



LAVERY, DE BILLY
BARRISTERS AND SOLICITORS

Suite 4000
1 Place Ville Marie
Montréal, Quebec
H3B 4M4
Tel. : (514) 871-1522
Fax : (514) 871-8977

Suite 500
925 chemin St-Louis
Québec, Quebec
G1S 1C1
Tel. : 1-800-463-4002
Tel. : (418) 688-5000
Fax : (418) 688-3458

Suite 500
3080 boul. Le Carrefour
Laval, Quebec
H7T 2R5
Tel.: (514) 978-8100
Fax: (514) 978-8111

20th Floor
45 O'Connor Street
Ottawa, Ontario
Tel. : (613) 594-4936
Fax : (613) 594-8783

Web site: <http://www.laverydebilly.com>

Associated Firm:
Blake, Cassels & Graydon
Toronto, Ottawa, Calgary
Vancouver, London (England)

MAJOR REFORM IN THE SETTING AND TAX TREATMENT OF SUPPORT

Radical changes have been made to the method of setting support and the taxation of support.

This major reform arose out of the political will of the two levels of government to protect the interests of children and to ensure that parents fulfil their financial responsibilities for the support of their children in a fair and consistent manner.

Thus, in its budget speech in the spring of 1996, the federal government announced its new two fold policy on child support dealing with the elimination of certain tax provisions applicable to support and the method of setting support.

This political will was given concrete expression when changes to the *Divorce Act*, establishing federal guidelines on child support, and to the *Income Tax Act* became law on May 1, 1997.

On the same date, the provincial legislator followed suit with the adoption of legislative changes to the *Civil Code*, the *Code of Civil Procedure*, and a regulation on setting child support and legislative changes to the *Income Tax Act*.

In this manner, the legislator sought to alleviate the inadequacy of some support orders granted by the courts which were resulting in increasing poverty levels of single-parent families throughout the country.

This legislative reform has significant repercussions for all persons subject to the authority of the courts who will

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pay or receive child support as of May 1, 1997, and may affect those who were already paying or receiving support prior to this date.

ELIMINATION OF TAX PROVISIONS

• The Old Regime

Under the old tax rules, spouses who paid support for the benefit of the other spouse and dependent children could deduct the amount of this support from their annual income. On the other hand, spouses receiving the support for their benefit and that of the dependent children were required to include the amount received in their annual income. This explains why courts and lawyers had an obligation to calculate the tax impact of the support payment.

• The New Regime

Since May 1, 1997, the new tax provisions, both at the provincial and federal levels, provide that the payment of support for the benefit of the children will no longer be deductible by the payer nor taxable for the recipient.

Nevertheless, it is important to emphasize that these new tax provisions only apply to child support.

Support payable for the benefit of the spouse will continue to be taxable in this spouse's hands and to be deductible by the spouse who pays it.

This distinction between the tax treatment of child and spousal support will require precise conclusions by the courts on the portion of support aimed at meeting the children's needs and the portion aimed at meeting the former spouse's needs. In the same manner, this distinction must be clearly set out in an agreement providing for an out-of-court settlement between the spouses.

Failing this, the support thus paid will be treated as child support for income tax purposes and therefore, not taxable in the hands of the person receiving it and not deductible by the payer.

• Scope of the New Regime

This new tax regime will apply to child support payable under the terms of a court order or written agreement made after April 30, 1997, that is, as of May 1, 1997. The regime will apply on the date of the judgment or the signature of the agreement. It should be noted that the agreement can be made prior to April 30, 1997 provided that the payment of support starts after May 1, 1997.

In addition, in certain circumstances, these new provisions will apply to child support paid in accordance with an agreement or order made before May 1, 1997, particularly where the two ex-spouses consent thereto.

In fact, both at the federal and provincial levels, it is provided that ex-spouses may by mutual agreement subject themselves to the new tax regime applicable to support by completing a form to be sent to the two ministries.

However, the amount of the support provided for in the agreement signed by the ex-spouses or set by judgment prior to May 1, 1997 cannot be modified.

For example, the support for the benefit of the children was set by a judgment on August 1, 1996 in a gross amount of \$1,200 per month. If the ex-spouses decide to take advantage of the new tax rules, support will be maintained at \$1,200 per month but will not be taxable in the hands of the beneficiary nor deductible by the payer.

Spouses paying or receiving child support under an agreement or judgment made before May 1, 1997 may continue to be subject to the old regime so long as an amending order or agreement has not been

made, unless the agreement signed has already provided for the eventual application of the new tax rules.

● Is the New Regime Advantageous or Disadvantageous?

It may be to one's advantage or disadvantage to become subject to the new tax rules.

Depending on the former spouses' incomes, it may be advantageous for some persons subject to the authority of the courts to apply the old tax rules. For others, the new regime will entail several advantages. It is therefore important for each person to be informed as to the ramifications of this new regime.

THE NEW RULES FOR SETTING CHILD SUPPORT: THE SCHEDULES

Like the federal government, the Government of Quebec sought to alleviate the inadequacy of some support orders granted by the courts which were resulting in the increasing poverty of single-parent families across the country.

● Setting Child Support: The Federal Schedules

- Who do these rules apply to?

The application of the federal guidelines will be limited to couples in which one of the spouses resides outside the province of Quebec. In such cases, these provisions will also apply to orders or agreements made after April 30, 1997.

● The Application of the Federal Schedules

The federal schedules take into account the income of the non-custodial parent only. Thus, the results obtained from the federal tables do not depend in any way

whatsoever on the income of the custodial parent. The federal legislator deemed that custodial parents also contribute in proportion to their income.

Consider the example of former spouses having two children. One of the parents has sole custody. The income of the non-custodial parent is approximately \$60,000. The custodial parent has an annual income of \$45,000. According to the federal child support payment tables, the non-custodial parent must pay net monthly support of \$720 and the custodial parent is deemed to allocate \$551 of his or her income each month to the children's needs.

It should be underlined in this example that if the custodial parent had an annual gross income of \$60,000, the net monthly support payable by the non-custodial parent would likewise be \$720. The net contribution of the two parents to their two children's needs would therefore be \$1,440 per month.

If the non-custodial parent has access rights to the children which represent no less than 40% of the living time with them, the amount of the support will be determined by taking into account the following criteria:

- the amounts set out in the federal support tables applicable to each spouse;
- the increased costs of shared custody arrangements;
- the conditions, means, needs and general circumstances of each parent and any child for whom support is sought.

● **Setting Child Support: The Provincial Schedules**

- **Who do these rules apply to?**

These rules apply to all former spouses residing in Quebec for more than one year and who will be paying or receiving support under a judgment or written agreement made after April 30, 1997 resulting from proceedings brought after this date. In fact, the transitional provisions of the Act provide that these new rules will not apply to proceedings in progress. However, nothing prevents spouses from making themselves subject to them by mutual agreement nor judges from applying them in the exercise of their discretion.

● **The Application of the Provincial Schedules**

The provincial schedules take into account the incomes of both parents to determine the basic needs of the children. These basic needs, known as the “basic parental contribution”, are assumed by the parents in proportion to their respective incomes.

To establish the gross annual incomes, the parents must supply their provincial and federal income tax returns for the last year and their assessment notices as attachments to the “child support determination form” duly completed by each.

To the “basic parental contribution” as established by the schedule are added other expenses relating to the children, more particularly, child care expenses, expenses for post-secondary education, and medical expenses exceeding \$200 per year. These special expenses are assumed by the parents in proportion to their respective incomes less any related advantage, subsidy, deduction or tax credit, as the case may be.

For example, orthodontic expenses or tuition fees for a private institution may be viewed as “special expenses”.

It should be emphasized that non-custodial parents will be entitled to a reduction of their contribution if their visiting and prolonged outing rights represent between 20% and 40% of the custody time. Certain adjustments are also made where the parents have shared custody of the children, sole custody or simultaneous shared custody.

The Regulation respecting the Determination of Child Support Payments provides that support determined in accordance with the formula for setting child support can in no event be greater than 50% of the disposable income of the parent paying the support, unless the court decides otherwise taking into account the parent’s assets, among other things.

Finally, the parents may agree on support that is greater or lesser than the amount calculated according to the schedules. However, they must give reasons for the variance. The court has the power to refuse to ratify an agreement pursuant to which the support agreed upon out of court is less than the amount provided for in the schedules if it considers that the reasons given do not justify the difference. Also, a court which derogates from the schedule in the context of litigation which aims to set support must give reasons for its decision.

To clearly illustrate the differences between the provincial and federal rules, let us reconsider the examples used in the paragraph **Application of the Federal Schedules**.

The spouses have two children. One of the spouses has sole custody of the children. The custodial parent has an annual gross income of \$45,000 and the non-custodial parent, \$60,000. If it is assumed that there are no special expenses associated with the children, net monthly support is \$586.

If the custodial parent, in the same example, has a gross annual income of \$60,000, net monthly support is set at \$527.

In addition, the provincial schedules provide for a reduction in the financial contribution of the non-custodial parent if access rights represent between 20% and 40% of the custody time, which is not the case under the federal schedules, where a reduction only occurs if the access rights of the non-custodial parent account for more than 40% of the custody time.

This reform is significant. All payers and beneficiaries of support are affected in one way or another by these new rules which we have outlined only in general terms.

It would therefore be prudent and advisable for you to consult a lawyer specialized in family law to determine the precise impact of these new rules in your case.

*Claudia P. Prémont
Élisabeth Pinard
Marie Gaudreau*