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Volume 19
Number 4 *Symposium: Minority Rights*

Article 7

8-1-1997

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Recommended Citation

Lisa Anne Coe, *Changing Child Support Taxation in Canada: Great Step or Sidestep*, 19 Loy. L.A. Int'l & Comp. L. Rev. 969 (1997).

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COMMENTS

CHANGING CHILD SUPPORT TAXATION IN CANADA: GREAT STEP OR SIDESTEP?

I. INTRODUCTION

A. The Thibaudeau Decision—Changing Inequities

Susan Thibaudeau obtained custody of her two children following her divorce in 1990.¹ Pursuant to the divorce decree, she received child support payments from her ex-spouse, Jacques Chaine, for the exclusive benefit of their children.² When it came time for Thibaudeau to pay taxes at year end, Canada's current system of taxation required her, and thousands of similarly situated support recipients, to include the child support payments as part of her income.³ Conversely, these child support payments were deductible from Chaine's income, thereby lessening his tax burden.⁴

Seeking to avoid an increase in her taxes, Thibaudeau made a daring move. She first prepared her individual return, excluding mention of Chaine's child support.⁵ She then prepared and filed a return for each of the children, splitting the support received between them.⁶ The Minister of National Revenue, however, rejected Thibaudeau's method of shifting this income to her children and imposed additional tax liability by including the support payment in her income.⁷ In her relentless pursuit against the inclusion/deduction system, Thibaudeau began her legal battles in the

1. See *Thibaudeau v. Canada* [1995] 2 S.C.R. 627, 665.

2. See *id.* In Canada, support obligations to an ex-spouse, including both ex-spousal obligations and obligations to the children, are traditionally referred to as "maintenance," rather than the U.S. terms of "alimony" and "support." In this Comment, payments made for the support of children shall be referred to as "support" or "child support" and payments made for the support of an ex-spouse shall be referred to as "alimony."

3. See *Income Tax Act*, R.S.C., ch. 1, § 56(1)(b) (1985) (Can.).

4. See *id.* § 60(b).

5. See *Thibaudeau* [1995] 2 S.C.R. at 666.

6. See *id.*

7. See *id.*

Tax Court, proceeded to the Federal Court of Appeals, and ultimately obtained review by the Supreme Court of Canada.⁸

Although Canada's Supreme Court denied relief to Ms. Thibaudeau,⁹ and to the similarly situated custodial parents, the Canadian legislature did not turn a deaf ear. On March 6, 1996, Finance Minister Paul Martin announced a proposal to change in the fifty-year-old system.¹⁰ This proposal makes sweeping changes to Canadian tax law, which Thibaudeau was unable to accomplish via the courts.¹¹

For taxation purposes, the new rules exclude child support payments made to a custodial parent from the payee's income. It also eliminates the previously allowed deduction of these payments from the noncustodial parent's income.¹² This tax reform, however, does not help Thibaudeau as the proposed changes only affect custodial agreements made after May 1, 1997.¹³ Without retroactive application, this legislation requires thousands of women with existing custody arrangements who wish to take advantage of the tax change to launch potentially costly court actions to modify their custodial agreements.¹⁴ On the other side of the coin are the noncustodial parents, usually fathers, who insist that the changes are "nothing but a massive tax grab by Ottawa that will take money out of the hands of families."¹⁵ Indeed, one Ottawa-based family lawyer stated that "the changes could prompt even more men to default on their payments, while others may go back to court to seek reduced obligations."¹⁶

B. Focus Of Comment

This Comment addresses the changing Canadian tax law in the area of child support payments, its effects on the current support system, and the future of child support calculation in Canada.

8. *See id.* at 628.

9. *See id.*

10. *See* Russel Blinch, *Tax Break Cheers Canada Moms, Worries Divorced Dads*, Reuters World Serv. (Can.), Mar. 7, 1996, available in LEXIS, Canada Library, Cannws File.

11. *See id.*

12. *See id.*

13. *See* Brian Bergman, *Tipping the Balance*, MACLEAN'S (CAN.), Mar. 18, 1996, at 19.

14. *See id.*

15. *Id.*

16. *Id.*

Part II describes the inherent problems in complex support calculations and compares the current taxation systems in the United States and Canada. Part III provides background information on the development of the current tax treatment of support and alimony payments in both the United States and Canada. Part IV of this Comment describes how *Thibaudeau v. Canada* prompted the change in Canada's fifty-year-old system of support taxation. In addition, it discusses the reasoning behind *Thibaudeau*, and describes initial reactions to the decision. Part IV also presents motives for the change in tax law, including both governmental greed and humanitarian interests.

Part V demonstrates the inherent problems with a new system of taxation by comparing developments in the United States before and after *Commissioner v. Lester*¹⁷ with the concerns arising over the new Canadian method. Part V also discusses current problems faced by the Canadian judiciary including: calculating support payments under the new system, and modification of support orders in effect prior to the new system's implementation, which reveal great uncertainty about the future of Canadian support determinations. Part VI demonstrates various methods that may be employed to calculate support payments under the new Canadian tax law, focusing on fairness to all parties. Finally, in Part VII, this Comment concludes that if Canada enacts this new legislation, it may do more harm than good to children of divorced parents, as these proposals merely sidestep the task of providing a workable support calculation guideline.

II. CALCULATION OF SUPPORT PAYMENTS

A. California's Approach To Support Calculation

In the United States, the federal Family Support Act of 1988¹⁸ requires each state to establish one support guideline that will be applied uniformly throughout the state.¹⁹ States must apply these guidelines in "any judicial or administrative proceeding for the

17. 366 U.S. 299 (1961). The decision in *Lester* required parties to specify what amount of a payment made to an ex-spouse constituted child support in order to determine the taxable amount. For a more detailed discussion of *Lester* and its effects see *infra* Part IIIA.

18. Family Support Act of 1988, Pub. L. No. 100-485, 102 Stat. 2343, 42 U.S.C. § 667 (West 1994).

19. See *id.* § 667(a).

award of child support.”²⁰ California, for example, has adopted per se statewide guidelines for calculating support awards, to which “the court shall adhere.”²¹

Under the current California system, the judiciary no longer has the broad discretion it previously enjoyed in ordering child support.²² Today, any exercise of judicial discretion must be within the statutory parameters developed by the states and the algebraic formula-based approach to the child support calculation.²³ Commentators have widely criticized this system as being both too complex and costly, as well as overstepping the Congressional requirement that states adopt guidelines for calculation.²⁴ Indeed, any support amount calculated under the California equation is presumed correct²⁵ and may only be rebutted by evidence showing that application of the formula in the case would be unjust or inappropriate.²⁶

Policy directives behind the support calculation formula seek to put support calculation guidelines in focus as well as provide courts with general standards to apply and enforce the statute.²⁷ According to the directives, courts must adhere to the following policy principles: a parent's first obligation is the support of his or her minor children in accordance with the parent's circumstances;²⁸ both parents are mutually responsible for supporting their children;²⁹ the formula takes into account each parent's income and level of parental responsibility;³⁰ the parent's ability to pay determines his or her support obligation;³¹ a child's interests are the state's top priority;³² children should share in both parents' standard of living;³³ an award should reflect increased household costs where both parents have a high level of responsibility (i.e.,

20. *Id.* § 667(b)(2).

21. CAL. FAM. CODE § 4053 (West 1996).

22. *See In re Marriage of Carter*, 26 Cal. App. 4th 1024, 1028 (1994).

23. *See id.* at 1024.

24. *See In re Marriage of Fini*, 26 Cal. App. 4th 1033, 1041 (1994).

25. *See* CAL. FAM. CODE § 4057(a) (West 1996).

26. *See id.* § 4057(b).

27. *See id.* § 4053.

28. *See id.* § 4053(a).

29. *See id.* § 4053(b).

30. *See id.* § 4053(c).

31. *See id.* § 4053(d).

32. *See id.* § 4053(e).

33. *See id.* § 4053(f).

the children live with each one-half of the time);³⁴ private financial resources should be the primary source for the needs of the children;³⁵ a primary caretaker is afforded a presumption of support;³⁶ settlements are favored over litigation and court intervention;³⁷ the guideline is presumptively correct in all cases, and child support should not fall below the amount set by the formula unless there are special circumstances;³⁸ and finally, the award of support should reflect the state's high standard of living and high costs of raising children as compared to other states.³⁹ Although the legislature retains authority to enact and amend these guidelines, the Judicial Council must periodically review the guidelines and recommend appropriate revisions.⁴⁰

B. Canadian Approach To Support Calculation

In Canada, Federal Courts determine support obligations stemming from a divorce⁴¹ under the Divorce Act of 1985.⁴² The provinces and territories of Canada retain jurisdiction over support in separation and paternity cases.⁴³ Under either system, Federal or Provincial, the judiciary's determination of support is based on the principle that both parents have an equal responsibility to their children and thus should contribute accordingly, as their means allow.⁴⁴ Although courts have generally not used percentage rules and special formulas,⁴⁵ some courts have used guidelines, complete with charts, provided by an Ottawa committee report.⁴⁶

Because The Divorce Act of 1985 merely provides general guidelines that an order for child support should "(a) recognize

34. *See id.* § 4053(g).

35. *See id.* § 4053(h).

36. *See id.* § 4053(i).

37. *See id.* § 4053(j).

38. *See id.* § 4053(k).

39. *See id.* § 4053(l).

40. *See id.* § 4054.

41. *See* Laura W. Morgan, *Child Support and the Anomalous Cases of the High-Income and Low-Income Parent: The Need to Reconsider What Constitutes "Support" in the American and Canadian Child Support Guideline Models*, 13 CAN. J. FAM. L. 161, 207 (1996).

42. The Divorce Act of 1985, R.S.C., ch. 3, 173 (1985), *amended by* ch. 27, § 10 (1990), ch. 18, §§ 1, 2(a), (d), ch. 8, §§ 1-5 (1993) (Can.).

43. *See* Morgan, *supra* note 41, at 207.

44. *See id.*

45. *See id.* at 210.

46. *See id.* at 210 n.98.

that the spouses have a joint financial obligation to maintain the child; and (b) apportion that obligation between the spouses according to their relative abilities to contribute to the performance of the obligation,"⁴⁷ the task of providing specific guidelines has been left to the courts.⁴⁸

A series of common law guidelines or "factors" eventually developed through judicial legislation. These are, however, by no means exclusive or sedentary.⁴⁹ For instance, the Supreme Court in *Willick v. Willick*⁵⁰ set forth the relevant factors for determining child support as including: (1) the total family income available for child support; (2) the costs associated with raising the children and other general factors pertaining to the cost of living; (3) prior agreements between the parties; and (4) the parties' responsibilities to subsequent families.⁵¹

These factors differ from the more comprehensive list developed in *Syvetski v. Syvetski*.⁵² The *Syvetski* factors require: (1) an assessment of the needs of the child; and (2) an assessment of both the non-custodial parent and custodial parent as to whether each is self sufficient and able to either contribute wholly, a portion, or more than his or her portion to the financial support of the child.⁵³ In addition, *Syvetski* mandates consideration of other factors including: the income tax aspects of maintenance, visitation expenses, adjustments for extended visitation, shared custody, responsibility for the care of others, cohabitation with others, or other non-financial contributions to the child.⁵⁴

The current Canadian system of judicial support calculation guideline development faces inadequacies similar to those that plagued the U.S. system prior to the Family Support Act of 1988.⁵⁵ These problems include inconsistency among awards issued by various courts, inadequacy of awards, and the system's overall in-

47. The Divorce Act of 1985, §§ 15(8), 17(8).

48. See generally Alastair Bissett-Johnson, *Reform of the Law of Child Support: By Judicial Decision or By Legislation?* (pt.1), 74 CAN. B. REV. 585 (1995).

49. See *id.* at 587-88.

50. [1994] 6 R.F.L.4th 161; see also Bissett-Johnson, *supra* note 48, at 594.

51. See Bissett-Johnson, *supra* note 48, at 594.

52. 86 N.S.R.2d 248, 253-54 (Fam. Ct. 1988); see also Bissett-Johnson, *supra* note 48, at 594 n.45.

53. See Bissett-Johnson, *supra* note 48, at 594 n.45.

54. See *id.*

55. See Morgan, *supra* note 41, at 212.

equity.⁵⁶ In response to these problems, a Family Law Committee Report recommended changes in the Canadian family law system, including employment of a formula to calculate child support.⁵⁷ Similar to the California system,⁵⁸ the proposed Canadian formula would operate as a rebuttable presumption that would apply unless the result would produce undue hardship to the non-custodial parent.⁵⁹ In addition, the Committee presented several extraordinary circumstances as factors to rebut the presumption, such as existing child support orders, custody of other children, second families, high debt load, and actual physical contact with the child.⁶⁰

III. TAXATION OF SUPPORT OBLIGATIONS

A. U.S. Taxation of Support and Alimony

The U.S. Congress is vested with the federal government's taxing power⁶¹ which it exercises by enacting taxing statutes.⁶² The Internal Revenue Code of 1986 (Code) is the current statute governing tax law in the United States.⁶³ "All tax decisions and controversies center around the meaning of provisions of the Code."⁶⁴

In the United States, to arrive at a person's taxable income, taxpayers calculate their gross income and then subtract allowable deductions.⁶⁵ The Code's general definition of gross income is "all income from whatever source derived."⁶⁶ Alimony and separate maintenance payments are specifically included in the definition of

56. *See id.*

57. *See* Alastair Bissett-Johnson, *Reform of the Law of Child Support: By Judicial Decision or By Legislation?* (Pt.2), 75 CAN. B. REV. 1, 21 (Mar. 1996) (citing *Federal/Provincial/Territorial Family Law Committee's Report and Recommendations on Child Support*, COM. BRANCH (Ottawa: Department of Justice Canada, 1995) ISBN 0-662-22967-3).

58. CAL. FAM. CODE § 4057(b) (West 1996).

59. *See* Bissett-Johnson, *supra* note 57, at 21.

60. *See id.* at 21-22.

61. *See* JAMES J. FREELAND ET AL., *CASES AND MATERIALS ON FUNDAMENTALS OF FEDERAL INCOME TAXATION* 21 (8th ed. 1994).

62. *See id.*

63. *See id.*

64. *Id.*

65. *See id.* at 46.

66. I.R.C. § 61 (1995).

gross income.⁶⁷

Prior to 1942, the Code considered payment of alimony and child support as mere family or living expenses, which did not constitute income to the payee.⁶⁸ An amendment to the Code in 1942,⁶⁹ however, reclassified the status of these payments. The general rule now provides that payees must include periodic payments received in the course of a divorce or legal separation in their gross income.⁷⁰ In turn, the payors may deduct the periodic payment from their gross income.⁷¹ The Code further provides, however, that where a divorce or separation instrument fixes an amount for child support, the payor includes that amount in gross income and the payee excludes it from gross income.⁷² It is postulated that child support payments do not constitute income to the custodial parent because these amounts have no gross income characteristics to either the parent or the child.⁷³

In a 1950 case, *Mahana v. United States*,⁷⁴ the U.S. Court of Claims rejected a challenge to the constitutionality of including alimony in the payee's income and the deduction of alimony from the payor's income for federal income tax purposes. In *Mahana*, the plaintiff ex-wife, asserted a constitutional challenge to the taxing of the alimony she received.⁷⁵ She argued that because alimony is not income, the Sixteenth Amendment to the U.S. Constitution cannot authorize its taxation.⁷⁶ This argument relied heavily on the court's holding in *Gould v. Gould* that alimony paid to a divorced wife was not taxable to her as income.⁷⁷

In *Gould*, however, the court had based its holding on interpretation of the legislation in force at the time of the decision: the

67. See *id.* § 71(a), (b)(1) (1995).

68. 4 A.L.R.2d 252, 253 (1995).

69. Revenue Act of 1942, 77 ch. 619, Pub. L. No. 753, 56 Stat., pt. 1, 816 (1942) (codified as amended at 26 U.S.C. § 71(c) (1995)).

70. See *id.*

71. See *id.*

72. I.R.C. § 71(c)(1) (1995).

73. See FREELAND ET AL., *supra* note 61, at 236.

74. 88 F. Supp. 285 (Ct. Cl. 1950).

75. See *id.* at 288.

76. See *id.* The Sixteenth Amendment, added to the Constitution in 1913, provides that "[t]he Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration." U.S. CONST. amend. XVI.

77. *Gould v. Gould*, 245 U.S. 151, 154 (1917).

Income Tax Act of 1913.⁷⁸ This Act neither expressly included or excluded alimony from its definition of taxable income.⁷⁹ Accordingly, the *Mahana* Court held that *Gould* merely interpreted the Income Tax Act of 1913 and did not make a constitutional determination.⁸⁰ Furthermore, the Court stated that "the Supreme Court should not be taken so literally when the consequence would be to nullify an act of Congress, the intention of which is clear," thus indicating the court's reluctance to circumvent congressional legislation.⁸¹

Prior to the 1984 Internal Revenue Code amendments, plaintiffs often asked the courts to determine what portion of a payment from one ex-spouse to another was "fixed" for purposes of determining deductibility from the payor's income.⁸² This stemmed from the attempt of payors to identify a larger portion of the payment to the ex-spouse as alimony and not child support, resulting in a larger deduction from their income.⁸³ This careful labeling of payments as alimony and not child support gave ex-spouses greater control over the tax consequences of their payments. In *Commissioner v. Lester*,⁸⁴ the Supreme Court held that for an amount to be "fixed" pursuant to section 71(c) of the Internal Revenue Code, and thus considered non-payee taxable child support, the parties must "specifically state the amounts or parts thereof allocable to the support of children" in the divorce agreement.⁸⁵ Thus, after *Lester*, the payor could benefit by drafting a divorce agreement with a provision reducing the amount of payments contingent upon a particular fact.⁸⁶ For example, payment could be contingent on the children reaching a certain age, and could completely omit any reference to a specific child support allocation.⁸⁷ Under this method, payors could receive a large deduction from their gross income, forcing payees to claim that amount as income.⁸⁸

78. Income Tax Act of 1913, 38 Stat. 114, 166.

79. *Gould*, 245 U.S. at 153.

80. *Mahana*, 88 F. Supp. at 288.

81. *Id.*

82. See FREELAND ET AL., *supra* note 61, at 237.

83. *See id.*

84. 366 U.S. 299 (1961).

85. *Id.* at 301.

86. See FREELAND ET AL., *supra* note 61, at 237.

87. *See id.*

88. *See id.*

In 1984, Congress responded to this method of tax-shifting. It enacted legislation that treats any reduction of amounts payable to an ex-spouse occurring on the happening of a contingency, or at a time that could be associated with a contingency (such as a certain year that is also the year the child becomes eighteen years old) as child support for taxation purposes.⁸⁹ Enactment of this new provision thus ended high income payors' forty-year use of tax shifting methods.⁹⁰

B. Canada's Taxation Of Support And Alimony

Canada's Constitution Act of 1867 granted Parliament the right to raise money "by any Mode or System of Taxation."⁹¹ The current mode or system, set forth in the Income Tax Act, provides for the inclusion/deduction system at issue in *Thibaudeau*.⁹²

Since 1942, Canada has required the payees of both alimony and child support to report these amounts as gross income.⁹³ The text of the current provision defining income reads:

3. The income of a taxpayer for a taxation year for the purposes of this Part is the taxpayer's income for the year determined by the following rules:

(a) determine the total of amounts each of which is the taxpayer's income for the year (other than a taxable capital gain from the disposition of a property) from a source inside or outside Canada, including, without restricting the generality of the foregoing, the taxpayer's income for the year from each office, employment, business and property.⁹⁴

Section 56(1), which further modifies section 3 by including as income the support payments received by the noncustodial parent as income, provides, in part:

Without restricting the generality of section 3, there shall be included in computing the income of a taxpayer for a taxation year, . . . (b) any amount received by the taxpayer in the year, pursuant to a decree, order or judgment of a competent tribu-

89. See I.R.C. § 71(c).

90. See FREELAND ET AL., *supra* note 61, at 212-37.

91. CAN. CONST. (Constitution Act, 1867) § 91.3.

92. *Thibaudeau v. Canada* [1995] 2 S.C.R. 627, 666.

93. See Louise Dulude, *Tax and Family Laws: A Search for Consistency*, in FAMILY LAW IN CANADA: NEW DIRECTIONS 63, 77 (Elizabeth Sloss ed., 1985).

94. Income Tax Act, S.C., § 3(a) (1970-72) (Can.).

nal or pursuant to a written agreement, *as alimony or other allowance payable on a periodic basis for the maintenance of the recipient thereof, children of the marriage, or both the recipient and children of the marriage*, if the recipient was living apart from, and was separated pursuant to a divorce, judicial separation or written separation agreement from, the spouse or former spouse required to make the payment at the time the payment was received and throughout the remainder of the year.⁹⁵

The companion to section 56(1) is section 60(b), which allows the deduction from income child support paid by the noncustodial parent. Section 60(b) provides:

There may be *deducted* in computing a taxpayer's income for a taxation year such of the following amounts as are applicable:

... (b) an amount paid by the taxpayer in the year, pursuant to a decree, order or judgment of a competent tribunal or pursuant to a written agreement, *as alimony or other allowance payable on a periodic basis for the maintenance of the recipient thereof, children of the marriage, or both the recipient and children of the marriage*, if the taxpayer was living apart from, and was separated pursuant to a divorce, judicial separation or written separation agreement from, the taxpayer's spouse or former spouse to whom the taxpayer was required to make the payment at the time the payment was made and throughout the remainder of the year.⁹⁶

Initial adoption of these provisions stemmed from a need for relief to husbands in certain income tax brackets who did not have enough income to pay both their support obligations and the high wartime tax present at the time.⁹⁷ The government did not repeal these provisions, however, when the wartime taxes disappeared.⁹⁸ Rationales then developed to support continuance of the inclusion/deduction method, including the notion that "deductibility may be an aid to enforcement of the agreement or order to pay."⁹⁹

The rationale most heavily relied on suggests that Parliament designed the inclusion/deduction provisions to confer a benefit on the broken family by minimizing the tax consequences of the ordered support.¹⁰⁰ By allowing payees to deduct the support pay-

95. *Id.* § 56(1)(b) (emphasis added).

96. *Id.* § 60(b) (emphasis added).

97. See Dulude, *supra* note 93, at 77.

98. See *id.*

99. *Id.*

100. See, e.g., Thibaudeau v. Canada [1995] 2 S.C.R. 627, 628-29.

ment from their income, more money would be available to provide for the children's care.¹⁰¹ This assumes that the noncustodial parent earns more than the custodial parent, putting the noncustodial parent into a higher income bracket. Furthermore, by requiring the custodial parent to take the payment as income, it is assumed that the payment amount would be taxed at a lower rate.¹⁰² One author suggests that these provisions "allow the spouses greater financial resources than when living together, compensating for the lost economics of maintaining a single household."¹⁰³

IV. END OF CANADA'S FIFTY-YEAR-OLD SYSTEM OF SUPPORT TAXATION

A. *The Thibaudeau Decision*

Susan Thibaudeau based her argument against the inclusion/deduction system of taxation on constitutional grounds. She argued that the current tax law infringed upon the equality rights guaranteed to her under section 15 of the Canadian Charter of Rights and Freedoms.¹⁰⁴ The Court of Appeals held that the inclusion section of the Tax Code did infringe upon section 15(1) of the Charter and could not be justified under section 1, which tests a law's rationality.¹⁰⁵ The Supreme Court of Canada disagreed and reversed the Court of Appeals.¹⁰⁶ It held that "[t]he impugned provisions of the Income Tax Act do not impose a burden or withhold a benefit so as to attract the application of Section 15(1) of the Charter."¹⁰⁷ The Supreme Court further stated that responsibility for any disproportionate displacement of the tax li-

101. See *id.* at 629.

102. See *id.* at 630.

103. See *id.* at 678 (citing C. Dawe, *Section 60(b) of the Income Tax Act: An Analysis and Some Proposals for Reform*, 5 QUEEN'S L.J. 153 (1980)).

104. See *id.* at 628. Section 15.1 of the Charter provides that "[e]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability." CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 15.1.

105. See Thibaudeau [1995] 2 S.C.R. at 628. Section 1 of the Canadian Charter reads "[t]he Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 1.

106. See Thibaudeau [1995] 2 S.C.R. at 628.

107. *Id.* at 629.

ability between former spouses lies within the family law system and the procedures from which support orders flow, and *not* with the Income Tax Act.¹⁰⁸

1. Effect Of Appellate Decision

An example of the effect of the Court of Appeals' decision in *Thibaudeau* demonstrates the perceived inequities of the system. In *Palanica-Gibson v. The Queen*,¹⁰⁹ Joanne Palanica-Gibson appealed a denial of her request for an Order to Extend Time within which to serve a Notice of Objection with respect to her 1992 tax return.¹¹⁰ Although the issue in this case involved a procedural challenge, the relevance here lies in the fact that Ms. Palanica-Gibson contested her tax assessment based on the Court of Appeals holding in *Thibaudeau*.¹¹¹ In a letter requesting appeal of the assessment, she stated:

If you deny me this appeal you continue to discriminate against me and continue to push me into further indebtedness. I feel like you are rewarding my ex-husband for deserting his family ... The money you are taxing me on was intended to make a better life for my children. Give my children and I back our futures and recognize this appeal.¹¹²

Unfortunately the Supreme Court made its final ruling in *Thibaudeau* prior to the resolution of her case.¹¹³ The *Palanica-Gibson* court thus refused to hear her appeal.¹¹⁴ This case, as demonstrated by the impassioned letter, does however indicate the strong personal feelings of the custodial parent faced with this additional taxation of their support payments.

2. Reasoning For Supreme Court Ruling

The Supreme Court's main rationale for reaching its decision in *Thibaudeau* (that the inclusion/deduction system did not violate section 15(1)) was its insistence that the family law system, and the procedures from which the support orders originally flow, dispel

108. See *id.*

109. *Palanica-Gibson v. The Queen*, APP-384-95-IT, 1995 Can. Tax Ct. LEXIS 4435 (Tax Ct. Oct. 31, 1995).

110. See *id.*

111. See *Thibaudeau v. Canada* [1995] 2 S.C.R. 627, 628.

112. *Palanica-Gibson*, APP-384-95-ITT at 2.

113. See *id.* at 3.

114. See *id.* at 5.

any taxing inequity.¹¹⁵ A review of the support calculation process bolsters this reasoning. Generally, when determining a support amount, lawyers and courts employ extensive tax considerations.¹¹⁶ The most prevalent is the "gross-up."¹¹⁷ Because the custodial parent, under the current tax system must include the support amount in his or her gross income, any tax paid because of this inclusion will naturally reduce the amount of money available for the care of the child. Therefore, in determining a support amount, courts and lawyers often "gross-up" the support award by the amount of tax payable.¹¹⁸ This allows the support payment to meet the financial needs of the child.¹¹⁹ Conversely, any "gross-up" that falls short of the tax payable constitutes an additional burden on the custodial parent.¹²⁰

Several dissenting justices in *Thibaudeau* voiced their concern over the failure of the family law system to adequately "gross-up" child support awards.¹²¹ Abandoning the notion that the family law system adequately balanced any inequality in the inclusion/deduction method, one Justice wrote:

[a] regime that materially increases the vulnerability of a particular group imposes a burden on that group which violates one of the four equaling rights under § 15. As such, the inclusion/deduction regime imposes upon separated or divorced custodial spouses an unequal burden of the law and denies them the equal benefit of the law.¹²²

Although the majority in *Thibaudeau* relied partly on the "gross-up" method as justification for refusing to strike down the inclusion/deduction method, it failed to give lower courts instruction regarding its employ.¹²³ Thus, unguided family court judges must determine whether the support payments can be adequately "grossed-up" to insert fairness into the inclusion/deduction system.¹²⁴

115. See *Thibaudeau* [1995] 2 S.C.R. at 629.

116. See *id.* at 646.

117. *Id.*

118. See *id.*

119. See *id.* at 646-47.

120. See *id.* at 647.

121. See *id.* at 629-33.

122. *Id.* at 636 (L'Heureux-Dubé, dissenting).

123. Lisa Philipps, *Tax Law: Equality Rights: Thibaudeau v. Canada*, 74 CAN B. REV. 668, 680 (1996).

124. See *id.*

B. Legislative Answer/Proposed Changes

Change in the system has long been debated. A paper prepared for the Canadian Advisory Council on the Status of Women, presented the following conclusions:

Money received by an estranged wife for her own support can truly be said to be under her full control. As she can spend these sums in any way she wants ... it is fair to add them to her own income for tax purposes.

On the other hand, money received by an estranged wife for the maintenance of the children in her custody is not under her full control. She is in a position similar to that of a trustee holding money for the benefit of the children, and she is not free to spend this money in any way she wishes. As trustees are not expected to pay tax on the money they administer for others ... women in this position should not have to pay tax on the money they receive for child support.¹²⁵

Another argument against the inclusion/deduction method revolves around the inequity created between divorced and intact families.¹²⁶ Because payors of child support can deduct this support from their gross income, they enjoy a benefit not available to parents in intact families.¹²⁷ Parents in intact families may only deduct a flat-rate exemption from their income, and may not deduct any amounts spent for care of their children.¹²⁸

When the Supreme Court handed down *Thibaudeau*, Justice Minister Allan Rock announced that the Liberals intended to introduce a package of child support reforms addressing those same concerns.¹²⁹ A little less than a year later, Justice Minister Rock presented proposals to change Canada's Income Tax Act which, if enacted, would abolish the inclusion/deduction system in place for over fifty years.¹³⁰ The proposed changes, announced along with Canada's 1996-97 Federal Budget Plan, affect all support payments stemming from orders or agreements entered into after May 1, 1997.¹³¹ Justice Minister Rock stated that the new scheme would only be retrospective if the parties either agreed to change to the

125. Dulude, *supra* note 93, at 77-78.

126. *See id.* at 77.

127. *See id.*

128. *See id.*

129. *See Bergman, supra* note 13.

130. *See id.*

131. *See id.*

new system or went back to court.¹³²

1. Initial Reaction

Women all over Canada embraced these changes. They had aggressively lobbied against what they deemed a system unfairly requiring single mothers to pay tax on child support when too many mothers live in poverty.¹³³ Sunera Thobani, then President of the National Action Committee on the Status of Women, stated that "[w]omen have argued for a long time that taxing custodial parents discriminates against women. This is a great victory."¹³⁴ With the sweet, however, often comes the bitter. Susan Thibaudeau, along with thousands of other single mothers, will not reap the benefit of her labors due to the non-retroactive nature of the changes.¹³⁵ Upon learning of this limitation, Ms. Thibaudeau stated that these measures once again penalize women.¹³⁶

Many divorced fathers are equally unhappy with the changes.¹³⁷ Standing to lose a considerable tax deduction, these fathers may find themselves unable to provide as much financial support for their children as they would under the old system.¹³⁸ Ross Virgin, President of a men's rights group "In Search of Justice," stated that the changes were "outrageous, disgusting and stupid."¹³⁹ In the aftermath of the announcement, Virgin fielded calls from anxious males who said "they were tired of being treated as wallets rather than fathers."¹⁴⁰

2. Motive

In support of the changes, Finance Minister Paul Martin stated: "This approach will ensure that the children who need support the most [will] get it, and eliminate the need for complex tax calculation and planning by parents."¹⁴¹ Interestingly, however, under the first three years of the new tax laws Ottawa expects to

132. See Bissett-Johnson, *supra* note 57, at 21.

133. See Blinch, *supra* note 10.

134. *Id.*

135. See Bergman, *supra* note 13.

136. See *id.*

137. See *id.*

138. See *id.*

139. Blinch, *supra* note 10.

140. Bergman, *supra* note 13.

141. Blinch, *supra* note 10.

reap a revenue gain of \$200 million Dollars Canadian.¹⁴² Other sources estimate gains of \$300 to \$700 million.¹⁴³ A revenue gain of this kind is interesting in light of Martin's current steamrolling of Canada's budget deficit.¹⁴⁴ Evidencing his zeal to continue balancing Canada's budget, Martin recently declared that "[t]he attack on the deficit is irrevocable and irreversible. Let there be no doubt about that. We will balance the books."¹⁴⁵

Justice Minister Rock insists, however, that the revenue realized under the new tax law will be used to support children of divorced parents and not to reduce the federal budget deficit.¹⁴⁶ The consequence may simply be that there is less money available for the children as most of those who pay child support fall into a higher income bracket and now will be forced to pay more tax.¹⁴⁷

V. POTENTIAL FOR PROBLEMS

With change comes a period of reflection and fine-tuning. No law has ever purported to resolve all potential conflicts, nor should it. For example, when the U.S. Congress enacted alimony and support tax legislation in 1942, problems surfaced.¹⁴⁸ Indeed, as previously discussed, there was even a challenge to the constitutionality of alimony taxation.¹⁴⁹

A constitutional challenge to the new Canadian tax law seems unlikely in the wake of the Supreme Court's decision in *Thibaudeau*.¹⁵⁰ As payors bring the other inevitable challenges, however, courts may find themselves striking down the rationales supporting this tax system for over fifty years.¹⁵¹

142. Bergman, *supra* note 13. The current exchange rate of Dollars Canadian to the American Dollar is approximately seventy-two cents. See *Currency Trading, Exchange Rates*, WALL ST. J., May 12, 1997, at C18.

143. See Ian Harvey, *A Divorced Dad's Best Friend; Maverick Grit Senator Help Block Controversial Changes to Divorce Act*, TORONTO SUN, Jan. 18, 1997, at 13.

144. Randall Palmer, *Canada's Liberals Slash Spending but Eye Elections*, Reuters Fin. Serv. (Can.), Mar. 6, 1996.

145. *Id.*

146. See Bergman, *supra* note 13.

147. See *id.*

148. See *Mahana v. United States*, 88 F. Supp 285 (Ct. Cl. 1950)

149. See *id.*

150. *Thibaudeau v. Canada* [1995] 2 S.C.R. 627, 628.

151. See Dulude, *supra* note 93, at 77 (presenting several rationales to sustain the taxation method, the main factor being that the method allows payment of higher amounts to ex-wives and children by reducing the total amount of tax paid).

A. Separation Of Alimony And Child Support

When U.S. tax law deemed child support non-deductible to the payor (and therefore not included in the income of the payee), a considerable amount of re-labeling of payments occurred.¹⁵² Although courts may be wary of these tax-shifting arrangements, parties often draft support agreements independent of judicial intervention. Although current U.S. law does not require alimony and child support payments to be separately delineated, accidental taxation could occur where a child support amount can be determined.¹⁵³ Such accidental taxation provides a strong incentive for parents to fix or delineate which amounts are for alimony and child support payments.¹⁵⁴

In comparison, Canadian tax law has treated alimony and child support as deductible from the payor's income and included in the payee's income since 1942.¹⁵⁵ Under the new Canadian taxation method, alimony remains taxable to the payee.¹⁵⁶ Only the taxation of child support changes. Thus, the future structure of Canadian support agreements remains in question. If a payor classifies all of the support as alimony, he or she may effectively avoid any tax increase under the new laws.

B. Calculation Of Support—Proposing Guidelines

Child support orders prior to the Canadian tax change attempted to factor in the tax consequences of the old inclusion/deduction method.¹⁵⁷ What was once a crucial factor in determining support, however, may now have no bearing on support calculations at all.¹⁵⁸ The question of what the new law will mean for judges trying to calculate support thus presents itself. The answer may not be far off.

In 1990, the Child Support Guidelines Project appointed a Family Law Committee to study and report on the problem of child support calculation and enforcement.¹⁵⁹ The Committee

152. See FREELAND ET AL., *supra* note 61, at 237.

153. See *id.*

154. See *id.*

155. See Dulude, *supra* note 93, at 77.

156. See Bergman, *supra* note 13.

157. See *Thibaudeau v. Canada* [1995] 2 S.C.R. 627, 646.

158. *McQuire v. McQuire*, slip op. No.647/92 (Ont. Ct. Gen. Div., Fam. Ct. 1996).

159. The Family Law Committee was created in 1990 by the federal/provincial/territorial Ministers responsible for Justice. See Morgan, *supra* note 41, at

completed a report regarding impact of the child support calculation guidelines in 1994 and a further study on guideline formation in 1995.¹⁶⁰ According to one family lawyer and author, the "Canadian Parliament is now on the cusp of passing legislation directing the Department of Justice to formulate child support calculation guidelines for use in the federal courts."¹⁶¹

Because the Committee published its first report and recommendations just prior to the Supreme Court's decision in *Thibault*, the Committee provided for either outcome.¹⁶² Thus the system appears ready for use as soon as the legislature adopts it. Adoption of a support guideline system in Canada, however, still requires much debate.

On May 30, 1996, the Canadian Parliament took up the issue of child support calculation guidelines by introducing "An Act to Amend the Divorce Act" in the House of Commons, which included the change to the tax inclusion/deduction method.¹⁶³ The need for further consideration, however, tabled the issue until November 1996.¹⁶⁴ Moreover, opposition to the Act further delayed its consideration until late January of 1997.¹⁶⁵ If the Act passes, the Minister of Justice will seek to implement the guidelines on May 1, 1997.¹⁶⁶

C. Modification Of Support Orders Currently In Effect

If passed, the new Canadian tax laws will not apply retroactively to support orders effective prior to May 1, 1997.¹⁶⁷ Rather, Justice Minister Rock stated that the new scheme would only be retrospective if the parties agreed to change to the new system or went back to court.¹⁶⁸

In the United States, a parent may always seek modification of a child support order if there is a change in circumstances.¹⁶⁹ California law, for example, states that establishment of the uni-

212.

160. *See id.*

161. *Id.*

162. *See Bissett-Johnson, supra* note 57, at 21-23.

163. *See Morgan, supra* note 41, at 212.

164. *See id.*

165. *See Harvey, supra* note 143.

166. *See Morgan, supra* note 41, at 213.

167. *See Bergman, supra* note 13.

168. *See Bissett-Johnson, supra* note 48, at 21.

169. *See JUDITH AREEN, FAMILY LAW, CASES AND MATERIALS* 647 (2d ed. 1985).

form guidelines on July 1, 1992 itself constitutes a change of circumstances.¹⁷⁰ Consequently, all child support orders predating the guidelines are per se modifiable.¹⁷¹ In response to a concern over a drastic increase in the amount of support, the California legislature provided for a two-step modification phase-in period.¹⁷² The phase-in allowed the payor a period of time to "rearrange his or her financial obligations in order to meet the full formula amount of support."¹⁷³ The statute also requires strict adherence to the phase-in conditions set forth regarding this allowance.¹⁷⁴

Whether the tax reforms in Canada constitute a change in circumstances allowing a petitioner to bring an action for modification of an existing support order remains an open issue. Justice Minister Rock's statement, however, suggests that petitioners may bring a court action for modification based solely upon the change in the tax laws.¹⁷⁵ In fact, mere enactment might constitute a change in circumstances providing for per se modification as in the California system.¹⁷⁶ Although the Family Law Committee has recommended that during a transition period, in the best interest of the child, higher existing orders should continue to apply unless a change in circumstances occurs, it is still in the process of developing a proper transition approach.¹⁷⁷

VI. NEW GUIDELINES—A SEARCH FOR FAIRNESS

A. Taxing The Post-Divorce "Family Unit"

One criticism of the *Thibault* decision focused on the majority's emphasis on the divorced parties as a couple.¹⁷⁸ By keeping the spotlight on the aggregate benefits derived through income-splitting, the court appeared to ignore the independent rights of each party.¹⁷⁹ In an argument submitted to the Supreme Court as an intervenor, the Coalition best described the sentiment

170. See Cal. FAM. CODE § 4069 (West 1996).

171. See *id.*

172. See *id.* § 4076.

173. See *id.* § 4076(a)(1).

174. *Id.* § 4076.

175. See Bissett-Johnson, *supra* note 57, at 21.

176. See CAL. FAM. CODE § 4069 (West 1996).

177. See Bissett-Johnson, *supra* note 57, at 27-28.

178. See Philipps, *supra* note 123, at 678.

179. See *id.*

for the majority's "couple" approach when it set forth the following statement in its brief:

Underlying much social and economic policy in Canadian society is the assumption that child-rearing work is the responsibility of women. Although not all women perform child-rearing work, and some men do, child-rearing has been seen traditionally as a female role within a two parent heterosexual family. *Women are stereotyped as secondary earners.* Such discriminatory notions about women's status in society reinforce the social and economic devaluation of child-rearing work and are used to justify the lack of social resources available to those with primary responsibility for child-rearing.¹⁸⁰

Until the dominant image of "the family" as the social norm can be overcome, we cannot dispel the concept that husbands' and fathers' income privately secures the economic well-being of women and children.¹⁸¹ The criticism lies not with the concept of the family itself, but with the concept that one must conform to the family image.¹⁸² The majority in *Thibaudeau* furthered this notion by treating "Mr. Chaine and Ms. Thibaudeau as an economic unit, even though they . . . obtained a divorce."¹⁸³

B. Support Calculation Guidelines

1. Setting The Standards

As discussed above, the task of setting guidelines for child support fell to the judiciary. The Family Law Committee's recommendations on guideline formation embraced the concept of separating the support calculation from a family unit standard.¹⁸⁴ The proposed calculation, however, attempted to equalize the standard of living for both households: in order to achieve equal standards, the noncustodial parent should give more of his or her income to the lower income custodial parent.¹⁸⁵

On its face, equalization appears to further the family unit

180. Coalition Argument in the *Thibaudeau* Child Support Case, By the Charter Committee on Poverty Issues, the Federated Anti-poverty Groups of BC, the National Action Committee on the Status of Women, and the Women's Legal Education and Action Fund, at 9, *Thibaudeau v. Canada* [1995] 2 S.C.R. 627 (No.24154) (emphasis added).

181. See Philipps, *supra* note 123, at 679.

182. See *id.*

183. *Id.*

184. See Bissett-Johnson, *supra* note 57, at 22.

185. See *id.*

concept. By ensuring that each family member in the two households enjoys a similar standard of living, however, the "Revised Fixed Percentage Formula"¹⁸⁶ furthers personal inequality.¹⁸⁷

The current guidelines under consideration seem to both discard the notion of the family unit, as well as embrace it. Rejecting the Family Law Committee's recommendations, the proposed guidelines merely offer a simple support calculation chart.¹⁸⁸ This chart considers only two variables: the number of children requiring support and the gross income of the payor.¹⁸⁹ The main source of opposition to this "chart" stems from the fact that it does not consider the income of the payee.¹⁹⁰ For example, according to this chart, a payor earning \$30,000 a year whose ex-spouse is unemployed would pay exactly the same amount of child support as a similarly situated payor with an ex-spouse earning \$200,000 a year.¹⁹¹

2. Criticisms Of The Proposed Legislation

In January 1997, the successful lobbying of opposition groups delayed a final vote by the Senate.¹⁹² According to Senator Anne Cools, of the Canada Senate Hearing Committee, more than forty groups have asked to present arguments regarding the guidelines when hearings resume.¹⁹³ In addition, non-custodial parents, fearing heavy court costs in re-adjustment actions have flooded the Senate offices with calls voicing their concern.¹⁹⁴ According to Senator Cools, initial findings suggest that these changes to the current support system may encourage more litigation and bitterness, and may ultimately mean less money for children in divorced families.¹⁹⁵

186. The Revised Fixed Percentage Formula requires the use of a computer generated table modifiable in low income situations. *See id.*

187. *See id.*

188. *See* Communication from user AAG AAG, *In Search of Justice Bulletin Board* (Toronto, Can., Jan. 25, 1997) (on file with *Loyola of Los Angeles International and Comparative Law Journal*).

189. *See id.*

190. *See id.*

191. *See id.*

192. *See* Harvey, *supra* note 143.

193. *See id.*

194. *See* *Senate Update* (In Search of Justice, Toronto, Can.), Dec. 13, 1996 (on file with *Loyola of Los Angeles International and Comparative Law Journal*).

195. *See* Harvey, *supra* note 143.

Proponents of the changes, however, have defended their position by blaming the family law system itself for any detrimental effects.¹⁹⁶ Looking ahead, one Toronto family lawyer admits that the Bill has many vague and poorly defined sections, but advises that the real test will come when mandatory review of the legislation occurs four years after its passage.¹⁹⁷ At that point, adjustments, if there are any, may be made to improve the legislation.¹⁹⁸

C. Joint Custody As A Basis For Eliminating Child Support

One interesting approach to support calculation seeks to abolish the concept of child support payments altogether.¹⁹⁹ By requiring joint physical custody, the Divorce Act would guarantee children equal time with both parents.²⁰⁰ Thus, responsibility for the financial expenses of the children would be commensurate with the extent of each parent's physical custody.²⁰¹ This approach may not be so far-fetched. Studies show that the U.S. states that introduced joint custody laws and access enforcement, which enforces visitation rights, experienced an almost ninety percent rise in support payment compliance.²⁰²

With very few exceptions,²⁰³ this approach is gaining support.²⁰⁴ Strongly expressed sentiments of its proponents include: "There must be no more custodial spouses," and "[j]oint physical custody gives back to children the right to have two parents, not just one."²⁰⁵

Criticism of Justice Minister Allan Rock's lack of action in this area is mounting.²⁰⁶ According to legislative watchers, Justice Minister Rock has failed to bring joint physical custody to the Divorce Act or to even lower child support amounts based on equal

196. See *id.*

197. See *id.*

198. See *id.*

199. See *Men Are Not Wallets* (In Search of Justice, Toronto, Can.), Nov. 12, 1996 (on file with *Loyola of Los Angeles International and Comparative Law Journal*).

200. See *id.*

201. See *id.*

202. See *Deadbeat Dads?—Nonsense!* (In Search of Justice, Toronto, Can.), Nov. 14, 1996 (on file with *Loyola of Los Angeles International and Comparative Law Journal*).

203. One exception involves ex-spouses who have grossly disproportionate incomes.

204. See *Outraged Men Ask Allan Rock to "Trash" Report on Child Support* (In Search of Justice, Toronto, Can.), Nov. 14, 1996 [hereinafter *Outraged Men*] (on file with *Loyola of Los Angeles International and Comparative Law Journal*).

205. *Id.*

206. See Harvey, *supra* note 143.

time sharing of children between the parents.²⁰⁷ In deference to this denial, father's rights groups have vowed to continue lobbying Justice Minister Rock and the Canadian legislature until a more pro-male, and arguably more equal, approach is adopted.²⁰⁸

D. The Need For A Workable Solution

While Rock claims that the new law ending the inclusion/deduction system and providing new support calculation guidelines benefits children, many do not agree.²⁰⁹ But what, if any, type of support guideline would Canadians embrace? In the case of a high-income payor, support could take into account expenditures to increase a child's standard of living to a point that the child would have enjoyed had the marriage remained intact.²¹⁰ In the case of the low-income payor, one should calculate support to allow the payor to remain self-supporting.²¹¹ With regard to the taxation of support, legislators must address the problems faced by custodial families,²¹² and at the same time abandon the notion that the noncustodial parent will solely bear their financial needs.²¹³

VII. CONCLUSION

A. Summary

The fifty-year-old Canadian system of taxation, requiring inclusion of support in the payee's income and deduction of that support from the payor's income, produced the need for complex tax calculations to determine a fair amount of support.²¹⁴ Since the current Canadian family law system fails to define guidelines for the judiciary, inaccurate tax planning under the inclusion/deduction method may often result in inequitable support orders.²¹⁵

207. See *Allan Rock Bleeds Fathers in Child Support changes* (In Search of Justice, Toronto, Can.), Nov. 14, 1996 (on file with *Loyola of Los Angeles International and Comparative Law Journal*).

208. See *Outraged Men*, *supra* note 204.

209. See *Rock Bashes Dads (again)* (In Search of Justice, Toronto, Can.), Nov. 14, 1996 (on file with *Loyola of Los Angeles International and Comparative Law Journal*).

210. See Morgan, *supra* note 41, at 214.

211. See *id.*

212. See Philipps, *supra* note 123, at 681.

213. See *id.* at 679.

214. See *Thibaudeau v. Canada* [1995] 2 S.C.R. 627, 646.

215. See *id.* at 646-47.

The war against the current tax scheme, waged by Susan Thi-baudeau and the many women's groups behind her, brought the inclusion/deduction method to national attention.²¹⁶ The outcry against the Canadian Supreme Court's decision to uphold the law, in combination with Canada's recent move to study, formulate and ultimately codify support calculation guidelines, led to the introduction of the Act to Amend the Divorce Act (Act).²¹⁷ The Act proposing guidelines to calculate support payments, in addition to abolishing the current inclusion/deduction method²¹⁸ has garnered much opposition based on its language and content. This opposition has stymied Justice Minister Rock's plan to pass the Act by January 1, 1997, and have it take effect on May 1, 1997.²¹⁹ A Senate Committee studying the Act has postponed a Senate vote on enactment, pending more hearings to determine its feasibility.²²⁰

Adverse consequences of the Act include: (1) confusion over the adequate modification to existing support arrangements,²²¹ (2) a substantial increase in the amount of cases presented to the judiciary for review of existing support orders,²²² (3) the potential for tax-shifting, as alimony remains taxable to the payee,²²³ and (4) a decrease in the amount of money available for support.²²⁴ On the other hand, a standard set of guidelines would be a welcome aid to the judiciary, which has been left alone to formulate a standard under the Divorce Act of 1985.²²⁵

The United States has faced many of these same issues since the changes to its tax law in 1942²²⁶ and the passage of the Family Support Act of 1988.²²⁷ The practice of tax-shifting by classifying payments as alimony instead of child support remained an issue

216. See Blinch, *supra* note 10.

217. See Morgan, *supra* note 41, at 212.

218. See *id.*

219. See Harvey, *supra* note 143.

220. See *id.*

221. See Bissett-Johnson, *supra* note 57, at 21.

222. See Bergman, *supra* note 13.

223. See *id.*

224. See *id.*

225. See generally Bissett-Johnson, *supra* note 57. (Discussing the Canadian judiciary's inability to establish consistent guidelines.)

226. Revenue Act of 1942, 77 ch. 619, Pub. L. No. 753, 56 Stat., pt. 1, 816 (1942) (codified as amended at 26 U.S.C. § 71(c) (1995)).

227. Family Support Act of 1988, Pub. L. No. 100-485, 102 Stat. 2343, 42 U.S.C. § 667(a), (b)(2) (West 1994).

until an amendment to the Internal Revenue Code in 1984.²²⁸ The guidelines governing child support calculation only recently removed from courts the broad discretion they once enjoyed.²²⁹

B. Recommendations

1. Judicial Standards Versus Legislative Guidelines

As previously discussed in this Comment, the Canadian judiciary attempted to develop standard, coherent factors to consider when calculating support.²³⁰ These factors range from the general factors in *Willick*,²³¹ to the more comprehensive list set forth in *Syvetski*.²³² But neither of these guidelines are ultimately controlling, and the inadequacies plaguing this system have led to much criticism.²³³

Although the legislature in the state of California retains authority to enact and amend support calculation guidelines, the Judicial Council periodically reviews the guidelines and recommends appropriate changes.²³⁴ To obtain reform in the area of child support law, one Canadian author suggests that all elements of a marriage breakdown be allocated to one government department.²³⁵

In pushing to codify Canada's support calculation guidelines, Canada's legislature may well be doing more harm than good. Initial reports indicate that the proposed changes are fraught with error and ambiguity.²³⁶ The alternative, however, is to leave guidelines in the hands of a judiciary that has struggled to formulate consistent guidelines,²³⁷ and, in *Thibaudeau*, has rejected legislative tampering.

To abandon the legislative answer in favor of continued common law is to abandon equality. While lobbyists have had no ef-

228. I.R.C. § 71(c) (1995).

229. CAL. FAM. CODE § 4050-76 (West 1996).

230. See discussion *supra* Part II.B.

231. *Willick v. Willick* [1994] 6 R.F.L.4th 161.

232. *Syvetski v. Syvetski*, 86 N.S.R.2d 248 (Fam. Ct. 1988).

233. See generally Bissett-Johnson, *supra* note 48, at 585.

234. CAL. FAM. CODE § 4054 (West 1996).

235. See Bissett-Johnson, *supra* note 57, at 32.

236. See Harvey, *supra* note 143.

237. See discussion *supra* Part II.B.

fect on decisions by the courts,²³⁸ they have been able to influence re-consideration of the proposed Act.²³⁹ Based on these reasons, the natural and necessary conclusion in the area of setting uniform support calculation standards is legislative action.

2. New Guidelines

By announcing the changes to the tax law shortly after Susan Thibaudeau's defeat, Justice Minister Allan Rock reaped many kudos.²⁴⁰ Since the announcement, however, the changes, packaged with sweeping child support calculation reform, have come under much criticism, including charges of money-grabbing by Ottawa, and deference to women's rights over equality.²⁴¹

Many of the criticisms deal with what the changes exclude rather than the text itself.²⁴² For example, the proposals do not address the issue of joint custody nor do they provide any adjustments for what the noncustodial parent spends on the child.²⁴³ California's guidelines, for example, require that "an award should reflect increased household cost where both parent's have a high level of responsibility," thus codifying this obvious conclusion.²⁴⁴

With regard to the tax changes, under the proposed legislation, a payor who has entered into a support arrangement prior to the law's enactment must decide whether to opt in or out of the program and apply to the court.²⁴⁵ In addition, the support formula does not take into account the income of the ex-spouse/custodial parent, thus furthering the notion that the parties are still a "family unit" which should be maintained.

In developing guidelines for support calculation, the Canadian legislature must critically analyze its "one chart" approach and factor in other important issues.²⁴⁶ If the inclusion/deduction system is to be abolished, it should be abolished fairly and equally so that noncustodial parents are not forced to suffer the same inequality

238. The issue in *Thibaudeau*, for example, generated widespread support for Susan Thibaudeau, who nonetheless was denied relief. See Bergman, *supra* note 13.

239. See Harvey, *supra* note 143.

240. See Blinch, *supra* note 10.

241. See discussion *supra* Parts IV.B.2, VI.B.2.

242. See Harvey, *supra* note 143.

243. See *id.*

244. CAL. FAM. CODE § 4053(g) (West 1996).

245. See *id.*

246. See discussion *supra* Part VI.B.1.

custodial parents claim under the current system. The legislature must address tax-shifting issues,²⁴⁷ making modification of pre-existing support orders a priority in the courts.²⁴⁸

Whatever its motive, money or social reform, Canada's legislature must take a step back prior to enacting legislation that would further muddy the already teeming waters of child support calculation. By passing this legislation without considering all of the factors and effects on its citizens, Canada is overlooking the ill effects this legislation will have on the welfare of children of divorced parents.

3. Joint Custody To Ease Tax Burden

The joint physical custody approach gains support from the rationale that noncustodial parents should either not have to pay child support for the amount of time the child spends with them, or, at the very least, be able to deduct a portion of the support payment from their gross income.²⁴⁹ In completely abolishing the inclusion/deduction tax method, Canada overlooks this alternative.

As discussed above, California considers joint custody as one factor in calculating support.²⁵⁰ In addition, other jurisdictions have recognized the need for adjustments in support calculation to reflect the increased costs of shared custody.²⁵¹ Indeed, it is a logical conclusion that the noncustodial parent should not have to pay double support by paying support to the custodial parent for the minor child when the child is under the noncustodial parent's physical care.

By refusing to include this important consideration in the proposed Act, Canada has discarded what may be a great inducement to the inclusion/deduction method. Canada's legislature should realize that eliminating tax-breaks altogether will further tip the scales of inequality.

4. Mandatory Review/Transition Period To Bring Current Support Orders Up To Date

If the legislature passes the Act, the inclusion/deduction

247. See discussion *supra* Part III.A.

248. See discussion *supra* Part V.C.

249. See discussion *supra* Part VI.C.

250. CAL. FAM. CODE § 4053(g) (West 1996).

251. See Bissett-Johnson, *supra* note 57, at 27.

method will not apply retroactively to support agreements entered into prior to May 1, 1997.²⁵² In addition, those parents seeking to take advantage of the new system must modify their current orders by returning to court.²⁵³ For those under former agreements, the current proposal allows for an application to the court to either opt-in or opt-out of the new law.²⁵⁴

When presenting its report on support calculation guidelines, the Family Committee recognized the fact that there would be pressure by a parent benefiting from the new scheme to take advantage of the opportunity to change his or her existing award.²⁵⁵ The Committee suggested that only higher existing orders should continue to apply unless there had been a change in circumstances.²⁵⁶

California adopted its two-tiered review to ease the burden on both the courts and the payor after enacting its support calculation guidelines.²⁵⁷ The phase-in period enabled payors to rearrange their financial obligations in accordance with the new scheme.²⁵⁸

If Canada's intent is to focus on the best interests of its children, it should provide for a period of transition instead of hurling parents into a virtual web of new requirements. One solution would be a gradual change-over period targeting support agreements that have a specified term of five years or longer. To alleviate the burden on the judiciary, the legislature could create a separate agency to review the current support orders, and give it authority to make new determinations of support. In any event, this issue must be resolved prior to enactment of the new support calculation guidelines.

C. Closing

The search for equality by custodial and noncustodial parents continues, with strong supporters on both sides. The motives behind the change in support calculation, however, suggest that the government may merely be attempting to pacify women's groups while lining their pockets with the increased tax payments. Con-

252. See Bergman, *supra* note 13.

253. See *id.*

254. See Harvey, *supra* note 143.

255. See Bissett-Johnson, *supra* note 57, at 27.

256. See *id.*

257. See discussion *supra* Part V.C.

258. See *id.*

versely, Canada's judiciary has had little luck in its attempt to create uniform standards of support calculation. Perhaps it is time for a new support calculation guideline, however, merely abolishing the inclusion/deduction method without adequate transition policies does not accomplish this goal.

If the Act passes as presented, Canada should brace itself for difficulties. As with the constitutional challenge to the 1942 U.S. tax law amendment,²⁵⁹ the legislation should expect attacks from numerous custodial and noncustodial parents.

Although the above recommendations seem the logical consequence of careful study of the issues involved, one cannot decide the issues of child support calculation in a merely academic fashion. As one critic of the new Act surmised, "[i]nterestingly, it's a very academic piece of legislation . . . [b]ut what we're dealing with here are people's lives, [the Act] needs a practical approach."²⁶⁰ Canada would do well to adhere to this advice.

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259. See discussion *supra* Part III.A.

260. Harvey, *supra* note 143.

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