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PLAINTIFFS	ROLAND NIKOLAUS AUER
DEFENDANTS	AYSEL IGOREVNA AUER
INTERVENOR	THE ATTORNEY GENERAL OF CANADA
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I. OVERVIEW

1. This Application engages the *vires* of the *Federal Child Support Guidelines*[1] (the ***Guidelines***). The *Guidelines* are subordinate legislation, passed as a regulation under the *Divorce Act*[2].

2. As far as subordinate legislation goes, it is hard to imagine a regulation with broader reach.[3] The *Guidelines* determine the amount of child support paid in every case of divorce and in respect of all common law separations, except in Quebec.[4]

3. This Application challenges the legality of the *Guidelines* on the basis that they are inconsistent with the *Divorce Act*. Backed by the authority of the state and powerful enforcement mechanisms, the *Guidelines* require one parent to transfer a certain percentage of their income to another parent. Under the *Divorce Act*, there are important limits on how much the *Guidelines* can require through that transfer. Specifically, the transfer is limited to amounts that are for the reasonable maintenance of the children and must divide those child costs between the parents on the basis of their relative abilities to contribute.

4. The *Guidelines* do not comply with those constraints.

5. Rather, they require that the non-custodial parent (**NCP**)[5] pay a greater share of child costs than the custodial parent (**CP**), sometimes calling for a transfer of the child costs, plus something more.

6. In these ways, the *Guidelines* impermissibly make the CP and their circle winners over the NCP and their circle.

7. The *Guidelines* are animated by a suspicion or disdain for NCP households and a corresponding preference for CP households.

8. Although, statistically, more men are the NCP, and therefore the payor under the *Guidelines*, a woman is often on the losing end if she is part of or related to a family unit involving a NCP. On the other hand, a man is often a winner under the *Guidelines* if he

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[1] *Federal Child Support Guidelines*, SOR/97-175 [*Guidelines*]. **[TAB 1]**

[2] *Divorce Act*, RSC 1985, c3 (2nd Supp) [*Divorce Act*]. **[TAB 2]**

[3] About one marriage in two ends in divorce. About one-half of children are expected to live part of their childhood in a single-parent family: Affidavit of Chris Sarlo, sworn August 24, 2012 in support of an application to the Federal Court in Docket No. T-2064-12, Exhibit G: D. Stripinis, R. Finnie, C. Giliberti, *The Construction and Implementation of Child Support Guidelines, Technical Report TR* 1993-17e, 1993 at p xi [Ex G] Attached as Ex A, B, and C to the Affidavit of Chris Sarlo, sworn July 8, 2013 and filed June 19, 2014 [Sarlo Affidavit]

[4] The *Guidelines* only apply to married individuals. Each province other than Quebec has, however, adopted the *Guidelines* to apply to common law couples. Quebec adopted its own, more reasonable, set of guidelines.

[5] Defined as having over 60% in physical custody time. This Application is focused on those instances when the non-custodial parent has less than 40% physical custody time.

is part of a new circle with a CP. The question of the *vires* of the *Guidelines* therefore is not a battle of the sexes, even if some may jump to that conclusion.

9. Ultimately, this Application is not about the wisdom of that choice to disproportionately favour CP households. Rather, it is about the fact that it was not a choice that was open to the Governor-in-Council (**GIC**) on the authority given to it under the *Divorce Act*.

10. In this Application, it is expected that the intervenor Attorney General of Canada (**AGC**) will defend the *Guidelines* on the basis that they are the end result of a number of decisions that entailed difficult trade-offs and that it is not for this Court to second guess that policy-laden work.

11. However, the GIC is not immune from review on the basis that constructing the *Guidelines* involved hard choices that engaged competing interests and broad economic consequences. While the appropriate approach to review does entail respect for the decisions of the GIC, those choices remain subject to meaningful review. The *Guidelines* have never before been scrutinized as they are in this Application. Behind their superficial simplicity lies a mathematical formula and a host of underlying assumptions that are capable of description and verification. When the formula and associated assumptions are examined, they do not add up.

12. As explained below, the *Guidelines* are meant to do two interrelated things:

    (a) When the custodial and non-custodial household begin with the same income, the amount of child support is calculated to supposedly leave the households at the same standard of living after separation (the **Standard of Living Metric**); and

    (b) The award is meant to ensure that both parents make an equal contribution to the costs of the child (the **Child Costs Metric**).

13. Because of the assumptions built into the *Guidelines*, they do not accomplish those two objectives. Among other things, the *Guidelines* assume away and ignore important resources that are available to the custodial household and significant amounts that the non-custodial household spends on the children. When those things alone are factored in, the discrepancy between what the *Guidelines* purportedly do (or what the GIC said they would do) and what the *Guidelines* actually do is material.

14. Other core assumptions exacerbate the problem. For example, the add-on regime creates double counting in child support awards, the test for decreasing awards in cases of undue hardship is illogical and overly onerous, and the regime creates unfair distinctions between the NCP's children of the marriage and children from subsequent families.

15. In defending the *Guidelines* as a matter of "policy", the AGC engages the notion of balancing. However, the *Guidelines* universally favour those in the custodial household

to the detriment of those in the non-custodial household. That is not a balancing act. It is an unreasonable preference for one set of interests that generates a reverse-engineered result that does not respect the applicable legal constraints.

16. The one aspect of the *Guidelines* that the AGC will rely on to argue balance is a red herring. That part of the *Guidelines* is explained in detail below - it is the core premise underlying the formula that the child support award should ensure that parents at the same income level pre-separation end up at equal standards of living post-separation. The AGC will argue that this manner of constructing a formula favours the non-custodial household because, in reality (statistically), CP's typically earn less than NCP's, meaning that the core starting point works to the CP's disadvantage in reality.

17. The drafters did not frame the issue this way, meaning that the intervenor now seeks to defend the *Guidelines* on a basis that the GIC never did. In fact, the drafters said the opposite of what the AGC is saying now. That is, they adopted the core premise of equal incomes because that assumption allowed for the formula that was most generous to custodial households. In other words, the one thing that the AGC now points to as working against custodial households was the central assumption the GIC adopted to ensure the most generous regime in favour of custodial households.

18. It is telling that the AGC now seeks to defend the GIC's decision in a way that the GIC never did and that is inconsistent with the GIC's own logic. Even if the AGC's current logic could be reconciled with the GIC's logic at the time of promulgation, this would remain an improper attempt to bootstrap and seek to supplement an otherwise deficient decision. The GIC's decision must be well reasoned in the first instance - not reconfigured or supplemented now when it is subjected to scrutiny.

19. In short, the Standard of Living and Child Cost Metrics do not prove out and the assumptions underlying the formula repeatedly favour the custodial household. Measuring the results of the *Guidelines* in reality, in example after example, we see that the standards of living of the two households diverge post-separation and that the non-custodial household bears a disproportionate share of the costs of the children.

20. There was a range within which the GIC was permitted to make its choices in constructing the *Guidelines*.

21. The GIC's failure to respect the applicable constraints renders the *Guidelines* unlawful because they go beyond the scope of what Parliament empowered the GIC to do.

II. FACTS

A. The Federal Court Application

22. The Plaintiff/Applicant Roland Auer (**Roland**) lives in Saskatoon and works as a Professor of Pathology & Laboratory Medicine at the University of Saskatchewan, College of Medicine.

23. Roland's first attempt to challenge the *Guidelines* began in 2012, with an Application in Federal Court File No T-2064-12 seeking judicial review under sections 18 and 18.1 of the *Federal Courts Act* (the **Federal Court Application**). The Federal Court Application ultimately resulted in the Supreme Court of Canada's decision in *Strickland v Canada (Attorney General), 2015 SCC 37* (***Strickland***).

24. Roland was one of several Applicants who brought the *vires* challenge in Federal Court because section 18 of the *Federal Courts Act* gives the Federal Court exclusive original jurisdiction to "grant declaratory relief, against any federal board, commission or other tribunal", and that exclusive jurisdiction includes the jurisdiction to declare as invalid regulations promulgated by the GIC.[6] The AGC, as the Respondent, brought a motion to dismiss that judicial review application.[7]

25. The Supreme Court ultimately held that the provincial superior courts have jurisdiction to address the validity of the *Guidelines* in resolving a case otherwise properly before them.[8]

26. As a result of the Federal Court ruling in *Strickland*, on June 19, 2014 Roland filed this Application to challenge the *vires* of the *Guidelines* in his family law proceeding before this Court. On October 1, 2014, this Court adjourned the Application *sine die* pending the Supreme Court's decision. Roland was granted leave to renew his Application once the Supreme Court had released its decision.[9]

27. Following the Supreme Court's decision, Roland filed his Amended Family Application on August 31, 2016 to renew this Application to challenge the *vires* of the *Guidelines*.[10] Considering that this is a proceeding between private parties under the *Divorce Act*, Roland did not name the AGC.

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[6] *Strickland v Canada (Attorney General),* 2015 SCC 37 [*Strickland*] at para 11 **[TAB 3]**
[7] *Strickland* at para 6 **[TAB 3]**
[8] *Strickland* at para *9* **[TAB 3]**
[9] *Auer v Auer,* 2018 ABQB 510 [*Auer 2018*] at paras 9-10 **[TAB 4]**
[10] *Auer 2018* at para 10 **[TAB 4]**

28. The Defendant/Respondent, Aysel Auer (**Aysel**) advised that she takes no position on this Application and does not wish to have any direct involvement.[11]

29. In 2017, the AGC applied to intervene in this Application.[12] On June 29, 2018, the case management justice granted intervenor status with rights and duties comparable to that of a party, including:[13]

    (a) the right to cross-examine on affidavits for no more than one day,

    (b) the right to make oral and/or written submissions on any aspect of the *vires* application, including evidentiary and jurisdictional issues,

    (c) the right to put public documents before the Court to establish legislative and social facts concerning the development and implementation of the *Guidelines*; and

    (d) the right to appeal an adverse decision.

30. While the AGC has been granted the right to intervene, this Application is essentially a public law review of the GIC's decision to enact the *Guidelines*, and therefore the role of the AGC is in the discretion of this reviewing Court, as set out by the Supreme Court in *Ontario (Energy Board)* (***OEB***).[14]

31. The question of the AGC's *participation* is distinct from the question of whether the *content* of the AGC's arguments is appropriate, as discussed in *OEB*.[15]

32. The issue of 'bootstrapping' is closely related to the question of when it is appropriate for an administrative decision maker to act as a party on appeal or judicial review of its decision.[16]

33. Bootstrapping may occur where a respondent seeks to supplement what would otherwise be a deficient decision with new arguments on review. Put differently, in the public law context, a respondent may not generally defend a decision on a ground that the decision maker did not rely on in the decision under review.[17]

34. The principle of finality dictates that once a tribunal has decided the issues before it and provided reasons for its decision, "absent a power to vary its decision or rehear the

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[11] Consent Order granted by the Honourable Justice K.H. Davidson (case management justice) April 23, 2020, filed May 5, 2020, preamble.
[12] *Auer 2018* at para 14 **[TAB 4]**
[13] *Auer 2018* at para 129 **[TAB 5]**, affirmed *2018 ABCA 409*
[14] *Ontario (Energy Board) v Ontario Power Generation Inc,* 2015 SCC 44 [*OEB*] **[TAB 6]**
[15] *OEB* at paras 60 and 62 **[TAB 6]**
[16] *OEB* at para 63 **[TAB 6]**
[17] *OEB* at para 64 **[TAB 6]**

matter, it has spoken finally on the matter and its job is done".[18] Under this principle, courts have found that tribunals could not use judicial review as a chance to "amend, vary, qualify or supplement its reasons".[19] A tribunal can offer interpretations of its reasons or conclusion, but "cannot attempt to reconfigure those reasons, add arguments not previously given, or make submissions about matters of fact not already engaged by the record".[20]

35. Raising new arguments on judicial review raises concerns about the appearance of unfairness and the need for decisions to be well reasoned in the first instance.[21]

36. The importance of reasoned decision making may be undermined if, when attacked in court, a tribunal can simply offer different, better, or even contrary reasons to support its decision.[22]

37. At most, the AGC may "offer interpretations of [the] reasons or conclusions and… make arguments implicit within [the] original reasons".[23] It may not raise wholly new and unrelated or inconsistent arguments.

38. Further, reviewing courts do not take post-promulgation facts into consideration to determine the *vires* of regulations.[24]

B. Background Facts

39. Roland's first marriage, of 18 years, was in 1985 to Iwona Auer-Grzesiak (**Iwona**). They had three children: Michael (born June 17, 1986), Mark (born May 14, 1989), and Philip (born February 6, 1993).[25] Iwona and Mark were also Applicants in the Federal Court Application.

40. This first marriage ended in 2003 and the issues surrounding their children were amicably resolved without litigation. They each contributed $500/month/child to a joint bank account, and resolved further expenses such as university tuition by agreement.[26]

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[18] *OEB* at para 65 **[TAB 6]**
[19] *OEB* at para 65 **[TAB 6]**
[20] *OEB* at para 65 **[TAB 6]**
[21] *OEB* at para 69 **[TAB 6]**
[22] *OEB* at para 66 **[TAB 6]**, citing *Ontario (Children's Lawyer) v Ontario (Information and Privacy Commissioner) (2005)*, 75 OR (3d) 309 (CA) [*Goodis*] at para 42
[23] *OEB* at paras 67-69 **[TAB 6]**, citing *Leon's Furniture v Information and Privacy Commissioner (Alta)*, 2011 ABCA 94 at para 29
[24] *Canadian Council for Refugees v Canada (Immigration, Refugees and Citizenship)*, 2020 FC 770 [*CCR*] at para 75 **[TAB 7]**
[25] Affidavit of Roland Auer sworn July 11, 2014 [*Auer Affidavit 2014*] at para 3
[26] Affidavit of Roland Nikolaus Auer, sworn October 1, 2013, Ex A at paras 2-4 [*Auer Affidavit 2013*]

41. In August 2004, Roland married the Defendant/Respondent Aysel. They had one child on October 2, 2005, Nikolaus Auer (**Nikolaus**).[27] Nikolaus resides with Aysel in Edmonton.

42. Just over one month after Nikolaus was born, on November 7, 2005, Aysel left with Nikolaus and never returned. Aysel and Roland were eventually divorced in 2008.[28]

43. Aysel commenced support proceedings which proceeded to arbitration in December 2005 and resulted in an award of $4,000/month, $1,500 of which was for spousal support and $2,500 for child support. This comprised a full third of Roland's monthly net income of about $12,000 at the time. This award was based on a straight application of the *Guidelines*, with no recognition to Roland's continuing support obligations to his three sons from his first marriage.[29] At the time Roland swore his Affidavit in respect of this Application on May 28, 2012, Aysel earned about $100,000 per year as a medical resident, aside from the support payments she received from Roland.[30]

44. In 2008, Roland married for a third time to Victoria Auer (**Victoria**). They had one son together, Vladmir (born October 30, 2008).[31] Vladmir was also an Applicant in the Federal Court Application.

45. Victoria also had a son from her previous marriage, Alex. Since 2008, Roland considered that he had the responsibility and did what he could to financially support Victoria, Alex, and Vladmir, as well as Victoria's elderly parents in the Ukraine following her father being diagnosed and treated for prostate cancer.[32]

46. The support orders with respect to Aysel resulted in a disproportionate amount of Roland's income being diverted to support Aysel and Nikolaus, with very little left for Roland to cover his obligations to his three sons from his first marriage, and his new family. His first ex-wife Iwona was forced to absorb the additional costs associated with their three sons, particularly post-secondary education expenses.[33]

47. At the time Roland swore his Affidavit in respect of this Application on May 28, 2012, he had recently moved from Calgary to work in a neuropathology position affiliated with the University of Montreal and he expected to earn around $200,000/year.[34]

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[27] Auer Affidavit 2013, Ex A at para 5
[28] Auer Affidavit 2013, Ex A at para 6
[29] Auer Affidavit 2013, Ex A at paras 7-8
[30] Auer Affidavit 2013, Ex A at para 10; See Ex A of the Auer Affidavit 2013 for the Affidavit of Roland Nikolaus Auer sworn May 28, 2012 in the Federal Court File No. T-2064-12
[31] Affidavit of Roland Auer sworn and filed July 11, 2014 [*Auer Affidavit 2014 #2*] at para 14]
[32] Auer Affidavit 2013, Ex A at para 11
[33] Auer Affidavit 2013, Ex A at paras 12-13
[34] Auer Affidavit 2013, Ex A at para 14

48. Roland's support obligations to Aysel were varied by the Honourable Justice P.R. Jeffrey on December 13, 2010 (the **Jeffrey Order**). Up to that time, he had paid approximately $250,000 in combined child and spousal support, which in addition to his other financial support obligations led him to incur debt well over $500,000. He was continually forced to access a line of credit secured against his home in Calgary to recover both his general living expenses and support obligations.[35]

49. The variation order that Roland obtained on December 13, 2010 was specifically made by the Court on an interim and without prejudice basis to allow him to participate in judicial review of the *Guidelines.*[36]

50. The 2010 Jeffrey Order was varied by the Order of the Honourable Justice M.D. Gates on June 1, 2012 (the **Gates Order**), which changed Roland's monthly child support payment to $2,351.

51. Roland is currently 66 years of age. He has no cash savings and little retirement savings. He does not envision having the financial means to retire until he is well into his 70s. He lives with Victoria and Vladmir in a 968 square foot condominium in Saskatoon, which is encumbered by a mortgage with a balance of $260,000. They have a family vehicle, obtained through financing. Other than that, he owns a 1996 Volkswagen, a small pension with his new employer worth about $4,000, and a RESP worth around $35,000. Victoria is a trained dentist in her home country, but cannot practice in Canada so she does not earn an income.[37]

52. On the other hand, starting in 2013 Aysel has earned an average of $340,000 per year with a successful medical practice. She is married to a lawyer. She lives in a 3,711 square foot, six-bedroom, three-bathroom home in a nice neighborhood in Edmonton, and owns several vehicles. She travels to Russia and Azerbaijan with Nikolaus to visit family on a yearly basis. Nikolaus attends a private school in Edmonton, has been cared for by a nanny throughout his childhood, and has his own private driver.[38]

[35] Auer Affidavit 2013, Ex A at para 15
[36] Auer Affidavit 2013, Ex A at para 19
[37] Affidavit of Roland Auer sworn July 9, 2020, at para 19 [*Auer Affidavit 2020*]
[38] Auer Affidavit 2020 at paras 22-23

53. Apart from this *vires* Application, Roland is represented by his family law counsel Micah Chartrand in the jointly managed family law proceedings with Aysel. Under direction from Justice Yungwirth, the following Applications were argued at a Half-Day Domestic Special on September 15, 2020, subject to the determination of this *vires* Application:

    (a) Roland's Application seeking rectification of the Order of the Honourable Justice P.R. Jeffrey, dated December 13, 2010;[39]

    (b) Roland's Application seeking a declaration of undue hardship, pursuant to section 10 of the *Guidelines*, for the years 2010-2014;

    (c) Aysel's Cross-Application seeking an Order for retroactive child support dating back to 2010; and

    (d) Aysel's Cross-Application seeking rectification of the Jeffrey Order, according to her own interpretation of the Court's direction in 2010.

54. The *vires* Application is the only Application scheduled for hearing before this Court on December 2-4, 2020 and is the only Application addressed in these written submissions.

III. LAW

C. The Legal Test

55. Reviewing the *vires* of subordinate legislation is a subset of reviewing the legality of any delegated decision - the overarching principle is that the entity that was given authority must act within the parameters of the powers assigned to it. Here, the GIC passed the *Guidelines* based on authority that Parliament granted under the *Divorce Act*. If the *Guidelines* are inconsistent with the *Divorce Act*, they are invalid.

56. The Supreme Court described the proper approach for reviewing subordinate legislation in its seminal decision in *Vavilov*.[40]

57. The onus is on Roland as the Applicant to establish that the *Guidelines* are invalid. That inquiry does not focus on the policy merits of the *Guidelines* but, rather, on assessing whether they are inconsistent with the purpose of the *Divorce Act* or whether some condition precedent has not been observed.[41]

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[39] Roland submitted that due to a drafting error by his previous legal counsel, the Jeffrey Order resulted in an overpayment of child and spousal support in the approximate amount of $25,500.

[40] *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]. **[TAB 8]** Any prior caselaw about how to review subordinate legislation must be reviewed carefully to ensure that its application is aligned in principle with *Vavilov*: *Vavilov* at para 143 **[TAB 8]**

[41] *Katz Group Canada Inc v Ontario (Health and Long-Term Care)*, 2013 SCC 64 [*Katz*] at paras 24-25 **[TAB 9];** See also *Innovative Medicines Canada v Canada (Attorney General)*, 2020 FC 725 at para 69 **[TAB 10]**; *CCR* at para 75 **[TAB 7]**

58. The applicable standard of review is reasonableness. In crafting the *Guidelines*, the GIC interpreted the *Divorce Act* and decided on the scope of its discretion. In reviewing that interpretation, this Court begins by adopting a framework of respect for the distinct role of the GIC as an administrative decision maker. This Court cannot simply impose its own preferred interpretation of the *Divorce Act*.[42]

59. Nor, however, may it simply "rubber-stamp" the GIC's interpretation or shelter it from accountability.[43]

60. It is anticipated that the intervenor will belabour that the GIC enjoyed wide discretion in choosing between hard options. It is bound to emphasize that no child support regime is perfect and that the *Guidelines* are the result of a series of difficult trade-offs.

61. Consistent with *Vavilov*, this Application asks the Court to look behind those sweeping arguments. The weighing of social and economic considerations to arrive at a particular course of action[44] is what governments do. The GIC cannot hide behind the notions of policy or discretion in an effort to effectively immunize the *Guidelines* from meaningful review. More specifically, discretion "cannot be equated with arbitrariness".[45] Rather, there is a range of permissible *Guidelines* that flows from the constraints imposed in the *Divorce Act*. Those constraints dictate the limits of the space in which the GIC was authorized to act and the types of solutions it could adopt.[46]

62. This applies on two levels.

63. Some grants of regulation-making authority are in the broadest possible terms. Regulations made under such authority are invalid to the extent that they cannot be reconciled with the **overall** scheme of the enabling framework.

64. Other grants of regulation-making authority are subject to specific limitations. Regulations passed under that more limited type of authority must be consistent with both the overall scheme of the enabling regime and with the specific applicable constraints.

(i) The *Guidelines* must comply with the overall scheme of the *Divorce Act*

65. As to the first, more holistic, type of review, an administrative decision maker may not arrogate powers to itself that it was never intended to have or exercise authority which was not delegated to it.[47]

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[42] *Vavilov* at paras 12-15 and 115-116 **[TAB 8]**
[43] *Vavilov* at paras 12-15 **[TAB 8]**
[44] *R v Imperial Tobacco Canada Ltd,* 2011 SCC 42 at para 87 [**TAB 11]**
[45] *Montréal (City) v Montreal Port Authority*, 2010 SCC 14 at para 33 [*Montréal (City)*] **[TAB 12]**
[46] *Vavilov* at paras 99, 102-104 **[TAB 8]**
[47] *Vavilov* at para 109 [**TAB 8]**

66. This Court must therefore examine the *Guidelines* as a whole, the entire relevant record, including the underlying reasons and rationale, and the outcome that was reached to determine whether those things are consistent with the *Divorce Act*.[48]

67. *Re Doctors Hospital*[49] provides an example of a subordinate decision that failed to comply with the overall scheme of the enabling regime. In that case, the Ontario LGIC passed an Order In Council revoking its approval of certain hospitals. The decision was based on entirely financial reasons. The executive defended the revocation as a high level and economic policy decision that the Court could not look behind.

68. The argument had superficial appeal since the enabling statute expressly authorized the revocation or suspension of approval and did not, on its face, restrict that ability.

69. Nonetheless, while that revocation authority was broad, it had to be understood against the Act's overall purpose. Read in context, the Act was concerned with the staffing, management, and operation of hospitals. The revocation power was not intended as a way to close hospitals for financial reasons. The LGIC's financial decision was therefore beyond the objects and policy of the Act. The Orders In Council were invalid because the executive cannot use an enabling statute with purpose A to pass a regulation with purpose B.

70. In *Multi-Malls Inc v Ontario*[50] the Court of Appeal applied the same principles. In that case, a Minister refused to issue permits under the law regulating highways so as to prevent Multi-Malls from developing a shopping centre contrary to government planning policy. The Court struck down the Minister's exercise of discretion under the highway statute because "the purpose of the Act in general is not to ensure proper land use planning but generally to control traffic".[51]

71. Applying that principle to this case, as discussed below, the *Divorce Act* distinguishes between child and spousal support - two regimes that are governed by different principles and serve different purposes. The GIC violated that scheme and purpose by enacting child support *Guidelines* that merge those two concepts and call for the transfer of funds that go beyond the reasonable maintenance of children.

(ii) The *Guidelines* must comply with the Limiting Principles in Particular

72. There is a more specific way in which the GIC did not have free rein in interpreting the *Divorce Act*. Section 26.1(2) of the *Divorce Act* provides that:

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[48] *Vavilov* at paras 110-125 and para 137 **[TAB 8]** citing *Catalyst Paper Corp v North* Cowichan (District), 2012 SCC 2 at paras 29 and 33 (not reproduced)

[49] *Doctors Hospital v Ontario (Minister of Health) (1976),* 12 OR (2d) 164 (Div Ct) **[TAB 13]**

[50] *Multi-Malls Inc v Ontario (Minister of Transportation & Communications),* [1976] OJ No 2288 (ONCA) [*Multi-Malls*] **[TAB 14]**

[51] *Multi-Malls* at para 36 **[TAB 14]**

> (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.

73. These are referred to herein as the **Limiting Principles**, which acted as a specific constraint on the GIC in crafting the *Guidelines*.[52] The GIC could not simply "reverse-engineer" an overall desired outcome.[53] Rather, it had to take seriously, and apply rigorously, the section 26.1(2) limits on its authority.[54]

74. *Gach v Brandon*[55] is an example of failing to comply with a specific constraint in the enabling regime. There, the impugned Regulation required the Director of Welfare to consider the parents' means when determining an applicant's financial resources.

75. That Regulation was invalid because the enabling statute defined financial resources as limited to the property of the applicant and any dependents (not parents). However tempting it was to expand that definition to include parents' resources, that was a decision for the Legislature, as it would require amending the Act. As the Court put it:

> In seeking, by regulation, to make the resources of a *parent* part of the resources of an applicant, the Lieutenant-Governor in Council was not 'carrying out the provisions of the Act', it was enlarging those provisions in a material way.[56] [emphasis in original]

76. *Montréal (City)* involved federal Crown corporations' calculation of their municipal taxes using payments in lieu of real property taxes.[57] In overturning the impugned decisions, the Court confirmed that the corporations' discretion to set the appropriate rate when calculating payments in lieu of taxes was not unlimited. Specifically, it did not authorize them to disregard the actual tax regime in place:

> [33] … in a country founded on the rule of law and in a society governed by principles of legality, discretion cannot be equated with arbitrariness. …**[D]iscretion… must be exercised within a specific legal framework.** Discretionary acts fall within a normative hierarchy. In the instant cases… **[t]he statute and regulations define the scope of the discretion and the principles governing the exercise of the discretion, and they make it possible to determine whether it has in fact been exercised reasonably**.
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> …

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[52] *Canada (Attorney General) v Almon Equipment Limited*, 2010 FCA 193 at para 38 [**TAB 15]**, cited with approval in *Vavilov* at para 108 **[TAB 8]**

[53] *Vavilov* at para 121 **[TAB 8]**

[54] *Vavilov* at paras 68 and 110 **[TAB 8]**, citing *City of Arlington v. Federal Communications Commission (2013)*, 569 US 290 (US Sup Ct) at p 307 [*Arlington*] **[TAB 16]**

[55] *Gach v Brandon (Welfare)* (1973), 35 DLR (3d) 152 (MBCA) [*Gach*] **[TAB 17]**

[56] *Gach* at para 154 **[TAB 17]**

[57] *Montréal (City)* [**TAB 12]** cited with approval in *Vavilov* at paras 108 and 111 **[TAB 8]**

> [40] … As I have indicated, the two corporations certainly have a discretion. It is clear from the definition of "effective rate" that Crown corporations have to decide on the appropriate tax rate. However, they cannot base their calculations on a fictitious tax system they themselves have created arbitrarily… In s. 2 of the Regulations and the corresponding provision of the PILT Act, it is assumed that the corporations begin by identifying the tax system that applies… They cannot do so on the basis of a system that no longer exists. [Emphasis added]

77. Section 2 of the Regulations and the corresponding provision of the enabling Act placed a specific constraint on the corporations' authority. The impugned decisions ignored and violated those constraints and were therefore unreasonable.[58]

78. Applying those principles to this Application, the Limiting Principles give rise to two crucial constraints on the authority to craft child support guidelines - that is, the amounts awarded must: (i) be for the maintenance of children; and (ii) reflect the parents' respective abilities to contribute to that maintenance.

79. As discussed below, the *Guidelines* violate these constraints.

80. In summary, the *Guidelines* must comply with the overall scheme of the Divorce Act as well as any specific constraints contained in that statute. They fail both tests since they blend child and spousal support[59] by stipulating awards that go beyond maintaining children and require the NCP to contribute disproportionately to child costs.

IV. ANALYSIS

D. Scope of the Mandate Conferred

(i) Overview of the *Divorce Act*

(a) The Overall Regime

81. Parliament created separate regimes for child and spousal support. The provinces have jurisdiction over the separate topic of division of property.[60]

82. Under section 15.1(1) of the Divorce Act, child support orders are those that require "a spouse to pay **for the support of any or all children of the marriage**". Child support orders must be made "in accordance with the applicable guidelines".[61]

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[58] *Montréal (City)* at paras 41-51 **[TAB 12]**

[59] And, arguably, division of property, which is an area of exclusive Provincial jurisdiction.

[60] *The Constitution Act*, 1867, 30 & 31 Victoria (UK), c. 3 at s 92(13)

[61] Except in special circumstances, in which case the Court must explain its reasons for deviating from the *Guideline* amount. The parties may only agree to a different amount if that agreement makes reasonable arrangements for the support of the relevant child: *Divorce Act* at ss 15(3)-15(6) **[TAB 2]**

83. Under section 15.2(1), spousal support orders are those that require a spouse to pay such sum "as the court thinks reasonable **for the support of the other spouse**".

84. Child support and spousal support are distinct on the face of the Divorce Act. Leading caselaw confirms that difference.

85. In *Francis v Baker* the Supreme Court considered the principles for adjusting child support awards when the paying parent has high income. The Court held that the Guidelines must only allow for maintenance of the children and not some broader household equalization or spousal support:[62]

> … [E]ven though the *Guidelines* have their own stated objectives, they have not displaced the *Divorce Act*, which clearly dictates that maintenance of the children, rather than household equalization or spousal support, is the objective of child support payments.

86. Along similar lines, in *FJN v JK*[63] a custodial parent sought a child support award with add-on amounts to reflect her child's special needs due to Down's Syndrome. The trial judge concluded that because of the child's more extensive needs, she was entitled to a standard of living of a relatively well-financed couple.

87. The Court of Appeal overturned the decision because the trial judge had reverse engineered an outcome that was inconsistent with the Divorce Act. The Court affirmed that the Guidelines could not be used to achieve an ostensibly, but subjectively, noble social ideal beyond the purpose of the enabling legislation.[64] The Guidelines do not exist to allow the court to redistribute income between families, even if that redistribution would supposedly benefit the child. It was not open to a court to characterize any expense as an appropriate amount of child support merely because the paying parent could afford it.[65]

88. In short, child support serves an important but limited purpose related to costs to maintain the children.

89. Broader goals related to addressing the economic consequences of marriage breakdown are specifically addressed through spousal support.

90. Both child support and spousal support relate to caring for children, but in different ways. Child support addresses estimated direct costs of children and spousal support is a residual financial remedy used to compensate the custodial parent for their role in

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[62] *Francis v Baker*, [1999] 3 SCR 250 at para 41 [*Baker*] [**TAB 18]**
[63] *FJN v JK*, 2019 ABCA 305 [*FJN*] [**TAB 19]**
[64] *FJN* at paras 70 and 91 [**TAB 19]**
[65] *FJN* at paras 81-82 and 101-106 [**TAB 19]**

caring for the child and otherwise to shore up the custodial household standard of living for the benefit of both the CP and the child.[66]

91. In short, under the Divorce Act, spousal support is aimed at broad social ideals and the holistic economic consequences of the marriage and its breakdown. Child support is more limited. It is for the direct support of the children[67] and must address amounts for their maintenance.[68]

(b) The Limiting Principles

92. The legislated distinction between child and spousal support is the first part of the statutory backdrop that informs the review of the Guidelines. That distinction constrains the GIC's discretion.

93. The Limiting Principles, in turn, place more specific constraints on the GIC's authority and are at the heart of this Application. They create crucial limits on the range of reasonable policy choices that were open to the GIC - namely, guidelines can only relate to amounts for maintaining the child of the marriage (and not some other purpose); and must reflect the principle that spouses have a joint financial obligation to maintain the children of the marriage in accordance with their relative abilities to do that.

94. Parliament did not have to place those boundaries on the GIC's authority to design child support guidelines. The only reason to include the Limiting Principles was to circumscribe the GIC's discretion. As the Supreme Court affirmed in *Vavilov*, such limits are to be taken seriously and applied rigorously by the reviewing court.[69] The Limiting Principles decrease the GIC's margin of appreciation.

95. Prior to *Vavilov*, the leading cases on determining the *vires* of a delegated regulatory enactment were *Katz* and *West Fraser Mills*.[70]

96. In *Katz*, the Supreme Court said that "[a] successful challenge to the *vires* of regulations requires that they be shown to be inconsistent with the objective of the enabling statute or the scope of the statutory mandate".[71] Regulations benefit from a

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[66] Sarlo Affidavit, Exhibit K: C. Rogerson and R. Thompson, Spousal Support Advisory Guidelines, Department of Justice Canada, July 2008 at pp 72-74 [Ex K]; *Divorce Act* at s 15.2(6) **[TAB 2]**. The disparity between the spouses' income levels are the primary determinants of spousal support amounts. Where the couple has children, spousal support is calculated using a mathematical formula that leaves the recipient spouse with between 40% and 46% of the spouses' net income after child support has been taken out: Sarlo Affidavit, Ex K at p 33; Sarlo Affidavit, Ex B: C. Sarlo, *An Assessment of the Federal Child Support Guidelines*, August 2012 at pp 40-42 [Sarlo Report].

[67] *Divorce Act* at s 15.1(1) **[TAB 2]**

[68] *Divorce Act* at s 26.1(2) **[TAB 2]**

[69] *Vavilov* at paras 68 and 110 **[TAB 8]**, citing *Arlington* at p 307 **[TAB 16]**

[70] *West Fraser Mills Ltd v British Columbia (Workers' Compensation Appeal Tribunals)*, 2018 SCC 22 [*West Fraser*] **[TAB 20]**

[71] *Katz* at para 24 **[TAB 9]**

presumption of validity that has two aspects: it places the burden on challengers to demonstrate the invalidity of regulations, and "it favours an interpretive approach that reconciles the regulation with its enabling statute so that, *where possible*, the regulation is construed in a manner which renders it *intra vires*" [original emphasis].[72]

97. In *West Fraser*, the Supreme Court confirmed that where the statute confers a broad power to pass regulations, the court must grant the decision maker significant deference on review.[73]

98. Unlike the specific and constrained grant of power at issue in this Application, *West Fraser* concerned a "broad and unrestricted delegation of power".[74] The Court observed:[75]

> …Section 225 of the Act is very broad. Section 225(1) empowers the Board to make "regulations the Board considers necessary or advisable in relation to occupational health and safety and occupational environment". This makes it clear that the Legislature wanted the Board to decide what was necessary or advisable to achieve the goal of healthy and safe worksites and pass regulations to accomplish just that. The opening words of s. 225(2) - "Without limiting subsection (1)" - confirm that **this plenary power is not limited by anything that follows**. **In short, the Legislature indicated it wanted the Board to enact whatever regulations it deemed necessary to accomplish its goals of workplace health and safety. This delegation of power to the Board could not be broader**. [underline in original; bold emphasis added]

99. In *Gitxaala Nation v Canada*, the Federal Court of Appeal noted that the standard of review must be applied to GIC decisions "under the different and unique legislative scheme" of the particular case; there is no one-size-fits-all approach to a particular administrative decision-maker.[76]

100. Reasonableness review will reflect the specific decision made in light of the provision authorizing it, the structure of the legislation and the overall purposes of the legislation.[77] Like *West Fraser, Gitxaala* concerned a broad and amorphous grant of discretion:[78]

> …And by defining broadly what can go into the report upon which it is to make its decision - literally anything relevant to the public interest - Parliament must be taken to have intended that the decision in issue here be made on the

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[72] *Katz* at para 25 **[TAB 9]**
[73] *West Fraser* at paras 8 and 23 **[TAB 20]**
[74] *West Fraser* at paras 9 and 11 **[TAB 20]**
[75] *West Fraser* at para 10 **[TAB 20]**
[76] *Gitxaala Nation v Canada*, 2016 FCA 187 at paras 136-137 [*Gitxaala*] **[TAB 21]**, leave denied February 9, 2017, 2017 CanLII 5370 (SCC)
[77] *Gitxaala* at para 137 **[TAB 21]**
[78] *Gitxaala* at para 144 **[TAB 21]**

> broadest possible basis, a basis that can include the broadest considerations of public policy.

101. By contrast, in *Kabul Farms Inc v Canada,* the Federal Court of Appeal quashed penalties assessed by the Director of Financial Transactions and Reports Analysis Centre of Canada for money laundering violations, because the figures chosen by the Director at each step in his methodology were not underpinned or justified by reasoning or evidence in the record.[79] Stratas JA rejected the Crown's assertion that the decision was reasonable because the Director relied on a methodology consistent with the Act and the Regulations to make a discretionary, fact-based assessment:[80]

> …**Before concluding that a decision is reasonable, at some point in its analysis a reviewing court must go further than the appellant suggests. A fact-based, discretionary decision made on the basis of proper methodology is not automatically reasonable. The reviewing court must also be satisfied that the administrative decision-maker has made an acceptable and defensible decision on the particular evidence before it**. Specifically, in the case before us, in order to conclude that the penalties the Director assessed are reasonable, **we must be satisfied, among other things, that the numbers the Director plugged into his calculation of the penalties are supportable on the evidence before him.** [Emphasis added]

102. Just how satisfied the court must be that the decision is reasonable on the evidence depends on the margin of appreciation to be afforded under reasonableness review. The decision under review in *Kabul* involved an imprecise, fact-based task that called for judgment informed by experience regulating in a specialized field, but the Court stressed that the task had to be seen in its wider context where violators face potentially significant monetary penalties:

> …As administrative decisions, they can be challenged by way of judicial review or (where available) statutory appeal, and administrative law principles apply. Sometimes those principles lead to strict scrutiny, other times less intensive scrutiny. Put in the language of some cases, reviewing courts can afford the decision-maker hardly any margin or no margin of appreciation, a moderate margin, or a broad margin... The margin of appreciation depends on various factors animated by two conflicting principles, the reviewing court's obligation to respect legislative intention and its obligation to defend and, where necessary, to vindicate the rule of law [citations omitted].[81]

> …the particular task of the Director we are reviewing, his selection of a penalty amount, is imprecise and fact-based, guided in this case only by general criteria rather than a rigid mathematical formula. It calls for an exercise of subjective judgment informed by experience and knowledge in a specialized field of

[79] *Canada v Kabul Farms Inc*, 2016 FCA 143 [*Kabul*] at paras 26-27 **[TAB 22]**
[80] *Kabul* at para 19 **[TAB 22]**
[81] *Kabul* at para 24 **[TAB 22]**

> regulation. **In light of this, I conclude that we must be satisfied the sorts of figures the Director chose at each step in his methodology are underpinned or justified by some reasoning or evidence in the record**.[82] [emphasis added]

103. The Court was not so satisfied. As there was nothing in the record to tell why the figures were chosen, the Court simply did not know what evidence or analysis was relied upon:[83]

> ...Here, the Director has provided no rationale for the base amounts or reductions he chose. The evidentiary record before the Director also sheds no light on the matter. **To conduct reasonableness review here, we would have to simply assume or trust that the Director had good reasons for the numbers he chose**. As this Court said in *Leahy* (at para. 137), that "is inconsistent with our role on judicial review." **We are to review, not trust or assume**. [emphasis added]

104. *Kabul i*s applicable to this *vires* Application, both in terms of the principles and the facts. While the GIC deserves a margin of appreciation because of the nature of its imprecise task in developing the *Guidelines*, this Court must nonetheless be satisfied that the figures chosen by the GIC at each step are underpinned or justified by some reasoning or evidence in the record.

105. In two recent cases, the Federal Court of Appeal has discussed the principles from *Vavilov* and noted that decisions can range from relatively unconstrained to constrained.

106. In *CMRRA-SODRAC Inc v Apple Canada Inc*:[84]

> Sometimes statutory words direct an administrative decision-maker to follow a particular recipe or restrict the scope of discretion… This can constrain the number of acceptable and defensible options available to the administrative decision-maker…

107. In *Entertainment Software Assn v Society of Composers, Authors and Music Publishers of Canada,* "**administrative decision-makers that are constrained by specifically worded statutory provisions… may find their decisions set aside if they ignore these constraints**…"[85] [*emphasis added*]

108. In this case, the GIC is specifically constrained by the Limiting Principles contained in the part of the *Divorce Act* that grants the power to make the *Guidelines*.

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[82] *Kabul* at para 26 **[TAB 22]**
[83] *Kabul* at para 34 **[TAB 22]**
[84] *CMRRA-SODRAC Inc v Apple Canada Inc,* 2020 FCA 101 at para 41 **[TAB 23]**
[85] *Entertainment Software Assn v Society of Composers, Authors and Music Publishers of Canada*, 2020 FCA 100 at paras 31-33 **[TAB 24]**

109. *Vavilov* indicates a direction by the Supreme Court to review an impugned decision in the context of the applicable legal constraints. Those constraints are to be taken seriously. The reviewing court must take the necessary steps to understand the decision-maker's reasoning process when determining whether a decision was, as a whole, unreasonable.[86] After all, the focus of reasonableness review must include both the decision maker's reasoning process and the outcome.[87]

110. If the only constraint on the GIC's authority were the separation between child and spousal support, the margin of appreciation in this Application would be at the higher end of the scale. The Limiting Principles are a specific restriction on the GIC's authority and this Court's approach to reasonableness review must reflect that. The Limiting Principles decrease the GIC's margin of appreciation.

111. As we will see below, the *Guidelines* reflect a series of crucial decisions that the GIC endorsed to reverse engineer large child support awards. The problem with that approach is that the GIC was so motivated to accomplish its goal that adopted inconsistent and illogical reasoning. As *Vavilov* explains, that is unlawful because it entails the decision maker re-writing the bounds of its delegated authority. On any meaningful application of the Limiting Principles, the *Guidelines* exceed the allowable latitude for error.

E. History of the *Guidelines*

112. Before the *Guidelines* were passed, child support awards were determined on a case-by-case basis.

113. In 1990, the "Child Support Project" was announced by the Federal, Provincial, and Territorial Justice Ministers. The Federal/Provincial/Territorial Family Law Committee (**FLC**) was created to determine a way to standardize child support payments under the *Divorce Act*.[88]

114. The Department of Justice Canada (**DOJ**) funded and published research to facilitate that work.

115. Daniel Stripinis, Ross Finnie, and Carolina Giliberti were the three main consultants who led that research project (the **DOJ Consultants**).[89]

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[86] *David Suzuki Foundation v Canada-Newfoundland and Labrador Offshore Petroleum Board*, 2020 NLSC 94 at para 73 **[TAB 25]**

[87] *Vavilov* at para 83 **[TAB 8]**

[88] Sarlo Affidavit, Exhibit C: Federal/Provincial/Territorial Family Law Committee, The Financial Implications of Child Support Guidelines: Research Report, May 1992 [Ex C] at p 1

[89] Daniel Stripinis was the president of Stripinis Consulting Incorporated. Ross Finnie was a professor of Economics at Laval University. Carolina Giliberti was Acting Chief, Family Law, Research Section at the DOJ. Ross Finnie stopped acting as a consultant sometime after 1995 and eventually became a critic of the *Guidelines*.

116. Child support formulas consist of two components: 1) a mathematical expenditure model for estimating what parents spend on their children (child costs) and 2) a method of apportioning those costs between the parents.[90] The expenditure model and apportioning approach together comprise the formula that underpins a set of guidelines, which may also include rules about deviations from the formula.

117. The work to develop a formula was carried out in three phases: (i) development of expenditure models and apportioning approaches; (ii) refinement of expenditure models and apportioning approaches; and (iii) selection of the preferred formula.[91]

118. In phase 1, a DOJ researcher[92] reviewed 11 expenditure models and further studies were then commissioned on four of those.

119. In May 1992, the FLC published a Research Report[93] focused more narrowly on the financial and economic aspects of child support. The report summarized the strengths and weaknesses of the expenditure models and described seven different apportioning approaches.[94]

120. In phase 2, the DOJ Consultants critiqued the potential formulas, both theoretically and empirically - by comparing the awards that would be generated against a database[95] of existing child support awards.[96]

121. They considered four expenditure models: Consumption, Adult Goods, Extended Engel, and Blackorby-Donaldson;[97] and four apportioning approaches: Income Shares, Surplus Shares, Standard of Living, and Fixed Percentage.[98]

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[90] Sarlo Affidavit, Exhibit D: R. Finnie, C. Giliberti, D. Stripinis, An Overview of the Research Program to Develop a Canadian Child Support Formula, 1995 at p 3 [Ex D]

[91] Sarlo Affidavit, Ex D at p 1; Sarlo Affidavit, Exhibit E: Federal/Provincial/Territorial Family Law Committee, Report and Recommendations on Child Support, January 1995 at pp 52 [Ex E]

[92] Sarlo Affidavit, Exhibit H: M. Browning, Measuring the Costs of Children in Canada: A Practical Guide - Phase I, Technical Report TR1991-13a, January 1991 [Ex H]

[93] Sarlo Affidavit, Ex C

[94] Income Shares, Income Shares with Reserve, Delaware Melson, Flat Percentage, Flat Percentage with Reserve, Australian, and Income Equalization: Sarlo Affidavit, Ex C at pp 39 and 45-76

[95] Sarlo Affidavit, Ex D at p 3; Sarlo Affidavit, Ex E at p 53. For an evaluation of the DOJ database, see Sarlo Affidavit, Ex D at pp 32-34. The DOJ Consultants were not certain how well the database represented the population of divorce/separation cases that the child support formulas were intended to cover. While the data was far from ideal, the DOJ Consultants recognized it as the best available. That sub-set of data was later altered, though. The size of the research database dropped from more than 2,000 cases to around the 700 mark with "cleaning". Finnie concluded that it was unclear how representative that smaller sample remained in general and certainly at low income levels: R. Finnie, "Good Idea, Bad Execution: The Government's Child Support Package" (1996) (Ottawa: The Caledon Institute of Social Policy at FN 15 [Finnie Caledon] **[TAB 26]**

[96] Sarlo Affidavit, Ex G at p xii.

[97] The Phipps' Implementation of the Extended Engel Method, Phipps' Implementation of Blackorby-Donaldson, Fedyk's Implementation of the Adult Goods Method, and Browning's Implementation of the Consumption Model: Sarlo Affidavit, Ex G at pp 9-16.

122. Based on empirical analyses, the DOJ Consultants concluded that the Extended Engel was the best expenditure method and the Income shares with reserve, Fixed Percentage, and Surplus Shares apportionment approaches were viable.[99]

123. Notwithstanding that significant research and analysis, none of those approaches were ultimately recommended.

124. Instead, Finnie and Stripinis proposed a novel approach that would use the Statistics Canada (**StatsCan**) 40/30 equivalence scale for Low Income Cutoffs (**40/30 Scale**) as the expenditure model and apportion those deemed costs according to a new method called the "revised fixed percentage" (**RFP Formula**).[100]

125. In phase 3, the FLC scrutinized and recommended the novel RFP Formula proposed by Stripinis and Finnie.[101]

126. In 1995, the DOJ Consultants published a report to provide an overview of the issues and of the research that was undertaken to develop the preferred child support formulas.[102] The FLC published a sister report aimed at situating that research in the broader context of family law in Canada and providing its recommendations.[103]

127. The government then announced the resulting proposed *Guidelines* in the March 1996 budget. The proposed overhaul of child support worked its way through the legislative process and the *Guidelines* came into effect on May 1, 1997.[104]

128. In important ways, that legislative process occurred in the dark. Although the *Guidelines* were promulgated in May 1997, the DOJ Technical Report that describes the math underlying the *Guidelines*[105] was not published until sometime after February 1998. As late as February 19, 1998, the DOJ was still crystallizing its own understanding of the (already promulgated) *Guidelines*. Put simply, many months after the *Guidelines* were law, those who drafted the *Guidelines* and were charged with explaining them to the

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[98] Sarlo Affidavit, Ex G at pp 25-42.
[99] Sarlo Affidavit, Ex D at p 7
[100] Sarlo Affidavit, Ex G at pp 65-93
[101] Sarlo Affidavit, Ex D at p 27
[102] Sarlo Affidavit, Ex D at p ix
[103] Sarlo Affidavit, Ex E
[104] Affidavit of Charlotte Harper (Part 1 of 3) sworn on June 10, 2020 [Harper Affidavit] Exhibit1: Regulatory Impact Assessment Statement for the Federal Child Support Guidelines, SOR/1997 97-175, Canada Gazette Part II, Vol. 131, No. 8, [Ex 1] at p 1121-1124; Harper Affidavit Exhibit 11: New Child Support Package (March 1996), released by the Minister of Finance as part of the 1996 Budget [Ex 11]; *Guidelines* at s 27 **[TAB 1]**
[105] Sarlo Affidavit, Exhibit F: Department of Justice Canada, Formula for the Table Amounts Contained in the Federal Child Support Guidelines: A Technical Report, Research Report CSR-1997-1E, December 1997 [Ex F]

public, were still trying to understand their own work and finalize the corresponding Technical Report.[106]

F. Overview of the *Guidelines*

(i) Introduction

129. The child support awards in the *Guidelines* are presented as a set of tables, organized by province, NCP income level, and the number of children.

130. The far left column lists the NCP's income in thousand dollar ranges. The right hand columns list a basic monthly amount plus a certain percentage of the NCP's income between the $1000 increments the *Guidelines* are presented in. The tables generate a specific number to be transferred from the NCP to the CP as child support. There are different tables depending on the number of children (up to a maximum of six), and on the province. A simplified table for Alberta is as follows (up to three children):

NCP Annual Gross Income			
Number of Children	**1**	**2**	**3**
$15,000	$128 plus 1.06% of income over $15K	$164 plus 3.6% of income over $15K	$177 plus 3.84% of income over $15K
$25,000	$213 plus 0.88% of income over $25K	$391 plus 1.4% of income over $25K	$533 plus 1.88% of income over $25K
$50,000	$412 plus 0.94% of income over $50K	$723 plus 1.42% of income over $50K	$972 plus 1.82% of income over $50K
$100,000	$884 plus 0.86% of income over $100K	$1458 plus 1.38% of income over $100K	$1917 plus 1.78% of income over $100K

131. Section 3 of the *Guidelines* establishes these table numbers as the "presumptive amount" for the NCP to pay based only on: (i) their annual income, (ii) province of residence and (iii) number of children.

132. The tables are not the whole of the *Guidelines*. As discussed below, under other sections, the presumptive table amounts can be increased quite easily but can be decreased only rarely.

[106] Affidavit of Roger Gallaway, sworn June 2, 2011 in support of an application to the Federal Court in Docket No. T-2064-12 [Gallaway Affidavit], Exhibit A at pp 61-65

133. The ostensible appeal of a guideline system is that it is simple. It is meant to allow parents, judges, and lawyers to determine the amount of child support without research or debate.

134. The tables, however, hide the assumptions that lie behind them.

135. This Application involves an evaluation of the *Guidelines* at a deeper level of analysis than has been done previously. Evaluating the legality of the *Guidelines* cannot just be about looking at the numbers in the tables. Any meaningful *Vavilov* review must be based on the reasoning and assumptions that underpin those numbers.

(ii) Expenditure Model: Equivalence Scales as an Estimate of Child Costs

136. Recall that the *Divorce Act* distinguishes between funds transferred for the direct maintenance of children (child support) and funds transferred to reflect the indirect costs of children, the overall financial consequences of divorce, and sharing between spouses (spousal support). Child support awards can only address direct child costs and those must be shared proportionately.

137. The challenge is that there is no unique "cost of a child". When the details of any particular family are known, the incremental costs of the children can be determined for shared categories like housing, but when one just has the average spending on categories, by groups of families, that incremental amount is much harder to discern.

138. Nonetheless, there are certain agreed ways for isolating the costs that any given child represents for any given family.

139. Economists have taken two broad approaches. The first is to use a budget approach that defines and costs a bundle of goods deemed necessary for the maintenance of a child. The FLC studied but rejected that budget approach.

140. The second is to use equivalence scales to compare household living standards. This approach to estimating child costs bears emphasis because the unreasonableness of the *Guidelines* stems in material part from the way that the FLC inconsistently applied its chosen equivalence scale.

(i) What is an equivalence scale?

141. A family with children might have higher income than a childless couple, but their needs are also greater. What income would the larger family need to be as well off as the couple? What leaves them "equivalent"?

142. Children reduce the amount of money which parents have available to spend on themselves. **Child cost is therefore sometimes defined as the dollar amount by which total family income must rise to bring the parents in families with children up to the**

same standard of living they would have in the absence of children.[107] This definition equates child costs with the increase in household income needed to restore the parents' pre-child level of spending on themselves.[108] The theory is applied in this way even though parents who have a child likely change their habits and spend less on some things and more on others.

143. Proportion of family income spent on food is one way of constructing equivalence scales. There are other ways of comparing two expenditure functions.[109] Regardless of the specific method, the underlying exercise remains consistent: The mathematical equivalence ratio provides the marginal cost of the child in a household and describes the proportion of total family expenses that the child represents in the separated family.[110]

144. The purpose of an equivalence scale, used as a proxy for child costs, is to allow comparisons of well-being between families of different compositions.

145. While equivalence scales do not actually measure direct spending on children, when they are used in the child support context, they stand in as a proxy for precisely that.

146. The point for our purposes is to recall that the review of delegated decision making includes assessing the soundness of the underlying reasoning. The *Guidelines* are unreasonable in part because they are founded on the illogical application of the DOJ's chosen equivalence scale.

147. The AGC will likely belabour that there is no one true cost of a child and that economists do not universally agree on the best expenditure model.

148. That may be so but, once a model is chosen, it must be applied consistently and transparently within a given formula. However difficult it found the decision, the GIC did ultimately endorse a method for estimating child costs. Within that chosen method, if a single adult is estimated to cost X, and an adult plus child are estimated to cost X plus Y, then Y is the cost of the child. Any amount transferred in excess of that amount, Y, is for a purpose other than maintaining the child.

(i) The 40/30 Scale

149. The FLC considered a selection of equivalence scales[111] and ultimately chose the 40/30 Scale[112] where the second individual in a household is said to increase income needs by

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[107] Sarlo Affidavit, Ex G at pp 3-4
[108] Sarlo Affidavit, Ex G at pp 4-5
[109] Ira Mark Ellman, "Fudging Failure: The Economic Analysis Used to Construct Child Support Guidelines" (2004) 2004:1 U.Chi.Legal F., 167 [Fudging Failure] at pp 189-193 **[TAB 27]**
[110] Sarlo Affidavit, Ex G at p 16; Sarlo Affidavit, Ex D at pp 9-10; Sarlo Affidavit, Ex E at pp I, 9, 55, and 59-60
[111] Sarlo Affidavit, Ex G at pp 20-21
[112] Sarlo Report at p 9

40 percent, and the third and all subsequent individuals increase income needs by an additional 30 percent each.[113]

150. As a result, according to the 40/30 Scale, when a household grows from one person to two, it needs 140% of the income of a single person for both persons to live as comfortably as they did separately. For each additional person, the household needs an additional 30% of income of a single person household.

151. The 40/30 Scale was adopted by StatsCan for the purpose of estimating low income measures. The incremental costs of 40% and 30% were not determined with children in mind.[114] Nonetheless, the DOJ Consultants determined they could use it as a proxy for child costs.

152. Applied in the *Guidelines* context, the 40/30 Scale is meant to answer two related questions:

(a) How much does each child increase the income needs of the custodial household; and

(b) What percentage of the custodial household expenditures does each child represent?[115]

153. The first child is treated as the first incremental person, increasing custodial household income needs by 40% of the income of the first adult. Similarly, two children increase custodial household income needs by 70% of the income of the first adult. The corresponding child cost is 28.6% of household resources for one child and 41.1% of household resources for two children.[116]

154. Using concrete numbers, for example, suppose that a household comprising one parent and one child requires $14,000 in net income to be at the same standard of living as a single adult earning $10,000 after-tax. The corresponding equivalence scale would therefore be 1:1.4 and assumes that $4,000 of the $14,000 are the "costs of the child". Again, these costs do not bear any resemblance to actual discrete amounts spent solely or directly on the child. Rather, they represent the amount by which the child increases the household's income needs. The deemed costs of the child are $4,000, which represents roughly 28.6% of total custodial family resources.[117]

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[113] Sarlo Affidavit, Ex D at p 88

[114] Sarlo Affidavit, Ex E at p 11: "… the amount is based on the needs of a second person in a household, whether that person is a child, a teenager or an adult".

[115] Sarlo Affidavit, Ex E at p i

[116] Sarlo Affidavit, Ex D at p 12; Sarlo Affidavit, Ex E at p 9, FN 3 and p 11; Sarlo Affidavit, Ex F at p 3.

[117] Sarlo Affidavit, Ex D at p 10

155. The DOJ Consultants adopted those same ratios for all income levels,[118] meaning that, for example, a custodial household with one child is deemed to require $140,000 to be as well off as a single person with $100,000, and so forth.

156. This underscores the extent to which the equivalence scale approach rejects the notion of one true cost of a child. Under this linear application of the 40/30 Scale, deemed child costs can range from a small number to many tens of thousands of dollars.

157. For purposes of this Application, we accept that using an equivalence scale as a proxy is a viable way to estimate the cost of children. The details of the scale chosen and how it is implemented are important, however. The choice of the 40/30 Scale is significant because it produces high estimates of child costs, particularly outside the low income context.

(i) The 40/30 Scale is high and arbitrary

158. The 40/30 Scale was the highest proxy considered. Other scales were much lower[119] and the FLC chose the 40/30 Scale specifically because it produced high estimates of child costs and, therefore, high child support awards.[120] The difference between applying the 40/30 Scale and something more average is significant:[121]

Income Level	Table Amounts			
	40/30 (1 child)	30/20 (1 child)	40/30 (2 children)	30/20 (2 children)
$30K	$2,880	$1,945	$5,153	$3,614
$50K	$5,402	$3,983	$8,913	$6,582
$70K	$7,665	$5,747	$12,448	$9,303
$110K	$11,498	$8,730	$18,456	$13,919

159. As Professor Sarlo put it:

> In comparison to the 30/20 scale (which was a rough average of the scales under consideration by the DOJ), the 40/30 scale generates a payment as much as 48% more for low-income NCP's with one child. It was 43% more for the

[118] Under s 4 of the *Guidelines*, the Court may vary the child support amount if the NCP earns income over $150K, although the table award is one of the factors the Court should consider in deciding whether to depart from that amount.

[119] Sarlo Affidavit, Ex G at pp 21-23 and Sarlo Report at pp 18-19: Browning's scale was 28/14 and Phipps Extended Engel scale was 25/13/15

[120] Sarlo Affidavit, Ex D p 13

[121] Sarlo Report at p 19 at Ex 1

> same low-income NCP with 2 children. The additional payment for other NCP incomes averages about 33%. These are not trivial differences and they are due solely to the choice of equivalence scale.[122]

160. The 40/30 Scale also produces estimates of child spending that far exceed those generated by the expert budget method.[123] The Manitoba Agriculture estimate, for example, is by no means a stringent, bare bones approach but is very comprehensive and includes all of the expected costs of raising a child" and would yield much lower child support awards.[124]

161. The DOJ has suggested that those high estimates generated by the 40/30 Scale are empirically based. They are not.

162. The DOJ cited StatsCan for the proposition that the 40/30 Scale is based on "empirical research", "econometric evidence" or "economic studies of average spending on children".[125] In fact, what that StatsCan paper says is that the numbers 40 and 30 are "conspicuously arbitrary" and that other values could just as easily have been chosen.

163. **There are no economic studies underlying the 40/30 Scale**.[126] The FLC's representation to the contrary is misleading and badly undermines the transparency of the choice of the 40/30 Scale.

164. Recall that the purpose of an equivalence scale is to show how much more income one household needs to be as well off as another. The equivalence ratio of any given scale is typically based on underlying data.

165. For the 40/30 Equivalence Scale, it seems that no one quite knows what that data is. The 40/30 Scale was selected in 1993. The *Guidelines* were tabled in Parliament in 1996 and became law in 1997. When the *Guidelines* were promulgated, the DOJ was still working behind the scenes to finalize its explanation of the data underlying the formula. That explanation proved elusive.

166. Part of the rationale for choosing the 40/30 Scale was that the data underlying StatsCan's "FAMEX survey" was inappropriate for estimating child costs.[127] The 40/30 Scale was publicly presented as a better alternative to FAMEX estimates. Notably, the DOJ did not actually know what data the 40/30 Scale was based on. As late as February, 1998, the DOJ was internally trying to determine whether (and if so, to what extent), the

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[122] Sarlo Report at p 19

[123] Sarlo Report at pp 48-50. The Quebec guidelines are based on this approach and produce lower estimates of child costs than the 40/30 Scale.

[124] See Sarlo Report, internal Exhibit 14 at p 69

[125] E.g., Sarlo Affidavit, Ex E at p 60; Sarlo Affidavit, Ex F at p 3, FN 2; *Guidelines* at FN 5 **[TAB 1]**

[126] Sarlo Report at pp 15-17; Harper Affidavit, Exhibit 9: SatsCan Low Income Measures, 1993, December 1994 Report [Ex 9] pp 1-2

[127] Sarlo Affidavit, Ex E at p 56

40/30 Scale was based on FAMEX, the very data that the DOJ said it was avoiding through use of the 40/30 Scale. Since it did not know, it edited its original draft language and simply stated that the 40/30 Scale is "based on econometric evidence and a consultation process". That dubious statement was carried forward into the actual *Guidelines* and remains there today. It is misleading.[128]

167. Further, the AGC's deponent, Professor Thompson, and Professor Sarlo agree that the 40/30 Scale, as applied in the *Guidelines*, does not adjust for the age of the child, even though children generally become more expensive as they get older.[129]

168. In short, the numbers 40 and 30 are high and arbitrary. Even allowing for equivalence scales as a permissible indirect estimate of child costs, the 40/30 Scale is hard to defend, given that it is such a shot in the dark.

169. Under the Limiting Principles, child support awards must be based on the parents' relative abilities to contribute to the maintenance of the children.

170. Through the 40/30 Scale, the GIC set its bounds for costs to maintain the children. Amounts transferred above the 40/30 Scale estimates are for something other than maintaining the children.

171. It is anticipated that the AGC will seek to improperly obscure this simple point.

172. This Court may not eschew an empirical analysis on the basis that it is "just mathematics, numbers".[130] As the Court confirmed in *Kabul*, the numbers in the formula must be underpinned by reason and evidence. There is nothing wrong in examining those numbers; on the contrary, it is at the heart of this Court's task.

173. The deemed costs of the child are (or should be) readily discernible. To the extent they are not, that works against the AGC since this Court's task is to review, not to trust or assume. To the extent they are discernible, then this Court's task is to confirm those deemed costs, assess whether the *Guidelines* call for the transfer of amounts in excess

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[128] Guidelines at FN 5: "The amounts in the tables are based on economic studies of average spending on children in families at different income levels in Canada". Transcript of D.A. Rollie Thompson Cross-examination dated August 6, 2020 at pp 92/15-96/8 [Thompson Cross]

[129] Thompson Chemistry at p 262 **[TAB 28]**; Sarlo Report at pp 16, 18, 36-37, and 73. In this very specific sense, the 40/30 numbers cannot be correct because they are fixed for children of all ages. At page 18 of his Report, Professor Sarlo suggests that the very high 40/30 numbers *might* be justifiable in the case of a teenager. The numbers are high for younger children.

[130] Affidavit of D.A. Rollie Thompson sworn June 11, 2020 [Thompson Affidavit] at para 3 and Ex B: D.A Rollie Thompson Q.C., Rebuttal Report: Federal Child Support Guidelines, Auer v Auer June 10, 2020 [Thompson Report] at para 92; Professor Thompson is the intervenor's witness. He is a co-author of the spousal support advisory guidelines, which are constructed with reference to the *Guidelines*. If the *Guidelines* must be reframed, Professor Thompson's spousal support regime will have to be reframed as well.

of those, and, if so, whether those excessive amounts fall outside the allowable margin of appreciation.

(iii) Apportioning Approach: Revised Fixed Percentage

174. Having selected the 40/30 Scale as the method for estimating child costs, the FLC then needed to decide how the parents would share those costs between them.

175. It considered three models for sharing child costs between the parents: standards of living, income shares, and fixed percentage.[131]

176. The standards of living model has never been expressly adopted in any jurisdiction. Under this approach, a poverty level of support is allocated to every member of both households and all remaining resources are then redistributed based on the number of people in each household. This approach is not related to child costs; rather, the disposable income of both households is redistributed.[132]

177. This approach would often lead to very large child support awards.[133] Its transparent justification would be very challenging.[134] If it were to be adopted, at anything other than equal standards of living, a judgment would have to be made as to the right ratio of relative standards of living. Further, this approach represents a complete melding of child and spousal support into "family support".[135] The FLC did not overtly adopt the standards of living approach but opaquely incorporated significant aspects of this philosophy into its ultimate formula.[136]

178. Income shares is the apportioning method that underpins the vast majority of child support guidelines. It is implemented by using estimates of the costs of children in two-parent families and a division of these costs according to the income of the two parents. That is, it expressly considers both parents' incomes - the higher the income of the CP, the lower the support award becomes.[137] Under this approach, the NCP's support payment is their income-weighted share of the estimated child costs.

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[131] Sarlo Affidavit, Ex G at pp 33-38

[132] Sarlo Affidavit, Ex C at pp 67-69; Sarlo Affidavit, Ex G at pp 34-35

[133] If the NCP earned the majority of the income. In scenarios where the CP earned more, such a model would call for a transfer from the CP to the NCP - see, for example, Sarlo Affidavit, Ex G at p 100.

[134] See, e.g., Thompson Cross at p 225/10-226/3: "equal living standards… has never been implemented anywhere because it produces such whopping amounts of child support that is [sic] politically not feasible"; See also, e.g., Ross Finnie, "Child Support Guidelines: An Analysis of Current Government Proposals" (1995) 13 CFLQ 145 [Finnie 1995] at pp 153-154 **[TAB 29]**

[135] Sarlo Affidavit, Ex G at p 32 FN 10

[136] Sarlo Affidavit, Ex G at p 104 and FN 2

[137] Sarlo Affidavit, Ex G at p 33; Jane C. Venhor, "Child Support Guidelines and Guidelines Reviews: State Differences and Common Issues," (2013) 47 Fam LQ 327 at p 331 [*Venhor*] **[TAB 30]**

179. Fixed percentage is far less common and of the handful of jurisdictions that originally adopted it, a number have since changed to income shares.[138] Canada's formula is based on a unique variation of this approach.

180. In the 1980s, the American Federal Government mandated that all states create child support guidelines.[139] By that time, Wisconsin had already been experimenting with guidelines within the context of social assistance where the CP often had no private income, the NCP often had no contact with the children, and everyone involved was at or below the poverty line. Under those circumstances, Wisconsin developed a simple guideline rule that focused on the NCP's income - this is the genesis of the "percentage of obligor income" (**POOI**) apportioning model.[140] As the NCP was typically the only private income earner, child support payments were calculated by multiplying the NCP's income by some fraction based on the number of children. The range of incomes was small in this poverty line context, so the fractions for a given number of children were simply held constant. When the American Federal government mandated guidelines, a number of states implemented the Wisconsin POOI model, at all income levels[141] even though that model was not intended to be implemented outside the low income context.[142]

181. The DOJ Consultants opted for a POOI approach. They devised the novel RFP Formula, ostensibly based on a mathematical formula derived from a core premise: assuming the parents have equal gross incomes, they should contribute equally to the direct expenditures on the children and be left at equal standards of living (the **Core Premise**).[143] At each point, the award is said to be the amount that would equalize the shares of the post-divorce costs of the child were the CP to have the same income as the NCP.[144]

182. To make the formula universal, the drafters then used this key assumption: if it is fair to transfer $X when both the NCP and CP are earning a certain amount (say, $40K), it

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[138] In the United States, of the 51 jurisdictions, 41 use the income shares model, 7 states use POOI (soon to be 6), and 3 use a different model. There has been a steady shift of states away from POOI to income shares: Thompson Report at para 20; *Venhor* at p 332 **[TAB 30]**

[139] In 1984 the American Federal Government mandated that all states create advisory child support guidelines for judges. In 1989, those state guidelines became a rebuttable presumption.

[140] Douglas W. Allen and Margaret F. Brinig, "Child Support Guidelines: The Good, the Bad, and the Ugly" (2011) 45 FLQ at p 144 **[TAB 31]**

[141] *Venhor* at pp 331-332 **[TAB 30]**

[142] R. Mark Rogers, "Wisconsin-Style and Income Shares Child Support Guidelines: Excessive Burdens and Flawed Economic Foundation" (1999) FLQ 135 at pp 10-14 **[TAB 32]**

[143] The two households' standards of living will decrease post-separation, compared to their standards of living pre-separation. Two households are more expensive to maintain than one. The Core Premise is therefore not that the two households maintain their same equal standard of living pre- and post-separation. Rather, it is the narrower premise that the two households, if they start with equal incomes, should end up at an equal standard of living post-separation.

[144] Sarlo Affidavit, Ex E at p 67.

remains fair to transfer $X for any NCP earning $40K, regardless of what the CP earns. According to the DOJ Consultants, all NCP's earning $40K can afford to make that same transfer.

183. Under the POOI model, the CP's income has no actual bearing on the support award amount, only a presumed one (and CP's are therefore generally not required to disclose their financial information, whereas NCP's are).[145]

184. Under the POOI model, there is no direct consideration of the relative abilities of the CP to contribute to the joint financial obligation to maintain the children of the marriage - a specific constraint on the grant of authority under section 26.1(2) of the *Divorce Act*. The income shares approach addresses the CP's contribution to child support directly; the POOI approach presumes the CP's contribution.

185. As noted above, for purposes of evaluating the *Guidelines* against the Limiting Principles, it is the use of the 40/30 Scale as the expenditure model that sets the bounds of costs to maintain the children. Child support awards may transfer those estimated child costs and no more.

186. The RFP Formula, and its Core Premise as the apportioning method, in turn allows us to evaluate whether the parents are contributing according to their relative means when they start with the same income. The parents are supposed to make equal contributions to the deemed child costs and end up at equal standards of living when they start out at those equal incomes. As we will see, that is not remotely borne out at equal incomes (where it is expressly designed to prove out) or at other income levels (proving that the formula does not achieve the proportional sharing of child costs in the vast majority of cases.) The AGC has provided no evidence to contradict this (and could not do so, since the numbers speak for themselves).

G. The Resulting Formula

187. Recall that according to the Core Premise, the formula allegedly intends to equalize the living standards of the two households following separation if the income of the NCP is equal to the income of the CP.

188. To do that, the DOJ Consultants needed to define living standards, and flowing from their choice of expenditure model, they did so with reference to the 40/30 Scale. They illustrated that concept as follows:[146]

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[145] This sole focus on NCP income generally goes hand and glove with a linear treatment of child costs. Guidelines that reflect the actual costs of children reflect a decreasing proportion spent on children as income increases, which requires information about the income level in both households: Affidavit of Douglas W. Allen, sworn June 7, 2013, filed June 19, 2014 [Allen Affidavit] at para 2 Ex A: Supplementary Report of Douglas W. Allen dated August 29, 2012 [Allen Report] at paras 25 and 30. Income shares models tend to be non-linear. Some of the few remaining States that continue to use POOI models use a sliding scale percentage of obligor income: *Venhor* at p 333 **[TAB 30];** Thompson Report at para 16

PAYING (non-custodial) PARENT (PP)		RECEIVING (custodial PARENT (RP)
Pre-Tax Income$_{PP}$ - Taxes$_{PP}$ - Table Amount	=	Pre-tax IncomeRP - TaxesRP + Table Amount
AEU for the Paying Parent		AEU for Receiving Parent and Children

189. In the Formula, AEU stands for adult equivalent unit. An AEU is simply a number which reflects the "equivalency" for different sized families consistent with the chosen equivalence scale. In this case, the formula uses the 40/30 Scale, where 1.0 is the AEU for one person living alone, 1.4 is the AEU for a single parent and one child; 1.7 is the AEU for a single parent and two children, and each additional child adds .3 to the AEU.

190. The "living standard" of a household, according to this formula, is its (defined) after-tax income divided by the AEU value.

191. The formula uses a specific set of underlying principles to arrive at the percentages:

(a) The awards rise as the NCP's income rises; the award does not vary with the income of the CP;

(b) At every level of income, the formula is said to share the costs of the child equally between the two parents in cases where the CP has the same income as the NCP; and

(c) All NCP's who earn the same income have the capacity to pay the same award, regardless of the CP's income.[147]

192. Based on those built-in assumptions, the formula is then applied at all NCP income levels. As the DOJ itself explained the formula:

> The basic premise of the formula is that the income-to-needs ratios (INRs) of the two families should be the same because they both have the same income. Therefore, the INR of non-custodial parent (A) equals the INR of the custodial parent (B) plus the child.
>
> The mathematical expression can be shown as follows:

[146] Sarlo Affidavit, Ex F at p 4

[147] Sarlo Affidavit, Ex D at pp 27-28 and 57; Sarlo Report at pp 6-7

Disposable Income of A		Disposable income of B
_____	=	_____
Needs of A (equivalence scale for one)		Needs of B plus child (equivalence scale for CP + child)

> Disposable income is the household's gross income minus taxes.
>
> The amount of the contribution is the dollar value required to make these two households equal, that is the number of dollars A has to give to B to ensure that the INR of A is equal to the INR of B, including child(ren).
>
> The calculation of this award is independent of the income of the CP although the income of the CP is considered in deriving the fixed percentage. The award thus calculated applies to all NCP's who earn that given level of income.
>
> Taxes are included in the calculation because the income-to-needs ratios include the tax consequences.[148]

193. The result ends up being straightforward: at all income levels, through the application of this formula, founded on the 40/30 Scale and the equal incomes apportioning method, the prescribed amount of child support is .4/2.4 or 16.7% of net NCP income for one child and .7/2.7 or 25.9% of net NCP income for two children.[149]

194. The original exception was that the formula is adjusted at low income levels to allow for a NCP self-support amount, below which the NCP does not pay any child support. Above that, some "smoothing" of the formula occurs to ensure proper incentives for a range of incomes between the self-support amount up to somewhere around $25K.[150] Further exceptions were implemented later, as described below.

195. The formula is relatively comprehensible on its face. However, to understand what lies behind the resulting numbers, we must understand what goes into each individual element.

196. As to the numerator:

    (a) "Income" under the *Guidelines* is determined only for the NCP. It is generally the amount on the NCP's income tax return. However, that amount may be adjusted

[148] Sarlo Affidavit, Ex E at A-11 to A-13
[149] Sarlo Report at p 20 and FN 34
[150] Sarlo Report at p 10; Sarlo Affidavit, Ex F at pp 6-7

under Schedule III of the *Guidelines*, to take into account particular deductions and inclusions, all aimed at ensuring the highest income for the NCP.[151] The NCP is subject to disclosure obligations; the CP is not.[152]

(b) "Taxes" was originally meant to include all applicable federal and provincial taxes at a particular level of income. That was eventually changed to exclude certain tax benefits related to children that are paid by the government to the CP household (the **Ignored Benefits**).[153] The decision to exclude the Ignored Benefits has the effect of increasing the child support award.

197. As to the denominator:

(a) The AEU represents the income needs that flow from the 40/30 Scale. A CP household with one child has an AEU of 1.4; a CP household with two children has an AEU of 1.7; and so on.

198. The resulting standards of living are meant to be equal net of tax so the calculation must be done based on the relevant province's tax regime.[154]

199. Professor Sarlo offers the following example:

> … consider an Ontario situation in 2010 of a CP with $40,000 income and one pre-school child and a NCP with $40,000 income. The after-tax income for the NCP is $31,580… the after-tax income… for the CP is $33,836 due largely to [certain tax credits provided in respect of children]. In this case, the table amount of child support is $4,404…
>
> $31,580 - $4,404 / 1.0 = $33,836 + 4,404 / 1.4
>
> … [In other words]

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[151] Sarlo Affidavit, Ex F at p 5. Among other things, for example, the Court may disregard expenses of earning income, even if the relevant tax regime allows them to be deducted and NCP's, but not CP's, can be deemed to be under-employed.

[152] *Guidelines* s 25. Once per year, CP's are permitted to file and serve a Notice to Disclose Application, a process which requires a court appearance if every requested document is not provided. Associated legal costs can be significant. CP's only need to disclose income information in limited circumstances, including cases of alleged undue hardship, shared custody, or if apportionment of section 7 expenses is at issue.

[153] Sarlo Report at pp 7-8; Sarlo Affidavit, Ex F at p 5 and Appendix 1 where the DOJ confirmed that the federal Child Tax Benefit and the GST rebate for children are "not included in the calculation of the receiving parent's taxes". The Ignored Benefits are cash benefits that are available to eligible CP's through the tax system but are not included in the formula when after-tax (or disposable) income is calculated. An example of an ignored benefit in 2020 is the CCB. An example of a tax benefit or credit which is included in the formula is the eligible dependent credit. Government benefits change over time. It is unclear who continues to determine which benefits are and are not included in the calculation of the receiving parent's taxes for purposes of calculating updated table amounts.

[154] Sarlo Affidavit, Ex E at p ii

$27,176 / 1.0 = $38,240 / 1.4

… [In other words]

$27,176 = $27,314[155]

H. The *Guidelines* are Unreasonable

(i) The Effect of Excluding the Ignored Benefits is Substantial

200. The *Guidelines*, according to the DOJ, should generate awards that equalize the financial circumstances of the two households when the CP and NCP earn the same income. Also, because gross income is the same, the parents should contribute equally to the deemed child costs. These aspects of the formula are capable of empirical testing.

201. The intervenor protests against such an empirical evaluation, suggesting that the *Guidelines* must be evaluated based primarily on lived reality, not math.[156]

202. That is unpersuasive because it provides no meaningful way of assessing the *vires* of the *Guidelines*. It is also inconsistent with the FLC's own approach. Empirical testing was a big part of the FLC's work. This Application can be understood largely as the observation that the RFP Formula does not withstand scrutiny when evaluated in the very way that the FLC and DOJ tested child support formulas.

203. In its research, the FLC created a database of existing awards[157] and of potential awards generated by the formulas being considered.[158] While the drafters considered the theory behind various awards, their evaluations were ultimately based on concrete numbers.

204. The FLC tested on two bases: (i) a comparison of the standards of living of the CP and NCP households after separation (the Standard of Living Metric); and (ii) whether a given formula resulted in the parents sharing child costs equally, in proportion to their income (the Child Costs Metric).[159] Specifically, for a given formula, the DOJ Consultants measured: the average child support award generated; the households' relative income to needs ratios (their relative standards of living post-separation); the percentage of each parent's disposable income devoted to child costs; and the percentage of child costs paid by the NCP.[160]

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[155] The small difference is likely related to minor tax changes: Sarlo Report at p 9
[156] See, e.g., Thompson Report at para 92
[157] Sarlo Affidavit, Ex G at Chapters 4 and 5
[158] Sarlo Affidavit, Ex G at Chapter 6
[159] Sarlo Affidavit, Ex G at pp 59 and 84
[160] See, e.g., Sarlo Affidavit, Ex G at pp 70-83

205. The DOJ Consultants tested prospective formulas in this way and noticed that, in some scenarios, the calculations generated negative numbers where the CP did not contribute to the child costs. In other words, certain formulas led to the NCP paying a far greater share (sometimes over 100 percent) of the deemed expenditures on the child.[161] The Blackorby/Donaldson model, for example, resulted in the NCP paying a much larger portion of the child costs than the CP. The drafters rejected that model for producing such "poor results".[162]

206. The DOJ's empirical testing was an involved task and the summary of the results occupy many pages of the DOJ Consultants' 1993[163] and 1995 reports.[164]

207. As noted, the DOJ ultimately rejected all of those evaluated formulas and chose the novel RFP Formula instead. The RFP Formula was said to be chosen in 1995 "based on research rather than policy considerations".[165]

208. That crucial empirical research was based on isolating child costs, identifying how those costs were shared between the parents, and comparing the families' resulting standards of living. What is conspicuously absent from the record is any similar empirical analysis of the final RFP Formula.

209. The FLC tested potential formulas against the Standard of Living and Child Cost Metrics. It did not do that (publicly) for the chosen RFP Formula. Rather, its empirical analysis of the RFP Formula was limited to confirming that it produced the largest awards. It did not, however, (publicly) evaluate how that RFP Formula fared in respect of the two key metrics: how the parents shared child costs and the households' respective standards of living post-award.

210. The only evidence we have in that respect comes from case examples included in early drafts of the Technical Report that were later deleted. Those drafts were obtained under an access to information request.[166]

211. We do not know when or why those case examples were deleted from the Technical Report but a reasonable inference is that the DOJ omitted them because they

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[161] Sarlo Affidavit, Ex G at pp 59, 68, 84; Sarlo Affidavit, Ex E at pp 56-57

[162] Sarlo Affidavit, Ex G at pp 84-86

[163] Sarlo Affidavit, Ex G at pp 62-88

[164] Sarlo Affidavit, Ex D at pp 31-51; See also Sarlo Affidavit, Ex E at pp 52-77 (DOJ sister report)

[165] See, e.g., Sarlo Affidavit, Ex D at p 31: "the final choice of the Revised Fixed Percentage formula was based on research rather than policy considerations. It was made following an overall assessment of… dollar value… of the award and the resulting standards of living of the two households."

[166] Sarlo Report at p 6 and FN 4; Sarlo Affidavit, Exhibit L; Gallaway Affidavit, Exhibit A, see "Draft #6 Nov 15" at pp 88-112, representing the draft Technical Report as of November 1996. As far as Professor Thompson is aware, the 1998 Technical Report is the only such publication that the DOJ ever produced regarding the *Guidelines*: Thompson Cross at 10/4-10/13

demonstrate that the *Guidelines* do not accomplish their stated objectives and do not fare well when measured against the Standard of Living and Child Cost Metrics.

212. Professor Sarlo calls these case examples the Newfoundland Illustrations because they show what the *Guideline* formula produced in Newfoundland in 1996:

	Custodial Parent	Non-custodial Parent
Earnings	$25,000	$25,000
Total Taxes		
Actual	-$2,066	-$6,076
ignoring GST/CTB for custodial	-$4,806	-$6,076
After-tax Pre-award Income		
Actual	$22,934	$18,924
ignoring GST/CTB/EIS for custodial	$20,194	$18,924

With May 97 no deduction/no inclusion taxes, the calculations are completed as:

Award	$4,435	-$4,435
After-tax After-award Income		
Actual	$27,369	$14,489
ignoring GST/CTB/EIS for custodial	$24,629	$14,489
Direct Expenditures on children	$11,270	$0
Personal (for parent) Disposable Income	$16,099	$14,489

213. Taking the illustration in pieces:

> Income: Both households start with $25K in gross income.
>
> Taxes: The taxes owed by the NCP are $6,076.
>
> The actual taxes owed by the CP are $2,066.
>
> When excluding the Ignored Benefits, the taxes owed by the CP increase to $4,806.[167]
>
> AEU (income to needs): The NCP AEU is 1.0, as it always is in the *Guidelines*. In this scenario, the DOJ assumed a CP household with two children, meaning that

[167] That number is still lower than what the NCP owes at the same income level, because there are tax credits and deductions relating to children that **are** included in the formula, specifically in the taxes paid by the CP.

> the CP AEU is 1.7. The CP and two children need 170% of the income of a single adult to be at the same standard of living.
>
> Child support award: The award that ostensibly equalizes the household standards of living is $4,435.
>
> That amount proves out, provided we continue to exclude the Ignored Benefits. In reality, the CP household has $27,369 after taxes and after award. However, excluding the Ignored Benefits, the CP household is notionally ascribed income of $24,629.
>
> $24,629 divided by the CP AEU of 1.7 is $14,487.64. That is effectively equal to the NCP after-tax, after-award resources of $14,489 divided by the NCP equivalency unit of 1.0.

214. In the Newfoundland Illustration, the DOJ evaluated the *Guidelines* formula against the two criteria the DOJ had used throughout its evaluation process: post-separation standards of living and relative parent contribution to child costs.

215. As to standards of living, after taxes, the total resources in the CP household are $27,369 and in the NCP household are $14,489.

216. The child support award is $4,435. That amount only equalizes the household standards of living to the extent that we subtract the Ignored Benefits, which decreases CP household resources from $27,369 to $24,629.

217. Using actual CP household resources, including all child benefits, the CP standard of living is 11.1% higher ($27,369/1.7 is 11.1% higher than $14,489).

218. This is fundamental. The RFP Formula is simple on its face, but it is complex in the background. It generates the table amounts through use of "a complex computer algorithm program".[168] That program is not in evidence. It is presumably designed to achieve the Core Premise of equalizing household standards of living at equal incomes using the 40/30 Scale. Specifically, it is presumably designed to iterate until the NCP household standard of living/1.0 = the CP household standard of living/1.7 (in the case of two children). Once the decision was made to exclude them, the algorithm was likely updated to iterate to balance those standards of living with the Ignored Benefits simply removed from the equation. The award is generated by equalizing the households (with their respective 40/30 AEU numbers), absent the Ignored Benefits. The Newfoundland Illustration shows the concrete effect of that. When the Ignored Benefits are added back in, the CP standard of living is 11.1% higher.

[168] Harper Affidavit, Exhibit 32: Proceedings of the Standing Senate Committee on Social Affairs, Science and Technology, Issue 19 – Evidence (29 January 1997) [Ex 32] at p 458

219. As to child costs, the Newfoundland Illustration evaluates how each household contributes to the deemed expenditures on children.

220. Recall that the 40/30 Scale is meant to measure how much more income is needed so the parent lives at the same standard they did pre-child. That amount is then used as a proxy for child costs.[169]

221. In the case of two children the scale estimates that child costs are 40% for the first child and 30% for the second divided by the household's overall income needs of 170%. In other words, deemed child costs are .7/1.7 or roughly 41% of the CP resources.[170]

222. The question is 41% of what? Are the child costs 41% of actual CP resources ($27,369) or the fictional CP resources that subtract the Ignored Benefits ($24,629)?

223. In the Newfoundland Illustration, the DOJ calculated the deemed expenditures on children based on actual CP resources. Specifically, the child costs were calculated as 41% of the total household resources of $27,369, being $11,270 (not 41% of $24,629, which is $10,098, a difference of over $1,000).

224. Those costs were understood to be shared three ways: paid by government tax expenditures ($4,010), paid by the NCP ($4,435), and paid by the CP ($2,825). As the DOJ authors described it:

> … the standard of living of the custodial household is 11.1% higher than that of the non-custodial… The total expenditures for the children include a portion of the housing, transportation, utilities, etc., the portion being estimated using the [40/30 Scale]. The estimate is based on the assumption that for a single parent household with two children, 0.7/1.7 = 41.1765% of the expenditures are for the children. The total available income is $27,369, so that the expenditures are estimated at $11,270. The summary of the financing of these expenditures is as follows:
>
> Total Expenditures on Children: $11,270
>
> Paid by Government Tax Expenditure: $4,010
>
> Paid by Custodial Parent: $2,825
>
> Paid by Non-Custodial Parent: $4,435

225. In the Newfoundland Illustration, the standards of living are equal in the fictional world where $2,740 available to the CP household is simply disregarded. In reality, where all actual resources are acknowledged, two things follow:

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[169] Gallaway Affidavit, Exhibit A at p 92

[170] The deemed expenditures on one child are .4/1.4 (28%) of CP resources

(a) The CP household has an 11.1% higher standard of living; and

(b) The NCP pays a disproportionate amount of child costs: the CP is assumed to contribute $2,825 and the NCP actually pays $4,435 (57% more).

226. That discrepancy between what the formula is supposed to do and what it actually does was significant when the DOJ did the Newfoundland Illustration in 1996. The discrepancy has increased materially over time, as child benefits have increased.

227. When the Newfoundland Illustration is updated using 2010 tax numbers, including child benefits, the CP household standard of living is 30% higher and the NCP pays more than 100% of the child costs.

228. Specifically, as to standards of living: the CP after tax, benefits, and award income is $36,414 and the NCP's is $16,415. Adjusting that income based on the 40/30 Scale definition of "needs", the standards of living are $36,414/1.7 ($21,420), which is 30% higher than $16,415/1.0 ($16,415).[171]

229. Specifically, as to child costs: the deemed expenditures are 41% of $36,414 ($14,995). The NCP pays $4,452 of that amount out of their resources. The CP does not contribute any of their disposable income toward that amount because the government benefits account for more than the difference between the NCP's contribution and the remaining amount needed to render the CP household as well off as the NCP household.[172]

230. When the Newfoundland Illustration is further updated using 2019 tax numbers, the CP household standard of living is 45% higher and the NCP continues to pay more than 100% of the child costs.

231. Specifically, as to standards of living: the CP after tax, benefits, and award income is $43,361 and the NCP's is $17,542. Adjusting that income based on the 40/30 Scale definition of "needs", the standards of living are $43,361/1.7 ($25,506), which is 45% higher than $17,542/1.0 ($17,542).[173]

232. Specifically, as to child costs: the deemed expenditures are 41% of $43,361 ($17,865). The NCP pays $4,212 of that amount out of their resources. The CP does not contribute any of their disposable income toward that amount because the government benefits account for more than the difference between the NCP's contribution and the

[171] Sarlo Report at p 57
[172] Sarlo Report at p 57
[173] Affidavit of Chris Sarlo, sworn February 13, 2020 [Sarlo 2020 Affidavit] at para 13 and Ex B and C.

remaining amount needed to render the CP household as well off as the NCP household.[174]

233. In short, contrary to its stated design, the RFP Formula leaves the CP household at a higher standard of living and requires the NCP to pay a higher share of the child costs. Notably, those results reflect only the consequence of the Ignored Benefits. They do not reflect further discrepancies that arise in favour of the CP based on the formula's other inherent assumptions, discussed below.[175]

234. When the FLC was evaluating potential formulas between 1993 and 1995, it would have described these as "poor results".

(ii) The Justification for the Ignored Benefits is Illogical

235. The decision to ignore a crucial source of CP household income is explained in two short sentences in the 1998 Technical Report:

> 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 governments' contribution to children and not available as income to the receiving parent**.[176] [Emphasis added]

236. The explanation defies common sense. Government child benefits are plainly available as income within the custodial household.

237. It is also a key example of internal incoherence in the DOJ's logic.

238. When the RFP Formula was first conceived, the DOJ Consultants explained the logical approach to government benefits as follows:

> [t]he government… provides tax credits to parents for the children. In the analysis, it can be assumed that this money goes toward raising the standard of living of the parent, or goes towards the child expenditures. Care should be taken that money provided by the government for the children is used for the children. This is not to say that the custodial parent and the children can be at different standards of living. In a methodology which seeks to split the costs between two people, it should be recognized that the cost is actually split between the government and the two people. The parents only have to split that part of the cost which the government is not paying for.[177]

239. To understand this quote, we must return to the fundamental tenets underlying the *Guidelines*.

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[174] Sarlo 2020 Affidavit at para 13 and Ex B and C
[175] Sarlo Report at p 65
[176] Sarlo Affidavit, Ex F at p 5 and Appendix 1 at p 9
[177] Sarlo Affidavit, Ex G at p 96

240. The formula assumes that "within the principal residence of the children, the parent and the children will share the same standard of living".[178] If extra funds in the custodial household allow for an upgrade to the living space, both the parent and child profit because "the standard of living of the custodial parent is inextricably linked to that of the children".[179]

241. The DOJ Consultants rejected a budget-based approach to estimating specific expenditures on children and repeatedly said that resources in the custodial household are shared by the child and the parent. On this view, child support is for the whole custodial family because of joint consumption.[180]

242. In fact, it was the acceptance of an inherent, unavoidable relationship between the CP's means and the child's well-being that allowed the DOJ Consultants to presume that every CP contributes to child costs according to their means.[181]

243. Government child benefits are earmarked for the child and assumed to be spent for the child's benefit. But on the theory of joint consumption, there is no credible way to suggest that those expenditures can be isolated from the CP or the CP household standard of living. Rather, amounts spent for the child are nonetheless *jointly* spent, with the effect that they raise the CP household standard of living and go towards the "child costs" (in that they reduce the CP household income needs and move that household toward the same level of well-being as the NCP household).

244. The DOJ's explanation that government benefits are deemed to be unavailable to the CP requires a bifurcation of the standard of living of the child and the CP. That bifurcation runs directly counter to the fundamental principle that standards of living are shared within the household. The DOJ's logic does not hold up. In the language of *Vavilov*, it is incoherent and internally inconsistent.

245. Recall that the purpose of an equivalence scale is to isolate the amount of income that a child adds to the household's "income needs". It purportedly isolates the resources required to render one household as well off as another. The custodial household "needs" until it is as well off as the non-custodial household and then it does not need anymore (at least for purposes of addressing the marginal cost of the child; further

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[178] Sarlo Affidavit, Ex F at p 1

[179] Gallaway Affidavit, Ex A at p 117

[180] Sarlo Affidavit, Ex G at pp 26-27. See also Thompson Cross at pp 121/2-123/4 where he affirms the centrality of joint consumption: "… If I get the CCB and the result of that is I fill up the gas tank in my car, then the result of that is if I'm driving my kid to an event, the child gets the benefit of it, so do I because I get to go to the event too. If it means I use it to go shopping to buy groceries for me and my child, then again, it's extremely hard to allocate, and it involves value judgements and estimates endlessly to come up with expenditures upon children." He understands the inevitability that income will benefit each member of the household. Government benefits get spent on needs for the household, including for the children.

[181] Sarlo Affidavit, Ex G at pp 28-29.

sharing between spouses is supposed to be addressed through spousal support, not child support).

246. There is no intelligible way to describe the excluded government benefits or tax credits within this regime. The DOJ's attempt falls woefully short.

247. One child adds 40% to household income needs and two children add 70%.

248. Child benefits are meant to be spent on the child and the *Guidelines* assume that they are. As such (and, in truth, whether they are spent on the child or not), those resources increase the custodial standard of living and decrease the income needs created by the child.

249. This common sense understanding is reflected in Professor Thompson's spousal support advisory guidelines (**SSAG's**). For the purpose of determining income for each spouse, and comparing the relative standards of living, the SSAG's include all government benefits that are ignored by the *Guidelines*.[182] These benefits are sizeable, particularly at lower incomes. As Professor Thompson put it:

> First… [i]ncluding 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 sizable, 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.[183]

250. Professor Thompson explained that ignoring benefits is particularly unfair, given NCP direct spending on children and other costs they incur related to work expenses.[184] He has also said elsewhere that "[i]n assessing household standards of living, it is important to take into account the allocation of" child tax benefits.[185]

251. During his cross-examination, Professor Thompson tried to explain why, notwithstanding what he recognized in respect of spousal support, it might be defensible to ignore benefits in the child support context. His explanation lacked coherence:

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[182] Sarlo Affidavit, Ex K at pp 47-48; Sarlo Report at pp 40-42

[183] Sarlo Affidavit, Ex K at pp 47-48

[184] Thompson Cross at p 135/17-136/25: removing government benefits would produce significantly higher amounts of spousal support which would cause significant hardship for payor spouses especially those with lower incomes; See also Sarlo Affidavit, Ex K at p 78

[185] Thompson Chemistry at p 271 **[TAB 28]**

> Well, number one it's part… it's part of their income, and in determining the… the… okay, let me explain this more accurately. Spousal support has to look at ability to pay and ability to bear expenses after the payment of child support and taking into account their respective incomes. So it's a residual remedy in that sense. So you're looking at ability to pay much of the time, all right. That's the first point. And you're also looking at standard of living. So the results of this is we included the child benefits. Once again the difficulty of joint good, the difficulty of that reflection in the standard of living, and the amounts are fairly sizeable. So in terms of… once again… we actually debated this long and hard, but if you take the child benefits out of the equation… and this is about guidelines design… if we had taken the child benefits out, we would have had to redesign the formula entirely.[186]

252. None of that explains why it makes sense to ignore those same benefits in the child support context, where ability to pay and standard of living are just as central to the analysis.

253. As noted, when the DOJ Consultants first proposed the RFP Formula in 1993, they understood that government child benefits go toward raising the CP standard of living and/or toward covering the costs of the child.[187]

254. When the DOJ recommended adopting the RFP Formula in 1995, it confirmed that:

> Where both parents have similar incomes, the Revised Fixed Percentage formula determines the amount of money which should be transferred from the non-custodial parent to the custodial parent to ensure that every family member enjoys a similar standard of living. **In doing this exercise, all taxes, government subsidies, credits, and deductions are considered**.[188] [Emphasis added]

255. Around this same time, though, we start to see the seeds of inconsistency when the DOJ Consultants explained the directions from the DOJ to find a way to increase awards at low incomes:

> The DOJ felt that although governments provide significant subsidies to low income custodial parents, these subsidies should not necessarily be factored in when determining child support awards… [189]

256. This edict presented the DOJ Consultants with a dilemma.

257. Notably, the consensus at the relevant time was that "existing awards", as calculated under the FLC's database were of questionable reliability, particularly in the low income

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[186] Thompson Cross at pp 131/16-133/21
[187] Sarlo Affidavit, Ex G at p 96
[188] Sarlo Affidavit, Ex E at p 12
[189] Sarlo Affidavit, Ex D at pp 54-55

range. Further, leading authors in the field were of the view that current awards were punitively high in the low income context:

> While the evidence suggests that awards under the old system have… tended to be inappropriately *low* at *higher-income levels*… awards also appear to have represented punitively *high* levels of non-custodial parents' incomes at *lower* levels… Guidelines can fix this problem by raising awards at middle- and upper-income levels… and **reducing** payments at lower income levels (where non-custodial parents are currently paying too much). In short, it is entirely appropriate for guidelines to decrease awards for low-income non-custodial parents, and this outcome should not [be] resisted.[190] [Emphasis added]

258. While the DOJ Consultants preferred internal coherence and fairness to the NCP, the questionable goal of increasing low income awards above those in the FLC database won the day. The Ignored Benefits were the mechanism for achieving that. The consequence is dramatic and unfair for low income NCP's.

259. As Ross Finnie persuasively put it after he had stopped consulting on the project:

> The awards [only] equalize the parents' contributions to the child in a fictional situation which is replaced with the reality of the tax credits actually received, which are sometimes quite substantial… the availability of the child tax credits to custodial parents means non-custodial parents will, by the basic formula, pay greater shares of their children's costs than will the custodial parents, which goes against one of the basic principles of the guidelines. Furthermore, in the case of intact families, there is no question that child tax credit transfers not only *increase* spending on the child (their intention), but also *displace* parental spending which is redirected to themselves to some degree (an inevitable by-product of the transfers). Thus, child tax benefits work to the advantage of all children, to parents in intact families, and to custodial parents in situations of divorce, but *not* to the advantage of non-custodial parents.[191]

260. Put differently, the GIC promulgated a formula that is inherently designed to solve out to something other than equal living standards at equal incomes but never transparently acknowledged that fact. Instead, it continued to present the *Guidelines*

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[190] Finnie Caledon at p 5 **[TAB 26]:** See also Sarlo Affidavit, Ex G at p 36 and FN 16 (leading authors believe there is a compelling argument to set the NCP's AEU above 1.0) and p 97 (the database of existing awards is based on 1991 data, including relatively low government benefits; the burden of having children has continually decreased, further calling into question the objective of designing a formula that increases child support awards above those designed during a time when children were a greater financial burden).

[191] Ross Finnie, "The Government's Child Support Package" (1997) 15 CFLQ 79 [Finnie Child Support Package] at p 89 **[TAB 33]** See also Matthew Gray and David Stanton, "Costs of Children and Equivalence Scales: A Review of Methodological Issues and Australian Estimates" (2010) 13:1 Australian Journal of Labour Economics 99 at p 105 **[TAB 34]**, where the authors state that, under the equivalent living standards approach to estimating child costs, the cost to parents is partly a function of "the extent of support received from outside the household". Because families with children receive child-related benefits from the government, in reality, children bring additional resources to a family.

and the underlying formula as doing precisely that and trying to gloss over the extent to which that became untrue as a result of the Ignored Benefits. Mr. Finnie asked the question this way pre-promulgation:

> You should ask the Department of Justice how to factor in the current tax credits and about all the advantages which go toward the parent with custody of the child. For example, are [the tax credits] just ignored? In the public record, there is a comparison of the standard of living if they were to have the same income level. Does that same income level take into account the tax credits which are now quite sizeable which go toward the custodial parent? Or do they make those calculations without taking those credits into account? Would it then be simply a windfall sort of income gain to custodial parents?[192]

261. In ultimately discounting the Ignored Benefits, the GIC reverse engineered its agenda of raising awards at low income levels. In doing so, it contradicted core tenets underpinning the formula with the result that the actual awards do not do what they are supposed to do.

262. It would have been more intellectually honest for the DOJ to acknowledge that the Ignored Benefits undermine the Core Premise. That is, the credible way of approaching the decision is to concede that the Ignored Benefits render the formula internally incoherent and ask what degree of inconsistency is reasonable. If the *Guidelines* are meant to equalize post-separation standards of living and share child costs equally when the parents have equal incomes, what degree of departure is justifiable? The Newfoundland Illustration, updated by Professor Sarlo, shows that the Ignored Benefits alone mean that the formula misses its own mark and place the *Guidelines* outside the allowable margin of appreciation.

263. The Ignored Benefits reflect an agenda to maximize what could be transferred into the custodial household under the guise of child support. Several other core assumptions in the formula are illogical or unfair and exacerbate the unreasonableness of the *Guidelines.*

(i) The Add-On Regime Constitutes Double Counting

264. Another prime example of incoherence that favours the CP household is the section 7 add-on regime.

265. The FLC justified the 40/30 Scale on several bases, including its simplicity and the upsides of **averaging all imaginable child costs**, regardless of the child's age or any household's particular circumstances. The scale includes child care costs and

[192] Harper Affidavit, Ex 32 at p 430

extraordinary medical expenses[193] and there is no room for individualized add-ons. As the DOJ Consultants put it:

> … because this equivalence scale is an estimate of expenditures on children **it is assumed to include all expenditures relating to a child and to apply to children of all ages**. In using this equivalence scale, **it would be inappropriate to add on, as a separate item, the specific amount of day care costs being incurred by the parents**.[194] [Emphasis added]

266. The FLC had originally preferred a formula that produced a base award with child care costs isolated and then added on.

267. The DOJ Consultants knew this was the preference but, after reviewing different options, they decided that the choice of expenditure model should "be guided by the results of the research on expenditures on children".[195]

268. The expenditure models that would have allowed child care costs to be treated separately were rejected in favour of the 40/30 Scale. The research relied on in making that choice showed that the 40/30 Scale "includes child care costs and extraordinary medical expenses".[196] The whole notion of an equivalency scale is that the costs it generates at different income levels are supposed to be all inclusive.[197]

269. The DOJ Consultants therefore recognized that it would be inappropriate to add on any individual expenditures. The 40/30 Scale entailed trade-offs and the fact that it included child care costs made it more simple, which was described as an upside.[198]

270. Since child care costs (like all conceivable child-related expenditures) were baked into the scale according to averages, the DOJ Consultants understood that child support awards would be high for custodial households that did not incur certain expenses, like daycare. As they put it, a downside of the 40/30 Scale is that it "includes a child care amount even when no child care costs are being incurred".

271. This bears some emphasis - it means that all conceivable average costs are reflected in the table amount, whether the custodial household incurs them or not. A custodial household with no child care costs still receives a child support amount that

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[193] Sarlo Affidavit, Ex G at p 18
[194] Sarlo Affidavit, Ex E at p 10
[195] Sarlo Affidavit, Ex G at p 18
[196] Sarlo Affidavit, Ex G at p 18
[197] Sarlo Report at p 32, citing Sarlo Affidavit, Ex E at p 10
[198] The drafters expressly rejected economic models that allowed for the separate treatment of child care costs and acknowledged the consequence that add-ons were therefore inappropriate: Sarlo Report at pp 31-32; Sarlo Affidavit, Ex E at pp 10-12; Sarlo Affidavit, Ex G at p 97

incorporates those costs. This was a known consequence of relying on average overall household expenditures as a proxy for child costs.[199]

272. The DOJ Consultants also understood that, on the flip side, the estimates might prove low in instances where individual expenditures were above average.

273. Those trade-offs acknowledged, the DOJ Consultants nonetheless recommended the 40/30 Scale and said it was preferable to a formula that would allow the separate calculation of child care costs.[200]

274. In 1995, the FLC continued to honour the nature of the 40/30 Scale in respect of child care costs, but, again, it started to weave in the seeds of inconsistency, this time by isolating and adding on extraordinary medical expenses:

> The equivalence scale used to determine the costs of children in the post-family breakdown context, only provides for average costs of a child. Where extraordinary expenses are incurred, these costs would not be compensated completely but would have been averaged out through the population, even to those who may not incur such expenses.[201]

275. By 1996, the DOJ had expanded those categories of so-called extraordinary expenses, stating that six categories of special child-related expenses that "do not lend themselves to averages" can be added to the table amounts.[202] Those categories are captured in section 7 of the *Guidelines*, which provides the court with discretion to increase child support awards to cover all or any portion of: certain child care expenses; medical and dental insurance premiums attributable to the child; health-related expenses that exceed insurance reimbursement by at least $100 annually; extraordinary expenses for educational programs and extracurricular activities.[203]

276. Any add-on expenses ordered under section 7 are to be shared by the parents in proportion to their respective incomes.[204]

277. Like the decision to disregard the Ignored Benefits, the section 7 add-on regime is unreasonable because it is inconsistent with the 40/30 Scale.

278. Again, the 40/30 Scale is nothing more than a proxy for child costs. It does not reflect actual amounts spent directly on children but rather an estimate of all average costs incurred in any household that adds an incremental member of any age. The problem

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[199] Sarlo Report at p 32, Sarlo Affidavit, Ex E at pp 10-11 and 31
[200] Sarlo Affidavit, Ex E at p 11
[201] Sarlo Affidavit, Ex E at p 31
[202] Harper Affidavit, Ex 1: at p 1121-1124.
[203] *Guidelines* at s 7 **[TAB 1]**
[204] *Guidelines* at s 7(2) **[TAB 1]**

with the section 7 add-on regime is therefore that the so-called extraordinary expenses are already included in the child cost estimate and therefore result in double-counting.

279. The stated rationale for the add-on regime is that those expenses do not lend themselves to averages. The break in this logic is that those same expenses are included in every base award *on an average basis*. According to the DOJ, then, these categories of expenses both lend themselves to averages (for purposes of inclusion in the base amount) and do not lend themselves to averages (for purposes of isolation as add-on amounts).

280. Internal consistency would have been possible through a (known) simple fix:

> [I]t would not be unreasonable to separate out certain "extraordinary" expenses on the grounds that some kinds of expenses do not lend themselves to averages. However, **to eliminate the double-counting, base awards should first be generally adjusted downward to net out the average costs associated with the identified special categories of spending, with the required amounts then - and *only* then - added to awards on a case-by-case basis**.[205] [Emphasis added]

281. The impact is material. As noted, the 40/30 Scale is already at the high end of credible child cost estimates. With the section 7 add-on expenses, the scale becomes something even higher.[206]

282. Add-on expenses under Section 7 of the *Guidelines*, which are in addition to the table amount of child support, are double counted in that the CP receives an average amount plus something a little more than the NCP's share[207] of the actual amount.

283. Further, those double counted expenses are shared on the basis of the parents' pre-tax income ratios, which distorts the parents' true proportional means to pay. No one lives in a tax-free world so pre-tax incomes do not reflect lived reality. The section 7 income ratios therefore tend to distort the NCP's share of these expenses upward and the CP's downward.[208]

284. Professor Thompson estimated that section 7 expenses are added to the table amount in roughly 30% of cases.[209]

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[205] Finnie Child Support Package at p 91 **[TAB 33]**
[206] Sarlo Report at p 32
[207] The amounts are based on gross, not net income and therefore distort the parents' true equal share.
[208] The DOJ understood this point. Under s 7(3) of the *Guidelines*, the amount of the section 7 add-on must expressly account for any government subsidy relevant to the particular expense at issue. In other words, the calculation of the expense itself is net of tax and yet, for some reason, the expense is shared on the basis of pre-tax / gross incomes. This is emblematic of the disregard for consistency and common sense in favour of maximizing the amount transferred.
[209] Thompson Cross at 87/24-88/14

285. Every section 7 add-on expense entails known double counting. It constitutes a break in the logic underlying the *Guidelines* and another example of reverse-engineering the goal of increasing awards above the amounts that would flow from a coherent application of the formula.

(ii) Assumption of no NCP Direct Spending on the Child has a Dramatic Effect

286. A third aspect of the formula that unreasonably undermines the Core Premise is that the NCP's AEU is set at 1.0. Tangibly, that means that the formula is constructed under the assumption that the CP has the child all the time and therefore does 100% of the direct spending on the child, while the NCP's financial responsibilities are fulfilled wholly through child support payments (and not also by directly paying for things while the child is with the NCP). The Court has discretion to reflect such NCP direct spending only if the NCP has physical custody at least 40% of the time.[210]

287. In reality, NCP's often spend time with their children and incur related direct expenses.[211] Up to 40% access time, those direct NCP expenses are not accounted for as needs of the NCP household (by increasing the NCP AEU above 1.0) or as resources to the CP household (by decreasing the income needs of the CP).

288. As with the Ignored Benefits and section 7 add-ons, the decision to ignore this important source of needs was the result of the evolution of the formula from what the DOJ Consultants first proposed to what the DOJ ultimately implemented.

289. When the DOJ Consultants proposed the RFP model in 1993, they called for recognition of direct NCP spending on the children:

> All costs borne by the parents should be considered. The principle underlying this approach is to not just compensate the custodial parent for the expenses of the child, but to ensure that every family member lives at a similar standard of living. Consequently, if the non-custodial parent required a larger residence to accommodate the child, those costs would be included… they could be integrated… by changing the "needs" of the non-custodial parent, and then completing the calculations for the equalization of the standard of living.[212]

290. By 1995, the FLC was espousing the different view that "the non-custodial parent is expected to be able to afford… costs of access".[213]

291. There is good reason to doubt that ability to pay at low income levels. NCP disproportionate spending on child costs is most pronounced at low income levels because of the impact of the Ignored Benefits.

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[210] *Guidelines* at s 9 **[TAB 1]**
[211] Studies have confirmed that NCP's incur child related costs when they have custody time: Sarlo Report at p 31.
[212] Sarlo Affidavit, Ex G at p 91 and FN 4
[213] Sarlo Affidavit, Ex E at p 30

292. In any event, even in those instances where the NCP can afford to pay a disproportionate share of child costs, ability to pay is not the test. Child support may only be in respect of the deemed child costs (not something more) and those must be shared according to the parents' respective means. It is inconsistent with that constraint to adopt a test based instead on the NCP's ability to pay. By that logic, provided they can afford it, why not have the NCP pay the full amount of deemed child costs, since that will maximize the resources available within the CP household? That test, focused on NCP ability to pay, is inconsistent with the Limiting Principles.

293. The Limiting Principles are violated and the Core Premise does not prove out for every dollar that the NCP spends directly on their child. This has a real impact on many NCPs' ability to provide for their children while they are together.

294. A balanced approach would adjust to reflect the NCP's direct spending on the child whenever that becomes significant. Such adjustments could be kept relatively simple and certain standard adjustments could easily be established.[214]

295. As discussed in more detail below, the Quebec guidelines adjust awards to reflect NCP direct spending. As the intervenor concedes, that aspect of the Quebec guidelines has a "dramatic" effect in lowering child support where the NCP spends time with the children.[215] As Ross Finnie put it in 1996:

> The resulting shifts in spending on the child from the custodial parent to the non-custodial parent will… result in many awards which are inequitable - not just according to common sense notions of fairness, but also with respect to the guidelines' own basic "equal sharing" principle, whereby the costs of the child are to be equally divided between parents with equal means to pay.[216]

296. This significant over-payment occurs in most cases. Typically, NCP's exercise access and most spend directly on their children during the time they spend with them.[217]

297. Further, even when the NCP does have a minimum of 40% access, the parents' proportional sharing of child costs is not properly calculated, but delegated to the court. The court has no meaningful background about where the table numbers come from, yet that amount is prescribed as a material factor in determining the appropriate amount of child support. The Court is therefore not well equipped to determine a fair

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[214] Finnie Child Support Package at p 89 **[TAB 33]**
[215] Thompson Report at para 73 and FN 54
[216] Finnie Child Support Package at p 88 **[TAB 33]**
[217] Thompson agrees that NCP direct spending on the child is common or typical: Thompson Cross at pp 49/16-51/24 and 104/3-104/24; Sarlo Affidavit, at Ex K p 78: "Most payors are exercising access and most are spending directly upon their children during the time they spend with their children". See also D.A. Rollie Thompson, "The Chemistry of Support: The Interaction of Child and Spousal Support" (2006) 25 CFLQ 252 [Thompson Chemistry] at p 262 **[TAB 28]**

number even when it does exercise its discretion above 40% of NCP physical custody time.[218]

298. Finally, the decision to ignore the vast majority of NCP direct spending cannot be credibly explained by saying that those costs are balanced by the CP's non-financial contribution. The DOJ specifically considered that issue and confirmed that the CP's non-financial contribution is addressed through the separate spousal support regime.[219]

299. Professor Thompson agrees, stating that "[t]he… *Guidelines* only compensate the custodial parent for the "direct" costs of children… indirect costs of children are left to the law of spousal support".[220] Using CP non-financial contribution as a justification for ignoring NCP direct spending confounds child and spousal support and leads to double counting.

300. Notably, post-promulgation, the DOJ has said the exact opposite, suggesting incorrectly that the decision to ignore NCP direct spending was deliberately made as a counter-balance to CP indirect costs.[221] It was not.

301. The decision to ignore NCP direct spending is therefore the third crucial baked-in assumption that renders the formula unreasonable.

(iii) Undue Hardship Test Is Inappropriate and Onerous

302. Section 10 of the *Guidelines* is the one mechanism for downward adjustment of the table amount.

303. The intervenor may suggest that this section provides meaningful relief against the ways that the formula is unbalanced in favour of CP households.

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[218] *Guidelines*, at s 9 **[TAB 1]**: "Where a spouse exercises a right of access to, or has physical custody of, a child for not less than 40 per cent of the time over the course of a year, the amount of the child support order must be determined by taking into account… (a) the amounts set out in the applicable tables for each of the spouses; (b) the increased costs of shared custody arrangements; and (c) the conditions, means, needs and other circumstances of each spouse and of any child for whom support is sought."

[219] Sarlo Affidavit, Ex E at p 47.

[220] Thompson Report at para 34. See also Sarlo Affidavit, Ex K at pp 32 and 72-74. Professor Thompson also recognizes that NCP's incur work-related expenses such as clothing, commuting, parking, tools and hardware, and the like. Those are not accounted for at all in the child support formula and are only potentially factored into the spousal support regime, as a discretionary consideration in picking the range of spousal support: Sarlo Affidavit, Ex K at p 100.

[221] Affidavit of Alar Soever, filed June 19, 2014, Ex A, "in cases where the recipient parent spends substantially more time with the children, the Guidelines take into account the paying parent's access costs by balancing them against the recipient parent's 'hidden costs'"; Harper Affidavit, Exhibit 13: Children Come First: A Report to Parliament Reviewing the Provisions and Operations of the Federal Child Support Guidelines (2002) Report [Ex 13] at p 81

304. In fact, the test is inappropriate and overly onerous. It makes no attempt to resolve what the real question is supposed to be. The test should relate to excessive amounts (awards that exceed deemed child costs) and failure to share those costs proportionally. Instead, it requires proof that the NCP household is impoverished and worse off than the CP household.

305. Specifically, adjustment of awards under section 10 involves first establishing undue hardship and the cause for it. Relevant causes of hardship are restricted to unusually high debts incurred while the family was still together, unusually high expenses associated with the NCP's access to the child, or any legal obligation to support another individual, including the child of a prior marriage.

306. Those categories of expenses are relevant only if they create "undue hardship", which courts have interpreted as a very high bar.[222] Access costs, for example, are only to be recognized when they are extraordinary and where failure to account for them might deprive the child of the ability to see the NCP at all.[223]

307. That measure is a far cry from gauging whether the table amount requires the parents to equally share the deemed child costs. It reflects a different test altogether: whether the table amount impoverishes the NCP to the point where the child is deprived of any relationship with that parent. The requirement of undue hardship has no basis in the *Divorce Act* (rather, it is inconsistent with it).

308. If the NCP can prove this particular type of impoverishment, the second step requires calculating household standards of living. Both parents have to define and report the composition of their current family units (new spouses, new children) and the total income (including income earned by subsequent spouses). Household incomes are translated into standards of living and those are used to determine if there should be adjustments based on the enumerated list of factors that are said to justify it. Those invasive and complicated calculations are required over the entire life of the child-support award, sometimes as much as 20 years or more. This comparison is very complicated; it is invasive; and it requires constant re-visiting.

309. Further, the condition that the NCP be below a certain (unspecified) income level is inappropriate. NCPs should pay their fair share of their child's costs but there is no reason founded in the *Divorce Act* to require them to pay any more.

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[222] Thompson Cross at pp 140/1-141/12

[223] Sarlo Affidavit, Ex E at p 30; See, for example, R. Thompson, "Of Camels and Rich Men: Undue Hardship, Part II" (Ottawa: Department of Justice, September 1998) at p H-32 [Thompson Of Camels] **[TAB 35]** citing cases where thousands of dollars in annual travel costs to exercise access (not even counting any other direct spending that occurred, above those travel costs) were considered "normal access expenses and not unusually high". Remarkably, this logic has even been applied to NCPs traveling from Yellowknife to Hinton, Alberta and to Nova Scotia.

310. Further still, even if the NCP is experiencing undue hardship and a lower standard of living, the court may still decline to lower the award. Some judges, for example, refuse to apply section 10 if the NCP earns more than minimal income, effectively refusing to acknowledge that an NCP can experience a lower household standard of living and undue hardship outside the low income context.[224]

311. Finally, the undue hardship test yet again creates fundamental internal inconsistency in the *Guidelines*.

312. As noted above, one of the apportioning approaches that has been written about academically is the standards of living method. This theory focuses not on the NCP's proportional level of contribution but rather on a specific target for relative standards of living, post-award. It was rejected as an overall guideline model, in part, because it would require complicated calculations relating to the composition and incomes of the two households and would generally tie the personal and economic lives of the divorced parents in a way that most consider excessive.[225]

313. The FLC rejected that standards of living apportionment method for the basic table award but then inconsistently adopted it only in respect of downward adjustments to the NCP contribution.[226] As Finnie put it, "… that which the Committee so forthrightly rejects as a basic principle, it drags in through the back door when recommending adjustments to the basic guideline".[227]

314. Also, the test's extreme complexity shows that the DOJ espoused simplicity only when it favoured the CP household.[228] When that same simplicity might favour the NCP, the DOJ rejected it. Indeed, the undue hardship test is so complicated that a cynic might conclude the DOJ deliberately stacked it against the NCP.[229] That is acutely unfair when viewed from the NCP perspective. Those NCP's who most need to rely on the undue hardship provision are also those who cannot afford a lawyer. Being self-represented materially decreases the chances of success.[230] It is cold comfort to suggest that courts can help self-represented applicants figure out the test.[231]

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[224] Thompson Cross at p 151/3-151/21
[225] Finnie Child Support Package at pp 89-90 **[TAB 33]**
[226] Sarlo Affidavit, Ex E at pp 28-29
[227] Finnie 1995 at p 154
[228] See, e.g., Sarlo Affidavit, Ex E at p i; Sarlo Affidavit, Ex G at p 37
[229] Thompson Of Camels at p H-48 **[TAB 35]** "Judges and counsel have struggled with the joys of working out the calculations of Schedule II. The cynical would suggest that the feds made it this complicated to create a barrier to spouses attempting to claim undue hardship".
[230] Thompson Cross at p 144/9-145/7
[231] Thompson Cross at pp 146/5-147/3

315. This lack of concern for NCP legal costs is an added layer of internal inconsistency. One of the supposed objectives of the *Guidelines* was to standardize child support to, among other things, reduce litigation costs.[232] That concern apparently applied only to CP's.[233]

316. Related to this, CP's are only required to disclose their financial information if the NCP can first prove undue hardship. In this context, courts are particularly willing to acknowledge the inherently invasive nature of financial disclosure and that a request for it gives rise to expense.[234]

317. The *Divorce Act* does not call for or countenance a regime so skewed in favour of CP households to the detriment of NCP households. Rather, it calls for proportional sharing of child costs based on the parents' relative means. The undue hardship test is inconsistent with that regime as it applies wholly different standards, thereby making it unnecessarily difficult for NCP's to adjust awards downward when the table amount is unfair.

(iv) Applying the 40/30 Scale at all Incomes Is Unreasonable

318. A final core aspect of the formula is the application of the 40/30 Scale at all income levels on the assumption that parents spend the same proportion of their income on their children, regardless of their income. In fact, the preponderance of evidence confirms the common sense point that as income rises, the overall amount spent on children increases but the proportion of that income spent decreases. By ignoring this fact, the formula calls for the NCP to transfer excessive amounts of child support.

319. Recall that the Wisconsin POOI approach of applying a fixed percentage with a sole focus on NCP income was not originally intended to apply outside the low income context.[235]

320. Similarly, StatsCan's "conspicuously arbitrary" choice of 40 and 30 as equivalence ratios was done to help StatsCan determine its "low-income cutoff", which is Canada's unofficial poverty line. As we move away from low to moderate levels of income, the difference between the equivalent income generated by the 40/30 Scale and the true equivalence relation starts to grow, as people spend a lower proportion of their income on their children. [236]

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[232] Sarlo Affidavit, Ex G at p xi: "guidelines are intended to reduce the time, money, and emotional anguish involved in the legal proceedings required to arrive at (final) child support awards."
[233] Sarlo Affidavit, Ex E at p 39
[234] Auer v Auer, 2015 ABQB 67 at paras 12-21 **[TAB 36]**
[235] R. Mark Rogers, "Wisconsin-Style and Income Shares Child Support Guidelines: Excessive Burdens and Flawed Economic Foundation", FLQ 1999 at pp 10-14
[236] Douglas W. Allen, "The Effect of Divorce on Legislated Net-Wealth Transfers", (2007) 23:3 JLEO 580 at p 5 [Allen Article **[TAB 37]**]; Allen Report at para 6

321. Instead of acknowledging this fact, the formula is applied on the basis that child costs are proportional or linear.[237]

322. Professor Thompson, agrees that spending on children is not linear (that, he says, is as certain as "the law of gravity").[238] He acknowledges that non-linearity affects most NCP's but says it is not material enough to warrant taking into account.[239]

323. Thompson relies in part on DOJ research that child spending is proportional across a large range of incomes. That research, however, is inconsistent. For example, for one model (Extended Engel), child spending is non-linear - 11.4% of gross income for lower income families and 9.5% of gross income for higher income families. Using another model (Adult Goods approach), the difference is much larger (19.2% vs. 10.6%). Yet another model (Consumption) produced a percentage that is quite flat at about 9.3-9.5%. The Blackorby-Donaldson approach also reveals a fairly constant outcome, but at about 18%. As Professor Sarlo put it:

> So, we have four quite different models to determine spending on children. Based on simulations using those different models, two of the approaches… show that [spending is non-linear]. Another two show that the percentage is fairly [linear, but]… (over a fairly limited range of incomes), that "constant" percentage is dramatically different - in fact one is double the other.[240]

324. The DOJ also relied on a procedurally questionable public opinion survey done in Wisconsin in 1985. It did not cite contradictory data from a survey done in Canada in 1990.[241]

325. All of those DOJ sources therefore provide a poor foundation from which to conclude that child spending is linear.

326. Professors Sarlo and Allen cite much more compelling evidence that non-linearity is material even at lower levels of income.

327. In his 1991 DOJ commissioned Report, Browning concluded that there is "no particular reasons to believe that… the costs of children should be proportional to income. Indeed, I find it… more plausible that the adult equivalence of a child decreases with the income of the household".[242]

328. In its 1992 Research Report, in describing the Adult Goods Model, the DOJ authors concluded that "[a]s has been found in studies using similar methodologies, upper

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[237] Sarlo Report at p 21
[238] Thompson Cross at p 70/10-70/24
[239] Thompson Cross at p 72/8-73/15; Thompson Report at para 64; Sarlo Affidavit, Ex K at p 110
[240] Sarlo Report at pp 22-23
[241] Sarlo Report at pp 24-25
[242] Sarlo Affidavit, Ex H at pp 48-49

income families spend more dollars but a smaller proportion of income than lower income families". In summarizing the results from all the various models, it concluded that "[w]ealthier families spend more on their children… though not necessarily proportionately more.[243]

329. More recent empirical estimates also undermine the notion of linear spending. Leading economists conclude that average costs within a household fall as income rises, meaning that "equivalence scales for households with children decrease significantly with expenditure".[244] In plain English, this means that a different equivalence scale should be applied at higher incomes.

330. Non-linearity is also consistent with general consumer behaviour. Consumption spending, as a percentage of income, decreases as income rises. The ratio of overall consumption spending to after-tax income for households with over $90,000 income is fully a third less than middle-income households.[245]

331. Because the 40/30 Scale is applied at all income levels, the formula does not acknowledge non-linearity. As a result, as we move away from low income levels, the table amounts are unrealistically high.

332. Section 4 of the *Guidelines* allows discretion in setting awards for NCP's with income over $150K. That section is a poor way of addressing this issue since the table amount is still the starting point and courts regularly apply that presumptive amount well above $150K.

333. Finally, setting aside the preponderance of evidence for the moment, there is the lingering issue of the percentage at which costs are supposedly proportional. As noted above, two different models studied by the DOJ suggested 9% and 18% respectively. The DOJ never did make any connection between the proportionality number generated by the formula and the underlying research it relied on elsewhere.[246]

334. The application of the 40/30 Scale on a linear basis is contrary to the preponderance of credible evidence. It is one more factor that works heavily in favour of CP households and renders both the table awards and the logic underpinning them unreasonable.

(v) Unfair Treatment of Children from Subsequent Families

335. The *Guidelines'* treatment of NCP children from subsequent families is yet another indication of unreasonableness.

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[243] Sarlo Affidavit, Ex C at pp 29 and 36

[244] Allen Report para 31 and FN 11]

[245] Sarlo Report at pp 25-26. Within that data, the categories of children's clothing and food both decline as a proportion of income.

[246] Sarlo Report at pp 22-23

336. The objectives of the *Guidelines* are supposed to include the consistent treatment of children in similar circumstances.[247] In fact, however, the *Guidelines* ignore subsequent families and thereby create different classes of children in terms of their standards of living. For example, Professor Allen demonstrates a scenario where expenditures on children from the NCP's first marriage are $13,156 per child, while the child in the second family receives only $6,117.[248]

337. The AGC's witness, Professor Thompson, has rightly noted that this philosophy of "first family first" constitutes unfair differential treatment of similarly situated children.[249]

338. That is the case in this Application. Roland has three children from his first marriage, one from his second, and two from his third. His children from his first and third marriages have suffered.

339. Roland's first wife, Iwona, swore that as their children entered their post secondary educations, the $3,000/month that she and Roland jointly contributed was no longer sufficient to cover their children's expenses. Iwona was forced to take on a much greater responsibility for the costs arising from their sons' activities. Although Roland continued to contribute his $1,500 to the joint account, Roland was simply financially unable to contribute more because of the large support amount he continually had to pay to Aysel, plus his legal fees related to the dispute. In addition, Roland was in a third marriage and had two further children to support. Iwona swore that she knows "Roland as a generous person" and he was "very upset and frustrated with not being able to contribute more" to their three sons. She estimates that she has incurred tens of thousands of dollars in additional expenses to support their sons than what she and Roland have equally contributed.[250]

340. Mark Auer, one of Roland's sons from his first marriage, described the impact that the support obligations from Roland's second marriage had on him. He said that because of his father's strained financial circumstances, he brought any expenditure needs exclusively to his mother, Iwona. For example, when he had transportation needs and wanted to purchase a used car, he obtained half of the cost from his mother, but did not seek any assistance from his father. In addition, he moved into residence in his first year of university, got his mother to co-sign his loan, and subsequently paid off the loan himself. Although Roland had traditionally arranged activities to do as a family, those

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[247] *Guidelines* at s 1(d). **[TAB 1]**

[248] Allen Report at paras 53-56 and Table 3

[249] Thompson Cross at pp 149/4-150/1; See also R. Thompson, "The Second Family Conundrum in Child Support" (2001) 18:2 Can J Fam L 227. **[TAB 38]** Among other things, the caselaw shows a preference, not just for first families, but also for biological children, as compared to step-children and adopted children: Thompson Cross at p 150/2-151/2.

[250] Affidavit of Iwona Auer filed July 11, 2014 at paras 6-10

activities were either curtailed or restricted following the obligations that required him to pay the large amount of support to Aysel.[251]

341. As the legal guardian of his fifth son Alex, who had no contact with his natural father, Roland paid his living expenses which totaled $1,245 per month, his yearly tuition of $4,918, and parking fees of $910.[252]

342. Roland's sixth son, Vladmir, lives with him and Victoria, and has little resources from Roland other than his time, and his love for learning and sport.[253]

343. Subordinate legislation can only distinguish between classes of children like this if such discrimination is authorized by statute or is implicitly essential to the proper functioning of the overall scheme.[254] The *Divorce Act* does not endorse the creation of classes of children and the fact that the *Guidelines* allow for just that is one more factor that renders them unlawful.

344. As a final point, it is interesting that, if the CP re-partners, the child is now the third person in the house, not the second. Under the 40/30 Scale, the child should arguably now add 30%, not 40%, to household income needs. That is no small thing and could be an easy fix in the *Guidelines*. By contrast, as we have seen, when an NCP re-partners, the *Guidelines* continue to assume they only have the costs of a single adult.[255] This provides an apt segue into a discussion of the *Guidelines'* overall balance, or lack thereof.

(vi) Overall Disdain for NCP Households

345. As we have seen, the *Guidelines* reflect a series of assumptions and decisions that universally favour the CP household: (i) the Ignored Benefits; (i) the section 7 add-on regime and its inherent double counting; (iii) the assumption that NCP's do not spend directly on their children; (iv) the irrational undue hardship test; (v) the application of the 40/30 Scale in a linear fashion; and (vi) discrimination among NCP children from different marriages.

346. Other more subtle aspects of the *Guidelines* are also notable. For example, the drafters espoused simplicity when it could work in the CP's favour but not when it worked in the NCP's favour. They also adopted a regime that allowed for only one party to have to disclose financial information. That ongoing obligation makes the NCP vulnerable,

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[251] Affidavit of Mark Auer filed July 11, 2014 at paras 5-7
[252] Auer Affidavit 2014 #2 at para 42
[253] Auer Affidavit 2014 #2 at paras 43 and 45
[254] *Montreal v Arcade Amusements Inc,* [1985] 1 SCR 368 at p 404 **[TAB 39]**; See also *679619 Ontario Limited (Silvers Lounge) v Windsor (City),* 2007 ONCA 7 at para 17 **[TAB 40]** citing *R v Sharma*, [1993] 1 SCR 650 at pp 667-668 (not reproduced)
[255] Sarlo Report at pp 37-38

creates an ongoing (but one-sided) interweaving of the spouses' lives, and imposes what can be a significant cost on the NCP.

347. These aspects of the *Guidelines* favour the CP household, disadvantage the NCP household, create a discrepancy between what the *Guidelines* are supposed to do and what they actually do, and render them inconsistent with the Limiting Principles.

348. The AGC is expected to advocate for a deferential review of the *Guidelines* because they are an exercise in policy and trade-offs. However, choices between different possibilities should entail compromise. A reasonable guideline regime should represent a legitimate balancing act, not a one-sided vehicle for engineering a pre-determined and lopsided outcome.[256]

349. The number of decisions that weigh in favour of the CP household is itself a badge of unreasonableness. That is all the more apparent when we consider the extent to which those decisions are made at the cost of internal coherence in design.

(i) Lack of Transparency

350. As noted, the DOJ did not release a detailed description of the *Guidelines* until after they were law. And although the *Guidelines* have been evaluated since promulgation, the math that underlies the presumptive table amounts remains something of a mystery to most.[257]

351. The *Guidelines* were first presented in March 1996, as part of the Federal budget.[258] At that time, Parliamentarians and Senators could not have had an informed understanding of the math underlying the *Guidelines*, whether the presumptive table amounts reflected the parents' relative abilities to contribute to the deemed child costs, and whether the *Guidelines* called for parents to share those child costs equally.[259]

352. Rather, they were provided only high level and inaccurate explanations such as:

> The mathematical formula chosen incorporates… a method of determining the costs of raising a child used by Statistics Canada…

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[256] Professor Thompson agrees that implementing policy should be based on balancing interests: Thompson Cross at p 24/6-24/16. As Ellman put it, the construction of child support guidelines is a policy-making exercise that should balance the interests of children, non-custodial households, and custodial households. A "rational" child support system, he says, should reflect compromise and the fair treatment of both the CP and NCP: Ellman Fudging Failure at pp 177-178 **[TAB 27]**

[257] Professor Thompson, for example, admits that most lawyers and judges simply do not understand how the *Guidelines* are crafted: Thompson Cross at pp 95/19-96/5.

[258] Harper Affidavit, Ex 11

[259] Sarlo Report at p 6.

> The Schedule amounts are fixed by a formula that calculates the appropriate amount of support in light of economic data on average expenditures on children across different income levels.[260]

353. In reality, as we know, the 40/30 Scale was adopted by StatsCan for the purpose of estimating low income measures. The incremental costs of 40% and 30% were arbitrary and not determined with children in mind.[261] The DOJ's representations to the contrary are a concerning example of lack of transparency.

354. Further, the *Guidelines* continue to state, on their face, that "[t]he amounts in the tables are based on economic studies of average spending on children in families at different income levels in Canada".[262] That is inaccurate, as Professor Thompson acknowledges.[263]

355. Around this same time, in June 1996, Ross Finnie noted material discrepancies between the DOJ Consultants' original RFP Formula and the one later tabled by the GIC. Either the basic principles or the specifics of the calculations were changing. The information explaining that difference was simply not provided.[264]

356. The details that were eventually provided in 1998, post-promulgation, were scant and, as noted, omitted the empirical analysis the DOJ had done in respect of the final formula.[265]

357. Transparency is a way for a decision maker to show that it understands and has honoured the applicable constraints. On the flip side, a lack of transparency can suggest result-oriented reasoning and excess of authority.

(ii) Comparisons to other Guidelines

(a) AGC Comparisons are Irrelevant and Unreliable

358. The intervenor now defends the *vires* of the *Guidelines* on the basis that they fall within the range of outcomes seen in the United States, Australia, and New Zealand.

359. In drawing this comparison, the intervenor is impermissibly defending the *Guidelines* based on post-promulgation facts and on bases that the DOJ did not expressly consider in its original reasoning process. That is contrary to *OEB*, *Goodis*, and *CCR* and the Court must therefore reject this argument altogether.

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[260] Harper Affidavit, Ex 1 at p 1121; Harper Affidavit, Ex 11 at p 12

[261] Sarlo Affidavit, Ex E at p 11: "… the amount is based on the needs of a second person in a household, whether that person is a child, a teenager or an adult".

[262] *Guidelines* at FN 5

[263] Thompson Cross at 92/15-96/8

[264] Finnie Caledon at pp 2-3 and FN 9 **[TAB 26],** Finnie Child Support Package at p 84 **[TAB 33]**

[265] Sarlo Affidavit, Ex F at p 5 re: income and tax variable and Appendix 1.

360. In any event, were the Court to examine this part of Professor Thompson's opinion, it will find that it is too speculative to warrant any weight.

361. Without properly evaluating the relevant contextual facts, Professor Thompson's comparisons are not reliable. Professor Sarlo considered undertaking a cross-jurisdictional analysis and concluded that he could not reach dependable conclusions without doing an unfeasible level of research.[266] The FLC and DOJ, for example, employed a team of consultants to work for years to do comparative analyses in the early 1990's. That kind of detailed work is necessary to draw meaningful comparisons.

362. Material differences across jurisdictions are long and varied. Some of those include: (1) tax rate assumptions; (2) definition of income available for child maintenance; (3) price levels of living expenses; (4) adjustments for particularly high or low living expenses; (5) inclusion of medical insurance or related out-of-pocket expenses; (6) inclusion of work-related child care expenses; (7) adjustments at low income levels; (8) adjustments for shared parenting; and (9) whether the system is mandatory or merely advisory (and the list can go on).[267]

363. We do not know the legal context, the economic situation, or the tax and benefit regime in these other jurisdictions.

364. For example, American guidelines do not appear to be constrained by the requirement to allocate child costs between the parents according to their means, as stipulated under the Limiting Principles.[268]

365. In any event, fundamentally, if such a constraint did apply, compliance with it can only be assessed by examining the parents' relative means after their contributions to child costs. Professor Thompson did not do that analysis, which would have been a monumental task.

366. It is difficult to compare net incomes in particular and it can be hard to establish whether a guideline is based on net or gross income, since many guidelines include definitions of income that are specific to isolating what is available for child support.

367. Further, American states with gross-income guidelines often incorporate assumptions about tax filing status and federal and state income tax rates. Some states account for local economic circumstances (high or low incomes or housing costs), many incorporate variations at low income levels, some include standard adjustments for NCP direct

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[266] Affidavit of Chris Sarlo sworn September 16, 2020 at Ex A [Sarlo Sur-rebuttal Affidavit] at para 6

[267] *Venhor* at pp 333-336 **[TAB 30]**

[268] Federal regulation does not prescribe which guidelines model a state must use. Instead, federal regulation allows states considerable flexibility in their guidelines. Specifically, states are not limited by the requirement that Guidelines call for parents to split the costs of children according to their respective means: *Venhor* at pp 328-329 **[TAB 30]**

spending, and most allow income deductions to recognize a parent's financial support of additional children.[269]

368. The cost of living and the relationship between a child support formula and government benefits is of particular concern. That interplay happens largely in the background of the formula, in a way that can be impossible to decipher from a surface comparison of table amounts.[270]

369. In respect of Quebec's regime, for example, we know that some government subsidies are not factored into CP income for purposes of comparing household well-being but we do not know which precise ones. As Professor Thompson put it, Quebec's explanation of how government subsidies are treated behind the surface of the formula is even "more obscure than the Federal technical report as to its precise data sources and calculations".[271]

370. In short, fundamental underlying assumptions impact the post-award CP and NCP living standards and render superficial comparisons unhelpful.[272] There is no meaningful reassurance that Professor Thompson's comparisons were apples to apples. They are a wholly unreliable manner of assessing the reasonableness, coherence, and transparency of the *Guidelines*.

371. What is more, Professor Thompson's comparator numbers are deceptive.

372. For his percentage of **gross** payor income, Professor Thompson alludes only to Wisconsin as a comparator and acknowledges by footnote that Wisconsin has a sliding scale as income rises. His other comparisons are to dated and now-replaced models. It takes the irrelevance of this comparative approach to the extreme to rely on after-the-fact **and** out-dated numbers.

373. Professor Thompson's net numbers suffer from further issues.

374. He provided a net percentage of income **range** for payor parents in Alberta: 10.9-13.9% for 1 child and 19.9-22.9% for 2 children. These numbers ignore an important factor.

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[269] *Venhor* pp 333-336; 343; and 351 **[TAB 30]**

[270] See, for example, Finnie Caledon at p 2 and FN 9 where Ross Finnie describes a 45% increase in the table amount from the original DOJ Consultant Model to a later DOJ version of the *Guidelines*. The increase was the result of the treatment of government subsidies but it was not possible to decipher precisely how the underlying calculations were altered. It would have been nice, Finnie noted, to be able to evaluate the detailed construction of the guidelines, such as the treatment of various tax credits when calculating the child's financial needs and the sharing of those costs between the two parents. That was simply not possible, given the lack of information then provided. **[TAB 26]**

[271] Thompson Cross at 175/14-175/25

[272] Professor Sarlo Sur-rebuttal at paras 3-5

375. The table amounts are derived from the DOJ Consultants' Revised **Fixed** Percentage Formula. Professor Thompson's presentation of a range, instead of a fixed percentage, discloses that there is an income dependent variable - the net percentage paid depends on the NCP's income.[273]

376. The DOJ's Technical Report and the description of the Formula, should result in a fixed percentage of net income of 16.7% for one child and 25.9% for 2 children,[274] which Professor Thompson understands.[275] This flows from the RFP Formula itself, which calls for a CP household with 2 children to have 170% of the net income of the NCP household. That percentage, which is the result of the 40/30 Scale, translates into certain fixed percentages of NCP income - namely, 16.7% for 1 child, 25.9% for 2 children, and so on.

377. Those are the net percentage values that correspond to those predicted by the mathematics of the RFP Formula as explained in the DOJ's Technical Report.[276] Those percentages were applicable to all incomes, and neither the DOJ Consultants nor the DOJ described the RFP Formula as creating ranges within the "fixed" Formula.

378. Professor Thompson's ranges, therefore, do not correspond to the RFP Formula because he glosses over the impact of the Ignored Benefits. More specifically, Professor Thompson ends up with a range, rather than a fixed percentage, of NCP net income because he did not equalize tax credits across the CP and NCP households, as called for in the RFP Formula. That step of equalizing tax credits is fundamental to fulfilling the Core Premise of equal living standards at equal incomes.

379. Appendix A to Professor Sarlo's Sur-rebuttal report evidences the application of tax credits in calculating the percentage of net payor income devoted to child support. This demonstration was done in the context of the original Newfoundland Illustration:

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[273] Sarlo Report at pp 28-30

[274] Sarlo Report at p 20 and FN 34: The fixed percentage table amount for one child is .4/2.4 of 16.7%. For two children, the amount generated by the formula is .7/2.7 or 25.9% of NCP net income. The denominators are the sum of the equivalence values for the number of people in the family plus one as per the Formula - see Sarlo Affidavit, Ex F at p 4

[275] Thompson Cross at 62/18-63/15

[276] Sarlo Affidavit, Ex F at pp 2-7

Case 1 - Government Benefits Included in Formula Evenly Split Between CP and NCP

	2019		2010	
	CP	NCP	CP	NCP
After Tax Income	$24,880	$20,853	$24,831	$20,486
Adjust for benefits paid in formula	(2,014)	2,014	(2,173)	2,173
Adjusted Net Income	22,867	22,867	22,659	22,659
Guidelines Award	4,212	(4,212)	4,452	(4,452)
Adj from above	2,014	(2,014)	2,173	(2,173)
Child Support Rec'd (Paid)	6,226	(6,226)	6,625	(6,625)
		-27.2%		-29.2%
Income Adj for Child Support Pymts	29,092	16,641	29,283	16,034
Income Ratio CP/NCP	1.75		1.83	

Case 2 - Case 1 Plus Split of all Benefits Excluded in Formula

	2019		2010	
	CP	NCP	CP	NCP
After Tax Income	$24,880	$20,853	$24,831	$20,486
Adjust for benefits paid in formula	(2,014)	2,014	(2,173)	2,173
Adjust for benefits o/s Formula	7,585	7,585	3,756	3,756
Adjusted Net Income	30,452	30,452	26,415	26,415
Guidelines Award	4,212	(4,212)	4,452	(4,452)
Adj from above for in Formula Amts	2,014	(2,014)	2,173	(2,173)
Adj from above for out of Formula Amts	7,585	(7,585)	3,756	(3,756)
Child Support Rec'd (Paid)	13,811	(13,811)	10,381	(10,381)
		-45.4%		-39.3%
Income Adj for Child Support Pymts	44,262	16,641	36,795	16,034
Income Ratio CP/NCP	2.66		2.29	
Government Benefits not included in taxable Income	$14,269	$901	$7,131	$381
If split equally between CP and NCP	$7,585	$7,585	$3,756	$3,756

380. Using the Newfoundland Illustration, Case 1 above shows the RFP Formula assumption that the tax credit and benefits at $25,000 of gross income were split evenly between the CP and NCP households. After tax income (**ATI**) was then adjusted to account for a reduction in the CP's and increase in the NCP's income to account for that deemed split of the available $4,356 or $2,173 each. This produces an adjusted net income (**ANI**) equalizing the CP's and NCP's position as the Formula purportedly intends.

381. Taking the analysis forward, the RFP Formula deems a transfer of the NCP's $2,173 portion of the tax credits and benefits back to the CP household. This ANI after the transfer shows the result of the resources received by the CP household under the RFP Formula. It therefore shows the actual financial position of the CP and NCP households according to the formula's underlying assumptions.

382. Those are the true income ratios and net percentage of income devoted to child maintenance. They are the numbers that approach the 1.7 ratio and 25.9% of net NCP income that application of the RFP Formula dictates for two children. [277]

383. In Case 2 above, as he did in his original Report, Professor Sarlo expands his adjusted net income analysis to assess the relative income ratios and the percentage of net income the NCP devotes to child support if additional available government benefits are factored into the formula (as the DOJ did in its original Newfoundland Illustration).[278]

384. The inclusion of such benefits in the analysis discloses the NCP devotes 39.3% of adjusted net income to child support in 2010 and 45.4% in 2019 (in this case with two children). Recall that Professor Thompson posited net percentage numbers of 19.9-22.9% and the RFP Formula calls for 25.9%.

385. These extraordinarily high percentages of NCP net income devoted to child maintenance illustrate the material economic effects of the DOJ's later decision to exclude the Ignored Benefits, yet still use a formula the DOJ Consultants designed with the intention that such benefits should be accounted for.

386. Professor Thompson's numbers do not reflect the realistic financial position of the CP's and NCP's post-divorce households.

387. The GIC at the time of promulgation, and the intervenor now, simply refuse to confront head-on the impact of the Ignored Benefits.

388. In short, Professor Thompson's attempted comparison to other jurisdictions fails because it is an impermissible and irrelevant after-the-fact analysis, because it is wholly unreliable, and because his numbers are misleading.

(b) Quebec is a More Relevant Comparison

389. The applicant's comparison to Quebec is more relevant.[279]

390. Quebec is the only province in Canada that did not adopt the *Guidelines* and instead, developed its own child support system. The Quebec guidelines apply to determine child support in divorce proceedings when both spouses are ordinarily resident in Quebec.[280]

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[277] The results are not precisely the 1.7/1.0 (CP/NCP) net income ratio the 40/30 Scale and RFP Formula solve to. The actual numbers are 1.83/1.0 and 29.2% in 2010, and 1.75/1.0 and 27.2% in 2019. The explanation for this difference is because the table amounts are not timely updated for yearly federal or provincial tax or benefit changes.

[278] These numbers reflect the NCP's income if they are given credit for half of the child benefits, as they were in the intact household.

[279] It detracts from Professor Thompson's impartiality that he would not concede that the Quebec guideline regime is the most relevant comparator: Thompson Cross at 219/9-219/23.

391. The Quebec Guidelines use the income of both parents to determine child support amounts and the share that each is expected to pay.[281] It is an income shares model that expressly honours the Limiting Principles requirement to share child costs according to the parents' relative means.

392. Although the Quebec Guidelines do not fully account for costs incurred by the NCP while the children are in their custody, an adjustment to child support is made as long as the NCP has the children at least 20% of the time. Time of custody is broken into three categories: "sole custody" where the children spend between 0% and 20% of their time with the NCP; "prolonged access" where the children spend between 20% and 40% of their time with the NCP; and "shared custody" where the children spend between 40% and 60% of their time with each parent. Direct NCP spending on the child is recognized where a parent has at least 20% residential custodial time.[282] As noted above, this treatment of NCP costs has a dramatic downward impact on child support awards in Quebec.

393. Further, in the Quebec Guidelines, NCP table support declines as a percentage of after-tax income as income increases (the regime is not linear). The Quebec percentages are notably lower at high incomes compared to a province that has adopted the *Guidelines*. For example, for an NCP earning $250,000 in Ontario the incremental rate (as a percentage of after-tax income) is 16.7% for one child and 25.9% for two.[283] However, in Quebec, the corresponding incremental rates are 8.44% and 11.34%. Those percentages continue to decrease as income rises and the Court has discretion to deviate from table amounts above $200,000 in income. The Quebec Guidelines acknowledge the common sense understanding that parents spend a declining percentage of disposable income on their children as income rises.[284]

394. The Quebec Guidelines make an attempt to accommodate new relationships for the NCP by allowing the court to decrease Quebec's table amounts where the NCP has an

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[280] *Divorce Act* at ss 2(1), 5, and 6 **[TAB 2]**: Individual provinces are empowered to enact their own guideline regime provided those guidelines: (i) are comprehensive; (ii) provide for the determination of child support; and (iii) deal with the matters referred to in section 26.1 of the *Divorce Act* (i.e., including the Limiting Principles); See: Regulation respecting the determination of child support payments, CQLR c C-25.01, r 0.4 [*Quebec Guidelines*] **[TAB 41]**; *Code of Civil Procedure*, CQLR c C-25.01 [Code of Civil Procedure] **[TAB 42];** and *Civil Code of Québec*, CQLR c CCQ-1991 [Civil Code] **[TAB 43];** Sections 585 to 596 of the *Civil Code* govern the support of children, with sections 587.1 to 587.3 implementing the child support rules. Sections 443 to 450 of the *Code of Civil Procedure* regulate the procedure for determining child support.

[281] Affidavit of Andrew Heft sworn June 10, 2013 and filed June 19 2014 at Ex A: Affidavit of Andrew H. Heft, sworn August 1, 2012 in support of an anticipated application for a declaration that the Federal Child Support Guidelines are ultra vires the federal Divorce Act, Exhibit A at p 2 [Heft Report]; Quebec Guidelines at s 3 **[TAB 41]**

[282] Heft Report at p 2

[283] Provided the Court does not vary that under s 4 of the *Guidelines*. Courts regularly apply the table awards even when NCP income exceeds $150K: *Baker* at para 41 **[TAB 18]**; See also *Ewing v Ewing*, 2009 ABCA 227 at paras 45-46(i) **[TAB 44]**.

[284] Heft Report at pp 3-4 and 6-7, Table 1, and Figure 1; *Quebec Guidelines* at s 10 **[TAB 41]**

obligation to support other children.[285] Quebec applies the principle that none of the NCP's children should receive preferential treatment in relation to the others.[286]

395. The Quebec Guidelines use basic child costs determined by experts to calculate child support amounts. The basic parental contribution covers nine recognized essential needs: food, lodging, communications, housekeeping, personal care, clothing, furniture, transportation and recreation. All of the children's needs are taken into consideration in establishing the table but the model is flexible enough to include the possibility of adding other child-related expenses to the amounts established in the table.[287]

(iii) Assumption of Equal Incomes does not Favour CP Household

396. Another aspect of the intervenor's anticipated argument warrants emphasis.

397. As we have seen, the very heart of the RFP Formula is the assumption of equal CP and NCP incomes. A POOI model needs a rule for establishing which percentage of obligor income is devoted to child maintenance at a given income level, for a given number of children. Canada's RFP Formula provides that answer through the assumption of equal incomes: the entire formula is designed by isolating the amount that an NCP must transfer to ensure equal living standards and equal sharing of child costs when the CP and NCP have equal incomes.

398. Professor Thompson now suggests that this fundamental technical assumption works in favour of NCP households and to the disadvantage of CP households,[288] even to the point that its impact counter-balances the consequences of all of the assumptions that work to the disadvantage of NCP households.[289]

399. The drafters did not weigh the assumption of equal incomes this way and, in fact, understood it otherwise:

> "… where the custodial parent has a lower income than the non-custodial parent, the child's standard of living will be tied directly to the standard of living of the lower income custodial parent. The formula minimizes the effects of the decline in the child's standard of living when the child is living with the lower income parent by calculating the amount of child support as if both parents had the same income as the non-custodial parent. Because the amount of the award is based on the assumption of equal incomes, **the award would, in most cases,**

[285] Heft Report at pp 7-8; The reason put forward in 14 (46%) of the 35 cases where the level of support was reduced from that established by applying the model was "other dependent children," either from a new union or a previous one: Report of the Follow Up Committee (Thompson Report at para 78 and FN 57) https://www.justice.gc.ca/eng/rp-pr/fl-lf/child-enfant/qcmodel/p1.html

[286] Heft Report at p 8

[287] Report of the Follow Up Committee (Thompson Report at para 78 and FN 57) https://www.justice.gc.ca/eng/rp-pr/fl-lf/child-enfant/qcmodel/p1.html; Thompson Cross at pp 174/20-175/3

[288] Thompson Report at paras 27-29

[289] See, e.g., Thompson Cross at 74/4-74/12

> **be higher than it would have been if it were based on a proportional division of the total of the non-custodial parent's income and the custodial parent's lower income**".[290] [emphasis added]

400. Again, contrary to *OEB*, *Goodis*, and *CCR*, the intervenor now seeks to defend the coherence of the *Guidelines* on a basis that was not considered by those who promulgated them. The argument goes beyond bootstrapping and entails the AGC now defending the *Guidelines* in a way that directly contradicts the drafters' logic at the time of development.

401. We are therefore remarkably far from evaluating the actual decision that was made and the reasons that underpinned it.

402. The decision made at the relevant time was that combining the 40/30 Equivalence Scale and the Revised Fixed Percentage apportioning method created the formula that **provided the greatest advantage to the CP household**.

403. In other words, the assumption of equal incomes was not a policy decision that worked to the disadvantage of the CP household and that counter-balanced a host of policy decisions that worked to the disadvantage of NCP households. Rather, it was the core assumption that allowed the FLC to justify a model that was uniquely designed to be generous to CP households.[291]

404. Based on an in-depth comparison and years of research by a team of consultants, the FLC confirmed that, of all potential models, the RFP Formula provided the greatest cushion against the decline in the child's standard of living that results on divorce.[292] To put this in the context of concrete numbers, the most generous average monthly award generated by the then-existing models was $277. The FLC received submissions advocating for equalizing standards of living through average child support awards of $756 per month. The FLC could not justify that extreme model but designed its own novel formula to raise awards above those generated through existing models. The assumption of equal incomes allowed the FLC to accomplish that objective, which resulted in an initial average award of $477.

405. The RFP Formula, which relies on the assumption of equal incomes, is what allowed the drafters to engineer the FLC's goal of increasing awards. It accomplished a remarkable

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[290] Sarlo Affidavit, Ex E at pp 12-13

[291] Sarlo Affidavit, Ex E at pp 68-71 and 81-85. It is also the **assumption** of the CP's income that allows for one-sided disclosure obligations. This in itself creates serious issues of imbalance. It is a win for the CP, but a corresponding loss for the NCP, in terms of simplicity, time, and expense. It also obscures the determination of the amount that the CP should spend on the child and how that should be shared.

[292] Sarlo Affidavit, Ex E at p 84

increase in average award from $277 to $477, **before** its later decision to exclude the Ignored Benefits or add on the double counted section 7 expenses.[293]

406. This is the regime that Professor Thompson now seeks to defend as being fundamentally in favour of NCP households and to the disadvantage of CP households.

407. Implicit in this new argument is the notion that this same model could have been adopted but with a different assumption about the spouses' incomes - one more in line with the statistics that CP's tend to earn less than NCP's.

408. That premise is wrong. Absent the assumption of equal incomes, there is no Revised Fixed Percentage Formula.[294] The RFP is defined by, or synonymous with, the equal income assumption.

409. The choice was not between the RFP Formula with an assumption of equal incomes and an RFP formula with an assumption of unequal incomes. Rather, the choice was between the Revised Fixed Percentage Formula with that necessary core assumption or some other approach to the formula altogether.

410. The plausible alternative would be a formula based on a proportional division of the total of both the NCP's and the CP's (lower) income. According to the FLC, based on their years of research, that alternative model incorporating the CP's lower income would have produced lower awards. In other words, the FLC understood that CP's tended to earn less than NCP's[295] and selected the assumption of equal incomes apportioning method because it was how they could justify a regime that provided the most generous possible award to the CP household.

411. Professor Thompson now takes issue with the fact that this model, like all continuity-of-marginal-expenditure models, implicitly assumes an unrealistic capacity for CP's to contribute to their child's standard of living. In other words, such models do too little, in Professor Thompson's view, to address the economic consequences of marriage breakdown. He effectively argues that, because the *Guidelines* do too little (in his view) to address poverty, they cannot be unreasonable. That is a conclusion that does not logically follow from the stated premise.

412. In summary, equal incomes is not an assumption that works to the benefit of the CP household. Rather, it is the apportioning method that the DOJ used to construct a novel regime that increased awards above those generated by existing models and allowed for one-sided disclosure obligations, all to the benefit of CP households.

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[293] Sarlo Affidavit, Ex G at pp 98-100
[294] See, e.g., Thompson Cross at 44/23-46/14
[295] See, e.g., Sarlo Affidavit, Ex E at pp 13 and 54

413. It is most accurately described as the core idea that animates the mathematical formula. Under the core formula, if we do not know how the household standards of living are supposed to compare, then we cannot solve the equation. The drafters selected the least contentious assumption by solving the formula by deeming that the standards of living should be equal after child support when the parents' incomes are equal beforehand.

414. The AGC's new position in this application begs the question: how would the RFP apportioning method solve for non-equal incomes?

415. Professor Thompson agrees that a formula based on actual incomes would amount to an income shares approach.[296] There is no reason to believe such a formula would be more generous to the CP household (the income shares models studied at the relevant time produced lower awards).[297] And, yet, Professor Thompson espouses that alternative as a way to fix the existing regime, which he views as unfair to CP households.[298] Professor Thompson's critique of the assumption of equal incomes simply misses the point that the FLC adopted this technical assumption to justify crafting the regime that would prove as generous as possible to the CP household.[299]

(iv) Holistic Empirical Evaluation of the *Guidelines*: Major Discrepancy Between the Stated Design and the Outcome

416. We have seen that the FLC studied a number of potential formulas and struck out on its own to design a regime that would be more generous to CP households. Even in 1995 when the FLC announced that original iteration of the RFP Formula, it was an outlier in its generous approach toward CP households - for example, the 40/30 Scale was a high estimate of child costs, it was applied in a linear fashion, and the RFP Formula apportioned child costs in a way that led to relatively high awards.

417. The DOJ then evolved that regime by excluding the Ignored Benefits, implementing the section 7 add-on regime, and assuming that NCP's do not spend directly on their children, all of which moved the formula significantly further in favour of CP households.

418. The record in this Application establishes that the effect of all of those decisions in favour of CP households can be quantified. Professor Thompson criticizes that evidence without offering any alternative empirical analysis.

419. The legal test, however, requires something concrete. The *Guidelines* were promulgated in the context of important legal constraints - the overall scheme of the *Divorce Act*

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[296] Thompson Cross at pp 44/16-46/3
[297] Sarlo Affidavit, Ex G at pp 98-100
[298] Thompson Cross at pp 57/2-58/4, 84/5-84/22, and 98/5-99/4 - he describes the *Guidelines* regime as inadequate
[299] Thompson Cross at pp 59/15-61/6

limits the extent to which the *Guidelines* can blend child and spousal support, and the Limiting Principles require that the NCP transfer only their proportionate share of child costs and not something more. The allowable margin of appreciation must reflect these constraints.

420. In assessing whether the *Guidelines* fall within that margin of appreciation, it is helpful to refer to tangible numbers. As noted, it is not this Court's task to trust or assume that the formula is reasoned and proves out; the task is to review and confirm whether that is the case.

421. In Section 7 of his original Report, Professor Sarlo tests the RFP Formula as the FLC tested potential formulas during the development process.

422. Professor Sarlo began by replicating the DOJ's own analysis in the Newfoundland Illustration. That Illustration shows: (1) how the RFP Formula calculates deemed expenditures on children (according to the 40/30 scale); and (2) compares the post-award standard of living of both households.

423. Professor Sarlo then, using logical, supported, and reasonable assumptions, replicates and expands the analysis to include: (1) NCP costs; (2) section 7 expenses; (3) savings; (4) a 30/20 equivalence scale; and (5) spousal support.

424. Notably, Professor Thompson neither misunderstands, nor critically analyzes, how the RFP Formula was applied by either the DOJ in its Newfoundland Illustration or by Professor Sarlo in his expanded examples. In addition, Professor Thompson agrees with many of the factual points made by Professor Sarlo (e.g., NCP's regularly spend directly on their children).

425. This Court may be confident in Professor Sarlo's numbers.

426. Beginning with the Newfoundland Illustration, as noted, the DOJ included government benefits in comparing standards of living and found that the CP household is 11.1% better off than the NCP household. In other words, an application of the base Formula does not meet its stated objective of an equal financial situation if the parents start with equal income.

427. Professor Sarlo updated that illustration to 2010 taxes and benefits in Exhibit 9 of his Original Report and again for 2019 in his 2020 update. Because of increasingly material child related benefits since 1997, the CP household is 30% better off in 2010 and 45% better off in 2019. These mathematical results are a far way off from the DOJ's stated objective of equal standards of living at equal incomes.

428. The DOJ's Newfoundland Illustration forms the template for Professor Sarlo's further empirical analyses.

429. Professor Sarlo's definition of "means" or "relative ability to contribute" is central to his analysis and conclusions. The "should pay" amount is based on the assumed child costs remaining after removing government benefit/deductions related children. In other words, and as the DOJ and FLC originally stated, the amount to be shared by the parents was that amount left after the application of government benefits towards child costs.

430. In Exhibit 9 the after-tax, after-benefit, and after Guidelines award income for the CP is $36,414. The RFP Formula deems 41.2% (.7/1.7) of that amount, or $14,995, is spent on children.

431. The "should pay" amounts in Professor Sarlo's analysis are based on the CP's and NCP's relative after-tax income. The should pay number is then based on each parent's respective proportion of total combined after tax income. The amount of assumed child costs left for the parents to cover is the amount remaining after applying government benefits to the assumed child costs.

432. The "do pay" amounts are based on what the NCP and CP actually contribute to the costs. The NCP's do pay figure is the *Guidelines* award. The CP's do pay amount is the net amount left after deducting the government benefits and NCP's payment from the assumed child costs. For the example in Exhibit 9, the CP's do pay number is -$552. The figure is negative because the combination of the NCP's child support payment and the child related benefit money exceed the assumed costs. Professor Sarlo's update in 2020 shows that the combined NCP child support and government benefits exceed the costs by $3,742.

433. Put another way, the CP receives a transfer from the NCP in excess of child costs and is not required to contribute any of their own income or resources to the cost. Remember, this is the base case under the formula where, at assumed equal incomes, equality is the claimed objective. Both the DOJ's original Newfoundland Illustration, and Professor Sarlo's updates of that analysis, show that the formula's base objective of equality at equal incomes is not achieved.

434. Professor Sarlo then expands the Newfoundland Illustration to other scenarios:

> Sarlo Report, internal Exhibit 10 at p 61: Where the CP earns $25K and the NCP earns $75K, the NCP's **proportional** share of net child costs would be 71.9% of $7,083, or $5,089 and the CP's proportional share would be 28.1% of $7,083, or $1,993. Under the RFP Formula that discounts the Ignored Benefits, the NCP's **actual** share is 172%, or $12,180 and the CP's actual outcome is the receipt of a transfer beyond child costs in the amount of $5,097. It is noteworthy here that despite starting with a 3-1 NCP to CP income difference, after accounting for government benefits and the Guidelines award, the CP's respective after-tax, benefits and award incomes ($44,142) exceeds the NCP's ($41,099).

> Sarlo Report, internal Exhibit 11 at p 63: Where the CP earns $25K, the NCP earns $75K, and we account for a mid-range spousal support award under the SSAG's, the NCP's **proportional** share of net child costs would be 68.5% of $8,736, or $5,981 and the CP's proportional share would be 31.5% of $8.736, or $2,755. Under the RFP Formula that discounts the Ignored Benefits, the NCP's **actual** share is 139.4%, or $12,180 and the CP's actual outcome is the receipt of a transfer beyond child costs in the amount of $3,444.
>
> Sarlo Report, internal Exhibit 12 at p 65: Where the CP earns $50K and the NCP earns $350K, and we account for a mid-range spousal support award under the SSAG's, the NCP's **proportional** share of net child costs would be 64.2% of $55,381, or $35,544 and the CP's proportional share would be 35.8% of $55,381, or $19,837. Under the RFP Formula, the NCP's **actual** share is 88.7%, or $49,116 and the CP's share is 11.3%, or $6,265.

435. Appendix 2 to the Sarlo Report shows more examples where the NCP pays a disproportionate share of child costs. It is only in exceedingly rare circumstances when the parents share the deemed child costs relatively proportionately and, even then, that is still based on the unrealistic assumptions that the NCP does not spend directly on the children, beyond the child support award, the CP has not re-partnered, the NCP has no other children to support, there are no savings, child costs are linear, and there are no section 7 expenses.[300]

436. When those unrealistic assumptions are replaced with more realistic assumptions, the disconnect between the RFP's stated design and its actual outcome is exacerbated.

437. Looking at a couple of discrete examples amply illustrates these conclusions.

438. For instance, in scenario 8 on Attachment 1, the CP and NCP have in fact equal incomes, and the should pay – do pay numbers are close to equal on the base formula. Notably, that rough equality on the should pay – do pay numbers is achieved at an income level of $90,000, and where the availability of government benefits is limited.

439. The moment any additional assumptions are added in, the results immediately skew to favour the CP. For instance, with the NCP cost recognition, and split of increased costs, the results are not equality. Rather, the do pay amount for the NCP is over double that of the CP at $25,677 NCP to $11,343 CP. That do pay differential rises to 3-1 with the addition of section 7 add-ons. Once savings and the 30/20 scale are added, the NCP and CP do pay ratio rises to about 12 to 1.

440. Recall that Professor Sarlo's should pay / do pay analysis mimics the one undertaken by the DOJ in the Newfoundland Illustration - the analysis simply extrapolates that logic out to a number of different scenarios. The DOJ devised this manner of testing the RFP Formula. Professor Thompson seeks to diminish that by noting that the Newfoundland

[300] Sarlo Report at p 65.

Illustration only appeared in an early draft of the Technical Report. Because it was later deleted, it has no official status or DOJ approval.[301]

441. Whatever the DOJ's reasons for deleting it from the final Technical Report, the Newfoundland Illustration is one viable way of evaluating the RFP Formula. Among other things, it is consistent with what the FLC did throughout its evaluation process. Namely, it uses the 40/30 Scale to isolate the deemed child costs, calculate the parents' respective shares of those costs, and compare the post-award standards of living. In doing that, the Newfoundland Illustration includes all government child benefits in the CP household resources. Those are, after all, the **actual** resources of the CP household. In its previous empirical analyses, the DOJ also included government child benefits in the CP household means.[302]

442. In short, Professor Thompson's critiques boil down to him imploring that this Court continue to ignore the Ignored Benefits. That approach, however, does not allow this Court to evaluate the internal coherence of the *Guidelines*. The Newfoundland Illustration, and related should pay / do pay analyses, provide that necessary information by showing the concrete impact of the decision to exclude the Ignored Benefits.

443. Professor Thompson has also suggested that the Newfoundland Illustration is unsound because it yields unrealistic results, particularly in the example where the CP has little or no earned income.

444. He suggests that it is anomalous that a CP with no earned income is deemed to only spend .4118 of all government benefits and child support on the two children, when those amounts are intended to be entirely spent on the child.[303]

445. Professor Thompson highlights that those at the poverty line spend all their income. That is surely true. But it does not mean that every dollar spent is solely for the children. The CP must still spend on their own food and shelter and the like.

446. The theory underpinning the *Guidelines* is that all household resources are shared, spent jointly, and in a linear fashion. The estimate that .4118 of household resources is spent on two children is the result of applying the RFP Formula (and the 40/30 Scale in particular).

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[301] Thompson Report at para 82

[302] For example, in evaluating relative well-being post-award, the DOJ Consultants noted that most models left low income CP households at higher standards of living than NCP households precisely because of "important" government benefits and child tax credits available to CP households": Sarlo Affidavit, Ex E at pp 57-58. Those important government benefits were plainly considered within the CP household's resources for purposes of evaluating relative standards of living.

[303] See, e.g., Thompson Report at para 85

447. The Newfoundland Illustration applied when the CP has no earned income simply illuminates the problem of linearity at the low end of the scale. As we have seen, the DOJ did not deviate from linearity at either low or high incomes. The result is that the *deemed* expenditures on children are .4118 of CP resources (in the case of two children) at all income levels.

448. Professor Thompson's observation that this yields odd results is simply a comment on how the RFP Formula functions.

449. A reasonable formula should produce defensible results in a number of different scenarios. Professor Sarlo has laid bare the problematic empirical results that flow from the RFP Formula in a number of scenarios, including in the example where the CP has no earned income.

450. Taken as a whole, Professor Sarlo's should pay / do pay analyses, which are based on the DOJ's Newfoundland Illustration, confirm that the math underlying the RFP Formula simply does not add up.[304] Because of the Ignored Benefits, the NCP regularly pays a substantially disproportionate share of the deemed child costs.[305] When that analysis is expanded to include more variables, the discrepancy between the formula's stated design and actual awards increases.[306]

V. CONCLUSION

451. The *Guidelines* that the GIC enacted are inconsistent with the applicable constraints.

452. The only reason to include the Limiting Principles is to place a justiciable limit on the GIC's discretion in promulgating child support guidelines. Flowing from the *Divorce Act* as a whole and the Limiting Principles in particular, awards must be: (i) for the maintenance of children of the marriage; and (ii) based on the parents' relative abilities to contribute to that maintenance.

453. The *Guidelines* do not satisfy those conditions precedent - they call for awards that provide for more than the maintenance of children and require the NCP to pay a disproportionate share of child costs. Some will view that outcome as the achievement of a noble cause; others will question whether a regime designed to maximize the transfer to the CP household represents wise or fair policy, much less one that is truly in the child's best interests.[307] This Application is not the forum for that debate. The legal question here is narrower. Child costs may be difficult to isolate and estimate but that is the task prescribed by the *Divorce Act* and Limiting Principles. The broader task of

[304] Sarlo Report at p 51
[305] Sarlo Report at pp 60-64
[306] Sarlo Report at pp 65-68
[307] See, e.g., Fudging Failure at FN 16 **[TAB 27]**

addressing the costs of marriage and any lost earning opportunities related to child rearing is left for spousal support.

454. There are many ways that the DOJ could have estimated child costs and set a rule for how the parents would share those. The DOJ selected the 40/30 Scale and the RFP Formula. Those decisions set the bounds of the margin of appreciation - they provide a concrete measure of child costs and they tell us how the apportionment of those costs should play out. The *Guidelines'* failure according to the DOJ's own design renders them unreasonable.

455. The decision to exclude the Ignored Benefits is incoherent and indefensible. It means that NCP's, particularly those most vulnerable at the low income level, regularly (and by design) pay a disproportionate amount of child costs and have a lower standard of living. The extent of this mismatch between design and outcome and compliance with the Limiting Principles is significant.

456. The section 7 add-on regime is a further inherent design flaw. Every add-on expense entails double counting as it requires the NCP to pay both a share of the amounts actually incurred **plus** a double counted portion of the average cost of those expenses. This double counting was a known defect that the DOJ adopted to maximize the funds available within the CP household.

457. The assumption that NCP's do not spend any money directly on their children when they are with them is another decision that defies common sense and works dramatically in favour of CP households. That decision is not fixed through the undue hardship test. Rather, the design of that test does not relate to the logic or purpose of child support and sets an illogical and prohibitively high bar for decreasing the table award.

458. Further, according to the preponderance of reliable evidence, the application of the 40/30 Scale straight across the board leads to excessive child support amounts outside the low income context, especially for younger children.

459. The *Guidelines* do not do what they are supposed to do (they do not achieve their Core Premise). They are also inconsistent with the Limiting Principles. The *Guidelines* are therefore unreasonable based on their core underlying assumptions.

460. That the *Guidelines* allow for the unequal treatment of the NCP's children from different families is a further indication of an unreasonable overall regime.

461. Viewed as a whole, the *Guidelines* do not deliver on the task of balancing the interests of the children, the CP, and the NCP. Instead, they create clear winners (CP's and their circle) and losers (NCP's and their circle). That outcome needs to flow from and be consistent with the enabling regime. It does not. The *Divorce Act* calls for a more balanced outcome.

462. The test for reviewing subordinate legislation rightly focuses on both the outcome and the underlying logic. Breaks in logic are important because they signal a decision maker who engineered a result at the expense of coherence, which, in turn, signals an excess of authority. After all, if the result were justified within the ambit of the authority conferred, there would be no need to fudge the underlying logic. The *Guidelines* are based on several crucial inconsistent lines of reasoning:

(a) The DOJ represented that the 40/30 Scale is based on empirical research when it is not and that misleading notion is carried forward into the *Guidelines* to this day;

(b) The economic theory of **joint** consumption and **household** standards of living underpins the formula, yet the Ignored Benefits can only be excluded by purporting to isolate spending on the child and the child's standard of living;

(c) The 40/30 Scale includes the average costs of all conceivable expenditures on children, yet section 7 allows for some of those same expenses to be covered in full (in addition to the average amount already built into the base award);

(d) The DOJ ostensibly rejected a standards of living apportioning method, yet adopted that very framework in a different context, for the purpose of making it difficult to decrease the presumptive table award; and

(e) The DOJ espouses simplicity and says the *Guidelines* are based on that objective when, in reality, they are only superficially simple (the underlying math and logic are complicated and often incoherent) and simplicity was adopted only when it favoured CP households and rejected when it might favour NCP households.

463. The *Guidelines* are also poorly explained. The information that the DOJ made publicly available is scant and it is hard to understand the logic and math that underpins the RFP Formula. That is notable given that the DOJ provided comparatively detailed evaluations of the formulas that it considered *but rejected*. The deletion of the Newfoundland Illustration from the Technical Report is an important example of the paucity of information that would allow for a robust evaluation of the RFP Formula. It is a reasonable inference that the DOJ did not include that kind of empirical evaluation of the RFP Formula because there is such a notable disconnect between what the Formula is supposed to do and what it does in reality. The AGC could and should have adduced evidence in this Application to rebut this reasonable inference.

464. The intervenor's approach to defending the *Guidelines* in this Application is unpersuasive. Professor Thompson's extra-jurisdictional comparisons are an impermissible attempt to defend the *Guidelines* on a basis that the DOJ did not rely on at the time of promulgation. Those comparisons also suffer from a lack of reliability.

465. Similarly, Professor Thompson's suggestion that the assumption of equal incomes works in favour of NCP households and therefore balances out the *Guidelines* is incorrect in a very telling way. The assumption of equal incomes is effectively synonymous with the RFP Formula. It is **the** core technical assumption that allowed for this guideline regime. That regime was uniquely designed for the express purpose of creating awards that were **more generous to CP households** than any then-existing regime. Professor Thompson nonetheless critiques this regime as doing too little for CP households. He would prefer something even more generous but, again, this Application is not the forum for the policy debate about whether to amend the *Divorce Act* and implement the theoretical "equal standards of living regime" or something akin to it.[308]

466. This Application is focused on the policy currently reflected in the *Divorce Act* and Limiting Principles, and the decisions and rationales of the DOJ reflected in the existing *Guidelines*.

467. The DOJ described the RFP Formula differently than Professor Thompson does now. It acknowledged that the RFP Formula was new, was designed to be as generous to CP households as possible, and succeeded in that goal by calling for child support awards that were higher than any other formula that the DOJ studied (even *before* the decision to exclude the Ignored Benefits and add section 7). It is also the assumption that allows for one-sided disclosure obligations, with all the benefits to the CP household (and costs to the NCP household) that entails. Under this regime, contrary to the Limiting Principles, neither the total resources available to support the child, nor the parents' relative resources, is meaningfully determined.

VI. RELIEF REQUESTED

468. The Applicant Roland seeks:

(a) a determination and ruling that the *Guidelines* are *ultra vires* the *Divorce Act*, or unlawful, invalid or illegal, and are of no force and effect and should not be applied;

(b) the costs of this Application per the Court's discretion, including on an elevated basis if found to be warranted; and

[308] Like the "sliding supplement" regime discussed by Ellman in Fudging Failure at p 186 **[TAB 27]**

(c) such further and other relief as this Honourable Court may deem just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 2nd day of October, 2020.

JENSEN SHAWA SOLOMON DUGUID HAWKES LLP

Per: _____

Laura Warner
Counsel for the Applicant, Roland Auer

Estimated Length of Argument: 6 hours
Calgary, Alberta

VII. LIST OF AUTHORITIES

1. *Federal Child Support Guidelines*, SOR/97-175
2. *Divorce Act*, RSC 1985, c3 (2nd Supp)
3. *Strickland v Canada (Attorney General)*, 2015 SCC 37
4. *Auer v Auer*, 2018 ABQB 510
5. *Auer v Auer*, 2018 ABCA 409
6. *Ontario (Energy Board) v Ontario Power Generation Inc.*, 2015 SCC 44, [2015] 2 S.C.R. 147
7. *Canadian Council for Refugees v Canada (Immigration, Refugees and Citizenship)*, 2020 FC 770
8. *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65
9. *Katz Group Canada Inc v Ontario (Health and Long-Term Care)*, 2013 SCC 64
10. *Innovative Medicines Canada v Canada (Attorney General)*, 2020 FC 725
11. *R v Imperial Tobacco Canada Ltd.*, 2011 SCC 42
12. *Montréal (City) v Montreal Port Authority*, 2010 SCC 14
13. *Doctors Hospital v Ontario (Minister of Health) (1976)*, 12 OR (2d) 164 (Div. Ct.) (ONSC)]
14. *Multi-Malls Inc v Ontario (Minister of Transportation & Communications)*, [1976] OJ No 2288 (ONCA)
15. *Canada (Attorney General) v Almon Equipment Limited,* 2010 FCA 193
16. *City of Arlington v. Federal Communications Commission (2013)*, 569 US 290 (US Sup Ct)
17. *Gach v Brandon (Welfare) (1973)*, 35 DLR (3d) 152 (MBCA)
18. *Francis v Baker*, [1999] 3 SCR 250
19. *FJN v JK*, 2019 ABCA 305
20. *West Fraser Mills Ltd v British Columbia (Workers' Compensation Appeal Tribunals*, 2018 SCC 22
21. *Gitxaala Nation v Canada*, 2016 FCA 187

22. *Canada v Kabul Farms Inc*, 2016 FCA 143

23. *CMRRA-SODRAC Inc v Apple Canada Inc*, 2020 FCA 101

24. *Entertainment Software Assn v Society of Composers, Authors and Music Publishers of Canada*, 2020 FCA 100

25. *David Suzuki Foundation v Canada Newfoundland and Labrador Offshore Petroleum Board*, 2020 NLSC 94

26. Ross Finnie, "Good Idea, Bad Execution: The Government's Child Support Package" (1996) The Caledon Institute of Social Policy at FN 15 [Finnie Caledon].

27. Ira Mark Ellman, "Fudging Failure: The Economic Analysis Used to Construct Child Support Guidelines" (2004) 2004:1 U.Chi.Legal F., 167

28. D.A. Rollie Thompson, "The Chemistry of Support: The Interaction of Child and Spousal Support" (2006) 25 CFLQ 252

29. Ross Finnie, "Child Support Guidelines: An Analysis of Current Government Proposals" (1995) 13 CFLQ 145

30. Jane C. Venhor, "Child Support Guidelines and Guidelines Reviews: State Differences and Common Issues," 47 Fam LQ 327

31. Douglas W. Allen and Margaret F. Brinig, "Child Support Guidelines: The Good, the Bad, and the Ugly" (2011) 45 FLQ

32. R. Mark Rogers, "Wisconsin Style and Income Shares Child Support Guidelines: Excessive Burdens and Flawed Economic Foundation" (1999) FLQ 135

33. Ross Finnie, "The Government's Child Support Package", 15 CFLQ 79

34. Matthew Gray and David Stanton, "Costs of Children and Equivalence Scales: A Review of Methodological Issues and Australian Estimates" (2010) 13:1 Australian Journal of Labour Economics 99

35. R. Thompson, "Of Camels and Rich Men: Undue Hardship, Part II" (Ottawa: Department of Justice, September 1998)

36. *Auer v Auer*, 2015 ABQB 67

37. Douglas W. Allen, "The Effect of Divorce on Legislated Net-Wealth Transfers", (2007) 23:3 JLEO 580

38. D.A Rollie Thompson, “The Second Family Conundrum in Child Support” (2001) 18:2 Can J Fam L 227.

39. *Montreal v Arcade Amusements Inc.*, [1985] 1 SCR 368

40. *679619 Ontario Limited (Silvers Lounge) v Windsor (City)*, 2007 ONCA 7

41. *Regulation respecting the determination of child support payments*, CQLR c C-25.01, r 0.4 and 3 [*Quebec Guidelines]*

42. *Code of Civil Procedure,* CQLR c C-25.01 [*Code of Civil Procedure*]

43. *Civil Code of Québec*, CQLR c CCQ-1991 [*Civil Code*]

44. *Ewing v Ewing*, 2009 ABCA 227

45. Sections 585 to 596 of the *Civil Code* govern the support of children, with sections 587.1 to 587.3 implementing the child support rules. Sections 443 to 450 of the *Code of Civil Procedure* regulate the procedure for determining child support.