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JUDICIAL CENTRE	EDMONTON
PLAINTIFF/APPLICANT	ROLAND NIKOLAUS AUER
DEFENDANT	AYSEL IGOREVNA AUER
INTERVENOR	ATTORNEY GENERAL OF CANADA
DOCUMENT	**BRIEF OF THE ATTORNEY GENERAL OF CANADA ON *VIRES* APPLICATION**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Attorney General of Canada Department of Justice Canada Edmonton Regional Office EPCOR Tower 300, 10423 – 101 Street NW Edmonton, Alberta T5H 0E7 **Attention: Cameron G. Regehr / Tessa la Bastide** Tel: (780) 224-4378 Fax: (780) 495–8491 Counsel for the Attorney General of Canada

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I. Overview

1. For the past 23 years, courts across Canada have interpreted and applied the *Federal Child Support Guidelines*, SOR/97-175 (the ***"Guidelines"***)[1] on a daily basis to determine child support obligations. The applicant Roland Nikolaus Auer ("**Mr. Auer**") submits that these proceedings (no doubt in the hundreds of thousands) involved the application of unlawful legislation. While he seeks a remedy that would only apply to this proceeding,[2] an *ultra vires* determination in relation to the *Guidelines* would undoubtedly have far-reaching consequences beyond this litigation.

2. The crux of Mr. Auer's argument is that the application of the *Guidelines* produces child support awards for non-custodial parents[3] that are too high. He asks this Court to embark on a deep dive into the formula used to determine presumptive child support amounts under Schedule 1 of the *Guidelines* with the intention of showing that they are unfair to non-custodial parents and reflect poor policy decisions by the Governor in Council (**"GIC"**). While the Attorney General of Canada (**"AGC"**) disputes these points, Mr. Auer's issues are wholly irrelevant to the question of *vires*. Issues related to the efficacy of the *Guidelines*, whether they achieve their statutory objectives, whether they generate awards that are too high or too low, whether they were driven by some hidden agenda or motivation, and whether they involve a reasonable balancing of competing interests all lie outside the scope of the present application.

3. Mr. Auer's application is based on a fundamental misapprehension as to the nature of a *vires* challenge. To succeed, Mr. Auer must establish that the *Guidelines*, as a whole, are extraneous, irrelevant or completely unrelated to their enabling legislation, the *Divorce Act*, RSC 1985, c3 (2nd Supp) (the ***"Divorce Act"*** or the ***"Act"***). This is a question of statutory interpretation. As subordinate legislation, there are no reasons put forward by the GIC that can be reviewed for

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[1] *Federal Child Support Guidelines*, SOR/97-175 [the *Guidelines*] **[AGC Authorities TAB 1**]. Tab 1 of the AGC's Authorities are the *Guidelines* as promulgated by the Governor in Council on May 1, 1997. Tab 1 of Mr. Auer's Authorities are the consolidated *Guidelines,* as amended to September 9, 2020 [**Applicant's BOA TAB 1**].

[2] Mr. Auer seeks "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": Mr. Auer's Brief of Argument filed October 2, 2020 [Auer Brief] at para 468(a). In prior related proceedings, he has stressed the "private" nature of this litigation and that he is not seeking a "public remedy": see *Auer v Auer*, 2018 ABCA 409 [*Auer* 2018 ABCA] at para 5 **[Applicant's BOA TAB 5]**.

[3] For the purposes of this application, the term "non-custodial parent" refers to a parent who exercises a right of access to, or has physical custody of, a child for less than 40 per cent of the time over the course of a year: *Guidelines*, *supra* note 1 at s 9 **[Applicant's BOA TAB 1]**.

their transparency, intelligibility and justifiability. The issue before this Court is whether the *Guidelines* are wholly unrelated to the statutory mandate conferred by Parliament or egregiously inconsistent with the purposes of the *Divorce Act*. This question is assessed on a standard of reasonableness.

4. Parliament provided broad discretion to the GIC to establish child support guidelines under the *Divorce Act*. This discretion was to be guided by the principle that spouses have a joint financial obligation to maintain the children of the marriage based on their relative abilities to contribute. The *Guidelines* were enacted by the GIC consistently with this principle. The Supreme Court of Canada (**"SCC"**) stated as much fifteen years ago in *Contino v Leonelli-Contino.*[4] This is far from an egregious case where the *Guidelines* might be found to be unrelated to their statutory purpose as set out in the *Divorce Act.*

5. Mr. Auer has failed to discharge his high burden of establishing that the *Guidelines*, as a whole, are irrelevant, extraneous or unrelated to their statutory purpose. He misinterprets s. 26.1(2) of the *Divorce Act* to impose narrow limits on the amount of child support awards ordered under the *Act.* He invites this Court to assess whether the *Guidelines* achieve the statutory goals that he misapprehends s. 26.1(2) of the *Act* to require. And he asks this Court to engage in a policy-balancing exercise to determine whether the *Guidelines* appropriately consider varying interests, particularly those of non-custodial parents. It would be wholly inappropriate for this Court to enter into the policy debate sought by Mr. Auer or to engage with his questions as to whether the *Guidelines* successfully achieve their goals.

6. The AGC does not simply ask this Court to rubber-stamp the *Guidelines.* But Mr. Auer's attempt to impose restrictions on the GIC beyond any constraints provided by Parliament in the *Act* must be rejected. While acknowledging that there is no single true cost of a child, Mr. Auer argues that the GIC "set bounds" on its discretion by using a particular means of estimating child costs in its child support table formula. Similarly, Mr. Auer argues that the GIC went beyond its statutory mandate in adopting a table formula that excluded child-related government benefits in calculating income. These are restrictions that Mr. Auer, and not Parliament, wishes to impose on

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[4] *Contino v Leonelli-Contino,* 2005 SCC 63 [*Contino*] at para 32 **[TAB 2]**: "The underlying principle of the Guidelines is [s. 26.1(2) of the *Divorce Act*]. The Guidelines reflect this principle through [their] stated objectives[.]"

the GIC. Indeed, Mr. Auer entirely glosses over the actual provisions through which Parliament delegated authority to the GIC to establish child support guidelines: s. 26.1(1) & (2) of the *Divorce Act.*

II. Background/context

A. Child support in Canada before the *Guidelines*

7. Statutory child support has been a feature of Canadian family law since 1885.[5] As recently recognized by the Supreme Court of Canada in *Michel v Graydon*, 2020 SCC 24:

> The law has long recognized that a parent's obligation of support to their child "arise[s] automatically, upon birth" and that these obligations "have come to be refined, quantified and amplified" through statute [.][6]

8. Prior to the 1997 amendments to the *Divorce Act* and promulgation of the *Guidelines*, the *Divorce Act* was significantly amended in 1985. Pursuant to section 15(2), Parliament empowered courts to order support payments (for either a spouse or a child) as follows:

> **15(2)** A court of competent jurisdiction may, on application by either or both spouses, make an order requiring one spouse to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump sum and periodic sums, as the court thinks reasonable for the support of
>
> **(a)** the other spouse;
>
> **(b)** any or all children of the marriage; or
>
> **(c)** the other spouse and any or all children of the marriage.[7]

9. Parliament also specified the following objectives for support orders under the 1985 *Divorce Act:*

> **15(8)** An order made under this section that provides for the support of a child of the marriage should
>
> **(a)** recognize that the spouses have a joint financial obligation to maintain the child; and
>
> **(b)** apportion that obligation between the spouses according to their relative abilities to contribute to the performance of the obligation.[8]

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[5] *Michel v Graydon*, 2020 SCC 24 [*Michel*] at para 45 **[TAB 3]**.
[6] *Ibid* **[TAB 3]**.
[7] *Divorce Act*, RSC 1985, c 3 (2nd Supp), [*Divorce Act* as enacted in 1985] at s 15(2) **[AGC Authorities TAB 4**]. Tab 4 of the of the AGC's Authorities is the *Divorce Act*, as enacted in 1985. Tab 2 of Mr. Auer's Authorities is the current *Divorce Act*, as amended. **[Applicant's BOA TAB 2].**
[8] *Divorce Act* as enacted 1985, *supra* note 7 at s 15(8). The *Divorce Act* as enacted in 1985 included an analogous "objectives" provision in s 17(8) for variation orders related to child support **[AGC Authorities TAB 4**].

10. Until 1997, the *Divorce Act* "treated need and judicial discretion as the governing principles in awards of child support, leaving it to judges to decide upon a reasonable sum to commit for the care of the child."[9] As a result, support awards for children in similar circumstances varied widely across the country and even within individual provinces and territories. The litigation process was burdensome, requiring custodial parents to submit itemized budgets for each child and demonstrate the non-custodial parent's ability to pay in each case.

11. The pre-*Guidelines* discretionary approach prompted significant criticism from stakeholders, including the judiciary. In *Levesque v Levesque* (1994), 116 DLR (4th) 314 (Alta CA) the governing decision on child support in Alberta before the *Guidelines*, the Alberta Court of Appeal frankly acknowledged that it was unable "[to] deal with all the problems that arise in connection with child support awards for two-income families."[10] In *DBS v SRG*, 2005 ABCA 2, the Alberta Court of Appeal described judicial discretion as "the sole uniformly applied principle" in determining child support before the *Guidelines*, stating that a survey of retroactive child support orders "reveal[ed] a patchwork quilt of disparate and sometimes random support awards."[11]

12. In *Michel v Graydon*, Justice Martin of the Supreme Court of Canada recently discussed the discretionary approach that existed prior to the *Guidelines*:

> Commentators, however, criticized this discretionary approach, which was simultaneously subjective and needs-focussed, for being uncertain, inconsistent, and often resulting in unfair awards. In many cases, the inadequacy of awards resulted from judges, counsel, or parties underestimating the cost of raising a child, coupled with the courts' insistence on proof of the child's expenses. One adverse impact of this approach was to place the burden of proof on the custodial parent, though this same parent would often be the least able to afford litigation […]. In cases where such evidence was not adduced, there existed the concern that any award made under the prevailing approach would "necessarily be subjective and arbitrary"[…].[12]

B. The process leading to the *Guidelines*

13. The growing inconsistency in support awards and well-recognized problems with the existing legal framework led to major reform in the law of child support. This process began in

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[9] *Michel, supra* note 3 at para 45 **[TAB 3]**.
[10] *Levesque v Levesque* (1994), 116 DLR (4th) 314, 1994 CarswellAlta 143 (Alta CA) [*Levesque*], at para 2 **[TAB 5].**
[11] *DBS v SRG*, 2005 ABCA 2 [*DBS* ABCA] at para 13 **[TAB 6]**.
[12] *Michel, supra* note 5 at para 48 **[TAB 3]**.

earnest in 1990. Most provinces and territories, along with the federal government, contributed towards research costs to examine potential models for child support guidelines.[13] The Federal/Provincial/Territorial Family Law Committee (the **"FLC"** or the **"Committee"**), made up of representatives from every provincial and territorial government along with the federal government, was instrumental in exploring the development of a guidelines system in Canada. For almost four years, this project was the FLC's primary undertaking.[14]

14. From 1990–1994, the FLC commissioned two consultation papers, conducted research on average expenditures on children and possible formulas for determining child support, and consulted with individuals and organizations across Canada. The result was the *Report and Recommendations on Child Support* published in January 1995 (the **"FLC Report"**). The FLC recommended that "the best approach to help parents, lawyers and judges set fair and consistent child support awards"[15] involved the application of a child support formula. After considering nine different approaches,[16] the Committee recommended a Revised Fixed Percentage formula (the **"RFP Formula"** or **"Table Formula"**). The Committee stated the following with respect to the RFP Formula:

> The formula is guided by the principles that both parents have a responsibility to meet the financial needs of the children according to their incomes and that all non-custodial parents who earn the same income have the capacity to pay the same award, regardless of the custodial parent's income.[17]

15. The FLC recommended that the RFP Formula be incorporated into legislation and applied by courts as a rebuttable presumption.[18] The Committee recognized that a variety of circumstances could arise where courts should consider departures from the RFP Formula, including where a

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[13] Affidavit of Charlotte Harper, sworn June 10, 2020, filed June 12, 2020 [Harper Affidavit] at Exhibit 1, Regulatory Impact Analysis Statement, SOR/DORS/97-175 at p 1123.
[14] Harper Affidavit, *supra* note 13 at Exhibit 8, Federal/Provincial/Territorial Family Law Committee's Report and Recommendations on Child Support, January 1995, [FLC Report] two page proceeding at p i.
[15] Harper Affidavit, *supra* note 13 at Exhibit 8, FLC Report at p i.
[16] The FLC considered income shares with or without a reserve, surplus shares (Delaware-Melson), flat percentage with or without a reserve, the Australian guidelines, income equalization, revised fixed percentage, and revised equal standard of living: Harper Affidavit, *supra* note 13 at Exhibit 8 FLC Report at pp 56-57.
[17] Harper Affidavit, *supra* note 13 at Exhibit 8, FLC Report at p ii.
[18] Harper Affidavit, *supra* note 13 at Exhibit 8, FLC Report at p 28.

party would suffer undue hardship or where the non-custodial parent's income exceeded $150,000.[19]

C. Legislative history of 1997 *Divorce Act* amendments and the *Guidelines*

16. In 1996, Bill C-41: *An Act to amend the Divorce Act, the Family Orders and Agreements Enforcement Assistance Act, the Garnishment, Attachment and Pension Diversion Act and the Canada Shipping Act* (**"Bill C-41"**), was introduced by the federal government. Bill C-41 contained amendments to federal legislation dealing with child support and related issues, including significant amendments to the child support provisions in the *Divorce Act*. A working draft of the *Guidelines* was provided to Parliamentarians (and circulated publicly) as they considered Bill C-41.[20]

17. Bill C-41 involved comprehensive revisions to the statutory framework related to child support. The previous s. 15 was replaced in its entirety. Bill C-41 split apart the *Act*'s provisions governing child support orders from those addressing spousal support orders – child support orders now fell under s. 15.1, while spousal support was pursuant to s. 15.2. Bill C-41 also introduced the use of child support guidelines under s. 15.1(3), directing that court-issued child support orders be "in accordance with the applicable guidelines."[21] The *Act* continued to govern an individual's entitlement to or liability for child support.

18. Bill C-41 included the addition of s. 26.1 to the *Act*, the enabling provision for the establishment of guidelines for child support orders by the Governor in Council. Introducing Bill C-41 in the House of Commons, Minister of Justice and Attorney General of Canada the Hon. Allan Rock (**"Minister of Justice Rock"**) stated:

> First of all, I must say that we have introduced the child support guidelines as a way of determining what constitutes a proper amount of support according to the financial capabilities of the payer.

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[19] Harper Affidavit, *supra* note 13 at Exhibit 8, FLC Report at p 28-33.
[20] Harper Affidavit, *supra* note 13 at Exhibit 41, Legislative Summary LS 258E, Bill C-41: An Act to Amend the Divorce Act, the Family Orders and Agreements Enforcement –Assistance Act, the Garnishment, Attachment and Pension Diversion Act and the Shipping Act, Library of Parliament Research Branch, July 10, 1996 (Revised March 11, 1997) [Bill C-41 – Legislative Summary] at pp 4, 15 and 16.
[21] Harper Affidavit, *supra* note 13 at Exhibit 41, Bill C-41 – Legislative Summary at p 4.

> They involve numerical calculations which take into account amounts that families at similar income levels would spend on their children. These amounts are easy enough to ascertain. They are presented in a table format, similar to an income tax table.
>
> In this way, child support awards can be consistent, fair and predictable. Yet at the same time, the objective of consistency always has to be balanced with the need to have sufficient flexibility to deal with individual circumstances.
>
> Consequently, application of the table amounts is not completely rigid. The table award can be adjusted either upwards or downwards to account for special expenses or for any undue hardship suffered by either parent or the child as a result of awarding the amount of child support proposed by the guidelines.[22]

19. Minister of Justice Rock also explained the federal government's policy decision to set Table Amounts in the *Guidelines* and the divergent public opinion on whether they were too high or too low:

> There are no doubt those – as there were among the witnesses before the committee – who considered the actual amounts in the guidelines to be too high or too low. Opinion will be divided forever on whether we have captured just the right amounts in the relevant income categories. However, we believe that as a matter of policy, standard guideline amounts are a vast improvement for children of separated families and we have to start somewhere.
> …
> We believe the amounts now proposed are realistic, fair and appropriate.[23]

20. The Hon. Gordon Kirkby, Parliamentary Secretary to the Minister of Justice and Attorney General of Canada (**"Parliamentary Secretary Kirkby"**), described the benefits of the new child support framework as follows:

> This approach has tremendous strengths. It is simple and it is standard. It ensures that support paying parents with the same level of income will pay the same level of child support as other parents. It is also easy to use and in the end it is easy to understand. There will be less reasons for parents to argue about what is and what is not an appropriate level of support. This means less conflict, lower legal bills, reduced legal aid and diminished court costs. The result is that a lot of money which would be spent on lawyers in courts can be kept in the hands of parents for the benefit of the children.[24]

21. An important provision in this application is s. 26.1(2) of the *Divorce Act*. It states:

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[22] Harper Affidavit, *supra* note 13 at Exhibit 25, House of Commons Debate, 35-2, vol 134, No. 98 (6 November 1996), (Hon Gilbert Parent) at p 6196.
[23] Harper Affidavit, *supra* note 13 at Exhibit 25, House of Commons Debate, 35-2, vol 134, No. 98 (6 November 1996), (Hon Gilbert Parent) at p 6197.
[24] Harper Affidavit, *supra* note 13 at Exhibit 22, House of Commons Debate, 35-2, vol 134, No. 78 (1 October 1996) (Hon Gilbert Parent) at p 4901.

Principle

> **(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.

22. Subsection 26.1(2) (as enacted) was not included in the original version of Bill C-41 tabled and passed by the House of Commons before going to the Senate.[25] Subsection 26.1(2) originated in the Senate as an amendment to Bill C-41 passed by the Standing Senate Committee on Social Affairs, Science and Technology on February 12, 1997. The Hon. Senator Duncan Jessiman proposed the amendment, explaining that its purpose was to ensure that the principles previously set out in s. 15(8) and 17(8) of the *Divorce Act* remained in the statute. He stated:

> These words are taken from sections 15(8) and 17(8) of the [A]ct. Section 15(8) dealt with orders in the first instance. Section 17(8) dealt with amending orders. The bill would have deleted both subsections 15(8) and 17(8). It has now been agreed to leave in the act that the guidelines will be drawn with those principles involved.[26]

23. When Bill C-41 returned to the House of Commons, the Senate's amendment to add s. 26.1(2) to the *Act* was accepted. Parliamentary Secretary Kirkby told the House of Commons that the purpose of the amendment was to give the principle "more importance"[27] by reintegrating it into the *Divorce Act.* The Senate amendment (among others) to Bill C-41 was passed on February 14, 1997[28] and Bill C-41 received royal assent on February 19, 1997.[29]

24. The final *Guidelines* promulgated by the Governor in Council came into force on May 1, 1997.[30] The *Guidelines* are regulations and therefore subordinate legislation of general application. The *Guidelines* provide detailed rules for the determination of child support,

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[25] Bill C-41, *An Act to amend the Divorce Act, the Family Orders and Agreements Enforcement Assistance Act, the Garnishment, Attachment and Pension Diversion Act and the Canada Shipping Act*, 2nd Sess, 35th Parl, 1996, cl 26.1 (as passed by the House of Commons 18 November 1996) **[TAB 7]**.

[26] Harper Affidavit, *supra* note 13 at Exhibit 33, Proceedings of the Standing Senate Committee on Social Affairs, Science and Technology, *Issue 21 – Evidence* (12 February 1997) at p 7.

[27] Harper Affidavit, *supra* note 13 at Exhibit 27, House of Commons Debates, 35-2, vol 134, No. 130 (14 February 1997) (Hon Gilbert Parent) at p 8122.

[28] Harper Affidavit, *supra* note 13 at Exhibit 27, House of Commons Debates, 35-2, vol 134, No. 130 (14 February 1997) (Hon Gilbert Parent) at p 8153.

[29] Harper Affidavit, *supra* note 13 at Exhibit 41, Legislative Summary LS 258E, Bill C-41: An Act to Amend the Divorce Act, the Family Orders and Agreements Enforcement –Assistance Act, the Garnishment, Attachment and Pension Diversion Act and the Shipping Act, Library of Parliament Research Branch, July 10, 1996 (Revised March 11, 1997) at two pages before p 1.

[30] *Guidelines, supra* note 1 [**AGC Authorities TAB 1**].

including tables of child support amounts for each province and territory (Schedule 1) (the **"Table Amounts"**) based on the RFP Formula recommended by the FLC. Under s. 3(1) of the *Guidelines*, the presumptive amount of child support for a minor child is the Table Amount plus any contribution for s. 7 "special or extraordinary expenses". Many sections of the *Guidelines* provide for amounts of child support that depart from the presumptive Table Amounts in Schedule 1: s. 3(2)(b) (adult children), s. 4 (incomes over $150,000), s. 5 (spouse in place of parent, or step-parent), s. 9 (shared custody) and s. 10 (undue hardship).

D. *Auer v Auer* – procedural background

25. Mr. Auer brings this *vires* application within his divorce proceeding with Aysel Auer ("**Ms. Auer"**), his second wife. Mr. Auer and Ms. Auer were married in August 2004 and separated sixteen months later in November 2005. They had one child, Nikolaus Auer ("**Nikolaus"**), born on October 2, 2005. Nikolaus currently lives with his mother in Edmonton, while Mr. Auer resides in Saskatoon, Saskatchewan.[31]

26. The divorce proceeding between Mr. Auer and Ms. Auer began almost fifteen yeas ago. A divorce judgment was granted on June 20, 2008. This proceeding has been under case management since July 2006. Justice M.D. Gates, the case management judge for approximately 6 ½ years, described this as "high conflict litigation" and the relationship between the parties as "strained, indeed highly acrimonious."[32]

27. Prior to bringing his *vires* application in this Court, Mr. Auer (and others) brought a judicial review application in Federal Court challenging the *vires* of the *Guidelines* in November 2012 (**"*Strickland*"**). On May 6, 2013, the Federal Court granted the AGC's motion to dismiss the proceeding on the basis that this Court was "better placed" than the Federal Court to determine the *vires* issue. [33] An appeal to the Federal Court of Appeal was subsequently dismissed.[34]

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[31] *Auer v Auer*, 2018 ABQB 510 [*Auer* 2018 ABQB] at para 5 **[Applicant's BOA TAB 4]**
[32] *Auer* 2018 ABQB, *supra* note 31 at para 6 **[Applicant's BOA TAB 4]**.
[33] *Strickland v Canada (Attorney General)*, 2013 FC 475 at para 61 [**Not Reproduced**].
[34] *Strickland v Canada (Attorney General)*, 2014 FCA 33 [**Not Reproduced**].

28. On June 19, 2014, Mr. Auer commenced a *vires* application in this Court.[35] One week later, the SCC granted Mr. Auer's (and others') application for leave to appeal the Federal Court of Appeal decision.[36] The AGC brought an application in this Court to stay the *vires* application pending the outcome of the SCC appeal. Mr. Auer opposed. This Court granted the application and adjourned the *vires* application *sine die*, stating that Mr. Auer could "renew his application before this Court to have this matter set down for hearing on the merits, assuming such an avenue remains open to him, once the Supreme Court has released its decision on the *Strickland* matter."[37]

29. On July 9, 2015, the SCC issued its decision in *Strickland v Canada (Attorney General)*, 2015 SCC 37. The SCC upheld the Federal Court's decision not to entertain the judicial review application. The majority stated that the *vires* of the *Guidelines* could be determined in a provincial superior court where it is a "necessary step" to resolve a claim:

> The Court's jurisprudence, which I have just reviewed, supports the principle that the provincial superior courts, in the context of proceedings properly before them, can address the legality of the conduct of federal boards, commissions and tribunals, where doing so is a necessary step in resolving the claims asserted in those proceedings. This means that in the context of family law proceedings otherwise properly before them, the provincial superior courts can decide that the *Guidelines* are *ultra vires* and decline to apply them if doing so is a necessary step in resolving the matters before them.[38]

30. On August 31, 2016, Mr. Auer filed an amended Application seeking a "determination and ruling that the *Federal Child Support Guidelines* […] are *ultra vires* the *Divorce Act* […] or unlawful, invalid or illegal and are of no force and effect and should not be applied" (the ***"Vires* Application"**).[39] This is the application currently before this Court.

31. Ms. Auer, the defendant in this proceeding, advised the Court on September 9, 2016, that she did not intend to participate in the *Vires* Application. The Attorney General of Alberta advised that it would not seek leave to intervene on September 12, 2016.[40]

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[35] *Auer v Auer*, 2014 ABQB 650 [*Auer* 2014 ABQB] at para 1 **[TAB 8]**.
[36] *Robert T. Strickland, et al. v Attorney General of Canada*, 2014 CanLII 34288 [**Not Reproduced**].
[37] *Auer* 2014 ABQB, *supra* note 31 at para 25 **[TAB 8]**.
[38] *Strickland v Canada (Attorney General)*, 2015 SCC 37 [*Strickland* SCC 2015] at para 33 **[TAB 9]**.
[39] Amended Family Application by Roland Auer, Plaintiff/Applicant, filed August 31, 2016.
[40] *Auer* 2018 ABQB, *supra* note 31 at para 12 **[Applicant's BOA TAB 4]**.

32. On February 3, 2017, the AGC filed an intervention application restricted to the *Vires* Application. Mr. Auer opposed. On June 29, 2018, Mr. Justice Gates granted intervenor status to the AGC (the **"Intervention Decision"**) with rights and duties comparable to that of a party, including the right to cross-examine on affidavits, make oral or written submissions on any aspect of the application, put public documents before the court concerning the development and implementation of the *Guidelines* and appeal any adverse decision.[41] At the same time, Mr. Justice Gates dismissed Mr. Auer's application for his recusal as Case Management judge based on a reasonable apprehension of bias (the **"Recusal Decision"**).

33. Mr. Auer appealed the Intervention Decision and the Recusal Decision to the Alberta Court of Appeal. On December 3, 2018, Mr. Auer's appeal was dismissed.[42]

34. Prior to filing the *Vires* Application in August 2016, Mr. Auer filed a number of other applications with this Court seeking to reduce his child support obligations. Until recently, these applications were held in abeyance.[43]

35. On June 26, 2020, Ms. Auer filed a Special Family Chamber's Cross Application, seeking orders to impute Mr. Auer's income from 2010 onwards and directing Mr. Auer to pay child support in accordance with the *Guidelines* retroactive to 2010. By endorsement, Justice Yungwirth set a special chambers hearing for September 15, 2020. The endorsement stated:

> Purpose of the chambers application is to set both parties guideline incomes during the retroactive period and ongoing both with respect to s. 3 and s. 7 child support. Application will also deal with rectification of Justice Jeffrey's Order of December 13, 2010. It will also quantify retroactive child support payable and deal with the DBS analysis, though the payment of retroactive child support will be delayed until after the ultra vires application is concluded or until further order, whichever first occurs. Dad's undue hardship application will also be addressed during the special.
>
> Also, the issue related to the ultra vires application are to be kept completely separate from this special as it is proceeding with its own process.[44]

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[41] *Auer* 2018 ABQB, *supra* note 31 at para 129 **[Applicant's BOA TAB 4]**.
[42] *Auer* 2018 ABCA, *supra* note 2 **[Applicant's BOA TAB 5]**.
[43] *Auer* ABQB 2018, *supra* note 31 at para 11 **[Applicant's BOA TAB 4]**.
[44] Family Docket Court Endorsement of Justice D.A. Yungwirth, filed June 1, 2020. Based on para 53 of Auer Brief, *supra* note 2, it appears that four applications were scheduled and heard on September 15, 2020.

36. On September 15, 2020, the applications scheduled by Justice Yungwirth were heard in special chambers by Justice Sulyma. A decision on these applications is currently under reserve.

III. Argument – The *Guidelines* are within the scope of s. 26.1 of the *Divorce Act*

A. Reasonableness is the standard of review but *vires* remains the issue

37. The AGC agrees with Mr. Auer that the applicable standard of review for this Court to assess the issue of *vires* is reasonableness. Although the correctness standard has historically been applied to questions of jurisdiction/*vires*,[45] the SCC recently confirmed in *West Fraser Mills Ltd v British Columbia* 2018 SCC 22 [*West Fraser Mills*] that reasonableness is the appropriate standard for a Court in reviewing a delegated power to enact regulations. The SCC's recent decision in *Canada (Minister of Citizenship and Immigration v Vavilov*, 2019 SCC 65 [*Vavilov*], affirms the application of the reasonableness standard in this case. In *Vavilov,* the SCC established reasonableness as the presumptive standard of review and ceased to recognize jurisdictional questions as a distinct category attracting correctness review.[46]

38. Where the AGC fundamentally departs from Mr. Auer is on what this Court's reasonableness review requires in the context of this case. In *Vavilov,* the SCC confirmed that reasonableness "takes its colour from the context" despite being a single standard. The majority stated:

> In any attempt to develop a coherent and unified approach to judicial review, the sheer variety of decisions and decision makers that such an approach must account for poses an inescapable challenge. The administrative decision makers whose decisions may be subject to judicial review include specialized tribunals exercising adjudicative functions, independent regulatory bodies, ministers, front-line decision makers, and more. Their decisions vary in complexity and importance, ranging from the routine to the life-altering. These include matters of "high policy" on the one hand and "pure law" on the other. Such decisions will sometimes involve complex technical considerations. At other times, common sense and ordinary logic will suffice.[47]

39. The context in this case involves the Governor in Council's exercise of a legislative power to enact regulations (in the form of "guidelines") of general application. In enacting the

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[45] See, for example, *United Taxi Drivers' Fellowship of Southern Alberta v Calgary (City),* 2004 SCC 19 at para 5 **[TAB 10]**; *Canadian Council for Refugees v Canada*, 2008 FCA 229 [*Canadian Council for Refugees*] at para 63 **[TAB 11]**; *Sunshine Village Corp. v Canada (Parks),* 2004 FCA 166 at para 10 [**Not Reproduced**].
[46] *Canada (Minister of Citizenship and Immigration) v Vavilov,* 2019 SCC 65 [*Vavilov*] at para 65 **[Applicant's BOA TAB 8]**.
[47] *Vavilov, supra* note 46 at para 88 **[Applicant's BOA TAB 8]**.

Guidelines, the GIC was acting in a legislative capacity and not as an administrative decision-maker. The significance of this distinction cannot be understated. In *Canadian National Railway Canada Co v Canada (Attorney General)*, 2014 SCC 40, the SCC stressed the importance of this distinction when reviewing a decision of the GIC exercising an adjudicative function:

> This case is not about whether a regulation made by the Governor in Council was *intra vires* its authority. Unlike cases involving challenges to the *vires* of regulations, such as *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, 2013 SCC 64, [2013] 3 S.C.R. 810, the Governor in Council does not act in a legislative capacity when it exercises its authority under s. 40 of the *CTA* to deal with a decision or order of the Agency.[48]

40. While the legislative power vested in the GIC is not beyond judicial review, the *Guidelines* themselves are not a decision of the GIC subject to reasonableness review in the same manner as an administrative decision-maker. Governments do not publish reasons for their decisions to enact legislation. In *Canadian Council for Refugee v Canada*, 2008 FCA 229, the Federal Court of Appeal soundly rejected the proposition that regulations enacted by the GIC be reviewed like administrative decisions:

> [T]he generally accepted view [is] that the "decision" of the GIC to promulgate regulations, just like the "decision" by members of Parliament to enact legislation, is not subject to review by the courts […]. That said, the legality or *vires* of a regulation promulgated under the authority of Parliament has always been open to challenge before the courts and to that extent, the actions of the GIC are subject to judicial review. This distinction between what can be reviewed and what falls outside the purview of the courts is highlighted by the Supreme Court in *Thorne's Hardware Ltd. et al. v. The Queen et al.*,, [1983] 1 S.C.R. 106, at page 111:
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> > The mere fact that a statutory power is vested in the Governor in Council does not mean that it is beyond judicial review: *Attorney General of Canada v. Inuit Tapirisat of Canada*, 1980 CanLII 21 (SCC), [1980] 2 S.C.R. 735 at p. 748. I have no doubt as to the right of the courts to act in the event that statutorily prescribed conditions have not been met and where there is therefore fatal jurisdictional defect. Law and jurisdiction are within the ambit of judicial control and the courts are entitled to see that statutory procedures have been properly complied with: *R. v. National Fish Co.*, [1931] Ex. C.R. 75; *Minister of Health v. The King (on the Prosecution of Yaffe)*, [1931] A.C. 494 at p. 533. Decisions made by the Governor in Council in matters of public convenience and general policy are final and not reviewable in legal proceedings. Although, as I have indicated, the possibility of striking down an order

[48] *Canadian National Railway Canada Co v Canada (Attorney General)*, 2014 SCC 40 at para 51 **[TAB 12]**.

> in council on jurisdictional or other compelling grounds remains open, it would take an egregious case to warrant such action. This is not such a case.

[54] The dividing line was succinctly identified by Strayer J.A. in *Jafari v. Canada (Minister of Employment and Immigration),* 1995 CanLII 3592 (FCA), [1995] 2 F.C. 595 (C.A.), at page 602:

> It goes without saying that it is not for a court to determine the wisdom of delegated legislation or to assess its validity on the basis of the court's policy preferences. The essential question for the court always is: does the statutory grant of authority permit this particular delegated legislation? [Footnote omitted.]
>
> …

[57] Understanding precisely what is in issue in a judicial review application is important when it comes time to determine the standard of review as well as the scope of the review that can be conducted by the Court. An attack aimed at the *vires* of a regulation involves the narrow question of whether the conditions precedent set out by Parliament for the exercise of the delegated authority are present at the time of the promulgation[.][49] [emphasis added]

41. Notably, the SCC recognized in *Vavilov* that legislative decisions are not accompanied by official reasons and that this context requires an adjustment of reasonableness review.[50] The majority also referenced principles from *Katz Group Canada Inc v Ontario (Health and Long Term Care),* 2013 SCC 64 [*Katz*] in its explanation of how reasonableness review should be conducted.[51]

42. *Katz* and *West Fraser Mills* are the leading cases on reviewing the *vires* of a delegated regulatory enactment. They provide a clear analytical framework for a *vires* challenge alleging inconsistency with the purpose and mandate of enabling legislation. *Katz* and *West Fraser Mills* establish the following:

- The starting point is a presumption of validity, which places the onus on challengers to establish invalidity and favours an interpretive approach that reconciles the regulation with its enabling statute;[52]

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[49] *Canadian Council for Refugee, supra* note 45 at paras 53, 54, and 57 **[TAB 11]**.
[50] *Vavilov, supra* note 46 at para 137 **[Applicant's BOA TAB 8]**.
[51] *Vavilov, supra* note 46 at para 111 **[Applicant's BOA TAB 8]**.
[52] *Katz Group Canada Inc. v Ontario (Health and Long Term Care),* 2013 SCC 64 [*Katz*] at paras 25-26 **[Applicant's BOA TAB 9]**; *West Fraser Mills Ltd. v British Columbia,* 2018 SCC 22 [*West Fraser Mills*] at para 12 **[Applicant's BOA TAB 20]**.

- A regulation should only be found *ultra vires* on the basis of inconsistent purpose where it is "irrelevant", "extraneous" or "completely unrelated" to the statutory purpose of the enabling legislation;[53]

- A *vires* challenge does not hinge on whether, in the court's view, impugned regulations will actually succeed at achieving their statutory objectives. The question is not whether the regulation is "necessary, wise or effective in practice". Unlike judicial review of administrative decisions, a reviewing court is usually restricted to assessing whether regulations are inconsistent with the purpose of the statute. The motives for promulgation are irrelevant.[54]

- *Vires* review is not an inquiry into underlying political, economic, social or partisan considerations. To determine whether a regulation represents a reasonable exercise of delegated power, a *vires* challenge requires the court to determine the purpose of the enabling provisions and ensure that the regulation is not completely unrelated to the enabling legislation.[55]

43. *Vavilov* did not sweep away the SCC's recent jurisprudence on *vires* review concerning the enactment of regulations as set out in *Katz* and *West Fraser Mills*. The above principles must guide this Court in conducting its review of the *Guidelines* for *vires.* A review for reasonableness, in this context, requires this Court to remain focused on the issue of *vires* and whether the *Guidelines* are completely unrelated to their statutory mandate in the *Divorce Act.*

B. Mr. Auer's misguided focus on the effectiveness and policy merits of the *Guidelines*

i. The vires issue does not turn on whether the Guidelines are "good policy" or achieve their statutory objectives

44. Mr. Auer anticipated that the AGC would defend the *Guidelines* as a matter of policy involving a balancing of interests by the GIC.[56] He will be disappointed. It is not for this Court

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[53] *Katz, supra* note 52 at para 28 **[Applicant's BOA TAB 9]**; *West Fraser Mills, supra* note 52 at para 12 **[Applicant's BOA TAB 20]**.
[54] *Katz, supra* note 52 at paras 27-28 **[Applicant's BOA TAB 9]**.
[55] *Katz, supra* note 52 at para 28 **[Applicant's BOA TAB 9]**; *West Fraser Mills, supra* note 52 para 12 **[Applicant's BOA TAB 20]**.
[56] Auer Brief, *supra* note 2 at paras 15 and 348.

to determine the wisdom of the *Guidelines* or to assess their validity based on policy preferences.[57] Neither is it appropriate for this Court to inquire into the political, economic, social or partisan considerations leading to the *Guidelines*' promulgation.[58] Policy issues are simply off the table on a *vires* challenge. While Mr. Auer is quite right that the *Guidelines* required the GIC to balance various competing interests,[59] this Court must refrain from judging the wisdom of the GIC's legislative choices in the *Guidelines.*

45. Similarly, this Court must not explore whether the *Guidelines* achieve or accomplish their statutory objectives, including those set out in s. 26.1(2). Mr. Auer's argument is that the *Guidelines* "do not deliver on the task of balancing the interests of the children, the CP, and the NCP."[60] They do not "achieve"[61] or "accomplish"[62] their objectives or "do what they are supposed to do".[63] None of these issues are relevant to a *vires* challenge.

46. That said, there are strong indicators that the *Guidelines* substantially do achieve their objectives and resulted in positive changes to the law of child support in 1997. Every province and territory, except Quebec, has adopted child support guidelines that are substantially similar to the *Guidelines.*[64] In a statutorily-mandated Report to Parliament tabled in 2002, the *Guidelines* were found to be "working well" (although with room for improvement).[65] The objectives in s. 1 were determined to have been, for the most part, achieved, both as ends in themselves and as means in forming the grounds upon which judicial decisions were made.[66]

47. More recently in *Michel v Graydon*, Justice Martin (in her concurring reasons) touted the *Guidelines'* success in achieving many of their objectives:

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[57] *Jafari v Canada (Minister of Employment and Immigration),* [1995] 2 FC 595 (FCA) at p 6 **[TAB 13]**.
[58] *Thorne's Hardware Ltd. v the Queen,* [1983] 1 SCR 106 [*Thorne's Hardware Ltd.*] at at p 112-113 **[TAB 14]**; see also *Katz, supra* note 52 at para 28 **[Applicant's BOA TAB 9]**.
[59] Auer Brief, *surpa* note 2 para 348.
[60] Auer Brief, *surpa* note 2 at para 461.
[61] Auer Brief, *surpa* note 2 at paras 186, 218, 433, 439, 453.
[62] Auer Brief, *surpa* note 2 at paras 13, 211.
[63]Auer Brief, *surpa* note 2 at paras 261, 459.
[64] Affidavit of D.A. Rollie Thompson, sworn and filed June 11, 2020, [Thompson Affidavit] at Exhibit B, Rebuttal Report Federal Child Support Guidelines [Rebuttal Report] at para 7.
[65] Harper Affidavit, *supra* note 13 at Exhibit 13, Children Come First: A Report to Parliament Reviewing the Provisions and Operation of the *Federal Child Support Guidelines* (2002) Report [Report to Parliament], Volume 1 at p 1.
[66] Harper Affidavit, *supra* note 13 at Exhibit 13, Report to Parliament, Volume 2 at p 30.

> The *Guidelines* thus helped shift the focus from the child's needs to their entitlement to support, embracing in the process the principles of fairness and flexibility, balanced with consistency and efficiency, all in the child's best interests. While the courts' fact-specific inquiries and judicial discretion provide fairness and flexibility, the Tables provide certainty by determining how much child support a recipient parent is entitled to, based solely on the payor parent's income and the number of children supported (unless the payor parent's annual income surpasses $150,000).[67]

48. The success of the *Guidelines* is also reflected in the lack of desire to return to the pre-1997 system.[68] This was recognized as early as 2002 in the Report to Parliament. Professor D.A. Rollie Thompson (**"Prof. Thompson"**) is cited as follows:

> In my view, and that of most others too, the Guidelines have been remarkably successful in achieving the objectives for the new system, set out in s. 1 of the Guidelines: adequacy, objectivity, efficiency, and consistency. Quibble as we might about this or that sub-area of child support law, few would suggest now that we go back to the "old", individualized system.[69]

ii. Mr. Auer's opinion evidence is irrelevant to the *vires* question

49. Mr. Auer has put forward extensive opinion evidence that is, on the whole, irrelevant to the *Guidelines' vires.* In particular, the reports from Professor Chris Sarlo (**"Prof. Sarlo"**)[70] and Professor Douglas W. Allen (**"Prof. Allen"**)[71] assess the efficacy of the *Guidelines* and whether they result in equitable child support awards for non-custodial parents. As explained above, this evidence has no bearing on whether the *Guidelines* are *intra vires* the *Act.*

50. The purpose of Prof. Sarlo's report is to assess "whether [the *Guidelines*] reasonably determine the monetary amounts required to maintain the children of a marriage."[72] In other words, Prof. Sarlo's opinion concerns whether the *Guidelines* are effective in practice. This is precisely the question that *Katz* states is beyond the scope of *vires* review.

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[67] *Michel, supra* note 5 at para 52 **[TAB 3]**.
[68] Prof. Allen is an exception to this general sentiment: see Transcript from Cross-Examination on Affidavit of Douglas Ward Allen, dated June 24, 2020 [Allen Cross-Examination] at p 26, line 25 – p 27, line 14.
[69] Harper Affidavit, *supra* note 13 at Exhibit 13, Report to Parliament, Volume 2 at p 30, citing D.A. Rollie Thompson, "Rules and Rulelessness in Family Law: Recent Developments, Judicial and Legislative." Appeals Courts Seminar, National Judicial Institute, Faculty of Law, Dalhousie University, Halifax, April 19, 1999.
[70] Affidavit of Chris Sarlo, sworn July 8, 2013, filed June 14, 2014 [Sarlo Affidavit] at Exhibits A, B, and C, "An Assessment of the Federal Child Support Guidelines" [Sarlo Report].
[71] Affidavit of Douglas W. Allen, sworn June 7, 2013, filed June 19, 2014, [Allen Affidavit] at Exhibit A, Supplementary Report of Douglas W. Allen on Professor Sarlo's CSG Report [Allen Report].
[72] Sarlo Affidavit, *supra* note 70 at Exhibit A, B, and C, Sarlo Report at p 1.

51. Prof. Sarlo's view is that the application of the *Guidelines* (or more precisely the Table Formula) results in child support orders that are unfair and inequitable for non-custodial parents. His opportunity to provide such views was during the pre-legislative consultation process when the Government of Canada consulted broadly on Bill C-41 and the proposed guidelines.[73] Prof. Sarlo did not participate in this process.[74] Should the federal government choose to substantially amend the *Divorce Act* or the *Guidelines* in the future, undoubtedly Prof. Sarlo (like all Canadians) will have further opportunity to provide his views and recommendations for improvement. But his opinions are wholly irrelevant to the issue of *vires* in this application.

52. Similarly, Prof. Allen's view is that the federal government had a hidden agenda in 1997 "to maximize the feasible amount of the transfer from the NCP to the CP."[75] In his opinion, the true purpose of the *Guidelines* was to create a "net wealth transfer" from non-custodial to custodial homes.[76] Once again, this evidence is irrelevant to the *vires* issue. Like Prof. Sarlo, Prof. Allen chose not to participate in the pre-*Guidelines* consultation process.[77]

53. A *vires* challenge is not an opportunity to litigate issues fully explored with stakeholders during the consultation process more than 20 years ago. The Regulatory Impact Analysis Statement for the *Guidelines* describes the extensive submissions received and reviewed by various bodies during the consultation process, noting that "the present Guidelines reflect many of the comments received during the legislative process."[78] Prof. Sarlo and Prof. Allen missed their opportunity to influence child support reform during a critical period. A similar opportunity may arise again. But a *vires* challenge should not provide another kick at the legislative can 23 years after the fact. This Court should disregard their evidence.

iii. The *Guidelines* are not merely the Schedule 1 Table Amounts

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[73] Harper Affidavit, *supra* note 13 at Exhibit 1, Regulatory Impact Analysis Statement, SOR/DORS/97-175 at p 1124.
[74] Transcript from Cross-Examination on Affidavit of Christopher Anthony Sarlo, dated June 26, 2020 [Sarlo Cross-Examination] at p 37, lines 5-14.
[75] Allen Affidavit, *supra* note 71 at Exhibit A, Allen Report at para 11.
[76] Allen Affidavit, *supra* note 71 at Exhibit A, Allen Report at para 64.
[77] Allen Cross-Examination, *supra* note 68 at p 63, line 21 – p 64, line 19.
[78] Harper Affidavit, *supra* note 13 at Exhibit 1, Regulatory Impact Analysis Statement, SOR/DORS/97-175 at p 1124.

54. A persistent theme running through Mr. Auer's Brief of Argument, along with the reports from Prof. Sarlo and Prof. Allen in support of his application, is the conflation of the *Guidelines* with the Table Amounts in Schedule 1 of the *Guidelines.* As stated by Prof. Thompson:

> Both Sarlo and Allen refer to "the Guidelines" when they really mean "the Guidelines table formula". The *Child Support Guidelines* are more than just the table formula, more than just Schedule 1. […] The *Child Support Guidelines* involve the whole regulation[.][79]

55. Both Prof. Sarlo and Prof. Allen acknowledged their conflation of the *Guidelines* with the Table Amounts during cross-examination. Prof. Sarlo stated frankly that "when I'm referring to the guidelines, I'm basically referring to the formula[.]"[80] Out of fourteen references to the *Guidelines* in the introduction to his report, Prof. Sarlo admitted that only four actually referred to the *Guidelines* and the remaining ten referred to the Table Amounts or the Formula.[81] Similarly, Prof. Allen stated that whether he referred to the *Guidelines* or Table Amounts in his report "depend[ed] on the context" and acknowledged that he has expressly stated in other writings that he uses the term "guidelines" to refer to the Table Amounts.[82]

56. This conflation is significant to the issue of *vires.* Subsection 26.1(2) states that the *Guidelines* as a whole are to be based on the principle set out therein (an issue that will be examined further in this brief). As stated by Prof. Thompson, "[t]he table formula is a part, albeit an important part, of 'the Guidelines'".[83] The Table Amounts are merely presumptive, and multiple other provisions of the *Guidelines* allow a court to tailor child support orders to the circumstances of a particular case. For example, s. 10 (a provision that Mr. Auer appears to have availed himself of in this proceeding) allows the court to adjust child support amounts to avoid undue hardship for the non-custodial parent. Similarly, s. 4 enables a court to modify child support amounts for incomes over $150,000 where the presumptive Table Amount under s. 3 would be "inappropriate". These discretionary "safety valves" in the *Guidelines* are largely ignored by Mr. Auer. Where he

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[79] Thompson Affidavit, *supra* note 64 at Exhibit B, Rebuttal Report at paras 23-24.
[80] Sarlo Cross-Examination *supra* note 74 at p 29, lines 17-19.
[81] Sarlo Cross-Examination *supra* note 74 at p 30, line 12 – p 36, line 12.
[82] Allen Cross-Examination, *supra* note 68 at p 34, line 22 – p 36, line 3.
[83] Thompson Affidavit, *supra* note 64 at Exhibit B, Rebuttal Report at para 4.

discusses them, his complaint is that they have been inappropriately interpreted by Canadian courts.[84]

57. This Court's task is not to assess the extensive judicial consideration of the *Guidelines*, nor is it the AGC's role to defend the prevailing jurisprudence. The issue is whether the *Guidelines* themselves are *intra vires.* In this regard, the *Guidelines* demonstrate the GIC's intention to allow for judicial discretion to deviate from the presumptive Table Amounts in appropriate circumstances. Mr. Auer, along with Prof. Sarlo and Prof. Allen, obscure this important point by using the term "Guidelines" to refer to either the Schedule 1 Table Amounts or the RFP Formula used to determine these amounts.

iv. The GIC enacted the *Guidelines*, not the FLC, the DOJ or their consultants

58. In s. 26.1 of the *Divorce Act*, Parliament delegated the power to establish child support guidelines to the Governor in Council. This authority was not delegated to the Family Law Committee, the Department of Justice (**"DOJ"**), or any consultants involved in the pre-legislative research and consultation process leading up to 1997. The issue in this application is the GIC's exercise of its delegated power. In his Brief of Argument, Mr. Auer launches a myriad of criticisms at the FLC, the DOJ and various consultants involved in the consultation and research process prior to Bill C-41. While this evidence has some relevance to the legislative context in which the *Guidelines* were promulgated, it is the *Guidelines* themselves that must be examined to determine whether they fall reasonably within the scope of the statutory mandate. Mr. Auer is mistaken to say that "[a]ny meaningful *Vavilov* review must be based on the [FLC, DOJ and consultants'] reasoning and assumptions that underpin those numbers."[85]

59. The GIC is the Governor General of Canada acting on the advice of the Privy Council.[86] In practice, this executive authority is carried out by Cabinet, or a Cabinet committee, the members of which come to a decision and send a "minute of the decision to the Governor General for

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[84] For example, in relation to s 10 he states that courts have imposed a "very high bar" and that "the test [for undue hardship] is inappropriate and overly onerous" (Auer Brief, *supra* note 2 at paras 304 and 306).
[85] Auer Brief, *supra* note 2 at para 135.
[86] The statutory definition is "the Governor General of Canada acting by and with the advice of, or by and with the advice and consent of, or in conjunction with the Queen's Privy Council for Canada": *Interpretation Act*, RSC 1985, c I-21, s 35(1), "Governor General in Council or Governor in Council" [**Not Reproduced**].

signature".[87] The Governor General's executive powers exercised in accordance with constitutional conventions and democratic principles dictate that Cabinet's advice is generally binding on the Governor General.[88] Regulations made by the GIC are subject to parliamentary scrutiny through their permanent referral to the Standing Joint Committee for the Scrutiny of Regulations.[89]

60. Mr. Auer refers to the FLC and/or the DOJ in his Brief of Argument as the *Guidelines'* "drafters".[90] This is not accurate. The Governor General, acting on the advice of Cabinet, promulgated the *Guidelines* pursuant to its delegated authority. To the extent that Mr. Auer conflates various reports prepared by the FLC and the DOJ prior to the enactment of the *Guidelines* with the *Guidelines* themselves, he is mistaken. While these various reports provide context for the *Guidelines'* enactment, they cannot be treated as the GIC's reasons for decision.

v. The GIC's motives are irrelevant

61. The GIC's motives in promulgating the *Guidelines* are also irrelevant to the *vires* issue. In *Thorne's Hardware Ltd v The Queen*, [1983] 1 SCR 106 [*Thorne's Hardware*] , the SCC considered whether a federal Order in Council extending the limits of the Port of St. John was *ultra vires* the Governor in Council. The appellants (Irving Oil Limited and its subsidiaries) alleged that the Order was passed for the improper motive of collecting harbour dues without offering any service in return. The SCC rejected this argument, stating:

> Counsel for the appellants was critical of the failure of the Federal Court of Appeal to examine and weigh the evidence for the purpose of determining whether the Governor in Council had been motivated by improper motives in passing the impugned Order in Council. We were invited to undertake such an examination but I think that with all due respect, we must decline. It is neither our duty nor our right to investigate the motives which impelled the federal Cabinet to pass the Order in Council […].[91]

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[87] Peter W Hogg, *Constitutional Law of Canada*, 5th ed supplemented (Toronto: Thompson Reuters, 2007), ch 9.4(b) **[TAB 15]**.
[88] *Reference re Canada Assistance Plan (BC)*, [1991] 2 SCR 525 at 546-47 [**Not Reproduced**].
[89] *Statutory Instruments Act*, RSC 1985, c S-22, s 19 [**Not Reproduced**].
[90] Auer Brief, *supra* note 2 at paras 203 and 346.
[91] *Thorne's Hardware Ltd.*, *supra* note 58 at p 112 **[TAB 14]**.

62. Mr. Auer alleges that the GIC was improperly motivated by an "overall disdain for NCP households"[92] and intended to "maximize the transfer to the CP household."[93] Along with being unsupported by evidence, these allegations of bad faith are not relevant to the *vires* issue. Respectfully, and as stated in *Thorne's Hardware*, it is neither the duty nor the right of this Court to investigate the motives that impelled the GIC to pass the *Guidelines.* Neither should this Court infer the GIC's motivations from documents prepared by other entities such as the FLC or the DOJ.

vi. The AGC is not "bootstrapping"

63. Mr. Auer's attempt to limit the AGC's submissions on the basis that they involve "bootstrapping"[94] entirely misconstrues the line of jurisprudence from which they draw. The SCC's decision in *Ontario (Energy Board) v Ontario Power Generation Inc,* 2015 SCC 44 [*OEB*], involved an administrative tribunal with standing to appear in the judicial review of its own decision. Concerns arise in such situations about the impartiality of the tribunal and its ability to "bootstrap" by supplementing an otherwise deficient decision with new arguments on appeal.

64. The bootstrapping concerns that arise on *OEB* are not present here. The Governor in Council has not sought standing in a judicial review of its own decision, nor was the GIC acting as an impartial administrative tribunal in adopting the *Guidelines.* Nor are the *Guidelines* themselves a decision that the AGC is now attempting to supplement. Mr. Auer's bootstrapping allegations further betray his misunderstanding of the nature of *vires* review. There are no "reasons for decision" with respect to the *Guidelines.* It is the *Guidelines* themselves that must be examined to determine whether they are within the scope of the GIC's statutory mandate. Bootstrapping is not possible in this context. Neither does the SCC decision in *OEB* apply.

C. The Governor in Council's broad discretion to establish guidelines under the *Divorce Act*

65. Parliament granted the Governor in Council broad discretion under the *Divorce Act* to establish guidelines related to child support. The central provision is s. 26.1(1) of the *Act* through which Parliament granted this statutory power to the GIC. Conspicuously, this crucial provision

[92] Auer Brief, *supra* note 2 at paras 345-349.
[93] Auer Brief, *supra* note 2 at para 453.
[94] Auer Brief, *supra* note 2 at paras 30-38.

to the *intra vires* issue is entirely missing from Mr. Auer's Brief of Argument. The GIC's wide discretion to establish guidelines respecting child support pursuant to s. 26.1(1) is to be "based on the principle" set out in s. 26.1(2) of the *Act.* Properly interpreted within the *Act*, including the purpose and context of the child support provisions, s. 26.1(2) does not impose narrow constraints on the GIC's discretion as argued by Mr. Auer. Rather, s. 26.1(2) sets out a purpose statement within which the GIC must exercise its discretion when establishing guidelines. The text of the *Guidelines*, along with the context in which they were promulgated, conclusively establish that the GIC exercised its discretion consistently with the statutory purpose set out in s. 26.1(2). Thus, the *Guidelines* are *intra vires.* They are not irrelevant, extraneous or completely unrelated to the scope of the statutory mandate established by Parliament.

66. This Court's determination of whether the *Guidelines* are *intra vires* involves an exercise in statutory interpretation.[95] This Court is called upon to apply the well-established modern approach to statutory interpretation and determine whether the *Guidelines* reasonably fall within the ambit of s. 26.1 of the *Divorce Act.* The words of s. 26.1 must be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the *Act*, the object of the *Act*, and the intention of Parliament.[96] As re-affirmed by the SCC in *Canada Trustco Mortgage Co v Canada*, 2005 SCC 54:

> The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole.[97]

i. Parliament's broad grant of discretion in s. 26.1(1) of the Act

67. The discretion granted to the GIC by Parliament to establish guidelines respecting child support orders could not be broader. Subsection 26.1(1) of the *Act* as enacted in 1997 states:

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[95] *West Fraser Mills, supra* note 52 at para 12 **[Applicant's BOA TAB 20]**.
[96] *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR at para 21 [**Not Reproduced**].
[97] *Canada Trustco Mortgage Co v Canada*, 2005 SCC 54 at para 10 [**Not Reproduced**].

Guidelines

26.1 (1) The Governor in Council may establish guidelines respecting the making of[98] orders for child support, including, but without limiting the generality of the foregoing, guidelines

(a) respecting the way in which the amount of an order for child support is to be determined;

(b) respecting the circumstances in which discretion may be exercised in the making of an order for child support;

(c) authorizing a court to require that the amount payable under an order for child support be paid in periodic payments, in a lump sum or in a lump sum and periodic payments;

(d) authorizing a court to require that the amount payable under an order for child support be paid or secured, or paid and secured, in the manner specified in the order;

(e) respecting the circumstances that give rise to the making of a variation order in respect of a child support order;

(f) respecting the determination of income for the purposes of the application of the guidelines;

(g) authorizing a court to impute income for the purposes of the application of the guidelines; and

(h) respecting the production of income information and providing for sanctions when that information is not provided. [99] [underline added]

68. Through s. 26.1(1), Parliament provided an unquestionably wide-ranging delegation of power to the GIC to establish guidelines related to child support orders. Provided that guidelines are "respecting the making of orders for child support", the GIC was empowered by Parliament through s. 26.1(1) to promulgate guidelines under this broad statutory mandate. This includes guidelines to determine how child support is determined, paid, varied, income imputed and information produced (as enumerated in (a)-(h)). The phrase "without limiting the generality of the foregoing" makes apparent that the GIC's authority over child support guidelines is not limited to these enumerated categories. It includes a plenary power to enact any other guidelines related to child support orders, if necessary. The intention of Parliament in s. 26.1(1) was clearly to

[98] The phrase "the making of" in the English version of s. 26.1(1) was removed by legislative amendment that came into force on June 21, 2019 **[Applicant's BOA TAB 2]**.

[99] *Divorce Act, supra* note 1 at s 26.1(1) **[Applicant's BOA TAB 2**]. Subsection 26.1(1)(h) was amended by legislative amendment that came into force on June 21, 2019 and now reads: "(h) respecting the production of information relevant to an order for child support and providing for sanctions and other consequences when that information is not provided." **[Applicant's BOA TAB 2]**.

provide the GIC with extremely broad delegated statutory powers to establish child support guidelines. Parliament's intention could not have been clearer.

69. Mr. Auer's characterization of s. 26.1(2) of the *Act* as providing a "specific and constrained grant of power"[100] to the GIC to enact guidelines is misguided and reflects a flawed interpretation of the relevant *Divorce Act* provisions. Subsection 26.1(1) of the *Act*, not s. 26.1(2), empowers the GIC to establish child support guidelines. In failing to refer to s. 26.1(1) whatsoever in his brief, Mr. Auer wholly ignores the central provision to the question of *vires* put in issue through his application. Subsection 26.1(2) must be interpreted harmoniously with the broad delegation of power in s. 26.1(1) to determine the scope of the GIC's authority to establish child support guidelines.

70. Mr. Auer also attempts to distinguish the GIC's "specific and constrained" power to establish guidelines from the "broad and unrestricted" power at issue in *West Fraser Mills.*[101] In *West Fraser Mills*, the enabling statute empowered the Worker's Compensation Board (**"WCB"**) to make regulations that it considered "necessary or advisable" related to workplace health and safety. The SCC majority stated that this delegation of power "could not be broader."[102] Arguably, the power delegated to the GIC to establish child support guidelines is even broader than the WCB's power in *West Fraser Mills.* In s. 26.1(1), Parliament chose not even to qualify the authority granted to the GIC to "necessary and advisable" regulations. It is difficult to conceive of a delegation of power broader than s. 26.1(1) of the *Act.*

ii. Subsection 26.1(2)'s Guiding Principle

71. The final version of Bill C-41 enacted by Parliament in 1997 included s. 26.1(2) of the *Act.* Properly interpreted according to the modern approach, s. 26.1(2) establishes a guiding principle for the GIC when exercising its discretion to establish child support guidelines. It is, in effect, a purpose statement.[103] Subsection 26.1(2) was not intended by Parliament to significantly

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[100] Auer Brief, *supra* note 2 at para 98.
[101] Auer Brief, *supra* note 2 at paras 97-98.
[102] *West Fraser Mills Ltd., supra* note 52 at para 10 **[Applicant's BOA TAB 20]**.
[103] The predecessor provision, s. 15(8) was described as "the motherhood section" during the Senate Standing Committee Hearing by the Chair of the Committee the Hon. Mabel DeWare: Harper Affidavit, *supra* note 13 at Exhibit 30, Proceedings of the Standing Senate Committee on Social Affairs, Science and Technology, Issue 17 – Evidence (11 December 1996 & 12 December 1996) at p 5 of 57.

constrain the GIC's broad delegated powers. Rather, s. 26.1(2) was intended as a legislative affirmation of the objectives upon which the *Guidelines* were based. Mr. Auer's submission that s. 26.1(2) results in substantive constraints on the GIC's delegated powers runs contrary to the provision's text, its context within the *Act* and its purpose as gleaned from s. 26.1(2)'s unique legislative history.

72. Subsection 26.1(2) of the *Act* (the **"Guiding Principle"**) states:

> **Principle**
>
> **(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. A close reading of the text of s. 26.1(2) reveals a number of significant features. First, s. 26.1(2) refers to "guidelines" as a whole and not to each provision or regulation within the guidelines. With reference to the 1997 *Guidelines*, this means that the *Guidelines* as a whole must be based on s. 26.1(2) and not necessarily each particular provision. Also significantly, s. 26.1(2) states that guidelines, and not child support amounts determined based on the application of guidelines, must be based on the Guiding Principle. Mr. Auer misinterprets s. 26.1(2) to impose a constraint on the amounts of child support awards under the *Guidelines.*

74. Second, any guidelines regime established by the GIC must be "based on the principle" set out in s. 26.1(2). The Guiding Principle effectively operates as a purpose statement. While philosophical distinctions can be drawn between purposes and principles, they are not functionally distinguishable.

75. One of the uses of a legislative purpose statement is to guide discretion.[104] Mr. Auer takes the function of s. 26.1(2) a step further, arguing that it imposes "Limiting Principles" on the GIC's exercise of discretion. This is an overstatement. A statutory purpose statement "gives context for the entire Act."[105] Similarly, a legislative purpose statement for delegated legislation "gives context" to the delegated authority's exercise of discretion. In this case, s. 26.1(2) provides context for the exercise of the GIC's delegated power, but does not go so far as imposing limiting principles

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[104] Sullivan on the Construction of Statutes, 6th Ed., Chapter 9 – Purposive Analysis, para 9.89 **[TAB 16]**.
[105] *Councils of Canadians with Disabilities v VIA Rail Canada Inc.*, 2007 SCC 15 at para 287 **[TAB 17]**.

on the GIC. It is better understood as a guiding principle to be borne in mind by the delegated authority in exercising its power.[106]

76. Mr. Auer suggests that s. 26.1(2) imposes a reasonableness requirement on the amount of child support orders pursuant to the *Guidelines.* Specifically, he states that "amounts awarded must…reflect the parents' respective abilities to contribute" to the maintenance of children[107] [underline added]. But this "Limiting Principle" (as described by Mr. Auer) is not found in the text of s. 26.1(2). The provision states that guidelines must be based on the Guiding Principle, not child support award amounts. Through this misinterpretation of s. 26.1(2), Mr. Auer asks this Court to embark on an analysis into the reasonableness of possible child support award amounts under the *Guidelines*, and more specifically calculated according to the RFP Formula in determining the Table Amounts. This approach should be rejected by this Court. The issue is whether the *Guidelines* themselves are reasonably consistent and not completely unrelated to their statutory purpose set out in the *Divorce Act.*

77. Mr. Auer's interpretation of s. 26.1(2) as a significant constraint on the GIC's discretion is inconsistent with s. 26.1 as a whole. In s. 26.1(1)(a), Parliament delegated broad authority to the GIC to establish guidelines "respecting the way in which the amount of an order for child support is to be determined."[108] This wide-ranging power to determine how child support amounts are calculated is wholly at odds with the narrow limits that Mr. Auer argues s. 26.1(2) imposes on the GIC's discretion. In failing to read s. 26.1(2) harmoniously with s. 26.1(1), Mr. Auer disregards the modern approach to statutory interpretation mandated by the SCC.

78. Mr. Auer's interpretation of s. 26.1(2) is further inconsistent with Parliament's intended shift to a child-centred guidelines regime in amending the *Divorce Act* in 1997. In *DBS v SRG*, 2005 ABCA 2, Justice Paperny explained how the 1997 legislative changes "radically altered the

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[106] A similar point was made by the SCC with respect to preambles in *Alberta Union of Provincial Employees v Lethbridge Community College*, 2004 SCC 28 at para 32: "The Preamble to the [Labour] Code provides insight into the purposes of the statute as a whole. The primary object of the legislation is the promotion of an 'effective relationship between employees and employers' through the 'fair and equitable resolution of matters arising in respect of terms and conditions of employment'. When the Code was introduced in the Alberta legislature, these two tenets of the legislation were described as 'philosophical statement[s]' that 'must be kept in mind when reading every section of the statute.'" [emphasis added] [**Not Reproduced**].

[107] Auer Brief, *supra* note 2 at para 78.

[108] *Divorce Act*, *supra* note 7 at s 26.1(1)(a) **[Applicant's BOA TAB 2]**.

method of calculating child support."[109] She explained the rationale and purpose for the *Guidelines* as follows:

> By focussing on the payor's income, the Guidelines de-emphasize the traditional reliance placed on unrealistic expense claims and budgets by both the non-custodial and custodial parent alike. As a consequence, the Guidelines have effectively eliminated the scenario of duelling budgets, a hallmark of pre-Guidelines support litigation, made necessary because of the use of the needs and means test. This shift in focus to the payor's income from the payee's needs or ability to pay is an important and fundamental change that must remain at the forefront of any discussion on the various financial obligations of parents.
> …
> In summary, the Guidelines' emphasis is on children, creating a child-centred, not payor-centred, approach: they are designed to put children first.[110] [emphasis added]

79. A similar point regarding the *Guidelines'* shift to a child-centred approach was made by Justice Martin in *Michel v Graydon,* 2020 SCC 24:

> The *Guidelines* heralded a shift from a "need-based" regime, which focussed on expenses, to one that determines a child's entitlement to support (*D.B.S. v. S.R.G.*, 2005 ABCA 2, 361 A.R. 60, at para. 66 ("*D.B.S.* (C.A.)")). The "Federal Child Support Tables" ("Tables", incorporated in Sch. I of the *Guidelines*) prescribe the amount of support to which a child is entitled on the basis of the income of the payer parent and the number of children supported.
> …
> The *Guidelines* thus helped shift the focus from the child's needs to their entitlement to support, embracing in the process the principles of fairness and flexibility, balanced with consistency and efficiency, all in the child's best interests.[111]

80. Mr. Auer's interpretation of s. 26.1(2) is inconsistent with Parliament's intention in enacting the *Divorce Act* amendments and the subsequent promulgation of the *Guidelines.* By concentrating his s. 26.1(2) analysis on the non-custodial parent's contribution to child costs, he shifts the focus from a child-centred to a payor-centred approach. This is contrary to Parliament's (and the GIC's) intention to shift to an entitlement-focused system in the best interests of the child. Any interpretation of s. 26.1(2) that fails to harmonize with this shift, as articulated by the ABCA in *DBS v SRG* and the SCC in *Michel v Graydon,* should be rejected.[112]

81. The plain meaning of the Guiding Principle in s. 26.1(2) is readily apparent from the text itself. First, any system of guidelines established by the GIC must be based on spouses' joint

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[109] *DBS* ABCA, *supra* note 11 at para 35 **[TAB 6]**.
[110] *DBS* ABCA, *supra* note 11 at paras 40 and 42 **[TAB 6]**.
[111] *Michel*, *supra* note 5 at paras 50 and 52 **[TAB 3]**.
[112] Further, the principles of child support favour an interpretation that is favourable to children such that the best interest of the child is at the heart of any interpretive exercise: *Michel*, *supra* note 5 at para 102 **[TAB 3]**.

financial obligation to maintain the children. In an egregious case, a guidelines regime that ignored this joint responsibility of spouses for their children could be found inconsistent with the Guiding Principle. Second, the joint financial obligation to support the child must be carried out in accordance with the spouse's relative ability to contribute. Simply put, a spouse with greater ability should contribute more and a spouse with less ability should contribute less. The GIC's broad discretion to establish guidelines must be carried out within the context of these principles. Subsection 26.1(2) puts no further limits than this on the GIC's authority under the *Divorce Act.*

82. It is important to recognize that s. 26.1(2) was not a novel principle developed by Parliament in 1997. First, the legislative history of Bill C-41 shows that the Senate's amendment to include this provision was based on the text of the deleted sections of the 1985 *Divorce Act.* Second, the Supreme Court of Canada has stated that s. 26.1(2) was based upon a pre-existing obligation independent from the provision itself. In *DBS v SRG,* 2006 SCC 37, the SCC held:

> This wording [of s. 26.1(2)] suggests that the principle being discussed — "that spouses have a joint financial obligation" — exists prior to the enactment of the provision itself. Further, this principle is not said to be dependent on a court order or on any other kind of action by the recipient parent, consistent with pre-*Guidelines* jurisprudence: see *MacMinn*, at para. 15. The *Divorce Act* in the *Guidelines* era thus confirms that there still exists a free-standing obligation for parents to support their children commensurate with their income. Its payor parent income-based approach then shapes this obligation, with the result that the total amount of child support is determined — and not merely divided — according to the income of the payor parent. A parent who fails to do this will have failed to fulfill his/her obligation to his/her children.[113]

D. The *Guidelines* are not irrelevant, extraneous or completely unrelated to the GIC's statutory mandate in s. 26.1

83. The *Guidelines* are clearly compatible with the statutory mandate set out by Parliament in the *Divorce Act,* including the Guiding Principle in s. 26.1(2). This is apparent from the *Guidelines* themselves, the contextual record at the time that the *Guidelines* were established and subsequent jurisprudence confirming the *Guidelines'* purpose. This is far from an egregious case where the GIC exercised its wide-ranging authority extraneously to its statutory mandate. On the contrary, the *Guidelines* represent a reasonable exercise of the GIC's delegated power, well within the bounds of the enabling legislation.

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[113] *DBS v SRG*, 2006 SCC 37 [*DBS* SCC] at para 48 **[TAB 18]**.

84. Significantly, the *Guidelines* have previously been found *intra vires* the *Divorce Act* by the Ontario Superior Court of Justice. In *Premi v Khodeir*, 2009 CanLII 42307 (ONSC), Mr. Khodeir (who filed an affidavit in support of Mr. Auer in this proceeding) argued that the *Guidelines* were *ultra vires* because they did not reflect the relative abilities of the parties to contribute to maintain the child.[114] After examining the legislative history of the *Guidelines* (including s. 26.1(2)) and case law considering the relevant provisions, the Court found that "Parliament has enacted a constitutionally valid child support system to encompass the underlying principles of s. 26.1(2) of the *Divorce Act* and any perceived deficiencies should be addressed through legislative change."[115] Although Mr. Khodeir appealed multiple decisions in his divorce proceeding to the Ontario Court of Appeal,[116] no appeal appears to have been filed from the *vires* determination.

85. The objectives of the *Guidelines* plainly demonstrate their consistency with the Guiding Principle. Section 1 of the *Guidelines* states:

> **1** The objectives of these Guidelines are
>
> **(a)** to establish a fair standard of support for children that ensures that they continue to benefit from the financial means of both spouses after separation;
>
> **(b)** to reduce conflict and tension between spouses by making the calculation of child support orders more objective;
>
> **(c)** to improve the efficiency of the legal process by giving courts and spouses guidance in setting the levels of child support orders and encouraging settlement; and
>
> **(d)** to ensure consistent treatment of spouses and children who are in similar circumstances.[117]

86. The Supreme Court of Canada has recognized that the objectives of the *Guidelines* set out in s. 1 reflect the Guiding Principle. In *Contino v Leonelli-Contino*, 2005 SCC 63, the SCC majority stated:

> The underlying principle of the Guidelines is that "spouses have a joint financial obligation to maintain the children of the marriage in accordance with their relative abilities to

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[114] *Premi v Khodeir*, 2009 CanLII 42307 (ONSC) [*Premi*] at para 42 **[TAB 19]**.
[115] *Premi*, *supra* note 113 at para 70 **[TAB 19]**. While the Court characterized Mr. Khodeir's challenge as "constitutional", it is apparent based on the Court's reasons that Mr. Khodeir's application involved an administrative challenge to the *vires* of the *Guidelines*. As in this case, Mr. Khodeir argued that the *Guidelines* were *ultra vires* based on s. 26.1(2) of the *Divorce Act*. The constitutionality of the *Guidelines* was not put in issue.
[116] *Premi v Khodeir*, 2008 ONCA 313; *Premi v Khodeir*, 2009 ONCA 800; *Premi v Khodeir*, 2010 ONCA 721 [**Not Reproduced**].
[117] *Guidelines*, *supra* note 1 at s 1 **[Applicant's BOA TAB 1]**.

> contribute to the performance of that obligation (*Divorce Act*, s. 26.1(2) (see Appendix)). The Guidelines reflect this principle through these stated objectives (Guidelines, s. 1)[.][118] [emphasis added]

87. While s. 26.1(2) of the *Act* is the underlying principle of the *Guidelines,* it is not the only objective that the GIC sought to fulfill through their enactment. Section 1 demonstrates the polycentric nature of the *Guidelines* and the multiple objectives of the GIC. As recently summarized by Justice Martin in *Michel v Graydon*, the *Guidelines* "embrac[e]…the principles of fairness and flexibility, balanced with consistency and efficiency, all in the child's best interests."[119] Subsection 26.1(2) of the *Act* must not be allowed to eclipse the GIC's diverse objectives as set out in s. 1. The polycentric nature of the *Guidelines,* where competing objectives required balancing by the GIC, calls for this Court's deference to the GIC's legislative choices.[120]

88. The legislative record shows that the Guiding Principle was understood at the time of the 1997 amendments to be a re-statement of the objectives set out in s. 1 of the *Guidelines.* In speaking to the Senate's proposed amendments to Bill C-41, the Hon. Mabel De Ware, chair of the Standing Senate Committee on Social Affairs, Science and Technology, stated that it was important to include this principle in the *Act* (and not only the *Guidelines)* from a "psychological and symbolic perspective":

> Honourable senators, the committee shares the view of many Canadians that the obligation of parenting should be shared by both spouses. This important principle is reflected in the present Divorce Act, which explicitly recognizes the obligation of both parents to support their children. However, Bill C-41 contains no such recognition.
>
> Professor Nick Bala noted in a letter to the committee that from a psychological and symbolic perspective, it is unfortunate that Bill C-41 contains no provision like the present section 15(8) of the Divorce Act which explicitly recognizes the obligation of both parents to support their child.
>
> Therefore, the committee believes it is a serious error to remove the recognition of joint financial obligation and that this must remain part of the law. While we are aware that the obligations of both spouses are alluded to in objectives set out in section 1 of the draft guidelines, we feel that such a significant principle must be stated clearly in the act itself. The committee therefore proposed an amendment to Bill C-41 to state that the guidelines

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[118] *Contino, supra* note 4 at para 32 **[TAB 2]**.
[119] *Michel, supra* note 5 at para 52 **[TAB 3]**.
[120] *Trinity Western University v College of Teachers (British Columbia),* 2001 SCC 31 at para 54 [**Not Reproduced**].

> shall be based on the principle that spouses have a joint financial obligation to maintain the children of the marriage in accordance with relative abilities.[121] [emphasis added]

89. Before the Senate amendment to Bill C-41 was passed in the House of Commons, Parliamentary Secretary Kirkby confirmed that the addition of s. 26.1(2) "reaffirmed" the objectives set out in the *Guidelines:*

> Second, Bill C-41 through the introduction of child support guidelines reaffirms the objective that both parents have a joint financial obligation to support their children. However the minister understood the concerns raised by some members of the committee that this objective was no longer apparent since it was removed from the act along with the other provisions which were part of the concept of broad discretion which is currently used in the determination of child support. This broad discretion concept defeated the objectives of the guidelines and as such we needed to remove it from the act.
>
> The minister has always supported the objective that both parents are financially responsible for the needs of their children. This obligation is included in the guidelines but to give it more importance the minister agreed that it be reintegrated in the act to ensure that any guidelines will respect that principle.[122] [emphasis added]

90. Evidence establishing that the *Guidelines* were intended to comply with the Guiding Principle can also be found in Government of Canada documents released to explain the child support changes. In "Budget 1996: The New Child Support Package", the Government of Canada's explanation of the design of the *Guidelines* tracks very closely to s. 26.1(2)'s Guiding Principle:

> The Guidelines are designed to: establish a fair standard of support for children that ensures that children continue to benefit from the financial means of both parents after divorce.[123]

91. Prior to the GIC's enactment of the *Guidelines*, the FLC affirmed that, in their view, the recommended RFP Formula was consistent with the principle later to be set out in s. 26.1(2). In their Report, the FLC stated:

> The Committee's proposed child support formula is guided by the principle that both parents have a responsibility to meet the financial needs of the children according to their income.[124]

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[121] Harper Affidavit, *supra* note 13 at Exhibit 39, Senate Debate, 35-2, vol 135, Issue 70 (12 February 1997) (Hon Gildas L. Molgat) at p 35 of 42.
[122] Harper Affidavit, *supra* note 13 at Exhibit 27, House of Commons Debate, 35-2, vol 134, No. 130 (14 February 1997) (Hon Gilbert Parent) at p 8122.
[123] Harper Affidavit, *supra* note 13 at Exhibit 11, Budget 1996: The New Child Support Package, March 1996 at p 11.
[124] Harper Affidavit, *supra* note 13 at Exhibit 8, FLC Report at p i.

92. Notably, the FLC's view was that every child support formula that they considered (including the RFP Formula) was consistent with objectives substantially the same as the Guiding Principle. Before recommending the RFP Formula, the Committee compared each formula model with various objectives and principles of child support.[125] Among the principles considered were:

- Parents have legal responsibility for the financial support of their children;
- Responsibility for the financial support of the children should be proportionate to the means of each parent; and
- Levels of child support should be established based in relation to parental means.[126]

93. The FLC found that every child support formula respected these three principles.[127] Ultimately, the Committee held that the RFP Formula was the preferred means of achieving the various principles and objectives of child support, stating:

> …it would be impossible to develop a formula which perfectly respects every principle and objective. From a research perspective, the Revised Fixed Percentage Formula was identified as the preferred approach mainly because it offered the best solution to the problematic areas identified. The Committee agreed that the Revised Fixed Percentage represented the best formula from a policy perspective.[128]

94. A review of the *Guidelines* themselves demonstrates consistency with the Guiding Principle. As noted by Prof. Thompson in his Rebuttal Report, multiple provisions in the *Guidelines* involve the explicit or implicit consideration of both parental incomes in determining child support amounts: s. 7 for special or extraordinary expenses; s. 8 for split custody; s. 9 for shared custody; s. 10 for undue hardship; s. 3(2)(b) for most adult children; s. 4 for payor income above $150,000; and other discretionary sections like s. 5 (step-parents) and retroactive child support.[129]

95. The Table Amounts themselves, calculated using the RFP Formula, reflect the Guiding Principle. The non-custodial parent's relative ability to contribute is readily apparent in the increasing presumptive child support amounts that result from increasing levels of income.

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[125] Harper Affidavit, *supra* note 13 at Exhibit 8, FLC Report at pp 78-89.
[126] Harper Affidavit, *supra* note 13 at Exhibit 8, FLC Report at p 87.
[127] Harper Affidavit, *supra* note 13 at Exhibit 8, FLC Report at p 87-88.
[128] Harper Affidavit, *supra* note 13 at Exhibit 8, FLC Report at p 78.
[129] Thompson Affidavit, *supra* note 64 at Exhibit B, Rebuttal Report at para 24. For further detail on how these provisions consider both parental incomes, see paras 25-26 of the Rebuttal Report.

96. The custodial parent's obligation is less obvious but also present within the formula's assumptions. Because the child lives with the custodial parent, their standards of living are inextricably linked. As is the case for the paying parent, the custodial parent is also responsible to support their children based on their capacity to pay. The Table Formula makes the technical assumption that both parents have the same income.[130] The custodial parent is then expected to pay a similar percentage of his or her income to meet the children's needs.[131] In this way, the Table Amounts in Schedule 1 reflect the relative ability of the custodial parent to contribute to the child's maintenance in accordance with the Guiding Principle.

97. Minister of Justice Rock explained on two occasions during the passage of Bill C-41 how the *Guidelines* reflected the custodial parent's ability to pay. The first was before the House of Commons Standing Committee:

> …the family law committee struggled for some time with the question of whether they should adopt a model that worked on the income of both parties or whether it was appropriate to work from just one. The approach you see reflected in these guidelines is based on the following assumptions, which the committee eventually decided were sound.
>
> First, the standards of living of a child and of the parent with whom that child lives are inseparable. If I have sole custody of the child, that child has my standard of living. If I have two children in my sole custody they have my standard of living. They're inseparable.
>
> …
>
> Why is it fair to disregard the income of the custodial spouse? Because the custodial spouse is already paying the average proportion. It's inescapable.[132]

98. Later, Minister of Justice Rock offered a similar explanation for how the *Guidelines* reflected the non-custodial parent's ability to contribute before the Senate Standing Committee:

> What about the custodial parent? Why should he or she not have to contribute? That person does contribute, because the standard of living of the child and the parent who has custody are inseparable. It is impossible to look differently at my standard of living and at the standard of living of my children. They are the same, because I live with them.

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[130] See Thompson Affidavit, *supra* note 64 at Exhibit B, Rebuttal Report at para 27; see also Harper Affidavit, *supra* note 13 at Exhibit 12, Department of Justice Canada, Formula for the Table Amounts Contained in the Federal Child Support Guidelines: A Technical Repot, Research Report CSR-1997-1E, December 1997 Report at p 1.
[131] Harper Affidavit, *supra* note 13 at Exhibit 1, Regulatory Impact Analysis Statement, SOR/DORS/97-175 at p 1121.
[132] Harper Affidavit, *supra* note 13 at Exhibit 14, House of Commons Standing Committee on Justice and legal Affairs, House of Commons, No .54 (21 October 1996) at pp 1710-1715.

> We have started from the presumption that the custodial parent also spends the same average proportion of his or her income on the children. […]
>
> Again, just as before separation, the child enjoys a standard of living that reflects the total income of both parties. That does not mean that the non-custodial parent's support payments should decrease, just because the custodial parent's income has gone up to $80,000 [and the non-custodial is $50,000]. It should not decrease, because they want that child to have the standard of living reflecting $130,000, and it would not if we decreased the support being paid by the parent making $50,000. That is the theory. To me, it is compelling.[133]

E. Responses to Mr. Auer's criticisms on the operation of the Guidelines

99. The AGC's position is that Mr. Auer's submissions at paras. 136-450 of his Brief of Argument are not relevant to the issue of the *vires* of the *Guidelines.* Nonetheless, the remainder of the AGC's brief will respond to Mr. Auer's submissions therein.

100. As the record demonstrates, the construction of a child support formula is not a simple task. There are many options to determine the costs of children. There are many options for how to apportion those costs between parents. There are many decisions about departures from the formula and situations where the formula should not be applied. It took the FLC and the DOJ six years to choose, construct and specify the details of a recommended formula that would ultimately be enacted by the GIC through the *Guidelines.* Unsurprisingly, the various reports and working papers prepared over that time reveal false starts, discarded ideas, new ideas, shifts in emphasis and some inconsistent statements. Broad policy statements in the early days of research eventually became detailed technical specifications for a workable formula operating within a larger set of child support guidelines. After the GIC promulgated the final version of the *Guidelines* in 1997, the Table Formula was explained in the *Formula for the Table of Amounts contained in the Federal Child Support Guidelines: A Technical Report* (the **"Technical Report"**).[134]

101. Every set of child support guidelines – whether in the United States, the United Kingdom, Australia or New Zealand – goes through a similar process of construction, reconsideration and adjustment. There are conflicting interests and policy goals at work. The issues raised – how to

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[133] Harper Affidavit, *supra* note 13 at Exhibit 30, Proceedings of the Standing Senate Committee on Social Affairs, Science and Technology, Issue 17 – Evidence (11 December 1996 & 12 December 1996).

[134] Harper Affidavit, *supra* note 13 at Exhibit 12, *Formula for the Table of Amounts contained in the Federal Child Support Guidelines: A Technical Report*, Research Report CSR-1997-1E, Department of Justice Canada, December 1997 ["Technical Report"].

estimate the costs of a child in a formula; how to apportion the costs between parents; and when to depart from the formula – are not answerable simply by technical economic analysis. As Professor Ira Ellman explains in *Fudging Failure: The Economic Analysis Used to Construct Child Support Guidelines*:

> But the standard economic analysis does not expressly recognize the inevitable trade-off between these competing interests [of children, non-custodial parents and custodial parents], and it therefore lends no assistance to the policymaking body ultimately responsible for those tradeoffs. Indeed, it seems that participants in the process – members of the guidelines writing committee – assume that the setting of support guidelines is an exercise in economic analysis requiring primarily technical economic expertise, rather than an exercise in policymaking requiring interest balancing.[135]

102. Mr. Auer spends much of his brief combing through older reports and working papers, finding quotations that are at odds with later decisions or broad policy statements that must later be specified in operational detail. He raises many arguments about the details of how the Table Formula was constructed that will be addressed briefly in response here. For each of these issues, a different policy decision could have been made (and often was considered at some point during the process). Mr. Auer would obviously have preferred some other formula (although neither Prof. Sarlo nor Prof. Allen propose an alternative). But that is not the issue in a *vires* challenge.

103. Mr. Auer also takes a literal view of every aspect of the Table Formula used to calculate the Table Amounts. Each simplifying assumption used within the formula is treated as if it must be true in every fact situation and, if not, the Table Formula, and the *Guidelines* themselves, are "unreasonable" or "inconsistent". But the Table Formula's assumptions were never intended to map on perfectly with real life situations. As the Technical Report explains:

> [The Table Formula's] technical assumptions have the narrow purpose of producing a mathematical model. They do not restrict the application of the tables to real life situations which may involve more complex family situations.[136]

The function of the Table Formula and resulting Table Amounts are to consistently resolve the vast majority of cases with a minimum of cost and delay for those involved. Child support

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[135] Ira Mark Ellman, "Fudging Failure: The Economic Analysis Used to Construct Child Support Guidelines", *University of Chicago Legal Forum*: Vol. 2004: Iss. 1, Article 6, 167 at p 178. **[Applicant's BOA TAB 27]**
[136] Harper Affidavit, *supra* note 13 at Exhibit 12, Technical Report at p 2.

formulas provide a workable tool for access to justice for the majority of parents who need to efficiently determine the amount of child support to be paid and received.[137]

i. The heart of the RFP Formula critique: Prof. Sarlo's flawed "should pay-do pay" analysis

104. Mr. Auer's technical critique of the RFP Formula principally flows from Prof. Sarlo's "should pay-do pay" analysis in section 7 of "An Assessment of the Child Support Guidelines" (the "**Assessment**").[138] There, Prof. Sarlo claims to see "if the numbers 'add up'"[139] by examining the respective contributions of custodial and non-custodial parents to the costs of children, after removing the government child benefits.[140] He suggests that, in a wide range of cases, what the non-custodial parent "should pay" is much less than what they "do pay" and, to go one step further, in many cases the custodial parent does not financially contribute to the support of the children but receives a "net wealth transfer".[141] He relies on these conclusions to support his argument that the Table Amounts are "too high" or "unreasonable".

105. Mr. Auer describes this as a "holistic empirical evaluation".[142] But it is not. The title of section 7 of the Assessment is "The Mathematics of the Guidelines" (by which Prof. Sarlo means the Table Formula). Prof. Sarlo himself describes this as an examination "strictly from a 'math' perspective".[143] Prof. Sarlo makes questionable assumptions and then does math to reach his conclusions. For his framework, he relies upon "Newfoundland illustrations" found in an early draft of the Technical Report: illustrations that are not in the final version of the Technical Report and have no official status of any kind.[144] The flaws in Prof. Sarlo's assumptions and methods are

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[137] See Harper Affidavit, *supra* note 13 at Exhibit 8, FLC Report at p 6: "[T]he introduction of a child support formula will bring considerable assistance to parties negotiating child support, thus reducing an important element of conflict at the time of the family breakdown. This may also result in lower legal costs for parties and state (legal aid, court costs and maintenance enforcement costs). It should also lessen the emotional trauma and costs to families. A child support formula is an important step to a child centred approach to family law and is clearly in the best interest of Canadian children.".
[138] Sarlo Affidavit, *supra* note 70 at Exhibit A, B, and C Sarlo Report.
[139] Sarlo Affidavit, *supra* note 70 at Exhibit A, B, and C Sarlo Report at p 51.
[140] Sarlo Affidavit, *supra* note 70 at Exhibit A, B, and C Sarlo Report at pp 51-72.
[141] Sarlo Affidavit, *supra* note 70 at Exhibit A, B, and C Sarlo Report at p 72.
[142] Auer Brief, *supra* note 2 at sub-heading before para 416.
[143] Sarlo Affidavit, *supra* note 70 at Exhibit A, B, and C Sarlo Report at p 51.
[144] Their lack of official status was aacknowledged by Prof. Sarlo: Sarlo Cross-Examination *supra* note 74 at p 52 - line 23 p 43, line 6.

detailed in the Rebuttal Report of Prof. Thompson.[145] The most significant flaw is his artificially low number for "direct expenditures on children", especially for lower income custodial parents, by assuming that the custodial parent does not spend all of their government child benefits or child support upon the children.[146]

106. Prof. Sarlo himself admits that some of the results of his math appear "anomalous" or "strange".[147] Further, Prof. Sarlo had to correct errors in his calculations, in Attachment #1 to his Assessment and then to his updated 2019 Newfoundland calculations.[148] His after-tax calculations are not always clear.[149]

107. Prof. Sarlo's "should pay – do pay" analysis is purely mathematical and not empirical in any way. It is based on flawed assumptions, most significantly that the custodial parent does not spend all of their child benefits or child support on the children. It does not found an empirical conclusion that custodial parents do not contribute financially to their children's expenses or receive a "net wealth transfer" through the application of the Table Formula.

ii. The GIC's choice of the 40/30 equivalence scale

108. In enacting Schedule 1 of the *Guidelines*, the GIC chose to adopt the RFP Formula recommended by the FLC, including the "40/30 equivalence scale", to determine the Table Amounts. The GIC's choice of a formula based upon the 40/30 equivalence scale is not inconsistent in any way with the *Divorce Act.*

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[145] Thompson Affidavit, *supra* note 64 at Exhibit B, Rebuttal Report at paras 81-92. Prof. Sarlo did not disagree with Prof. Thompson's description of the "should pay – do pay" analysis: Sarlo Cross-Examination *supra* note 74 at p 48, line 2 – p 54, line 2 (except for the reference to an income shares approach).

[146] Thompson Affidavit, *supra* note 64 at Exhibit B, Rebuttal Report at paras 83-87. Further, to get to his "should pay" numbers, Prof. Sarlo simply decides that parents *should* pay for the costs of children in accordance with their "relative after-tax incomes", without explanation and without defining his measure of "after-tax income": Thompson Affidavit, *supra* note 64 at Exhibit B, Rebuttal Report at paras 87-89.

[147] Sarlo Affidavit, *supra* note 70 at Exhibit A, B, and C Sarlo Report at pp 67, 68.

[148] Affidavit of Chris Sarlo, sworn September 16, 2020 [2020 Sarlo Affidavit] at Exhibit A Surrebuttal Report [Surrebuttal Report] at paras 20-22 under "Corrections".

[149] Thompson Affidavit, *supra* note 64 at Exhibit B, Rebuttal Report at para 89; Transcript from Cross-Examination on Affidavit of Christopher Anthony Sarlo, dated October 2, 2020 [Sarlo October Cross-Examination] at p 28, line 5-p 28, line 14.

109. There is no consensus (among economists or otherwise) on how to measure the costs of children. This fact is undisputed in this application.[150] There are many methods of estimating child costs with a wide variance in outcomes. The range of outcomes reflects a mix of data problems, assumptions, adjustments for joint goods and value judgments.[151]

110. The denominators in the RFP Formula are solved in accordance with the 40/30 equivalence scale.[152] This scale was based on a method identified by Statistics Canada and recommended by the FLC. In recommending this approach, the FLC acknowledged its limitations:

> The 40/30 equivalence scale is proposed in the absence of a definitive formula and perfect method for determining expenditures on children which is totally reliable and without criticism. Therefore, a reasonable set of round numbers derived from empirical research and a public consultation process could be used and produce reasonable results.[153]

111. While the 40/30 equivalence scale does not achieve the standard of perfection, neither was it "a shot in the dark"[154] by the GIC. The FLC found little support for the economic models initially proposed to determine expenditures on children. As a result, they brought together economists and experts in the area to discuss other options. On their advice, the 40/30 Equivalence Scale was selected as the recommended method.[155] The GIC's subsequent adoption of a formula incorporating this method was a reasonable exercise of its delegated legislative authority.

112. Mr. Auer argues that the GIC "set its bounds for costs to maintain the children" by selecting a Table Formula that incorporated the 40/30 equivalence scale.[156] In other words, the mathematics of the RFP Formula somehow constrained the GIC's discretion to establish guidelines. Much of Mr. Auer's argument flows from this premise. It reflects a complete misapprehension of the GIC's delegated powers under s. 26.1 of the *Divorce Act.* Parliament delegated broad authority to the GIC to determine how child support amounts were to be calculated within the context of the

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[150] See Auer Brief, *supra* note 2 at para 137.
[151] Thompson Affidavit, *supra* note 64 at Exhibit B, Rebuttal Report at para 37.
[152] Harper Affidavit, *supra* note 13 at Exhibit 12, Department of Justice Canada, Formula for the Table Amounts Contained in the Federal Child Support Guidelines: A Technical Repot, Research Report CSR-1997-1E, December 1997 Report p 3.
[153] Harper Affidavit, *supra* note 13 at Exhibit 8, FLC Report.
[154] Auer Brief, *supra* note 2 at para 168.
[155] Harper Affidavit, *supra* note 13 at Exhibit 8, FLC Report at p 8-9.
[156] Auer Brief, *supra* note 2 at para 170. See also Auer Brief at para 185: "[I]t is the use of the 40/30 Scale as an expenditure model that sets the bounds of costs to maintain children. Child support awards may transfer those estimated child costs and no more." [emphasis added].

Guiding Principle. The choice of a particular method of estimating the costs of children within the Table Formula in no way constrained this wide-ranging statutory power.

iii. The Table Formula's consideration of government child benefits

113. The *Guidelines'* Table Formula does not include child-related government benefits in determining income. It assumes that such benefits are to be spent directly on the child and are not income to the recipient parent for their own use. This does not render the *Guidelines ultra vires.* The rationale underlying this legislative choice was explained in the Technical Report by the Department of Justice:

> Not included in the calculation of the receiving parent's taxes are the federal Child Tax Benefit and the GST rebate for children. These are deemed to be the government's contribution to children and not available as income to the recipient parent.[157]

114. The Quebec *Child Support Guidelines* (favoured by Mr. Auer) adopt the same approach as the federal model to government child benefits. Prof. Thompson cites the Quebec Follow-up Committee's 2000 Report explaining the rationale for Quebec's decision:

> In fact, these transfer payments are used especially to meet the needs of children, as are support payments, and, for low-income families, they represent an important form of compensation for the relatively low support contributions listed in the table, amounts that take both parental resources and the number of children into account. Basic parental support contributions are directly based on the income of both parents so it follows that the lower their respective incomes, the lower the contributions as established in the table. Family allowance and child tax benefits serve to supplement the relatively low incomes of these parents.[158]

115. The premise behind the treatment of government child benefits in the federal and Quebec child support regimes is that a parent receiving the benefits will spend the full amount on their children.[159] The same premise applies to child support paid by the non-custodial parent. Their purpose is to permit the custodial parent to spend more on their children than would be possible based on the custodial parent's income alone.[160]

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[157] Harper Affidavit, *supra* note 13 at Exhibit 12, Technical Report, at p 5.
[158] Thompson Affidavit, *supra* note 64 at Exhibit B, Rebuttal Report at para 78, citing *Report of the Follow-up Committee on the Quebec Model for the Determination of Child Support Payments* at p 67.
[159] Thompson Affidavit, *supra* note 64, at Exhibit B, Rebuttal Report at para 80.
[160] *Ibid.*

116. Mr. Auer rejects these premises. In the calculations throughout his brief, he (and Prof. Sarlo) assume that the custodial parent spends only a portion of government child benefits and child support on their children. As Prof. Thompson explains:

> Both the public child benefits and the child support payment from the non-custodial parent are intended to be spent for the children and are in most cases, especially at lower income levels. But Sarlo's math, for two children, allocates only .4118 of those two sources of income to spending upon the children, using the 40/30 Equivalence Scale, thereby producing an artificially low number for such expenditures.[161] [emphasis added]

117. The GIC made a legislative choice not to include government child benefits in determining income for the purposes of the *Guidelines'* Table Formula. Mr. Auer and Prof. Sarlo disagree with this choice. The assumptions inherent in their calculations reflect this disagreement. But once again, this does not render the *Guidelines* inconsistent with the statutory mandate conferred by Parliament in the *Divorce Act.*

iv. The linear application of the 40/30 equivalence scale

118. At paras. 318-334 of his Brief of Argument, Mr. Auer criticizes the linear application of the 40/30 equivalence scale in determining Table Amounts. This issue is again irrelevant to the *Guidelines' vires.*

119. Prof. Thompson clearly sets this issue out in his Report:

> The 40/30 Equivalence Scale is applied by the table formula at all incomes above the self-support reserve (now $12,000/year) up to an annual payor income of $150,000. Section 4 of the *Guidelines* does not make $150,000 a hard "cap", but gives the court a broad discretion to depart from the table formula for higher incomes where the amount generated would be "inappropriate"."[162]

120. There is no consensus about the income level at which a child support formula should adjust for the declining percentage of parental income spent upon children.[163] Some authorities on child support believe that parental expenditures on children are roughly proportional across a broad range of income levels.[164] Others differ. As pointed out by Prof. Thompson, "the real issue

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[161] Thompson Affidavit, *supra* note 64 at Exhibit B, Rebuttal Report at para 85.
[162] Thompson Affidavit, *supra* note 64 at Exhibit B, Rebuttal Report at para 60.
[163] Thompson Affidavit, *supra* note 64 at Exhibit B, Rebuttal Report at para 64.
[164] See Thompson Affidavit, *supra* note 64 at Exhibit B, Rebuttal Report at paras 65-66, citing Ira Ellman in the United States and Ross Finnie in Canada.

is "how high", i.e. at what higher income levels do the significantly smaller proportions of spending begin?"[165]

121. In s. 4 of the *Guidelines*, the GIC chose an income level of $150,000 as the point at which courts could depart from the presumptive Table Amounts pursuant to s. 3. Other legislative choices were obviously possible. But Mr. Auer fails to show how the linear application of the 40/30 equivalence scale up to $150,000 is inconsistent with any purpose of the *Divorce Act.*

v. The *Guidelines*' treatment of s. 7 expenses

122. Subsection 7(1) of the *Guidelines* states that the determination of amounts for special or extraordinary expenses is based on the income of both parents. Subsection 7(2) of the *Guidelines* then expressly states the principle that the amounts are "shared by the spouses in proportion to their respective incomes".[166] This statement is plainly consistent with the Guiding Principle in s. 26.1(2). But Mr. Auer nonetheless alleges that the s. 7 regime is unreasonable.[167] His primary argument is that s. 7 expenses constitute "double-counting" with child support amounts determined under s. 3.

123. Amounts ordered pursuant to s. 7 of the *Guidelines* are clearly distinguished from the presumptive Table Amounts in s. 3(1) of the *Guidelines.*[168] Section 7 of the *Guidelines* gives the court a limited discretionary power to order both parents to contribute to a list of six "special" or "extraordinary" expenses over and above the Table Amount. The s. 7 analysis is fact-specific, taking into consideration the necessity and reasonableness of the expense and obligation of the non-custodial parent to contribute on a case-by-case basis.[169] Each of these mechanisms within s. 7 operates to avoid possible double-counting as alleged by Mr. Auer to render the *Guidelines* unreasonable.

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[165] Thompson Affidavit, *supra* note 64 at Exhibit B, Rebuttal Report at para 66. Another issue is the rate at which any decrease in spending occurs. If the relationship between income and spending on children is non-linear, as alleged by Mr. Auer, then what shape is it? Mr. Auer offers no answer to this question.
[166] *Guidelines, supra* note 1 at s 7(2) **[Applicant's BOA TAB 1]**.
[167] Auer Brief, *supra* note 2 at paras 264-285.
[168] *Guidelines, supra* note 1 at s 3(1) **[Applicant's BOA TAB 1]**.
[169] *Child Support Guidelines in Canada*, 2020, Julien D. Payne & Marilyn A. Payne, Toronto: Irwin Law, p 255-256, citing *MacDonald v Pink*, 2011 NSSC 421 at para 55 [**Not Reproduced**].

vi. Costs of parenting time or access for the non-custodial parent

124. At paras. 286-301 of his Brief of Argument, Mr. Auer argues that the Table Formula's failure to consider the non-custodial parent's direct spending on the child renders the formula unreasonable.[170] Again, the issue in this application is the *vires* of the *Guidelines* themselves and not simply the Table Formula. Nonetheless, the GIC made a legislative choice in s. 9 of the *Guidelines* to consider direct spending of the non-custodial parent only where a 40% threshold was met.[171] This decision was not inconsistent with its delegated authority.

125. Prof. Thompson explains the policy reasons supporting the GIC's choice on this issue as follows:

> In the *Federal Guidelines*, it was a policy decision not to make any similar explicit adjustment until a parent's time with the child reaches the threshold of 40% of the time over the course of a year. The policy reasons are explained in my "TLC of Shared Parenting" article (at pp. 324-25): (i) to protect the position of the primary parent; (ii) to recognise the direct spending of the other parent; (iii) to provide an objective method of identification of shared parenting cases; and (iv) to minimise incentives for opportunistic behaviour by either parent. The location of this "threshold" for adjustment varies among American guidelines, from a low of 14% to a high of 45%, with most states falling between 25 and 40%.[172]

126. While Mr. Auer focuses on costs of the non-custodial parent that are not considered in the Table Formula, Prof. Thompson notes that there are also costs for the custodial parent that are not considered:

> There are also clear indirect and non-monetary *costs* for a custodial parent, also not recognized by child support guidelines. Indirect costs include the impact of child care obligations upon the custodial parent's income, such as less ability to travel for work or to work shifts or overtime or long hours. Compensation for indirect costs may come by way of spousal support for middle- and higher-income parents, but such costs will not be compensated where the non-custodial parent lacks the ability to pay spousal support, which is common. Non-monetary costs include increased time spent on child care and household management by the custodial parent, the loss of leisure time, and other limits on life choices. In the end, <u>the net result of such benefits and costs is not at all clear.</u>[173] [emphasis added]

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[170] See Auer Brief, *supra* note 2 at para 301: "The decision to ignore NCP direct spending is therefore the third crucial baked-in assumption that renders the formula unreasonable.".
[171] *Guidelines*, *supra* note 1 at s 9 **[Applicant's BOA TAB 1]**.
[172] Thompson Affidavit, *supra* note 64 at Exhibit B, Rebuttal Report at para 74.
[173] Thompson Affidavit, *supra* note 64 at Exhibit B, Rebuttal Report at para 104.

127. The 40% threshold established by the GIC in s. 9 was authorized by the *Divorce Act.* Mr. Auer's view is that the *Guidelines* ought to have reflected the non-custodial parent's direct spending "whenever that becomes significant."[174] This would clearly involve a more complex regime and, in all likelihood, a case-by-case assessment contrary to the *Guidelines'* express objective of improving efficiency.[175] In establishing the 40% threshold, the GIC chose a different approach entirely consistent with the purposes of the *Divorce Act.* Section 10 of the *Guidelines* also allows for a departure from the Table Amount where the non-custodial parent's costs result in undue hardship.

vii. Undue hardship

128. At paras. 302-317 of his Brief of Argument, Mr. Auer argues that the undue hardship test in s. 10 is inappropriate and onerous. But the GIC did not prescribe a "test" for undue hardship in the *Guidelines.* Instead, the GIC set out a non-exhaustive list of circumstances that "may cause a spouse or child to suffer undue hardship" in s. 10(2). Where undue hardship is found, standards of living in both households must be compared pursuant to s. 10(3) of the *Guidelines.* In Schedule II of the *Guidelines,* the GIC provided an optional "advisory test"[176] to compare household standards of living.

129. Mr. Auer's issues related to undue hardship appear to be with the courts, and not the GIC. He argues that "courts have interpreted [undue hardship] as a very high bar"[177] and that "some judges" refuse to apply s. 10 where the non-custodial parent earns more than minimal income.[178] These issues have no bearing whatsoever on the *vires* of the *Guidelines.*

130. In s. 10 of the *Guidelines,* the GIC enabled courts to deviate from the presumptive Table Amounts in circumstances where a parent (including the non-custodial parent) or a child suffers undue hardship. Section 10 demonstrates the type of interest-balancing required during the construction of child support guidelines as was required of the GIC in this case. [179]

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[174] Auer Brief, *supra* note 2 at para 294.
[175] *Guidelines, supra* note 1 at s 1(a) **[Applicant's BOA TAB 1]**.
[176] Harper Affidavit, *supra* note 13 at Exhibit 1, Regulatory Impact Analysis Statement, SOR/DORS/97-175 at p 1122.
[177] Auer Brief, *supra* note 2 at para 306.
[178] Auer Brief, *supra* note 2 at para 310.
[179] See Thompson Affidavit, *supra* note 64 at Exhibit B, Rebuttal Report at para 40.

viii. Children from subsequent families

131. At paras. 335-344 of his Brief of Argument, Mr. Auer alleges that the treatment of children from subsequent families is inconsistent with the objectives of the *Guidelines.* This is not the issue in this application. The issue is whether the *Guidelines* are inconsistent with the purpose of the *Divorce Act.* Mr. Auer fails to identify any such inconsistency in the *Guidelines.*

132. The *Guidelines* account for a parent's duties to subsequent children in s. 10, the undue hardship provision. In his Rebuttal Report, Prof. Thompson shows three ways in which s. 10 adjusts for multiple families.[180] Mr. Auer's failure to consider s. 10 further demonstrates his myopic focus on the Table Formula rather than the *Guidelines* as a whole.

ix. The *Guidelines* do not provide spousal support

133. The *Guidelines* do not blend child and spousal support.[181] Pursuant to s. 15.1(3) of the *Act,* the *Guidelines* only apply to child support orders. One of the purposes of the amendments to the *Divorce Act* in 1997 was to distinguish between claims for child support and spousal support. Prior to 1997, blended orders for both child support and spousal support were issued pursuant to s. 15 under the legislative subheading "corollary relief".[182] Bill C-41 and the resulting *Divorce Act* amendments separated child support orders (s. 15.1) from spousal support orders (s. 15.2).[183] Child support takes priority over spousal support, as directed by s. 15.3 of the *Act.*

134. Mr. Auer never fully sets out his argument on how the *Guidelines* blend child and spousal support. It appears to be based on his premise that child support awards are allegedly greater than he suggests to be necessary for the custodial parent to maintain the children. Thus, any excess payment amounts to *de facto* spousal support.[184] This proposition reflects two errors. First, it assumes there to be an unequivocal measure of the direct costs of children across different income levels despite the admitted lack of consensus on measuring the costs of children. Second, Mr. Auer simply labels any amount above his (and Prof. Sarlo's) particular measure of child costs to

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[180] See Thompson Affidavit, *supra* note 64 at Exhibit B, Rebuttal Report at paras 96-98.
[181] Auer Brief, *supra* note 2 at paras 80 and 419.
[182] *Divorce Act* as enacted 1985, *supra* note 7 at s 15 **[AGC Authorities TAB 4**].
[183] *Divorce Act, supra* note 7 at s. 15 [**Applicant's BOA TAB 2**].
[184] See Auer Brief, *supra* note 2 at para 170: "Amounts transferred above the 40/30 Scale estimates are for something other than maintaining the children." Mr. Auer suggests that the "something other" is spousal support.

be "spousal support" and therefore not child support. This is Mr. Auer's characterization of these amounts, not the *Guidelines.*

x. Prof. Thompson's inter-jurisdictional comparisons

135. Mr. Auer resists any attempt to compare the Table Amounts calculated using the RFP Formula with child support amounts calculated using formulas in other jurisdictions. According to Prof. Thompson, the percentages and amounts under the Canadian Table Formula consistently land at the low end, or below, those calculated under American, Australian or New Zealand formulas.[185] Prof. Thompson describes this as a "more practical" way to test the view of Prof. Sarlo and Prof. Allen that the 40/30 equivalence scale overcompensates custodial parents.[186]

136. Mr. Auer suggests that these comparisons are somehow misleading, unreliable, superficial or based on dated models.[187] Prof. Thompson provided full footnotes for his comparisons. He was not cross-examined on any of his sources or calculations for child support formulas in other jurisdictions.

137. Mr. Auer challenges inter-jurisdictional comparisons by citing Jane Venohr, an American child support guidelines expert, about the many variables at work in constructing specific child support formulas and some of the risks of comparisons.[188] Ironically, these quotes are drawn from one of two Venohr articles, both of which engage in detailed inter-jurisdictional comparisons of child support formulas and outcomes in the United States in 2013 and 2017.[189] Both Venohr articles were cited in Prof. Thompson's Rebuttal Report[190] and both articles were used by Prof. Thompson in his report to compare child support amounts under the formulas.[191]

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[185] Thompson Affidavit, *supra* note 64 at Exhibit B, Rebuttal Report at paras 43-59.
[186] Thompson Affidavit, *supra* note 64 at Exhibit B, Rebuttal Report at paras 43.
[187] The "old" POOI models cited in Thompson Affidavit, *supra* note 64 at Exhibit B, Rebuttal Report at paras 48 and 53, were all replaced after the *Guidelines* were enacted in 1997: Nevada (2020), Australia (2008), New Zealand (2013), Illinois (2017), Arkansas (2020). Note that similar higher percentages were used for Australia, New Zealand and Illinois in their newer Income Shares formulas.
[188] Auer Brief, *supra* note 2 at paras 362, 363, 366, and 367.
[189] Venohr, "Child Support Guidelines and Guidelines Reviews: State Differences and Common Issues" (2013), 47 Fam.L.Q. 327; Venohr, "Differences in State Child Support Guidelines Amounts: Guidelines Models, Economic Basis, and Other Issues" (2017), 29 Journal of American Academy of Matrimonial Lawyers 377 **[TAB 21]**.
[190] Thompson Affidavit, *supra* note 64 at Exhibit B, Rebuttal Report at footnote 2.
[191] Thompson Affidavit, *supra* note 64 at Exhibit B, Rebuttal Report at paras 56-59.

138. Mr. Auer challenges Prof. Thompson's calculations of net income and net income percentages.[192] In his Rebuttal Report, Prof. Thompson acknowledged that it is "hard to be precise" about comparisons of net incomes in net income child support formulas.[193] Nonetheless, the Canadian percentages for non-custodial parent net incomes are still at the low end or below comparable U.S. net income percentage-of-obligor-income formulas.[194] Moreover, Mr. Auer says very little about the comparisons to gross income formulas, whether percentage-of-obligor-income or income shares models, except for Quebec.[195] Quebec's gross income shares formula begins around the same percentages as the federal formula, but then the percentages decline as joint parental incomes rise.[196] Prof. Thompson's Rebuttal Report shows that Canadian percentages are consistently below, and often well below, other child support formulas that use gross incomes in the United States, Australia and New Zealand.[197] If the RFP Formula produces amounts that are "too high", as alleged by Mr. Auer, Canada's placement should be significantly higher in these inter-jurisdictional comparisons.

IV. Remedy sought

139. Dismissal of the *Vires* Application with costs to the AGC.

Dated this 2nd day of November, 2020.

Estimated Time of Argument: 6 hours.

ATTORNEY GENERAL OF CANADA

Per: Cam Regehr
Solicitor for the Respondent
(Signed Electronically)

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[192] Auer Brief, *supra* note 2 at paras 373-382. Prof. Sarlo suggests that the mathematical formula means that the percentages of net income for 1 child must be fixed at 16.7% for 1 child and 25.9% for two children.
[193] Thompson Affidavit, *supra* note 64 at Exhibit B, Rebuttal Report at footnote 22.
[194] Thompson Affidavit, *supra* note 64 at Exhibit B, Rebuttal Report at para 49. In fact, even if Prof. Sarlo were correct about the percentages of 16.7% of NCP net income for 1 child and 25.9% for 2 children, the Canadian percentages would still be at the low end or below most of these net income POOI formulas. But Prof. Sarlo is wrong in suggesting that those mathematical percentages reflect the actual percentages when calculating child support amounts as a percentage of NCP net income (Prof. Sarlo did not dispute this math in his October 2020 Cross, Sarlo October Cross-Examination, *supra* note 149 at p 33, line 21 – p 34, line 7). Prof. Sarlo offered an elaborate explanation as to why the NCP net income percentages should be higher in his September 16, 2020 Affidavit, including the table of calculations set out in Auer Vires Brief, *supra* note 2 at para 379. Prof. Sarlo could not explain in cross-examination the basis for a $2,014 adjustment to the table child support amount of $4,212 for the 2019 NCP column: Sarlo October Cross-Examination, *supra* note 149 at p 20, line 10 – p 33, line 9. Mr. Auer now refers to this as a "deemed split": Auer Brief, *supra* note 2 at para 380. In the tab at para 379, the child support amount of $4,212 in 2019 can be divided by Prof. Sarlo's calculated NCP net income of $20,853, to yield a percentage of 20.2% for two children .
[195] See Sarlo Cross-Examination *supra* note 74 at p 9, line 15 – p 10, line 4.
[196] Thompson Affidavit, *supra* note 64 at Exhibit B, Rebuttal Report at paras 52 and 105-112.
[197] Thompson Affidavit, *supra* note 64 at Exhibit B, Rebuttal Report at paras 48 and 50-55.

V. Authorities