its 1997 *Guidelines*, the Canadian federal government adopted a percentage-of-obligor-income (POOI) model, called the “Revised Fixed Percentage” model. At the same time, Quebec adopted an income shares model. The Quebec model has been “designated” by the federal government, so that it applies not only to parents under provincial law, but also to divorcing spouses under the *Divorce Act* where both parties reside in Quebec: *Divorce Act*, s. 2(5) and SOR/97-237.⁵ I will set out the specifics of the Quebec model later.

20. In the United States, of the 51 jurisdictions (including the District of Columbia), 41 now use the income shares model, 7 states use POOI (soon to be 6, as Arkansas moves to income shares), and 3 use the Melson model: National Conference of State Legislatures, ncsl.org/research/human-services/guidelines-models-by-state.aspx.⁶ Since child support guidelines were first required in the United States in 1988, there has been a steady shift of states away from POOI to income shares, most recently by Illinois (July 1, 2017) and soon Arkansas (July 1, 2020). Australia used the POOI model, but shifted to income shares in 2008. New Zealand now uses the income shares model, having used the POOI model until 2014. The United Kingdom still uses a POOI model.⁷

21. Both Sarlo and Allen identify many problems with the federal Revised Fixed Percentage model. Explicitly or implicitly, both of them appear to prefer the income shares model. Allen suggests this as one of the “simple changes” that could be made to the *Guidelines* (“Supplementary Report”, para. 65). In his *Assessment*, Sarlo supports the use of an income shares model, suggesting that child costs should be allocated “in accordance with the relative means of the parents” (p. 75).

22. There are competing advantages and disadvantages to the two most common models. The income shares model is more sophisticated and allows for greater flexibility in determining the basic child support amount, but it is more complicated for the user and for updating amounts. The POOI model is simpler and less flexible, but it is easier to understand, requires less

⁴ Delaware, Hawaii and Montana.

⁵ The federal designating regulation recites the relevant child support provisions in the *Civil Code, Code of Civil Procedure and Regulation respecting the determination of child support payments*. Quebec’s current *Regulation respecting the determination of child support payments* is cited as: chapter C-25.01 r. 0.4.

⁶ The District of Columbia and Massachusetts used a hybrid model for many years, but both switched to the income shares model, as noted in Venohr (2013) at p. 332, note 9. The National Conference list incorrectly still refers to D.C. as a hybrid model.

⁷ The U.K. POOI model is administered by the Child Maintenance Service in H.M. Revenue and Customs. It is a complicated regime. The most common rate is the Basic rate for weekly gross incomes of 200 to 800 pounds: 12% for 1 child, 16% for 2 and 19% for 3 or more. The Basic Plus rate applies for additional weekly income from 800 to 3,000 pounds: 9% for 1 child, 12% for 2, and 15% for 3 or more. See U.K. Child Maintenance Service, “How we work out child maintenance: A step by step guide” (November 2013).

information, and amounts are more easily updated or “recalculated” over time, as the formula only requires knowledge of one income. The choice of model is a difficult policy decision. No one model is perfect.

4. Both Parental Incomes

23. Both Sarlo and Allen frequently refer to “the Guidelines” when they really mean “the Guidelines table formula”. The *Child Support Guidelines* are more than just the table formula, more than just Schedule I.

24. Section 26.1(2) of the *Divorce Act* refers to “the guidelines”, not just the table amounts or the formula to determine those amounts. The *Child Support Guidelines* involve the whole regulation, not just the table amounts in Schedule I. There are a number of provisions in the *Guidelines* that involve explicit or implicit consideration of both parental incomes: section 7 for special or extraordinary expenses; section 8 for split custody; section 9 for shared custody; section 10 for undue hardship (which looks at household incomes of both parents); section 3(2)(b) for most adult children; s. 4 for payor income above \$150,000; and other discretionary situations like s. 5 (step-parents) and retroactive child support.

25. Section 7(2) of the *Guidelines* is explicit about the “guiding principle” that special or extraordinary expenses are “shared by the spouses in proportion to their respective incomes”. Section 8 looks at both parental incomes in determining a set-off of table amounts where each spouse has at least one child in his or her care, termed “split custody”. In shared custody cases, both incomes are considered under s. 9, not just in determining the set-off amount under s. 9(a), but also in analysing the other two factors in paragraphs (b) and (c), as elaborated by the Supreme Court of Canada in *Contino v. Leonelli-Contino*, [2005] 3 S.C.R. 217, 2005 SCC 63. The undue hardship defence of section 10 requires consideration of the standard of living in each parental household, thanks to ss. 10(3) and (4). Section 3(2)(b) applies to adult children in a range of cases, notably the common situation where the child goes away to university, and again “the financial ability of each spouse to contribute” is to be considered. Under s. 4 for incomes over \$150,000, a court can consider the income of the custodial parent in determining whether the table amount is “inappropriate” and in assessing the alternative amount of child support under s. 4(b)(ii):

26. Less obvious is the consideration of both parental incomes in s. 5 of the *Guidelines*. Section 5 provides a broad discretion to the court to fix an amount that is “appropriate” for a step-parent, and the case law demonstrates that the courts look at the incomes of the step-parent, the non-custodial parent and the custodial parent, e.g. the leading case of *U.V.H. v. M.W.H.*, 2008 BCCA 177. Retroactive child support claims became much more common after the Supreme Court’s decision in *D.B.S. v. S.R.G.*, [2006] 2 S.C.R. 231, 2006 SCC 37. One of the four “circumstances” to be considered in fixing any retroactive amount is “the [past] circumstances of the child”, which include consideration of the income of the custodial parent and any other source of support to the custodial parent’s household.

27. In discussing the formula for the table amounts and the Department of Justice *Technical Report*, both Sarlo and Allen are clear about the underlying income assumptions in the federal Revised Fixed Percentage model: **that both parents have the same incomes**. The federal model does not simply “ignore” the income of the custodial parent.⁸ The custodial parent’s income does affect the amount paid by the non-custodial parent, by the technical assumption that the custodial parent has the same income, even though that sort of equality is rare. While that may be a dubious assumption, it works mostly to the benefit of the non-custodial parent. If the payor parent earns \$150,000 a year, then the table formula assumes the recipient parent also earns \$150,000 a year.

28. According to the 1998-2003 *Survey of Child Support Awards*, 92.8 per cent of child support payors were fathers.⁹ Recent census numbers for couples reveal that male partners made more than females in 69.4 per cent of opposite-sex relationships in 2015: Statistics Canada, Data Tables, 2016 Census, Distribution of Income Between Married Spouses or Common-Law Partners. Framed in broader terms, 32 per cent of opposite-sex couples earn within 40 to 60 per cent of the total family income, or “fairly equal” in Statistics Canada parlance, while 50.7 per cent of males made more than 60 per cent of the couple’s income and females made more than 60 per cent in 17.3 per cent of couples: Statistics Canada, *The Daily*, September 13, 2017. There is a long-term shift in these proportions: in 1985, males made more than 60 per cent of couple income in 71.3 per cent of cases, and females only in 8.0 per cent, with 20.7 per cent “fairly equal”.

29. Practically, what these numbers mean is that the assumption built into the table formula generally overestimates the income of the custodial parent, to the advantage of the paying non-custodial parent in the great majority of the cases. In a minority of cases, the assumption will disadvantage the non-custodial parent. In terms of sheer numbers, those most disadvantaged by the table formula assumption are low-income custodial parents, especially those with little or no income.

30. Apart from their factual descriptions of the *Guidelines* table formula, neither Sarlo nor Allen focus much of their analysis on the issue of considering both parental incomes. In his *Assessment*, Sarlo refers to s. 26.1(2) (at p. 2) and to “proportionate sharing” (at p. 10), as well as using both parental incomes in his “should pay – do pay” section.

5. Maintaining the Children

31. Both Sarlo and Allen offer detailed critiques of the table formula, apart from the alleged failure to take into account both parental incomes. Put briefly, they argue that the table formula “over-compensates” the custodial parent (CP) and unfairly burdens the non-custodial parent (NCP), for a variety of reasons.

⁸ Sarlo puts it this way, at p. 7 of his *Assessment*: “The CP’s actual income is completely ignored (i.e., it is always assumed that the CP’s income is the same as the NCP’s income).”

⁹ Bertrand, Hornick, Paetsch and Bala, *Phase 2 of the Survey of Child Support Awards: Final Report* (Department of Justice Canada, Research Report 2004-FCY-7E, 2005) at p. v. Mothers were payors in 6.2% of cases.

32. Before delving into their specific criticisms, a few larger points need to be made. Any support formula will involve a number of simplifying assumptions. In the end, what matters practically is whether the formula produces reasonable numbers across a wide variety of fact situations, especially the most typical fact situations. To quote Norman Fera, the child support tables “focus on a system of ‘average’ justice” rather than the individual justice of a case-by-case approach to child support.¹⁰ Invariably, the formula chosen will be less effective “around the edges”, or on unusual facts which will require some degree of discretion. Too much discretion to depart from the formula, however, creates dangers for the mass of cases where the formula “works”.¹¹

33. Next, in constructing the formula, policy-makers do not wish to depart too markedly from existing patterns of support awards, whether child support or spousal support. The federal Department of Justice had created a database of child support awards in 1991, against which it tested the various proposed child support formulas: Finnie, Giliberti and Stripinis, *An Overview of the Research Program to Develop a Canadian Child Support Formula* (Canada, Department of Justice, January 2005) at pp. 3-4.

34. Finally, the *Child Support Guidelines* only compensate the custodial parent for the “direct” costs of children: *Federal/Provincial/Territorial Family Law Committee’s Report and Recommendations on Child Support* (January 1995), pp 46-7. The indirect costs of children are left to the law of spousal support, and the *Spousal Support Advisory Guidelines (SSAG)*. Spousal support is a residual financial remedy which offers much more flexibility than child support. Where both child support and spousal support are paid, it is important to look at the two remedies, and not child support in isolation. Because of the statutory priority to child support, there is often insufficient ability to also pay spousal support in low- to middle-income situations.

35. I am familiar with these practical guidelines issues from my work on the *Spousal Support Advisory Guidelines*, especially the *with child support* formula.

(1) The 40/30 Equivalence Scale

36. Sarlo states that the 40/30 equivalence scale was “not... a reasonable choice” (at p. 18), as “many NCPs pay an inordinately high amount of child support, which worsens as income increases” (p. 27). Allen comments that “there is strong evidence that the FLC’s [Family Law Committee’s] ultimate design of the *Guidelines* was driven to maximize the feasible amount of transfer from the NCP to the CP” (para. 11) and that “the largest equivalence scale available” was used (para. 12).

37. Before getting into the weeds, there is only one point of consensus about estimating the “costs” of children: there are many methods, with a wide variance in outcomes. The range of outcomes reflects a mix of data problems, assumptions, adjustments for joint goods, and value

¹⁰ Fera, “New Child Support Guidelines – A Brief Overview” (1997), 25 R.F.L. (4th) 356.

¹¹ Most case law and academic writing focuses on those departures. For the best general legal reference to the *Guidelines* and the case law, see Payne and Payne, *Child Support Guidelines in Canada, 2020* (Toronto: Irwin Law, 2019).

judgments. As Sarlo states, at p. 1 of his *Assessment*, “there is no one true ‘cost’ of a child”. Matthew Gray put it well, in his 2005 Australian review, at p. 1:¹²

While it may seem simple to define the costs of children, the reality is that several different approaches have been used and there is no agreement as to the most appropriate definition. Even where there is agreement as to the concept that is being used, there is no consensus as to the appropriate method for estimating the cost. The problem from a policy perspective is that the different approaches and estimation methods can result in very different estimates of the cost of a child.

38. The Justice Department engaged in a research program to develop and refine various econometric models of child-rearing expenditures, but there were serious problems with all of them: *Overview*, pp. 5-6. A number of equivalence scales were considered, before adopting the Statistics Canada 40/30 scale: *Overview*, pp. 9-13. The Federal/Provincial/Territorial Family Law Committee stated its reasons for adopting the 40/30 scale in its 1995 *F/P/T Report*, at p. 9:

The 40/30 equivalence scale is proposed in the absence of a definitive and perfect method for determining expenditures on children which is totally reliable and without criticism. Therefore, a reasonable set of round numbers derived from empirical research and a public consultation process could be used and produce reasonable results.

(a) The “Continuity-of-Marginal-Expenditure” Model

39. Both Sarlo and Allen question the “empirical research” underpinning the 40/30 Equivalence Scale. Their arguments are based upon various empirical studies that attempt to estimate the marginal costs of children, or more accurately the marginal expenditures of families upon children at various income levels. As they demonstrate, most economic studies attempt to estimate such costs by looking at the marginal expenditures of intact families without and with children. To be precise, such studies use a “continuity-of-marginal-expenditure” basis to estimate expenditures.

40. There are a host of problems with this technical approach being used as the foundation for child support payments, most of which are detailed by Ira Mark Ellman in “Fudging Failure: The Economic Analysis Used to Construct Child Support Guidelines” [2004] University of Chicago Legal Forum 167. Ellman emphasises that the construction of child support guidelines is a policy-making exercise that requires interest balancing, and not just an exercise in economic analysis that demands primarily technical economic expertise (at p. 178):

But the standard economic analysis does not expressly recognize the inevitable trade-off between these competing interests [of children, non-custodial parents and custodial parents], and it therefore lends no assistance to the policymaking body ultimately responsible for those tradeoffs. Indeed, it seems that participants in the process –

¹² Published originally as “Costs of children and equivalence scales: A review of methodological issues and Australian estimates”, a paper for the Australian Ministerial Taskforce on the Child Support Scheme, Department of Social Services (June 2005), which was subsequently revised and published as Henman and Stanton (2010), 13 Australian Journal of Labour Economics 99.

members of the guideline writing committee – assume that the setting of support guidelines is an exercise in economic analysis requiring primarily technical economic expertise, rather than an exercise in policymaking requiring interest balancing.

41. Ellman questions the assumptions implicit in the “continuity-of-marginal-expenditure” model. Why should child support be tied to an estimate of how much additional income a childless couple would need in order to maintain their living standard if they had a child? Why the spending of an intact family, when there are now two post-separation households? And why, says Ellman, should we treat the child as the marginal member of the household, which has the effect of excluding most of the household joint or public goods from the child support calculation? Most household expenditures go to joint or public goods, like shelter, heat, electricity, water, basic automobile expenses, etc. Even most household private goods are difficult to disentangle into individual consumption, like food or automobile gas.

42. As Ellman points out, where both parents have equal incomes, then the “continuity-of-marginal-expenditure” model “yields a plausible compromise of the parties’ interests” (p. 167).

But in the great majority of cases the parents do not have equal incomes, and then the marginal expenditure model yields a result that is harder to defend. It allocates the custodial household no funds from which to pay joint consumption items (for example, the car, the heat, the portion of the rent covering everything other than the child’s room). As the custodial parent’s income declines relative to the non-custodial parent’s income, the custodial parent has fewer resources with which to pay for these items. At the limiting case, the custodial parent with no income other than child support would have no resources with which to pay these items.

Ellman goes on to explain the conceptual and practical frailties of the “continuity-of-marginal-expenditures” approach to determining child support in “Fudging Failure”.

(b) Comparing the Federal Child Support Percentages and Amounts

43. There is a more practical way to test the view that the 40/30 Equivalence Scale over-compensates custodial parents, as compared to some other notionally-superior formula. We can look at the percentage of parental incomes that other child support guidelines use as the basis for their child support amounts. First, we can look at other “POOI” or percentage-of-income models. Second, we can look at income shares models, assuming that both parents have the same guidelines incomes. Under each set of guidelines, as with the *Federal Child Support Guidelines*, there are various adjustments and departure rules for less common cases. Our focus here is upon the basic percentages in various models for 1, 2 and 3 children.¹³ We can also compare the amounts generated under the *Guidelines* table formula to amounts produced by American child support guidelines. If the *Federal Guidelines* formula is as high as Sarlo and Allen suggest, then we would expect to see the Canadian percentages or amounts above or at the top of comparable child support guidelines.

¹³ According to the 2016 Census, 45.3% of families (couples and lone parents) had 1 child, 38.5% had 2 children, and 16.2% had 3 or more children: Statistics Canada, “Census Profile, 2016 Census”.

44. If we start with the 2017 Simplified Table for Alberta under Schedule II of the *Federal Guidelines*, and calculate child support table amounts as a percentage of Guidelines (gross) payor income, the percentages are, for incomes between \$20,000 and \$100,000: **1 child, 9.6-10.7 per cent; 2 children, 17.4-19.7 per cent; and 3 children, 21.9-25.8 per cent.**¹⁴ The range of percentages reflects the underlying **net or after-tax incomes** used to calculate the table amounts, some transitional smoothing at the low end of the income range, and tax brackets and shifting tax rates as we move up the income range.¹⁵

45. It is worth remembering the judicial “litmus test” or formula created by the Alberta Court of Appeal in its pre-Guidelines decision in *Levesque v. Levesque*, [1994] A.J. No. 452, 4 R.F.L. (4th) 375: 20% of gross income for one child and 32% for two children, to be applied to the combined income of the parents and then allocated as between them based upon relative incomes.¹⁶ This was essentially an income shares formula, but the fixed percentage means that the outcome is the same, no matter whether you use an income shares model or a percentage-of-obligor-income model. The *Levesque* formula was applied to divorce cases in Alberta in 1994-97 and to provincial family law cases from 1994 until the *Federal Child Support Guidelines* were adopted under the *Alberta Family Law Act* in 2005.

46. I will first look at percentages for POOI models that, like the *Federal Guidelines*, use gross incomes. Next, I will compare POOI models that use net incomes. Net incomes can make precise comparisons trickier than those for gross incomes, given differences in taxes and deductions across jurisdictions. But my purpose here is to show broad trends and patterns. Third, I will compare income shares models that use gross incomes (many use net incomes).

47. A review of this array of child support guidelines reveals that the federal 40/30 Equivalence Scale does not in practice appear to produce higher percentages of income or higher amounts compared to other child support formulas. If anything, the Canadian percentages are below most others, often well below. Even more noticeable is that the Canadian one-child and two-child percentages and amounts are markedly lower than other jurisdictions.

(i) POOI Models Using Gross Incomes

48. First, we can look at some POOI models elsewhere that also use a gross income measure.

Alberta: 9.6-10.7% for 1 child, 17.4-19.7% for 2, 21.9-25.8% for 3
Wisconsin: 17% for 1 child, 25% for 2, 29% for 3¹⁷

¹⁴ At \$150,000 annual payor income, the Alberta percentages for 1, 2 and 3 children are: 10.5%, 17.1%, and 22.3%. The percentages are complicated for 2 and 3 children by the effect of smoothing that continues into the \$20,000-\$30,000 range. Once past smoothing, the percentages are typically 10% for 1 child, 17.5% for 2 and 23% for 3.

¹⁵ Because the table formula works to equalize living standards using net incomes, each province and territory has its own table, reflecting different provincial or territorial tax rates and brackets.

¹⁶ Under the old pre-1997 deductible-taxable regime for child support, these *Levesque* amounts would then have had to be “grossed up” to get the before-tax amount of child support.

¹⁷ On child support in Wisconsin generally, see: dcf.wisconsin.gov/cs/home. For the table that applies for gross payor incomes up to \$84,000/year, see: docs.legis.wisconsin.gov/code/admin_code/DCF/101_199/150_a.pdf.

Different percentages *may* be applied for incomes \$84,000-\$150,000: 14% for 1 child, 20% for 2, 23% for 3. Lower

Nevada (old): 18% for 1, 25% for 2, 29% for 3¹⁸
Australia (old): 18% for 1, 27% for 2, 32% for 3¹⁹
New Zealand (old): 18% for 1, 24% for 2, 27% for 3²⁰

(ii) POOI Models Using Net Incomes

49. Second, we can look at POOI models that use a net income measure. For this purpose, DivorceMate software was used to calculate the net income for Alberta residents for gross income levels from \$20,000 to \$100,000.²¹ Compare American state percentages of net income.²²

Alberta: 10.9-13.9% of net income for 1, 19.9-22.9% for 2, 22.2-30.2% for 3

Alaska: 20% for 1, 27% for 2, 33% for 3²³

Texas: 20% for 1, 25% for 2, 30% for 3²⁴

North Dakota: 21.5-17% for 1, 28.1-28.4% for 2, 33.2-34% for 3²⁵

Mississippi: 14% for 1, 20% for 2, 22% for 3²⁶

Arkansas (soon to be old): 15% for 1, 21% for 2, 25% for 3²⁷

percentages can be applied for incomes above \$150,000: 10% for 1 child, 15% for 2, 17% for 3. The tables also have columns for 4 and 5 or more children.

¹⁸ As of February 1, 2020, Nevada has shifted to variable, cumulative percentages, for incomes below \$6,000/mo., between \$6,000 and \$10,000/mo. and incomes over \$10,000/mo. For 1 child, the three percentages are 16%/8%/4%. For 2 children, the percentages are 22%/11%/6%. For 3 children, the percentages are 26%/13%/6%. As an example, at a gross income of \$100,000, the percentages work out to 13.76% for 1 child and 18.92% for 2 children. See: leg.state.nv.us/NAC/NAC-425.html at NAC 425.145. For a brief explanation of the impact of the change, see: mcfarlinglaw.com/blog/the-new-nevada-child-support-law-winners-losers-charts/

¹⁹ *In the Best Interests of Children – Reforming the Child Support Scheme: Summary Report and Recommendations of the Ministerial Taskforce on Child Support* (May 2005) at p. 1. See also Parkinson, “The Future of Child Support” (2007), 33 *Univ. of Western Australia L.Rev.* 179 (Prof. Parkinson was the chair of the Ministerial Taskforce). The old POOI formula was replaced in July 2008 by the income shares formula recommended by the Taskforce, described below.

²⁰ See Peter Dunn, Minister of Revenue, *Supporting children: A Government discussion document on updating the child support scheme* (Inland Revenue, September 2010) at p. 9. This discussion paper eventually led to the shift to an income shares formula and other changes in the *Child Support Amendment Act 2013* (2013 No. 12).

²¹ Using 2020 taxes and employment deductions (CPP, EI) to determine net income. At \$150,000 gross annual income, the percentages would be: 1 child, 14.1%; 2, 22.8%; 3, 29.8%.

²² It is harder to be precise about comparisons of “net income” as opposed to “gross income”, but perfect precision is not necessary for our purposes.

²³ Alaska Civil Rule 90.3(a)(2), up to net income of \$126,000/year, located at: public.courts.alaska.gov/web/rules/docs/civ.pdf and also “How to calculate child support under Civil Rule 90.3” located at: public.courts.alaska.gov/web/forms/docs/dr-310.pdf.

²⁴ Texas Family Code, s. 154.125(b). The percentages apply up to \$90,000 of annual net payor income, with discretion for higher incomes. See: statutes.capitol.texas.gov/Docs/FA/pdf/FA.154.pdf

²⁵ North Dakota Administrative Code, ch. 75-02-04, located at: childsupport.dhs.nd.gov/child-support-guidelines/current-child-support-guidelines (effective January 1, 2019). The stated ranges are for net incomes from \$2,000/mo. to \$10,000/mo. The tables run up to \$25,000/month. of net payor income.

²⁶ Mississippi Code, Title 43, ch. 19, s. 43-19-101. The percentages apply to “adjusted gross income”, a form of net annual payor income, from \$10,000 to \$100,000.

²⁷ Arkansas, Court Rule, Administrative Order Number 10 at: arcourts.gov/content/administrative-order-10-arkansas-child-support-guidelines. Arkansas will switch to the income shares model on July 1, 2020, with similar percentages: see Venohr and Matyasic, “Review of Arkansas Child Support Guidelines: Analysis of Economic Data,

Illinois (old): 20% for 1, 28% for 2, 32% for 3²⁸

(iii) Income Shares Models Using Gross Incomes

50. Next, we can consider the percentages applied in jurisdictions that use gross incomes for the income shares model. Many of these jurisdictions use a declining percentage of income in the underlying formula, a non-linear formula, so a range of declining percentages is provided. These percentages can be compared to the POOI models, if we assume the parents have equal incomes.

51. To repeat the Alberta table amount percentages of gross incomes: **9.6-10.7% for 1 child, 17.4-19.7% for 2, 21.9-25.8% for 3.**

52. Closest to home is **Quebec**, which shows the following range of percentages for the basic parental contribution table based upon combined gross parental “disposable income” up to a maximum of \$200,000/year, after deduction of the self-support reserve: 10.6% down to 6.5% for 1 child; 16-9% for 2; and 19.9-11.9% for 3.²⁹ The Quebec formula starts near the federal formula at lower incomes, but its declining percentage has a noticeable effect at higher incomes, as well as for three or more children.

53. Compare the percentages for some American states that use gross income for their income shares model:

Alberta: 9.6-10.7% for 1 child, 17.4-19.7% for 2, 21.9-25.8% for 3.

New York: 17% for 1, 25% for 2, 29% for 3³⁰

Arizona: 20-8.7% for 1, 29.2-12.4% for 2, 34.4-14.3% for 3³¹

Colorado: 18.0-9.1% for 1, 27.8-13.7% for 2, 34.0-16.4% for 3³²

Indiana: 17.5 to 10.4% for 1, 26.4-15.6% for 2, 32.9-19.6 for 3³³

Maine: 20.5-10.3% for 1, 29.8-14.7% for 2, 35.4-17.1% for 3³⁴

Development of Income Shares Charts and Other Considerations (Arkansas Department of Finance and Administration, Office of Child Support Enforcement, September 30, 2019).

²⁸ See Venohr, “Technical Documentation: Illinois Schedule of Basic Obligations and Standardized Net Income Table (Illinois Department of Health Care and Family Services, June 12, 2017). This report was the foundation for the switch by Illinois from the old POOI model to the income shares model on July 1, 2017.

²⁹ Note that, under the Quebec formula, the combined gross parental income stated in the table is *after* the deduction from gross income of a self-support reserve for each parent of \$11,680 for 2020. The percentages are calculated for combined annual gross incomes from \$30,000 to \$200,000. Calculated using the 2020 “Basic Parental Contribution Determination Table”, located at: justice.gouv.qc.ca/en/couples-and-families/separation-and-divorce/children-a-joint-responsibility/child-support/tables-to-determine-the-basic-parental-contribution/

³⁰ See Child Support Standards Chart, located at: childsupport.ny.gov/dcse/pdfs/CSSA.pdf. The percentages operate up to combined annual parental gross income of \$154,000 for 2020, with discretion for higher incomes. Legislative authority flows from s. 240(1-b) of N.Y. Consolidated Laws, Domestic Relations Law.

³¹ Arizona Child Support Guidelines, adopted by Arizona Supreme Court, effective April 1, 2018. See: azcourts.gov/Portals/34/Forms/FamilyLaw/AOCDRS10H2018.pdf. The table runs up to \$20,000 of combined monthly gross income.

³² For gross combined monthly incomes from \$2,500 to \$20,000: Colorado Revised Statutes, Title 14, co-rev-st-14-10-115

³³ For weekly combined gross incomes from \$580/week to \$2,890/week, for the table found at: in.gov/judiciary/files/schedule.pdf. More detail is provided in the order with the 2019 amendments to their child support guidelines at: in.gov/judiciary/files/order-rules-2019-0726-child-supp.pdf

Illinois: 21.6-13.0% for 1, 33.2-19.5% for 2, 40.3-23.2% for 3³⁵

Note that all these state formulas start much higher than the Canadian *Federal Guidelines* for one and two child amounts.

54. Australia differentiates rates for children under 13 versus those 13 and over (and their teen rate is 4 to 6 percentage points higher). The Australian range for children under 13 for combined gross incomes up to \$191,815 is: 17-12.2% for 1; 24-19.0% for 2; and 27-24.0% for 3.³⁶

55. New Zealand also differentiates rates, for children under 12 versus those 12 and over (which are 4 to 6 percentage points higher). The New Zealand percentages for children under 12 are similar to those in Australia, up to \$153,376 of combined gross income: 17-12.2% for 1; 24-19.0% for 2; and 27-24.0% for 3.³⁷

(iv) Comparisons to U.S. Amounts

56. Another way of comparing child support formulas is to compare some typical case scenarios across jurisdictions. Jane Venohr, a leading American guidelines expert, has written two articles taking this approach to American state child support formulas, one article in 2013 and another in 2017.³⁸ The two Venohr articles drive home the remarkable range of estimates of child spending, child support formulas and, ultimately, child support amounts in the United States.

57. In her 2013 article, Venohr used three cases: low-income, middle-income and high-income.³⁹ In the low-income one-child case, state child support awards ranged from \$220 to \$412/month, with a median of \$339/month.⁴⁰ The equivalent Alberta award at the time was \$188/month (in Canadian dollars on Canadian incomes). In the middle-income two-child case, the range of U.S. awards was \$552-\$1,052/month, with a median of \$770/month. The Alberta

³⁴ For annual gross combined incomes from \$30,000 to \$150,000, located at: courts.maine.gov/fees_forms/forms/pdf_forms/fm/fm-084-child-support-table.pdf.

³⁵ See Venohr, note 28 above, at p. 18.

³⁶ See note 19 above. These were the percentages brought into effect in July 2008. The 2020 cost of children table can be found at: guides.dss.gov.au/child-support-guide/2/4/2#costs2020. The rates vary depending upon the combined income of the parents, based upon their proportion of average weekly earnings.

³⁷ See the New Zealand child support expenditure tables for 2020 at: ird.govt.nz/topics/child-support/how-much-will-i-get-or-pay/child-support-expenditure-tables-for-2020.

³⁸ Venohr, “Child Support Guidelines and Guidelines Reviews: State Differences and Common Issues” (2013), 47 *Fam.L.Q.* 327, especially Table 2 at pp. 348-49; Venohr, “Differences in State Child Support Guidelines Amounts: Guidelines Models, Economic Basis, and Other Issues” (2017), 29 *Journal of American Academy of Matrimonial Lawyers* 377, especially Table 3 at pp. 404-05.

³⁹ Case A involved parents with less than high school, one child in the mother’s custody, mother’s gross income \$14,628/year and father’s \$21,840/year. Case B involved parents with some college, 2 children in mother’s custody, mother’s gross income \$27,336/year and father’s \$40,248/year. Case C involved parents with graduate or professional degrees, one child in mother’s custody, mother’s income \$54,120/year and father’s \$80,916/year.

⁴⁰ In the United States, child support is non-taxable for the recipient and non-deductible for the payor, the same tax treatment as in Canada.

award was \$566/month. In her high-income one-child case, Venohr found a range of \$600-\$1,306/month, with a median of \$763/month. The Alberta award was \$697/month.

58. In her 2017 article, Venohr constructed two cases, a low-income case and a high-income case, both involving one child aged 10.⁴¹ The low-income case generated a range of state awards from \$236 to \$460/month, with a median of \$382/month. The equivalent 2016 Alberta award was \$211/month. In the high-income case, the range was \$651-\$1,358/month, with a median award of \$777/month. The 2016 Alberta award was \$736/month.

59. In 2017, Venohr assessed whether the choice of guidelines model might explain the variation in state awards. The average support award in the low-income case was higher for income-shares states (\$381/month) than for percentage-of-obligor-income states (\$342/month), but the converse was true for the higher-income case: the average award in IS states was \$812/month versus \$944/month in POOI states. Venohr explains: “One reason for this is that income-shares states tend to be based on measurements of child-rearing expenditures that reflect a declining percentage of income devoted to child rearing as income increases.”⁴²

(2) The Fixed Percentage of Payor Income, or Linearity

60. The 40/30 Equivalence Scale is applied by the table formula to all incomes above the self-support reserve (now \$12,000/year) up to an annual payor income of \$150,000. Section 4 of the *Guidelines* does not make \$150,000 a hard “cap”, but gives the court a broad discretion to depart from the table formula for higher incomes where the amount generated would be “inappropriate”. To put these incomes in perspective, in 2015, 97 per cent of individual incomes in Canada were less than \$150,000.⁴³

61. Section 4 was interpreted by the Supreme Court of Canada in *Francis v. Baker*, [1999] 3 S.C.R. 250, where Mr. Baker made \$945,538 per year and was ordered to pay the full table amount of \$10,034/month for two children (including private school tuition fees). Presumptively, the table formula amounts would apply under s. 4(a), unless that amount is “inappropriate”, i.e. “unsuitable”, in which case the factors in s. 4(b)(ii) are used to guide the court’s discretion on amount for payor incomes above \$150,000.

62. There are adjustments at lower-income levels. The self-support reserve reflects the basic personal amount below which income tax is not paid: *Technical Report*, pp. 5-6. Below this income level, no table amount of child support is paid.⁴⁴ Above that self-support reserve, the linear 40/30 Scale is not strictly applied, but is “smoothed” in a “transition zone” of lower incomes, to avoid harsh marginal increases in support and to alleviate work disincentives: *Technical Report*, pp. 6-7. This “transition zone” ends around different annual incomes,

⁴¹ In Case A, the father’s income was \$25,129/year and the mother’s \$16,161/year. In Case B, the professional father’s income was \$85,202/year and the professional mother’s was \$56,726/year. In 2017, Venohr also tried to determine whether variations in the cost of living might explain the outcomes, based upon median gross rents and price parities. Neither measure provided much of an explanation.

⁴² Venohr (2017) at p. 399.

⁴³ See www12.statcan.gc.ca/census-recensement/2016/dp-pd/dv-vd/inc-rev/index-eng.cfm.

⁴⁴ Some other guidelines set a minimum or nominal amount of child support to be paid, even by those with low or little income.

depending upon the number of children, e.g. for one, around \$17,000; for two, \$20,000; for three, \$23,000.

63. Both Sarlo and Allen devote considerable criticism to the linear nature of the Revised Fixed Percentage model, and to the underlying idea that parental spending upon children is directly proportional to income across a wide spectrum of incomes: Sarlo, *Assessment*, pp. 20-27; and Allen, “Supplementary Report”, paras. 22-35.

64. It is clear that, however you estimate parental spending upon children, at higher income levels such spending will be a declining percentage of parental income. Estimating such expenditures is difficult, with widely-varying numbers within and across income levels, so that there is also no consensus about the income levels at which the child support formula should adjust for that declining percentage.

65. As can be seen from the above review of formulas in some other jurisdictions, it is not uncommon for a fixed percentage to be used for a range of incomes up to a limit, with discretion thereafter. Both POOI and income shares models can use a fixed percentage, as shown above, rather than a declining scale. Ellman suggests:

parental expenditures on children may in fact be a roughly constant percentage of total expenditures over an income range that is wide enough to include the great majority of parents subject to support awards.⁴⁵

66. To similar effect is a 1994 statement by Ross Finnie, one of those involved in the creation of the *Federal Guidelines*, who then became a critic of many of their aspects and who is often cited by Sarlo for his criticisms (pp. 43-44). In his book, *Child Support: The Guideline Options*, Finnie offered this statement, after discussing the Statistics Canada “40/30 equivalence scale” and its derivation from low-income measures:

Therefore, if child costs actually rise or fall more than proportionally with income, this could present a problem; fortunately, looking across the full set of child expenditure estimates suggests that child expenditures are in fact approximately proportional to income.⁴⁶

In a footnote, Finnie suggested, “A guideline could, however, incorporate an adjustment built in at very high income levels on the grounds that families spend smaller proportions of their income on children in these ranges.”⁴⁷ On this view, the real issue is “how high”, i.e. at what higher income levels do the significantly smaller proportions of spending begin?

67. To give context to this linearity discussion, the 1998-2003 *Survey of Child Support Awards* showed that the median income of child support payors then was \$37,000 (about

⁴⁵ Ellman, “Fudging Failure”, above, at 181-2, citing the work of David Betson, widely relied upon in the United States in fashioning child support guidelines.

⁴⁶ (Montreal: Institute for Research on Public Policy, 1994) at pp. 52-3.

⁴⁷ At p. 53.

\$52,000 in 2020 dollars).⁴⁸ The same *Survey* showed that 62.7% of payor parents had incomes below \$45,000 a year and 80% were below \$60,000 a year at that time.⁴⁹

68. One final point. For most income levels, parents spend 100 per cent of their incomes (or more, thanks to debt). As incomes rise, spending proportions drop and savings rates rise. Fundamental theoretical and policy questions arise in very-high-income cases. Should the non-custodial parent pay child support only to meet a child's basic needs? Should the custodial parent be able to put away funds for savings for the child as well as the non-custodial parent? How should the interests be balanced in high-income cases?

(3) Non-Custodial Parent Costs of Parenting Time

69. The mathematical construct that underpins the table formula also makes no allowance for spending on children by the non-custodial parent (NCP). The *Technical Report* does not explicitly say so, but the statement of the formula and Figure 1 are clear (p. 2). This assumption is discussed by both Sarlo (pp. 30-31) and Allen ("Supplementary Report", paras. 42-47).

70. Once again, it is important to distinguish between the mathematical construct and its role in estimating child support amounts. In reality, if a non-custodial parent has overnight access, necessitating a bedroom for the child(ren), then the parent will be bearing fixed costs at a fairly low percentage of parenting time. Variable costs for food and other items will be more dependent upon the amount of parenting time spent with the non-custodial parent. Only when the NCP's parenting time exceeds 40 per cent over the course of the year is there any express adjustment made in the *Federal Guidelines* for the NCP spending, which I discussed at length in my 2013 article, "The TLC of Shared Parenting: Time, Language and Cash".⁵⁰

71. There is the possibility of claiming undue hardship under s. 10 of the *Federal Guidelines*, where a parent has "unusually high expenses in relation to exercising access to a child" in s. 10(2)(b). This hardship circumstance is most often claimed where a parent exercises long-distance access, but there are a few cases where the expenses relate to adequate accommodation for more extensive parenting time.⁵¹ Since the claimant parent also needs to show a lower household standard of living under s. 10(3), this claim only works for some parents, usually those with lower incomes.

72. As set out above, the *Federal Guidelines* formula percentages are lower than for many other child support guidelines, especially the percentages for one or two children. Thus, some

⁴⁸ Bertrand et al., *Survey of Child Support Awards*, above, note 9, p. 14. The 2020 equivalent was calculated by adjusting for inflation from 2001 to 2020. The median income of parents receiving child support was \$26,000 in 1998-2003.

⁴⁹ *Survey of Child Support Awards*, Figure 3.2, p. 15. The inflation-adjusted incomes would be \$63,000 and \$84,000 in 2020 dollars.

⁵⁰ (2013), 32 Can.Fam.L.Q. 315. See also Thompson, "Case Comment: *Contino v. Leonelli-Contino*" (2003), 42 R.F.L. (5th) 326 and "Annotation: *Contino v. Leonelli-Contino*" (2005), 19 R.F.L. (6th) 277.

⁵¹ *C.W.T. v. K.A.T.*, [2013] A.J. No. 1303, 2013 ABQB 678; *Wainman v. Clairmont*, [2004] N.S.J. No. 69, 2004 NSSC 29; *Dugan v. Dugan*, [2001] B.C.J. No. 258, 2001 BCSC 219; *Smith v. Marsellis Smith*, [1999] A.J. No. 1180, 1999 ABQB 767; *Baranyi v. Longe*, [1998] O.J. No. 606 (Gen.Div.); *Petrocco v. Von Michalofski* (1998), 36 R.F.L. (4th) 278 (Ont.Gen.Div.).

room is left for child spending by the non-custodial parent. In the *Spousal Support Advisory Guidelines*, we did something similar in the *with child support* formula, lowering the percentage sharing of “individual net disposable income” for three reasons, one of which was to recognize “the access-related expenses of the payor spouse, expenses that are not otherwise reflected in the [SSAG] formula”.⁵²

73. The Quebec model does recognize the non-custodial parent’s child-related costs in a subset of cases. Sarlo mentions this in his *Assessment*, at pp. 31, 45. The Quebec formula has an adjustment for “visiting and prolonged outing rights” (“droits de visite et de sortie prolongés”) that amount to 20 to 40% of custody time. If the NCP has the child for, say, 26% of the time, then the two-parent “basic annual contribution” is reduced by 6% (26%-20%) and then the reduced contribution is allocated *pro rata* between the parents.⁵³ According to the Report of the Follow-up Committee, 8.8% of Quebec child support cases fell into this category of prolonged parenting time in 1997-98.⁵⁴ Once the custody time reaches 40%, like s. 9 of the *Federal Guidelines*, the Quebec *Guidelines* have a more substantial adjustment. Each parent’s custody time is directly applied to prorate the “basic annual contribution”, an adjustment that dramatically reduces child support in Quebec shared custody cases, compared to support under the *Federal Guidelines*.

74. In the *Federal Guidelines*, it was a policy decision not to make any similar explicit adjustment until a parent’s time with the child reaches the threshold of 40% of the time over the course of a year. The policy reasons are explained in my “TLC of Shared Parenting” article (at pp. 324-25): (i) to protect the position of the primary parent; (ii) to recognise the direct spending of the other parent; (iii) to provide an objective method of identification of shared parenting cases; and (iv) to minimise incentives for opportunistic behaviour by either parent. The location of this “threshold” for adjustment varies among American guidelines, from a low of 14% to a high of 45%, with most states falling between 25 and 40%.⁵⁵

(4) Exclusion of Government Benefits for Children

75. The Guidelines table amount formula does not include child-related government benefits in the income of the recipient or custodial parent in its calculations, as is explained at p. 5 of the *Technical Report*:

⁵² *Spousal Support Advisory Guidelines* (Justice Canada, July 2008) at p. 78. The percentage range for this formula was reduced from 44-50% to 40-46%, to recognize access-related expenses, as well as employment-related expenses of the payor and concerns about 50% being too high compared to the case law. On this point, Sarlo is wrong to state otherwise in his *Assessment*, at pp. 41, 42.

⁵³ See the Quebec “Child Support Determination Form”, page 4, Schedule I to Regulation respecting the determination of child support payments, Code of Civil Procedure, C-25.01, r. 0.4.

⁵⁴ Report (Justice translation), below, note 42 at p.38. To put this percentage in context, 75.9% of the sample of 1,997 cases were sole custody (i.e. less than 20% access/parenting time by the NCP), 7.2% split custody, 7.2% shared custody and 0.8% mixed sole and shared custody. Table 13 on p. 39 of the Report shows the breakdown by father/mother and time within the “visiting and prolonged outing rights” category, for bands of 20-25%, 26-34% and 35-39%, with 57% of the cases in the 26-34% range. These data were gathered from court files in 1997-98.

⁵⁵ Brown and Brito, *Characteristics of Shared-Placement Child Support Formulas Used in the Fifty States* (March 2007), Report to the Wisconsin Department of Workforce Development, Bureau of Child Support, by the Institute for Research on Poverty, University of Wisconsin-Madison, at pp. 3-4.

Not included in the calculation of the receiving parent's taxes are the federal Child Tax Benefit and the GST rebate for children. These are deemed to be the government's contribution to children and not available as income to the receiving parent.

Sarlo is critical of this decision (at pp. 28-30). Allen does not discuss this issue, apart from his general agreement with Sarlo ("Supplementary Report", para. 10).

76. First, a few technical points about child benefits. In 2006, almost a decade after the *Federal Child Support Guidelines* were introduced, the federal government created the Universal Child Care Benefit (UCCB), a taxable payment of \$1,200 per year per child, an additional benefit over and above the existing Child Tax Benefit (CTB). Schedule III to the *Guidelines* was then amended, to remove the UCCB from a parent's income, consistent with the policy stated in the *Technical Report*: Schedule III, ss. 3, 3.1, as amended by SOR/2007-59. The CTB was a non-taxable payment, and was not included in "Line 150 income" in the first place. Thus, the UCCB was in place when Sarlo wrote his *Assessment* in 2014.

77. Since then, in July 2016, the federal government replaced both the CTB and the UCCB with a single, non-taxable, enriched benefit, the Canada Child Benefit. This change is noted and discussed in Sarlo's February 2020 affidavit. The Canada Child Benefit is paid monthly and has two maximum rates at present: a higher one for children under the age of 6 and a lower rate for children aged 6 to 17. The 2019-20 maximum rates are \$6,639/year for children under 6 and \$5,602/year for children aged 6 to 17.⁵⁶ Although the Canada Child Benefit is non-taxable, there is a "clawback" to reduce the Benefit based upon the adjusted family net income of the recipient.⁵⁷

78. The Quebec *Child Support Guidelines* adopt the same approach to child benefits as the federal model, excluding them from parental income. As the Follow-up Committee explained in its 2000 Report:

In fact, these transfer payments are used especially to meet the needs of children, as are support payments, and, for low-income families, they represent an important form of compensation for the relatively low support contributions listed in the table, amounts that take both parental resources and the number of children into account. Basic parental support contributions are directly based on the income of both parents so it follows that the lower their respective incomes, the lower the contributions as established in the table. Family allowance and child tax benefits serve to supplement the relatively low incomes of these parents.⁵⁸

⁵⁶ In the recent federal election campaign, the governing Liberals committed to creating a third rate, for children under the age of one, increasing their rate by 15%, which would be an annual amount of \$7,634 at 2019-20 rates if implemented.

⁵⁷ The clawback starts at adjusted family net income (AFNI) of \$31,120, increases at AFNI of \$67,426, and eventually wipes out any CCB at incomes ranging from \$157,000 to \$206,000 for one or two children. The Child Benefit amount is based on the AFNI reported on the previous year's tax return(s), with the CCB adjusted the following July. The new CCB is clawed back at different rates than the previous Child Tax Benefit.

⁵⁸ *Report of the Follow-up Committee on the Quebec Model for the Determination of Child Support Payments* (translated by Justice Canada in July 2004) at p. 67, and at p. 73 of *Rapport du Comité de suivi du modèle Québécois de fixation des pensions alimentaires pour enfants* (Ministère de la Justice, mars 2000).

In Quebec, the Canada Child Benefit is supplemented by a provincial Family Allowance, which is much larger than any other provincial child benefit, amounting to a maximum of \$2,515 per child per year.⁵⁹

79. The Quebec Committee makes an important point: the public child benefits are intended to be spent upon the children, to improve the economic position of children in lower-income households. The “private” child support table amounts in turn reflect that assumption about the level and expenditure of “public” child benefits. The enriched Canada Child Benefit is intended to improve the economic position of children, especially children in lower-income households. Across Canada, provincial income assistance schemes no longer provide allowances for children’s food, clothing and miscellaneous expenses, leaving the support of children to the CCB (plus any provincial supplementary child benefits).⁶⁰

80. The premise is that a parent receiving these public child benefits will spend the *full* amount for their children. The same premise applies to child support paid by the non-custodial parent to the custodial parent. Their purpose is to permit the custodial parent to spend more upon the children than would be possible based on the custodial parent’s income alone.

(5) A Net Wealth Transfer?

81. At the heart of the Sarlo *Assessment* is his “should pay – do pay” analysis in “Section 7: The mathematics of the Guidelines”, at pp. 51-68. It is a purely “mathematical” analysis, flowing from assumptions to numerical conclusions. I will identify a number of weaknesses in this analysis. Allen accepts the Sarlo calculations: “Supplementary Report”, paras. 48-49. Sarlo concludes, at pp. 68 and 72:

The results of the “should pay – do pay” analysis, beginning with the original Newfoundland illustration, speak for themselves. They demonstrate as well as anything else in this report the severe unfairness and one-sidedness of the Guidelines *in action*. There is virtually no case in which the (deemed) costs of the children are shared according to the parents “relative abilities to contribute”. By any standard, the child support Formula is not equitably distributing both parents’ responsibility to maintain their children.

.....
Exhibit 16, in combination with Exhibit 15, shows that, over a wide range of reasonable assumptions, the CP does not financially contribute to the support of the children but in fact *receives a net wealth transfer* from the system. (emphasis in original)

⁵⁹ For 2020, the maximum amount is \$2,515 per child per year, plus an extra \$882/year if the parent is a single parent: see rrq.gouv.qc.ca/en/programmes/soutien_enfants/Pages/montant.aspx. The Allowance is reduced as the recipient’s “family income” increases, with different clawbacks for couples vs. single parents. Compare, for example, the Alberta Child Benefit maximum amounts: \$1,155 per year for the first child, then \$577 for each subsequent child: see alberta.ca/alberta-child-benefit.aspx.

⁶⁰ Alberta is a rare province that provides some additional funding for children on income support/assistance, \$200/mo. for the first child and \$100/mo. for each child after that, on top of the CCB and the Alberta Child Benefit: see alberta.ca/income-support-what-you-get.aspx.

82. First, Sarlo relies on the unpublished “Newfoundland illustrations” for the foundation of his whole analysis (pp. 54-58), illustrations which only appeared in an early draft and did not appear in the final published *Technical Report*. The illustrations have no official status or approval.

83. Second, Sarlo effectively minimizes the custodial parent’s spending on children, by applying the 40/30 Equivalence Scale to the custodial parent’s income, *after* adding in the public child benefits and the non-custodial parent’s child support. Thus, for two children, he takes the fraction $.7/1.7$, or $.4118$, to arrive at the share of the CP’s income devoted to “direct expenditures on children”. Then he deducts the *full* amount of the public child benefits and the *full* amount of the NCP’s child support from the hypothetical amount of the “direct expenditures” (based upon an assumed fraction). The custodial parent only needs to contribute the remainder and is shown by the math to not be paying their “fair share” or even receiving an overpayment, a surplus, a “net wealth transfer”.

84. To come up with the “should pay – do pay” numbers, Sarlo takes his estimate of “direct expenditures on children”, subtracts the public child benefits (and tax credits relating to children), and then distributes the balance between the parents based upon their respective “after-tax incomes”, to assess what the non-custodial parent and custodial parent “should pay” for those “direct expenditure” numbers. Those “should pay” numbers are then compared to the “do pay” numbers. The “do pay” numbers trace back to the non-custodial parent’s actual child support payment and the custodial parent’s remainder (after deduction of the public child benefits and the tax credits relating to the children).

85. Both the public child benefits and the child support payment from the non-custodial parent are intended to be spent for the children and are in most cases, especially at lower income levels. But Sarlo’s math, for two children, allocates only $.4118$ of those two sources of income to spending upon the children, using the 40/30 Equivalence Scale, thereby producing an artificially-low number for such expenditures.

86. This unrealistic approach is most obvious for the situation where the custodial parent has no income in his Attachment #1. If a custodial parent’s only income is public child benefits and child support, then the numbers get quite wonky, because Sarlo is now deducting $.4118$ of that total to get the “direct expenditures on children” and then deducts the *full* amount of both from that fraction.⁶¹ In this table, there are calculations for zero income for the CP and then NCP income of \$30,000, \$60,000, \$90,000, \$120,000, \$240,000, \$500,000 and \$1 million. As Sarlo himself says, at pp. 6-7:

⁶¹ The math for a custodial parent (CP) with no other income is straightforward. Using round numbers, if the CP’s income consists only of \$12,000 in CCB for two children plus \$8,000 in child support from the other parent (which would imply an Alberta NCP payor income of \$45,900), then Sarlo takes that total CP income of \$20,000, and multiplies it by $.4118$ ($.7/1.7$ using the equivalence scale) to determine the “direct expenditures on children” by the custodial parent to be \$8,236. Then Sarlo would deduct the *full* amount of the CCB, i.e. $\$8,236 - \$12,000 = (-\$3,764)$. To that negative amount is added the *full* \$8,000 in child support actually paid by the NCP, for a “net wealth transfer” to the CP of \$11,764 under his “do pay” math. Under his “should pay” math, the two parents should share the negative “net cost” of $-\$3,764$ in proportion to their after-tax incomes. The math is less obvious if the custodial parent earns \$25,000 in employment income.

The "should pay – do pay" analysis generates what appear to be some anomalous results. In Appendix 1, we note the case where the CP has a zero income, receives no spousal support and the NCP a good mid-level income of \$90,000. Here the total net spending on the children to be funded by the parents is only \$31. The explanation of this is that the CP's low income results in the maximum level of government benefits for the two children. This amount is very close to the "deemed" spending on children making the net amount to be shared very little.

To take Sarlo's \$90,000 case, there is nothing "anomalous" about the result. The zero recipient income case just reveals the inevitable mathematical outcome of Sarlo's assumptions described above. In Attachment #1, every zero recipient income case shows a large "net wealth transfer", to use Sarlo's language, even at low levels of payor income.

87. Further, to get to "should pay", Sarlo makes this judgment (at p. 58), although cast in neutral terms:

In determining the amount that "should" be paid by each parent, which requires a determination of their relative after-tax income (their means), I, of course, exclude from their means those government benefits that they may have received but which I have already accounted for as having been spent on the children. *Described another way, the should pay amount is based on relative after-tax income after removing all government benefits/deductions related to the children.* For the purpose of this Report, this is considered to be the parent's relative abilities to contribute or simply their "means" for short. (emphasis in original)⁶²

Sarlo judges that the parents' "relative after-tax incomes" is how child support *should* be determined, taking an income shares approach.

88. Why "after-tax incomes"? Why not gross incomes? Or, like Quebec, disposable incomes after deduction of a self-support reserve? Or some other adjusted form of income?

89. Nor is it clear what Sarlo means by "after-tax income". He does not use the "after-tax income" line in his examples in calculating the percentages the parents "should pay". There is an unstated adjustment to the "after-tax incomes", presumably related to tax credits for children for the custodial parent.⁶³ But the calculations are not transparent, and thus it is not possible to assess their correctness, even if the discrepancies are small. This issue runs through all the calculations for different incomes and situations.⁶⁴

⁶² In support law, "means" has a much broader meaning, taking into account not only income, but also expenditures, and also assets and liabilities.

⁶³ On pages 53-54, under heading 6 a), it is stated that this item refers to "Government Tax Credits (included on tax return and in the child support Formula) – represents the amount federal and provincial taxes are reduced by tax credits attributable to the children". No details are provided, and thus it is difficult to determine whether this adjustment has been made to the "after-tax incomes" of the parents in the "should pay – do pay" math.

⁶⁴ To take Exhibits 7 and 9, where the parental gross incomes are equal, each earning \$25,000/year, Exhibit 9 just allocates 50/50, despite the supposed use of "after-tax incomes", with no elaboration. Once gross and after-tax incomes differ, then it gets much more complicated to do the math.

90. In his February 2020 Affidavit, Sarlo updates his math, for the two Newfoundland illustrations, by including the new Canada Child Benefit, in Exhibits 9 and 10. The custodial parent is shown to make “little or no financial contribution in support of the children, but instead receives a substantial net wealth transfer from child support payments. These examples show that inequity in the CP’s and NCP’s contributions to maintaining the children of the marriage has worsened under the now more generous CB amounts.” (at para. 15)

91. The 2019 calculations suffer from the same problems as the 2010 math. Exhibit 9 replicates the 2010 calculations for parents with equal \$25,000/year incomes. A significant drop in “Government Tax Credits” is not explained, from \$3,145 to \$1,382. Exhibit 10 updates the case where the custodial parent earns \$25,000 and the non-custodial parent \$75,000/year. It contains a serious error in the “should pay” math, as it shows that the lower-income custodial parent “should pay” 56.53% of the residual “net cost” and the higher-income NCP 43.47%. The percentages were erroneously taken from the “After-tax, Benefits and after Award Income” line, and not the usual “after-tax incomes” line (where the proportions would be CP 30.9%, NCP 68.1%).

92. In the end, this is just mathematics, numbers, which bear no relationship to the lived reality of a single custodial parent earning \$25,000 a year with two children aged 9 and 4. From my time as a practising family law lawyer, both in private practice and at legal aid, I am familiar with the spending patterns and hard decisions faced by lower-income custodial parents.

(6) Adjusting for Multiple Families

93. Sarlo states in a sub-title, at p. 37: “The Guidelines Ignore the Re-Partnering Status of Both Separated Parents.” Here we see again the confusion between “the Guidelines” and “the table formula”. According to Sarlo, repartnering of parents is “not a factor taken into account in the CSGs” (p. 37). Allen repeats the same errors: “Supplementary Report” at paras. 53-59. Sarlo focuses more upon new spouses, while Allen emphasises that the *Guidelines* “ignore” subsequent families: “Supplementary Report” at para. 53. Sarlo does note the possibility of an undue hardship application (at pp. 38-39).

94. The table formula assumes that each parent lives on their own, with no new partners and no new children: *Technical Report*, p. 2.

95. The repartnering or remarriage of parents and, more importantly, duties to the children of other relationships, *are* taken into account, not in the table formula, but in s. 10 of the *Guidelines*, the undue hardship provision. For a parent to succeed on an undue hardship claim, he or she must first prove: (i) an undue hardship circumstance under s. 10(2); *and* (ii) a lower household standard of living under s. 10(3). A court then has the remedial discretion to order a different amount of child support under s. 10(1), typically an amount below the table amount. Generally, see Thompson, “Of Camels and Rich Men, Undue Hardship Part II” (October 1998) and “Undue Hardship” (June 1997) in *Federal Child Support Guidelines Reference Manual* (looseleaf, Ottawa, 1997). More specifically, on prior and subsequent children, I explored these

issues in detail in Thompson, “The Second Family Conundrum in Child Support” (2001), 18 *Can.J.Fam.L.* 227.⁶⁵

96. There are three ways that s. 10 of the *Guidelines* adjusts for multiple families. The most common situation comes under s. 10(2)(d), where a prior or subsequent child resides in the same household as the payor. Second is s. 10(2)(c), where the payor has agreed or been ordered to pay support to a child, either prior or subsequent, or to a spouse. Third and quite rare is s. 10(2)(e), supporting a person suffering from an illness or disability, usually a spouse.

97. The second step in undue hardship analysis requires the claimant payor to demonstrate a lower *household* standard of living. At this stage, the incomes of new partners are taken into account in the analysis, as well as the new children in the parental households: see *Guidelines*, Schedule II “Comparison of Household Standards of Living Test”.

98. As I explained in my “Second Family Conundrum” article, there are a number of judicial approaches that are applied by Canadian judges in the second family/undue hardship cases: first family first; let the second family succeed; equal treatment of the payor’s own children; equal treatment of all children; and just case-by-case discretion. The *Guidelines* do not provide any clear guidance to judges grappling with these cases. That is not unusual, as many American guidelines treat second families similarly as a deviation or departure factor. Many of the U.S. guidelines impose a “first family first” policy for a prior child by means of an income deduction for the payor for that child. Most “second family” cases involve what are called “subsequent children”, children born after the child(ren) whose support is in issue.

99. Allen puts forward two second family examples in his “Supplementary Report”, in Tables 3 and 4, when claiming that the *Guidelines* fail to adjust for second families. His Table 3 example actually could qualify for a claim of undue hardship. In this example, both parents have gross incomes of \$60,000/year and each household has three members: the custodial parent with the two children, then the non-custodial parent with a new spouse and young child. The subsequent child in the NCP’s household would qualify as an undue hardship circumstance under s. 10(2)(d). The comparison of household standards of living under Schedule II would show a significantly lower household income ratio. But two policy issues would arise in addressing the Table 3 undue hardship claim. First, the non-custodial parent’s spouse is assumed by Allen to have no income. A court may choose to impute income to the second spouse, which could change the math considerably in his Table 3. Second, Canadian judges usually do not grant hardship claims in these cases, based upon a strong policy of “first family first”, as I explain in my “Second Family Conundrum” article. Table 4 presents a very unusual fact situation, but it is complicated by a lack of sufficient information or explanation.

100. The Quebec *Child Support Guidelines* take a similar approach to second families, but apply a less demanding threshold test. “Simple” hardship is enough to justify a departure from the formula amounts, and there is no household-standard-of-living test: *Code civil du Quebec*,

⁶⁵ See also Takas, “Improving Child Support Guidelines: Can Simple Formulas Address Complex Families?” (1992), 26 *Fam.L.Q.* 171.

S.Q. 1996, c. 68, art. 587.2 (as amended by S.Q. 2004, c. 5, to relax the test from “undue hardship” to simple “hardship”).⁶⁶

101. The *Federal Child Support Guidelines* do take into account multiple families and children, in section 10, as a ground to depart from the amount under the table formula.

(7) Children as Benefit or “Value”

102. Sarlo states (in the heading at p. 73) that “The Guidelines View Children Only as Costs (and Not Benefits)”, followed by this conclusion on the same page:

The reality, of course, at least for most, is that children bring joy to a family. By ignoring these benefits, the state can claim that all it is doing is equitably distributing the costs. Yet, what often happens is that one parent, the non-custodial parent (NCP), gets significantly less than half of the benefits and pays most (or all, or even more than all) of the costs.

Allen also states this criticism in his “Supplementary Report”, paras. 37-41, in discussing the utility or value of children. In his “Supplementary Report”, Allen frames it differently, at para. 41: “By not taking these benefits into account, the true welfare of the separate households is not equalized.”⁶⁷

103. No one can dispute that children generate non-monetary benefits to parents, as well as costs. But child support guidelines are about sharing costs, expenditures and standards of living. To quote Ellman in “Fudging Failure”, at p. 198: “No existing child support law overtly adjusts the amount of child support to account for this nonfinancial factor, whether as an addition or a subtraction.”

104. There are also clear indirect and non-monetary *costs* for a custodial parent, also not recognized by child support guidelines. Indirect costs include the impact of child care obligations upon the custodial parent’s income, such as less ability to travel for work or to work shifts or overtime or long hours. Compensation for indirect costs may come by way of spousal support for middle- and higher-income parents, but such costs will not be compensated where the non-custodial parent lacks the ability to pay spousal support, which is common. Non-monetary costs include increased time spent on child care and household management by the custodial parent, the loss of leisure time, and other limits on life choices. In the end, the net result of such benefits and costs is not at all clear.

⁶⁶ See also Fortin and Verdon, *Barème québécois: Aspects civils et fiscaux* (CCH, 2e ed., 2004) at pp. 274-6.

⁶⁷ In the preceding paragraphs in his “Supplementary Report”, Allen suggests that the table formula is intended to equalize, not “disposable household income”, but the “welfare” of the two households, and thus the formula should take the benefits of children into account. There is no mention of “equalizing welfare” in the *Guidelines Technical Report*.

6. The Quebec Child Support Guidelines Model

105. Sarlo frequently refers to the Quebec income shares model as a better policy choice, “more reasonable than the federal system”, to avoid many of the problems he identifies with the *Federal Child Support Guidelines* model: see Sarlo, pp. 44-47. I too have referred to the Quebec *Guidelines* on specific issues like linearity or visiting and prolonged outing rights or second families. Allen does not refer to the Quebec model.

106. I will briefly explain the Quebec model and its distinctive characteristics here. As is noted above, the Quebec *Guidelines* apply to child support cases under provincial law and, thanks to federal designation, to child support upon divorce where both parties reside in Quebec. According to the Report of the Follow-up Committee, their 1997-98 data showed that 99% of Quebec child support orders applied the Quebec model.⁶⁸

107. Quebec developed its own income shares model for determining the amount of child support, which also came into force on May 1, 1997. A brief account of the legislative history can be found in *Droit de la famille – 139*, a decision of the Quebec Court of Appeal in response to a s. 15 challenge by six custodial parents who argued, unsuccessfully, that the Quebec guidelines were discriminatory by mandating less generous support amounts for higher income payors than the *Federal Guidelines*.⁶⁹ The 2000 Report of the Follow-up Committee gives a short account of the Quebec model in Chapter 1, before the Report sets out the child support data and their recommendations for improvements.⁷⁰

108. The Quebec “Child Support Determination Form” is Schedule I to the Quebec *Guidelines*. It is a 7-page form. It requires both parental incomes to determine their combined “disposable income”, which reflects their gross incomes after the basic deduction (the self-support reserve, adjusted annually, \$11,680 for 2020). The parents’ disposable income is then used to locate the appropriate amount on the “Basic Parental Contribution Determination Table” (increments of \$1,000 for disposable incomes from 0 to \$200,000/year, for 1 to 6 children). The basic contribution is then allocated based upon each parent’s share of disposable income. To this basic table amount can be added three categories of child expenses: child care, post-secondary education, or special expenses.⁷¹

109. The annual support is then adjusted for “custody time”: sole custody; visiting and prolonged outing rights (20-40% of time); split custody (sole custody to each parent); shared custody (at least 40% of time); and mixed arrangements (any combination of the above). The form then addresses other issues, like capacity to pay of debtor parent, agreements between parents, payment frequency, and parents’ assets and liabilities.

⁶⁸ Report (translation), p. 27.

⁶⁹ [2013] Q.J. No. 36 (English), 2013 QCCA 15, [2013] J.Q. no 36 (French), leave to SCC refused as *H.C. v. P.N.*, [2013] S.C.C.A. No. 113. The Court of Appeal sat as a five-judge panel to hear the case. Place of residence was rejected as an analogous ground of discrimination under s. 15.

⁷⁰ Report (translation), pp. 1-5.

⁷¹ Section 9(1) of the child support Regulation defines “special expenses” as “annual expenses other than child care expenses and post-secondary education expenses, such as medical expenses, expenses for primary or secondary studies or for any other educational program and expenses related to extracurricular activities, where those expenses are linked to the needs required by the particular situation experienced by the child”.

110. The foundation document for the Quebec model is dated June 1996 and is entitled “Document de consultation: Modèle de fixation des pensions alimentaires pour enfants”, 26 pages long. It explains the sources and data that underpin the Quebec table. Sarlo states at p. 45 that Quebec “starts with basic child costs determined by experts”. The story is more complicated.

111. The 1996 “Consultation Document” leaves the precise technical details a bit obscure. Nine “essential needs” were identified: food, lodging, communications, housekeeping, personal care, clothing, furniture, transportation and recreation.⁷² Then data were used from the Statistics Canada Survey of Household Spending:

The data utilised come from the Survey of Household Spending. The sample selected includes family households (with and without children), where the head of household, less than 55 years of age, has fewer than four children. It is worth noting that the sample only includes two types of households: couples without children and two-parent families where the children were present in the home for the 52 weeks of the year under study. The expenditures of these two types of households were compared to obtain the needs of the children.⁷³

Thus, the Quebec model used, not equivalence scales, but household spending estimates. Such estimates have their own distinctive problems, some of which are mentioned above.

112. The original 1996 Quebec table has never been reconsidered. From 1996 to 2003, the table amounts were increased each year for inflation. In January 2004, indexing stopped. The table amounts were converted into percentages of 2003 net incomes (for single persons) and then those percentages have been used ever since to adjust for subsequent federal and provincial tax changes.⁷⁴ Quebec issues an annual updated table. By 2020, the Quebec table amounts reflect a series of adjustments and compromises to the original 1996 table.

7. A Few Comments about the SSAG and Child Support

113. Some of Sarlo’s analysis of the *Spousal Support Advisory Guidelines* at pp. 40-42 and 47-48 is erroneous or misconceived.

114. Because of the interaction of child support and spousal support, it is important to address some of these issues.⁷⁵ Professor Carol Rogerson and I were the co-directors of the federal project that created the “SSAG” from 2001 to 2008. Our work was assisted by a nationally-

⁷² These 9 categories are a sub-set of total household spending in the Survey.

⁷³ At p. 9 (translation by me). See also the Report of the Follow-up Committee, at pp. 4-5. Complicating matters is the reference to the Survey of Household Spending, since in 1997 that Survey replaced the previous Family Expenditure Survey (FAMEX). Both surveys rely upon questionnaires, interviews and spending diaries for participants.

⁷⁴ See Ministère de la Justice du Québec, Guide: The Québec Model for the determination of child support payments (2014) at p. 8.

⁷⁵ Thompson, “The Chemistry of Support: The Interaction of Child and Spousal Support” (2006), 25 Can.Fam.L.Q. 251.

representative Advisory Working Group on Family Law. A “Draft Proposal” was issued in January 2005 and, after further feedback, the “Final Version” was released in July 2008.⁷⁶ The Spousal Support Advisory Guidelines have been used since 2005 in over 480 appeal court decisions, over 4,200 reported trial decisions, and many more settlements.

115. The SSAG differ from the *Child Support Guidelines*. The SSAG are “advisory”, not legislated as regulations. The SSAG deal with the amount and duration of spousal support, and not entitlement.⁷⁷ The project was funded by the federal Department of Justice, but the SSAG are applied under provincial and territorial family laws, as well as under the *Divorce Act*. At the heart of the SSAG are two formulas, one for cases *without child support* and another for cases *with child support*. I was the principal architect of the *with child support* formula, which is really a collection of related formulas depending upon parenting arrangements and child support.

116. By law, child support takes priority over spousal support, e.g. s. 15.3 of the *Divorce Act* or s. 61 of the Alberta *Family Law Act*. Spousal support is thus a residual financial remedy. Under the *with child support* formula of the SSAG, the priority for child support often means little or no ability to pay spousal support over and above child support, despite a clear entitlement on the part of the recipient spouse.

117. At pp. 40-41, Sarlo points out that parental incomes for the SSAG *with child support* formula do include “government benefits”, by which he probably means “government child benefits”. The rationale for their inclusion is stated in Chapter 6 of the SSAG (and quoted by Sarlo at pp. 40-41):

First, these benefits and credits reduce, sometimes dramatically, with increasing amounts of spousal support transferred to the recipient spouse, especially through the lower and middle income brackets. Including these benefits and credits in the recipient’s income gives a much clearer picture of the impact of spousal support upon the recipient’s actual net disposable income. Second, some fine lines would have to be drawn between child- and non-child related portions of these benefits and credits. A precise disentanglement would be complicated and for little practical gain. Third, for lower income recipient spouses, these amounts are sizeable, more than \$7,000-\$8,000 annually for two children. Their removal would produce significantly higher amounts of spousal support, which would cause significant hardship for payor spouses, especially those with lower incomes, unless the formula percentages were adjusted.⁷⁸

The inclusion of these child benefits also reflects the residual nature of spousal support.

118. The software programs used to calculate amount and duration under the SSAG – DivorceMate, ChildView and AliForm – are updated annually for tax and benefit changes, as

⁷⁶ Rogerson and Thompson, *Spousal Support Advisory Guidelines* (Department of Justice Canada, July 2008). A companion document in its most recent version is Rogerson and Thompson, *Spousal Support Advisory Guidelines: The Revised User’s Guide* (Department of Justice Canada, April 2016).

⁷⁷ On entitlement issues, and their role in the use of the SSAG, see Thompson, “Ideas of Spousal Support Entitlement” (2015), 34 Can.Fam.L.Q. 1.

⁷⁸ Sections 6.3 and 6.4, pp. 47-48. For a reference to the Canada Child Benefit, see *The Revised User’s Guide*, p. 18.

Sarlo points out on p. 41. The updates are part of their proprietary software. But that does not mean that the amount of spousal support itself is updated annually. If anything, spousal support orders are *less* likely to be varied than child support orders.⁷⁹

119. Sarlo’s explanation at p. 41 of the calculation of Individual Net Disposable Income (INDI) in the *with child support* formula includes an error, as child support contributions are deducted from *both* parents’ incomes, both from the payor and from the recipient, to give proper priority to their respective child support obligations.⁸⁰

120. At p. 76, the SSAG are clear about the limits of using a “notional table amount” plus s. 7 contributions to estimate the custodial parent’s child support obligation:

In reality, the recipient will likely spend more than these amounts through direct spending for the children in her or his care. But by this means we make an adjustment, however imperfect, for the recipient’s child support obligation. A formula could be constructed without this notional child support number, but such a formula would have adjusted to the number of children and income levels with less precision and with less transparency about the role of the recipient parent.⁸¹

This important qualification about the SSAG use of a “notional table amount” is not reflected in Exhibit 3 at p. 35 of Sarlo’s *Assessment*, when he compares child spending under the *Spousal Support Advisory Guidelines* to child spending under the *Federal Child Support Guidelines* formula.

121. At pp. 47-48, Sarlo uses the SSAG to make a point about equalizing “Individual Net Disposable Income” (INDI) for the parents, when the custodial parent earns \$25,000 and the non-custodial parent earns \$51,410 in his Exhibit 6. The SSAG do not generate equal INDI, ever: the maximum share of INDI for a recipient spouse is 40-46% of the combined total INDI. There is no spousal support paid in Exhibit 6, as Sarlo notes at p. 48. The equal INDI are entirely the product of the parents’ employment and other incomes.

122. Sarlo is correct in his quotation from the SSAG at p. 48 that, for annual payor incomes above \$350,000, the large amounts of child support can practically include some compensation for the indirect costs of child-rearing, such that spousal support may be lower as a result. As a general rule, however, the indirect costs of child-rearing for the custodial parent are NOT taken into account in the child support guidelines: see *F/P/T Report*, at pp. 46-47.⁸² Indirect costs include the impact of child-rearing demands upon the income of the custodial parent (ability to travel for work, or to work shifts or overtime) plus the hidden costs of increased time devoted to child care and household management. These indirect costs are left to be compensated under spousal support law, except in unusually high-income cases.

⁷⁹ See Thompson, “To Vary, To Review, Perchance To Change: Changing Spousal Support” (2012), 31 *Can.Fam.L.Q.* 355 at pp. 366-67.

⁸⁰ SSAG, section 8.3.1, pp. 76-77.

⁸¹ SSAG, p. 76.

⁸² The point is discussed at greater length in Thompson, “Chemistry”, at pp. 259-60.