

Appendix I

SPOUSAL SUPPORT ADVISORY GUIDELINES APPEAL CASES

[September 12, 2007 – July 10, 2008]

For a list of the appeal cases decided prior to Sept. 12, 2007 see our paper “The Advisory Guidelines 31 Months Later” at

<http://www.law.utoronto.ca/faculty/rogerson/ssag.html>

Smith v. Smith, [2008] B.C.J. No. 1068, 2008 BCCA 245, 2008 CarswellBC 1218 (Newbury J.A.)
 Married 10 years, husband 62, wife 51, separated 1999
 One child 16 with wife, some chronic psychiatric difficulties
 Husband orthodontist, earns \$477,206/yr., likely retire when 70, work less after 65
 Wife part-time flight attendant, retired 2005, not worked since, interior design training
 Couple spent lavishly, husband supported wife until 2005, in hope of reconciliation
 Trial decision 2006: family assets divided, 30% of husband’s corporate interests *in specie*
 Reversed on appeal, compensation order made instead, \$237,990 to wife
 Also 10% interest in husband’s property company ordered on appeal
 Child support order at trial upheld: husband’s table amount \$3,854/mo., but \$3,528/mo. ordered
 Reduced by \$326/mo., table amount for wife at \$35,000/yr. imputed income
 Also husband to pay all special expenses of \$3,000/mo.
 Spousal support at trial: 7 years of support until June 2013 when wife 65, husband 70
 Step-down order: \$13,750/mo. for 3 yrs., \$11,000/mo. for 2 yrs., \$8,000/mo. for 2 yrs.
 Trial judge not required as matter of law to state conceptual basis for spousal support
 Above ceiling case under SSAG, husband supported wife for 7 years, trial judge restructured
 Reduced on appeal to encourage self-sufficiency, wife no efforts and still spending
 Order for \$8,000/mo. for 4 years, then \$6,500/mo. to reflect husband’s reduced earning capacity
 No time limit, but order may be varied when husband retires completely
 [With child support range if husband \$477,206, wife \$35,000, no s. 7 expenses: \$11,368-\$13,802/mo.]
 [If \$3,000/mo. s. 7 expenses: \$9,237-\$11,351/mo.; if husband \$350,000, no s. 7: \$7,601-\$9,470/mo.]
 [Without child support range if incomes \$477,206/\$35,000: \$5,528-\$7,370, mid \$6,449/mo., 5-10 years]

Loesch v. Walji, [2008] B.C.J. No. 897, 2008 BCCA 214 (Saunders J.A.)
 Together 21 years, married 17, husband 46, wife 44, 4 children 18, 17, 15 and 10
 Interim decision, husband provided generous support voluntarily for 3 years, 5 mos. to trial
 Issues of income, debt, disclosure, family trust
 Wife home, primary caregiver to children
 Husband businesses, income goes offshore, not tax, says \$900,000/yr., grossed-up to \$1.6 million
 Child support \$30,000/mo., 1 in university and 3 in private school
 Spousal support, above ceiling, range \$30-\$35,000/mo., order for \$50,000/mo., ability to pay
 Demanding standard of review on interim support appeal: “inordinately high or low”
 Husband admitted income, other sources of income available to him in Canada, Dubai, Switzerland
 Unusually extravagant lifestyle during marriage, husband little questioning of wife’s budget
 Above ceiling case, possible approached considered
 Range at \$350,000 under *with child support* formula \$5,835-\$7,123/mo., preferable if discrepancy from
 Guidelines explained
 Payor’s income “far beyond” the ceiling, Guidelines “really of no assistance”, pure discretion
 After tax, support produces same amount as was paid voluntarily
 Husband’s income in fact greater than that admitted, amount can be adjusted after trial
 Whether trust for children a “special provision” for child support purposes also matter for trial

Pagnotta v. Malozewski, [2008] O.J. No. 1318, 2008 CarswellOnt 1896 (Div.Ct.), reversing 2007 CarswellOnt 9117

Interim support appeal allowed in part
 Married 20 years, 2 children, with wife
 Husband earns \$127,453, child support \$1,731/mo., plus \$7,000/yr. s. 7 expense for dance
 Wife no income at hearing, depression at separation, worked part-time since birth of second child
 \$34,000 imputed in Sept. 2007 as part-time French teacher, full-time by Sept. 2008
 Interim spousal support of \$2,000/mo. ordered, from August 2006 to August 2007, then terminated
 Factors and objectives of Act not discussed, nor SSAG raised in argument
 Interim support to continue until Sept. 2008, subject to further order
 Guidelines range \$1,179 to \$1,940, mid-point of \$1,563/mo. ordered from Sept. 2007 until then
 “No articulated basis for departing from the Guidelines”

Snyder v. Pictou, [2008] N.S.J. No. 77, 2008 NSCA 19 (Fichaud J.A.)

Together 10 years, 2 children 10 and 11, with wife
 Husband long-distance trucker, income issues, estimated at \$40,000, child support \$579/mo.
 Wife home, stress problems, no income
 Trial judge ordered 2 lump sum payments, totalling \$4,700, as 22 mos. retroactive spousal support,
 but no ongoing support
 Following Advisory Guidelines, indefinite order substituted, \$214/mo. based on trial amount

Lapp v. Lapp, [2008] A.J. No. 208, 2008 ABCA 15 (Conrad, Watson and Rowbotham JJ.A.)

Married 23 years, 2 adult children, traditional marriage
 Wife now full-time in Sears catalogue dept., earns \$25,300
 Husband earns \$40,000, reduced income after post-separation motorcycle accident, but large settlement
 Guidelines ranges used to assess reasonableness of retroactive spousal support award 1998-2005
 Ongoing support of \$1,000/mo. from 2006 on, in range

Chalifoux v. Chalifoux, [2008] A.J. No. 174, 2008 ABCA 70 (Conrad and Rowbotham JJ.A., Berger J.A. dissenting in part)

Married 22 years, 3 children, now 1 with husband
 Wife sought spousal support under SSAG, \$4,200-\$6,300/mo. based on husband’s post-separation income
 Husband now earning \$171,432 as electrician in Yemen, earned \$70-\$80,000 during marriage
 Wife receives income of \$24,828 from disability policies and rent
 Trial judge ordered child support by wife of \$213/mo., spousal support by husband of \$2,000/mo.,
 Trial judge did not err in determining husband’s income, or in not basing support on actual income
 Husband adopted “burdensome life” after separation, insufficient connection to marriage
 But erred in including retroactive support in wife’s income, and in estimating monthly cash flows
 Spousal support increased on appeal from \$2,000/mo. to \$2, 827/mo.
 Dissent on property issues
 [Custodial payor range, at \$80,000 for husband: \$1,256-\$1675; at \$100,000: \$1,715-\$2,287/mo.]

Shellito v. Bensimhon, 2008 CarswellBC 469, 2008 BCCA 68 (MacKenzie J.A.)

Together 5-6 years (married 4), husband 35, wife 33, no children
 Wife serious migraines, worsened by stress, unable to work full-time, teacher’s certificate
 Husband RCMP corporal, earns \$88,000 with overtime
 Property divided 50/50, despite short marriage, wife’s need vs. premarital property, upheld on appeal
 Wife not work now, can work part-time in 4 mos., full-time in 3 years, \$18,000 imputed during period of
 part-time employment
 Support non-compensatory, Guidelines maximum \$700/mo. for 3 to 6 years, “too low”, said trial judge
 Wife sought \$1500-\$2000, interim support \$750/mo. for 12 mos.
 Support \$1800 for 4 mos., \$1500 for 18 mos., \$1200 for 18 mos., then end (52 mos. total)
 Upheld on appeal, no error to depart from SSAG amount to reflect wife’s disability, no “double counting”
 of disability factor in property and support

D.L.M. v. J.A.M., [2008] N.B.J. No. 9, 2008 NBCA 2 (Larlee J.A)

Married 6 years, 2 children 9 and 5, with wife

Husband working as superintendent for parents' rental property company, salary \$42,684

Wife primary caregiver, also worked in company, now 2 jobs, call centre/retail, \$19,000/yr.

Trial judge ordered child support, no further spousal support

Issues: gift vs. loan re home from husband's parents, imputing income to husband

Gift, not loan, wife entitled to half of net proceeds from home

Couple income split during marriage, total close to \$70,000, amount imputed in interim

No explanation by husband for drop in income after separation

Income imputed at \$70,000, support issues remitted to trial judge

Trial judge to consider entitlement and, if entitlement, application of Guidelines

[Child support, \$983/mo., Guidelines range (no s. 7 expenses): \$149-\$668/mo.]

Fisher v. Fisher, [2008] O.J. No. 38, 2008 CarswellOnt 43, 2008 ONCA 11, 47 R.F.L. (6th) 235, 88 O.R. (3d) 241 (Lang J.A., Doherty and Goudge JJ. A. concurring)

19 year marriage, separation 2004, no children

Husband completes B.A. and B. Ed. during marriage; then teacher earning \$65,000; 1999 new job with teacher's federation; income increases in last 3 years of marriage and continues to increase after separation: 2003, \$81,800; 2004, \$120,000; 2005, \$132,000; 2006, \$140,000

Husband new partner with two young children, staying home, receiving \$700 per month child support

Wife worked during marriage, sometimes full-time, sometimes part-time; also took university courses; average earnings \$30,000; income \$41,000 for 2 years before separation unusually high

Wife depressed after separation; unemployed and on disability benefits; back to full-time employment, earning \$30,000

October 2004, interim support \$2000/mo

Trial 2006: spousal support of \$2600/mo March 1 to Dec. 1, 2006, \$1800/mo in 2007, \$1050 in 2008;

either party able to request review in 2009; no retroactive support; no reference to SSAG even though parties argued

Wife's appeal allowed

Trial judge made errors in finding of fact relating to wife's employment and potential new relationship

Wife's claim for support primarily non-compensatory

Husband's obligations to second family not to be relied upon to reduce support; new partner capable of working;

No basis for review order; no specified uncertainty

Support to be made retroactive to Oct. 2004; consistent with SSAG which include interim support in calculating duration of awards

Time-limited order appropriate; seven years of transitional support

Incomes determined by averaging incomes earned in 3 years prior to separation and in the year of separation; result: husband \$89,825 and wife \$35,500

Trial judge's order replaced by order of spousal support for \$3000 per month (for 3.5 years) beginning October 2004; step-down April 1 2008 to \$1,500 (for 3.5 years); terminating Sept 1, 2011 (7 years total)

SSAG a "useful tool" or "litmus test" in determining reasonableness of award; when counsel address SSAG; trial judges should provide reasons if award amount outside range

Range: \$1,290 to \$1,720 (\$15,483 to \$20,644 annually), 9.5 to 19 years

Court's award outside range for both amount (higher) and duration (lower), but allowed by restructuring because with global range [global range: \$147,088 to \$392,236; trial judge's global award \$94,200, outside range; Court of Appeal's global award \$189,000, within global range, at low end]

Beninger v. Beninger, [2007] B.C.J. No. 2657, 2007 BCCA 619 (Prowse J.A.)

25 year marriage, 4 children, separation 2000; two dependent children, one with each parent

Wife obtains M.Sc. in economics in early years of marriage and but homemaker after birth of first child

Husband lawyer; obtains master of laws in early years of marriage; unsuccessful business ventures at end of marriage; bankruptcy 2001; unemployed due to depression; then consulting business

2003 order: assuming income of \$312,000, child support for 1 child \$2,111/mo; spousal support \$6,500

2004 order: based on income of \$120,000, child support for one child of \$888/mo; spousal support \$2,000; subsequent variation requiring contribution to university expenses
Husband returns to work as tax lawyer on contract basis in 2006; income \$364,500; remarried; new spouse earning \$75,000; seeks variation of child and spousal support
Wife health issues, no income
Chambers judge finds husband's income to be \$318,900 (after deduction of business expenses of \$45,000); orders spousal support of \$4000 per month
Wife appeals, arguing husband's income much higher
Court of Appeal sets husband's income at \$330,650; not appropriate to impute income to wife
Child support raised to \$2,711.07
Use of SSAG on variation: appropriate on these facts, wife has on-going entitlement to substantial support both on compensatory and non-compensatory basis; appropriate to base spousal support on husband's increased income because career linked to education acquired during marriage and years of work during marriage while wife cared for children
Range under *with child support* formula if husbands' income \$330,000: \$8,500 - \$10,000, leaving wife with 48.9% of NDI
Spousal support ordered: \$9000/mo, indefinite