The Canadian Law of Spousal Support

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I. Introduction

Alimony—or as we call it in Canada, spousal support—appears to be experiencing a resurgence of interest in the United States. Part of the explanation for this may be the American Law Institute's recent proposals for a radical overhaul and expansion of this area of law as part of its massive project dedicated to rethinking the principles of the law of family dissolution. In a bold move intended to unshackle alimony from its historical roots, the ALI recommendations reject "need" as the conceptual cornerstone of this area of the law and replace it with the principle of "compensation" for financial losses incurred or realized upon dissolution of the spousal relationship.

Americans debating the appropriate structure for this area of law might be interested in the way in which the Canadian law of spousal support has developed. Canadian law, which has been heavily influenced by com-

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1. This conceptual shift is reflected in a change in terminology, from "alimony" to "compensatory spousal payments." See American Law Institute, Principles of the Law of Family Dissolution: Analysis and Recommendations (LexisNexis, 2002). The recommendations with respect to spousal support, are found in chapter 5, Compensatory Spousal Payments. Two main compensable losses are identified: the earning capacity loss experienced by primary care-givers due to disproportionate assumption of child-rearing responsibilities during marriage and, in longer marriages, the loss of the marital standard of living. The claims can be stacked, subject to ceilings on the maximum amount of income that may be shared.

2. The ALI proposals have generated a lively debate in the United States. Most applaud the
pensatory principles, has in large part already undergone the kind of transformation proposed by the ALI. The evolution of the Canadian law of spousal support reveals both the strengths of a compensatory approach as well as the challenges which can arise in its implementation, in particular the resiliency of the concept of “need.”

The Canadian law of spousal support has undergone a dramatic evolution over the course of the past twenty years. Starting from a point in the 1980s when the “clean break” model of spousal support dominated, our law has come to recognize an expansive basis for spousal support that would likely surprise many Americans. Reacting against the unfairness of the clean break model, this expansion has been driven in large part by a concern to fairly compensate women for what typically continues to be their disproportionate assumption of child-rearing responsibilities under current family structures.

But in the course of trying to implement this principle, and at the same time to also recognize a broader role for spousal support in responding to the economic dislocation that results when relationships of economic inter-dependency break down, our law has become somewhat confused and lost its sense of guiding principles. The result is a broad obligation, but one that is somewhat uncertain and unpredictable in its actual contours. Increasing dissatisfaction with this state of affairs has led to an interest in developing some form of spousal support guidelines to bring more structure to this area of law. This, in turn, has generated interest in Canada in the American experience with spousal support guidelines, and in particular in the ALI proposals, which have a significant formulaic component, based on the view that guidelines are the appropriate path for future development and reform in this area of law.4

ALI for its attempt to bring more certainty and predictability to this highly discretionary area of law. However, opinion divides on the actual support outcomes generated. While some claim that the proposals would entail an unjustified expansion of spousal support, others are of the view that they are move in the right direction, but will still generate inadequate awards. For commentaries on the ALI proposals see the symposium issues in (2001), 8 Duke J. Gender, L. & Pol’y ’97; (2002), 4 J.L. Fam. Stud. 54; and (2001) B.Y.U. L. Rev. See also J. Thomas Oldham, ALI Principles of Family Dissolution: Some Comments (1997) U. Ill. L. Rev. 801.

The ALI’s proposals to re-conceptualize alimony as a form of compensatory payments may have been indirectly influenced by developments in the Canadian law of spousal support. Claire L’Heureux-Dubé, who until her recent retirement was a justice of the Supreme Court of Canada, is listed as one of the advisors on the ALI project. The concept of “compensation” utilized by the ALI is very broad, and as will become apparent from the discussion below, covers much of what we in Canada call “non-compensatory” support.

3. The methodology on which the ALI guidelines are built is one of income-sharing, whereby spousal support under each of the major compensable claims would be determined by the application of specified percentages to the income difference between the spouses. Through reliance on a “durational factor,” such as, for example, 1.5% or 2% per year, the percentages increase with the length of the marriage or child-care period. A formula is also devised to determine the duration of awards such that they too would be correlated to the length of the marriage or child-care period. For example, use of a specified factor of .5 would yield half a year of support per year of marriage or child-care.

In Canada, as in other western legal systems, spousal support raises a difficult set of issues with which legislators, judges, and academics have been struggling for more than two decades. What is the appropriate role, if any, for spousal support given the basic principles and values of modern family law? How can the spousal support obligation be justified in an era of no-fault divorce, gender equality, and equal (or at least equitable) division of matrimonial property?

The law of spousal support—or alimony as it was traditionally known—was once relatively straightforward. A wife, innocent of matrimonial fault, was entitled upon the breakdown of the marriage to support in an amount that would allow her to maintain the marital standard of living for the rest of her life, an entitlement terminated only by her remarriage or death.

The conceptual foundation of this understanding of spousal support—sometimes labeled the “pension for life” model—was clear. The support obligation was clearly grounded in the status of marriage and was justified through a contractual analysis of the obligations taken on in marriage in which fault and gender played a central role. Essentially, spousal support was a form of expectation damages for breach of contract. Marriage was understood to involve, on the husband’s part, a promise of life-long economic support to his wife. If he subsequently decided to abandon the relationship or was responsible for its breakdown through commission of a matrimonial offense, the “innocent” wife was able to claim what she had been promised by marriage—life-long economic security. The traditional law of spousal support involved a large component of “needs and means”
analysis. Alimony was intended to provide for the wife’s economic needs; and in principle, if not in practice, “need” was to be assessed in the context of the marital relationship and the standard of living the wife had enjoyed during its course.

The introduction of no-fault divorce, which in Canada became available under the 1968 Divorce Act, eliminated the rationales of status and fault that sustained the traditional model of spousal support. A status-based support obligation assumes that marriage in and of itself entails a promise of life-long support, an assumption at odds with the premise of the terminability of marriage on which no-fault divorce rests (and as well, with emerging norms of gender equality that challenged the assumption that women were inherently dependent on men for their economic security). And furthermore, status was intertwined with fault, which was the linchpin of the traditional model.

With the disappearance of fault, an explanation of spousal support as an innocent wife’s expectation damages for her husband’s breach of his marital obligations was no longer sustainable. To the extent that spousal support was understood as simply giving a spouse what he or she would have gotten had the marriage continued, the imposition of the obligation was rendered illegitimate. Absent a finding of wrongful breach of promise, why was one spouse required to use his or her “means” to meet the “needs” of the other post-divorce?

Yet spousal support has persisted as a remedy in the no-fault era, despite the eradication of its theoretical underpinnings—a remedy without a rationale. The theoretical challenge has been to come up with new justifications for the imposition of a continuing spousal support obligation after divorce to replace explanations based on status and fault.

The modern law of spousal support can be seen as a series of ongoing responses to this challenge of justifying the imposition of a post-divorce support obligation between spouses in the context of modern family. The challenge has not been an easy one, raising conflicting policy goals and fundamental disagreements about the nature of marriage and the kinds of obligations it generates. On the one hand, marriage is no longer a life-long union; as a society, we allow people to divorce fairly easily and to form new relationships and commitments. This suggests that the law should place some value on disentangling the spouses and promoting spousal independence after relationship breakdown. As well, we no longer subscribe to the assumption that women are inherently dependent on men for their support. On the other hand, marriage (and cohabitation) can create complex interdependencies that are hard to unravel. Not every former spouse is going to be able to become economically self-sufficient—and certainly not easily or quickly. But to what extent should a former spouse be responsible for such post-divorce need? Not surprisingly, the law in this area has undergone numerous shifts as the appropriate balance between these competing values has been sought.

III. The Evolution of the Law of Spousal Support in Canada: A Search for Guiding Principles

How have Canadian legislatures and courts responded to the challenge of defining the appropriate role of spousal support in the context of modern family law? After a brief description of the governing legislative framework, the story of the evolution in our law of spousal support will focus on a series of three important decisions in which our highest court, the Supreme Court of Canada, attempted to clarify the general principles that structure this area of the law. The first was Pelech v. Pelech in 1987, which favored limited support obligations in the interests of promoting clean breaks and finality. The second was the ground-breaking Moge v. Moge decision in 1992, which endorsed an expansive “compensatory” basis for spousal support directed at redressing the economic disadvantage suffered by spouses who have sacrificed labor force participation to care for children. The third was the Bracklow v. Bracklow decision in 1999, which further expanded the law by recognizing a “non-compensatory” basis for spousal support in meeting “needs” that exist when relationships of economic dependency break down.

In the interests of creating fairer outcomes for divorced spouses, our law has generated a very broad support obligation. At the same time, our law has accepted the proposition that marriage per se—i.e., status alone—

7. The challenge was made even more difficult by the introduction of the new remedy of matrimonial property division, intended to compensate spouses for their contributions to the marriage and to provide a capital base to set them on their post-divorce paths as separate individuals.
8. Unlike the situation in the United States, in Canada spousal support obligations apply to unmarried couples, both opposite-sex and same-sex, as well as to married couples. This makes it even more difficult, in Canada, to justify the spousal support obligation as an incident of the formal status of marriage. For more discussion on the legislative framework of spousal support in Canada, see infra note 12.
9. [1987] 1 S.C.R. 801. Pelech was one of a trilogy of cases decided at the same time; the other two cases were Richardson v. Richardson, [1987] 1 S.C.R. 857 and Caron v. Caron, [1987] 1 S.C.R. 892.
does not create an entitlement to support. The problem remains of how to structure our broad support obligation so that it does not revert to the traditional model of support. As well, in recognizing multiple bases for spousal support, our law runs the risk of fragmentation, raising the challenge of how to provide sufficient guidance to judges and lawyers to enable support outcomes to be predicted with some degree of certainty.

A. The Legislative Framework for Spousal Support in Canada

Under the Canadian constitution, divorce is a federal power and hence, unlike Americans, we have a national law of divorce and of spousal support. Spousal support, when sought in the context of a divorce, is governed by provisions in our federal divorce legislation as interpreted, ultimately, by the Supreme Court of Canada. Although there are also provincial laws governing spousal support outside the divorce context, the focus here will be on support determinations under federal divorce legislation, which have tended to exert a unifying influence on decisions under provincial support legislation.

The statutory provisions in our divorce legislation are an important starting point in understanding our system of spousal support. However, spousal support legislation in Canada, both at the federal and provincial level, tends to take the form of relatively vague provisions incorporating a variety of factors. Much room is thus left for judicial discretion in the interpretation and application of the legislation.

Our first piece of national divorce legislation, the 1968 Divorce Act, for example, provided that support was to be awarded by the court “if it

12. Section 91(26) of the Constitution Act, 1867, gives the federal Parliament power over marriage and divorce. The divorce power has been interpreted to allow the federal government to deal with matters of “corollary relief” sought in the context of divorce—which includes custody and access, spousal support and child support. Provincial governments in Canada also have significant jurisdiction over family law stemming from their powers over “property and civil rights” and “matters of a purely local or private nature in the province” (sections 92 (13) and (16) respectively of the Constitution Act, 1867). Provincial laws govern matrimonial property division. As well, each province has its own laws of custody and access and child and spousal support which apply outside of the divorce context, in cases involving unmarried couples or married couples who have separated but are not seeking a divorce.

13. In general, despite some differences in statutory language, the interpretation of provincial spousal support statutes has been guided by the same basic principles, as articulated by the Supreme Court of Canada, that guide determinations under the Divorce Act. Although Canada is a federal state, we have a unified court system within which superior court judges deal with matters arising under both provincial and federal law. Appeals of matters arising under both federal and provincial laws are heard first by provincial courts of appeals and then by the Supreme Court of Canada. The Supreme Court of Canada is thus the ultimate authority on the interpretation of provincial legislation; it is therefore not surprising that its interpretations of federal divorce legislation influence the interpretation of provincial support legislation.

14. Supra note 5, s.11(1).

thinks it fit and just to do so having regard to the conduct of the parties and the condition, means, and other circumstances of each of them.” In the 1985 Divorce Act, the legislation now in force, the federal government attempted to provide somewhat more guidance by setting out, in s. 15.2 (6), four principles or objectives for spousal support:

15.2 (6) An order . . . that provides for the support of a spouse should
   (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
   (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage and above the obligation apportioned between the spouses pursuant to subsection (8);
   (c) relieve any economic hardship of the spouses arising from the break-down of the marriage; and
   (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

In addition, s. 15.2 (4) lists certain factors to be taken into account in making support orders either for a spouse or child:

15. 2 (4) In making an order . . . the court shall take into consideration the condition, means, needs and other circumstances of each spouse and of any child of the marriage for whom support is sought, including
   (a) the length of time the spouses cohabited;
   (b) the functions performed by the spouse during cohabitation; and
   (c) any order, agreement or arrangement relating to support of the spouse or child.

Finally, s. 15.2 (5) is more specific, indicating one factor that may not be taken into account—spousal misconduct:

15.2 (5) In making an order [for spousal support or an interim order] the court shall not take into consideration any misconduct of a spouse in relation to the marriage.

Thus in contrast to the situation in many American jurisdictions, our law of spousal support has completely removed fault as a relevant consideration, at least in principle.

On the positive side, the 1985 legislation is an improvement on the 1968 legislation in providing somewhat greater guidance as to the objectives of spousal support. It has been praised for its recognition of diverse objectives and factors, thereby allowing spousal support awards to be responsive to the diversity of marital arrangements. On the other hand, the listing of a broad range of diverse criteria and objectives also indicates a legislative inability

15. Divorce Act, R.S.C., 1985, c. 3 (2d Supp.). The current numbering of the support provisions of the Act reflects changes made in 1997 to accommodate the introduction of child support guidelines. For further discussion of our child support guidelines, see infra, note 79.
to meet the challenge of defining a clear role for spousal support. The legislation establishes multiple objectives for spousal support—compensating spouses for the economic impact of the marriage and marital roles, meeting post-divorce needs, and encouraging spousal self-sufficiency after divorce, to identify three. Although in some cases these objectives can work together and reinforce one another, in other cases, depending on which is emphasized—compensation, need, or self-sufficiency—they can suggest very different understandings of the purpose of the support obligation and lead to very different support outcomes.

The difficult task of reconciling these multiple objectives and dealing with the conflicts and tensions between them—in short, of bringing some theoretical coherence to the law of spousal support—has thus been left to the courts, and ultimately to the Supreme Court of Canada. As will be shown below, the Court’s understanding of the basic principles that underlie the spousal support obligation has shifted over time—with the conceptual framework shifting from a clean break model, to a compensatory model, to an income-security or needs-based model of spousal support.

**B. Pelech and the “Clean Break” Model of Spousal Support**

The first response to the theoretical challenge of justifying spousal support in the new world of no-fault divorce is by now a very familiar one: The answer was that it was no longer possible to justify the imposition of extensive post-divorce support obligations. Spousal support was only justified for a limited transitional period to allow unemployed spouses a period of time to “rehabilitate” by acquiring or upgrading skills to enable them to seek employment and become self-sufficient. Under various rehabilitative and transitional theories, the new purpose of spousal support was to facilitate spousal self-sufficiency and independence, and to encourage a “clean break” between the spouses as quickly as possible. After a relatively short period of transition, a former spouse’s “needs” were to be satisfied by his or her own income, or barring that, the state.

In the United States, this “clean break” model of spousal support was reflected in the 1970 *Uniform Marriage and Divorce Act* which directly or indirectly influenced much state legislation. In Canada, the Law Reform Commission of Canada’s very influential 1975 *Working Paper on Maintenance* placed considerable emphasis on the rehabilitative and transitional nature of the spousal support obligation. In Canada throughout the 1980s there was an increasing emphasis in spousal support decisions on the objective of promoting spousal self-sufficiency after divorce, particularly after the enactment of the 1985 *Divorce Act*. These trends were reinforced and fuelled by three decisions of the Supreme Court of Canada in 1987—the so-called *Pelech* trilogy.

On their facts, all three of the cases in the *Pelech* trilogy involved situations where the spousal support obligation had been terminated under the terms of a separation agreement between the spouses. The former wives, who in each case were unemployed and in difficult economic circumstances, had requested that the court vary or set aside the agreements and award spousal support pursuant to the terms of the *Divorce Act*. The result in all three cases was a denial of spousal support. Clearly endorsing the policy value of promoting finality between former spouses and allowing them to “put their mistakes behind them and get on with their lives,” the Supreme Court of Canada ruled that final support agreements should not be easily interfered with. The Court articulated a very stringent test for overriding final support agreements—that of a radical change in circumstances causally connected to the marriage.

Although these cases were technically contracts cases, they drew on an underlying vision of spousal support—or at least were interpreted in that way

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16. Compensatory objectives can also cover the economic consequences of post-divorce child-rearing responsibilities. However, as will be shown below, in the discussion of “parental partnership” theories, recognition of ongoing parental responsibility can also be seen as an independent objective.

17. As will be discussed further below, a “parental partnership” or “parental responsibility” model of spousal support is also emerging in lower courts, but this model has not been explicitly endorsed by the Supreme Court of Canada.

The so-called “causal connection” test that emerged from the Pelech trilogy came to represent a particular understanding of spousal support as intended to meet only those needs caused by the marriage. Although this test could, in principle, be linked to broader compensatory theories of spousal support, which will be discussed below, the narrow and strict interpretation of the causal link offered in the trilogy and subsequent cases meant that it was used more often to deny connection than to find it. The primary value informing the application of the causal connection test was that of severing the ties between the spouses as quickly as possible and relieving former spouses of responsibility for post-divorce support. Pelech clearly rested on a “clean break” model of spousal support.

The trilogy cases were actually decided under the 1968 Divorce Act. However, the 1985 Divorce Act was already in force and lower courts used Pelech to guide their application of the new legislation. Despite the fact that the 1985 legislation contained an array of spousal support objectives, courts tended to emphasize the fourth objective—that of promoting spousal self-sufficiency. Time-limited and transitional support became the norm, often even after lengthy traditional marriages. The quantum of support when awarded was typically modest—subject to implicit ceilings generated by the concept of “need,” which was understood more often in terms of basic need rather than in the context of the marital standard of living. Full-time employment of any sort typically meant the termination of spousal support.

The clean break model of spousal support did entail predictability and certainty—support would be limited, both in terms of quantum and duration, by the value of spousal self-sufficiency. However, it had serious failings on the fairness front. By the late 1980s and early 1990s a substantial body of

23. In its 1992 decision in Moge, supra note 10, which will be discussed further below, the Supreme Court of Canada ruled that this was an erroneous interpretation. Wishing to distance itself from the clean break model of spousal support, the Court held that the Pelech “causal connection” test was applicable only in cases in which the spouses had negotiated a final support agreement and was not a general test for spousal support.

24. In Pelech the former wife’s needs were found to be caused by her mental illness and not the marriage; even more surprisingly, in Richardson, a case of a twelve-year marriage in which the wife had withdrawn from the labour force for five years after the birth of the parties’ second child, her post-divorce unemployment was found not to be causally connected to the marriage. The reason given was that she had been employed during the first part of the marriage as a clerk-typist and had work experience.

25. In Moge, [1992] 3 S.C.R. 813, the Supreme Court of Canada, attempting to distance itself from Pelech without actually overruling it, subsequently ruled that this was another erroneous reading of Pelech. They held that Pelech was intended to apply only to decisions under the 1968 Divorce Act, not the more expansive regime of spousal support envisioned under the 1985 Divorce Act.


literature had developed documenting the severe decline in the economic circumstances of women and children after marriage breakdown. Attention was focused not only on the plight of homemakers left impoverished after long, traditional marriages, but also on that of younger mothers left with custody of children. The clean break model of spousal support, which was seen as contributing to the feminization of poverty, came under increasing criticism in Canada for its unfair treatment of former spouses. In its 1992 decision in Moge, the Supreme Court of Canada, building on developments in provincial appellate courts, responded to those criticisms and rejected the clean break model of spousal support. Drawing its inspiration in part from academic writing, the Court endorsed a much more expansive, “compensatory” model of spousal support.

C. Moge and Compensatory Support

Compensatory theories have loomed very large in modern attempts to justify the spousal support obligation. These theories, of which Ira Ellman’s “The Theory of Alimony” is the best-known example, draw heavily on economic theory to suggest that imposition of a post-divorce support obligation can be justified by the need to compensate a spouse for earning capacity or “human capital” losses arising as a result of the roles adopted during the marriage. Although the various compensatory theories differ in their details, the central principle is one of compensation for economic loss. Under such theories the marital standard of living or the other spouse’s income is, in principle, irrelevant. The benchmark for assessing spousal support is the earning capacity the spouse would currently have in the paid labour market had he or she not married.

Under compensatory theories, spousal support will not be available in all marriages to respond to post-divorce economic need; rather, it will be available only in cases where an earning capacity loss traceable to the marriage can be established. While offering a fairly restrictive basis for spousal support awards, such theories have the potential to support fairly generous awards in cases where there have been significant losses of earning capacity.


28. Many of the compensatory theories are grounded in concerns about economic efficiency and creating incentives for sharing behavior in families that will maximize marital gains.

29. Under Ellman’s theory, earning capacity loss claims would be confined to cases either where the earning capacity loss was incurred to further the economic advancement of the other spouse, such as a move to facilitate one spouse’s career, or where it resulted from child care responsibilities. Earning capacity losses incurred for lifestyle reasons would not give rise to claims.
because of lengthy periods of work-force interruption—certainly more generous awards than those under a strict clean break approach.

Compensatory theories have attracted substantial support as offering a sound, theoretical justification for a post-divorce spousal support obligation within the structure of modern family law.\textsuperscript{30} The ALI proposals for reconfiguration of the law of alimony draw heavily on compensatory theories, as reflected in the change of terminology to “compensatory spousal payments.” One of the main compensatory claims envisioned by the ALI is for earning capacity loss by primary caregivers.\textsuperscript{31}

Compensatory theories have had a very significant impact on the evolving Canadian law of spousal support. The Law Reform Commission of Canada’s 1975 working paper on maintenance\textsuperscript{32} gave indirect support to the compensatory principle in its articulation of the idea that the right to spousal support flows not from the fact of marriage, but from a division of functions within the marriage that has had the effect of hampering the ability of a spouse to provide for himself or herself. Although still drawing on the traditional concept of “need,” the Law Reform Commission re-conceptualized spousal support as a response to “needs caused by the marriage.” As a result of their linkage to the “causal connection” test from Pelech, these early compensatory ideas received a very restrictive interpretation. More direct and explicit endorsement of the compensatory principle, and in a more expansive form, came with the Supreme Court of Canada’s ground-breaking decision in Moge.\textsuperscript{33}

Moge involved an unlikely set of facts to make its way to the Supreme Court of Canada. The case involved a very low-income immigrant couple whose sixteen-year marriage ended in 1973. The husband, Mr. Moge, had worked throughout the marriage as a welder. Mrs. Moge, who had married very young and had limited education, had cared for the couple’s three children during the day and worked part-time as a cleaner at night. When they separated, Mrs. Moge was awarded custody of the children and Mr. Moge was ordered to pay combined child and spousal support of $150 per month. Mrs. Moge continued to work part-time as a cleaner and raised the children. In 1989—sixteen years after their separation\textsuperscript{34} and at a point when all of the children had reached the age of majority—Mr. Moge applied to terminate spousal support. At that time Mrs. Moge was earning approximately $800 a month, while Mr. Moge had an annual salary of approximately $24,400.

The lower court decisions reflected the shifting terrain of spousal support law. Mr. Moge was successful at trial, the judge finding that Mrs. Moge had had sufficient time to become self-sufficient. The Manitoba Court of Appeal reversed, reinstating the support order of $150 per month. Drawing on the compensatory language in what is now s.15.2(6)(a) of the Divorce Act, the majority found that Mrs. Moge continued to suffer economic disadvantage from her role in the marriage. But a dissenting judge disagreed, finding no disadvantage because the Moge’s marriage had not been a traditional one as Mrs. Moge had worked throughout. The Supreme Court of Canada dismissed Mr. Moge’s appeal, leaving Mrs. Moge, who had not appealed on the issue of quantum, with her support order of $150 per month. In the course of reaching this result, the Court took the opportunity to rethink the foundational principles of spousal support under the Divorce Act.

The main judgment in Moge was written by Justice L’Heureux-Dubé. Her judgment clearly rejected the clean break model of spousal support that had been adopted by many lower courts throughout the country, finding that it was both inconsistent with the intention of the legislature and unfair in its results. Focusing on the statutory language in the Divorce Act, she noted that there were four spousal support objectives and insisted that each of them had to be given weight. Lower courts were found to have seriously erred in using Pelech, a case primarily about the effect of spousal agreements, as a general guide to the interpretation of the Divorce Act spousal support provisions. They were also found to have erred in giving undue emphasis to the objective of promoting spousal self-sufficiency.\textsuperscript{35} L’Heureux-Dubé J. took particular objection to the deeming of self-sufficiency after the passage of time, when actual self-sufficiency had not been obtained, and to the penurious level at which self-sufficiency was often set.

In place of the clean break model of spousal support, Moge offered a compensatory model. Drawing on a vast body of academic writing examining the role of spousal support in the modern context, L’Heureux-Dubé J. endorsed the principle of compensation as the most appropriate basis for the modern law of spousal support and as the foundation for the interpretation of the four statutory objectives for spousal support in the 1985

\textsuperscript{30} See Carbone, supra note 6.
\textsuperscript{31} See supra note 1. However, as will be discussed further below, the method chosen for implementing this claim seems, at least on the surface, to be at odds with the basic premises of the compensatory theory. The claim would be quantified by applying a specified percentage to the income disparity between the spouses. The applicable percentage would be determined by a “duration factor” that would make the percentage responsive to the number of years the spouse claiming support assumed child care responsibilities during the marriage; the duration of the claim would also be proportionate to the length of the child-rearing period.
\textsuperscript{32} Supra note 19.
\textsuperscript{33} See Moge [1992] 3 S.C.R. 813
\textsuperscript{34} Nine years after their divorce—they were divorced in 1980.
\textsuperscript{35} On the Court’s interpretation of the spousal support provisions of the Divorce Act, the objective of promoting self-sufficiency continues to play a role. Spouses have an obligation after divorce to contribute to their own support commensurate with their abilities. However, if the marriage has had a significant economic impact on a spouse’s earning capacity, spousal support should continue to be paid to recognize that, and thus to “top-up” a spouse’s earnings.
Divorce Act. The starting point of the compensatory model, as she understood it, was that "marriage per se does not automatically entitle a spouse to support." Nor could spousal support be determined by an exclusive focus on the "needs and means" of the parties. Instead the primary focus of the inquiry when assessing spousal support under the compensatory model was the economic impact of the relationship on the parties:

[The support provisions of the Act are intended to deal with the economic consequences, for both parties, of the marriage or its breakdown.... [the] focus of the inquiry when assessing spousal support after the marriage has ended must be the effect of the marriage in either impairing or improving each party's economic prospects.]

The compensatory principle, as articulated in Moge, was admittedly an extremely broad one. In its broadest formulation in the judgment it was presented as a principle requiring the equitable distribution between the spouses of the economic consequences of the marriage and its breakdown. This principle could be (and over time has been) interpreted in many different ways in light of many different theories of spousal support. In particular, the concept of compensation for the consequences of the marriage breakdown can encompass the economic dislocation caused by the marriage breakdown and the loss of marital standard of living—considerations not relevant under a pure compensatory approach.

However, at the core of the Moge judgment was a concern with the central preoccupation of compensatory theories, i.e., the need to provide compensation for loss of economic opportunity as a result of roles adopted in the marriage (or in terms of our statutory language, for the "economic disadvantages" of the marriage). The primary focus of the Moge judgment was what remains, despite new norms of gender equality, the typically gender-based role division in families around child care, both during marriage and after marriage breakdown. Drawing on economic studies, L’Heureux-Dubé J. argued that economic costs of women’s sacrifices of labor force participation were significant and had been ignored or underestimated by the courts when determining spousal support. One of the main messages of Moge was that women should be fairly compensated for their child-rearing responsibilities in the home. However, the compensatory principle, as articulated by L’Heureux-Dubé J., was not restricted to a focus on the economic losses or disadvantages suffered by the wife in the typical

domestic arrangement. She also emphasized the need to consider the economic advantages conferred by the marriage, specifically the advantage conferred upon the husband, as a result of the wife’s economic sacrifices, of an enhanced earning potential because of his ability to pursue his economic goals unimpeded by family responsibilities. Thus the compensatory principle, as articulated in Moge, also had a restitutionary dimension.

Assessing Mrs. Moge’s claim for spousal support under the Divorce Act, interpreted in light of underlying compensatory principles, the Court found that she was entitled to continued support. The Court concluded that she had suffered economic disadvantage due to her role in the marriage, where she had been primarily responsible for child care and her employment had clearly been secondary to that of his husband; that her long-term responsibility for the raising of the children after the spouses’ separation had further had an impact on her ability to earn an income; and finally, that she had failed to become self-sufficient despite her conscientious efforts. In concluding that Mrs. Moge had suffered disadvantage because of her role in the marriage, the Court adopted a very generous view of causation, rejecting Mr. Moge’s argument that, given her limited education, Mrs. Moge would have been a cleaner even if she had not married. Having found that Mrs. Moge had clearly been a secondary earner in the marriage, the Court essentially presumed economic disadvantage. This was a very different view of “causal connection” to the marriage than that which had prevailed under the Pelech trilogy.

Moge was a remarkable decision both for its strong grounding in the sociological reality of women’s lives and for the Court’s willingness to engage seriously with the theoretical underpinnings of the modern spousal support obligation. In its application, the decision had a dramatic impact on our law of spousal support. Put simply, with the demise of the clean break model, spousal support awards in Canada became much more generous and spousal support re-emerged as a significant legal obligation. Most notably, time-limited orders arbitrarily defining the time period in which self-sufficiency was to be achieved became much rarer. As well, particularly in cases of longer marriages, top-up support that continues on a permanent basis even after a former spouse has found employment became common.

In terms of the conceptual structure of our law, the language of the compensatory model started to permeate the analysis of spousal support

37. Pelech, 1 S.C.R. at 848-49. In adopting this compensatory understanding of spousal support, L’Heureux-Dubé J. linked spousal support to marital property division. Like marital property division, spousal support was concerned with the equitable distribution between the spouses of the resources generated by the marriage. The absence of accumulated assets in many cases meant that spousal support would be required in order to effect equitable distribution.
38. As Mrs. Moge had not litigated the issue of quantum and had simply requested the continuation of support at $150 per month, the Court was not required to actually apply its compensatory model to the determination of quantum.
the spouses, thus making the payor’s income relevant to the loss. Such a measure involves a significant departure from the theoretical grounding of the compensatory principle in the concept of earning capacity loss.\(^{41}\)

Canadian courts also responded to these implementation problems in the post-Moge case law by developing proxy measures of economic loss. They showed no enthusiasm for the introduction of expert economic evidence documenting loss of earning capacity.\(^{42}\) Instead, "need"—the traditional conceptual anchor of spousal support—became a convenient proxy measure of economic disadvantage. A spouse in economic need was assumed to be suffering economic disadvantage as a result of the marriage; and conversely, a spouse not in need was presumed not to have suffered any economic disadvantage as a result of the marriage.\(^{43}\) And, at least in longer marriages, need was measured against the martial standard of living, a measure suggested by the Supreme Court of Canada itself in *Moge*:

As marriage should be regarded as a joint endeavour, the longer the relationship endures, the closer the economic union, the greater will be the presumptive claim to equal standards of living upon its dissolution.\(^{44}\)

The “rule” that emerged in many lower court decisions was that the goal of spousal support, in longer marriages, was to provide the support claimant, when combined with what she might reasonably be expected to earn, with a “reasonable” standard of living judged in light of the marital standard of living.\(^{45}\) Thus the compensatory model of spousal support started to collapse into something that resembled a more traditional support

40. In general, restitutionary claims for contribution to the other spouse’s earning capacity have been confined to cases where one spouse has made a very direct and significant contribution, financial or otherwise, to the other’s career. Indirect contributions, in the form of assumption of child-rearing responsibilities, have generally been understood to generate claims based on the earning capacity loss of the care-giver. However, in a few cases courts, drawing on partnership principles in matrimonial property law, have taken the view that a wife’s non-financial contributions to the marriage, particularly the assumption of a disproportionate share of child-rearing responsibilities, should be valued in terms of the earning capacity the husband was allowed to develop during the marriage. This has been seen as a more appropriate reflection of the dynamics of the marital relationship than treating the husband as a tort-feasor paying the wife damages for her loss. *See, for example, Elliot v. Elliot* (1993, 48 R.F.L. (3d) 237, where the Ontario Court of Appeal refused, for this reason, to rely upon economic evidence of earning capacity loss to quantify spousal support, and *Waterman v. Waterman* (1996, 16 R.F.L. (4th) 10 (Nfld. C.A.) in which the court re-conceptualized compensatory support as a form of sharing a marital asset (i.e., income) rather than as compensation for loss. For a recent case in which the spousal support analysis recognized the wife’s contribution to the husband’s financial success through assumption of responsibility for the home and child care see *Marinangeli v. Marinangeli* (2003, 38 R.F.L. (5th) 526 (Out. C.A.) where the wife was found entitled to an increase in spousal support based on a post-divorce increase in the husband’s income because she had contributed to his earning capacity by supporting him while he obtained his education and caring for the children during the marriage.

41. In his original article, *supra* note 27, Ellman acknowledged the difficulties of implementing the compensatory principle and talked about reliance on proxy measures of loss based on statistical evidence of average outcomes in such cases. He recognized that in the end precision is not obtainable and that the determination of alimony claims will rest upon the rough justice of trial judge discretion. He asserted, nonetheless, that we are better off knowing the principle and what we should be doing, even if we cannot do it perfectly. As chief reporter for the ALI project on the Principles of Family Dissolution, *supra* note 1, Ellman endorsed a proxy measure for the loss incurred by primary care-givers that arguably involves significant compromises of principle—a measure based on income disparity between the spouses at the point of marriage breakdown, thus making the income of the payor the measure of economic loss; see discussion *supra* note 31. The explanation offered by the ALI drafters is the somewhat contestable assumption that people tend to choose spouses of similar economic status. Thus the rich wife, had she not assumed primary responsibility for child-rearing, would likely have had the same income as the husband.

42. Although there were predictions, shortly after the release of the Supreme Court of Canada’s decision in *Moge*, that expert economic evidence of earning capacity loss would become a common feature of spousal support litigation, Canadian courts were not receptive to such evidence. After the Ontario Court of Appeal’s refusal to base an award on such evidence in *Elliot, supra* note 40, it virtually disappeared.

43. A move that tended to last women who had been employed during the marriage.


45. In some cases the principle for long marriages has been expressed as providing similar lifestyles for each of the spouses. The use of need and standard of living as proxy measures for loss of opportunity is discussed by Bastarache J. A. (as he then was) in *Ross v. Ross* (1995), 16
could not make claims to support based on losses or gains in spousal earning capacities during the marriage, some judges understood the inevitable logic of the compensatory model to require a denial of support spousal support, or at best limited transitional support. Even after long term traditional marriages, some judges imputed income to ill or disabled spouses, on the rationale that the former spouse was not responsible for the economic consequences of the illness.

Many other judges, faced with similar situations and unable to accept the results of a pure compensatory model, emphasized that the compensatory language both in the Divorce Act and Moge included compensation for the consequences not just of the marriage, but also of the marriage breakdown. Thus the Moge compensatory principle was stretched to cover the loss of access to the other spouse’s income as a result of the marriage breakdown. On this interpretation of the compensatory principle, spousal support was available to meet post-divorce needs as they would have been met had the marriage not broken down.

While initially the dissatisfaction with the compensatory model were reflected in reconfigurations of the compensatory principle, in its 1999 decision in Bracklow, the Supreme Court of Canada responded more directly by restructuring the spousal support framework so as to encompass alternative theories under the label of “non-compensatory” support. Unfortunately, in the course of trying to create a broader basis for spousal support, our law began to lose its sense of guiding principles.

D. Bracklow and Non-Compensatory Support

While the early compensatory theories, grounded in the loss of opportunity principle, have attracted significant support, they have also been criticized as being based on a distorted and inadequate conception of the marital relationship, one which is unduly individualistic and market-based. New theories of spousal support have emerged that emphasize the relational aspect of marriage and the merger of economic (and non-economic) lives that marriage involves. Some of these theories style them-

50. In addition to Singer, supra note 49, see Ianc Singer, Divorce Reform and Gender Justice, 57 N.C.L.R. 1103 (1989); Stephen D. Sugarman, Dividing Financial Interests Upon Divorce in Divorce Reform at the Crossroads, (Stephen D. Sugarman & Herma Hill Kay, eds.) (1990); and Milton C. Regan, Jr., FAMILY LAW AND THE MEANING OF MARRIAGE (1993) and ALONE TOGETHER: LAW AND THE MEANING OF MARRIAGE (1999). These income-sharing proposals are contentious. For some these theories more accurately capture the nature of the marital relationship and offer a fairer distribution of economic resources at its end than either the clear break or compensatory (economic loss) theories. The use of the length of the marriage to structure and limit the extent of the support obligation is seen as sufficient to distinguish these...
Dissatisfaction with the limitations of a pure compensatory approach confined to the redress of earning capacity losses caused by the marriage has also been expressed in Canadian law, beginning in the post-Moge case law and culminating in the Bracklow decision of the Supreme Court of Canada. However, with a few exceptions where courts have drawn on concepts of marital partnership, this dissatisfaction has tended to manifest itself in the revitalization of the concept of need, rather than in any explicit reliance on concepts such as merger over time and income-sharing.

Bracklow was a case that clearly raised the limits of pure compensatory analysis. It involved a relatively short, second marriage and a spouse who became disabled during the course of the marriage. The Bracklows’ relationship lasted about seven and a half years. After cohabiting for four years, the parties married in 1989, only to separate three years later in 1992, when Mrs. Bracklow was age forty-three. The marriage was a second relationship for both parties, and they had no children of their own. Both parties were employed at the beginning of the relationship and they structured their relationship on the basis of financial independence. They maintained separate bank accounts and credit cards and shared household expenses. However, as a result of health problems that predated the relationship, Mrs. Bracklow ceased full-time employment in 1989. By 1991, she had become seriously ill, suffering from a variety of physical and psychological problems that left her completely incapacitated and unable to work and financially dependent upon Mr. Bracklow. The marriage ended about a year later. Mrs. Bracklow’s only income was a government disability pension of $787 per month, while Mr. Bracklow had an annual salary of approximately $44,000.

Mr. Bracklow paid interim spousal support, but in the divorce proceedings in 1995 the trial judge dismissed Mrs. Bracklow’s claim for any

his concept of merger over time, with the result that the support claim becomes more extensive the longer the marriage has lasted. The claim would give the lower-income spouse a percentage share of the income difference between the spouses. The percentage would increase with the length of the marriage in response to a durational factor of, for example, 1.5% per year of marriage. The duration of the award would also be proportionate to the length of the marriage (for example, a factor of .5 would yield half a year of support for every year of marriage). On this formula, shorter marriages would generate relatively low awards. This aspect of the ALI proposals has been criticized both for providing awards that are too low and awards that are too generous, thus reflecting the contentious nature of claims based on loss of the marital standard of living.

53. Supra note 11.
54. See cases discussed supra note 40.
55. Mrs. Bracklow had two children from her previous marriage who lived with the parties during the first part of their relationship, but who were independent by the time of the separation.
56. At the time of the hearing before the Supreme Court of Canada his income had increased to approximately $70,000 per year.
ongoing support. Reading Moge as having mandated essentially a tort-based approach to spousal support, the trial judge held that Mrs. Bracklow was not entitled to spousal support because the marriage had not caused her any economic disadvantage. He found no compensatory basis for her claim because her economic hardship was the result of her illness, not the marriage or its breakdown. The British Columbia Court of Appeal upheld that decision. The issue that was placed before the Supreme Court of Canada was that of entitlement: Was Mrs. Bracklow entitled to spousal support? The Supreme Court of Canada answered yes. Mrs. Bracklow’s appeal was allowed, and, her entitlement to support having been established, the matter was remitted back to a trial judge for determination of the appropriate quantum and duration.

As in Moge, the Court took the opportunity to review the entire structure of spousal support rather than simply issue a narrow ruling on the facts. The Court clarified that the spousal support provisions of the Divorce Act did not envision an exclusively compensatory model. The Court identified three different bases for spousal support—compensatory, non-compensatory, and contractual—and found that our Act encompassed all three. While little was said about the contractual basis of support, non-compensatory spousal support was identified as being based on “need alone.” Thus a spouse experiencing economic need could claim spousal support even if he or she could make no claim that financial opportunities were given up because of the relationship and the roles adopted in the marriage or that he or she had contributed to the other’s financial success.

Non-compensatory support was justified by a view of marriage as a relationship of mutual support that generates expectations and obligations—obligations that may be permanent. Marriage, the Court held, can create complex interdependencies that may be difficult to unravel upon separation, with the result that former spouses may not always find it easy to move from the mutual support status of marriage to the absolute independence of single life. The conventional concepts of need and dependency around which spousal support law have been historically structured thus returned to our law in a full-fledged way.

Given some of the limitations of a narrow compensatory theory based on economic loss it was not surprising to see some expansion of the basis for spousal support in Bracklow. The spousal support provisions of our Divorce Act, in particular the reference in s. 15.2(6)(c) to the relief of economic hardship caused by the breakdown of the marriage, do not contemplate a pure compensatory model. Moge had actually recognized this in its broad formulation of the compensatory principle, which covered the economic consequences of the marriage breakdown. It seems clear that one of the functions of spousal support, at least under the Canadian Divorce Act, is to respond to the economic dislocation caused when relationships of economic dependency break down—whether that role is encompassed under a broadened definition of compensatory support or, as the Court chose in Bracklow, is given the new label of non-compensatory. The trial judge in Bracklow interpreted Moge in an extreme and atypical way as excluding any such role for spousal support.

What many had hoped for from the Bracklow judgment, however, was guidance in thinking about how to structure awards made on the basis of need and loss of the marital standard of living. Was transitional support generally the appropriate response?58 Or was a spouse like Mrs. Bracklow, who could not become self-sufficient after marriage but for reasons that had nothing to do with the marriage itself, entitled to permanent support on the basis of need alone? And if so, at what level? Unfortunately, Bracklow, which is a poorly reasoned decision, provided no clear answers to these questions, leaving trial judges and lawyers only with the amorphous concept of “need.”

The Court made no attempt to anchor non-compensatory support in any of the theoretical literature offering alternatives to the compensatory model, and refused to provide any firm guidance on how such obligations were to be structured. In contrast to Moge, where the Court tried to articulate a set of over-arching principles, the Court in Bracklow preferred to view spousal support as primarily a function of the statutory language in the Divorce Act. The Court rejected the view that there is any dominant model or philosophy of spousal support in the Act. The inclusion of multiple objectives and factors was seen as encompassing many different models of spousal support. In the Court’s view, spousal support determinations did not involve the choice of one model over another, but rather the sensitive application of all of the relevant factors and objectives to the facts of particular cases. Spousal support was essentially discretionary and fact-driven—the domain of the trial judge. There could be no hard and fast rules.

True to this view, the Court articulated no coherent concept of non-compensatory support and offered little concrete guidance about how to shape awards based on “need” alone. And what it did say is open to multiple interpretations. There is language of “basic social obligation” that suggests that the Court understood needs-based support as providing a basic level of self-sufficiency; but there is also other language of expectation and

57. Contractual support clearly covers arrangements made in express spousal agreements, but it may also entail implied contractual arrangements. This latter basis for contractual support remains relatively unexplored in the case law to date.

58. As recommended by the Law Reform Commission of Canada, supra note 19.
interdependency that suggests that need should be judged against the marital standard of living. Some of the Court's comments about the serious commitments taken on marriage support the possibility of permanent support obligations if a former spouse cannot become self-sufficient (however that is interpreted); yet other comments indicate that even if post-divorce need exists, a former spouse may not be required to meet the full need, particularly if the relationship was a short one.

Some of the language of "interdependency" in Bracklow is suggestive of the income-sharing theories reviewed above, which require some sharing of the marital standard of living (or more accurately, its loss) based on a principle of merger over time. However, the Court specifically refused to endorse an approach that would allow the length of the marriage to be a determinative factor, rather than one of many to be considered. It is equally possible to read Bracklow as supporting a very different theory of spousal support. The Court describes non-compensatory support as derived from a "basic social obligation" assumed in marriage that places the primary burden for support of a needy partner who cannot attain post-divorce self-sufficiency on the partners to the relationship rather than the state. This language suggests a much more traditional understanding of spousal support as an obligation flowing from the status of marriage itself, and potentially involving permanent obligations if a former spouse cannot attain at least a basic level of self-sufficiency. The theoretical grounding of this "basic social obligation" model of spousal support is questionable, and even belied by other statements in Bracklow where the Court continues to insist, as in Moge, that marriage per se does not create an entitlement to support. However, there is little doubt that this traditional view of spousal support is one to which many legislatures and courts are responsive, not only out of a desire to save the public purse, but also out of sympathy for former spouses in desperate economic circumstances.

While different theories—justifiable or not—can be read into Bracklow, in the end the decision provided no theory of needs-based support, leaving awards to be shaped by the discretion of trial judges responding to the facts of particular marriages. Reinforcing this point, after ruling on the narrow issue of Mrs. Bracklow's entitlement to spousal support, the Supreme Court of Canada refused to go further. The case was returned to a trial judge for a determination of the appropriate amount and duration of support in light of an array of factors laid out by the Court, including consideration of the possibility that Mr. Bracklow had already paid sufficient support under the interim order.

The trial judge (a different judge than the one who had originally heard the case) carved a middle path. Rejecting both Mrs. Bracklow's request for permanent support at $400 per month and Mr. Bracklow's claim that he had already paid enough, the judge ordered continued support of $400 per month for a further five years. The result in the case, taking into account the interim order, was seven years of support after what was approximately a seven year marriage, and at a relatively modest level. The decision to limit the support payable, despite Mrs. Bracklow's ongoing need, was justified by the relatively short length of the marriage, as well as the parties' relative financial independence. It was clear, as well, that the trial judge had strongly held views that marriage in and of itself is not a pension for life. Many other judges, both before and after Bracklow, confronted with similar facts have ruled differently and imposed a permanent support obligation.

IV. The Canadian Law of Spousal Support in Practice

A. Conceptual Confusion—The Return of "Needs and Means"

The Supreme Court of Canada decisions in Moge and Bracklow have created an expansive basis for spousal support under the framework of the Divorce Act, moving our law far from the clean break model that initially took hold in the 1980s. There is much to be admired in the evolution of our law as it has strived to create fair outcomes for former spouses that recognize the complex ways in which people's lives can be woven together in marriage (and cohabitation), rendering a quick clean break unrealistic and unfair. In particular, our law has recognized the compelling need for spousal support to ensure the fair allocation between parents of the economic consequences of having and caring for children—a principle which in practice means compensating women for their disproportionate assumption of child-rearing responsibilities both during marriage and after marriage breakdown. It cannot be claimed that this principle has always been realized. There remain many ongoing issues about its implementation, such as whether the care-giver's economic loss is the appropriate measure of compensation or some share of the higher-earner's income, whether secondary earners are seen as having compensatory claims, and whether the costs of post-divorce parenting are recognized. But the equitable allocation of the costs of parenting is nonetheless an important focus of our law.

However, in the course of trying to implement the compensatory principle, and as well to create a broader basis for spousal support that recognizes other forms of interdependency that develop in marriage, our law has lost

59. The actual result in Bracklow is not too far off what would be generated under the ALI proposals. A seven-year marriage, using a durational factor of 1.5%, produces a result of 10.5% of the income differential, or $312 per month. Using a factor of 5, the duration would be 3.5 years.
some of its sense of guiding principles. Our law now recognizes three different bases for spousal support under the Divorce Act—compensatory, non-compensatory, and contractual—but has left unanswered many questions about the nature of each kind of claim and the inter-relationship between the different kinds of support. In particular, the basis for non-compensatory support is very confused. The determination of which kind of support is appropriate on the facts of any particular case has been delegated to trial judges. Numerous variants of compensatory and non-compensatory theories are drawn upon by individual judges, or often no theories at all. Spousal support decisions are increasingly seen simply as the exercise of discretion by individual trial judges balancing numerous objectives and factors and creating fair results on the facts of particular cases.

In the post-Moge, post-Bracklow world, some judges and lawyers continue to place primary reliance on the compensatory principle as the primary analytic tool in spousal support cases, reserving non-compensatory support as a narrow, residual category for atypical spousal support cases not involving children and with no claims of earning capacity loss. However, in many more cases, judges and lawyers gravitate to a non-compensatory analysis. In some cases both compensatory and non-compensatory bases for any support obligation are recognized, but increasingly claims are analyzed only in non-compensatory terms. The non-compensatory language of “needs and means”—the traditional language of spousal support—has come to dominate spousal support discourse. These terms, rather than the compensatory language of “economic disadvantage” that predominated in the early days after Mogey, have become the primary analytic tools for determining spousal support, even when it is acknowledged that there may be a compensatory component to the award. This has led to a heavy emphasis on individual budgets as the primary determinant of outcomes.

The “needs and means” analysis of spousal support is the source of much of the uncertainty in our current law. “Need” can be understood in many different ways—basic needs, average needs, or those associated with the marital standard of living. An understanding of the purpose of the support obligation is necessary to structure and give content to the idea of need; but this is what is now lacking in our law, at least at the articulated level. The assessment of need has thus become very subjective, interpreted in light of many unarticulated assumptions about the purpose of spousal support.

On a theoretical level, “need” in and of itself does not provide a justifiable basis for the imposition of a spousal support obligation.60 What then explains the resiliency and attraction of this concept in the modern law of spousal support? There are likely several factors. The first is familiarity. Spousal support has historically been understood as a form of income-security, and “need” has traditionally been one of its conceptual cornerstones. It remains the concept to which many lawyers and judges naturally gravitate. The second reason is a practical one—efficiency. The “needs and means” framework avoids the complex issues of evidence and causation raised by a compensatory/economic loss model of spousal support and focuses on what is actually known at the time of the divorce—the parties’ incomes and expenses and deficits. However, while appearing to simplify the law of support around a uniform standard, the move to a “needs and means” framework has actually contributed to its fragmentation given the absence of any clear theoretical underpinning and the variety of ways in which need can be interpreted.

The lack of clarity about guiding principles in the Canadian law of spousal support has created several problems. From a normative perspective, there is the risk of unfair results. At one end of the spectrum, the highly discretionary “needs and means” analysis that is now dominant can easily lead to the resurgence of the traditional model of spousal support. Some now believe that life-long support (and at the most extreme—at the marital standard of living) can be claimed after the breakdown of any marriage, whatever its length or nature, if breakdown will leave the parties in significantly different financial positions. Such a model of spousal support is theoretically unjustifiable, absent fault, and will only serve in the long run to de-legitimize the spousal support obligation.

Canadian legislators and courts have insisted (and correctly so) that spousal support has a larger role than compensating spouses for their assumption of child-rearing responsibilities. But the challenge is to structure this aspect of the spousal support obligation in a principled and justifiable way. As has been shown in the review of theories of spousal support above, plausible models of income-sharing exist, but they all in some way link the extent of the support obligation to the length and nature of the marriage. They are not based on the fact of marriage itself or any promise or expectation of life-long support flowing from it.

At the other end of the spectrum, the current “needs and means” framework creates significant opportunities for spousal support to be unjustifiably denied or limited. It is very easy for concepts of need to collapse into notions of basic self-sufficiency. As a result, spouses may be under-compensated for their child-rearing responsibilities because they have managed to attain a basic level of economic self-sufficiency and to recover from any dependency during the marriage, or alternatively because they have

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60. The starting point in the theoretical writing on spousal support is the inadequacy of the concept of “need” as the basis for imposition of a spousal support obligation. See Sugarman, supra note 50, and the extensive critique of need in the ALI PRINCIPLES, supra note 1.
managed to maintain a basic level of self-sufficiency during the marriage. Under the current framework of spousal support there is a danger of all spousal support claims being treated the same—as grounded in need and dependency. The compensatory focus easily disappears under such a framework, undermining ongoing efforts to have compensatory claims acknowledged in less obvious contexts, such as those involving secondary earners and post-divorce custodial parents. The positive effects of Moge and its compensatory analysis are being eroded.

On the practical level, the lack of clear guiding principles and the highly discretionary nature of the current law have resulted in an unacceptable degree of uncertainty and lack of predictability. Similar fact situations can generate a wide variation in results. There are significant variations in understandings of appropriate spousal support outcomes between individual judges, and moreover significant regional differences in spousal support cultures across the country. Individual judges are provided with little concrete guidance in determining spousal support outcomes, and their subjective perceptions of fair outcomes inevitably play a large role in determining the spousal support ultimately ordered. Lawyers in turn have difficulty predicting outcomes, thus impeding their ability to advise clients and to engage in cost-effective settlement negotiations. And for those without legal representation or in weak bargaining positions, support claims may simply not be pursued. Despite an expansive basis for spousal support under current Canadian law, many women do not pursue their claims. The uncertain and controversial nature of the spousal support obligation means that it is often one of the first items taken off the bargaining table.

B. Spousal Support Outcomes: Patterns in the Case Law

To the extent that generalization is possible, this section of the paper will provide a brief overview of patterns in spousal support decisions under the broad and highly discretionary framework that now exists in Canada. While there are clearly divergent practices, current practice also yields some emerging patterns that might provide the foundation for bringing some needed structure back into our law.


In terms of the general contours of our law of spousal support, entitlement has largely disappeared as a significant issue in Canadian spousal support law—in contrast to the situation in many American states where the threshold for entitlement to alimony remains fairly stringent. With Bracklow’s expansion of the basis for spousal support, even if there is no compensatory basis for support, “need alone” may be enough to ground an award of support; and if need is interpreted broadly to cover any significant drop in standard of living after marriage breakdown, as it often has been in the post-Bracklow case law, the basis for entitlement is very broad. The real issues in spousal support cases in Canada are, by and large, quantum and duration rather than entitlement.

With respect to duration, a striking feature of our law is the increasing duration of the spousal support obligation. In general, there is a reluctance or hesitancy on the part of Canadian courts to impose rigid duration limits. Time-limited orders, which were once so common, have become relatively rare. The standard spousal support order is an order for indefinite duration. In many cases, particularly those involving longer marriages (fifteen years might count as a long marriage), it is now contemplated that spousal support, at least of a “top-up” variety, will be on a permanent basis. Even in those cases where an eventual termination of the obligation is contemplated—for example, because of improvements in the economic circumstances of the support recipient—the preference is for such termination to be accomplished by means of a subsequent variation application when circumstances change, or by means of an order for review of spousal support at the time.

64. Influenced by the threshold set by the UMDA, supra note 18.

65. See Keller v. Black (2000), D.L.R. (4th) 690 (Ont. S.C.J.). In a recent decision of the Ontario Court of Appeal, Allaire v. Allaire (2003), 35 R.F.L. (5th) 256, a wife who was working as a hospital administrator earning between $52,000 and $61,000 per year was awarded permanent support of $2,500 per month from the husband, who earned over $200,000 per year, after the end of their twenty-four-year marriage. Exceptions can, of course, be found. Some judges, who continue to give primacy to the compensatory framework, would deny any entitlement to spousal support based simply upon a drop in standard of living if both spouses have maintained full employment during the marriage and there is thus no claim based on career loss. For judges who take this approach, non-compensatory support would be confined to cases where there is an inability to meet basic needs and could not be claimed by a spouse who is able to sustain a reasonable standard of living.

66. Time-limited orders are now generally confined to exceptional cases where the entitlement to support is clearly perceived to be of a limited and defined nature. They are used most often in short marriages, where there are very limited compensatory claims. They also are used by some judges who view non-compensatory support as a limited, transitional obligation, despite ongoing disparities in income or even the ongoing existence of basic and compelling need. Despite their infrequency in court orders, time-limits on support continue to find favor in separation agreements and consent orders. In some cases this may reflect unfair bargains promised, in part, on women’s unrealistic expectations of self-sufficiency after divorce. But in others it reflects a genuine desire on the part of the parties for certainty and finality in planning their post-divorce lives. The current uncertainty around duration creates many problems.
when such a change might be likely, rather than through a time-limit.\textsuperscript{67} Where re-training and re-integration into the labour force are contemplated, the time periods now being allowed for the attainment of self-sufficiency are increasingly generous. Under such a framework, duration remains highly uncertain. The Canadian approach to duration is very much in contrast to current American law where time-limited orders remain popular. Even the ALI proposals make heavy use of durational limits to structure the support obligation, with permanent support being reserved for a narrow category of cases.\textsuperscript{68}

Given an expansive basis for entitlement and a general reluctance to impose rigid durational limits in cases involving significant post-divorce income disparities, most of the serious issues in spousal support in Canada come down to issues of quantum. And, not surprisingly, this is where most of the uncertainty in the current law exists. There is, by and large, little discussion of the principles being used to determine quantum. Widely divergent, and often unarticulated, understandings of the purpose of the spousal support obligation determine how the amorphous concept of “need” is understood and thus what amount of spousal support is required to satisfy that need. Often duration and quantum are interconnected, and uncertainty about duration results in relatively modest awards spread out over long periods of time.

When the case law on spousal support is analyzed in terms of types of cases, certain patterns, or lack thereof, can be identified somewhat more precisely. Where current practice yields the most divergence is with respect to the atypical, pure non-compensatory spousal support cases of the Bracklow variety. These are typically cases of relationships without children, where there is dependency and need, but the spouse claiming support cannot base the claim on the roles adopted during the marriage.\textsuperscript{69} Entitlement to support is not usually an issue in these cases if there are significant income disparities, but both quantum and duration remain uncertain. In particular, the case law remains split on the issue of whether spousal support can be terminated if a spouse continues to experience ongoing need (however need is defined).

Some judges, such as the trial judge who rendered the final judgment in Bracklow, appear willing to limit the extent of the support entitlement in cases where a spouse’s need is extrinsic to the marriage and the roles adopted during its course. These judges see the role of non-compensatory spousal support as essentially transitional, for the purpose of allowing a dependent spouse a period of time to re-organize his or her life in the face of loss of access to the other spouse’s income. However, other judges interpret the basic social obligation of mutual support that flows from marriage more expansively, and appear unwilling to distinguish between needs created by roles in the marriage and other kinds of need. For these judges, once the marriage has been of any significant duration,\textsuperscript{70} a permanent spousal support obligation is seen as appropriate if a spouse will continue to experience post-divorce need because of limited earning capacity, whatever its cause.\textsuperscript{71} The quantum of such ongoing orders is highly unpredictable, ranging from a modest contribution to basic needs to generous payments that bring the former spouse closer to the marital standard of living.

It is not surprising that these non-compensatory support cases remain a contentious area in our law. In Bracklow the Supreme Court of Canada was unwilling to come to any definite resolution, and the mixed signals the judgment sent about the appropriate outcome on the facts of the case itself are being replayed in the ensuing case law. Conflicting social views about the nature of marriage and the kinds of obligations one assumes in marriage are at play in these cases. Some of the income-sharing theories reviewed above, which draw on the concept of “merger over time,” offer possibilities for structuring non-compensatory support in a principled fashion. On these theories, the extent of the support obligation would be

\textsuperscript{67} Review orders, which are a relatively new arrival on the spousal support scene, are something of a halfway house between indefinite orders and time-limited orders. While the authority to make such orders has been questioned, they have become an established feature of spousal support law and their use endorsed by provincial appellate courts. An excellent discussion of review orders can be found in Schmidt v. Schmidt (1999), 1 R.F.L. (5th) 197 (B.C.C.A.) and Bergeron v. Bergeron (1999), 2 R.F.L. (5th) 57 (Ont. S.C.J.). Typically review orders are understood as orders for indefinite support, but with a provision for a review, for which either party may apply, at a specified point in the future. Unless the contrary is specified, support is generally understood as continuing until there has been a determination, on a review, that the support order should be modified. One of the most significant features of a review order is that the review is conducted as if it were a fresh determination of support on the facts before the court, rather than a variation of prior orders. There is thus no need to establish a material change in circumstances.

\textsuperscript{68} Indefinite support would only be available when the age of the recipient and the duration of the marriage were above certain specified minimums, for example, fifty years of age and twenty years of marriage.

\textsuperscript{69} The kinds of cases that give rise to pure non-compensatory claims are childless, often relatively short, first marriages where there are significant income disparities between the two parties; second marriages later in life, without children, where the parties bring to the marriage income-earning capacities significantly affected by prior choices and relationships and where, once again, there are significant disparities in income; and finally, cases where unemployed or low-income husbands are claiming support.

\textsuperscript{70} Can often mean anything over five years. Typically marriages of less than five years result in modest time-limited or lump-sum awards, see, for example, Nahatchewicz v. Nahatchewicz (1999), 1 R.F.L. (5th) 395 (Ont. C.A.) (granting lump-sum spousal support of $15,000 after a three-year marriage).

\textsuperscript{71} For a recent example of a case awarding spousal support on this basis, see Skoreyko v. Skoreyko (2002), 28 R.F.L. (5th) 440 (B.C.S.C.) (holding where both parties employed during fifteen-year childless marriage; wife loses sight after marriage breakdown; husband ordered to pay support).
determined by the length of the marriage. This is the route adopted by the ALI, where both the quantum and duration of claims based on loss of the marital standard of living are governed by the length of the marriage. However, it remains uncertain whether such a solution would find support in Canada, given the strong adherence on the part of many judges and legislators to the “basic social obligation” theory, which would impose ongoing support obligations in cases of compelling need.

There is somewhat more consistency in what might be called typical spousal support cases—cases where there have been children, where one of the spouses (typically the wife) has borne a disproportionate share of the child-rearing responsibility, and where there are significant disparities in spousal incomes when the marriage ends. The cases where it is easiest to discern patterns in the current Canadian law are long marriages where the children are no longer dependent. These cases now tend to generate fairly generous support on a permanent basis, although issues remain around the precise rules for determining quantum.\textsuperscript{72}

While there are occasional references to a principle of income equalization (more often than not in Ontario, the part of the country where one finds the most generous spousal support awards),\textsuperscript{73} the most generous standard is typically expressed as a principle of rough equivalency of standards of living. Equivalent standards of living rarely translates, in practice, into equalization of income. And many courts even refuse to adhere to that principle, preferring to apply a standard of meeting “reasonable” needs as demonstrated in a budget.\textsuperscript{74} Prior research has shown that in cases of long marriages where there are no longer dependent children, the outcome, after payment of spousal support, is to leave wives with gross incomes that are approximately 60% of their husbands’, although awards are higher than that in some parts of the country and slightly lower in others.\textsuperscript{75}

\textsuperscript{72} Where there is more uncertainty are cases of “non-traditional” long marriages where wives have been engaged in paid employment for some part of the marriage, but often in the role of secondary earners. The case law is divided on whether such women are entitled to spousal support at all, or to anything more than transitional support. Some judges will find no compensatory claims in such cases and limited “need” because of the wife’s full-time employment, while others will treat such cases in the same way as long traditional marriages. For an example of the former approach, see Spencer v. Spencer (2002), 27 R.F.L. (5th) 431 (B.C.C.A.) (holding wife who had been employed in latter part of twenty-nine-year marriage and earning significantly less than husband entitled to time-limited support for two years); for an example of the latter approach, see Allaire, supra note 65.

\textsuperscript{73} For a recent example, see Grant v. Grant (2001), 22 R.F.L. (5th) 294 (Ont. S.C.J.).

\textsuperscript{74} For a recent case explicitly rejecting any principle of equalization, see Cook v. Cook (2002), 27 R.F.L. (5th) 12 (N.S.C.C) (holding wife who had been homemaker in twenty-nine-year traditional marriage to be awarded spousal support of $3,000 per month, while husband earned in excess of $200,000 per year).

\textsuperscript{75} See Rogerson, Spousal Support Post-Bracklow, supra note 63.

cases of long marriages where wives have been full-time homemakers or have significantly cut back on their labour force participation would appear to be the easiest in which to develop some form of structuring guidelines. In these cases the only issue is typically quantum and there already exists a principle of generous sharing that simply needs to be made more specific.

Given the demographics of marriage breakdown, marriages of shorter and medium duration where there are still dependent children, typically in the custody of the mother, constitute the most typical spousal support cases.\textsuperscript{76} The patterns here are somewhat less clear than with respect to long marriages where the children are no longer dependent, as this is an area of shifting and emerging norms. These cases are complicated by the fact that they involve the interaction of child support and spousal support. They also raise more difficult policy choices than long marriages, in particular the weight to be given to the value of promoting spousal independence and self-sufficiency, given the shorter duration of the marriages and the younger age of the spouses at the point of marriage breakdown.

Assuming significant income disparities (and an ability to pay on the payor’s part after child support is paid), there will likely be entitlement to spousal support in these cases. However, duration as well as quantum is often in issue. One of the central issues in cases of shorter and medium duration marriages is whether there will eventually be a termination of the support obligation—after a generous period of time to allow for re-training and the acquisition of employment—or whether long-term support is envisioned to ease any ongoing disparity in the parties’ standards of living even after the wife has made reasonable efforts to obtain full-time employment or upgrade her skills.\textsuperscript{77}

Our current law is by no means consistent in its treatment of these sorts of cases, with significant variation between individual judge, and even more between different parts of the country. However, it does reveal some interesting developments that might suggest a possible course for future evolution of the law. In some cases involving dependent children, partic-

\textsuperscript{76} In 1998, the median duration of marriages ending in divorce in Canada was eleven years: Statistics Canada, Divorce—Shelf Tables, Cat. No. 84F0025XPB (Ottawa, 2000), Table 13. Only 25% of the marriages that ended in divorce in 1998 lasted longer than twenty years.

\textsuperscript{77} This issue was posed starkly by the Ontario Court of Appeal decision in Biddy v. Biddy (1999), 44 R.F.L. (4th) 81 (Ont. C.A.) (deciding support for a thirteen-year marriage with two children; wife a secretary but out of workforce for more than eight years; husband a successful lawyer; two years after separation trial judge imposed a time-limit of five years on spousal support based on his conclusion that the wife would not otherwise make efforts towards self-sufficiency; the Court of Appeal deleted the time-limit, and extended support for a further four years, with a review of entitlement and quantum at the end of that period; Court suggested that even if Mrs. Biddy had found employment and was earning $30,000 at the time of the review (the amount of her spousal support), she might still be entitled to ongoing top-up support).
ularly those that are of somewhat longer duration, judges have begun to provide spousal support for a lengthy, if not indefinite, period of time to bridge significant disparities in the standard of living between the two households created by marriage breakdown. More specifically spousal support has been set at a level to roughly equalize the net disposable incomes of the spouses after child support is taken into account. This development in the case law is interesting from both a theoretical and a practical perspective.

The justification for generous, ongoing child support in these cases appears to be the presence of dependent children. There is clearly a compensatory element to many of these cases, as courts recognize the economic implications not just of wives’ past child-care responsibilities, but also of their ongoing custodial responsibilities. In Moge, Justice L’Heureux-Dubé had emphasized the need, under the compensatory model, to recognize the costs to women of their post-divorce child-care responsibilities. Most of the post-Moge case law, however, tended to focus only on disadvantage flowing from past child-rearing. These recent cases show courts finally beginning to take seriously the spousal support objective, found in s. 15.2(6)(b) of the Divorce Act, which specifically directs courts to apportion between the spouses the financial consequences of the care of any child of the marriage to the extent that they have not been met by child support. Moreover, our child support guidelines, which were introduced in 1997, were based on an explicit policy choice to exclude the indirect costs of child-rearing, which were assumed to be covered by spousal support.

However, there also seems to be strong element of needs-based support in these cases. And the concern is not just for the needs of the former spouse, but also those of the children whose standard of living is ultimately determined by that of the custodial parent with whom they share a household. From the theoretical perspective, these cases reflect, in a modest way, some of the newer “parental partnership” theories that base spousal support on the obligations derived from parenthood rather than the marital relationship per se. These theories, which blur the boundaries between child and spousal support, generate models of income-sharing under which the crucial determinant of the extent of income-sharing is not the length of the marriage but the entire length of the child-rearing period, including the post-divorce period. The period of income-sharing could thus be much longer than the length of the marriage.

Many of the recent Canadian cases taking a generous approach to spousal support in cases involving dependent children are also interesting from a methodological perspective. In these cases some courts are adopting a quasi-formulaic approach to assessing spousal support, and moreover an approach that explicitly draws on concepts of income equalization. The methodology used in these cases, which involves a comparison of net disposable household incomes, relies upon computer-generated calculations using software programs developed to assist in the calculation of child support under our child support guidelines.

In the academic writing, parental partnership theories have generated proposals for income sharing which would require equalization of household standards of living for the duration of the children’s dependency. Canadian courts have clearly not adopted such a generous standard, but some have begun to rely upon other conceptions of equalization. In a number of cases involving spousal support claims where there are dependent children, however, courts have begun to award spousal support in an amount that, when combined with child support and the custodial parent’s earnings, will result in an equalization of net household incomes. This might be called the “weak” version of equalization. In the recent case of *Andrews v. Andrews*, which has garnered a fair amount of attention, the Ontario Court of Appeal

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79. The Federal Child Support Guidelines, SOR/97-175, which were enacted as regulations pursuant to the Divorce Act, R.S.C.1985, c. 3 (2d Supp.), came into force in May 1997. Almost all of the provinces and territories have subsequently followed suit, adopting either identical or slightly modified versions of the federal guidelines for application in child support cases coming under provincial jurisdiction. Our guidelines are based on a percentage of income formula. Child support takes priority over spousal support and must be calculated first. A discussion of the decision not to include the indirect costs of child-rearing in the guidelines is found in Federal/Provincial/Territorial Family Law Committee, Report and Recommendations on Child Support (Ottawa: Minister of Justice, January 1995), at 46-7.

80. These theories have been identified by Jane Carbone as the “second wave” of income-sharing; see Income Sharing: Redefining the Family in Terms of Community, 51 Hous. L. Rev. 539 (1994). Under these theories spousal support is justified not only to compensate the custodial parent for her ongoing child-rearing responsibilities, but also to recognize the obligation of a parent to provide his or her children with a standard of living equivalent to the parent’s own.

81. See Joan Williams, *Is Coverture Dead? Beyond a New Theory of Allonomy*, 82 Georgetown L.J. 2227 (1994). Drawing on a view of the “ideal worker’s wage” as a family wage, Williams proposes an equalization of household standards of living for the duration of the children’s dependency, and thereby an equalization of income for one further year for every two years of marriage. The principle of equalization Williams adopts while there are minor children present is notably not that of simple income equalization. Rather, the standard is equalization of household standards of living, which takes into account differences in the number of people in each household.

82. Supra note 79.

83. See Williams, supra note 81.

84. The Ontario case law is reviewed extensively in Regerton, supra note 75. For a recent decision from outside of Ontario adopting this approach, see Weiden, supra note 73.

adopted a stronger version of equalization. In Andrews the court endorsed a methodology for assessing spousal support that would provide the wife, when combined with child support and her earnings, with 60% of the parties' net disposable income and the husband with 40%. Andrews went beyond equalization of income and generated results that left more than half the income in the household of the custodial parent given its greater needs. Although the result does not generate equalization of household standards of living, it does bring them closer together than a simple 50/50 division of income.86

Even the "weak" version of equalization is not widely adopted as a method of calculating spousal support in cases where there are dependent children. The Andrews approach is even rarer—being confined largely to Ontario, and even within Ontario to a range of higher-earner cases. Neither version of equalization reflects a dominant trend in the case law, but these cases suggest interesting possibilities for the future development of our law, both for their recognition of the important role of spousal support in supporting post-divorce parenting, as well as for the turn to formulas for the determination of spousal support. It is not surprising that this development should take place in cases that combine claims for spousal support with those for child support; the methodology of income-sharing in child support, inculcated by guidelines, has begun to spill over into spousal support determinations.

It must be acknowledged, however, that the parental partnership theories, even the modest versions of which are reflected in Canadian decisions, are controversial. Income-sharing proposals based on notions of parental partnership are open to the criticism that they involve the use of spousal support to create a more expansive child support obligation. Such proposals also entail a fairly radical shift in norms. Extensive, long-term obligations to a former spouse may be imposed even after a very short relationship if there are children, in order to recognize and support the former spouse's ongoing role as caregiver. On a practical level, long periods of post-divorce life lie ahead for each of the spouses in cases of shorter and medium duration marriages with minor children, which will likely include re-partnering for one if not both of the spouses. Difficult questions will be raised about the impact on the support obligation of the reconfiguration of households through the addition both of new incomes and new financial obligations.

The ALI proposals, notably, do not adopt the parental partnership theory of spousal support. The main compensatory claims recognized by the ALI are strongly linked, both in quantum and duration, to the length of the marriage and the length of the child-care period during marriage. As a result, relatively short marriages, even those with children, generate relatively limited claims. To the extent that the ALI chose to deal with issues related to post-divorce child-rearing, it was through a reconfiguration of the law of child support, rather than spousal support.87

The ALI proposals have been rightly criticized for failing to provide adequate support payments to younger women leaving marriages with custody of young children.88 Whether or not one accepts parental partnership theories in their full form, the need for generous support payments to custodial parents, even if only for a transitional period, is compelling, and is beginning to be recognized in Canadian law.

V. The Next Step: Spousal Support Guidelines in Canada?

The broad and highly discretionary spousal support obligation that Canadian law now recognizes is in need of some structuring principles to retain its legitimacy and its practical efficacy. Some clarification of the theoretical bases for spousal support is required, as well as the development of some practical and easily administered rules to implement those theoretical concepts. Spousal support guidelines may be one solution. They have been adopted in some American jurisdictions89 and more significantly, the ALI's broad proposals for revamping the law of alimony entail a significant guideline component in the interests of promoting certainty and predictability.90

Although spousal support guidelines can vary in form, most of the existing models build on a methodology of income sharing, whereby spousal support is determined as a percentage of the income difference between the spouses. The appropriate percentage can be determined by an array of relevant factors, including for example the length of the marriage or the presence or absence of dependent children. Budgets, now relied on heavily in spousal support cases to establish need, are thus eliminated.

86. Another explanation of the Andrews result is that it reflects the operation of a principle, as between the spouses, of a 50/50 division of any income which remains after the payment of child support.

87. The child support recommendations are found in chapter 3. Through use of a supplemental percentage, the ALI child support formula makes some adjustment for parental income disparity. The "compensatory payment" (i.e., spousal support) is determined and transferred first. Initially child support is calculated by a "base percentage" and then a "supplemental percentage" of the payor's net income. As the recipient parent's income (in excess of a self-support reserve) rises, the supplemental percentage is reduced, reaching zero when parental incomes are equal (and even the base percentage can be reduced where the recipient parent's income exceeds that of the payor parent). The net effect of the supplement is to reduce, but not eliminate, disparities in household living standards.

88. See Oldham, supra note 2.

89. For a review of American spousal support guidelines, see Rogerson, supra note 61.

90. See discussion supra note 4.
Finally, the American experience shows that spousal support guidelines are a realistic possibility. While none of the American guidelines models may in the end be completely appropriate for the Canadian context, they do demonstrate the feasibility in principle of developing some form of spousal support guidelines. The ALI proposals, in particular, also demonstrate that spousal support guidelines can be structured in fairly sophisticated ways to respond, at least to some extent, to diverse objectives and diverse fact situations, thus meeting some concerns about the undue rigidity of guidelines. Specifically, the ALI proposals contemplate multiple bases for support claims, with the claims for loss of earning capacity and loss of the marital standard of living corresponding roughly to our categories of compensatory and non-compensatory support. As well, through the concept of the duration factor, the ALI proposals make the quantum of spousal support orders, and not only their duration, sensitive to the length of the marriage.

Responding to growing concerns among lawyers and judges about the excessively uncertain nature of the law of spousal support and sensing that the time may be ripe for a reconsideration of guidelines, the federal Department of Justice has initiated an innovative project to explore the possibility of spousal support guidelines as a way of bringing some much-needed structure to this area of law. The project, which commenced in September of 2001, is a somewhat unusual one, in that it is not directed at formal legislative reform. Rather, it involves the government as facilitator of a process of informal rule-making intended to reflect and structure practice under the current legislation. The process takes its inspiration from the American context, where spousal support guidelines have, in general, been the product of bench and bar committees of local bar associations. Most American guidelines were, at least initially, informal guidelines created with the intention of reflecting local practice and providing a more certain framework to guide settlement negotiations.

The Canadian project contemplates a similar process, which would involve building guidelines “from the ground up.” The process involves working with judges, lawyers, and mediators who have an expertise in family law to assist them in articulating informal guidelines based on emerging patterns (or best practices) embedded in current practice. Such

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92. But the current emphasis on “need” also creates impediments to income-sharing when a spouse is employed and able to meet his or her reasonable needs.

93. Discussed supra note 79.

94. Supra note 85.

95. The project is chaired by the author and Professor D.A. Rollie Thompson from Dalhousie Law School. (For the background paper prepared for the project, see Rogerson, supra note 61.)

96. One exception is the ALI proposals, which involve a blueprint for legislative reform. However, they have been the basis for the development of informal guidelines in Maricopa County, Arizona, Superior Court of Arizona, Maricopa County, Family Court Department, Spousal Maintenance Guidelines. An extensive discussion of the Maricopa Guidelines and the process of their creation can be found in Ira Ellman, The Maturing Law of Divorce Finances: Towards Rules and Guidelines, 33 Fam. L.Q. 801 (1999).
guidelines would be expected to operate on an advisory basis only within the existing legislative framework. It is envisioned that such guidelines would be implemented on a regional basis to guide local practice. They would not be binding, but would simply provide some common starting points for discussion or argument in negotiation and adjudication respectively.97

The project is a long-term one, stretching at least over five or six years, that involves many different stages. The first stage of the project involves working with a small group of family law experts to begin the discussion about developing spousal support guidelines. The discussions within this group are directed at clarifying and reaching some rough consensus on the assumptions underlying spousal support and then developing guidelines to implement those assumptions. A central feature of the process, given that the goal is to work from current practice, is to identify different categories of cases, and in this way to work “from the ground up” in articulating basic principles and crafting guidelines that are appropriate for each category of case.

If it is possible to find sufficient consensus on the most important issues in this phase, the project will then move into a wider range of consultations with the bench and the bar, in small groups across the country. At some point thereafter, assuming consensus and workable guidelines, it will be possible to move into the third stage of the project, which will involve developing “pilot projects” in a small number of localities. The pilot experience will, in turn, lead to revisions of the draft guidelines.

The project is currently in the middle of the first stage, the discussions within the small working group to determine the initial feasibility of the project. At this stage there is little that can be said other than by way of some general reflections on the project, which is undoubtedly a very challenging one on both the practical and conceptual levels.

The project is premised on the hope that consensus on appropriate support outcomes is possible, particularly if the focus is on outcomes in practice rather than on abstract theories. However, given the uncertainty of the current law, there is a risk that consensus will not be possible, or only in some areas and not others. Thus far, the process has shown, not surprisingly in light of developing case law, that it is easier to achieve consensus on appropriate outcomes in certain kinds of fact situations than in others. Notably, it is the more standard fact situations involving either long traditional marriages where the children have grown up, or medium and longer duration marriages where there are still dependent children, where there is the most potential for consensus. Short, childless marriages are also relatively easy.98

Other kinds of fact situations pose more difficulties, raising contentious issues about the purpose of the support obligation.

The very idea of consensus is also complicated by uncertainty about the nature of the project, given an inherent tension between reflecting current practice and changing the law. The project is put forward as one that builds on current practice. Yet current practice is diverse. To bring more structure and certainty into the law choices have to be made as to what are “emerging trends” or “best practices” and the law will be “restructured” along those lines. The project thus contemplates a certain degree of change, but change that is consistent with the current legislative structure and basic framework that comes from decisions of the Supreme Court of Canada interpreting those provisions. One way to see the project is as facilitating or “speeding up” the normal common law process for the development of the law, whereby the best understandings or interpretations of the current law eventually rise to the surface. The normal process of legal development has fallen apart in this area of law because of an excessive emphasis on discretion and individualized decision-making rather than on underlying principles and structure, combined with a very deferential standard of appellate review.99 However, determining how much change can be introduced before the project is seen as dramatically reforming the law rather than reflecting current practice remains a constant issue.

Finally, there are unique challenges to developing spousal support guidelines in the Canadian context, in contrast to the American context. Many existing American guidelines are relatively limited in scope—they apply only to what we in Canada would call interim support orders (in American terminology, alimony pendentil lite), or even if applicable to permanent orders, apply only after stringent conditions for entitlement have been met. In Canada, given our broad basis for entitlement, guidelines must cover a much wider range of cases. The only guidelines comparable in scope are the ALI proposals, and even these, despite their many admirable features, are not completely transferable to Canada.

The ALI recommendations rely heavily upon durational limits to structure the support obligation, something that is not possible to the same degree

barring exceptional circumstances where a short marriage results in significant economic gains or losses to the spouses.

98. There seems to be a general consensus that very short marriages generate modest support obligations, in either the form of lump-sum payments or time-limited transitional payments.

97. For a more detailed review of the process, see Rogerson, supra note 61.

99. In Hickey v. Hickey, [1999] 2 S.C.R. 518, a decision of the Supreme Court of Canada released shortly after its decision in Bracklow, the Court articulated a very narrow scope for appellate review of support orders, restricted to material error, serious misapprehension of the evidence, or an error in law. A significant degree of deference was found owed to trial judges because of the discretionary and fact-based nature of support decisions. Because of the difficulty of successful spousal support appeals, we have lost the benefit of the guidance of appellate courts in structuring the developing law. Typically appellate courts only intervene when trial judges have committed errors of law in imposing time limits or denying entitlement.
in Canada because of the preference of our courts for indefinite orders. As well, the ALI proposals are able to avoid many difficult issues of variation that arise in Canada as support orders play out over time. Under the ALI proposals, remarriage automatically terminates any entitlement to support. Under Canadian law this is not the case. Remarriage is simply considered a material change in circumstances upon which an application for variation might be based. The effect of remarriage on an existing spousal support order is thus determined on a discretionary basis by the court. In addition, the ALI proposals preclude any consideration of post-divorce increases in the payor’s income. Canadian law, once again, has no such firm rule, leaving the issue to the discretion of the trial judge.

Finally, the ALI proposals do not generate what would be viewed as appropriate support outcomes in Canada in cases of shorter and medium duration marriages involving dependent children. Relying heavily upon the length of the marriage and the length of the child-care period during the course of the marriage to determine both quantum and duration of support, the ALI proposals generate relatively limited claims in these cases. Canadian law is by no means uniform in its response to these kinds of cases. However, there are emerging norms that suggest these cases warrant relatively generous support, if not permanently, then at least on a transitional basis. There are no existing guideline models that deal with these cases satisfactorily, from a Canadian perspective, and we thus face the challenge of developing our own.

VI. Conclusion

However many challenges the Canadian spousal support guidelines project faces, it is, at this stage, perceived as a worthwhile endeavour. The Canadian law of spousal support has accomplished much in its attempt to create fairer outcomes for former spouses than those generated by the clean break model. But charting a clear and theoretically justifiable path for such an expansion in the context of modern family law is not an easy task. There is much to work with in our law—in its basic principle that spousal support should fairly compensate spouses who assume a disproportionate share of child-rearing responsibility and, as well, in its perception of the need for spousal support to respond to the economic dislocation that can result when relationships of interdependency breakdown. But more structure and guidance is needed. We hope spousal support guidelines will provide this, allowing our law to operate much more effectively in realizing the basic objectives it has identified.

100. See Marinangeli, supra note 40.