THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

April 22, 2022

Via email: Matthew.Chan2@justice.gc.ca

Matthew Chan
Counsel, Family and Children's Law Team
Justice Canada
284, Wellington Street
Ottawa ON K1A 0H8

Dear Matthew Chan,

Re: Shared parenting presumption

I am writing on behalf of the Canadian Bar Association's Family Law Section (CBA Section) in response to your email of April 7, 2022. The CBA Section is pleased to continue its discussions with Justice Canada on potential revisions to the Child Support Guidelines in cases of section 9 shared parenting.

The CBA is a national association of over 36,000 lawyers, law students, notaries and academics, and our mandate includes seeking improvement in the law and the administration of justice. The CBA Section consists of family law specialists from all regions of Canada, with clients representing the full range of individuals impacted by family breakdown.

The CBA Section recommends a rebuttable presumption that each parent pay support to the other in accordance with the table amount for their own income in cases of shared parenting. Creating such a presumption would leave open the possibility for parties to rebut the presumption in cases where it would be inappropriate.

The benefits in the proposed presumption are tied to the objectives of the Guidelines themselves. Those objectives are:

a) to establish a fair standard of support for children that ensures that they continue to benefit from the financial means of both spouses after separation;

b) to reduce conflict and tension between spouses by making the calculation of child support orders more objective;

c) to improve the efficiency of the legal process by giving courts and spouses guidance in setting the levels of child support orders and encouraging settlement; and

d) to ensure consistent treatment of spouses and children who are in similar circumstances.

This presumption is consistent with other provisions in the Guidelines that permit similar arguments. For example, s. 3(2) directs that child support for adult children be determined as if the child were under the age of majority. However, where the Court considers that to be inappropriate, s. 3(2)(b) permits the Court to set child support at the amount the Court considers appropriate, having regard to the condition, means and other circumstances.

Many cases have recognized the difficulty in pursuing a full *Contino* analysis, as presently required by section 9.

For example, the Alberta Court of Appeal said in *MacDonald v. Brodoff*:[1]

> engaging in a full *Contino* analysis is prohibitively expensive for most family law litigants because a fulsome analysis depends on a robust evidentiary record. This includes, at a minimum, statements of assets and liabilities and detailed household budgets that outline not only the total family expenditures, but those related to the children – both fixed and variable. Determining a child expense budget is a daunting and somewhat murky exercise. For example, what portion of a parent's fixed expenses, such as the mortgage, utilities and food, should be attributable to the child? Unless the other parent is prepared to accept those budgets at face value, probing or verifying those budgets through questioning adds an additional layer of delay and expense.

The New Brunswick Court of Appeal described s. 9 as "a vexing section for both lawyers and courts alike." (*J.C.M. v. M.J.M.*, 2018 NBCA 42 (CanLII))

In most cases, applying the full analysis mandated by the present s. 9 is not practical. The difficulty and expense inherent in meeting the requirements of s. 9(b) and (c) of the Guidelines fail to fulfill any of the Guidelines' objectives. By making the determination of the child support amount so difficult, the present s. 9 fails to ensure that children continue to benefit from the means of both their parents, increases conflict and tension between parents, reduces the objectivity of child support calculations, and is detrimental to an efficient court process.

Parties who expend a great deal of time and money for a court process with a full a *Contino* analysis generally do not return to analyze and vary child support when incomes or special expenses change. The Guidelines do not give self-represented parties (or counsel or the Court) guidance on how to navigate these complex calculations. Most provincial recalculation programs are unable to assist families with calculating support in shared parenting. In Manitoba, recent amendments to the *Child Support Service Act* allow the Support Determination Officer to fix support in some cases of shared parenting by applying s. 9(a) only (table amounts) and do not permit determination of support in cases where s. 9 (a), (b) and (c) are all engaged. In many provinces which have recalculation programs, orders in cases of shared parenting are ineligible for recalculation because discretion would be required on the part of the recalculation officer. This also precludes many inter-provincial recalculations for those with shared time arrangements, and have an added layer of complexity due to having to use the ISO process to vary child support.

---

1 *MacDonald v. Brodoff* (2020 ABCA 246) at para. 59.

Requiring the consideration of s. 7 special expenses as part of a global s. 9 analysis compounds these difficult matters greatly. In such cases, parties often do not come back to vary support when these expenses change. There will inevitably be changes to expenses for childcare, health needs, extracurricular activities and education. If base child support and s. 7 expenses are considered separately, it is easier to adjust s. 7 expenses without a complex re-evaluation of child support as a whole.

The CBA Section's suggested presumption would provide guidance to parents and courts, increase predictability, consistency and court efficiency, and reduce parental conflict by making child support calculations more objective. This would also allow parents to more easily adjust support as incomes change, and would allow recalculation services (where available) to recalculate support based on a specified formula. A presumption would also benefit access to justice by increasing the simplicity, predictability and objectivity of calculations of child support in situations of shared parenting. This proposal aligns with Justice Canada's recommendations in its 2002 Report to Parliament.

The vast majority of the shared parenting cases we examined ordered child support by applying a straight offset, and Courts, when asked, were also prepared to deal with s. 7 expenses separately. We reviewed reported cases only. While it is not possible to do a thorough review of those unreported, the results accord with CBA Section members' experiences in unreported court cases, and in cases where parties reached agreements. In recent cases reviewed (from January 1, 2020 to January 31, 2021) this was the common result, whether the courts did a *Contino* style analysis, adverted to s. 9 without much (or any) analysis, or simply applied the straight offset.

Describing the straight offset

The *Income Tax Act* does not currently permit a parent who pays child support to claim that child for tax purposes. There is an exception in cases of shared parenting, where each parent actually pays support for all children, resulting in neither otherwise being able to make the claim. Where only one parent is the payor of support in a shared parenting arrangement (which would be the case in an actual offset), the *Income Tax Act* would require amendment to allow a claim. Alternatively, although the presumption has been discussed as a "straight offset", it would be just as easy (and clearer in many respects) for the presumption to require that **each party pay to the other the table amount that accords with their own income.** This creates two payors, allowing the possibility for each to claim one child, or alternate the claim for a single child where agreed.

One possible addition to this proposal is a new category of s. 7 expenses to be considered in cases of shared parental responsibility. These are items that do not fit in the current definition of s. 7 expenses and are usually paid for by the recipient of child support. For example, if one parent had the majority of parenting time and received child support, that parent would be responsible for purchasing seasonal clothing like outerwear. Unlike ordinary clothing, which each parent in a shared parenting arrangement purchases for use in their own home, outerwear is typically purchased once for use by the children in both homes. This category could be a new s. 7(1.2) and include items such as haircuts, outerwear or other items or services where the cost incurred benefits the children in both homes. Another option would be to add a general category to the list of s. 7 expenses in shared parenting circumstances, subject to the court's discretion. While there has been no discussion of, or adjustment made, for this in the cases we reviewed where the straight offset was ordered, parents who reach agreements to base child support on each parent's table amount sometimes also make provisions for these expenses.

The changes we suggest would better address the objectives of the Guidelines for the growing number of children who reside in shared parenting arrangements. These changes would ensure that children continue to benefit from the financial means of both their parents. It would reduce conflict between parents by offering an objective method to calculate support, promote efficiency and consistency in child support orders, and improve access to justice.

For your convenience, we attach a copy of our April 29, 2021 letter to Claire Farid, which discusses this issue and provides additional detail.

We appreciate Justice Canada's willingness to hear our concerns and suggestions and would be pleased to continue discussions on this important subject.

Yours truly,

(original letter signed by Véronique Morissette for Erin L. Brook)

Erin L. Brook
Chair, Family Law Section