

Draft April 4, 2002

**THE FEDERAL CHILD SUPPORT GUIDELINES:
A BREAKDOWN OF DEMOCRATIC PROCESS
AND
THE CANADIAN LEGAL SYSTEM**

TABLE OF CONTENTS

1.0 SUMMARY 1
2.0 INTRODUCTION..... 5
3. THE FORMULA 6
 3.1 The Formula..... 6
 3.2 Effect of the Formula on Children 9
4. A BREAKDOWN OF DEMOCRATIC PROCESS 17
 4.1 Lack Of Debate And Disclosure 17
 4.2 Demonstrated Ignorance..... 19
 4.3 Further Misinformation 20
 4.4 A Revelation Of The True Nature Of The Guidelines 22
6.0 OPPORTUNITIES FOR ACTION 25
 6.1 Challenge to the Guidelines under the Divorce Act 25
 6.2 Constitutional Challenge under S.15.2 of the Charter of Rights and Freedoms 25
 6.3 Further Legal Action and a Class Action Suit? 29
REFERENCES 31
APPENDIX A..... 32
*"Formula for the Table of Amounts Contained in the Federal Child Support Guidelines,
A Technical Report, Research Report CSR-1997-1E"* 32
APPENDIX B..... 33
Correspondence from Virginia McRae explaining federal child support guidelines 33

List of Figures

Figure 1. Graphic showing Equation for Tables Amounts 6
Figure 2. Comparison of Tables Amounts and Re-Calculated Amounts Using Formula 8
Figure 3. Parenting Costs Relative to Time of Custody 10
Figure 4. Standards of Living Produced by Child Support Guidelines..... 13
Figure 5. Percentage of Income Spent on Children 14
Figure 6. Cost of Raising Children Implied by Guidelines Amounts..... 15

List of Tables

Table 1 Analysis of Tables Amounts 12

1.0 SUMMARY

The Federal Child Support Guidelines were passed by parliament in February 1997, and came into effect in May 1997. Although the Guidelines have been in effect for almost five years, there has been little discussion or legal scrutiny of the underlying formula used to calculate the Tables Amounts.

The purpose of this paper is to present the Formula for the Tables Amounts for scrutiny, and to examine how in our parliamentary democracy we could pass legislation, and implement it for now five years, without the judiciary being apprised of its very basis.

The formula used to generate the Tables Amounts in the Federal Child Support Guidelines is described in the Research Report "*Formula for the Table of Amounts Contained in the Federal Child Support Guidelines, A Technical Report, Research Report CSR-1997-1E*" published by the Child Support Team Department of Justice, Canada.

The formula used to generate the Guidelines Tables Amounts is a simplistic, one-line, household standard of living equalization formula.

There are two key assumptions made in the model:

1. The paying parent is assumed to the expenses of a single adult; and,
2. The incomes of the paying and receiving parent are assumed to be equivalent.

Knowing the formula, it is possible to assess the result produced by the Guidelines Tables Amounts over a range of custody arrangements.

Under the narrow set of assumptions built into the model, a loss of one parent and equal incomes, the model does actually meet the stated objectives of the guidelines, equal standards of living and a sharing of expenses between the two parents.

The effect of the formula, using more realistic income assumptions, and the entire range of custody over which the formula is applied (from 0 to 40%), shows that at average income levels, if the paying parent contributes nothing to the care of the children except the prescribed amount of child support, he would enjoy a standard of living 16% higher than the receiving parent.

Once his custody approaches 40% however, the standard of living in his home would be almost 30% lower than in the other home, and only marginally above the poverty line.

As the percentage of custody increases, the proportion of net income (before support) used by the receiving parent to support the children decreases to a negligible amount.

This is contrary to the stated objective of the guidelines, which state that the children should continue to benefit from the financial means of both parents.

Draft April 4, 2002

These results clearly indicate that the Federal Child Support Guidelines Tables result in appropriate child support awards only in the situation where the children lose substantial or total contact with one parent. As such they offer clear and powerful financial disincentives to joint parenting by penalizing those payor parents with substantial custody.

Rather than ensuring consistent treatment of spouses and children who are in similar circumstances, as is the stated objective, they apply similar awards in widely differing circumstances.

A further by-product of the legislation is that it encourages custody battles as parents strive for the magical 40% threshold.

How was it that we received such bad legislation? The answer to this question can be found in the fact that very few people actually know what the Guidelines Formula is and how it works, or rather doesn't work.

The report which explains the Guidelines amounts (*"Formula for the Table of Amounts Contained in the Federal Child Support Guidelines, A Technical Report, Research Report CSR-1997-1E"*) was not released until April 9, 1998, more than a full year after Parliament debated and passed the Guidelines, and almost a full year after they were implemented.

How I wonder, did parliamentarians debate and pass a law, when they had no information about its very basis? Where was the opposition demanding to know what they were passing? Why did it take almost two years to publish an eight page report?

Even now, the report has seen no publicity and very limited circulation. It is not, for example, listed on the Department of Justice website along with the other research reports.

Documents recently released by the Department of Justice under a Freedom of Information request, indicate that a conscious decision was made by the Department of Justice to limit circulation of this report.

As a result of this lack of disclosure, it can be documented very few people, even those that should know, are aware of the true nature of the Guidelines. This lack of knowledge extends throughout the legal system, from the Family Law Committee of the Canadian Bar Association, through specialists who write child support software right up to the justices of the Supreme Court of Canada.

The Supreme Court of Canada: in Francis v. Baker at p41 wrote:

Draft April 4, 2002

“ However, even though the Guidelines have their own stated objectives, they have not displaced the Divorce Act, which clearly dictates that maintenance of the children, rather than household equalization or spousal support, is the objective of child support payments.”

However, in the publication *“Formula for the Tables of Amounts Contained in the Federal Child Support Guidelines: A Technical Report”, Research Report CSR-1997-1E*; it states at page 2;

“Simply stated the model equalises the financial circumstances of the two households”

and at page 4;

“ As stated earlier, the objective is to determine the amount that must be transferred from one household to the other in order to make them “equally well off”, that is, the child support table amount.”

Why would the Honourable Justices of the Supreme Court make such a statement, if they knew the very basis of the Guidelines was a household equalization formula? Clearly they did not, which is a profound embarrassment to the Canadian judicial system.

Virginia McRae, Co-Chair of the Federal/Provincial/Territorial Family Law Committee for the Department of Justice Canada, has revealed that policy decisions were made to include in Child Support payments, amounts, which are under Section 15.2.6 of the Divorce Act taxable spousal support. This, as the Supreme Court has re-affirmed, is in contravention of the governing legislation the Divorce Act.

Is it any wonder that these policy decisions and the Formula itself were never debated and publicised?

How has it that in a democracy we can have Guidelines, which contravene the Divorce Act, are based on a largely unknown, admittedly deficient formula, and which are derived from undisclosed policy decisions that promote the loss of substantial contact with one parent?

The most obvious and most direct challenge to the Guidelines is under the Divorce Act. As described above we have at our disposal the letter from Ms. McRae, which confirms that the Guidelines Tables Amounts include amounts, that under the Divorce Act are spousal support.

Draft April 4, 2002

Furthermore we have the Supreme Court in Francis v Baker, where it is stated that child support must not be household equalization or spousal support.

Clearly, the current Tables Amounts include both, and thus are in contravention of the Divorce Act.

A constitutional challenge under the Charter of Rights and Freedoms would be a major undertaking. The Federal Child Support Guidelines have created two classes of parents: paying parents (those with under 40% custody) and receiving parents (those with over 60% custody).

These two classes of parents are arbitrarily treated unequally by the application of the Tables Amount. The household of the receiving parent is credited with the full expenditures on the children, regardless of whether the children reside there full time or not. The household of the paying parent on the other hand, is denied any recognition of parenting expenditures, regardless of the actual expenditures on the children and time of residency in that home (up to the 40% threshold).

The paying parent is denied the most basic of rights, the right to continue as an involved, care giving, parent, based solely on the irrelevant characteristic that he or she is a parent with less than 40% custody.

As discussed throughout this paper, it is clear that the Guidelines are based on a formula that was never fully disclosed, debated, and publicised.

Ms. McRae's letter reveals for the first time that the Department of Justice is aware that the Formula is deficient, and that the Guidelines are based on policy decisions which were never publicly debated or revealed.

Furthermore, the lack of disclosure of the Formula can be shown to have directly affected the dispensation of justice.

Is there a class action suit in this somewhere? Certainly the amounts in question would be substantial.

2.0 INTRODUCTION

The Federal Child Support Guidelines were passed by parliament in February 1997, and came into effect in May 1997. Although the Guidelines have been in effect for almost five years, there has been little discussion or legal scrutiny of the underlying formula used to calculate the Tables Amounts.

This can be directly attributed to the fact that the Research Report (CSR-1997-1E) which explains the Formula was not even released until April 9, 1998, 14 months after Parliament passed the Guidelines. Even then, the report was not advertised, and distributed only to members of the Federal/Provincial/Territorial Task Force on Child Support and the Federal Provincial Territorial Family Law Committee. Otherwise, the report was available by request only, assuming of course that one knew to request a document that was not publicised..

As a result, there is demonstrated ignorance of the underlying formula which extends throughout the legal system, from the Family Law Committee of the Canadian Bar Association, through specialists who write child support software, right up to the justices of the Supreme Court of Canada.

It is an embarrassment to the Canadian legal system, when the members of the highest court in the land, are made to look foolish because the material which forms the basis of the Guidelines has not been made available to them.

The purpose of this paper is to present the Formula for the Tables Amounts for scrutiny and to examine how in our parliamentary democracy we could pass legislation and implement it for now five years, without the judiciary being apprised of its very basis.

Fundamental flaws in the Formula are examined and avenues for legal action are explored.

3. THE FORMULA

3.1 The Formula

The formula used to generate the Tables Amounts in the Federal Child Support Guidelines is described in the Research Report “*Formula for the Table of Amounts Contained in the Federal Child Support Guidelines, A Technical Report, Research Report CSR-1997-1E*” published by the Child Support Team Department of Justice, Canada. (This report is appended as Appendix A.)

The formula used to generate the Guidelines Tables Amounts is a simplistic, one-line household standard of living equalization formula. The report summarizes the model as follows. “Simply stated the model equalises the financial circumstances of the two households”.

The model can be explained by the following graphic, Figure 1 from page 2 of CSR-1997-1E.

Figure 1 **Finances of the Post Separation Households**

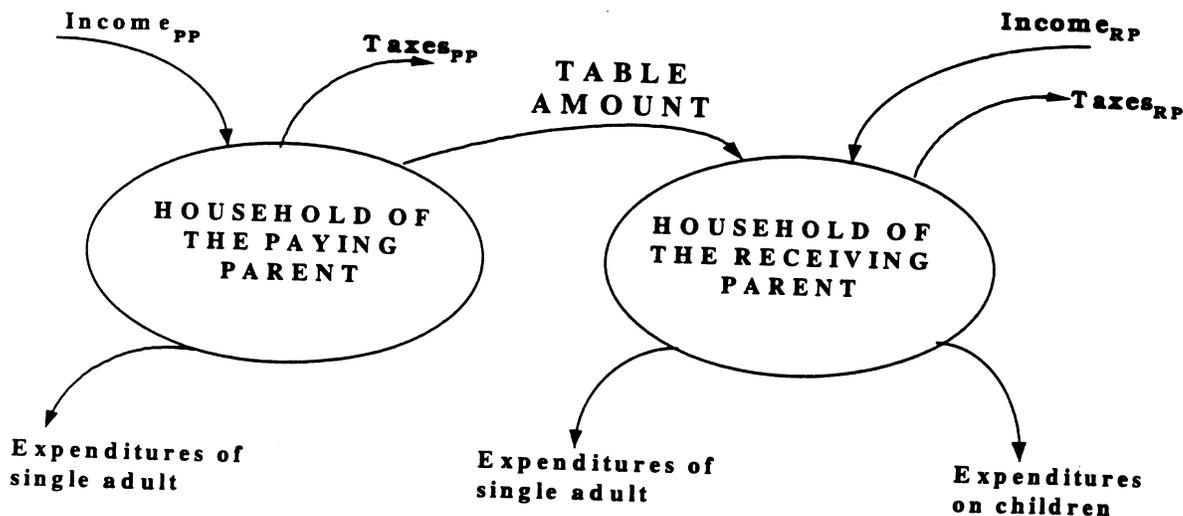


Figure 1. Graphic showing Equation for Tables Amounts

There are two key assumptions made in the model:

- 1) The paying parent is assumed to the expenses of a single adult. In other words he or she, most often he, is assumed to have no direct expenditures on the children. The formula assumes he does not, or must not, house, feed, or clothe the children while they are in his care. He also does not, or must not, have costs relating to activities with the children, such as school activities, extracurricular activities, or the like, and that all of this must flow through the receiving parent.
- 2) The incomes of the paying and receiving parent are assumed to be equivalent.

The mathematical formula can be stated as:

$$\frac{\text{Income}_{pp} - \text{taxes}_{pp} - \text{table amount}}{\text{Expenditures of a single adult}} = \frac{\text{Income}_{rp} - \text{taxes}_{rp} + \text{table amount}}{\text{Expenditures of a single adult and children}}$$

Where *pp* = paying parent and *rp* = receiving parent

The expenditures of the households are defined in terms of the Statistics Canada 40/30 Equivalence Scale. The expenditure amounts used in calculating the Tables Amounts can be found in the Table of Low Income Measures Amounts for the **COMPARISON OF HOUSEHOLD STANDARDS OF LIVING TEST** (Schedule II, Subsection 10.4 of the Federal Child Support Guidelines).

The formula uses standard tax calculations, deductions and credits. Not included are discretionary actions such as charitable deductions and RRSP and political contributions. Also not included are situation dependant items such as union dues and allowances for disabilities and dependent relatives.

Also 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 the children and not available as income to the receiving parent.

This is an interesting leap in logic. What is it that is being equalised by Child Support, the children's standard of living, or the parent's disposable incomes?

Knowledge of the formula and a basic understanding of tax calculations, is all that is required to re-calculate the Federal Child Support Tables.

To confirm that the Tables were actually constructed as described, I re-calculated the Tables Amounts for Ontario from first principles using the formula as described above. (Figure 2).

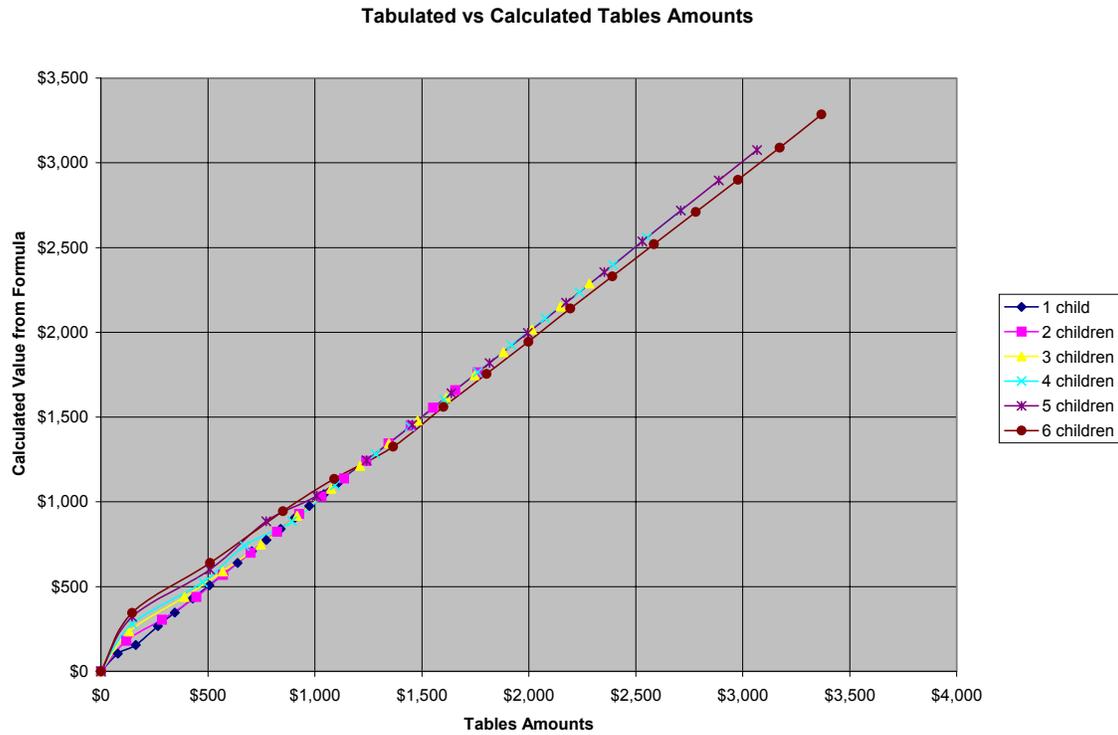


Figure 2. Comparison of Tables Amounts and Re-Calculated Amounts Using Formula

The re-calculated amounts match the Tables amounts almost to the dollar, except at the low-income end where there is capping of the support amounts. Another anomaly is observed in the amounts for 6 or more children. A support payer with six children actually pays support as if he is supporting not one adult and six children in the receiving household but three adults and four children.

3.2 Effect of the Formula on Children

The stated objectives of Federal Child Support Guidelines were:

- 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 the 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 settling the levels of child support orders and encouraging settlement; and,
- d) to ensure consistent treatment of spouses and children who are in similar circumstances.

As explained in the Research Report the Guidelines Amounts are designed to equalise household standards of living in the paying and receiving households.

This should not come as a surprise, as in the Guidelines themselves, a **COMPARISON OF HOUSEHOLD STANDARDS OF LIVING TEST** is provided (Schedule II, Subsection 10.4) to provide guidance in determining the appropriate level of support in unusual circumstances.

Knowing the formula and the manner in which this test works, it is possible to assess the result produced by the Guidelines Tables Amounts over a range of custody arrangements.

The analyses make use of the very same principles and formulae put forth by the Department of Justice. The only adjustments I have made are to:

- 1) divide that portion of the Low Income Measures Amount attributable to the children, between the paying and receiving parents households in proportion with their time of residence in each. Parenting costs do not increase with time of custody in a linear manner. There is a sharp increase in fixed costs at the point at which it becomes necessary to provide housing for the child. Recent research in Australia (Henman and Mitchell, 2000) establishes that the costs of exercising even moderate contact will be relatively high. For example, where contact with one child is for 20% of the nights of the year, the cost of this contact represents about 40% of the *total yearly* costs of raising that child in an intact couple household with a medium income, and more than half the *total yearly* costs of that child in a household with a low income.

Although Henman and Mitchell studied only a limited range of access (from 15 to 30%), Figure 3, shows that their data can be seen to approximate a square root

model. This is the model I have used to apportion the children's expenses between the two households.

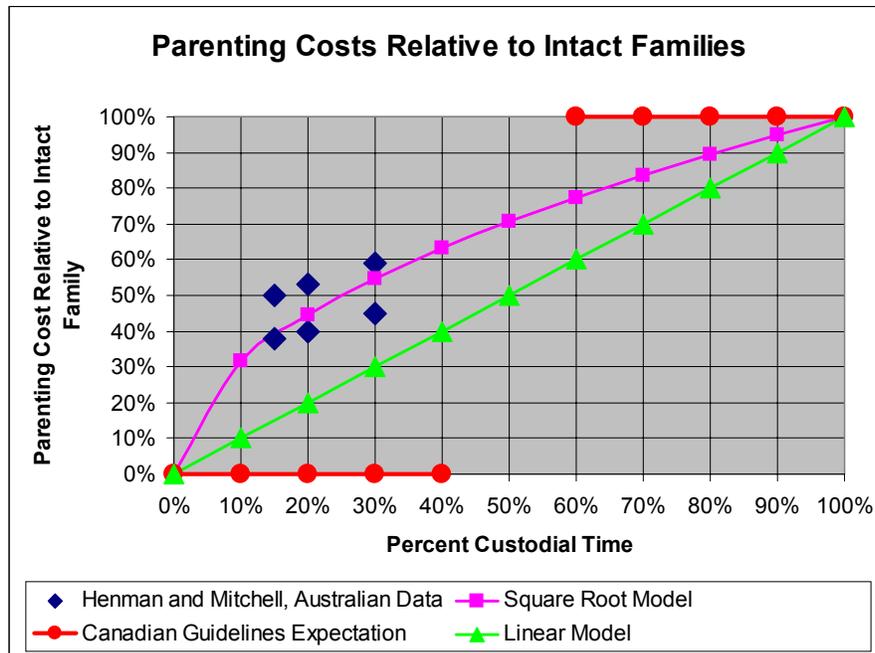


Figure 3. Parenting Costs Relative to Time of Custody

- 2) Include in the income of the receiving parents Household the Child Tax Benefit and children's GST credit amounts.

We have assumed there are two children. Ontario 1997 Tax Rates and Child Support Tables are used.

The first analysis carried out is an assessment of the resulting Household Income Ratio or Standard of Living. It is implied in the guidelines that a fair standard of support is one at which the household standards of living in both the paying and receiving parents' households are equivalent. A **COMPARISON OF HOUSEHOLD STANDARDS OF LIVING TEST** is provided (Schedule II, Subsection 10.4) of the Guidelines. This is the test I have used.

- 2) The second analysis carried out involved calculating the cost of raising the children implied by the tables' amount. The difference in household incomes is created and justified by child support payments. It is therefore logical and reasonable to assume that the difference in net incomes created between the paying and receiving parents households represents the cost of caring for the children during the extra days of custody in the receiving parents household. The implied daily cost of caring for the children can thus be calculated by dividing the difference in monthly net incomes by the difference in

days of custody. This can then be compared to the expected cost. The expected cost is determined the aggregate of the guidelines amounts for both parents, as the tables amounts are stated as reflecting the average spending by Canadians in those income brackets.

The objectives of the Federal Child Support Guidelines state that the children should continue to benefit from the financial means of both spouses after separation. The best measure of to what degree the children benefit from the financial means of each parent is the percentage of his or her income the parent spends on the children. This is the third analysis carried out.

The expenditure on the children is composed of direct spending, adjusted for support paid or received. The determination of the amount of direct spending has in the past a most contentious issue. However, the Federal Child Support Guidelines have provided a rather simple solution as to how to determine this. The Guidelines amounts, as stated above, are supposed to reflect average spending on children by Canadians in various income brackets. Therefore, in this analysis we have taken the aggregate Guidelines amount for both parents as determined by their income level and apportioned it by time of custody.

Table 1 shows the above three analyses, carried out in the case of the paying parent having no contact with the children and thus no time of custody and direct costs relating to the children. In this case as per the Guidelines assumptions incomes of the paying household and receiving household are assumed to be equivalent.

Table 1 demonstrates that under the narrow set of assumptions built into the model, a loss of one parent and equal incomes, the model does actually meet the stated objectives of the guidelines, equal standards of living and a sharing of expenses between the two parents.

Table 1 Analysis of Tables Amounts

**PAYING PARENT WITH 0% CUSTODY
SUPPORT PAYABLE UNDER NEW GUIDELINES TABLES (1997 TAXES)
DOJ ASSUMPTIONS (= INCOME, NO CTB, GST CREDITS)**

ASSUMPTIONS			
PAYEE PARENT'S INCOME		\$34,038	
PAYING PARENT'S INCOME		\$34,038	
PERCENT CUSTODY FOR PAYING PARENT		0.00%	
NO OF CHILDREN		2	
SUPPORT		\$493	

ITEM	SUPPORT BASED ON NEW SUPPORT GUIDELINES AND TIME OF CUSTODY		
	PAYING PARENT	PAYEE PARENT	TOTAL
NET INCOME	\$34,038.00	\$34,038.00	\$68,076.00
FEDERAL TAX (from tables)	-\$6,186.48	-\$6,186.48	-\$12,372.96
AMOUNTS FOR NON-REFUNDABLE TAX CREDITS :BASIC PERSONAL AMOUNT	\$6,456.00	\$6,456.00	\$12,912.00
EQUIVALENT TO SPOUSE	\$0.00	\$5,380.00	\$5,380.00
CPP CONTRIBUTIONS	\$916.14	\$916.14	\$1,832.28
EI PREMIUMS	\$987.10	\$987.10	\$1,974.20
TOTAL NON-REFUNDABLE TAX CREDITS	\$1,421.07	\$2,335.67	\$3,756.74
TOTAL INCOME TAX	-\$7,195.77	-\$5,814.72	-\$13,010.49
CPP CONTRIBUTIONS	\$916.14	\$916.14	\$1,832.28
EI PREMIUMS	\$987.10	\$987.10	\$1,974.20
CHILD TAX BENEFIT(DISABLED NOT INCLUDED IN FED MODEL)	\$0.00	\$0.00	\$0.00
GST CREDIT (NOT INCLUDED)	\$0.00	\$0.00	\$0.00
TOTAL NET ANNUAL INCOME (before support)	\$24,938.99	\$26,320.04	\$51,259.03
SUPPORT	-\$5,920.56	\$5,920.56	\$0.00
NET ANNUAL DISPOSABLE INCOME	\$19,018.43	\$32,240.60	\$51,259.03
DIFFERENCE BETWEEN PARTIES	-\$13,222.17	\$13,222.17	\$0.00
NET MONTHLY DISPOSABLE INCOME	\$1,584.87	\$2,686.72	\$4,271.59
MONTHLY DIFFERENCE	-\$1,101.85	\$1,101.85	\$0.00

ANALYSIS 1

**COMPARISON OF THE STANDARD OF LIVING IN EACH HOUSEHOLD
USING COMPARISON OF HOUSEHOLD STANDARDS OF LIVING TEST IN NEW SUPPORT GUIDELINES**

NET INCOME AFTER TAXES	\$19,018	\$32,241	\$51,259
LOW INCOME MEASURES AMOUNT PARENT	\$10,382	\$10,382	\$20,764
PERCENT CUSTODY	0.00%	100.00%	100.00%
LOW INCOME MEASURES AMOUNT 2 CHILDREN	\$0	\$7,267	\$7,267
TOTAL LOW INCOME MEASURES AMOUNT	\$10,382	\$17,649	\$28,031
HOUSEHOLD INCOME RATIO	1.83	1.83	1.83

ANALYSIS 2**IMPLIED COST OF RAISING CHILDREN**

DAYS CUSTODY PER MONTH	0.0	30.4	30.4
DIFFERENCE IN NET MONTHLY INCOME	(\$1,102)	\$1,102	\$0
DIFFERENCE IN DAYS OF CUSTODY	-30.4	30.4	0
IMPLIED COST OF RAISING CHILDREN PER DAY	\$36	\$36	\$36
IMPLIED COST OF RAISING CHILDREN PER MONTH	\$1,102	\$1,102	\$1,102
IMPLIED INCREMENTAL COST OF RAISING CHILDREN PER YEAR	\$13,222	\$13,222	\$13,222
MONTHLY EXPECTED COST FROM NEW FEDERAL CHILD SUPPORT TABLES (both parents)	\$493	\$493	\$986
RATIO TO EXPECTED COST			112%

ANALYSIS 3**PERCENTAGE OF INCOME USED TO SUPPORT CHILDREN**

EXPECTED CONTRIBUTION BY VIRTUE OF CUSTODY DAYS (based on expected contributions of both parents from tables)	\$0	\$986	\$986
CHILD SUPPORT PAID/RECEIVED	\$493	(\$493)	\$0
TOTAL MONTHLY CONTRIBUTION TO SUPPORT OF CHILDREN	\$493	\$493	\$986
AS PERCENTAGE OF TOTAL NET INCOME BEFORE SUPPORT	24%	22%	23.08%

New Table 1.xls

Next I examined the effect of the formula using more realistic income assumptions and the entire range of custody over which the formula is applied (from 0 to 40%).

I used the average incomes reported for custodial and non-custodial parents in An Overview of the Research Program to Develop a Canadian Child Support Formula (Finnie, Giliberti and Stripinis 1995). The incomes were adjusted for inflation to 1997 using the annual inflation rate as quoted by Statistics Canada. This results in an income of \$34,038 for the paying parent and \$21,421 for the receiving parent.

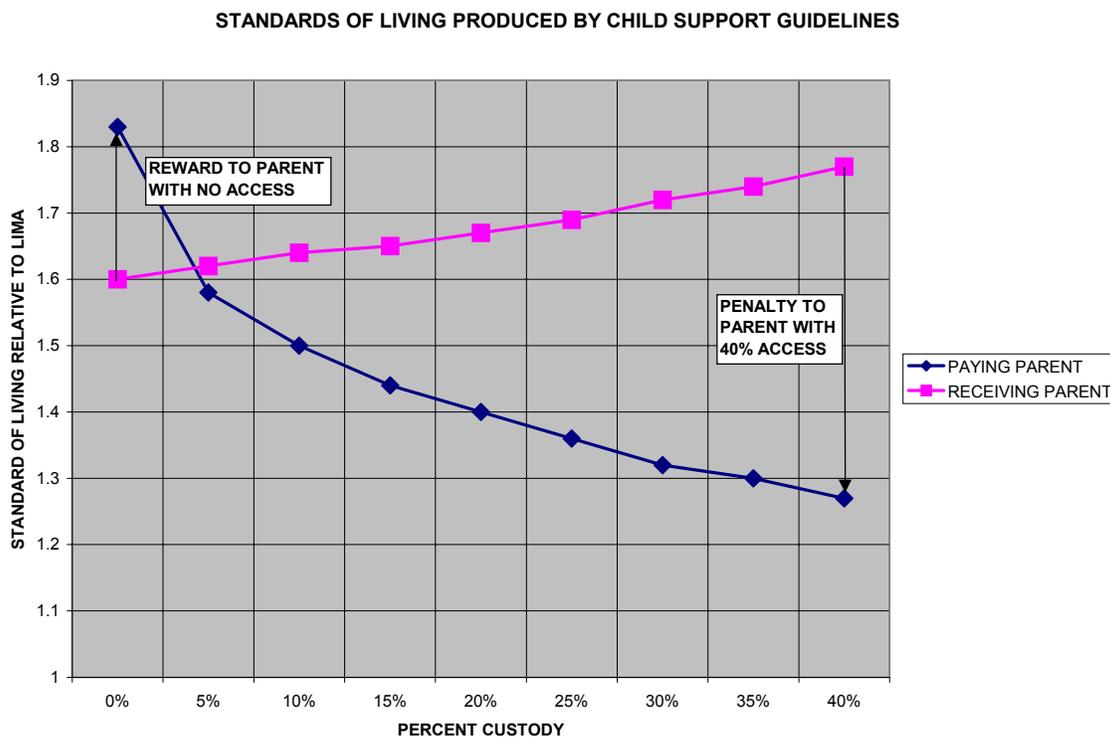


Figure 4. Standards of Living Produced by Child Support Guidelines

Figure 4 shows that at average income levels, if the paying parent contributes nothing to the care of the children except the prescribed amount of child support, he would enjoy a standard of living 16% higher than the receiving parent.

If however, the receiving parent is an involved parent, once his time of custody exceeds about 5% (or roughly one night every two weeks) he and the children while they are with him would be penalized with a lower standard of living than they enjoy in their other home.

Once his custody approaches 40%, the standard of living in his home would be almost 30% lower than in the other home, and only marginally above the poverty line.

This is contrary to the objectives of the Guidelines, which state that a fair level of support is one at which there is a comparable standard of living in both homes.

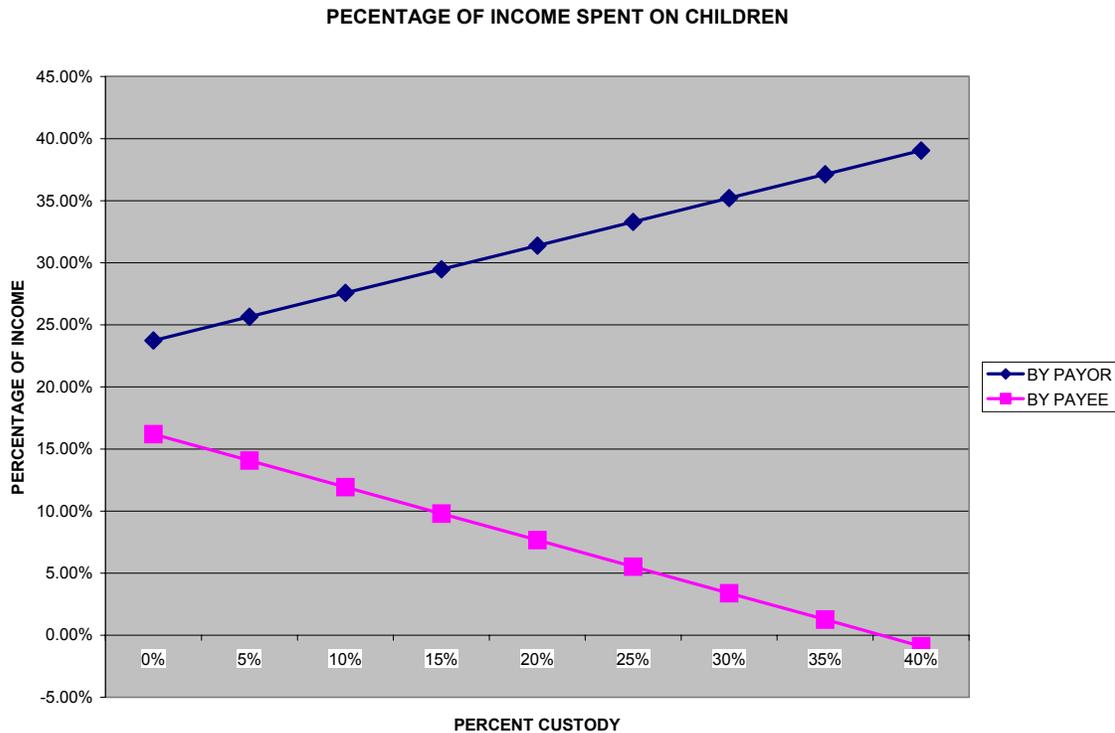


Figure 5. Percentage of Income Spent on Children

Figure 5 demonstrates that as the percentage of custody increases, the proportion of net income (before support) used by the receiving parent to support the children decreases to a negligible amount. As the payor parent takes on custody approaching 40%, the prescribed support payments in fact exceed the expected expenditures on the children on a daily basis and the payor bears 100% of the expected cost of raising the children.

This is contrary to the stated objective of the guidelines, which state that the children should continue to benefit from the financial means of both parents.

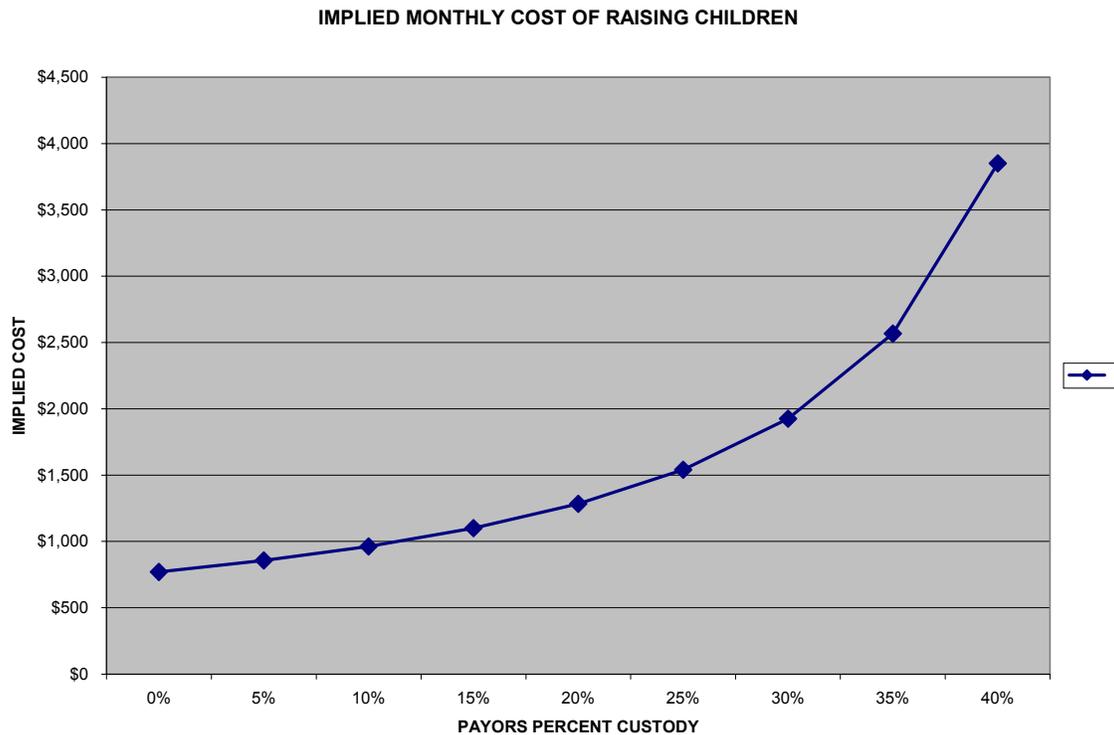


Figure 6. Cost of Raising Children Implied by Guidelines Amounts

The expected monthly incremental cost of raising the children, based on the tables amounts at the parents income levels in this case, is \$795. As the payors' level of custody increases to close to 40% and the discrepancy in net incomes created by the child support payments is spread over fewer days, the implied cost of raising the children increases to the fantastic sum \$127 per day or \$3,851 per month. This represents 98% of the combined net income of both parents (\$3,940), so is clearly unrealistic and unreasonable.

Very similar results are observed for other income brackets, as long as the parent's income is assumed to be about 60 to 70% of the payor's. This is a reasonable assumption based on Statistics Canada data.

For people with average incomes, the paying parent is left with a disposable income of only \$1585, which at least in an urban area, would severely limit his ability to provide a proper home for his children.

These results clearly indicate that the Federal Child Support Guidelines Tables result in appropriate child support awards only in the situation where the children lose substantial or total contact with one parent.

Draft April 4, 2002

As such they offer clear and powerful financial disincentives to joint parenting by penalizing those payor parents with substantial custody. Most perversely, parents who abandon their children are actually rewarded with a higher standard of living than the children they abandoned.

In summary, it can be shown, the model from which the tables' amounts are generated is that of an under-funded single parent family. As demonstrated above, in situations where the post divorce family does not live up to this expectation, application of the tables' amounts does not result in an appropriate level of support.

The Guidelines fail to meet their objectives and provide an appropriate level of support because the rather than tables amounts, which are based on a single parent model with faulty income assumptions, are applied over a far wider range of custody than that for which they were designed.

Rather than ensuring consistent treatment of spouses and children who are in similar circumstances, as is the stated objective, they apply similar awards in widely differing circumstances.

A further by-product of the legislation is that it encourages custody battles as parents strive for the magical 40%. I am personally aware of one case where a wife was prepared to allow her ex-husband joint custody and about 38% residence time with the children, but not the 50% he desired

This led to protracted mediation and negotiations. The father suspected the Guidelines magical 40% threshold was the root of the problem. To test his theory, the father asked if the children might occasionally have lunch at home with him on Fridays, as he was taking them to school Friday morning anyway, lived near the school, and could sometimes work from home. Obviously, a hot lunch at home with a parent was preferable to brown bagging it in a crowded cafeteria. This, however, would put him over the magical 40%.

It was not really a surprise, when the mother's lawyer responded, "My client is absolutely not agreeable to your suggestion with respect to the children having lunches".

The mother was prepared to fight a costly custody battle, just to achieve the 40% threshold. Could there be any more blatant example of the insidious nature of these Guidelines?

4. A BREAKDOWN OF DEMOCRATIC PROCESS

4.1 Lack Of Debate And Disclosure

How was it that we received such bad legislation? Why were these inadequacies not pointed out?

The answer to these questions can be found in the fact that very few people actually know what the Guidelines Formula is, and how it works, or rather doesn't work.

Between 1990 and 1995 there was an extensive consultation process carried out. Several research papers were published culminating in the January 1995 report titled "An Overview of the Research Program to Develop a Canadian Child Support Formula". This report reviewed several possible formulas, and favoured the Revised Fixed Percentage Formula, which is similar to the Formula currently used.

A preliminary draft of the Child Support Guidelines published in June 1996, complete with Support Tables, included the statement that *"A detailed explanation of the formula used to produce the child support tables is contained in the Department of Justice publication "Technical Report on the Formula for the Federal Child Support Guidelines" (To be published in the fall of 1996)"*

This obscure reference is to my knowledge the only public notice that a report describing the Formula even exists.

In fact, this Report (*"Formula for the Table of Amounts Contained in the Federal Child Support Guidelines, A Technical Report, Research Report CSR-1997-1E"*) was not released until April 8, 1998, more than a full year after Parliament debated and passed the Guidelines, and almost a full year after they were implemented.

Apparently, we are to believe that having calculated the Tables Amounts by June 1996, it took the Child Support Team at the Department of Justice almost two years to write an eight page report explaining what they had done.

How I wonder, did parliamentarians debate and pass a law, when they had no information about its very basis? Where was the opposition demanding to know what they were passing? Why did it take almost two years to publish an eight page report?

Even now, the research report which explains the formula, *"Formula for the Table of Amounts Contained in the Federal Child Support Guidelines, A Technical Report, Research Report CSR-1997-1E"*, has seen no publicity and very limited circulation. It is not, for example, listed on the Department of Justice website along with the other research reports.

Draft April 4, 2002

Documents recently released by the Department of Justice under a Freedom of Information request by Member of Parliament Roger Gallaway, indicate that a conscious decision was made by the Department of Justice to limit circulation of this report.

The information obtained indicates there was some concern that the release of the Formula would raise questions. Most of the concerns appear to relate to the “tenuous connection between the 40/30 Equivalence Scale and the FAMEX (Family Expenditure) Survey”. It is clear the Child Support Team was worried that once the report was released people would realize that the Child Support Formula had little to do with actual direct expenditures on children.

The concerns of the Department of Justice were relayed to the Minister in a Ministerial Summary. In this document Thea Herman, Senior Assistant Deputy Minister states of the report:

“Its final drafting and publication have been delayed because the Team’s efforts have been focused on implementation of the Guidelines”

Remember this is an eight page report.

“ The document is highly technical and is designed for use by mathematicians, economists and other experts”

Again, this is an eight page report, with a one line formula, which can be reduced to a single graphic.

Of the reports distribution she states;

“Although we do not intend to advertise this document, we have so far received about 40 requests from the general public for copies. Some members of the public may be disappointed that the report does not contain a list of specific expenses taken into account in setting up the Guidelines tables.”

She recommends:

“The Child Support Team proposes to release the report to members of the Federal/Provincial/Territorial Task Force on Child Support and the Federal Provincial Territorial Family Law Committee, and otherwise only by request on April 9, 1998.”

How anyone was to know to request a document that wasn’t advertised is an interesting question?

4.2 Demonstrated Ignorance

As a result of this lack of disclosure, it can be documented very few people, even those that should know, are aware of the true nature of the Guidelines. This lack of knowledge extends throughout the legal system, from the Family Law Committee of the Canadian Bar Association, through specialists who write child support software right up to the justices of the Supreme Court of Canada.

On February 24, 1998, a full year after the Guidelines were passed into law, Ms. Jennifer Cooper, Q.C., Chair of the Guidelines Implementation Committee, Family Law Section, Canadian Bar Association appeared before the Senate Social Affairs, Science and Technology Committee. She testified:

“We would argue that there is an expectation built into these guidelines that non-custodial parents, most often “he” will spend some money on these children; will take them out and feed them and so on. That is part of the expectation”.

“The guidelines were not developed so that there would be zero contact. The Canadian norm is to have some contact and hopefully a good amount of contact.”

Clearly this is not reflected in the formula, and she and the Canadian Bar Association (“CBA”) were misinformed and misled the parliamentary committee. At least Ms. Cooper had the good sense to acknowledge this was un-Canadian.

When I wrote her to advise her she had misled the committee, all I got was a response from the Executive Director of the CBA, who thanked me for my input. To my knowledge the CBA has not yet seen fit to correct its testimony.

Appearing before the same Senate Committee in February 1998, Mr. Barry Gardiner, developer of the competing ChildView Software at least had the integrity to admit *“I do not know how the table amounts were fixed. I assume that someone, some day, decided on how to arrive at the tables amounts*

In his February 1999 newsletter, Mark Harris developer of the competing Divorcemate software, commented on Statscan’s changing definition of poverty, by asking *“how this would affect the deep macro economics of the statistical data used by the Department of Justice to create future guidelines tables?”* Clearly Mr. Harris, although he writes child support software, is also in the dark.

Just how pervasive the misunderstanding of the Guidelines was demonstrated by the Supreme Court of Canada in their April 27, 1999 judgement in Francis v. Baker.

The Supreme Court of Canada: in Francis v. Baker at p41 wrote:

“ However, even though the Guidelines have their own stated objectives, they have not displaced the Divorce Act, which clearly dictates that maintenance of the children, rather than household equalization or spousal support, is the objective of child support payments.”

However, in the publication *“Formula for the Tables of Amounts Contained in the Federal Child Support Guidelines: A Technical Report”, Research Report CSR-1997-1E*, it states at page 2;

“Simply stated the model equalises the financial circumstances of the two households”

and, at page 4;

“ As stated earlier, the objective is to determine the amount that must be transferred from one household to the other in order to make them “equally well off”, that is, the child support table amount.”

How does one reconcile these two diametrically opposed statements.

Why would the Honourable Justices of the Supreme Court make such a statement, if they knew the very basis of the Guidelines was a household equalization formula? Clearly they did not, which is a profound embarrassment to the Canadian judicial system . On the face of it, they have ruled that the manner in which the Guidelines are constructed contravenes the Divorce Act.

4.3 Further Misinformation

When the Federal Child Support Guidelines were passed in 1997, the government agreed to a consultative process and review of the Guidelines, with the Minister of Justice to report back to Parliament in 2002.

The latest phase of the consultation process consisted of a two part package, a so called consultation document with the impressive title [Putting Children's Interests First: Custody, Access and Child Support in Canada](#), which purports to present and discuss

Draft April 4, 2002

the issues, and an accompanying [Feedback Booklet](#) with which people were invited to respond.

The impressive looking consultation process however has been carefully crafted to encourage people to support the Department of Justice stance.

In the discussion of recognition of costs relating to access time in the consultation booklet, no fewer than seven reasons are given why the costs relating to access time should not be recognised. Conversely, not one positive attribute of recognising these costs, such as affording the children a comparable standard of living in both their homes, is even mentioned.

So intent are the authors of this “consultation document” on denying support paying parents funds to spend on their children, that in an attempt to sway the respondent, they have laced their “consultation document” with misinformation in an attempt to sway the respondent to their point of view.

In the “consultation document, the statements are made that ***“The child support guidelines recognise that the paying parent’s costs related to access are offset by the paying parent’s direct and hidden costs.”***, and ***“... the guidelines already recognise that a paying parent will spend time with the children”***.

Nowhere in the consultation process or debate was there any recognition of the paying parents costs. These are not reflected in the Formula.

4.4 A Revelation Of The True Nature Of The Guidelines

When I challenged the Child Support Team on these statements Virginia McRae, Co-Chair of the Federal/Provincial/Territorial Family Law Committee for the Department of Justice Canada was kind enough to reply. Her reply reveals more about the Guidelines and the lack of democratic process in the manner they were crafted, than any other document to date.

She wrote :

“The Guidelines do recognize that the paying parent spends time with the children and may have associated costs.”

”First in cases where the recipient parent spends substantially more time with the children, the Guidelines take into account the paying parent’s access costs by balancing them against the recipient parent’s “hidden costs”. Examples of such hidden costs include diminished career advancement opportunities and reduced ability to earn overtime pay.”

“Second the formula, as you will have noticed, is modeled on the assumption that the table amount is just and equitable when both parents are earning an identical income. The typical recipient parent does not earn as much as the typical paying parent. Therefore the formula is usually weighted in favour of the paying parent, but is balanced when the paying parent has additional access costs”

She further explained:

“It is important that, the Federal Child Support Tables, which are derived from a mathematical formula using several different presumptions, not be confused with the Guidelines as a whole, which are derived from policy decisions adopted in part to address deficiencies in the mathematical formula”

The full text of Ms. McRae’s letter is appended as Appendix B.

Apparently she is defending the use of a deficient formula, which was never publicized, by saying it suits policy decisions, which were never revealed or publicly debated.

In fact Ms. McRae has revealed for the first time that these hidden policy objectives include financial compensation to parents, who deny the other parent substantial access, and suffer diminished career opportunities as a result. And, this is done under the guise of Child Support.

Draft April 4, 2002

She has also revealed that the formula is typically weighted in favour of the paying parent when he has minimal access costs, and thereby offers a financial inducement for the paying parent to abandon contact with his or her children.

The revelation by Ms. McRae that *“the Guidelines take into account the paying parent’s access costs by balancing them against the recipient parent’s “hidden costs”. Examples of such hidden costs include diminished career advancement opportunities and reduced ability to earn overtime pay”* is particularly significant.

The Divorce Act, which is the legislation governing the Child Support Guidelines clearly states at Section 15.2.6 (b)

(6) An order made under subsection (1) or an interim order under subsection (2) that provides for the support of a spouse should

(b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;

Clearly, diminished career advancement opportunities and reduced ability to earn overtime pay fall under Section 15.2.6 (b), spousal support.

Just as clearly access costs are a matter for Child Support.

Section 15.3 (1) of the Divorce Act states :

Where a court is considering an application for a child support order and an application for a spousal support order, the court shall give priority to child support in determining the applications.

The paying parents access costs therefore, must be given priority and cannot be balanced against what is clearly spousal support.

Furthermore the Supreme Court in Francis v Baker at p 41 has ruled that

“ However, even though the Guidelines have their own stated objectives, they have not displaced the Divorce Act, which clearly dictates that maintenance of the children, rather than household equalization or spousal support, is the objective of child support payments.”

Ms. McRae has revealed that policy decisions were made to include in Child Support payments, amounts, which are under Section 15.2.6 of the Divorce Act taxable spousal support. This, as the Supreme Court has re-affirmed, is in contradiction of the governing legislation the Divorce Act.

Draft April 4, 2002

Is it any wonder that these policy decisions and the Formula itself were never debated and publicised?

In fact judges, in blissful ignorance of this fact, have routinely ordered paying parents to pay additional spousal support on the basis of the child care responsibilities of the receiving parent. Nowhere, until now, has it been revealed that lost income due to child care responsibilities is already reflected in the Child Support Guidelines.

Wouldn't Mr. Miglin, who Justice Abella of the Ontario Court of Appeal recently ordered to pay \$3,000 per month in Child Support and \$4,400 in spousal support, be pleased to know that neither his lawyer, nor Justice Abella, could have known his wife's child care responsibilities were already being compensated for in the Child Support amount.

How has it that in a democracy we can have Guidelines, which contravene the Divorce Act, are based on a largely unknown, admittedly deficient formula, and which are derived from undisclosed policy decisions that promote the loss of substantial contact with one parent. How could this have been kept secret for 5 years?

Where were the checks and balances inherent in our parliamentary and legal institutions?

6.0 OPPORTUNITIES FOR ACTION

6.1 Challenge to the Guidelines under the Divorce Act

The most obvious and most direct challenge to the Guidelines is under the Divorce Act. As described above we have at our disposal the letter from Ms. McRae, which confirms that the Guidelines Tables Amounts include amounts, that under the Divorce Act are spousal support.

Furthermore we have the Supreme Court in *Francis v Baker* where it is stated that child support must not be household equalization or spousal support.

Clearly, the current Tables Amounts include both, and thus are in contravention of the Divorce Act.

It would be most interesting to file a motion asking that the Guidelines be declared in contravention of the governing legislation, the Divorce Act, and to call Ms. McRae as a material witness.

6.2 Constitutional Challenge under S.15.2 of the Charter of Rights and Freedoms

A constitutional challenge under the Charter of Rights and Freedoms would be a major undertaking.

The Guidelines are however open to challenge under s. 15(1) of the Charter of Rights and Freedoms.

The generally accepted principles governing the application of s. 15(1) of the Charter of Rights and Freedoms were expressed in *Benner v. Canada (Secretary of State)* [1997] 1 S.C.R. 358 (S.C.C.) by Iacobucci J. at paragraph 69:

A s.15 applicant, then, must show a denial of one of what have been termed the 'four equalities', namely, equality before the law, equality under the law, equal protection of the law, and equal benefit of the law. The applicant must show that the denial is 'discriminatory'. Where the denial is based on a ground expressly enumerated in s. 15(1), or a ground analogous to them, it will generally be found to be discriminatory, although there may of course be exceptions. see, e.g. *Wetherall v. Canada (Attorney General)* [1993] 2 S.C.R. 872.

In Miron, McLachlin J. wrote that the fundamental consideration in identifying analogous grounds is whether the characteristic may serve as an irrelevant exclusion and denial of essential human dignity in the human rights tradition. In other words, may it serve as a basis for unequal treatment based on stereotypical attributes ascribed to the group, rather than on the true worth of the individual?"

The Federal Child Support Guidelines have created two classes of parents: paying parents (those with under 40% custody) and receiving parents (those with over 60% custody).

These two classes of parents are arbitrarily treated unequally by the application of the Tables Amount. The household of the receiving parent is credited with the full expenditures on the children, regardless of whether the children reside there full time or not. The household of the paying parent on the other hand, is denied any recognition of parenting expenditures, regardless of the actual expenditures on the children and time of residency in that home (up to the 40% threshold).

In essence, the paying parent is told his or her parenting is worthless. The financial analyses carried out above demonstrate this unequal treatment under the law results in many cases in the paying parent being denied the financial means to provide for their children at a level equivalent to that in their other home, if at all.

Essentially, the paying parent is denied the most basic of rights, the right to continue as an involved, care giving, parent, based solely on the irrelevant characteristic that he or she is a parent with less than 40% custody.

Under s. 15.2, s.15.1 does not preclude any law, program, or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups. It could be argued that the Federal Child Support Guidelines are such a law. However, as shown by the economic analysis presented, it is the unequal treatment of the parenting costs in violation of s. 15.1 that is the very thing which defeats the objectives of the Child Support Guidelines.

Obviously, courts will be reluctant to throw out the Guidelines as a whole. An approach which might be successful would be one which asks the court to more broadly interpret Section 10, the hardship provision.

The basis of a claim under s. 15.1 of the Charter would be as follows

1. The *Federal Child Support Guidelines* are premised upon the assumption that separated and divorced parents who pay child support and who have less than 40% custodial time with their children, have **no** expenses or other costs in relation to the care of their children.
2. The *Federal Child Support Guidelines* are premised upon the assumption, in section 9 of the *Guidelines*, that separated and divorced parents who have 40% or

- more custodial time with their children, do have expenses or other costs in relation to the care of their children.
3. Accordingly, the *Federal Child Support Guidelines* have created two classes of parents: those with under 40% custodial time and those at or over 40% custodial time.
 4. Only seven per cent of all children from separated or divorced families in Canada reside primarily with their father. Approximately six per cent live in some form of joint custodial arrangement. The remainder (excluding less than one per cent) live primarily with their mother. Accordingly, the father in this case is part of a group of males who suffer discrimination on the ground of sex (gender).
 5. As a member of the class of separated and divorced parents who has his children in his care under 40% of the time, and as a male, the plaintiff claims that his section 15 *Charter* rights to equal protection of the law and equal benefit of the law without discrimination have been infringed.
 6. The plaintiff states that his membership in the ‘under 40% class’ constitutes an analogous ground of discrimination under section 15 (1) of the *Canadian Charter of Rights and Freedoms*.
 7. Under the *Federal Child Support Guidelines*, the household of the receiving parent is credited with the full expenditures for the children, regardless of whether the children reside there full time or not. The household of the paying parent, on the other hand, is denied any recognition of child care expenditures, regardless of the actual expenditures made for or on behalf of the children and regardless of the time of residency in that home (up to the 40% threshold).
 8. The father states that this denial of recognition of his direct parenting expenditures is based on stereotypical attributes ascribed to him as a member of the “under 40% class” and as a male, rather than his true worth, ability and circumstances as a parent.
 9. The standard table amount under the *Federal Child Support Guidelines* required of the father, based upon his annual income, would be \$xxx.xx per month.
 10. The father is a deeply involved and concerned parent. Being an involved parent involves much more than looking after the physical needs of the children. It requires assisting them to experience and share, as well as instilling in them a sense of identity and self-confidence. All of these things the father does. The father has:

List of father’s activities with children

11. These activities as well as providing the children with their own rooms, as well as feeding and clothing them have caused the father to incur financial costs. The father’s monthly costs approximate \$x,xxx.xx, not counting the child support

- which he pays to the mother. Attached as **Schedule "A"** is a summary of the father's costs.
12. An alternative financial analysis may be based on the presumption that the parents both spend the average amount spent by Canadians in their combined income brackets on the children during their respective times of custody. The Federal Department of Justice maintains that these amounts are reflected by the *Federal Child Support Guidelines* Tables Amounts. The father would be expected to contribute \$xxx.xx per month in support, while the mother at her income level would be expected to spend a further \$yyy.yy per month, resulting in total expected spending on the children in the custodial parent's home of \$z,zzz.zz.
 13. In order to afford to the children an equal standard of living in both the household of their mother and father, the father should be required to pay to the mother child support in the sum of \$xxx.xx per month for both children.
 14. If child support of \$xxx per month were paid, the standards of living in both households are equalized at x.xx times the Low Income Measures Amount. The implied cost of raising the children is \$x,xxx per month, or very close to the expected cost of \$y,yyy. At these levels, the father would spend xx.xx% of his income on the children while the mother would spend yy.yy% of hers.
 15. Since the *Federal Child Support Guidelines* assume that the father incurs no expenses to care for his children, the father states that the fact of his incurring any expenses at all must *per force* constitute: "*Unusually high expenses in relation to exercising access to a child*". The father pleads and relies upon the provisions of section 10 of the *Federal Child Support Guidelines*, and particularly subparagraph 10 (2) (b).
 16. Whether as a *Charter* remedy or otherwise, the father states that the Household Standards of Living Test ought to be interpreted in such a manner so as to mirror the actual time spent by the children in each household, thereby reflecting the proportion of parenting costs in each home. Applying this analysis, the father's household has 1.76 people, reflecting the 38% of the time the children spend there, while the mother's household has 2.24 people, reflecting the 62% of the time the children spend there.
 17. The father only wishes the children to live equally well while in both households and not to be deprived of the privilege (and his obligation) of being able to be a real and loving parent to the children. This implies that the father must be left with the financial resources to house, feed, and clothe the children and to partake in all the activities that the children are accustomed to while they are in his care.
 18. The father states that the *Federal Child Support Guidelines*, as presently interpreted by the courts:

- (a) deprives his children of the possibility to benefit equally (financially) in both households; and,
 - (b) discriminates against the father as a non-custodial parent and as a male in such a way so as to infringe his rights under section 15 of the *Charter*.
19. The father states that in order to save the *Federal Child Support Guidelines* from being declared unconstitutional under section 52 of the *Constitution Act, 1982*, the Court should grant a remedy under section 24(1) of the *Charter*, such that section 10 of the *Federal Child Support Guidelines* will be more broadly interpreted than is currently the case in order that the paying parent's direct parenting costs can be recognized in a manner that is consistent with section 15 of the *Charter*.

6.3 Further Legal Action and a Class Action Suit?

As discussed throughout this paper, it is clear that the Guidelines are based on a formula that was never fully disclosed, debated, and publicised.

Ms. McRae's letter reveals for the first time that the Department of Justice is aware that the Formula is deficient, and that the Guidelines are based on policy decisions which were never publicly debated or revealed.

Furthermore, the lack of disclosure of the Formula can be shown to have directly affected the dispensation of justice.

Is there a class action suit in this somewhere? Certainly the amounts in question would be substantial.

.

Draft April 4, 2002

REFERENCES

- Child Support Team Department of Justice, Canada
1997 Formula for the Table of Amounts Contained in the Federal Child Support Guidelines, A Technical Report, Research Report CSR-1997-1E
- Finnie, Giliberti, and Stripinis
1995 An Overview of the Research Program to Develop a Canadian Child Support Formula, Department of Justice Canada
- Henman and Mitchell
2000 Estimating the Costs of Contact for Non-resident Parents: a budget standards approach
- Statutes of Canada
1985 The Divorce Act
- Supreme Court of Canada
1998 Francis v Baker

APPENDIX A

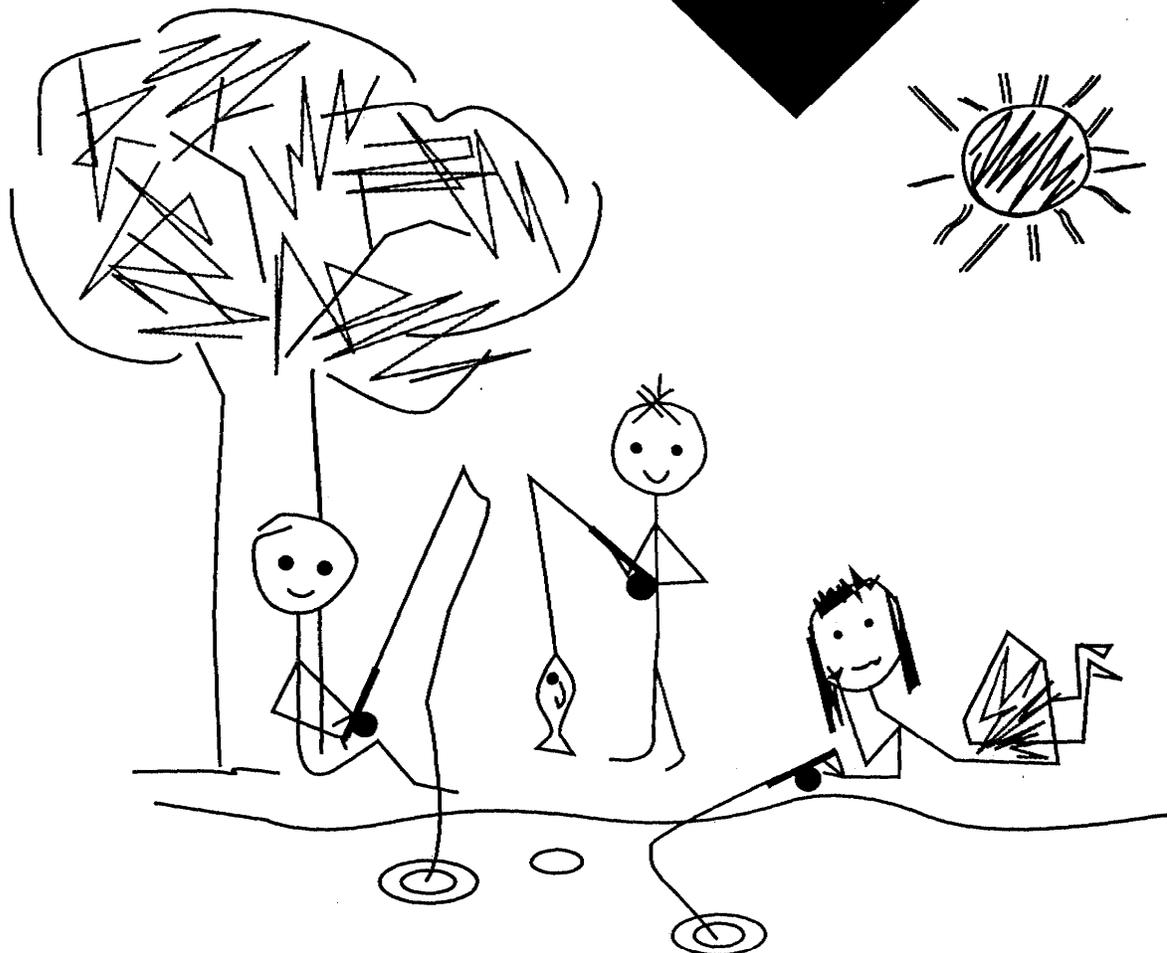
*"FORMULA FOR THE TABLE OF AMOUNTS CONTAINED IN THE FEDERAL
CHILD SUPPORT GUIDELINES, A TECHNICAL REPORT, RESEARCH REPORT
CSR-1997-1E"*



FORMULA FOR THE TABLE OF AMOUNTS CONTAINED IN THE FEDERAL CHILD SUPPORT GUIDELINES: A TECHNICAL REPORT

Research Report
CSR-1997-1E

Child
Support Team



DECEMBER 1997

Canada

**FORMULA FOR THE TABLE OF AMOUNTS
CONTAINED IN THE FEDERAL CHILD SUPPORT
GUIDELINES: A TECHNICAL REPORT**

December 1997

CSR-1997-1E

**Child Support Team
Research Report
Department of Justice Canada**

TABLE OF CONTENTS

1.0	INTRODUCTION	1
2.0	UNDERLYING PRINCIPLES AND ASSUMPTIONS	1
3.0	THE MODEL	2
4.0	INCOME	5
5.0	TAX VARIABLES	5
6.0	MODIFICATION TO THE FORMULA FOR BASIC NEEDS	5
7.0	MODIFICATION TO THE FORMULA AT LOW INCOME LEVELS	6
8.0	MODIFICATION TO THE FORMULA TO SMOOTH THE CURVE	7
9.0	USE OF THE CHILD SUPPORT TABLES	8
10.0	UPDATING THE TABLES	8

APPENDICES

Appendix 1	Federal, Provincial and Territorial Tax Parameters Used in Formula	9
Appendix 2	Sample Tables Generated by the Formula	11

LIST OF TABLES

Table 1	The Statistics Canada 40/30 Equivalence Scale (After-Tax)	3
Table 2	Marginal Capping Rates in the Transition Zone	6

LIST OF FIGURES

Figure 1	Finances of the Post Separation Households	2
Figure 2	Effect of Capping Versus No-Capping on Child Support Table Amounts	7

1.0 INTRODUCTION

Under the new Federal Child Support Guidelines, there are two main elements which determine the amount of child support awards:

- the amounts set out in the applicable table; and
- the amount, if any, determined under section 7 (special or extraordinary expenses).

The objective of this technical report is to explain the mathematical formula that generates the table amounts, the first of these elements.

2.0 UNDERLYING PRINCIPLES AND ASSUMPTIONS

In intact families, spending on children is directly related to family income, that is, the means of both parents. The concept of “cost of raising children” is an illusory theoretical construct. Spending on children is not fixed; it changes as the income of either parent changes. Families with higher incomes spend more on their children than do families of lower income. In the post separation arrangement, the Federal Child Support Guidelines aim to approximate, as closely as possible, the spending on the children that occurred in the pre-separation family. For a full description of the research and analysis conducted to arrive at the model for the formula used in the guidelines, please consult the following Department of Justice Canada publications:

R. Finnie, C. Giliberti, and D. Stripinis, *The Construction and Implementation of Child Support Guidelines* (Ottawa: Department of Justice Canada, 1993).

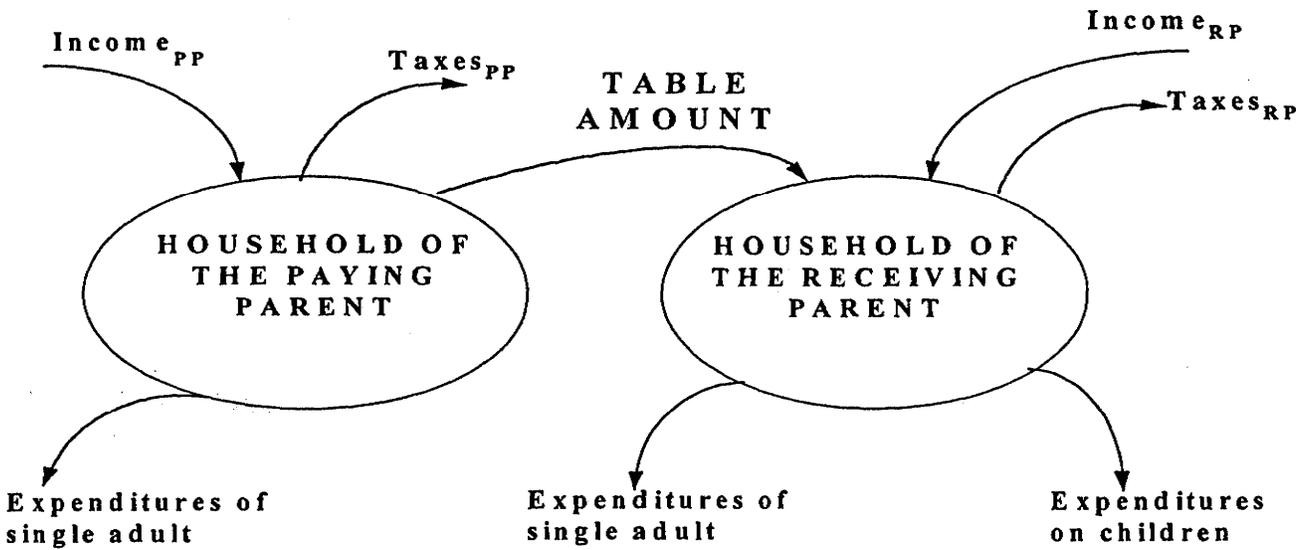
R. Finnie, C. Giliberti, and D. Stripinis, *An Overview of the Research Program to Develop a Canadian Child Support Formula* (Ottawa: Department of Justice Canada, 1995).

The objective of the formula that generates the child support tables is simply to find a means of calculating an amount to be transferred from the paying parent to the receiving parent. This transferred sum should maximise the amount available to be spent on the children while still allowing an adequate reserve for the self support of the paying parent. Several assumptions have been incorporated into the model. First, it is assumed that within the principal residence of the children, the parent and the children will share the same standard of living. A second assumption presumes that if the incomes of the parents are equal, it is fair and equitable that each should contribute equally to the financial support of the children, regardless of the extent of their contribution to the nurturing of the children.

3.0 THE MODEL

The following model, and the mathematical equation derived from it, makes the technical assumption that the household of the paying parent has one member: the paying parent. The receiving parent is also assumed to be single; the household of the receiving parent is made up of one parent and all the children of the marriage. Both parents earn income and pay taxes. These technical assumptions have the narrow purpose of producing the mathematical model. They do not restrict the application of the tables to real life situations which may involve more complex family arrangements.

Figure 1 Finances of the Post Separation Households



Simply stated, the model equalises the financial circumstances of the two households. Expressed mathematically, the model of equality becomes: ¹

$$\frac{\text{income}_{PP} - \text{taxes}_{PP} - \text{table amount}}{\text{Expenditures of single adult}} = \frac{\text{income}_{RP} - \text{taxes}_{RP} + \text{table amount}}{\text{Expenditures of single adult AND children}}$$

¹ The abbreviations PP and RP are used to denote paying parent and receiving parent.

The denominators in this equation are solved in accordance with the Statistics Canada “40/30” Equivalence Scale which allows expenditure variables to be expressed as a set of ratios.² Like most equivalence scales, the Statistics Canada 40/30 values are expressed in “adult equivalence units” (or AEU); a single person household has an AEU value of 1. Larger households have values greater than 1, depending on the family’s size and composition (i.e., whether there is one parent or two). The values in the equivalence scale are the multipliers required to determine the level of income a larger household needs in order to be as well-off as the household of a single adult.

Table 1 presents the numeric values of the 40/30 equivalence scale. Since the model postulates that each parent lives in a single adult household, the second column shows the values that are used in the formula. The fourth and fifth columns present an example of how the ratios of these adult equivalence units would translate into actual dollar amounts necessary to attain “equivalency”. The ratios reflect the fact that household expenditures are not a simple multiple of the number of family members. Economies of scale are realised through shared habitation.

Table 1 The Statistics Canada 40/30 Equivalence Scale (After-Tax)

	Adult Equivalence Units		Income required for equivalent standards of living	
	single adult household	two adult household	single adult household (\$)	two adult household (\$)
no children	1.0	1.4	10,000	14,000
one child	1.4	1.7	14,000	17,000
two children	1.7	2.0	17,000	20,000
three children	2.0	2.3	20,000	23,000
four children	2.3	2.6	23,000	26,000
five children	2.6	2.9	26,000	29,000
six children	2.9	3.2	29,000	32,000

Note: The AEU for a single parent with one child (1.4) is identical to the AEU for two adults (1.4). This means the second person in a household generates the same cost, regardless of age.

Note: \$10,000 is used as the base for a single person for illustrative purposes only.

² This scale is based on econometric evidence and a consultation process. See Statistics Canada, Income Distribution by Size in Canada, Cat no. 13-207 (Ottawa, 1991). The term 40/30 is used because of the particular percentage values that increment with size of family, from a 40% increase for the first member in addition to a single adult to a 30% increase for each additional member. The ratios have been found to be relatively stable at different income levels.

Using the equivalence scale concept for the denominators in the basic equation (page 2), where AEU is the abbreviation for adult equivalence unit, the expression becomes:

$$\frac{\text{income}_{PP} - \text{taxes}_{PP} - \text{table amount}}{\text{AEU for the paying parent}} = \frac{\text{income}_{RP} - \text{taxes}_{RP} + \text{table amount}}{\text{AEU for the receiving parent AND children}}$$

Substituting the known value of the equivalence unit (AEU_{PP}) for the paying parent single adult, the expression becomes:

$$\frac{\text{income}_{PP} - \text{taxes}_{PP} - \text{table amount}}{1.0} = \frac{\text{income}_{RP} - \text{taxes}_{RP} + \text{table amount}}{\text{AEU for the receiving parent AND children}}$$

As stated earlier, the objective is to determine the amount that must be transferred from the one household to the other in order to make them “equally well off”, that is, the child support table amount. Using the term AEU_{RP} for the denominator on the right hand side of the above equation and solving for the variable **table amount**, the expression becomes:

$$\text{TABLE AMOUNT} = \frac{[(\text{AEU}_{RP})(\text{income}_{PP} - \text{taxes}_{PP})] - (\text{income}_{RP} - \text{taxes}_{RP})}{1.0 + \text{AEU}_{RP}}$$

If there are two children with the receiving parent, using the equivalence table on page 3, the value of AEU_{RP} is 1.7 and the expression becomes:

$$\text{TABLE AMOUNT} = \frac{1.7(\text{income}_{PP} - \text{taxes}_{PP}) - (\text{income}_{RP} - \text{taxes}_{RP})}{2.7}$$

In generating the table amounts, income level by income level, the formula actually makes the income_{PP} and the income_{RP} equal, in keeping with the technical assumption of the model. Based on the equation, the formula produces a set of tables for each province/territory, by income level and by number of children up to a total of six children. As explained, the “number of children” variable is accommodated through the equivalence scale. The province/territory variable is required because each province/territory has its own taxing formula.

4.0 INCOME

In the Federal Child Support Guidelines, income is defined under Sections 15 to 20. For the majority of cases, “income” will be similar to “Total Income” from line 150 of the Revenue Canada T1 General form. However, that amount may have to be adjusted by the requirements of Schedule III of the guidelines that take into account certain deductions and inclusions deemed to be fair when applied to child support circumstances. In the formula used to generate the tables, the values are based on the guidelines’ definition of income.

5.0 TAX VARIABLES

Generally speaking, the formula uses those tax calculations, deductions and credits that apply to all employees. Included are Employment Insurance (EI) premiums, Canada Pension Plan/Québec Pension Plan (CPP/QPP) contributions and the Goods and Services Tax (GST) credits for both parents. Not included are discretionary actions on the part of tax-payers, such as charitable donations, RRSP savings and political contributions. Also omitted are factors which are not discretionary, but are specific to a situation, such as deductions for union dues, or allowances for disabilities, dependent relatives, and other special circumstances.

Not included in the calculation of the receiving parent’s taxes are the federal Child Tax Benefit and the GST rebate for children. These are deemed to be the government’s contribution to children and not available as income to the receiving parent. The only difference in tax calculations between the two parents is the inclusion, in the calculations for the receiving parent, of the federal “equivalent-to-spouse” deduction and certain provincial tax reductions and credits. For details on federal and provincial/territorial tax parameters used in the formula, see Appendix 1.

6.0 MODIFICATION TO THE FORMULA FOR BASIC NEEDS

It is recognised that all persons have basic needs that must be met. If the formula does not take this into account, persons could begin paying child support on the first dollar earned. Therefore, the first modification to the formula incorporates an amount required to allow for the self-support of the paying parent. This basic need amount, termed “self-support reserve”, is an amount deemed to be required for a minimal standard of living for a single adult. It is used as the starting point for child support responsibility.

The self-support reserve concept is used here solely to determine the level of income at which a parent would begin to pay child support. The chosen cut-off was a modification of the federal income tax basic personal non-refundable tax credit which represents the income threshold for payment of federal income tax.. This threshold reflects what society deems to be the minimum income necessary for individuals to look after their own needs. It is national in scope, is close to the average social assistance available to single persons across Canada and is thus a credible choice as the minimum income needed to meet basic needs. In determining the child support table amounts, the self-support reserve is defined as the federal basic personal amount plus the necessary standard employment deductions of EI contributions and CPP/QPP premiums. For 1997, the self-support reserve is \$6,730.³ An income above this amount will normally be subject to child support payments.

7.0 MODIFICATION TO THE FORMULA AT LOW INCOME LEVELS

A "marginal capping rate" is added at lower income levels to ensure that the amount of child support does not constitute a disincentive to working for a higher income which would simply increase tax and child support obligations, leaving little or no improvement in the payer's financial state. Paying parents with incomes below the self-support reserve do not have to pay child support. Unless the formula is modified to prevent it, those earning a single dollar above that threshold could be required to make child support payments of several hundreds of dollars. In order to avoid such discontinuities, a special adaptation was made to the formula so that the transition from \$0 payment to "full" payment would be gradual.

In this low income transition zone, the formula was adjusted so that the paying parent keeps a proportion of earnings above the self-support reserve amount.⁴ The rates which determine the amount the parent keeps vary with the number of children. The numerical details of how the transition is accomplished are shown in table 2.

Table 2 Marginal Capping Rates in the Transition Zone

Number of children	% of each earned dollar above the self support reserve and under the ceiling of the transition zone that the paying parent retains (in the transition zone).	Marginal Capping Rate -- Maximum for Taxes and Child Support Combined
1	40%	60%
2	35%	65%
3	30%	70%
4,5,6	25%	75%

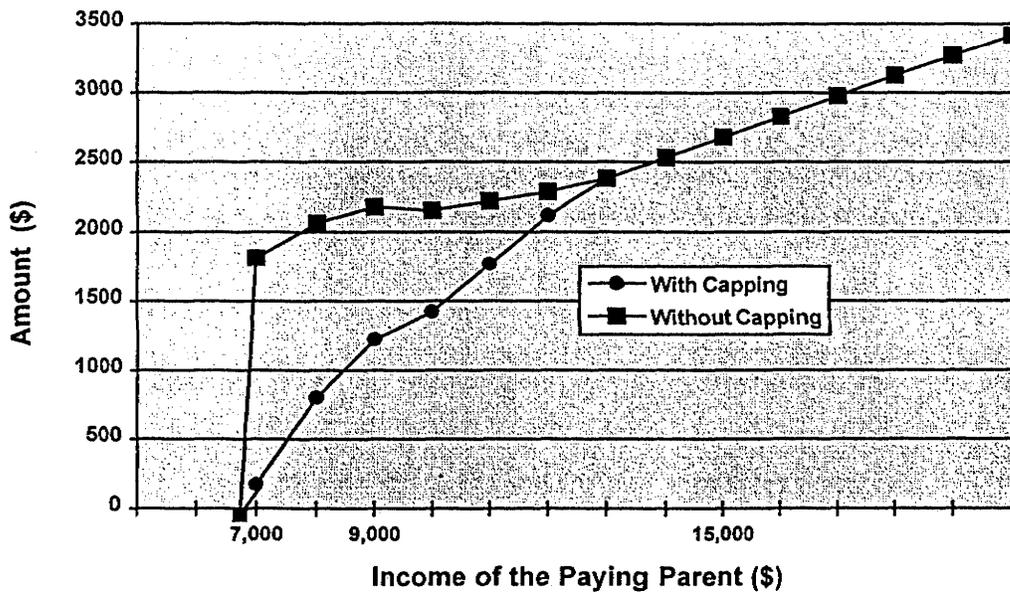
³ The provinces/territories were asked if this was an acceptable "minimum" income level for the self-support reserve. All except the Yukon, responded in the affirmative. The Yukon self-support reserve was set at \$8,940.

⁴ The upper limit of the "transition zone" is a function of the number of children and the province/territory. For one child, the limit is approximately \$10,000; for two children, \$13,500; for three, \$17,000; and for four, five and six, the upper limit can vary considerably, depending on the specific provincial/territorial tax scheme.

As shown in Table 2, a paying parent with one child and an income within the transition zone would keep the self-support reserve amount plus forty cents for each dollar earned above the self support reserve amount. The other sixty cents would be divided between taxes and child support.

Figure 2 illustrates the impact of the marginal capping mechanism. The horizontal axis is the paying parent's income in the low-income range up to \$20,000. The vertical axis represents the table amount for two children in Ontario. The two curves show the contrasting amounts for the capped version of the formula and for the non-capped version.

Figure 2 Effect of Capping Versus No-Capping on Child Support Table Amounts



As can be seen, the amounts without capping would increase dramatically once income exceeds the self-support reserve amount. In fact, at an income of about \$7,000, a paying parent could be paying close to \$2,000 a year. On the other hand, with capping, the amounts increase gradually. For the payer, this realistically takes into account basic needs, taxes to be paid on additional income and the obligation to pay child support.

8.0 MODIFICATION TO THE FORMULA TO SMOOTH THE CURVE

Because of the manner in which certain provincial/territorial tax functions come into play at different income levels, the curve of the table amounts was not always unidirectional as income increased. Within restricted ranges, some very slight discontinuities required smoothing in order to ensure that amounts never decreased with increasing income.

9.0 USE OF THE CHILD SUPPORT TABLES

An excerpt from the official Federal Child Support Tables and instructions for determining child support amounts can be found in Appendix 2. The formula generates the award amounts by province/territory, by income of the payer and by number of children, up to six children. The tables are specific to the jurisdiction because of differences in provincial/territorial tax parameters. Income intervals of \$1000, with an interpolation factor between intervals, are used in the official guidelines.⁵ For each province/territory, there is a single page for each "family size", based on the number of eligible children of the marriage for whom support is to be paid. The province/territory is determined by the residence of the paying parent.⁶ The "number of children" variable is the number of children of the marriage living with the receiving parent.

In cases of split custody, where each parent has sole custody of one or more children, the mother will be the paying parent for each child in the father's custody and the father will be the paying parent for each child in the mother's custody. Table amounts are found separately for each payer, based on the payer's income and the number of children in the custody of the other parent. The difference between the two table values is the amount to be paid by one parent to the other parent.

10.0 UPDATING THE TABLES

The Federal Child Support Guidelines that include the table amounts were implemented on 1 May 1997. The Department of Justice Canada will be monitoring any changes in tax parameters or legislation that may materially change table amounts.

⁵ For ease of use, simplified tables with intervals of \$100 (not shown in this report), have also been published. The Federal Child Support Guidelines and the simplified tables are available at the Department of Justice Canada website: <http://canada.justice.gc.ca>.

⁶ There are exceptions to this rule, such as when the payer's place of residence is outside of Canada. Please refer to the Federal Child Support Guidelines for details.

FEDERAL, PROVINCIAL AND TERRITORIAL TAX PARAMETERS
USED IN FORMULA

Jurisdiction	Basic Tax	Flat Rate Tax	Surtax	Tax Reduction	Tax Credits
Federal	Basic federal tax		<ul style="list-style-type: none"> Surtax 1: as a percentage of basic federal tax Surtax 2: after the basic federal tax reaches a certain threshold 	CPP/QPP contributions and EI (formerly UIC) premiums	<ul style="list-style-type: none"> GST tax credits for adult, or parent portion only Basic personal non-refundable tax credit Equivalent-to-spouse non-refundable tax credit for the receiving parent
Newfoundland	As a percentage of basic federal tax		When the provincial tax reaches a certain threshold		
Prince Edward Island	As a percentage of basic federal tax		When the provincial tax reaches a certain threshold		
Nova Scotia	As a percentage of basic federal tax		When the provincial tax reaches a certain threshold	A function of number of children Clawback is a function of net family income	
New Brunswick	As a percentage of basic federal tax		When the provincial tax reaches a certain threshold		
Quebec	<ul style="list-style-type: none"> Federal abatement Quebec provincial taxes 				
Ontario	As a percentage of basic federal tax		<ul style="list-style-type: none"> Surtax 1: when the provincial tax reaches a certain threshold Surtax 2: when the provincial tax reaches a second, higher threshold 	Reduces or eliminates the amount of Ontario tax otherwise payable Increased reduction for taxpayers with dependent children	Property and sales tax credits (assuming housing costs at 30% of net income)

Appendix 1

FEDERAL, PROVINCIAL AND TERRITORIAL TAX PARAMETERS
USED IN FORMULA

Jurisdiction	Basic Tax	Flat Rate Tax	Surtax	Tax Reduction	Tax Credits
Manitoba	As a percentage of basic federal tax	"Manitoba net income tax": flat rate tax on federal net income	Surtax (with reductions for basic, for equivalent-to-spouse and for children) based on the Manitoba net income tax	Tax reduction: with basic, equivalent-to-spouse and child components Clawback based on the Manitoba net income tax	<ul style="list-style-type: none"> Cost-of-living tax credit Property tax credit (assuming housing costs at 30% of net income)
Saskatchewan	As a percentage of basic federal tax	Based on federal net income	<ul style="list-style-type: none"> Surtax 1: when the provincial tax reaches a certain threshold [Note: technically, the threshold is sometimes described as \$0, but the first \$150 (in 1997) are not payable, so this is the equivalent of a threshold] Surtax 2: when the provincial tax reaches a second, higher threshold 	Reduction for self (sometimes referred to as the sales tax amount) and reductions for equivalent-to-spouse and for children Clawback based on net income	
Alberta	As a percentage of basic federal tax	Based on taxable income	<ul style="list-style-type: none"> When provincial tax reaches a certain threshold 	Reduction which decreases as a function of provincial tax payable Reduction only applies when tax payable is below a fixed low amount	
British Columbia	As a percentage of basic federal tax		<ul style="list-style-type: none"> Surtax 1: when provincial tax reaches a certain threshold Surtax 2: when provincial tax reaches a second, higher threshold 	Surtax reduction for equivalent-to-spouse and for children	Sales tax credit and clawback
Yukon	As a percentage of basic federal tax		When territorial tax reaches a certain threshold		
Northwest Territories	As a percentage of basic federal tax				Cost-of-living tax credit based on net income

SAMPLE TABLES GENERATED BY THE FORMULA

The attached set of tables for the province of Manitoba is an excerpt from the full set of tables in the Federal Child Support Guidelines. The child support amount is found by first selecting the correct table page for the number of children and the correct income interval represented by rows on the page. The table for six children is used for families with more than six children. Where the income is above the lower limit of a row's income range, the amount of child support is calculated by adding, to the award amount for the row, an interpolation value based on the dollar amount of income above the lower limit.

Draft April 4, 2002

APPENDIX B
CORRESPONDENCE FROM VIRGINIA MCRAE EXPLAINING FEDERAL
CHILD SUPPORT GUIDELINES



Family Children and Youth
284 Wellington St.
Ottawa, Ontario
K1A 0H8

June 19, 2001

Alar Soever
104 Caithness Avenue
Toronto, Ontario
M4J 3Y1

Dear Mr. Soever,

Thank you for your correspondence of May 27, 2001, in which you express your concerns regarding the statements made in the Federal-Provincial-Territorial Consultation Paper, *Putting Children's Interests First: Custody, Access and Child Support in Canada*. We apologize for the delay in responding.

In your letter, you raise the issue of access costs in relation to the Federal Child Support Guidelines' calculation of child support. The Guidelines do recognize that the paying parent spends time with the children and may have associated costs. This is reflected in four areas of the Guidelines.

First, in cases where the recipient parent spends substantially more time with the children, the Guidelines take into account the paying parent's access costs by balancing them against the recipient parent's "hidden costs". Examples of such hidden costs include diminished career advancement opportunities and reduced ability to earn overtime pay.

Second, the formula, as you will have noticed, is modelled on the assumption that the table amount is just and equitable when both parents are earning an identical income. The typical recipient parent does not earn as much as the typical paying parent. Therefore, the table amount is usually weighted in favour of the paying parent, but is balanced when that parent has additional access costs.

Third, in cases of very high access time, the shared custody provision may be applicable. As you may know, this provision applies in situations where a spouse has access to, or physical custody of, a child for not less than 40 percent of the time over the course of a year. In such cases, the courts have the discretion to set the support amount, taking into account:

- the amounts set out in the applicable tables for each of the spouses;
- the increased costs of shared custody arrangements; and
- the condition, means, needs and other circumstances of each spouse and of any child for whom support is sought.

In situations where parents share custody of children, the courts may order lower support payments than the table amounts as they feel is appropriate.

Fourth, the Guidelines specifically address access costs by giving the court the discretion to adjust the support amounts given in the tables if there are unusually high access expenses that, with the payment of the table amount, would cause undue hardship to either spouse. The parent requesting the change must show that his or her standard of living is lower than that of the other parent.

Based on the above, it is correct to say that the Federal Child Support Guidelines recognize that a paying parent will spend time with his or her children and may have related costs. It is important that, the Federal Child Support Tables, which are derived from a mathematical formula using several different presumptions, not be confused with the Guidelines as a whole, which are derived from policy decisions adopted in part to address deficiencies in the mathematical formula. Although the Tables may not include a specific allowance for access, this deficiency is addressed in the aforementioned four areas.

However, as we have outlined in the consultation paper, *Putting Children's Interests First: Custody, Access and Child Support in Canada*, we would like to hear from Canadians whether they feel that the current fashion in which access costs are dealt with under the Guidelines is adequate.

We trust this information addresses your concerns. Should you have any other questions or comments regarding the Federal Child Support Guidelines, please do not hesitate to call, toll-free, the Department of Justice Canada's Child Support Information Line at 1-888-373-2222. You may also visit our Internet site at <http://canada.justice.gc.ca>.

Again, thank you for writing and sharing your concerns with us.

Sincerely,



Virginia McRae
Co-Chair, Federal/Provincial/Territorial
Family Law Committee
Department of Justice Canada

LLH/ja

cc: Betty Ann Pottruff, Q.C.
Co-Chair, Federal/Provincial/Territorial Family Law Committee
Saskatchewan Justice