

# Alert

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## Challenge to Federal Child Support Guidelines Fails at Supreme Court of Canada

The Federal Child Support Guidelines, SOR/97 175 (the Guidelines), established by the Governor in Council (GIC) under the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), determine the amount of child support to be paid in case of divorce.<sup>1</sup>

In this 2024 case, the appellant challenged the vires (legal authority) of the Child Support Guidelines. This challenge required the Supreme Court to determine whether the GIC acted within the scope of its delegated authority in establishing the Guidelines.

At the Supreme Court, Mr. Auer argued that, in enacting the Guidelines, the GIC was limited by two constraints on their authority, including:

1. Per s. 26.1(2) of the Divorce Act, child related costs are to be shared according to the parents' relative abilities to contribute; and
2. Support amounts transferred from the payor parent to the recipient parent can only be in respect of "direct child costs," and cannot be used to more broadly redistribute income between parents (which is properly left to the law of spousal support).

In Mr. Auer's view, the Guidelines violate these two constraints by forcing the payor parent to bear more of their fair share of direct child-related costs, by:

1. failing to take into account the recipient parent's income;
2. incorrectly assuming that parents spend the same linear percentage of their respective incomes on their children, regardless of the parents' levels of income and the children's ages;
3. failing to take into account government child benefits paid to the recipient parent;
4. failing to take into account the payor parent's direct spending on the child, when that parent exercises less than 40% of annual parenting time; and
5. double counting the payor parent's obligations with respect to special or extraordinary expenses.

The Supreme Court unanimously rejected all of Mr. Auer's arguments. In doing so, the Court confirmed that, while s. 26.1(2) of the Divorce Act establishes that each parent has a "joint financial obligation" to the children of the marriage, this *shared* financial obligation to support their children does not necessarily mean that their respective financial contributions must be *equal* (para 79).

### The recipient payor's income

With this in mind, the Court rejected the argument that the Guidelines' failure to take into account the recipient payor's income was outside of the GIC's authority. The Court confirmed that the Guidelines were enacted in order to move away from a pure needs-based analysis of support, to a child-centered approach based on the payer parent's income in each case.

The Guidelines' formula for calculating the table amounts takes into account the ways in which the recipient parent contributes to the financial needs of the child by assuming that, because the child resides with the recipient parent, that parent will support the child in a manner that is proportionate



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to their income.

In this way, the recipient's income (and their "relative ability to contribute") is considered and incorporated: while some recipient parents may contribute a larger proportion of their income towards child related costs than others, the Court found that it was open to the GIC, in establishing a nationwide regime for child support, to assume that recipient parents contribute to child related costs in proportion to their income.

### **Linear percentage of income**

Mr. Auer further took issue with the Guidelines' assumption that parents spend the same linear percentage of income on their children regardless of the parents' income levels and the children's ages, resulting in payor parents paying a disproportionate share of child-related costs.

The Court rejected this argument, finding that the GIC's authority under s. 26.1(1) of the Divorce Act, which includes the authority to establish guidelines "respecting the way in which the amount of an order for child support is to be determined," can reasonably be interpreted as authorizing guidelines that do not take children's specific ages into account when calculating child support awards.

### **Government child benefits paid to the recipient parent**

Similarly, the Court rejected Mr. Auer's argument that the GIC was not authorized to not take into account government child benefits paid to the recipient parent in calculating income.

The Court once again confirmed that the Guidelines were intended as a departure from a needs-based approach to child support, and to maximize the amount available to be spent on children.

Per section 26.1.(1)(f) of the Divorce Act, the GIC is authorized to establish guidelines respecting the determination of income for support purposes: it was therefore open to the GIC to decline to include government benefits (deemed to be "government's contribution" to children) in the recipient payor's income.

### **Payor parent's direct spending when they exercise less than 40% of parenting time**

The Guidelines permit the court to consider payer parents' direct spending on their children only when they exercise 40% or more of annual parenting time. Mr. Auer argued that it is unreasonable for the Guidelines to assume that payor parents who exercise less than 40% of annual parenting time, which in turn violates the principle that parents have a joint financial obligation to the children.

Again, the Court disagreed, finding that the GIC is authorized under s. 26.1(1) of the Divorce Act to establish guidelines "respecting the way in which the amount of an order for child support is to be determined" and "respecting the circumstances in which discretion may be exercised in the making of an order for child support."

As mentioned above, the principle in s. 26.1(2) requires only *shared* contributions, and not *equal* contributions by parents. This principle is therefore not violated even if setting the threshold for considering payer parents' direct spending on their children at 40 percent of annual parenting time results in some payer parents paying more than half of the child related costs.

### **Special or extraordinary expenses**

Finally, Mr. Auer submitted that adding s. 7 expenses on top of monthly child support amounts results in "double counting" of child expenses for which the payor parent is responsible, on the basis that "all conceivable average costs are reflected in the monthly amount," and results in the payor parent overcontributing to child-related costs.

In rejecting this argument, the Court once again pointed out that Mr. Auer's submissions were premised on a needs-based analysis of support: an approach the Guidelines reject. The Guidelines begin with the payer parent's income, and determine the amount of support payable to ensure that the child continues to benefit from this income post-separation, and it is not outside of the GIC's broad authority to adopt guidelines that do not purely focus on the child's needs, and to permit

courts to include certain special or extraordinary expenses in a child support award. In the Court's view, it is not problematic if there is some overlap between the monthly support amounts and the special/extraordinary expenses.

## Conclusion

This decision makes it clear that the Guidelines are a child-focused regime, intended to provide the child with a standard of living as close to what they enjoyed prior to separation as possible, and they will be judicially interpreted and applied as such. There is no assumption that support must be equally paid by each parent, only shared: the assumption built into the Guidelines that recipient parents contribute to child related costs in proportion to their income stands.

In future, arguments by payor parents that are rooted in a needs-based approach, or that contain the assumption that each parent should equally contribute, are unlikely to be well received.

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<sup>1</sup> Except in the province of Quebec