

## **An Overview of the Child Support Regime in Ontario, Canada**

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### **Introduction**

In Canada, child support is considered the right of the child. This is the starting point in any determination of the appropriate amount of child support.

Calculating child support is a statute driven, gender neutral, and income-based exercise. The *Federal Child Support Guidelines*, (“*Guidelines*”)<sup>1</sup> provide a legislative framework for child support in Canada and set out Tables for each province that detail the amount of monthly child support payable. The *Guidelines* govern the calculation of child support based on the payor’s income and the number of children who are entitled to support. The amount of support payable is different depending on whether the child lives primarily with one parent or in a shared residential arrangement with both parents.

Each province has its own Tables setting out the amount of child support payable. The amounts vary because of differences in provincial income tax rates. The Table child support amounts are based on economic studies of average spending on children in families at different income levels in Canada and are calculated on the basis that child support payments are not taxable in the hands of the receiving parent and not tax deductible by the paying parent. The support amount payable is set to reflect average spending on children by a parent with a particular number of children and level of income.<sup>2</sup>

The stated objectives of the *Guidelines* are as follows:

1. To establish a fair standard of support for children that ensures that they continue to benefit from the financial means of both parents after separation;
2. To reduce conflict and tension between spouses by making the calculation of child support orders more objective;

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<sup>1</sup> *Federal Child Support Guidelines*, SOR/97-115 (“*Guidelines*”).

<sup>2</sup> *Guidelines*, Schedule 1, s.2(1).

3. To improve the efficiency of the legal process by giving courts and parents guidance in setting the levels of child support orders and encouraging settlement; and
4. To ensure consistent treatment of parents and children who are in similar circumstances.<sup>3</sup>

Parents cannot contract out of their obligation to pay child support. If they do, they risk their agreements being set aside by the court. Parents can negotiate, based on the Table child support amount payable, a different amount of support by considering other special contributions to child related expenses.

With these considerations in mind, this paper provides a general overview of child support in Ontario, Canada.

### **Who is obligated to pay?**

Parents are obligated to support their children.

A parent does not necessarily mean a biological parent. The *Guidelines* apply to anyone acting as a parent to a child. A non-biological parent can be compelled to pay child support if they acted “*in loco parentis*” i.e., in the place of a parent.

If a spouse “stands in place of a parent for a child” he or she may be ordered to pay child support for that child. The amount of support is what the court considers appropriate, having regard to the *Guidelines*, as well as any other parent’s legal duty to support the child.<sup>4</sup>

On January 1, 2017, the *All Families Are Equal Act*<sup>5</sup> came into force in the province of Ontario to change sections of the *Children’s Law Reform Act* defining who is considered a parent.<sup>6</sup> A parent includes intended parents, biological parents and their spouses, or a person declared to be a parent by the court.

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<sup>3</sup> *Guidelines*, s.1.

<sup>4</sup> *Guidelines*, s.3.

<sup>5</sup> *All Families Are Equal Act (Parentage and Related Registrations Statute Law Amendment)*, 2016, 2<sup>nd</sup> Sess, 41<sup>st</sup> Leg, Ontario 2016.

<sup>6</sup> *Children’s Law Reform Act*, R.S.O. 1990 c C.12, ss. 6 -13.

## How is child support paid?

Child support can be paid in periodic payments, typically on a monthly basis. However, the payments can also be made in a lump sum or in a lump sum and periodically.<sup>7</sup> Typically, to secure one's child support obligation under an agreement or a court order, a payor will set up a life insurance policy naming the other parent as the beneficiary.<sup>8</sup>

## How is income calculated?

In most cases where a payor earns employment income, a court starts with the payor's income tax return to see what the payor reports as their gross income.

If, after examining that person's annual income as reported on their tax return, the court determines the income is not a fair representation of that person's total income, then the legislation permits the court to look at the payor's income over the previous three years and determine an amount that is fair and reasonable based on the pattern of income, income fluctuation and any non-recurring amounts received during the years in question.<sup>9</sup>

The courts can also consider non-recurring capital or business investment losses and adjust the amount of the loss, including related expenses, carrying charges and interest expenses to determine an appropriate income amount.<sup>10</sup>

If a payor is a shareholder, director or officer of a corporation, and is in a position to control his or her income, the court may consider all or part of the pre-tax income of the payor's corporation, or any related corporation for the most recent tax year, or an amount that is commensurate with the services that person provides to the corporation, as long as it does not exceed the corporations pre-tax income.<sup>11</sup>

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<sup>7</sup> *Guidelines*, s. 11.

<sup>8</sup> *Guidelines*, s. 12.

<sup>9</sup> *Guidelines*, s. 17(1).

<sup>10</sup> *Guidelines*, s. 17(2).

<sup>11</sup> *Guidelines*, s. 18(1).

### Adjustment to corporation's pre-tax income

18(2) In determining the pre-tax income of a corporation for the purposes of subsection (1), all amounts paid by the corporation as salaries, wages or management fees, or other payments or benefits, to or on behalf of persons with whom the corporation does not deal at arm's length must be added to the pre-tax income, unless the spouse establishes that the payments were reasonable in the circumstances.

In cases that involve self-employed individuals or individuals with more complex income scenarios, accounting professionals will be retained to provide expert evidence about a payor's income for support purposes. Expert reports are used not only in litigation but also to assist the parties to negotiate out of court to reach an agreement.

If a payor's income is considered to be below what he or she is capable of earning and that person is considered to be intentionally underemployed or unemployed,<sup>12</sup> then a court can impute income to that parent that the court determines to be appropriate in the circumstances. The court can impute income based on a person's earning potential upon receipt of evidence such as past education, skill level, and employment history. The Court may also impute income for a variety of other reasons, as provided for in the legislation, such as diverting income, failing to disclose income information, or because a payor unreasonably deducted expenses from his or her income.<sup>13</sup>

The *Guidelines* also impose income disclosure obligations such that parents are required to exchange income information, including their tax documents.<sup>14</sup> The disclosure obligation is

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<sup>12</sup> *Guidelines*, s. 19. This applies in circumstances other than where the parent is under-employment or unemployed because he or she is required to do so to meet the needs of a child of the marriage or any child under the age of majority or by that parent's reasonable educational or health needs.

<sup>13</sup> *Guidelines*, 19 (1). The other reasons include:

- The spouse is exempt from paying federal or provincial income tax;
- The spouse lives in a country that has effective rates of income tax that are significantly lower than those in Canada;
- It appears that income has been diverted which would affect the level of child support to be determined under these Guidelines;
- The spouse's property is not reasonably utilized to generate income;
- The spouse has failed to provide income information when under a legal obligation to do so;
- The spouse unreasonably deducts expenses from income;
- The spouse derives a significant portion of income from dividends, capital gains or other sources that are taxed at a lower rate than employment or business income or that are exempt from tax; and
- The spouse is a beneficiary under a trust and is or will be in receipt of income or other benefits from the trust.

<sup>14</sup> *Guidelines*, s. 21.

Obligation of applicant

21 (1) A spouse who is applying for a child support order and whose income information is necessary to determine the amount of the order must include the following with the application:

- (a) a copy of every personal income tax return filed by the spouse for each of the three most recent taxation years;
- (b) a copy of every notice of assessment and reassessment issued to the spouse for each of the three most recent taxation years;
- (c) where the spouse is an employee, the most recent statement of earnings indicating the total earnings paid in the year to date, including overtime or, where such a statement is not provided by the employer, a letter from the spouse's employer setting out that information including the spouse's rate of annual salary or remuneration;
- (d) where the spouse is self-employed, for the three most recent taxation years
  - (i) the financial statements of the spouse's business or professional practice, other than a partnership, and

ongoing and upon a written request of the other parent, financial disclosure should be exchanged on an annual basis, for the duration of the time that a child remains a child under the *Guidelines*, to determine if any recalculation of the support payable is necessary.

### **What are the exceptions to the *Guidelines*?**

The table amounts of support under the *Guidelines* mandate the amount of child support payable based on the payor's income and the number of children entitled to support. The minimum threshold level of income for support to be payable is \$12,000 a year. The *Guidelines* set out specific amounts of support payable for incomes over \$150,000.

In the case of high income earners, with incomes over \$150,000, the Court can either order the applicable Table amount or, if the court considers this amount inappropriate, then it can order the Table amount for the first \$150,000 of income, and, for the amount income over \$150,000, the court can exercise its discretion to order an amount it considers appropriate, having regard to the condition, means, needs and other circumstances of the child who is entitled to support. The court can also take into account the financial ability of each parent to contribute to the support of the children as well as the amount payable for special and extraordinary expenses.<sup>15</sup>

For example, in the 2018 case of *Plese v. Herjavec*,<sup>16</sup> the high-income earner payor in question was Mr. Herjavec, an entrepreneur and investor famous for being on the reality television shows "Dragon's Den" and "Shark Tank". The Court reviewed the expert evidence, took a three-year average income of \$5.9 million dollars and used this income for 2018 to determine the *Guideline*

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(ii) a statement showing a breakdown of all salaries, wages, management fees or other payments or benefits paid to, or on behalf of, persons or corporations with whom the spouse does not deal at arm's length;

(e) where the spouse is a partner in a partnership, confirmation of the spouse's income and draw from, and capital in, the partnership for its three most recent taxation years;

(f) where the spouse controls a corporation, for its three most recent taxation years

(i) the financial statements of the corporation and its subsidiaries, and

(ii) a statement showing a breakdown of all salaries, wages, management fees or other payments or benefits paid to, or on behalf of, persons or corporations with whom the corporation, and every related corporation, does not deal at arm's length;

(g) where the spouse is a beneficiary under a trust, a copy of the trust settlement agreement and copies of the trust's three most recent financial statements; and

(h) in addition to any income information that must be included under paragraphs (c) to (g), where the spouse receives income from employment insurance, social assistance, a pension, workers compensation, disability payments or any other source, the most recent statement of income indicating the total amount of income from the applicable source during the current year, or if such a statement is not provided, a letter from the appropriate authority stating the required information.

<sup>15</sup> *Guidelines*, s.4.

<sup>16</sup> *Plese v. Herjavec*, 2018 ONSC 7749, 2018 CarswellOnt 21811.

amount owing on account of child support for Mr. Herjavec's youngest daughter, who was residing with the mother in the summer months while attending university.<sup>17</sup> The court did not exercise its discretion to deviate from the table amount of support under the *Guidelines* despite Mr. Herjavec's income greatly exceeding \$150,000.

The *Guidelines* also provide for an exception to the strict application of the *Guidelines* if there is a claim of "undue hardship" to the payor or the child to whom support is owed, which is demonstrated when the parent has usually high levels of debts, usually high expenses in order to exercise access to the child (for instance travel expenses), a legal obligation to support another child under the age of majority (who is not a child of the marriage), or another child over the age of majority or any person who is unable to obtain the necessities of life due to an illness or disability, or in the case of the child, other cause.<sup>18</sup> If the courts are of the opinion that the standard of living of the payor would be higher than that of the other spouse, then the undue hardship claim would be denied.<sup>19</sup>

If the court finds there is undue hardship to the payor to strictly apply the *Guidelines* and orders a different amount of child support, the court must provide the reasons for doing so and specify a reasonable time for the payor to satisfy the obligation arising from the circumstances that form the basis for the undue hardship claim and the amount payable at the end of that time.<sup>20</sup>

### **How does a child's residential schedule impact child support (shared custody, split custody or primary residence)?**

The residential schedule of the children also impacts the amount of child support. If one parent is the primary residential parent, then the strict child support formula under the *Guidelines* applies, subject only to the exceptions outlined above.

Shared parenting arrangements lead to a different calculation. If the residential schedule is such that the child resides with each parent, then the amount of child support is subject to some set off.<sup>21</sup> A shared parenting arrangement occurs when one parent exercises a right of access or has physical custody of a child for more than 40% of the time over the span of a year. The amount calculated in child support to be payable considers the following factors:

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<sup>17</sup> *Plese v. Herjavec*, paras 277-296, 352-357.

<sup>18</sup> *Guidelines*, s. 10(1) and 10(2).

<sup>19</sup> *Guidelines*, s.10(3) and 10(4).

<sup>20</sup> *Guidelines*, 10(6).

<sup>21</sup> *Contino v. Leonelli-Contino*, [2005] 3 S.C.R. 217, 19 R.F.L. (6th) 27 (SCC). There is no presumption in favour of the full table amount for the payor, nor is there any presumption in favour of the straight set-off, under section 9 of the *Guidelines*.

the Table amount payable by each parent to the other, the increased costs of the shared custody arrangement and the conditions, means, needs and other circumstances of each spouse and of any child for whom support is sought.<sup>22</sup>

In the case of split custody, where each parent has one or more of the children living with them, the amount of child support is calculated as the difference between the amount that each parent would otherwise pay to the other if the child lived primarily with the other parent.<sup>23</sup>

For older children who are in a full-time post-secondary program, a “summer only” formula may be used to calculate the time they are living with a parent in the summer, if they otherwise live on their own during the academic year.

## **What are Special and Extraordinary Expenses?**

Both parents have an obligation over and above any child support payments to contribute to their child’s special and extraordinary expenses. Special and extraordinary expenses, also called “s.7 expenses”, include the following:

1. Child care (incurred due to the custodial parent’s employment, illness, disability or education or training for employment).
2. Medical/dental insurance premiums (the portion attributable to the child).
3. Health-related expenses that exceed insurance reimbursement by at least \$100 annually, including orthodontic treatment, professional counselling provided by a psychologist, social worker, psychiatrist or any other person, physiotherapy, occupational therapy, speech therapy and prescription drugs, hearing aids, glasses and contact lenses.
4. Extraordinary expense, such as tuition, textbooks, residence, for primary or secondary school education or for any other educational programs that meet the child’s particular needs.<sup>24</sup>

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<sup>22</sup> *Guidelines*, s.9.

<sup>23</sup> *Guidelines*, s. 8.

<sup>24</sup> *Guidelines*, s.7 (1.1). The term *extraordinary expenses* means:

(a) expenses that exceed those that the spouse requesting an amount for the extraordinary expenses can reasonably cover, taking into account that spouse’s income and the amount that the spouse would receive under the applicable table or, where the court has determined that the table amount is inappropriate, the amount that the court has otherwise determined is appropriate; or

(b) where paragraph (a) is not applicable, expenses that the court considers are extraordinary taking into account

5. Post-secondary education expenses, such as tuition, textbooks, residence.
6. Extraordinary expenses for extracurricular activities<sup>25</sup>.

The *Guidelines* provide that parents share the cost the child's special/extraordinary expenses in proportion to the parties' respective incomes, unless agreed upon otherwise, after deducting from the expenses any contributions from the child.<sup>26</sup> Parents of similar means will often agree to share these expenses on a 50/50 basis, irrespective of their incomes, subject to agreeing to the expenses in advance. However, the courts may also order that one parent cover all the costs associated with the expenses.

In determining if an expense is a valid s.7 expense, the courts will consider the *necessity* of the expense, as it relates to a child's best interests, and the *reasonableness* of the expense in relation to the means of the parents and the child, as well as to the family's spending patterns before separation.

The courts can also require that a parent who has coverage for medical or dental insurance through his or her employer or can obtain it otherwise at a reasonable rate to acquire or continue that coverage for the child who is entitled to support.<sup>27</sup> Any subsidies, benefits, income tax deductions or credits relating to the expenses or eligibility to claim these would be factored into the calculation, except for any child care tax benefit provided by the government.<sup>28</sup>

### **When does child support end?**

The definition of child varies. The age of majority in Canada is 18 years old. Under the *Divorce Act*, a child is a child of the marriage who has not withdrawn from the charge of the two spouses or former spouses or over the age of majority and under the parents' charge but who is unable, by reason of illness, disability or other cause to withdraw from the parents' charge or obtain the necessities of life.<sup>29</sup> For a child under the age of majority, the presumptive rule applies that

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- (i) the amount of the expense in relation to the income of the spouse requesting the amount, including the amount that the spouse would receive under the applicable table or, where the court has determined that the table amount is inappropriate, the amount that the court has otherwise determined is appropriate,
  - (ii) the nature and number of the educational programs and extracurricular activities,
  - (iii) any special needs and talents of the child or children,
  - (iv) the overall cost of the programs and activities, and
  - (v) any other similar factor that the court considers relevant.

<sup>25</sup> *Guidelines*, s.7(1).

<sup>26</sup> *Guidelines*, s.7(2).

<sup>27</sup> *Guidelines*, s. 6.

<sup>28</sup> *Guidelines*, s.7(3),7(4).

<sup>29</sup> *Divorce Act*, R.S.C., 1985, c.3(2<sup>nd</sup> Supp), s. 2(1).



child support is payable as set out in the *Guidelines*. For children over the age of majority, if the amount in the *Guidelines* is considered inappropriate, then the court can order an amount it considers appropriate with regard to the condition, means, needs and other circumstances of the child and the financial ability of each parent to contribute to the support of the child.<sup>30</sup>

The Ontario *Family Law Act*, which governs unmarried parents, also provides that every parent has an obligation to provide support, to the extent the parent is capable of doing so, for his or her unmarried child who is either a minor, enrolled in a full-time program of education or is unable by reason of illness, disability or other cause to withdraw from the charge of his or her parents.<sup>31</sup> However, if a child is over 16 years old and has withdrawn from parental control, then that child is no longer entitled to child support.<sup>32</sup> Either the parent or the child him or herself can apply for an order for support.<sup>33</sup>

Parents may sometimes choose or reach an agreement to continue sharing s.7s including tuition for a child's second or even third post-secondary degree.

### **How does spousal support impact child support?**

If a payor's spouse is entitled to spousal support, then the *Spousal Support Advisory Guidelines*<sup>34</sup> drive the support analysis by providing ranges of support based on income and the amount of child support, as well as a range of apportioning the net disposable income of the spouses. Child support maintains priority over spousal support and can affect the range of spousal support ordered, including both amount and duration, as this affects their respective net disposal income. While not the focus of this paper, there are various formulas applied based on the family's circumstances that impact the outcome. In short, the higher the amount of child support, the lower the amount of spousal support.

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<sup>30</sup> *Guidelines*, s. 3.

<sup>31</sup> *Family Law Act*, RSO 1990, C. F.3, s. 31(1).

<sup>32</sup> *Family Law Act*, s. 31(2).

<sup>33</sup> *Family Law Act*, s. 33(2).

<sup>34</sup> The *Spousal Support Advisory Guidelines* (SSAG) - The Revised User's Guide, prepared by Professors Carol Rogerson and Rollie Thompson, April 2016.