

Summary

**FEDERAL/PROVINCIAL/TERRITORIAL
FAMILY LAW COMMITTEE'S REPORT
AND RECOMMENDATIONS
ON CHILD SUPPORT**

January 1995

**Published by authority of the Minister of Justice
and Attorney General of Canada
Government of Canada**

by

**Communications and Consultation Branch
Department of Justice Canada
Ottawa, Ontario
K1A 0H8**

(613) 957-4222

**Cat. No.: J2-129/1995-1E
ISBN 0-662-22968-1
JUS-P-673E**

©Minister of Public Works and Government Services Canada 1995

Printed in Canada

Summary

**Federal/Provincial/Territorial
Family Law Committee's
Report and Recommendations on
Child Support**

January, 1995

To receive more copies of this Summary, write to:

Communications and Consultation Branch
Department of Justice Canada
Ottawa, Ontario
K1A 0H8

Version française aussi disponible

Contents

Federal/Provincial/Territorial Family Law Committee Members	i
Introduction	1
Child Support Options	
Option 1 — Maintain the Current System	2
Option 2 — Give the Courts Data on the Costs of Children	2
Option 3 — Adopt a Child Support Formula	3
The Committee's Child Support Formula	
What are the Costs of a Child?	4
Income Needed for Three Family Types to have the Same Standard of Living	4
The Needs of a Single-Parent Family	5
How much of the Cost of a Child Should Each Parent Pay?	5
How Does the Child Support Formula Work?	5
Table 1 — Child Support Awards Calculated with Current Deduction/Inclusion Tax Treatment	8
Table 2 — Child Support Awards Calculated with No Deduction/ No Inclusion Tax Treatment	9
Impact of the Formula	
How the Formula Affects Low-Income Families	10
Implementing the Formula for Child Support Awards	
Determining the Income of the Non-custodial Parent	11
Recommended Approach to Application of the Formula	11
Departure from the Child Support	11
Undue Hardship	12
Existing Child Support Orders	12
Custody of Other Children	12
High Debt Load	12
Access Costs	13
Health Costs	13
Second Families	13
Custody Arrangements	13
Changes in Income and Standard of Living	14
Should the Child Support Formula Apply to Existing Awards?	15
Other Issues	
Income Tax Considerations	16
Jurisdictional Differences	17
Enforcement	17
General Reserve from the Province of Quebec Regarding the Report	18
Appendix A - Objectives and Principles	19
Appendix B - Recommendations	20

Federal/Provincial/Territorial Family Law Committee Members

Ms. Shannon Gullberg,
Department of Justice
Yellowknife, N.W.T.

Mr. Thomas E. Ullyett
Ms. Sylvia MacIntosh
Department of Justice
Whitehorse, Yukon

Mr. Derek Finall
Ministry of the Attorney General
Victoria, British Columbia

Ms. Peggy M. Hartman
Department of Justice
Edmonton, Alberta

Ms. Betty Ann Pottruff, Q.C.
Department of Justice
Regina, Saskatchewan

Ms. Joan MacPhail, Q.C.
Department of Justice
Winnipeg, Manitoba

Mr. Allan Shipley
Ministry of the Attorney General
Toronto, Ontario

Ms. Denise Gervais *
Ministère de la Justice
Quebec, Quebec

Ms. Cynthia Davis
Department of Justice
Fredericton, New Brunswick

Mr. George MacMillan
Department of Justice
Charlottetown, P.E.I.

Mr. Brian Norton, Q.C.
Department of Justice
Halifax, Nova Scotia

Mr. Brian Furey
Department of Justice
St. John's, Newfoundland

Principal Authors: Murielle Brazeau
Carolina Giliberti
Department of Justice
Canada



Mr. Glenn Rivard
Chair of the Committee

* The representative of Quebec's Ministère de la Justice has expressed on behalf of her department, a general reserve to the report which is found on page 18 of this summary.

Introduction

This report summarizes the findings and recommendations made by the Family Law Committee following their work on the Child Support Project. Over a period of almost four years, the Family Law Committee oversaw original research on child support in Canada, reviewed the research results and consulted widely with Canadians representing custodial and non-custodial parents, and with many other experts in the area of child support.

Child Support Options

The federal, provincial and territorial governments asked the Family Law Committee to address the widespread dissatisfaction that Canadians have expressed over child support awards. The Committee identified three options for addressing the problems of child support:

- (1) maintain the current system,
- (2) supplement the current system by giving the courts data on the costs of children, or
- (3) adopt a child support formula.

Committee members sought to develop a system that would produce adequate and equitable levels of child support in a way that would be consistent and predictable. They wanted to build in flexibility and ensure that any new system would be simple to apply and administer.

Option 1 — Maintain The Current System

The current system often results in situations where families in similar circumstances end up with significantly different child support awards. This, in turn, generates a sense of distrust for a legal system that appears to treat children inequitably. An equally significant problem is that the present system often results in inadequate awards. The Family Law Committee has confirmed that there is much room for improvement. Maintaining the current system is not in the best interest of Canadian children. The Committee does not recommend this option.

Option 2 — Supplement the Current System by Giving the Courts Data on the Costs of Children

To establish the level of child support to be paid by the non-custodial parent to the custodial parent, lawyers, judges and parents generally review the costs of the child. A custodial parent may be asked to provide a budget listing each expense he or she incurs for the child. Such budgets are often limited to tangible expenditures on children rather than considering all the elements which constitute the children's needs and which impact on their overall standard of living. At the time that the support level is being decided, the family is usually going through a period of major change, which can make budgeting very difficult and somewhat unrealistic. The fact that the child will ultimately live at the custodial parent's standard of living is generally ignored, although the courts do consider the custodial parent's income and capacity to contribute to the child's needs.

The option of providing data to the courts on the costs of raising children, and leaving to them the decision of how to divide these costs between the two parents, addresses only part of the problem. While it would inform courts on average costs per income category, such an approach would leave unresolved the problem of determining how these costs should be

shared between the two parents. Without a formula to calculate costs *and* share them fairly, families in similar situations will continue to receive significantly different child support awards.

Option 3 — Adopt a Child Support Formula

The Family Law Committee believes that the introduction of a child support formula will help parents, lawyers and judges set fair and consistent child support awards. Such a formula has the potential to increase acceptance of parental responsibility for children. By removing an important source of conflict at the time of the family breakdown, a child support formula will promote positive relations among the family members, particularly the child and the non-custodial parent. It also has the potential to lower legal costs for parents and lower legal aid, court and enforcement costs for the state. A child support formula is an important step towards a child-centred approach to family law and such an approach to determining child support awards is in the best interests of Canadian children.

The Committee's Child Support Formula

In developing its proposed child support formula, the Family Law Committee looked at the needs of the separated family. It agrees that both parents should be responsible for the financial support of a child. The challenge was to find a way to estimate the amount spent on a child and to determine how these expenses could be shared fairly between the custodial and non-custodial parent. The Committee first decided to adopt a method for estimating the average expenditures for children in a custodial parent's household. Then it developed a way to share these expenses, based on the income of the non-custodial parent. This two-step approach to developing the formula is explained below.

What are the Costs of a Child?

The proposed Child Support Formula incorporates an equivalence scale used by Statistics Canada to answer the question "How much more income does a family with children need to be as well off as a single person or a couple without children?" A family with children may have a higher income than a childless couple but its needs are also greater. This scale estimates that a couple needs 40 percent more money to have the same standard of living as a single person. In other words, for every \$10,000 of income needed by a single person, a couple needs \$14,000 to have the same standard of living. A child adds another 30 percent to the family's costs, so a couple with one child needs \$17,000 to have the same standard of living as a single person earning \$10,000. The child's costs represent \$3,000 of the family's \$17,000 budget, or 17.6 percent of the family's total expenses. This holds true at all income levels.

Income Needed for Three Family Types to Have the Same Standard of Living

Household Type	Income Needed	Application of the Equivalence Scale
1 adult	\$40,000	$1 \times \$40,000$
2 adults	\$56,000	$1 \times \$40,000 + (40 \% \text{ of } \$40,000)$ $= \$40,000 + \$16,000$
2 adults and 1 child	\$68,000	$1 \times \$40,000 + (40 \% \text{ of } \$40,000) +$ $(30 \% \text{ of } \$40,000)$ $= \$40,000 + \$16,000 + \$12,000$

This method of determining the costs of children produces higher estimates of those costs than most other methods in part, because it assumes to include all expenses, including daycare, and to apply to children of all ages. It also eliminates the false notion that these costs can be estimated precisely. Greater numbers of children of course imply greater costs, and the scale applies to families with up to seven children.

The Needs of a Single-Parent Family

Applying Statistics Canada's approach to the needs of children in a single-parent family, the formula treats the first child in the custodial parent's household as the second individual in that household, not the third as he or she would be in a two-parent household. This child, as the second family member, is considered to add 40 percent to the household's income needs, compared to a single-person household. The third person in the household, and every additional person, adds another 30 percent to the total income needed to match the standard of living of a single person. Most other expenditure models do not reflect the needs of the single-parent household.

How Much of the Cost of a Child Should Each Parent Pay?

Trying to equalize the standard of living of both the non-custodial and custodial parent, regardless of income, would have been a radical policy change. However, Committee members supported the premise that, where the parents have similar incomes, every family member in both households should enjoy a similar standard of living. When both parties make the same income, it is a straightforward process to apply the equivalence scale and determine how much income should be transferred from the non-custodial parent to the custodial household.

In most cases, however, both parents do not make the same income. The Committee concluded that, since the award determined by using the equivalence scale is fair to all concerned when the two incomes are equal, from the child's perspective it continues to be fair that the non-custodial parent should pay the same amount even when the incomes are different. In this way, the ability to pay the award is not at issue and the amount paid should help to meet the real needs of the custodial household.

The formula has two additional features which make it attractive. In the majority of separating families, the income of the custodial parent is lower. An award that is based on an assumption of equal incomes produces higher dollar amounts in these cases than one based on a proportional division of both parents' incomes. The second feature is that custodial parents in lower income tax brackets will receive more net support after payment of taxes than their higher income counterparts.

How Does the Child Support Formula Work?

Although the basis of the Child Support Formula is relatively simple, the formula itself is complicated by the need to consider income tax consequences. For this reason, a computer is used to calculate the awards and generate a table presenting the amounts payable at each level of gross income. In this way, the formula can take account of all income tax payable and all tax credits and government benefits such as the G.S.T. tax credit for low-income

families and individuals, while making the formula-generated awards easy to administer and apply.

The formula was originally developed in the deduction/inclusion tax system and tried to resolve most of the criticisms with this tax treatment. The formula takes the gross income of the non-custodial parent and determines how much he or she would have to pay to the custodial household to equalize the two standards of living *if both parents earned that amount*. For the non-custodial parent, the formula deducts the amount of the award from gross income before calculating the income tax payable. For the custodial parent, the formula takes account of the income tax payable on the award when determining the amount needed to meet the needs of the parent and children.

The tax implications are, therefore, included in the amount of child support recommended by the formula. Custodial parents would continue to include the award within their income and non-custodial parents would continue to receive the deduction at year end. The deduction provides the payor with additional disposable income from which to pay support. The child support formula passes on that benefit of the additional disposable income to the custodial parent through the child support award.

For the two-thirds of custodial parents, whose ex-spouses earn a higher income than they do, the child support award will always fully compensate them for having to include the award within their income. However, the one-third of custodial parents who earn a similar or higher income than their ex-spouses and who are in a higher tax bracket do not benefit by the current tax treatment; the formula cannot resolve their situation.

The way the formula works can be illustrated with the example of a two-parent family with one child, which has separated into two households. One parent — in this case the mother — has sole custody of the child. For this family, the conceptual framework underlying the computer formula is:

$$\frac{\text{Disposable income of the father}}{\text{Needs of the father}} = \frac{\text{Disposable income of the mother}}{\text{Needs of the mother and child}}$$

The father's income is \$50,000 and the mother's income is therefore assumed to be \$50,000. The formula will determine how much of the father's after-tax income should be transferred to the custodial household:

$$\frac{\$50,000 \text{ less taxes, less child support}}{1.0} = \frac{\$50,000 \text{ plus child support, less taxes}}{1.4}$$

In this example, the annual value of the child support award is \$8,458, or about 16.5 percent of the father's gross income. All non-custodial parents earning \$50,000 would pay a child support award of \$8,458 annually to the custodial household if there is one child. For families with two children, the non-custodial parent earning \$50,000 would pay \$13,938 a

year, or about 28 percent of gross income. If there were three children in the family, the non-custodial parent would pay \$18,318, or about 36.5 percent of gross income.

The following tables show the child support awards payable at incomes from \$8,000 a year to \$150,000 a year. For incomes over \$150,000, the courts would have discretion to set the amount of child support. Table 1 sets out the child support awards calculated with the tax implications of the current deduction/inclusion tax treatment included in the award. Under this current tax treatment custodial parents are expected to pay tax, if applicable, on the award. Separate tables can be developed to assist custodial parents in determining this figure.

Table 2 reflects the level of awards that would be generated under the formula if the tax system were changed so that awards were not deducted from the taxable income of the non-custodial parent and not included in the taxable income of the custodial parent. This tax treatment has been proposed but is not the current law.

Table 1: Child Support Awards Calculated with Current Deduction/Inclusion Tax Treatment

Gross Income of the non-custodial parent	Support for 1 child		Support for 2 children		Support for 3 children	
	Annual Award	Monthly Payment	Annual Award	Monthly Payment	Annual Award	Monthly Payment
\$ 8,000	\$ 735	\$ 61	\$ 886	\$ 74	\$ 1,038	\$ 87
\$10,000	1,228	\$ 102	1,628	\$ 136	2,053	\$ 171
\$15,000	1,726	\$ 144	2,458	\$ 205	3,338	\$ 278
\$20,000	2,228	\$ 186	3,493	\$ 291	4,678	\$ 390
\$30,000	4,793	\$ 399	7,593	\$ 633	9,758	\$ 813
\$40,000	6,783	\$ 565	11,138	\$ 928	14,158	\$1,180
\$50,000	8,458	\$ 705	13,938	\$1,162	18,318	\$1,527
\$60,000	10,673	\$ 889	17,123	\$1,427	22,228	\$1,852
\$70,000	12,953	\$1,079	20,358	\$1,697	26,208	\$2,184
\$80,000	14,918	\$1,243	23,638	\$1,970	30,213	\$2,518
\$90,000	16,688	\$1,391	26,623	\$2,219	34,203	\$2,850
\$100,000	18,463	\$1,539	29,318	\$2,443	37,968	\$3,164
\$110,000	20,153	\$1,679	32,013	\$2,668	41,418	\$3,452
\$120,000	21,818	\$1,818	34,683	\$2,890	44,848	\$3,737
\$130,000	23,488	\$1,957	37,273	\$3,106	48,278	\$4,023
\$140,000	25,153	\$2,096	39,868	\$3,322	51,638	\$4,303
\$150,000	26,818	\$2,235	42,458	\$3,538	54,638	\$4,553

Table 2: Child Support Awards Calculated with No Deduction/No Inclusion Tax Treatment

Gross Income of the non-custodial parent	Support for 1 child		Support for 2 children		Support for 3 children	
	Annual Award	Monthly Payment	Annual Award	Monthly Payment	Annual Award	Monthly Payment
\$ 8,000	\$ 293	\$ 24	\$ 734	\$ 61	\$ 923	\$ 77
\$10,000	493	\$ 41	1,308	\$ 109	1,608	\$ 134
\$15,000	993	\$ 83	1,908	\$ 159	2,493	\$ 208
\$20,000	1,493	\$ 124	2,508	\$ 209	3,473	\$ 289
\$30,000	2,793	\$ 233	4,588	\$ 382	5,833	\$ 486
\$40,000	3,978	\$ 332	6,363	\$ 530	8,223	\$685
\$50,000	4,958	\$ 413	8,053	\$671	10,348	\$862
\$60,000	5,913	\$ 493	9,553	\$796	12,448	\$1,037
\$70,000	6,763	\$564	10,878	\$907	14,173	\$1,181
\$80,000	7,618	\$635	12,213	\$1,018	15,888	\$1,324
\$90,000	8,448	\$704	13,513	\$1,126	17,563	\$1,464
\$100,000	9,283	\$774	14,813	\$1,234	19,238	\$1,603
\$110,000	10,123	\$844	16,118	\$1,343	20,913	\$1,743
\$120,000	10,958	\$913	17,418	\$1,452	22,588	\$1,882
\$130,000	11,798	\$983	18,723	\$1,560	24,263	\$2,022
\$140,000	12,633	\$1,053	20,023	\$1,669	25,938	\$2,162
\$150,000	13,473	\$1,123	21,328	\$1,777	27,608	\$2,301

The Committee set a basic minimum income of \$6,744 — representing the level of the basic personal exemption in the *Income Tax Act* — for the non-custodial parent, below which no award is payable. Alternatively, a province or territory may choose to set the basic minimum income at the level of its social assistance benefit for one adult. For incomes below the basic minimum income, the courts should have the discretion to award an amount where circumstances warrant. Any income above the basic minimum income is included in the calculation of an award but an award for one child plus all federal and provincial income taxes paid by the non-custodial parent cannot exceed 70 percent of the non-custodial parent's income.

Impact of the Formula

In order to examine the potential impact of the formula, the Family Law Committee asked court staff in 15 courts across Canada to fill out a form on all divorce and separation cases involving an application for child support during a three-month period in 1991. Information such as the amount of the award, each parent's income, and number of children was collected. This generated a usable sample of 869 cases. (For details see Part II "Results of Research" in the main report).

Using this database, the Committee's researchers could then simulate child support awards resulting from application of the formula and compare the formula's awards to the actual awards. The proposed Child Support Formula produces amounts that are on average similar to the court awards collected when the non-custodial parent earns a low (under \$15,000) and medium income (\$15,000-\$30,000). Awards tend to be slightly lower than the court awards for cases involving one child and slightly higher for cases involving two or more children. However, when the non-custodial parent earns a high income (over \$30,000), the awards are much higher than the court awards, especially for large families.

How the Formula Affects Low-Income Families

Research has indicated that where the income of both parents is under \$15,000 a year, the custodial household generally has a higher standard of living than the non-custodial household. This is generally due to significant subsidies from governments to low-income families.

Under an earlier version, where both parents' incomes were below \$20,000 per year, the formula produced a substantial *decrease* in the levels of child support compared to current levels. Therefore, the formula was modified so that it would not significantly decrease awards to be paid by non-custodial parents earning less than \$20,000 a year. The proposed Child Support Formula reflects this low-income adjustment.

It is important to note that no formula comes close to eliminating poverty because many families are close to (or in) poverty before the divorce. The loss of economies of scale makes things even worse after the separation. Moreover, the Family Law Committee recognizes that families on social assistance will only receive a benefit from increased child support levels where the increase is high enough to take them off social assistance completely. Otherwise the child support order is assigned to the provinces and territories.

Implementing the Formula for Child Support Awards

Determining the Income of the Non-custodial Parent

Determining the income of the non-custodial parent is the most important step in applying the proposed Child Support Formula. All of the income of the non-custodial parent must be considered before the formula is applied. Income should include, as applicable, earned income, wages, commissions, employment or ownership benefits, income-producing assets, interest on capital, and payments in lieu of income, such as Unemployment Insurance, disability payments, and support payments from a former spouse.

To ensure that the award is set at an appropriate level, the non-custodial parent should be required to provide a complete financial statement of income for the current year and the previous three years. Where a parent disregards this obligation, a sanction could be imposed or the court should be able to attribute income to the spouse.

Recommended Approach to Application of the Formula

A child support formula could be made applicable in one of three different ways: on a mandatory basis, as a rebuttable presumption — that is, that the formula will apply unless it would create undue hardship for one of the parents or the child — or as an advisory guideline. Ideally, to ensure that most Canadian children benefit from the formula, it should operate as a rebuttable presumption.

The courts could depart from the formula in cases of undue hardship or other carefully defined cases. Even after the formula is introduced, parties would continue to be free to negotiate the amount of child support between themselves but the court would be able to review the amount to ensure that it is reasonable. The formula can help them in this exercise.

Departure from the Child Support Formula

The formula is based on the average costs of children in Canada and should, therefore, be equitable for most Canadians. However, there may be circumstances where applying the formula would create undue hardship for the non-custodial parent. For example, applying the formula to a low-income non-custodial parent, who has many children and a high amount of debt, could result in an award that is higher than his or her total earnings. In these cases, the parties, lawyers and the courts should consider how to depart from the formula.

Undue Hardship

Courts should only make a finding of undue hardship with respect to lower income families; higher income earners should rarely have difficulty paying the award established under the formula. A non-custodial parent should not be able to make an application for undue hardship if, after applying the formula, he or she has a standard of living that is higher than that of the custodial household. Judges would consider whether this threshold test has been met before considering a departure from the formula.

The following extraordinary circumstances could justify a finding of undue hardship:

- an existing child support order
- having custody of other children
- a high debt load
- extraordinary costs related to exercising access

However, when determining whether these factors create undue hardship for a non-custodial parent, the courts should examine whether or not the hardship was caused by a deliberate act of the parent.

Existing Child Support Orders

All children of the same parent should be treated equally as far as possible. Therefore, even if a portion of the income of the non-custodial parent is committed to the support of other children, the formula should still be applied to the parent's total gross income so that all the children have equal access to the parent's income. If this method creates undue hardship for non-custodial parents with low incomes, the courts may consider deducting the amount of an existing child support order from the parent's income before applying the child support formula for the current children.

Custody of Other Children

Where a non-custodial parent has custody of a child from a previous relationship and applying the formula creates undue hardship for the non-custodial parent's household, the courts could depart from the formula. The courts may choose to deduct from that parent's income, an amount up to the amount that the formula produces for that child and determine the award on the remaining income.

High Debt Load

Where debts are said to create undue hardship, the courts should consider that average Canadian families have debts but are expected to cover the needs of their children. However, where debts were reasonably incurred for the benefit of the family or to earn income, the courts could find undue hardship and modify the level of the child support.

But the courts should also set a time-limit for the non-custodial parent to repay the debts and start to pay the award determined by the formula.

Access Costs

Where the costs of exercising access are so great that the child would be deprived of access, the court may find undue hardship for the non-custodial parent and adjust the support award so that the child is not substantially deprived of access.

Health costs

In Canada, most health and medical expenses are covered through provincial and territorial insurance plans. Nevertheless, parents may also incur medical and health-related expenses for their children that are not covered by these plans but represent significant amounts of money. These expenses may include special medication, orthodontic and dental costs, and costs associated with emotional and psychological counselling or specialized child care. This category of expenses is not meant to include everyday medication for children such as over-the-counter medication and occasional prescriptions. It is appropriate to make a special provision for these expenses, so that children are not deprived of special care when it is needed. These costs can be treated apart from the formula, with the specific amount determined and divided between the parents according to their income. In these cases, the custodial parent should also have to provide a complete statement of income to determine his or her share of these costs.

Second families

It is not uncommon for the non-custodial parent to remarry and have children in this second family to support. Before the courts depart from the proposed award, they should apply a test to compare the overall standards of living of the two households. If the first family is living at a lower standard of living than the family of the non-custodial parent, it would be inappropriate to reduce the child support award. However, if the custodial parent's household is better off than the household of the non-custodial parent, the courts should be able to vary the award if not doing so would create undue hardship for the second family.

Custody Arrangements

A non-custodial parent, who has regular access to his or her children, might have the children 20 to 30 percent of the time. No adjustment in the formula amount is recommended for these cases. But where the non-custodial parent spends a significant amount of time with the children, at least 40 percent or more of total time in a year, the court should be able to depart from the Child Support Formula.

It is generally recognized that in these situations the costs of children increase. In many American states, the costs are deemed to increase by 50 percent in shared-custody

arrangements. Even in cases where both parents share equal time with the children, however, there is usually one parent who takes on the primary responsibility for purchasing clothing and school supplies, for example.

To determine an award in shared-custody or extended-access arrangements, the courts should take into consideration the standards of living of both households, as well as the award determined by applying the formula. The award should help to minimize any discrepancy between the standards of living of the two households between which the child will be moving regularly.

Child support orders in shared-custody or extended-access arrangements could indicate an alternative amount of child support that would apply if, over time, the arrangement changes to one resembling sole custody (for example the formula amount). If the alternative amount is not being voluntarily paid, the custodial parent would have to go back to court and obtain a variation of the order. In such circumstances, the parent who has failed to comply to the alternative amount, could be held responsible for the other parent's legal costs.

In a split-custody arrangement, each parent has custody of one or more of the children. The courts have determined that, in these cases, each parent is entitled to receive child support from the other. If the Child Support Formula were applied, it would be appropriate to make a determination for the parent and children in each household. The parent responsible for the higher child support award would then pay the other parent the difference between the two awards.

Changes in Income and Standard of Living

Under the current system, an original child support award may remain unchanged for years even though the circumstances of the parties change. If support orders have no indexation clauses, they soon become outdated by the simple passage of time. As well, not varying child support orders when the income of the non-custodial parent changes may create a disadvantage for the children or the parents. Legal proceedings to vary support awards are costly in financial and emotional terms, so few custodial parents try to have their orders increased; similarly, many non-custodial parents whose incomes have dropped do not try to have the award changed, and instead default on their payments.

To avoid the expense of continuing to ask the courts to set and vary child support awards, governments may wish to establish administrative offices to set the initial awards and to reassess the award levels regularly. It could be expensive for governments to set up administrative offices, however, so their cost implications should be explored further, as should questions relating to jurisdictional responsibilities and possible constitutional impediments.

If child support were re-determined every year or second year, the Family Law Committee favours re-application of the formula rather than a cost of living clause. Re-application is

more consistent with one of the underlying assumptions of the child support project - that levels of child support should reflect parental means. It also has the advantage of being able to respond to decreases in a non-custodial parent's income.

Should the Child Support Formula Apply to Existing Awards?

If a child support formula is introduced, a significant number of parents, subject to existing orders, may apply to receive or pay an award that reflects the value determined by the formula. The Family Law Committee considers that, where existing awards are higher than the formula amount, they should not be reduced unless the circumstances have changed significantly. This decision was a difficult policy choice and the Committee wishes to review the matter one year after the implementation of a formula. Where existing awards are lower than the formula amount, parents should be allowed to apply to change them if the resulting change would represent more than ten percent of the value of the current award.

In this way, all children of separated and divorced parents have the potential to benefit from a child support formula. However, having a threshold of 10 percent will save parents and governments spending significant amounts of money for minor increases in awards and in effect, lessens the potential for frivolous variation applications.

Other Issues

The Family Law Committee considered many other issues related to child support, including legal costs, mediation, and the impact of remarriage on child support awards. The most important and widely applicable concerns are summarized here.

Income Tax Considerations

In June 1994, following the Federal Court of Appeal Decision of Thibaudeau v. Her Majesty the Queen, the Family Law Committee prepared a detailed analysis of the deduction/inclusion tax treatment of child support. Under the current tax treatment of separated and divorced families (where the recipient pays the tax on the awards and the payor deducts the award from income) the parties can pay less total tax than they would if the deduction for child support were not available. By increasing the capacity of the payer to pay child support, this tax treatment may make more funds available for the support of children. In effect, some of the costs of child support are being borne by governments and therefore by all Canadians who pay income tax. The annual cost of this subsidy is estimated to be about \$300 million.

However, the benefit of income splitting is lost when both parents have similar earnings or where the custodial parent earns more than the non-custodial parent. In these situations higher overall taxes are paid by the custodial parent than if there were a no deduction/no inclusion system. Also, it is often very unclear which portion of the award is for taxes and which portion is for the child. Where child support is determined by agreement between parties, it is even unclear whether tax implications have been accounted for at all.

There are other reasons why many persons view the present tax treatment of child support as discriminatory against the custodial parent. If tax consequences are properly taken into account and a proper gross-up is calculated, the amount of taxes can be as high as the amount for the child's needs. This combination of high taxes and high amounts required to cover children's needs can result in what is referred to as the "glass ceiling problem", which may result in a lower child support award. The concern is that when considering ability to pay, the courts may develop a ceiling on the combined amount of the award and taxes beyond which they will not go.

The Family Law Committee considered four general approaches for reforming the tax treatment of child support awards and recommends that two options be examined further:

- 1) Improvements to the existing deduction/inclusion system and the introduction of a Child Support Formula: The responsibility for paying tax on the support payment could be shifted to the payer, but the tax rate applied should be that of the lower income parent.

- 2) Changing the system to a no deduction/no inclusion system: If this is done, the federal government should preserve the value of the \$300 million subsidy and target it to children in low-income families or single-parent families.

Jurisdictional Differences

Provincial and territorial governments and the federal government share responsibility for the area of child support. The federal government deals with child support only when it is sought as a result of a divorce. In all other situations, such as the separation of a family where the parents are married or in a common-law relationship, the laws of the provinces and territories apply. The Family Law Committee considered the possible situation where a province or territory would introduce a formula that generates a different level of awards than would the application of the proposed formula in the federal *Divorce Act*.

The major problem of having two different formulas apply in one province or territory is that parties may do some "legislation shopping" and opt for a divorce or separation because of the child support award generated by the particular legislation, even if that course of action would not have been their original choice. Having two levels of child support available in the same province or territory could also suggest different values of children, depending on whether their parents were divorced or separated. The best interests of children may be served by allowing them to benefit from the formula that generates the higher award. Instead of recommending an approach to the jurisdictional question, the Family Law Committee developed a range of options for governments to consider. These options are contained in section 2.2 of the recommendations section.

Enforcement

High rates of default on support orders have always existed. As the divorce rate increased dramatically, so also did the impact of unpaid orders. More custodial parents and children were forced into poverty and turned to governments for social assistance.

Since the early 1980s, federal, provincial and territorial governments have worked together to improve the enforcement rates of support orders. All provinces and territories now have an automated government-run enforcement program. The federal government complements these programs by garnishing federal funds such as income tax returns and unemployment insurance and providing tracing information from federal data banks. It has also provided money for improvements to the provincial/territorial systems.

Although major improvements in this area have been made in the past ten years, there continue to be significant problems, especially with regard to non-custodial parents who are self-employed. There are also problems in obtaining accurate and current data to trace parents in default on support payments. To address these concerns, the Family Law Committee has developed a document, entitled "Future Directions for Development of a National Enforcement Strategy" which is found in Appendix D of the main report. This

document is intended to establish a framework of principles for improving support enforcement in Canada. The Family Law Committee will be refining this document in the course of the next year. Ideally, each jurisdiction would develop its own implementation plan for the strategy, according to its own specific needs.

General Reserve from the Province of Quebec Regarding the Report

The Quebec Department of Justice has expressed a general reservation about the Committee's report. It believes that provinces should be free to choose the child support model that suits them and also to choose the mode of enforcing these rules so that their policies in the area of social security, family policy and family fiscal policy are respected. Moreover, the decision to introduce such rules should take into account impact studies, especially at the administrative and financial levels.

Objectives and Principles

At the outset of the Child Support Project, Family Law Committee members formulated a number of objectives and principles regarding child support to use in considering various options. These objectives and principles were developed with respect to the current state of the law and in the context of possible future amendments to child support legislation. They are as follows:

1.1 Objectives

1. Yield adequate and equitable levels of child support.
2. Produce amounts which are objectively determinable, consistent and predictable.
3. Ensure flexibility to account for a variety of circumstances.
4. Be understandable and inexpensive to administer.

1.2 Principles

1. Parents have legal responsibility for the financial support of their children.
2. Child support legislation should not distinguish between the parents or children on the basis of sex.
3. The determination of child support should be made without regard to the marital status of the parents.
4. Responsibility for the financial support of children should be in proportion to the means of each parent.
5. In determining the means of each parent, his or her minimum needs should be taken into consideration.
6. Levels of child support should be established in relation to parental means.
7. While each child of a parent has an equal right to support, in multiple family situations the interests of all children should be considered.
8. The development of any new approach to the determination of child support should minimize collateral effects (e.g. disincentive to remarriage, joint or extended custody arrangements and voluntary unemployment or underemployment) to the extent compatible with the obligation to pay child support.

Recommendations

Objectives and Principles	1.1	The federal/provincial/territorial Family Law Committee recommends that the principles and objectives as drafted in the Family Law Committee's <i>Child Support: Public Discussion Paper</i> be used as a guide in determining the approach to child support.
Formula	2.1	The Family Law Committee believes that a formula is the best method for determining child support.
Jurisdictional Differences in Formula	2.2	The Family Law Committee recommends that governments examine the following three options for introducing a child support formula:
	2.2.1	All child support orders made in the context of a divorce would be decided pursuant to a formula contained in the <i>Divorce Act</i> , which formula may or may not be adopted within provincial and territorial legislation.
	2.2.2	The <i>Divorce Act</i> would provide for a formula but would indicate that where a province has adopted a different formula, the provincial one would apply even in cases decided pursuant to the <i>Divorce Act</i> .
	2.2.3	In cases of divorce, where child support awards, if made under provincial or territorial legislation would result in higher awards than would the application of the federal child support formula, the provincial or territorial amount should be applied by the courts.
Description of Formula	2.3	<p>The Family Law Committee recommends that jurisdictions consider implementing the Revised Fixed-Percentage formula with the low income adjustment developed by the Family Law Committee and which is described in this report and in the Department of Justice's Overview of the Research Program.</p> <p>The Family Law Committee recommends that in the event of a change to the tax system to a no deduction/no inclusion, the Revised Fixed-Percentage — low-income-adjusted formula be considered as an option (subject to the results of the current research comparing the results of other formulas in a no-deduction/no-inclusion/no-credit tax system).</p>

Right to Support 3.1 The Family Law Committee recommends that payment of child support should be a **primary obligation of a parent**.

Extent of Right to Support 3.2 The Family Law Committee recommends that a child support formula be applicable in all cases where a parent has a legal obligation to support a child, including upon breakdown of a **married or common-law relationship** or where the child is born outside of such a union.

Adequacy of Age 16 in Divorce Act 3.3 The Family Law Committee recommends that parents have an obligation to support their children until the **age of majority**, and beyond the age of majority if there are reasonable circumstances justifying the dependency (such as educational or health needs).

Where the child is a minor, the formula should apply. An order for support made in accordance with the formula, while a child was a minor, should remain in effect after the child attains the age of majority until or unless varied by a court order or agreement.

Where the child is over the age of majority at the time of the initial application or a variation application, the amount of support should be determined by the court having regard to the needs of the child and the means of the parent. The formula can be used to assist the court in making this determination if appropriate.

Parental Means 4.1.1 The Family Law Committee suggests that a full and accurate **assessment of parental income** is essential for the proper application of a child support formula.

4.1.2 The Family Law Committee recommends that in **determining income**, all sources, or potential sources, of gross income should be considered by the courts. These might include, but not be limited to the following: earned income, wages, commissions, employment or ownership benefits, income-producing assets, interest on capital, and payments in lieu of income such as unemployment insurance, social assistance, disability payments, and previous spousal support payments.

4.1.3 The Family Law Committee recommends that in determining the income of a parent, the courts should not consider child support payments received by that parent for a child other than the one who is the subject of the current support determination.

- Disclosure and Assessment of Income** **4.2** The Family Law Committee recommends that, for child support applications, where appropriate legislative provisions are not in place, jurisdictions will ensure that there are rules for **enforcement** of appropriate measures, to ensure that the relevant parent produces detailed financial information concerning his or her present financial situation and that of the last three years.
- Attribution of Income** **4.3** The Family Law Committee recommends that the Courts continue to **attribute income** in appropriate circumstances. Such circumstances should include, but not be limited to the following: where there is underemployment or unemployment not required by a child's needs or by a parent's reasonable educational or health needs; where it appears that income has been diverted to affect the level of child support; where assets are under-productive; where there are "in kind" benefits such as housing.
- Application of Formula** **5.1** The Family Law Committee recommends that the Child Support Formula be incorporated in legislation and applied by the courts as a **rebuttable presumption**.
- Departure From the Formula** **5.2** The Family Law Committee recommends that the courts apply the formula as a rebuttable presumption and depart from the suggested amount in the circumstances presented below.
- 5.2.1** The Family Law Committee recommends that, wherever appropriate, the courts could order a child support award in situations where the non-custodial parents' **income is below the lowest income level** provided for in the formula.
- As well, the courts could grant an order for support greater than the maximum provided for in the formula when the income of the non-custodial parent is higher than the maximum income to which the formula applies.
- 5.2.2** The Family Law Committee recommends that the courts have the authority to order an amount other than the formula amount, if a party would suffer **undue hardship**.
- The Family Law Committee recommends that non-custodial parents not be allowed to claim undue hardship if, following the application of the formula, the non-custodial parent would be living at an equal or higher standard of living than the custodial parent and children.

The income of a new spouse of the custodial parent or non-custodial parent, as well as any child and spousal support awards received or being paid, should be considered for the purposes of comparing the standards of living of the two households, but should not be included in the income of the parent when applying the formula (See Recommendation 10.1). In this exercise, the courts should consider attributing income to a dependent spouse of a non-custodial parent when the dependency is the result of a voluntary decision.

5.2.3 The Family Law Committee recommends that in determining undue hardship, the Courts may have regard to:

(a) where there are **debts**, the extent to which they were reasonably incurred:

- (i) prior to separation for the benefit of the family;
- (ii) for the purposes of earning income.

Where the court decides to depart from the formula because of debts, it should consider establishing a reasonable time limit for their repayment after which the formula amount would apply.

(Departure from the formula based upon debts should be effected with caution. The formula takes into account normal levels of household debts in the determination of the amount payable).

(b) the need to allow for **extraordinary costs of exercising access** where failure to do so would result in the child being substantially deprived of access;

(c) existing orders to pay **support for a child** who is not the subject of the current application;

(d) the necessity to provide support for a child in the custody of the party;

In regard to subparagraphs c) and d) above, the Family Law Committee recommends that all children of the same parent be treated equally whenever possible. In this context, where one or both parents have previous child support obligations, the formula should be applied to the non-custodial parent's total gross income, notwithstanding payment of another child support award or custody of a dependent child.

In these cases, if application of the formula to the total income of the non-custodial parent creates undue hardship, the courts may, before applying the formula, deduct from the non-custodial parent's income an amount up to the amount of the previous child support award, or if the paying parent has the child in his or her custody, an amount up to the amount that the formula would provide, as if the child were not in the payer's custody.

5.2.4 The Family Law Committee recommends that where the child has **special needs** (e.g. extraordinary health care costs) that justify a higher award, the custodial parent would not have to establish undue hardship. In these cases, the actual costs associated with the special need should be divided between the parents in proportion to their incomes, and the share of the non-custodial parent should be added to the formula amount.

**Use of a
Child Support
Formula**

5.3 The Family Law Committee recommends that parties remain **free to negotiate** the amount of child support between themselves with the assistance of the child support formula. The final agreement should, however, be reviewable by the courts, to ensure that reasonable arrangements have been made to provide for the children's needs, in accordance with Section 11(1)(b) of the *Divorce Act*.

**Transition
Issues**

6.1 If the federal government opted to allow application of a **provincial formula** to orders made under the *Divorce Act*, it would be preferable for the federal formula to come into effect at the same time or after the provincial formula.

**Application
To Existing
Awards**

6.2.1 The Family Law Committee recommends that an application to **vary an existing award** may be made by a parent, where application of the formula would indicate that the current award could be varied by 10 percent. (see 8.2 below)

6.2.2 The Family Law Committee recommends that where an existing award is higher than what the formula would produce, no reduction of the award should be granted, based upon the formula alone, unless a significant change in circumstances has also been established.

6.2.3 The Family Law Committee recommends that where a custodial parent received a higher property settlement or other benefits from a settlement, in exchange for a lower child support award, such exchanges should be considered by the courts in applications to vary existing child support awards in accordance with the formula.

Assessment of Child Support Formula	6.3.1	The Family Law Committee recommends that jurisdictions cooperate in the evaluation of the impact of a child support formula, once implemented.
	6.3.2	The Family Law Committee recommends that the child support formula be evaluated within four years and that it be reviewed after this time.
Split-Custody Arrangements	7.1	The Family Law Committee recommends that in split-custody situations (where each parent has the custody of one child or more), the formula should be applied separately to each non-custodial parent, to determine the two appropriate child support orders. The net difference between the two orders should be paid accordingly.
Shared Physical Custody and Extended Visitation	7.2	<p>The Family Law Committee recommends that where custody arrangements provide that each parent has physical custody of or access to the child for at least 40 percent of the time, the court should have the discretion to depart from the formula amount while considering the increased costs of such arrangements and the actual distribution of expenses between the parents.</p> <p>The Family Law Committee recommends that the courts, in making support determinations in these cases, consider the amount determined by the formula as well as the standards of living of both households where the child will be coming and going, with a view to limiting significant discrepancies between the two.</p>
Variation of Awards	8.1	The Family Law Committee recommends that, for the best interest of all family members, but most particularly for the best interest of children, provincial and federal governments should consider implementing measures for ensuring that child support awards continue to reflect changes in the parents' means .
Variation Process	8.2	The Family Law Committee recommends that an application to vary an award may be made by a parent where application of the formula would indicate that the existing award could be varied by 10 percent .
Income Information	8.3	The Family Law Committee recommends that in the interest of limiting prohibitive legal costs in the variation process, custodial parents, guardians of children who are not a parent and the Crown where subrogated to the custodial parent's rights, be authorized to request, on a yearly basis, financial information on the paying parent without commencing a variation application.

In situations where the custodial parent's income is necessary to determine the appropriate award, they should also be required to provide this information if requested by the non-custodial parent.

8.4 The Family Law Committee recommends that in order to limit costs and accelerate the process for determining child support awards, provincial and federal governments examine various measures for facilitating income disclosure and **administrative determination** and variation of child support awards.

Legal Costs **9.1** Since the child support award is a legal right of the child which custodial parents have an obligation to exercise on the child's behalf, the Family Law Committee recommends that the **legal costs** of the custodial parent incurred to obtain a child support award, be compensated in part by non-custodial parents.

The method of attributing these costs should be left to the discretion of the courts who should consider the financial situation of the parties and the willingness of the parents to cooperate in reaching a reasonable agreement.

Costs of Exercising Access **9.2** The Family Law Committee recommends that where the formula amount was adjusted in the original determination of support to take into account **extraordinary costs of exercising access**, and there has been wilful failure to comply with the custody or access arrangements, the formula amount should be awarded and the legal costs of applying to vary the support award should be paid by the non-compliant party.

Other Related Issues **10.1** The Family Law Committee recommends that, in general, a new **spouse's income** should not be considered in the determination of child support. However, in determining whether there is undue hardship, it should be considered when comparing the standards of living.

Custody and Access Issues **10.2** The Family Law Committee recommends that **custody and access issues** raised in the consultation be addressed by the Custody and Access Project.

Spousal Support **10.3.1** The Family Law Committee recommends that in cases where it is difficult to pay both child and **spousal support**, priority should be given to child support. Further, the courts should consider alternative methods of awarding spousal support such as lump sums and postponing commencement of the spousal support award.

10.3.2 The Family Law Committee recommends that the **non-financial contribution** of custodial parents toward their children not be compensated within the child support formula at this point in time.

**Support
Enforcement**

10.4 The Family Law Committee recommends that governments give priority to this issue by approving the further development of the attached draft **Future Directions for Development of a National Support Enforcement Strategy**. The Family Law Committee should report to Deputy Ministers within a year with specific recommendations to further improve this area.

