



Department of Justice
Canada

Ministère de la Justice
Canada

SPOUSAL SUPPORT ADVISORY GUIDELINES: A DRAFT PROPOSAL

PREPARED BY:

Professor Carol Rogerson
Faculty of Law
University of Toronto

AND

Professor Rollie Thompson
Dalhousie Law School

JANUARY 2005

Canada

Spousal Support Advisory Guidelines: A Draft Proposal

Prepared by:

Professor Carol Rogerson
Faculty of Law
University of Toronto

and

Professor Rollie Thompson
Dalhousie Law School

Presented to:

Family, Children and Youth Section
Department of Justice Canada

*The views expressed in this report are those of the authors
and do not necessarily represent the views of
the Department of Justice Canada.*

Aussi disponible en français

© Carol Rogerson and Rollie Thompson, 2005
University of Toronto, Faculty of Law; and Dalhousie Law School

This publication may be reproduced in part or in whole, and by any means, without charge or further permission from the authors, provided that due diligence is exercised in ensuring the accuracy of the materials reproduced; that the authors are identified as the source of the publication and that the reproduction is not represented as an official version of the original publication.

Also issued in French under title: *Lignes directrices facultatives en matière de pensions alimentaires pour époux — Ébauche d'une proposition.*
Also issued on the Internet.

© Her Majesty the Queen in Right of Canada, represented by the Minister of Justice and Attorney General of Canada, 2005, in the French-language translation.

The French-language version of the publication may be reproduced in part or in whole, and by any means, without charge or further permission from the Department of Justice, provided that due diligence is exercised in ensuring the accuracy of the materials reproduced; that the Department is identified as the source of the publication and that the reproduction is not represented as an official version of the original publication.

TABLE OF CONTENTS

EXECUTIVE SUMMARY	v
INTRODUCTION	1
1 BACKGROUND—THE CURRENT LAW OF SPOUSAL SUPPORT	5
1.1 The Legislative Framework	5
1.2 Judicial Interpretation	6
1.3 The Problem of Spousal Support and the Need for Guidelines	9
1.4 Why Guidelines Now?	10
2 THE GUIDELINES PROJECT	13
2.1 The Nature of the Proposed Guidelines: Informal, Voluntary and Advisory	13
2.2 The Challenges of the Project	14
2.3 How We Got Here: The Process to Date	15
2.4 The Next Stage.....	17
3 WHY GUIDELINES? HOW WILL THEY WORK IN PRACTICE?.....	19
3.1 The Advantages and Disadvantages of Guidelines.....	19
3.2 How These Advisory Guidelines Might Work in Practice	21
4 THE BASIC STRUCTURE OF THE ADVISORY GUIDELINES	23
4.1 Income Sharing	23
4.2 Preliminary Issues—The Applicability of the Advisory Guidelines	24
4.3 The Formulas	27
4.4 After the Formulas Have Been Applied: Issues of Restructuring and Exceptions	32
5 THE WITHOUT CHILD SUPPORT FORMULA.....	35
5.1 The Basic Structure of the <i>Without Child Support</i> Formula.....	35
5.2 Merger over Time and Existing Theories of Spousal Support	41
5.3 Applying the Formula.....	44
5.4 Making the Formula Concrete—Some Examples	47

5.5	Using the Ranges	53
5.6	Restructuring.....	55
5.7	Exceptions.....	58
6	THE WITH CHILD SUPPORT FORMULA.....	65
6.1	The Rationales for Spousal Support	65
6.2	Background to the Basic Formula.....	67
6.3	The Basic Formula.....	68
6.4	Amounts of Spousal Support: Examples of the Basic Formula.....	72
6.5	Fixing an Amount Within the Range	74
6.6	Duration under the Basic Formula	75
6.7	Custodial Variations: Shared and Split Custody.....	78
6.8	A Hybrid Formula for Spousal Support Paid by the Custodial Parent	80
6.9	Restructuring.....	82
6.10	Exceptions.....	83
6.11	The Crossover Between Formulas	84
7	CEILINGS AND FLOORS	85
7.1	Ceilings	85
7.2	Floors	87
8	INTERIM SUPPORT	91
9	APPLYING THE ADVISORY GUIDELINES IN QUEBEC	93
9.1	The Definition of Income.....	93
9.2	Length of Marriage Under the <i>Without Child Support</i> Formula.....	94
9.3	Child Support and the <i>With Child Support</i> Formula.....	94
10	VARIATION, REVIEW, REMARRIAGE, SECOND FAMILIES.....	97
10.1	Material Changes, Review and Issues of Continuing Entitlement	97
10.2	Applications to Reduce Spousal Support Because of Changes in Income	99
10.3	The Payor’s Post-Separation Income Increase	100
10.4	The Recipient’s Reduced Income After Separation.....	101
10.5	Crossover Between the Two Formulas	102

10.6	The Payor’s Remarriage or Re-partnering	104
10.7	The Recipient’s Remarriage or Re-partnering.....	104
10.8	Second Families	104
11	CONCLUSION.....	107
APPENDIX A		
	SPOUSAL SUPPORT CASES USING INCOME SHARING	109
APPENDIX B		
	MEMBERS OF THE ADVISORY WORKING GROUP ON FAMILY LAW	111
APPENDIX C		
	DETAILED CALCULATIONS UNDER THE BASIC <i>WITH CHILD SUPPORT</i> FORMULA.....	113
APPENDIX D		
	SPOUSAL SUPPORT RANGES BY PROVINCE/TERRITORY UNDER <i>THE WITH CHILD SUPPORT</i> FORMULA	117
	GLOSSARY OF TERMS.....	119

EXECUTIVE SUMMARY

The draft **spousal support advisory guidelines** proposed in this document are intended to bring more certainty and predictability to the determination of spousal support under the federal *Divorce Act*. This Draft Proposal for advisory guidelines is the product of more than three years of work, elaborated upon in Chapter 2. As its title indicates, this is truly a **draft** that invites application, experimentation, discussion and feedback, with a view to further revisions.

These advisory guidelines are very different from the *Federal Child Support Guidelines*. They are **not being legislated** by the federal government. They are informal guidelines that will operate on an **advisory basis only**. The proposed advisory guidelines will be used to determine the amount and duration of spousal support within the existing legal framework of the *Divorce Act* and the judicial decisions interpreting its provisions. The guidelines are not legally binding and their adoption and use will be voluntary. They are intended as a practical tool to assist spouses, lawyers, mediators and judges in typical cases. The basic formulas, variations and exceptions are intended to build upon current practice, reflecting best practices and emerging trends across the country.

The proposed advisory guidelines do **not** deal with **entitlement**, just amount and duration once entitlement has been found. The advisory guidelines **do not deal with the effect of a prior agreement on spousal support**. The advisory guidelines have been developed specifically under the federal *Divorce Act*. **Provincial/territorial laws** differ in important respects and any use of these guidelines in the provincial/territorial context would have to take account of these distinctive statutes, especially on matters of entitlement and agreements.

An overview of the structure of the proposed scheme is found in Chapter 4.

There are two basic formulas in the proposal: the ***without child support formula*** and the ***with child support formula***. The dividing line between the two is the absence or presence of a dependent child or children of the marriage, and a concurrent child support obligation, at the time spousal support is determined. Both formulas use **income sharing** as the method for determining the amount of spousal support, not budgets. The formulas produce **ranges** for the amount and duration of support, not just a single number. The precise number chosen within that range will be a matter for negotiation or adjudication, depending upon the facts of a particular case.

The ***without child support formula*** is built around two crucial factors: the **gross income difference** between the spouses and the **length of the marriage**. Both the amount and the duration of support increase incrementally with the length of the marriage, as can be seen in the summary box below. The idea that explains this formula is **merger over time**: as a marriage lengthens, spouses more deeply merge their economic and non-economic lives, with each spouse making countless decisions to mould his or her skills, behaviours and finances around those of the other spouse. The gross income difference measures their differential loss of the marital standard of living at the end of the marriage. The formulas for both amount and duration reflect the idea that the longer the marriage, the more the lower income spouse should be protected against such a differential loss. Merger over time captures both the compensatory and non-

compensatory spousal support objectives that have been recognized by our law since *Moge* and *Bracklow*.

The *Without Child Support* Formula

Amount ranges from 1.5 to 2 percent of the difference between the spouses' gross incomes (the **gross income difference**) for each year of marriage (or, more precisely, years of cohabitation), up to a maximum of 50 percent. The range remains fixed for marriages 25 years or longer at 37.5 to 50 percent of income difference.

Duration ranges from .5 to 1 year for each year of marriage. However, support will be **indefinite** if the marriage is **20 years or longer** in duration *or*, if the marriage has lasted 5 years or longer, when the years of marriage and age of the support recipient (at separation) added together total 65 or more (the **rule of 65**).

Gross income in this formula uses the same definition of income as under the *Federal Child Support Guidelines*, sometimes called Guidelines income. It is important to note that the percentages are not percentages of the payor's income, but **percentages of the gross income difference** between the spouses.

Chapter 5 contains examples of the application of the *without child support* formula and the ranges it produces for marriages of different lengths and incomes. A number of **factors** will affect the precise amount or duration within those ranges: a strong compensatory claim, the recipient's needs, property division, the needs and limited ability to pay on the part of the payor spouse, and self-sufficiency incentives.

Restructuring allows the amount and duration under the *without child support* formula to be traded off against each other, so long as the overall value of the restructured award remains within the total or global amounts generated by the formula when amount and duration are combined. Restructuring can be used in at least three different ways: (i) to **front-end load** awards by increasing the amount beyond the formula's range and shortening duration; (ii) to **extend duration** beyond the formula's range by lowering the monthly amount; or (iii) to formulate a **lump sum** by combining amount and duration.

Any formula, even with restructuring, will have its limits and there will always be exceptional cases. Because the guidelines are only advisory, departures are always possible on a case-by-case basis where the formula outcomes are inappropriate. Under both this formula and the *with child support* formula, the proposed guidelines do offer a short list of **exceptions**, intended to identify common categories of departures: a compensatory exception in short relationships, illness and disability, debt payment, prior support obligations, and compelling financial circumstances in the interim period.

Cases with dependent children and concurrent child support obligations require a different formula, the ***with child support* formula**. These cases raise different considerations: priority

must be given to child support; there is usually reduced ability to pay; and particular tax and benefit issues arise. The rationale for spousal support is also different. Where there are dependent children, the primary rationale is compensatory, as both *Moge* and *Bracklow* made clear. What drives support is not the length of the marriage, or marital interdependency, or merger over time, but the presence of dependent children and the need to provide care and support for those children. This **parental partnership** rationale looks at not just past loss, but also at the continuing economic disadvantage that flows from present and future child care responsibilities, anchored in s. 15.2(6)(b) of the *Divorce Act*.

There are three important differences between the *without child support* formula and the *with child support* formula. First, the *with child support* formula uses the **net incomes** of the spouses, not their gross incomes. Second, this formula divides the pool of combined net incomes between the two spouses, not the gross income difference. Third, the upper and lower percentage limits of net income division in the *with child support* formula **do not change with the length of the marriage**.

Set out below is a summary version of the **basic with child support formula**, used to determine the amount of spousal support to be paid where the payor spouse pays both child and spousal support to the lower income recipient spouse who is also the parent with custody or primary care of the children.

The Basic With Child Support Formula

(1) Determine the **individual net disposable income (INDI)** of each spouse:

- Guidelines Income *minus* Child Support *minus* Taxes and Deductions = Payor's INDI
- Guidelines Income *minus* Notional Child Support *minus* Taxes and Deductions *Plus* Government Benefits and Credits = Recipient's INDI

(2) Add together the individual net disposable incomes. Determine the range of spousal support amounts that would be required to leave the lower income recipient spouse with between 40 and 46 percent of the combined INDI.

Net income computations like these will usually require computer software. Basic to this formula is the concept of **individual net disposable income**, an attempt to isolate a **pool** of net disposable income available after adjustment for each spouse's child support obligations. This is done by deducting or backing out their respective **contributions to child support**. The details of these calculations are set out in Chapter 6, along with several examples.

Duration under this basic *with child support* formula also reflects the underlying parental partnership rationale. Initial orders would be **indefinite** in form, subject to the usual process of review or variation. There would, however, be **outside time limits** on the cumulative duration of spousal support, which would structure the process of review and variation. There are two tests for duration and whichever produces the longer duration will apply:

- First is the **longer-marriage** test, which is modelled on the maximum duration under the *without child support* formula, i.e. one year of support for every year of marriage, and which will likely govern for most marriages of ten years or more.
- The second test is the **shorter-marriage** test, which sets the outside time limit for support at the time that the last or youngest child finishes high school and which will typically apply for marriages under ten years. In these shorter-marriage cases, there will likely be review conditions attached. Relatively few cases will reach this outside time limit and those that do will likely involve reduced amounts of top-up support by that time.

Shared and split custody situations require a slight variation in the computation of individual net disposable income, as the backing out of child support obligations is a bit more complicated. There is also a different formula for cases where **spousal support is paid by the custodial parent**. Under this formula, the spouses' Guidelines incomes are reduced by the grossed-up amount of child support (actual or notional) and then the *without child support* formula is applied to determine amount and duration.

Restructuring has less scope for application under the *with child support* formula, but remains possible in some situations. The list of exceptions is the same as under the previous formula.

As with the *Federal Child Support Guidelines*, there is a **ceiling** and a **floor** that sets the range of incomes to which the formulas apply. The ceiling is the income level for the payor spouse above which any formula gives way to discretion, set here at a **gross annual income for the payor of \$350,000**. The floor is the income level for the payor below which no support is to be paid, here set at **\$20,000**. To avoid a cliff effect, there is an **exception** for cases where the payor spouse's gross income is **more than \$20,000 but less than \$30,000**, where spousal support may not be awarded or may be reduced below the low end of the range. An additional **exception** is also necessary, to allow an award of spousal support **below the income floor** in particular cases.

The advisory guidelines are intended to apply to **interim support**, a setting where the formulas can offer a quick, easily calculated range of amounts. There is an **exception for compelling financial circumstances in the interim period**, to recognize that it is not always possible to adjust family finances quickly, especially for housing expenses and debt payments.

Quebec has different guidelines for determining child support, which have an impact on spousal support determinations. The application of the advisory guidelines to *Divorce Act* cases in Quebec raises special issues that are dealt with in Chapter 9.

The formulas are intended to apply to initial orders and to the negotiation of initial agreements. Given the uncertain state of the current law, it is not possible to make the advisory guidelines apply to the full range of issues that can arise on **variation and review**. The advisory guidelines can be applied on applications to reduce spousal support because of changes in income, for example, when the payor spouse's income goes down or the recipient spouse's income goes up (or ought to have gone up). In some cases, one spouse may wish to apply to vary to **cross over** between the two formulas, mostly in longer marriages where the *without child support* formula produces higher ranges, once the children are no longer dependent.

More difficult issues arise where the payor's post-separation income increases or the recipient's income is reduced after separation. The most the formula can do is to establish an upper limit upon any increase in spousal support in such cases. At the present time, no formula can be constructed to resolve issues around the recipient spouse's remarriage or re-partnering, or the second family cases. At some later stage, it may be possible to find formulaic solutions to these categories of variation and review cases.

INTRODUCTION

In 2001 the federal Department of Justice identified the need for a project to explore the possibility of developing some form of advisory spousal support guidelines. The aim of the project was to bring more certainty and predictability to the determination of spousal support under the *Divorce Act*.¹ The project was a response to growing concerns expressed by lawyers, judges, mediators and the public about the lack of certainty and predictability in the current law of spousal support, creating daily dilemmas in advising clients, and negotiating, litigating or—in the case of judges—deciding spousal support issues. We were retained to direct that project.

Much hard work has been done in the intervening three years, culminating in this Draft Proposal for a set of advisory spousal support guidelines. As its title indicates, this is a draft document which we put forward to invite discussion and feedback.

The term “guidelines” inevitably brings to mind the *Federal Child Support Guidelines*, enacted in 1997.² We need to emphasize at the beginning that this comparison must be resisted. This project **does not involve formal, legislative reform**. Unlike the federal, provincial and territorial child support guidelines, these advisory guidelines will not be legislated, even after the process of feedback. They are instead intended to be **informal guidelines** that will operate on an **advisory** basis only, **within the existing legislative framework**. **They will not have the binding force of law** and will be applied only to the extent that lawyers and judges find them useful. They are guidelines in the true sense of the word. We have called them *advisory* guidelines to differentiate them from the child support guidelines.

Objectives of these advisory guidelines

These advisory guidelines are intended as a practical tool to assist in determinations of spousal support **within the current legal framework**—to operate primarily as a starting point in negotiations and settlements. The project was not directed at a theoretical re-ordering of the law of spousal support or at creating a new model of spousal support. The formulas we have developed are intended as proxies for the spousal support objectives found in the *Divorce Act* as elaborated upon by the Supreme Court of Canada. Our goal was to develop guidelines that would achieve appropriate results over a wide range of typical cases.

Given the informal nature of these advisory guidelines, they have been developed with the recognition that they must be broadly consistent with current support outcomes while also providing some much needed structure and consistency to this area of law—a not insignificant challenge. As informal guidelines, they **do not address entitlement**, but deal only with the amount and duration of support **once entitlement has been established**. In the same vein they

¹ *Divorce Act*, R.S.C. 1995, c. 3 (2nd Supp).

² The *Federal Child Support Guidelines*, SOR/ 97-175, which were enacted as regulations pursuant to the *Divorce Act*, *ibid*, came into force in May, 1997. All provinces and territories save Alberta (where a Bill to introduce child support guidelines has been passed but not yet proclaimed) and Quebec (where a different guidelines model applies) have adopted child support guidelines that are either identical or similar to the *Federal Child Support Guidelines*. The guidelines are based on a percentage-of-income formula.

confer **no power to re-open existing spousal support agreements** beyond what exists under current law.

Content of the proposed advisory guidelines

The proposed advisory guidelines are based on what is called income sharing. Contrary to popular conception, income sharing does not necessarily mean equal sharing. It simply means that spousal support is determined as a percentage of spousal incomes. The percentages can vary according to a number of factors. Our proposed scheme of advisory guidelines offers two basic formulas that base spousal support on spousal incomes and other relevant factors such as the presence or absence of dependent children, and the length of the marriage. The formulas deal with the amount (sometimes referred to as quantum) and duration of spousal support once entitlement to support has been established. The formulas generate ranges of outcomes, rather than precise figures for amount and duration, which may be restructured by trading off amount against duration.

The proposed guidelines are advisory only and thus always allow for departures from the outcomes generated by the formulas on a case-by-case basis where they are not appropriate. While we have tried to specify exceptions to further assist the parties and the courts in framing and assessing any departures from the formulas' ranges, they are not exhaustive of the grounds for departure. There will still be considerable room for the exercise of discretion under these advisory guidelines but it will be exercised within a much more defined structure than now exists—one with clearer starting points. Budgets, which are currently the primary tool in spousal support determinations, will play a reduced and less central role.

Structure of this report

Before we discuss in any more detail the actual content of these proposed spousal support advisory guidelines, there are many preliminary matters that must be addressed so that the advisory guidelines can be properly understood. In Chapter 1 we provide some necessary background to the project. We review the current legal framework for spousal support—the framework within which these advisory guidelines will operate—and also discuss the problems within the current law that led to this guidelines initiative.

In Chapter 2 we discuss in more detail the nature of this project, the challenges it raises, the process by which these advisory guidelines were developed, and the next stages of the project.

In Chapter 3 we deal with the preliminary question that many will be asking: Are spousal support advisory guidelines a good idea? We review the advantages and disadvantages of advisory guidelines, focussing on the particular set of informal, voluntary advisory guidelines we are proposing. To illustrate their potential usefulness, we also sketch how these advisory guidelines might work in practice.

With Chapter 4, we begin to move into the actual substance of the Draft Proposal, providing a road map of the basic structure of the advisory guidelines.

Chapter 5 deals with the first of the two basic formulas around which the advisory guidelines are structured—the *without child support* formula, which applies in cases where there are no dependent children and hence no concurrent child support obligation.

Chapter 6 deals with the other basic formula—the *with child support* formula, which applies in cases where there are dependent children.

Chapter 7 identifies the ceilings and floors—the upper and lower income levels over which the advisory guidelines are applicable.

Chapter 8 deals with the application of the advisory guidelines to interim spousal support determinations.

Chapter 9 deals with the application of the advisory guidelines to divorce cases in Quebec.

Chapter 10 addresses the application of the advisory guidelines in the context of reviews and variations, including situations involving remarriage and second families.

Chapter 11 offers a brief conclusion, including details on how to communicate your views on this Draft Proposal to us.

At the end of the document there are several appendices and a glossary of terms that offers a handy reference point for many of the terms used in this document. Some of these terms will be familiar to family lawyers and judges but not to other readers; others are new terms specific to this proposed set of spousal support advisory guidelines.

1 BACKGROUND—THE CURRENT LAW OF SPOUSAL SUPPORT

1.1 The Legislative Framework

Spousal support, when sought in the context of a divorce, is governed by the federal *Divorce Act*. There are also provincial and territorial laws that govern spousal support outside the divorce context, applying to unmarried couples and to married couples who have separated but are not applying for a divorce. The statutory provisions are an important starting point in understanding the law around spousal support; they provide the framework within which the proposed advisory guidelines will operate. The proposed advisory guidelines do nothing to alter that legislative framework.

Federal and provincial/territorial spousal support legislation in Canada tends to take the form of relatively open-ended provisions incorporating a variety of factors and objectives. Much room is left for judicial discretion in the interpretation and application of the legislation. Judicial interpretations in turn guide lawyers and mediators advising clients negotiating spousal support settlements.

The specific focus of this project has been on developing informal guidelines to assist in the determination of the amount and duration of spousal support under the *Divorce Act*. The current *Divorce Act*, enacted in 1985, attempts to provide guidance for spousal support determinations by setting out, in s. 15.2 (6), four 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 over and above the obligation apportioned between the spouses pursuant to subsection (8) [i.e. through child support];
 - (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 for a spouse:

- 15.2 (4)** In making an order ... the court shall take into consideration the condition, means, needs and other circumstances of each spouse 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.

Provincial/territorial support law is governed by distinctive statutory regimes. However, in practice there is much overlap between federal and provincial/territorial support laws. The leading Supreme Court of Canada decisions on spousal support, *Moge* and *Bracklow*, which will be discussed in more detail below, articulated a broad conceptual framework for spousal support that has been relied upon in decisions under both provincial/territorial and federal legislation. Indeed *Bracklow*, which combined claims under both the *Divorce Act* and provincial legislation, made no real distinction between the two.

Given this overlap, it is possible that these advisory guidelines might be used under provincial/territorial support legislation. Any such use would have to take account of the distinctive features of these statutes. In Chapter 4, below, we discuss in more detail some of the specific issues that would arise in the application of the advisory guidelines to support determinations under provincial/territorial spousal support laws. **It is important to keep in mind when reading this document that the advisory guidelines were developed for use under the federal *Divorce Act*.**

1.2 Judicial Interpretation³

In two important decisions, *Moge v. Moge*⁴ in 1992 and *Bracklow v. Bracklow*,⁵ in 1999, the Supreme Court of Canada has attempted to clarify the general principles that structure our law of spousal support. These decisions, together with the legislation, constitute the current legal framework for spousal support. Our proposed advisory guidelines do nothing to displace these decisions, but are rather an attempt to develop formulas to better implement the principles these decisions recognize.

The combined effect of these two decisions is a very broad basis for spousal support under the *Divorce Act*. Both *Moge* and *Bracklow* can be seen as responses to, and rejections of, the very limited view of spousal support that had emerged from the Supreme Court of Canada's 1987 *Pelech* trilogy⁶ which had emphasized the importance of finality and promoting a clean break

³ For a more detailed review of the judicial interpretation of the *Divorce Act*'s spousal support provisions see Carol Rogerson, "The Canadian Law of Spousal Support" (2004), 38 *Family Law Quarterly* 69; Carol Rogerson, "Spousal Support Post-*Bracklow*: The Pendulum Swings Again?" (2001), 19 *Canadian Family Law Quarterly* 185; Rollie Thompson "Everything is Broken: No More Spousal Support Principles?" unpublished paper prepared for the Continuing Legal Education Society of British Columbia Family Law Conference, July 12-13, 2001 available online at www.cle.bc.ca. The Background Paper, discussed at note 10 below and accompanying text, also reviews the current law of spousal support.

⁴ *Moge v. Moge*, [1992] 3 S.C.R. 813.

⁵ *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420.

⁶ The three cases were *Pelech v. Pelech*, [1987] 1 S.C.R. 801, *Richardson v. Richardson*, [1987] 1 S.C.R. 857 and *Caron v. Caron*, [1987] 1 S.C.R. 892. All three cases were decided under the earlier, 1968 *Divorce Act* and all three also involved separation agreements in which the former wives had waived their rights to ongoing spousal support. In each case the Court refused to override the agreement and the application for spousal support was dismissed.

between divorced spouses. In the wake of *Pelech*, spousal support came to be viewed as a transitional or rehabilitative remedy. Time-limited spousal support orders came to be the norm, even in cases of long, traditional marriages.

In the ground-breaking *Moge* decision in 1992, the Supreme Court of Canada clearly rejected the *Pelech* trilogy and the clean-break model of spousal support. The Court emphasized that all four support objectives in the 1985 *Divorce Act* had to be given weight and that the clean-break model of spousal support unduly emphasized only one of those objectives—the promotion of spousal self-sufficiency after divorce—at the expense of all the others. Former spouses were obligated to make reasonable efforts to maximize their earning capacity and contribute to their own support but the Court recognized that some spouses, despite their best efforts, would not be able to become self-sufficient. In the Court’s view, the clean-break model went too far in deeming spouses to be self-sufficient when they were not. In *Moge* the Court endorsed an expansive compensatory basis for spousal support, portraying its purpose as the equitable distribution between the spouses of the *economic* consequences of the marriage—both its economic advantages and disadvantages. While the Court recognized that many different circumstances could give rise to compensatory claims, the decision focused on the most common situation—that where a spouse has sacrificed labour force participation to care for children, both during the marriage and after marriage breakdown. Under the compensatory approach of *Moge*, spousal support came to be understood primarily as a form of compensation for the loss of economic opportunity—or in the language of the *Divorce Act*, the economic disadvantage—resulting from the roles adopted during the marriage.

The compensatory principle from *Moge* continues to play a significant role in structuring our law of spousal support. However, when lower courts attempted to implement the compensatory principle, which the Supreme Court of Canada had presented at a high level of generality, they ran into some difficulties on both the practical and theoretical fronts.

On the practical front, the compensatory principle is difficult to implement. Establishing a support claim requires, in principle, individualized evidence of earning capacity loss. As the Supreme Court of Canada itself acknowledged in *Moge*, providing this form of expert evidence can be costly. Evidence of earning capacity loss can also be difficult to obtain and somewhat hypothetical, particularly in cases of long marriages where the spouse claiming spousal support had no established career before assuming the role of homemaker. Difficult questions of causation can also arise as to why a spouse remained out of the labour force or chose lowly paid employment. On a practical level, effective implementation of the compensatory principle requires the development of proxy measures of economic loss that will inevitably involve some sacrifice of accuracy and theoretical purity.

After *Moge*, Canadian courts showed no enthusiasm for reliance upon expert economic evidence documenting loss of earning capacity.⁷ Instead, “need”—the traditional conceptual anchor of spousal support—became a convenient proxy measure of economic disadvantage. A spouse in economic need was presumed to be suffering economic disadvantage as a result of the marriage; conversely, a spouse not in need was presumed not to have suffered any economic disadvantage

⁷ After the Ontario Court of Appeal’s refusal to base an award on such evidence in *Elliot v. Elliot* (1993), 48 R.F.L. (3d) 237 (Ont. C.A.) it virtually disappeared from spousal support cases.

as a result of the marriage. The use of need and standard of living as proxy measures for loss of opportunity was expressly endorsed by Bastarache J. A. in *Ross v. Ross*, a New Brunswick case involving a long traditional marriage:

It is in cases where it is not possible to determine the extent of the economic loss of the disadvantaged spouse that the Court will consider need and standard of living as the primary criteria, together with the ability to pay of the other spouse.⁸

At least in longer marriages, need came to be measured against the marital 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.⁹

The rule that emerged in many lower court decisions was that the goal of spousal support following longer marriages was to provide the support claimant with a reasonable standard of living judged in light of the marital standard of living. In some cases, as in *Ross*, the principle for long marriages has been expressed as providing similar lifestyles or roughly equivalent standards of living for each of the spouses.

On the theoretical front, the post-*Moge* case law also revealed concerns with the limitations of a pure compensatory analysis that would confine the basis for spousal support to economic loss caused by the roles adopted during the marriage. Some judges shifted the compensatory focus to the economic *advantages* of the marriage in the form of the earning capacity the payor spouse was able to maintain and enhance. Other judges found the compensatory framework itself too restrictive. Compensatory theories narrowed the basis for entitlement. This was something many judges resisted. Some judges read the *Divorce Act* spousal support objectives more broadly, focussing on the section referring to the relief of economic hardship caused by the marriage breakdown. Others read *Moge* as a general directive to ameliorate the post-divorce impoverishment of former spouses. The most serious limitations of a compensatory analysis arose in cases involving ill or disabled spouses, whose economic needs were not related to marital roles and who could not claim spousal support based on losses or gains in earning capacity during the marriage.

The Supreme Court of Canada directly addressed these limitations of the compensatory principle in its 1999 decision in *Bracklow*. In that case the Court ruled that there is also a non-compensatory basis for spousal support under the *Divorce Act* based on “need alone.” Thus a former spouse has an obligation to pay spousal support if the other spouse is experiencing economic need at the point of marriage breakdown, even when that need does not arise from the roles adopted during the marriage. The Court based this obligation on a view of marriage as a relationship involving mutual obligations and complex interdependencies that may be difficult to unravel when the marriage breaks down. The Court also spoke of marriage as involving the assumption of basic social obligations, reflecting the view that primary responsibility for support of a needy partner rests upon the family rather than the state. The Court went on to say that the extent of a former spouse’s obligation to meet his or her former partner’s post-divorce needs

⁸ *Ross v. Ross* (1995), 16 R.F.L. (4th) 1 (N.B.C.A.) at 7.

⁹ At 870.

would be dependent upon many factors, including the length of the relationship, the way the parties had structured their relationship, ability to pay, and the re-partnering or remarriage of the former spouses.

Bracklow clearly expanded the basis of the spousal support obligation under the *Divorce Act* to include need as well as compensation. However, in the course of doing so the decision increased the level of uncertainty about the nature and extent of the spousal support obligation, well beyond what had existed after *Moge*. The Supreme Court of Canada failed to provide a definition of “need,” leaving open the question of whether it meant an inability to provide a basic standard of living or whether it should be assessed in the context of the marital standard of living. After *Bracklow*, many argued that any spouse who experienced a significant decline in standard of living after marriage breakdown was entitled to spousal support.

Even more significantly, *Bracklow* emphasized the highly discretionary, individualized nature of spousal support decisions. The Court was clear that the *Divorce Act* endorses no single theory of spousal support and must retain flexibility to allow judges to respond appropriately to the diverse forms that marital relationships can take. The Court presented spousal support determinations as first and foremost exercises of discretion by trial judges who were required to “balance” the multiple support objectives and factors under the *Divorce Act* and apply them in the context of the facts of particular cases. One of the main messages of *Bracklow* was that there were no rules in spousal support.

1.3 The Problem of Spousal Support and the Need for Guidelines

The current culture of spousal support is one that emphasizes individualized decision making and an absence of rules. Since the *Bracklow* decision, multiple theories of spousal support compete with each other while, on the ground, spousal support cases are negotiated and argued under an amorphous needs-and-means framework dominated by budgets. “Need” means many different things to different people and many different theories of spousal support can be couched in the language of need. The guidelines project springs from the growing concern expressed by lawyers and judges that the highly discretionary nature of the current law of spousal support has created an unacceptable degree of uncertainty and unpredictability.

Similar fact situations can generate a wide variation in results. Individual judges are provided with little concrete guidance in determining spousal support outcomes and their subjective perceptions of fair outcomes play a large role in determining the spousal support ultimately ordered. Appeals may often be of little help because appeal courts frequently dispose of appeals with little explanation, deferring to trial judges on issues of quantum and duration. 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 a very broad basis for entitlement under the current law, many spouses do not claim spousal support, being unwilling to engage in the difficult and costly process required.

More generally, the uncertainty and unpredictability that pervades the law of spousal support is undermining the legitimacy of the spousal support obligation. The widely differing understandings of the nature of the spousal support obligation generate concerns about unfair outcomes at both ends of the spectrum. In some cases awards are perceived as too low, in others unjustifiably high.

The proposed advisory guidelines are a response to these concerns. They have been developed for the purpose of bringing more certainty and predictability to spousal support determinations. They incorporate the basic principles of compensation and need that the Supreme Court of Canada has identified as the bases for spousal support under the *Divorce Act*. The advisory guidelines attempt to provide a more structured way of implementing those principles through formulas based on income sharing, i.e. formulas based on sharing specified percentages of spousal incomes.

1.4 Why Guidelines Now?

Spousal support guidelines rely upon mathematical formulas that determine spousal support as a percentage of spousal incomes. When spousal support guidelines were considered in the past, the idea was rejected as both impossible and undesirable. In our view, the time is now ripe for reconsideration. What has changed?

First and foremost, the law of spousal support has become more unstructured, more discretionary and more uncertain over time, particularly since 1999 in the wake of *Bracklow*. After *Moge* and prior to *Bracklow*, there had been some hope that a principled approach to spousal support was developing through the case law. Now it has become clear that the normal process of judicial development has effectively come to a halt. In this situation, spouses, lawyers and judges are attracted by the greater certainty and predictability that come with guidelines, even guidelines that are not perfect.

Second, since 1997 our experience with child support guidelines, both at the federal and provincial/territorial levels, has changed the legal culture. Their formulaic approach has accustomed us to the systemic advantages of *average* justice rather than individualized justice, to determining support without budgets and to the concept of income sharing after divorce.

Third, spousal support advisory guidelines are not simply an abstract concept any more. Some American jurisdictions have successfully experimented with such guidelines for more than a decade, as explained in the Background Paper that was prepared for this project.¹⁰ Most recently, the influential American Law Institute (ALI) has recommended a formulaic approach to spousal support as part of its comprehensive rethinking of the law of family dissolution, a process begun in the 1990s and culminating in the Institute's final report in 2002.¹¹ Some American

¹⁰ Carol Rogerson, *Developing Spousal Support Guidelines in Canada: Beginning the Discussion* (December, 2002), available on the Department of Justice website at: <http://canada.justice.gc.ca/en/dept/pub/spousal/index.html>. The Background Paper is discussed in Chapter 2.

¹¹ 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."

jurisdictions have begun to implement the ALI guidelines. Greater experience with guidelines is yielding more sophisticated models.

Finally, we can see the beginnings of formulaic approaches to the determination of spousal support in the current law. With the greater prevalence of computer software, especially since the *Federal Child Support Guidelines* came into effect in 1997, lawyers and judges can readily have available information on net disposable incomes or monthly cash flow, tax calculations and household standards of living. Armed with this information, some courts have looked to income sharing and standards of living, rather than budgets, to resolve spousal support issues. (A list of many of these cases can be found in Appendix A.)

All of these changes make spouses, lawyers, mediators and judges more interested in spousal support guidelines. In weighing the advantages and disadvantages of such guidelines, more see the balance tipping in favour of some type of spousal support advisory guidelines.

In Chapter 3 we will discuss in more detail the advantages and disadvantages of guidelines, focussing on the particular set of advisory guidelines being proposed here. Before that discussion can take place, however, it is important to have a better sense of our particular proposal—one of informal, voluntary advisory guidelines. Thus we move next, in Chapter 2, to a more detailed description of the guidelines project, including a discussion of the nature of the guidelines being developed and the process that has been used to develop them.

2 THE GUIDELINES PROJECT

2.1 The Nature of the Proposed Guidelines: Informal, Voluntary and Advisory

There are many preconceptions about what spousal support guidelines are and how they will work. Any talk of spousal support guidelines immediately brings to mind the *Federal Child Support Guidelines*. As we emphasized in the introduction, this comparison should be resisted. The proposed advisory guidelines we have developed are very different.

Unlike the *Federal Child Support Guidelines*, these **advisory guidelines** do not involve formal legislative reform. They are not being legislated by the federal government. They are intended to be **informal** guidelines that will operate on an **advisory** basis only, within the existing legislative framework.

We know that this concept of informal guidelines is one that many have difficulty understanding initially. Yet think of the early days of the *Federal Child Support Guidelines* before they were formally enacted. Many judges and lawyers used the draft proposed tables informally to assist in the determination of child support. Think also of the normal process of legal development and the ways that various presumptions can develop over time to structure judicial discretion. Such presumptions were starting to develop in the post-*Moge* law of spousal support, but since *Bracklow*, that process has broken down. This guidelines project can be thought of as an attempt to facilitate or speed up the normal process of legal development by providing a broad structure that can then be adjusted over time as it is tested by individual cases.

The inspiration for the process chosen for the development of these advisory guidelines came from the experience of many of the American jurisdictions that have adopted spousal support guidelines. In the American context, spousal support guidelines have generally been the product of bench and bar committees of local bar associations. They were created with the intention of reflecting local practice and providing a more certain framework to guide settlement negotiations. While some of the American guidelines subsequently evolved into legislation, at the initial stages they were informal.

A similar process was adopted for the development and implementation of these advisory guidelines. They have been created through a process that involves working with judges, lawyers and mediators who have expertise in family law. The goal of the process has been to articulate informal guidelines based on emerging patterns embedded in current practice. With the release of this Draft Proposal, the next stage in the development process will begin, one involving a wider circle of family law experts.

The advisory guidelines will not have the force of law. In terms of their implementation, they will be voluntarily adopted by lawyers and judges on a local basis and will acquire force based on their usefulness. Only if parties, lawyers and judges find the support ranges helpful and reasonable will the guidelines have any impact on the ground. The wider their use, the more the advisory guidelines can develop a loose, presumptive effect, providing a starting point that would require spouses to make arguments about why another outcome is appropriate in their

case. In some local areas, bench and bar may decide to follow the guidelines in a more organized fashion.

Government involvement in this process is limited. The federal Department of Justice is supporting the development of the advisory guidelines by providing financial support, communicating information on the project, participating in the discussions with the working group of family law experts, and keeping provincial and territorial governments informed. The project has no provincial/territorial sanction.

We have called this process for creating and implementing the advisory guidelines one of working “from the ground up”, in contrast to the “from the top down” process of formal legislative reform. The process, described in more detail below, is a long one involving many stages and different forms of feedback and implementation. But before we get to that, we would like to say a bit more about the general nature of this project and some of the challenges it raises.

2.2 The Challenges of the Project

2.2.1 Theory and practice

As stated in the introduction, this project is not directed at a theoretical re-ordering of the law of spousal support. Its aims are practical rather than theoretical—to provide a practical tool to assist family lawyers, mediators and judges who are confronted daily with the dilemma of determining appropriate levels of spousal support. As *Bracklow* has made clear, the *Divorce Act* does not mandate any one model of spousal support. We kept this in mind in constructing these guidelines. Reflecting current practice means reflecting a wide range of competing views of spousal support. No one theory or model or ideology or formula can be used. The formulas, described in more detail below, incorporate elements of different theories. In addition, the exceptions recognize alternate or subsidiary models of spousal support. There is no theoretical purity in the guidelines we have constructed—they are the product of much compromise.

But increased consistency and predictability—the goals of the project—do require structure, even if it does not come from theoretical purity. The project is premised on the view that patterns and structure are beginning to emerge in the law, at least in a range of typical cases—some unspoken guidelines.¹² But in the current culture of spousal support, these are often not discussed or articulated or openly acknowledged within the family law system. This project has attempted to build upon and facilitate those developments.

2.2.2 Reflecting current practice, changing current practice

Admittedly, there is a central tension in the project between reflecting practice and changing practice. As informal rules of practice without the force of law, the guidelines must reflect current practice and cannot stray too far from existing results over all. That said, there is also much in current practice that is inconsistent, arbitrary and hard to explain. These advisory guidelines were developed because of their potential to constrain some of these current practices. In building upon current practice the project draws on best practices or emerging trends. The

¹² See for example V. Jennifer Mackinnon and E. Jane Murray, “Magical Mystery Tour: Seeking Greater Consistency in Spousal Support Awards” (2004), 22 *Canadian Family Law Quarterly* 215.

proposed guidelines incorporate and reflect much of the current practice of spousal support while at the same time seeking greater consistency and logic in the results. Inevitably, even if there are some changes to current practice under these guidelines, the changes must be incremental.

The proposed advisory guidelines are not intended to raise the current levels of spousal support over the broad run of cases. Inevitably, greater consistency under the advisory guidelines will mean that some spouses will see higher support awards and others will see lower awards. The guidelines should logically lead to more frequent spousal support awards, as they offer default ranges and reduce the cost of ascertaining support amounts. Some spouses who would give up on seeking spousal support under the current costly and unpredictable discretionary regime will obtain support under the advisory guidelines, not a bad result in our view. But it is not the policy or intent of these guidelines to produce bigger support amounts.

2.2.3 National guidelines and local spousal support cultures

Early on we faced the problem of squaring national guidelines with local and regional patterns of support. To the extent that local variations reflect higher or lower incomes, guidelines can adjust for that. The ranges provided by the advisory guidelines leave some scope for adjustment towards local patterns and local conditions. There may be some local twists that require further fine-tuning in the next phase. We also hope that the advisory guidelines might lead to some cross-fertilisation of ideas amongst regions, as guidelines may force reconsideration of some local practices. During the next discussion phase, one of the challenges will be whether local or regional variations are so significant that the advisory guidelines must explicitly adjust further for such variations.

2.3 How We Got Here: The Process to Date

The first stage of the guidelines project, which commenced in September 2001, involved the preparation of a lengthy background paper by Professor Rogerson: *Developing Spousal Support Guidelines in Canada: Beginning the Discussion* (December, 2002) (the “Background Paper”). The paper and the project were first discussed at the National Family Law Program in Kelowna, B.C. in July 2002, with the paper being completed in December 2002.

The paper laid the groundwork for exploring the possibility of developing spousal support guidelines. It reviewed in detail the basic building blocks that could be drawn upon in creating guidelines: emerging patterns in the current law, the various theories of spousal support, as well as various models of guidelines that are in effect or proposed in the United States and elsewhere. The Background Paper also laid out a possible process for the development of guidelines—one of building informal guidelines that would reflect current practice and that would operate on an advisory basis only within the existing legislative framework.

The Background Paper has been translated and is available on the Department of Justice website at <http://canada.justice.gc.ca/en/dept/pub/spousal/index.html>

For those who want more detail about the multiple sources that have influenced the crafting of the proposed advisory guidelines, we encourage you to read the Background Paper.

The second stage of the project involved working with a small group of family law experts to begin the discussion about developing spousal support guidelines. Those discussions were supplemented by some additional small-scale consultations with other groups of lawyers and judges. The federal Department of Justice constituted what was initially a twelve (now thirteen) person Advisory Working Group on Family Law composed of lawyers, judges, and mediators from across the country. Its purpose was to advise the Department on family law matters generally, one of which was the guidelines project. (A list of the members of the Advisory Working Group can be found in Appendix B.)

We had five meetings with the Advisory Working Group: the first in Ottawa (February 2003), the second in Montreal (May 2003), the third in Toronto (November 2003), the fourth in Ottawa (April 2004), and the fifth in Toronto (October 2004).

The discussions within the Advisory Working Group were directed first at determining the desirability and feasibility of developing advisory guidelines. Initially, not every member of the Group was supportive of spousal support advisory guidelines, but all were receptive to the general idea. There was also agreement that there were certain patterns in spousal support, at least at the level of outcomes and at least in certain kinds of cases. We then began the process of trying to craft advisory guidelines.

Given that the goal was to work from current practice, we first started with concrete fact situations to draw out group members' views of likely outcomes. We identified certain categories of marriages and certain typical fact situations within them. In reviewing the group's responses we identified where the answers clustered. We used the responses to develop formulas and exceptions, which we then tested out on more fact situations. Finally, to ensure that they were acceptable when compared to current practice, we took the revised formulas and exceptions and demonstrated the range of outcomes they would generate.

Given the practical nature of the project, the primary focus of the process was on support outcomes rather than on appropriate theories of spousal support. We are of the view that while people might often disagree at the level of theory, there can be a fair amount of consistency in actual award levels. We also began with the easiest categories of marriages where patterns in the current law are the clearest and where we expected the greatest consistency in outcomes. We began with long marriages, then moved to short marriages without dependent children, and then to marriages with dependent children. Lastly, we tackled the most difficult category, medium duration marriages without dependent children, where there is the most diversity of outcomes and the least consistency in the current law.

This Draft Proposal draws on the discussions within the Advisory Working Group and constitutes our attempt to crystallize the advisory guidelines that emerged from our discussions. The drafting of this document involved much fine-tuning and ongoing consultations with the Advisory Working Group almost until the moment of release. As a result, **some aspects of these advisory guidelines differ from the version found in the Sneak Preview presented at the National Family Law Program in La Malbaie, Quebec in July 2004.** These advisory guidelines are definitely a work in progress. We could have worked longer on the Draft Proposal and continued to perfect it, but were of the view that it was important to begin to broaden the discussion.

You will see that we have not been able to accomplish as much in this Draft Proposal as we had hoped at the beginning. Some issues were too difficult and some areas of the law so uncertain that advisory guidelines were not possible, in particular those relating to variation of spousal support. Many compromises had to be made along the way. But we have found what we think is sufficient consensus in a number of areas to warrant moving ahead with the advisory guidelines.

Not every member of the Advisory Working Group will support every part of the Draft Proposal. The Advisory Working Group essentially played a consultative role. As directors of the project, we have had the responsibility for making the final judgement calls. Our role has been to find areas where there was sufficient common ground to anchor a guideline and then to develop a workable formula or exception to capture that common ground. We now send our best effort out for your reactions.

2.4 The Next Stage

With the issuance of the draft proposal, the next stage of the process begins—one of discussion and experimentation. This Draft Proposal will be widely circulated amongst family lawyers, mediators and judges. We will be travelling across Canada to explain and discuss the proposed advisory guidelines and to obtain feedback. Do the proposed formulas generate acceptable results? How might the advisory guidelines need to be adjusted?

Although these are draft guidelines and subject to ongoing discussion and revision, we do expect that lawyers, judges and mediators will begin to use them. This is in fact the best way to test the advisory guidelines—to find out if they are useful and to discover their flaws and limitations. Lawyers, for example, may begin to use the draft advisory guidelines to assist in structuring and guiding negotiations about spousal support, either explicitly as a principled basis for negotiation or, more modestly, as a litmus test of the reasonableness of offers or counter-offers derived by budgets or other methods.

Judges may wish to use the proposed guidelines in a similar fashion. The ranges can provide a check or litmus test to assess the positions of the parties in settlement conferences or in argument in hearings and trials. In this respect, the proposed advisory guidelines may serve much like the early proposals for child support amounts, before 1997. The advisory guidelines may also assist in adjudication, in providing one more way of approaching the discretionary decision to be made in spousal support cases.

We expect that there may be a number of local areas where the bench and bar will decide to implement the advisory guidelines in a more consistent and conscious way in order to test their usefulness. Thus lawyers and judges may agree to use the advisory guidelines as a starting point for cases in their area.

Over the next year or so, we expect to speak to many groups, to hear back from those using the advisory guidelines, and to receive suggestions for changes and improvements. We will sift through the responses and comments to consider revisions to the proposed advisory guidelines. In Chapter 11, the conclusion to this document, you will find details on how you can communicate your views to us.

3 WHY GUIDELINES? HOW WILL THEY WORK IN PRACTICE?

In this chapter we deal with the preliminary question that many will be asking: Are spousal support guidelines that utilize mathematical formulas based on income sharing a good idea? We review the advantages and disadvantages of spousal support guidelines focussing on the particular scheme of informal, voluntary and advisory guidelines we are proposing. To illustrate their potential usefulness, we also sketch how these advisory guidelines might work in practice.

3.1 The Advantages and Disadvantages of Guidelines

As noted earlier, in Canadian family law, if you mention guidelines most people think of the *Federal Child Support Guidelines*. They are not guidelines at all—they are really rules. Our proposed advisory guidelines are *true guidelines* that we have tried to distinguish from the *Federal Child Support Guidelines* by adding the descriptor advisory. Not legislated, but informal guides for lawyers and judges. Not binding but adopted voluntarily because of their usefulness as a tool in determining support. Even then, only advisory, a starting point for negotiation and adjudication. Dealing only with amount and duration, not entitlement. Constructed around two different formulas applicable to different marital situations and each offering a range of possible results rather than dictating a specific outcome. Containing broad exceptions that are not exhaustive of the grounds for departure.

Most of the advantages of guidelines are the usual arguments in favour of less discretion in family law generally. If rules are found at one end of the decision-making spectrum and discretion at the other, the current law of spousal support, after *Bracklow*, would be located very close to the discretion end. Advisory guidelines of the kind we are proposing would move the law back towards the middle ground between these two extremes.

We turn first to the **advantages** of spousal support advisory guidelines:

(1) *To provide a starting point for negotiations and decisions.* At their best the guidelines will be loosely presumptive, a starting point from which parties will have to give reasons for any departure. The proposed advisory guidelines itemize a series of exceptions that will constrain and rationalize departures from the basic ranges. At present the starting point for spousal support is zero for many claimants. To justify support claimants must then construct individual budgets demonstrating need. As has been the case with child support guidelines, spousal support advisory guidelines will establish a starting point other than zero, assuming entitlement has been established. Guidelines will be most helpful in the typical or common cases that are usually resolved in negotiations.

(2) *To reduce conflict and to encourage settlement.* All other financial matters on family dissolution are now governed by rules—property division, pensions, child support. Spousal support is the last remaining pool of unfettered discretion. It is also typically the last financial issue to be resolved. Spousal support thus becomes the flashpoint for unhappiness with all the other financial rules, as well as for any remaining bitterness between spouses. Guidelines can limit the range of results and constrain the issues and information required, thereby encouraging

settlement and damping down some of the conflict between the parties. Any reduction in conflict in family law, especially where children are involved, must be treated as an advantage.

(3) *To reduce the costs and improve the efficiency of the process.* In financial matters, it is ultimately dollars weighed against dollars, i.e. the cost of legal fees and disbursements weighed against the money gained or lost in support or property. Advisory guidelines can provide a starting point from which the parties can each decide whether further negotiation or litigation to push to the limits of the ranges, or beyond, is warranted. Further, published guidelines are even more important where one or both parties are unrepresented.

(4) *To avoid budgets and to simplify the process.* Under the current discretionary regime, expense budgets are required. Much time and trouble is taken, in disclosure and discovery, to particularize expenses—past, present and proposed—with the process often of dubious value in the end. Because guidelines are based on income sharing, there is no need to construct individual budgets. Less information is required and the process is simplified considerably.

(5) *To provide a basic structure for further judicial elaboration.* Advisory guidelines may prove to speed up, or perhaps more accurately, to kick start, the normal process of legal development in an area of judicial discretion. Under the current discretionary law, that process has nearly ground to a halt. Guidelines could give basic structure and shape to the law, with room left for lawyers and courts to adjust, modify, identify possible new exceptions, etc. By their very existence, guidelines create pressure to give reasons for any departures in negotiations or decisions.

(6) *To create consistency and legitimacy.* Advisory guidelines should create greater consistency in outcomes as well as more open explanations of how those outcomes were reached. In doing so, over time, the amounts and duration of spousal support under the advisory guidelines can develop a legitimacy of their own, as has been the case with child support amounts. Eventually, the outcomes generated by the advisory guidelines will come to be seen as appropriate for many payors and recipients.

Next, we turn to the **disadvantages** of guidelines, as compared to the current discretionary regime. In assessing these disadvantages, we stress again that it is important to remember the nature of these specific advisory guidelines. There is a tendency for critics to assume guidelines will operate like rules, for example, to foreclose arguments based upon the facts of a particular case.

(1) *Too rigid.* Guidelines may be seen to deny individual justice, as their starting premise is average justice, generating reasonable results across a range of typical cases. An individual spouse may be denied a meaningful opportunity to argue why his or her case is unique or exceptional.

(2) *Spousal support is too complicated.* Many think spousal support is just too complicated for any formulaic approach. There are too many legal factors to balance, too many marital facts to be proved, and too many exceptions—marital fact situations that are just too diverse. Implicit in this view is the assumption that there are very few typical or standard fact patterns in spousal support, so few that it is not worth even developing guidelines for those typical fact patterns.

Also implicit in this criticism is often an assumption that guidelines will be built around one big formula for all marriages.

(3) *Discretion allows intuitive reasoning.* Some argue that spousal support is a residual remedy; the last financial remedy that can be used flexibly to accomplish global justice in family matters. On this view, there are many factors at work, often intuitively, in reaching a just result, a result that is sometimes hard to explain.

(4) *Regional variations too great.* There are clearly local and regional variations in the amount and duration of spousal support. Some suggest that such variations are so great that any national guidelines would be of limited usefulness.

(5) *Litigation will be foreclosed.* For those who wish to settle, there is no question that guidelines will assist the negotiation process. But what if a party doesn't want to settle but wants to litigate? What if judges turn these guidelines into rules foreclosing arguments in court? That is a risk with any guidelines.

Many of these disadvantages depend upon the structure and operation of the specific set of guidelines involved. In constructing these advisory guidelines we have been conscious of many of the potential disadvantages of guidelines and have tried to address them. The advisory guidelines that we propose involve more than one formula, ranges for amount and duration, and exceptions and other features that keep them in the middle of the rules-vs.-discretion spectrum.

In our view, given the current state of spousal support law, the advantages of advisory guidelines significantly outweigh the disadvantages. In fact, without such guidelines, it may be impossible to move the law forward at all, based on the experience since *Bracklow*. That has also been the general response of all the groups of lawyers and judges with whom we have met so far. At the same time, all wanted to see the proposed advisory guidelines—and, more importantly, their outcomes in particular cases—before giving their support to any move to spousal support guidelines.

3.2 How These Advisory Guidelines Might Work in Practice

Suppose we did have spousal support advisory guidelines of the kind we propose. How might these advisory guidelines work in practice? Perhaps the best and most practical recent example would be the sample child support tables included in the Federal-Provincial-Territorial Family Law Committee's 1995 Report. Those tables had no legal force, but nonetheless were frequently cited and argued in negotiations and hearings. Or, remember the way that the *Federal Child Support Guidelines* were used in child support cases under provincial family law where those Guidelines had not yet been adopted as a matter of law.

The proposed advisory guidelines will not be legally binding, operating more like persuasive law reform. Initially the advisory guidelines might simply serve as another tool in determining spousal support, a litmus test for support outcomes determined by more traditional methods, another source of arguments in negotiation and adjudication. Over time, as they prove their usefulness, they may become an accepted starting point from which parties will have to give reasons for any departure.

In negotiations, if the advisory guidelines were to suggest a range of \$1,000 to \$1,500 per month for spousal support, a spouse seeking to have support fixed within that range would argue that the advisory guidelines ought to be used since his or her case is typical. The spouse suggesting an amount outside that range, whether higher or lower, would presumably take the position that his or her case falls within an exception or warrants a departure from the guidelines or even that the guidelines' numbers are just wrong. If both parties are prepared to work within that range, then the usual arguments would be made about why the amount should be fixed at the higher or lower end of that range.

In settlement conferences, the parties might repeat these arguments or the judge might ask the parties whether they have considered the advisory guidelines. The judge might want to know why one or the other party took the view that this case fell outside the range.

Finally, in hearings or trials, the parties might make the same arguments and be faced with the same questions from the Bench. Undoubtedly, different judges will treat the advisory guidelines with varying degrees of practical force, with some applying them more rigorously and others using them more loosely. For the latter, the guidelines will be just another tool, used to test a result obtained by a more conventional needs-and-means analysis of budgets. But some judges might start from the advisory guidelines, resorting to budgets and other individual financial data only to fine-tune the guideline numbers.

As you work your way through this document, consider the facts of recent cases that you might have negotiated, litigated, mediated or decided, and see how the ranges for amount and duration under these advisory guidelines compare to the actual outcomes in those cases. Only by comparing outcomes will it be possible to assess fairly the advantages and disadvantages of this particular set of spousal support advisory guidelines.

4 THE BASIC STRUCTURE OF THE ADVISORY GUIDELINES

Spousal support guidelines can be structured in many different ways. For those who are interested, the Background Paper reviews in detail other models of spousal support guidelines. This chapter presents a structural overview of the scheme of advisory guidelines that we are proposing. Some of what you will find here has already been touched on, in a less systematic way, in Chapters 2 and 3. As well, many of the individual components of the advisory guidelines will be discussed more extensively in subsequent chapters. However, we thought it would be helpful for readers to have a sense of the big picture at the beginning.

We begin with a discussion of the basic concept of income sharing on which the advisory guidelines are constructed and then move into an organized, step by step review of the specific components of the advisory guidelines. We have divided this review into three main sections. First, we deal with the preliminary issues that arise prior to any consideration of the formulas—what might be called issues of application. Then we deal with the basic structure of the income-sharing formulas for determination of amount and duration of support that are at the heart of the proposed approach. The outcomes generated by the formulas are not necessarily determinative, however. The final section deals with the possibilities for restructuring the formula outcomes (by trading off amount against duration), and for departing from the amounts and durations generated by the formulas, through exceptions.

4.1 Income Sharing

The core concept on which these spousal support advisory guidelines are built is **income sharing**. Budgets will no longer play a primary role in determining spousal support outcomes. Instead the advisory guidelines will look to the incomes of the parties and rely on a mathematical formula to determine the portion of spousal incomes to be shared. Contrary to common perception, **income sharing does not mean equal sharing**. There are many ways of sharing income; it all depends on the formula that is adopted.

You will see below that other factors are also relevant in determining support outcomes under the proposed advisory guidelines, such as the presence of dependent children or the length of the marriage. But the income levels of the parties and, and more specifically the income disparity between them, become the primary determinants of support outcomes. Under the spousal support advisory guidelines, as under the child support guidelines, the precise determination of income, including the imputing of income, will undoubtedly become a much more significant issue than it has in the past.

Income sharing is not a new theory of spousal support. As we have noted earlier, the advisory guidelines project is not driven by a desire to theoretically reorder the law of spousal support. Rather it is driven by the practical needs of family law practitioners and judges who deal with the daily dilemmas of advising, negotiating, litigating and deciding spousal support.

It is therefore important to emphasize that the use of income sharing as a **method** for determining the amount of spousal support does not necessarily imply adoption of the income-

sharing theories of spousal support identified in the Background Paper. Some of these theories, which are admittedly contentious, rest upon a view of marriage as a relationship of trust and community, which justifies treating marital incomes as joint incomes.

However, the **method** of income sharing can be used as a practical and efficient way of implementing many support objectives such as compensation for the economic advantages and disadvantages of the marriage or the recognition of need and economic dependency. Such use of **proxy measures** already exists in spousal support law—think of the prevalent use of standard of living and a needs and means analysis to quantify compensatory support.

These proposed guidelines do not commit to any particular theory of spousal support. As will become clear in the discussion of the different formulas under these advisory guidelines, they aim to accommodate the multiple theories that now inform our law and, to generate results that are in broad conformity with existing patterns in the law.

We now move on to an overview of the basic framework of the specific scheme of income sharing found in the proposed advisory guidelines.

4.2 Preliminary Issues—The Applicability of the Advisory Guidelines

4.2.1 Form and force

Unlike the *Federal Child Support Guidelines*, the proposed spousal support advisory guidelines **will not be legislated**. Following the practice in some American jurisdictions, these are **informal guidelines**. **They are not legally binding. Their use is completely voluntary.** They will be adopted on a voluntary basis by lawyers and judges to the extent they find them useful, and will operate as a practical tool within **the existing legal framework**. As non-legislated, informal guidelines, these guidelines are **advisory only**. They are intended as a **starting point** for negotiation and adjudication.

Courts and lawyers will certainly be free to order or negotiate spousal support outcomes that differ from those generated by the advisory guidelines. However, we hope that the advisory guidelines will have significant voluntary buy-in because of their usefulness—because of the structure and consistency they provide and because they are perceived to generate appropriate outcomes. If so, the advisory guidelines might develop some presumptive force, in the loose sense of the word, such that parties would have to make arguments for departing from the starting point provided by the formulas. The advisory guidelines also explicitly set out a series of exceptions, albeit not exhaustive, providing a structured framework for departures from the formulas.

The informal and voluntary nature of these advisory guidelines has been dealt with more extensively in chapters 2 and 3.

4.2.2 Entitlement

The proposed advisory guidelines do **not** deal with entitlement. The informal status of the proposed guidelines means that they must remain subject to the entitlement provisions of the *Divorce Act*, notably ss. 15.2(4) and (6) as interpreted by the courts. Entitlement therefore

remains a threshold issue to be determined before the guidelines will be applicable. **On its own, a mere disparity of income that would generate an amount under the advisory guidelines, does not automatically lead to entitlement.**

The advisory guidelines were drafted on the assumption that the current law of spousal support, post-*Bracklow*, offers a very expansive basis for entitlement to spousal support. Effectively any significant income disparity generates an entitlement to some support, leaving amount and duration as the main issues to be determined in spousal support cases. However, our proposed guidelines leave the issue of when an income disparity is significant, in the sense of signaling entitlement, to the courts. It is open to a court to find no entitlement on a particular set of facts, despite income disparity, and these advisory guidelines do not speak to that issue.

We recognize that the advisory guidelines may, over time, shape understandings of entitlement. But this would be part of the normal evolution of the law in this area, controlled by the courts. It is also possible that the law of entitlement may change over time in other directions, if the Supreme Court of Canada or an appellate court were to decide to narrow or refine *Bracklow*.

4.2.3 Application to agreements

The advisory guidelines **do not deal with the effect of a prior agreement on spousal support.** This issue, like entitlement, is outside the scope of the advisory guidelines and will continue to be dealt with under the evolving law guided by the Supreme Court of Canada's recent decision in *Miglin*.¹³

When the *Federal Child Support Guidelines* were brought into force, changes were made to the *Divorce Act* providing, in essence, that the Guidelines would prevail over child support agreements inconsistent with the Guidelines. No such change is proposed here, given the informal nature of these guidelines.

We do expect, however, that the advisory guidelines will play an important role in the *negotiation* of agreements by providing a more structured framework for negotiation and some benchmarks of fairness. One possible effect of the advisory guidelines might thus be a reduction in the number of agreements that are subsequently perceived to be unfair by one of the parties. Another might be that courts will be better able to identify unfair agreements when an agreement is subsequently challenged.

Further discussion of the application of the advisory guidelines in the cases where there are spousal support agreements can be found in Chapter 10.

4.2.4 Interim orders

The advisory guidelines are intended to apply to interim orders as well as final orders. We anticipate, in fact, that they will be particularly valuable at the interim stage, which is now dominated by a needs-and-means analysis—budgets, expenses and deficits that require individualized decision making. In many American jurisdictions, guidelines were developed only for the interim stage.

¹³ *Miglin v. Miglin*, [2003] 1 S.C.R. 303.

Any periods of interim support clearly have to be included within the durational limits set by the advisory guidelines. Otherwise, if duration were only to be fixed in final orders, there would be incentives in both directions—for some to drag out proceedings and for others to speed them up—and general inequity.

The advisory guidelines do recognize that the amount may need to be set differently during the interim period while parties are sorting out their financial situation immediately after separation. To accommodate these short-term concerns, the advisory guidelines recognize an exception for compelling financial circumstances in the interim period.

Interim support is dealt with more extensively in Chapter 8.

4.2.5 Review and variation

The primary application of these advisory guidelines is to **initial determinations** of spousal support at the point of separation or divorce, whether through negotiated agreements or court orders. Ideally a truly comprehensive set of advisory guidelines would apply not only to the initial determination of support but also to subsequent reviews and variations over time. However, these issues have proven the most difficult to reduce to a formula given the uncertainty in the current law concerning the effect of post-separation income changes.

In the end, we chose a more modest course, identifying certain situations where the advisory guidelines will apply on reviews and variations, including increases in the recipient's income and decreases in the payor's income. We have left others, such as post-separation increases in the payor's income, re-partnering, remarriage and second families, to discretionary determinations under the evolving framework of current law. Developing advisory guidelines to deal with some of these difficult issues may take place at a later stage of the project, after there has been some experience with these proposed advisory guidelines.

The application of the advisory guidelines in the context of review and variation is dealt with more extensively in Chapter 10.

4.2.6 Application to provincial/territorial law

The proposed advisory guidelines have specifically been developed under the federal *Divorce Act* and are intended for use under that legislation. Provincial/territorial support law is governed by distinct statutory regimes. However, in practice there is much overlap between federal and provincial/territorial support laws.

The broad conceptual framework for spousal support articulated by the Supreme Court of Canada in *Moge* and *Bracklow* has been relied upon under both provincial and federal legislation. Indeed *Bracklow*, which combined claims under the *Divorce Act* and provincial legislation, made no real distinction between the two. Given this overlap, it is possible that the advisory guidelines might be used under provincial/territorial support legislation.

The proposed advisory guidelines are informal and not binding. They will be used only to the extent that lawyers, judges and mediators find them to be a helpful tool in spousal support determinations. Because they establish ranges for amount and duration, the spousal support

advisory guidelines offer a fair amount of flexibility to accommodate any distinctive patterns under provincial/territorial law, just as they are able to respond to local variation under the *Divorce Act*. As well, departures from the advisory guidelines are always possible if the results generated by the formulas are inappropriate in the context of provincial/territorial support regimes.

We recognize that there are some clear differences between provincial/territorial support laws and the *Divorce Act*. Many provincial/territorial laws have specific provisions governing entitlement that would constrain the operation of the advisory guidelines. However the proposed advisory guidelines only deal with amount and duration, and not entitlement. Also, provincial/territorial statutes often include specific provisions governing the effect of agreements. However, because the advisory guidelines do not deal with the effect of agreements there will be no conflict.

Provincial laws also differ from the *Divorce Act* in their application to unmarried couples but this will not cause any difficulties with respect to the operation of the advisory guidelines. Although we conveniently referred to length of marriage as a relevant factor in the operation of the formulas, they actually rely upon the period of spousal cohabitation (including periods of pre-marital cohabitation), thus providing for easy meshing with provincial/territorial legislation.

It is important to keep in mind when reading this document that the draft advisory guidelines were not specifically developed for the provincial/territorial context; they were developed for use under the *Divorce Act*.

4.2.7 Application to same-sex marriages

At the time of writing of this Draft Proposal, the *Divorce Act* had not been amended to extend to married same-sex couples the rights to seek divorce and corollary relief. If those amendments are made, the advisory guidelines would have the same application to same-sex couples whose marriages have broken down and who are seeking spousal support under the *Divorce Act*, as they do to opposite-sex married couples. Provincial/territorial support laws, which cover unmarried couples, do apply to same-sex relationships that satisfy the statutory conditions for entitlement.

4.3 The Formulas

The advisory guidelines are constructed around **two basic income-sharing formulas**, rather than just one formula.

4.3.1 Categories of marriages: with and without children

The advisory guidelines are structured around a fundamental distinction between marriages where there are no dependent children and those where there are; or more specifically around the distinction between cases where there is no concurrent child support obligation, and those where there is. The result is **two different formulas**.

In cases where there are no dependent children, what we have called the ***without child support formula*** applies. This formula relies heavily upon length of marriage—or more precisely, the length of relationship, including periods of pre-marital cohabitation—to determine both the

amount and duration of support. Both amount and duration increase with the length of the relationship. This formula is constructed around the concept of **merger over time** which offers a useful tool for implementing both compensatory and non-compensatory support objectives in cases where there are no dependent children in a way that reflects general patterns in the current law.

Under the basic *without child support* formula:

- The *amount* of spousal support is 1.5 to 2 percent of the difference between the spouses' gross incomes for each year of marriage.
- *Duration* is .5 to 1 year of support for each year of marriage, with duration becoming indefinite after 20 years.

The *without child support* formula is discussed in detail in Chapter 5.

In cases where there are dependent children, an alternative formula—the ***with child support formula***—applies. The distinctive treatment of marriages with dependent children and concurrent child support obligations is justified by both theoretical and practical considerations and is reflected in current case law.

On the theoretical front, marriages with dependent children raise strong compensatory claims based on the economic disadvantages flowing from assumption of primary responsibility for child care, not only during the marriage, *but also after separation*. We have identified this aspect of the compensatory principle as it operates in cases involving dependent children as the **parental partnership principle**, and have drawn on this concept in structuring the *with child support* formula.

The parental partnership principle is reflected in s. 15.2(6)(c) of the *Divorce Act*, which specifically directs that a spousal support order should apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage. The *Federal Child Support Guidelines* do not fully take into account the *indirect* costs of child-rearing, leaving such costs to be compensated for by spousal support. For marriages with dependent children, length of marriage is not the most important determinant of support outcomes as compared to post-separation child-care responsibilities.

On the practical front, child support must be calculated first and given priority over spousal support. As well, the differential tax treatment of child and spousal support must be taken into account, complicating the calculations. Our *with child support* formula thus works with computer software calculations of net disposable incomes, of the kind often used now by lawyers and judges.

Under the basic *with child support* formula:

- Spousal support is an *amount* that will leave the recipient spouse with between 40 and 46 percent of the spouses' net incomes *after child support has been taken out*. (We refer to the spouses' net income after child support has been taken out as **Individual Net Disposable Income** or INDI).
- **The approach to *duration* under this formula is more complex and flexible than under the *without child support* formula and relies upon both length of marriage and duration of the post-separation child-rearing period.**

The *with child support* formula is discussed in detail in Chapter 6.

4.3.2 Length of marriage

Under the advisory guidelines length of marriage is a primary determinant of support outcomes in cases *without* dependent children. Under the *without child support* formula the percentage of income sharing is sensitive to and increases with length of the marriage; the same is true of duration of support.

Length of marriage is much less relevant under the *with child support* formula although it still plays some role in determining duration under that formula.

Given the relevance of length of marriage under the advisory guidelines, it is important to clarify its meaning. **While we use the convenient term length of marriage, the more accurate description is the length of the relationship, which includes periods of pre-marital cohabitation, and ends with separation.**

In discussing the development and operation of the advisory guidelines we have sometimes classified marriages according to 3 categories based on length—short (under 5 years); medium (5-19 years); and long (20 years plus). The main value of these categories comes in determining the duration of support, or in thinking about the kinds of circumstances that will call for exceptions to the *without child support* formula.

These categories correspond to those implicitly underlying the current law and outcomes. Current law shows a fair amount of consistency in approach with respect to long and short marriages without dependent children; medium duration marriages without children generate much more uncertainty. Not surprisingly, the development of advisory guidelines for that category of cases proved the most difficult.

4.3.3 Duration

The proposed advisory guidelines attempt to offer a formula for the determination of the duration as well as the amount of awards. Although judges and lawyers often see amount and duration as distinct issues, they are related; the two elements combined determine the total or global amount of a support award.

The proposed advisory guidelines set out the presumptive conditions for indefinite support. In other cases they establish time limits on the duration of awards. In particular, time limits are a significant feature of the *without child support* formula. They play a less significant, or softer, role under the *with child support* formula.

Time limits are admittedly a problem under the current law in Canada. After *Moge*, time-limited orders became less and less common. After *Bracklow*, some judges have brought back time limits, at least for non-compensatory support orders. While time limits are still frequently negotiated by parties in agreements and consent orders, many courts still frown upon time limits for all but short marriages.

Duration remains highly uncertain under the current law, particularly in medium duration marriages. The issue of duration is often put off to the future, to be dealt with through ongoing reviews and variations. Under current practice, uncertainty about duration can generate low monthly awards, as judges or lawyers fear that any monthly amount ordered or agreed upon could continue for a long time, even indefinitely.

In our view, reasonable time limits are an essential element of spousal support advisory guidelines intended to promote greater certainty, especially if the guidelines generate reasonable monthly amounts. The time limits generated by our formulas are potentially very generous; in marriages of medium duration they can extend for periods of up to 19 years. These time limits are thus very different from the short and arbitrary time limits, typically of between three to five years, that became standard under the clean-break model of spousal support. Once marriages are of any significant length, our time limits operate in conjunction with generous monthly amounts.

If current law cannot allow what we view to be the reasonable and potentially quite generous time limits proposed by the advisory guidelines, then the advisory guidelines will have to be re-designed and the amounts generated by the formulas lowered. Amount and duration are interrelated parts of the formulas—they are a package deal. Using one part of the formula without the other would undermine the integrity and coherence of our proposed approach. The advisory guidelines do provide for restructuring, which allows duration to be extended by lowering the amount of support.

4.3.4 Ranges

The advisory guidelines do not generate a fixed figure for either amount or duration, but instead produce **a range of outcomes** that provide a starting point for negotiation or adjudication. The ranges we have been able to develop for duration under the *without child support* formula are particularly broad, reflecting the variation and uncertainty in current practice. After some period of experience with the advisory guidelines, some tightening of these may be possible.

Ranges create scope for more individualized decision making, allowing for argument about where a particular case should fall within the range in light of the *Divorce Act's* multiple support objectives and factors. Ranges can also accommodate some of the variations in current practice, including local variations in spousal support cultures.

4.3.5 Determining income

Income-sharing schemes work directly off income, as income levels essentially determine the amount of support to be paid. Under these advisory guidelines, the accurate determination of income will become a much more significant issue in spousal support cases than it has in the past, and there will be more incentives to dispute income. However, because these advisory guidelines generate ranges and not specific amounts, absolute precision in the determination of income may not be as crucial as under the *Federal Child Support Guidelines*. Many cases will involve combined claims for child and spousal support, where a precise determination of income is already required for child support purposes.

The starting point for the determination of income under both our proposed formulas is the definition of income under the *Federal Child Support Guidelines*, including the Schedule III adjustments. This is consistent with current practice. In cases involving combined claims for child and spousal support, the payor's income, as determined under the *Federal Child Support Guidelines*, is also the basis for assessing spousal support.

These advisory guidelines do not solve the complex issues of income determination that arise in cases involving self-employment income and other forms of non-employment income. These are difficult cases under the *Federal Child Support Guidelines* and will remain so under these spousal support advisory guidelines. In determining income it may be necessary, as under the *Federal Child Support Guidelines*, to **impute income** in situations where a spouse's actual income does not appropriately reflect his or her earning capacity. In some cases the issue will be imputing income to the payor spouse; on variations and reviews the issue may be imputing income to the recipient spouse if it is established that the he or she has failed to make appropriate efforts towards self-sufficiency.

Imputing income is the appropriate tool under the advisory guidelines to deal with concerns about any disincentives to self-sufficiency created by generous amounts of spousal support, especially at higher income levels. In current practice, self-sufficiency concerns often result in downward adjustments of amount in initial orders. Under these advisory guidelines, the amount of support is determined by spousal incomes and such loose adjustments are not possible. If a spouse is failing to realize his or her earning capacity, income at the appropriate level can be imputed subsequently at the stage of review or variation.

4.3.6 Net vs. gross income

Existing guideline models vary, using both gross (before tax) and net (after tax) incomes in their income-sharing formulas. Good arguments can be made in favour of each method of calculating income.

Gross income is more readily calculated, without software, and more easily understood by most spouses. Gross income is also consistent with the *Federal Child Support Guidelines*.

Net income figures are more accurate and deal more effectively with the differential tax treatment of child and spousal support and the various tax benefits that accrue when there are children. Computer software, upon which many judges and lawyers have come to rely, also works with net income in calculations of monthly cash flow.

In the end, we have chosen to use different methods of calculating income under the two formulas:

- The *without child support* formula, which applies in cases where there are no dependent children of the marriage and hence no concurrent child support obligations, utilizes **gross income** in the interests of ease of calculation.
- The *with child support* formula relies upon **net income** calculations.

Both formulas generate a gross amount of spousal support that will be subject to the current deduction/inclusion rules for tax purposes. These advisory guidelines, given their informal status, do nothing to change the current tax treatment of spousal support.

The definitions of income used under each of the formulas are discussed in more detail in Chapters 5 and 6.

4.3.7 Ceilings and floors

As with the *Federal Child Support Guidelines*, the spousal support advisory guidelines establish ceilings and floors in terms of the income levels to which they are applicable. These advisory guidelines allow more flexibility in amounts over a certain ceiling (as with incomes over \$150,000 under the *Federal Child Support Guidelines*) and fix a floor below which spousal support is not payable (like the \$7,000 floor under the *Federal Child Support Guidelines*).

As under the *Federal Child Support Guidelines*, we have set both the ceiling and the floor by reference to the annual gross income of the payor. The ceiling has been set at a gross annual income for the payor of \$350,000 and the floor at a gross annual income of \$20,000.

Ceiling and floors are dealt with more extensively in Chapter 7.

4.4 After the Formulas Have Been Applied: Issues of Restructuring and Exceptions

Under the advisory guidelines there is still much room for the exercise of discretion to respond to the facts of particular cases. As discussed above, there is considerable room for discretion in the fixing of precise amounts and durations within the ranges generated by the formulas. Here we discuss two further opportunities for the exercise of discretion under our proposed approach: one is the ability to restructure the formula outcomes by trading off amount against duration; the other is the possibility of departing from the formula outcomes by relying upon exceptions.

4.4.1 Restructuring

Although the formulas generate separate figures for amount and duration, the advisory guidelines explicitly recognize that these awards can be restructured by trading off amount against duration. Such tradeoffs are commonly made in separation agreements and consent orders. The advisory guidelines also recognize that judges may adjust amount and duration in a similar way.

In *Bracklow* the Supreme Court of Canada explicitly recognized that the amount and duration of awards can be configured in different ways to yield awards of similar value (what the Court called quantum). Thus the Court noted that an order for a smaller amount paid out over a long period of time can be equivalent to an order for a higher amount paid out over a shorter period of time.

Restructuring can be used in three ways:

- to **front-end load** awards by increasing the amount beyond the formulas' ranges and shortening duration;
- to **extend duration** beyond the formulas' ranges by lowering the monthly amount; and
- to formulate a **lump sum** payment by combining amount and duration.

We anticipate that in many cases where the outcomes generated by the formulas initially appear to be inappropriate, the issue will be resolved through restructuring. This was our experience in developing the formulas. When restructuring is relied upon to resolve issues of inappropriate formula outcomes, awards remain consistent with the overall or global amounts generated by the advisory guidelines. Restructuring thus does not involve an exception or departure from the formulas.

Restructuring is dealt with in more detail in both Chapters 5 and 6 in the context of the discussions of the two formulas. Because restructuring will have more application in cases being dealt with under the *without child support* formula the more extensive discussion will be found in Chapter 5.

4.4.2 Exceptions

The formulas are intended to generate appropriate outcomes in the majority of cases. We recognize, however, that there will be cases where the formula outcomes, even after consideration of restructuring, will not generate results consistent with the support objectives and factors under the *Divorce Act*. The formulas are intended to generate appropriate results in a wide range of *typical* cases; exceptions are required for *unusual* cases.

The informal, advisory nature of these guidelines means that the formula outcomes are never binding and departures are always possible on a case by case basis where the formula outcomes are found to be inappropriate. The advisory guidelines do, however, itemize a series of exceptions which, although clearly not exhaustive, are intended to assist lawyers and judges in framing and assessing departures from the formulas. The exceptions create room both for the operation of competing theories of spousal support and for consideration of the particular factual circumstances in individual cases where these may not be sufficiently accommodated by restructuring.

The exceptions include, for example, a compensatory exception that allows for awards of greater value than those generated by the formula in shorter marriages where there have been economic losses as a result of the marriage or contributions to the other spouse's career that are disproportionate to the length of the marriage. The inability to be self-supporting because of illness or disability may also constitute an exception, as may disproportionate responsibility for marital debts or support obligations to children and spouses from prior relationships.

As with restructuring, exceptions are dealt with in more detail in Chapters 5 and 6 in the context of the discussions of the two formulas.

5 THE WITHOUT CHILD SUPPORT FORMULA

Here we examine the first of the two basic formulas that lie at the core of our proposed advisory guidelines—the *without child support formula*. This formula applies in cases where there are no dependent children and hence no concurrent child support obligations. Assuming entitlement, the formula generates ranges for amount and duration of spousal support.

This formula covers a diverse range of fact situations, the only unifying factor being the absence of a concurrent child support obligation for a child or children of the marriage.¹⁴ In thinking about the application of this formula we divided marriages without dependent children into three loose categories based on length: short (under 5 years); medium (5 to 19 years); and long (20 years plus).

The *without child support* formula covers marriages of all lengths where the spouses never had children. The formula also applies to long marriages where there were children, but they are no longer dependent.

It might seem impossible to develop one formula that could yield appropriate support outcomes over such a wide array of marital situations. We turned to the concept of **merger over time**, which the American Law Institute (ALI) relied upon in developing its guidelines and which we discuss in more detail below. Put simply, the idea is that as a marriage lengthens, spouses more deeply merge their economic and non-economic lives, resulting in greater claims to the marital standard of living. Using that concept, which relates support outcomes to the length of the marriage, we developed a formula that surprisingly generates results consistent with much of current practice, while bringing some much-needed structure.

In what follows we first describe the basic structure of the formula. Then we discuss the concept of merger over time that underlies the formula and its relation to existing rationales for spousal support. This is followed by a more detailed examination of the various steps involved in applying the formula, and a series of examples illustrating its application. In the final section of this chapter, we examine three issues that arise after the formula has generated its ranges for amount and duration: first, how to fix precise amounts and time periods within the ranges generated by the formula; second, whether the formula outcomes should be restructured by trading off amount against duration; and third, whether the circumstances of a given case fall within an exception warranting a departure from the formula outcomes.

5.1 The Basic Structure of the *Without Child Support* Formula

Set out in the box below, in its most basic form, is the proposed formula for determining spousal support in cases where there is no child support being paid, after entitlement has been established. The formula is in fact two formulas—one for amount and one for duration. The formula generates **ranges** for amount and duration, rather than fixed numbers. As you will see, there are two crucial factors under the formula. One is the **gross income difference** between the spouses. The other is the **length of the marriage**, or more precisely, as will be explained below,

¹⁴ Support obligations to children or spouses from prior relationships are dealt with as exceptions under both formulas, discussed below.

the length of the period of cohabitation. Both amount and duration increase incrementally with the length of marriage.

Keep in mind that the formula is intended to apply to **initial determinations** of support at the point of separation or divorce, using the spouses' incomes at the time the support is being determined by a court or negotiated by the parties.¹⁵ Orders made under the advisory guidelines will be subject to **variation** in light of changing circumstances over time. They may also include provisions for **review**. A subsequent review or variation may result in changes to amount and/or duration in the future. Similarly, parties negotiating agreements in accordance with the advisory guidelines may include provisions for review or variation. The extent to which the advisory guidelines will apply to re-determinations of spousal support upon review and variation is dealt with in Chapter 10.

The *Without Child Support* Formula

Amount ranges from 1.5 to 2 percent of the difference between the spouses' gross incomes (the **gross income difference**) for each year of marriage, (or more precisely, years of cohabitation), up to a maximum of 50 percent. The range remains fixed for marriages 25 years or longer, at 37.5 to 50 percent of income difference.

Duration ranges from .5 to 1 year for each year of marriage. However support will be **indefinite** if the marriage is **20 years or longer** in duration *or*, if the marriage has lasted five years or longer, when years of marriage and age of the support recipient (at separation) added together total 65 or more (the **rule of 65**).

A simple example illustrating the basic operation of the *without child support* formula will be helpful at this point before we venture further into its more complex details. The primary purpose of this example is to show the basic calculations required under the formula and to give a sense of the outcomes the formula generates. *Keep in mind that the outcomes generated by the formula are only the first step in determining spousal support under the advisory guidelines.* There are other important steps in the analysis that will be discussed below.

Example 5.1

Arthur and Ellen have separated after a 20-year marriage and one child. During the marriage Arthur, who had just finished his commerce degree when the two met, worked for a bank, rising through the ranks and eventually becoming a branch manager. He was transferred several times during the course of the marriage. His gross annual income is now \$90,000. Ellen worked for a few years early in the marriage as a bank teller, then stayed home until their son was in school full time. She worked part time as a store

¹⁵ In cases where the determination of spousal support is taking place many years after the separation and the payor's salary has increased dramatically since separation, there may be an issue of whether it is appropriate to use the parties' current incomes to determine support under the advisory guidelines. The treatment of post-separation increases in the payor's income is discussed in Chapter 10.

clerk until he finished high school. Their son is now independent. Ellen now works full time as a receptionist earning \$30,000 gross per year. Both Arthur and Ellen are in their mid forties.

Assuming entitlement has been established in this case, here is how support would be determined under the *without child support* formula.

To determine the **amount** of support:

- Determine the **gross income difference** between the parties:
 $\$90,000 - \$30,000 = \$60,000$
- Determine the **applicable percentage** by multiplying the length of the marriage by 1.5-2:
 $1.5 \times 20 \text{ years} = \mathbf{30 \text{ percent}}$
to
 $2 \times 20 \text{ years} = \mathbf{40 \text{ percent}}$
- Apply the applicable percentage to the income difference:
 $30 \text{ percent} \times \$60,000 = \$18,000/\text{year} (\mathbf{\$1,500/\text{month}})$
to
 $40 \text{ percent} \times \$60,000 = \$24,000/\text{year} (\mathbf{\$2,000/\text{month}})$

Duration would be indefinite in this case because the length of the marriage was 20 years.

Thus, assuming entitlement, spousal support under the formula would be in the range of \$1,500 to \$2,000 per month for an indefinite duration, subject to variation and possibly review.

An award of \$1,500 per month, at the low end of the range, would leave Ellen with a gross annual income of \$48,000 and Arthur with one of \$72,000. An award of \$2,000 per month, at the high end of the range, would leave Ellen with a gross annual income of \$54,000 and Arthur with one of \$66,000. We will deal below with the factors that determine the setting of a precise amount within that range.

5.1.1 The formula for amount

Several aspects of the formula for amount should be noted. First, this formula uses **gross income** (i.e. before tax) figures rather than net (i.e. after tax), with income defined in the same way as under the *Federal Child Support Guidelines*. While net income figures may be marginally more accurate, in our view familiarity and the ease of calculation (no need for software) tipped the scales in favour of using gross income figures. As you will see in Chapter 6, net income figures are used under our alternate *with child support* formula because of the need to deal with the differential tax treatment of spousal and child support.

Second, this formula applies a specified percentage to the **income difference** between the spouses rather than allocating specified percentages of the *pool* of combined spousal incomes. Here we drew on the ALI proposals and the Maricopa County, Arizona guidelines inspired by them, both discussed in the Background Paper. The income difference between the spouses operates as a proxy measure of their differential loss of the marital standard of living and, in long

marriages where there have been children, of the differential impact of marital roles on the spouses' earning capacities. In applying income sharing to the spousal income difference this formula once again differs from the *with child support* formula where the use of net income figures requires a model of income sharing that applies to a combined pool of spousal incomes.

Third, our formula for amount does not use a fixed or flat percentage for sharing the income differential. Instead, drawing once again on the ALI and Maricopa County guidelines and their underlying concept of merger of time, our formula incorporates a **durational factor** to increase the percentage of income shared as the marriage increases in length. The durational factor we have chosen is 1.5 to 2 percent of the gross income difference for each year of marriage.

We developed the **ranges for amount** by first determining the point when maximum sharing would be reached, which we set at 25 years. We also started with the assumption that maximum sharing would involve something close to equalization of incomes, or sharing 50 percent of the gross income difference. We then essentially worked backwards to determine what level of income sharing per year would be required to reach maximum sharing at year 25. The answer was 2 percent per year. In the course of developing the formula, we experimented with different percentage ranges (such as 1 to 1.5 percent for each year of marriage), but the range of 1.5 to 2 percent provided a better fit with outcomes under current practice.

We chose 50 percent of income difference (i.e. income equalization) as the **maximum level of income sharing**, potentially reached after 25 years of marriage and representing the full merger of the spouses' lives. Much time was spent considering the arguments for a somewhat lower ceiling to take into account incentive effects and the costs of going out to work in situations where only the payor is employed. Other possibilities we considered were 45 percent of income difference reached at 22.5 years or 48 percent reached at 24 years. However, we also recognized that there would be cases where equalization of income would be appropriate (for example where only pension income is being shared after a very long marriage, or perhaps where both spouses are employed after a long marriage, but with a significant income disparity). We drafted the formula to allow for that possibility.

Even at the maximum level of sharing, the formula does **not** require an award of 50 percent of the spousal income difference after 25 years, but rather provides for awards in the range of between 37.5 and 50 percent. Consistent with current law, the formula does not generate a general rule of income equalization. It does, however, reflect current patterns of generous support after a long marriage and is consistent with the guideline for the quantification of spousal support articulated in *Moge*—that of roughly equivalent standards of living after a long marriage.

In assessing the formula for amount it is important to keep in mind that the percentages are **not** percentages of the payor's income; they are **percentages of the income difference** between the spouses. In cases where the recipient's income is zero, the two measures will be the same, but not in cases where the recipient has an income.

5.1.2 The formula for duration

As with amount, duration under our proposed formula increases with the length of marriage. Subject to the special provisions for indefinite support, our formula generates:

- a minimum duration of half the length of the marriage and
- a maximum duration of the length of the marriage.

As with the formula for amount, this formula also draws on the ALI proposals and the concept of merger over time. However, **length of marriage** cannot be the only factor in determining duration for marriages without dependent children; **age** is also a significant factor as it affects the ability to become self-supporting.

The ranges for duration under this formula are admittedly very broad, allowing for an award at the top end of the range that is effectively double in value that at the bottom end. We regret that we were unable to come up with a tighter range. Given the uncertainties surrounding duration under the current law this was the best that was possible at this time. As discussed in the Background Paper, Maricopa County encountered similar difficulties in creating a formula for duration that aligned with existing law. We hope that experience with the advisory guidelines may enable the durational ranges to be narrowed over time.

We caution that if the durational limits, which we consider generous, are increased, the formula would have to be redesigned and the amounts decreased. Amount and duration are interrelated parts of the formula—they are a package deal. Using one part of the formula without the other would undermine its integrity and coherence. As discussed below, the advisory guidelines provide for restructuring, which allows duration to be extended by lowering the monthly amount of support.

5.1.2.1 *The problem of time limits*

The difficulties of developing guidelines for duration have already been discussed in Chapter 4. The *without child support* formula generates time limits in many cases of marriages where there are no dependent children. Time limits admittedly pose a problem under the current law, particularly in medium-length marriages.

After *Moge*, time-limited orders became less common. Since *Bracklow*, which recognized that a payor spouse was not necessarily responsible for meeting all of a former spouse's financial needs, some judges have brought back time limits, at least for non-compensatory support orders. While time limits are still frequently negotiated by parties in agreements and consent orders, many courts continue to frown upon time limits in all but short marriages. Long marriages are typically understood to generate indefinite support, but duration remains highly uncertain in marriages of medium length.

In court orders, the issue of duration in medium-length marriages is often put off to the future, to be dealt with through ongoing reviews and variations. Under current practice uncertainty about duration can generate low monthly awards, as judges or lawyers fear that any monthly amount of support could continue for a long time, even indefinitely. On the other hand, time limits are common in support agreements.

In our view, reasonable time limits are an essential element of spousal support advisory guidelines for medium-length marriages, especially if the guidelines are to generate reasonable monthly amounts. *Bracklow* emphasized this interrelationship between amount and duration, recognizing that a low award paid out over a lengthy period of time is equivalent to an award for a higher amount paid out over a shorter period of time.

The time limits generated by our formula are potentially very generous; in marriages of medium duration they can extend for up to 19 years. These time limits are thus very different from the short and arbitrary time limits, typically of between three to five years, that became standard under the clean-break model of spousal support, and which *Moge* rejected. The time limits generated by these advisory guidelines should be assessed in context—they are potentially for lengthy periods of time and, once marriages are of any significant length, operate in conjunction with generous monthly amounts.

5.1.2.2 Indefinite support

Our proposed formula provides that support will be for an **indefinite duration** once the marriage has been **20 years or longer** in length (the **20-year rule**). Current case law supports the idea that indefinite support is appropriate after a long marriage. Indeed in parts of the country it is difficult to time-limit support after 15 years of marriage.

By indefinite we simply mean that no time limit is placed on the duration of the support in the initial order. **An order for indefinite support does not necessarily mean permanent support, and it certainly does not mean that support will continue indefinitely at the level set by the formula.** Under the current law, orders for indefinite support are open to variation as the parties' circumstances change over time, and support may even be terminated if the basis for entitlement disappears. Orders for indefinite support may also have review conditions attached to them. The advisory guidelines do nothing to change this, operating as they do within the existing legal framework.

The formula also provides that indefinite support will be available even in cases where the marriage is shorter than 20 years **if the years of marriage plus the age of the support recipient at the time of separation equals or exceeds 65** (the **rule of 65**). Thus if a 10-year marriage ends when the recipient is 55, indefinite support will be available because years of marriage (10) plus age (55) equals 65. This refinement to the formula for duration is intended to respond to the situation of older spouses who were economically dependent during a medium length marriage and who may have difficulty becoming self-sufficient given their age. The rule of 65 for indefinite support is not available in short marriages (under 5 years in length) given the assumption in the current law that short marriages generate limited support obligations.

We struggled with the issue of whether an age component should always be required for indefinite support—i.e. whether the rule of 65 should apply even in long marriages. Under a 20-year rule with no age requirement, for example, a 38-year-old spouse leaving a 20-year marriage would be entitled to indefinite support. Some would argue that indefinite support is not appropriate for a spouse who is still relatively young and capable of becoming self-sufficient. If the rule of 65 were generally applicable, support would not become indefinite even after a 20-year marriage unless the recipient were 45 years of age or older.

Several considerations led us to the conclusion that a 20-year rule without any age requirement was the more appropriate choice. First, a spouse who married young and spent the next 20 years caring for children could be more disadvantaged than someone who married when they were older and had been able to acquire some job skills before withdrawing from the labour force. As well, under the current law it would be very difficult to impose a time-limit on support after a 20-year marriage, even if self-sufficiency and an eventual termination of support were contemplated at some point in the future. The typical order would be an indefinite order subject to review and/or variation. An order for indefinite support under the advisory guidelines would be no different. As under the current law, orders for indefinite support under the advisory guidelines do not necessarily mean permanent support; they merely reflect the inappropriateness of attempting to set a time limit on support in initial orders.

5.2 Merger over Time and Existing Theories of Spousal Support

The idea that underlies the *without child support* formula and explains sharing income in proportion to the length of the marriage is **merger over time**. We use this term, which we have taken from the ALI proposals and discuss in more detail in the Background Paper, to capture the idea that as a marriage lengthens, spouses merge their economic and non-economic lives more deeply, with each spouse making countless decisions to mould his or her skills, behaviour and finances around those of the other spouse. Under our proposed formula, the income difference between the spouses represents their differential loss of the marital standard of living. The formulas for both amount and duration reflect the idea that the longer the marriage, the more the lower-income spouse should be protected against such a differential loss.

Under our proposed formula, short marriages without children will generate very modest awards in terms of both amount and duration. In cases where there are adequate resources, the support could be paid out in a single lump sum. Medium duration marriages will generate transitional awards of varying lengths and in varying amounts, increasing with the length of the relationship. Long marriages will generate generous spousal support awards on an indefinite basis that will provide the spouses with something approaching equivalent standards of living after marriage breakdown. Our formula generates the same ranges for long marriages in which the couple have never had children as for long marriages in which there have been children who are now grown.

While the label may be unfamiliar, the concept of merger over time, which relates the extent of the spousal support claim to the length of the marriage, underlies much of our current law. Its clearest endorsement can be found in Justice L’Heureux-Dubé’s much-quoted passage from *Moge*:

Although the doctrine of spousal support which focuses on equitable sharing does not guarantee to either party the marital standard of living enjoyed during the marriage, this standard is far from irrelevant to support entitlement 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.¹⁶

Merger over time offers an effective way of capturing both the compensatory and non-compensatory spousal support objectives that have been recognized by our law since *Moge* and *Bracklow*. Under our current law, both kinds of support claims have come to be analyzed in terms of loss of the marital standard of living. Budgets, and more specifically budgetary deficits, now play a central role in quantifying this drop in standard of living. Under our proposed formula, the spousal income difference serves as a convenient and efficient proxy measure for loss of the marital standard of living, replacing the uncertainty and imprecision of budgets. The length of marriage then determines the extent of the claim to be protected against this loss of the marital standard of living.

Merger over time clearly has a significant compensatory component. One of the common ways in which spouses merge their economic lives is by dividing marital roles to accommodate the responsibilities of child-rearing. Compensatory claims directed at redressing economic disadvantage due to the assumption of primary responsibility for child care will loom large in one significant segment of marriages covered by the *without child support* formula—long marriages in which there were children of the marriage who are now independent. We in fact began our project of constructing advisory guidelines around these cases, in which current law recognizes strong compensatory claims and endorses generous spousal support awards. Our formula likewise generates generous spousal support awards in these cases, offering the possibility of awards of up to 40 percent of the spousal income difference after 20 years of marriage and rising to 50 percent after 25 years.

Compensatory claims, in theory, focus on the lower income spouse’s loss of earning capacity, career development, pension benefits etc. as a result of having assumed primary responsibility for child care. However in practice, after *Moge*, courts began to respond to the difficulties of quantifying such losses with any accuracy, particularly in longer marriages, by developing proxy measures of economic loss that focus on the marital standard of living. Such a measure also takes into account the economic advantages of the marriage in the form of earning capacity maintained and developed during the course of the marriage. In doing so, courts were supported by Justice L’Heureux Dubé’s comments in *Moge*, reproduced above, on the continued relevance of marital standard of living under the compensatory model of spousal support.

When awarding spousal support in cases involving long traditional marriages, courts began to articulate their goal as providing the lower income spouse with a reasonable standard of living as assessed against the marital standard of living. And increasingly the standard for determining

¹⁶ *Moge v. Moge*, [1992] 3 S.C.R. 813 at 870.

spousal support in long marriages has become a rough equivalency of standards of living. This development in our law, which quantifies compensatory support in long marriages against the marital standard of living, has paved the way for an income-sharing formula such as ours.

While incorporating compensatory claims, merger over time also has a significant non-compensatory component. In cases of long traditional marriages where the children are grown, it is now common to see spousal support justified on a dual basis. Non-compensatory support claims based on dependency over a long period of time are commonly relied upon to supplement compensatory claims based on earning-capacity loss. In marriages where the spouses have never had children—the other segment of marriages covered by the *without child support* formula—spousal support claims are often non-compensatory in nature, based on need, dependency, and loss of the marital standard of living. Merger over time addresses these non-compensatory claims.

Giving precise content to the concept of non-compensatory or needs-based support has, of course, been one of the main challenges in spousal support law since *Bracklow*. One reading of *Bracklow* suggests that non-compensatory support is grounded in the economic dependency and, to use Justice McLachlin’s words, the “interdependency” of spouses. It recognizes the difficulties of disentangling lives that have been intertwined in complex ways over lengthy periods of time. On this broad reading of *Bracklow*, which many courts have accepted, need is not confined to situations of absolute economic necessity, but is a relative concept related to the previous marital standard of living. On this view entitlement to non-compensatory support arises whenever a lower income spouse experiences a significant drop in standard of living after marriage breakdown as a result of loss of access to the other spouse’s income, with amount and duration resolved by an individual judge’s sense of fairness.

Merger over time incorporates this broad view of non-compensatory support and provides some structure for quantifying awards made on this basis. Merger over time recognizes the complex merger of economic and non-economic lives that marriage involves and the countless ways that spouses mould their skills and behaviour around those of the other spouse. It takes account not just of obvious economic losses occasioned by the marriage, but also of the elements of reliance and expectation that develop in spousal relationships and increase with the length of the relationship. Our proposed formula, based on merger over time, thus addresses non-compensatory claims based on a drop in standard of living after marriage breakdown (or more accurately, on a disproportionate loss of the marital standard of living as compared to the other spouse). With increasing length of marriage, our formula offers increasing amounts of support for increasing periods of time to cushion the lower income spouse’s drop in standard of living.

Our formula generates the same ranges for long marriages in which the couple have never had children as for long marriages in which there have been children who are now grown. This result, which flows from the merger over time principle, mirrors what we find in the current law—lengthy marriages involving economic dependency give rise to significant spousal support obligations without regard to the source of the dependency.

Marriages in which there have never been children can, of course, give rise to compensatory claims as well as non-compensatory claims. One of the spouses may have experienced a significant economic loss as a result of the marriage, by moving, for example, or by giving up

employment. Or one spouse may have conferred an economic benefit on the other by, for example, funding his or her pursuit of a professional degree or other education and training. If the marriage has been relatively lengthy, our formula will generate awards generous enough to provide adequate compensation for any significant economic loss or disadvantage or for benefits conferred. However in the case of shorter marriages, the formula will produce only modest awards reflecting a limited (non-compensatory) claim to the loss of the marital standard of living that may not satisfy compensatory claims. As will be discussed below, we have dealt with this problem by recognizing an **exception for disproportionate compensatory claims** that exceed the formula amounts in shorter marriages.

A final point needs to be made with respect to this formula's relationship with existing theories of spousal support under the *Divorce Act*. Building as it does on the concept of merger over time, our *without child support* formula does not directly incorporate the basic social obligation theory of non-compensatory support that some read *Bracklow* as supporting.¹⁷ This somewhat questionable theory, which is discussed in more detail in the Background Paper, understands need in the absolute sense of an inability to meet basic needs and grounds the obligation to meet that need in the status of marriage itself. Our proposed formula produces awards that will go some way toward meeting basic needs where they exist, but limits the extent of any basic social obligation by the length of the marriage. However, the exceptions recognized under the formula, discussed below, do provide some accommodation for elements of basic social obligation.

5.3 Applying the Formula

Here we provide more detail on many of the specific issues that arise in the application of the *without child support* formula.

5.3.1 Entitlement a prior issue

These advisory guidelines, which generate ranges for amount and duration, are only applicable after entitlement has been established. **The mere existence of an income difference that would generate an amount under this formula does not automatically result in an entitlement to spousal support.** Post-*Bracklow*, the basis for entitlement is very broad. A significant income disparity between the spouses (and hence a significant drop in the lower income spouse's standard of living) generally results in a finding of entitlement to *some* support, even if it is only of a limited and transitional nature. And in cases where there have been children, a significant spousal income disparity also reflects, at least in part, the impact of past child-rearing responsibilities on income-earning capacity. But it is always open to a judge to find no entitlement on a particular set of facts in light of the *Divorce Act* support objectives.

In *Example 5.1* we have assumed that entitlement exists on both compensatory and non-compensatory grounds. Ellen might be described as self-sufficient because of her full-time employment at an income \$30,000. However, in our view, given the significant income disparity

¹⁷ The extent to which *Bracklow* supports this theory is questionable. Although the Court made many references to basic social obligation, it also held that a former spouse will not necessarily be obligated to meet the needs of the other spouse indefinitely, even when those needs are permanent. The extent of the obligation would depend upon many factors, including the length of the relationship, the way the parties had structured their relationship, ability to pay, and the existence of new relationships.

between the parties (\$60,000), the length of the marriage (20 years), and the strong factual basis for a compensatory claim of earning capacity loss because of child-care responsibilities for the now-grown child, such an argument would be unlikely to succeed. If the facts were changed dramatically, so that the income disparity were much smaller and there had been no children, the finding on entitlement might be different.

5.3.2 No minimum income difference fixed

While some guidelines do establish a minimum income difference before income sharing kicks in (for example, the ALI guidelines require a 25 percent income disparity), our proposed formula does not. We view such a requirement as an issue relating to entitlement and, as emphasized above, these advisory guidelines do not deal with entitlement. The issue of when an income difference becomes insignificant in terms of entitlement to spousal support has been left to discretionary determinations under current law.

Requirements of a minimum income disparity to trigger income sharing also create problems of cliff effects such that an extra dollar in income difference can mean the difference, for example, between no income sharing and, depending on the length of the marriage, sharing a potentially large percentage of the spousal income difference. In not dealing with entitlement, these advisory guidelines avoid that problem.

5.3.3 Determining income under the *without child support* formula

The calculation of each spouse's gross income is a crucial step under the *without child support* formula. As under the child support guidelines the accurate determination of income will become a much more significant issue in spousal support cases than it has in the past. Income-sharing systems work directly off income; it is no longer possible to make loose adjustments to amount. As a result, there will be incentives to dispute income as it establishes the amount of spousal support to be paid. However, because these advisory guidelines generate ranges and not specific amounts, absolute precision in the determination of income may not be as crucial as under the child support guidelines.

The starting point for the determination of income under this formula is the definition of income under the *Federal Child Support Guidelines*, including the Schedule III adjustments. Just as under the child support guidelines, many complex issues will arise in determining income where a spouse is self-employed or has other forms of non-employment income. As well, it may be necessary to **impute income** in situations where a spouse's actual income does not appropriately reflect his or her earning capacity.

As under the *Federal Child Support Guidelines*, income may be imputed to the payor spouse. However, support amounts under these advisory guidelines are based on both spouses' incomes and the issue of imputing income to the recipient spouse may also arise. However, this is unlikely to be an issue on initial applications; it will more likely arise in subsequent reviews or variations if it is established that the recipient spouse has failed to make appropriate efforts towards self-sufficiency. The application of the guidelines to reviews and variations will be discussed in Chapter 10.

Imputing income is the appropriate tool under the advisory guidelines to deal with concerns about the disincentives to self-sufficiency created by generous amounts of spousal support, especially at higher income levels. In current practice, these self-sufficiency concerns often result in loose downward adjustments of the amount of support *in initial orders*. Under these advisory guidelines, the range for amount is determined by spousal incomes and such loose adjustments (except within the range) are not possible. If a spouse is failing to make reasonable efforts to realize his or her earning capacity income can be imputed *on a subsequent review or variation*.

5.3.4 Determining the length of the marriage

The formulas for both amount and duration rely upon length of marriage. While we use the convenient term “length of marriage”, the actual measure under the advisory guidelines is the **period of cohabitation**. This includes pre-marital cohabitation and ends with separation. Inclusion of pre-marital cohabitation in determining length of marriage is consistent with what most judges do now in determining spousal support. This way of defining length of marriage also makes the advisory guidelines more easily used under provincial spousal support laws, which apply to non-marital relationships, both opposite-sex and same-sex.

We have not set precise rules for determining the length of marriage. The simplest approach would be to round up or down to the nearest full year, and this is what we have done in our examples. Another, slightly more complicated, approach would be to allow for half years and round up or down to that. Because the formula generates a range and not a fixed number, absolute precision in the calculation of the length of the marriage is not required. Addition or subtraction of half a year will likely make little or no difference to the outcome.

5.3.5 Primary application to initial orders

The primary role of the formulas under these advisory guidelines is to establish ranges for **initial determinations** of spousal support based on the spouses’ incomes (or imputed incomes) at that point in time. **As under the current law, orders made under the advisory guidelines will be open to variation in the future based upon a material change in circumstances and may also include provisions for review.**¹⁸ The extent to which the advisory guidelines will apply on variations and reviews is discussed in Chapter 10.

The possibility of variation and review should be kept in mind when assessing the appropriateness of the outcomes generated by the formula. It should not be assumed that the amounts generated by the formula will remain the same over the entire duration of the support order. The amount might, for example, be varied downward at some point in the future if the recipient’s income has increased or if income is imputed to the recipient.

¹⁸ In the case of negotiated agreements, future changes in spousal support will be governed by the terms of the agreement; in the case of consent orders, by both the legislative provisions governing variation and the terms of any incorporated agreement. These issues are discussed in more detail in Chapter 10.

The same is true of duration. An initial order for indefinite support under the advisory guidelines, as found in *Example 5.1*, does not necessarily mean a permanent order. The amount Ellen receives under the formula might be varied downward over time and the order might even be terminated if her circumstances change dramatically such that her entitlement disappears. In the cases where the formula generates time limits, as under the current law, changed circumstances might result in the amount being reduced, and in some cases support might be reduced to zero or terminated before the time limit has expired. As marriages increase in length, so too do the time limits under the formula, creating more possibilities for variation and even termination before the expiry of the time period. Current law also allows time-limited orders to be varied by extending the payment of spousal support beyond the time limit, subject to the requirement in s. 17(10) of the *Divorce Act* that if the application is brought after the time limit has expired, the changed circumstances upon which the variation is based must be related to the marriage.

5.3.6 The Formula as a Starting Point

The formula's outcomes—the ranges it generates for amount and duration—are intended as a useful starting point for determinations of spousal support. In what follows we explore what this means—how to use the ranges, how to restructure the formula outcomes by trading off amount against duration, and when it will be appropriate to depart from the formula outcomes by recognizing an exception.

Before proceeding to these issues, however, we set out some further examples of the formula's application to provide a more concrete foundation for the subsequent discussion.

5.4 Making the Formula Concrete—Some Examples

5.4.1 A short-marriage example

We define short marriages as less than five years in length. In cases of short marriages, the *without child support* formula generates very small amounts for a very short duration. The rule of 65, which allows for indefinite support to older spouses in marriages of less than 20 years in length, does not apply to short marriages. Support will thus always be time-limited in these cases of short marriages. Restructuring, discussed in more detail below, may be used to convert to a lump sum if there are available resources. These formula outcomes conform to current law which, barring exceptional circumstances, understands short marriages to generate very limited support obligations. These formula outcomes conform to current law which, barring exceptional circumstances, understands short marriages to generate very limited support obligations, if entitlement is found to exist at all.

Example 5.2

Karl and Beth were married for only four years. They had no children. Beth was 25 when they met and Karl was 30. When they married, Beth was a struggling artist who earned a meagre gross income of \$12,000 a year giving art lessons to children. Karl is a music teacher with a gross annual income of \$60,000. With Karl's encouragement, Beth stopped working during the marriage to devote herself to her painting.

Entitlement is a threshold issue before the advisory guidelines apply. On these facts, given the disparity in income and Beth's unemployment at the point of marriage breakdown, entitlement is likely to be found.

The conditions for indefinite support do not apply and duration would be calculated on the basis of .5 to 1 year of support for each year of marriage.

To determine the **amount** of support under the formula:

- Determine the **gross income difference** between the parties:
 $\$60,000 - 0 = \$60,000$
- Determine the **applicable percentage** by multiplying the length of the marriage by 1.5-2:
 $1.5 \times 4 \text{ years} = \mathbf{6 \text{ percent}}$
to
 $2 \times 4 \text{ years} = \mathbf{8 \text{ percent}}$
- Apply the applicable percentage to the income difference:
 $6 \text{ percent} \times \$60,000 = \$3,600/\text{year} (\mathbf{\$300/\text{month}})$
to
 $8 \text{ percent} \times \$60,000 = \$4,800/\text{year} (\mathbf{\$400/\text{month}})$

Duration of spousal support = $(.5-1) \times 4 \text{ years of marriage} = 2 \text{ to } 4 \text{ years}$

The result under the *without child support* formula is support in the range of \$300 to \$400 per month for a duration of 2 to 4 years.

Using **restructuring**, discussed in more detail below, this modest award could be converted into a lump sum or into a periodic award that would be paid out over a very short time period such as one year.

5.4.2 Some medium-length marriage examples

In medium-length marriages (5 to 19 years), the formula generates increasing amounts of support as the marriage increases in length, moving from relatively small percentages at the shorter end of the spectrum to relatively generous amounts after 15 years, when awards of 30 percent of the gross income difference become possible. Except where the rule of 65 is applicable, the formula generates time limits of varying lengths depending on the length of the marriage. The ranges for duration are, however, very wide, leaving much opportunity to respond to the facts of particular cases.

This category covers a diverse array of cases raising a variety of support objectives. Current law is at its most inconsistent in its handling of these cases. This area posed the greatest challenges to developing a single formula that would yield appropriate results. We concluded that our formula based on merger over time provided the best starting point. But not surprisingly, it is in these cases that there will be the most frequent need to rely upon restructuring to massage the formula outcomes and where there will likely be the greatest resort to exceptions.

Example 5.3

Bob and Susan have been married 10 years. They married in their late twenties and Sue is now 38. Bob is employed as a computer salesman and Sue is a hairdresser. Both worked throughout the marriage. There were no children. Bob's gross annual income is \$65,000; Sue's is \$25,000.

Entitlement is a threshold issue before the advisory guidelines are applicable. An argument might be made that there is no entitlement to support: Sue is employed full time and could support herself, and there is no compensatory basis for support. However, Sue will suffer a significant drop in standard of living as result of the marriage breakdown and, at an income of \$25,000, will likely experience some economic hardship. Current law would suggest an entitlement to at least transitional support on a non-compensatory basis to allow Sue to adjust to a lower standard of living.

The case does not satisfy the conditions for indefinite support. The marriage is under 20 years and the case does not fall within the rule of 65 for indefinite support because Sue's age at separation plus years of marriage is below 65 ($38+10=48$).

To determine the **amount** of support under the formula:

- Determine the **gross income difference** between the parties:
 $\$65,000 - \$25,000 = \$40,000$
- Determine the **applicable percentage** by multiplying the length of the marriage by 1.5-2:
1.5 X 10 years = **15 percent**
to
2 X 10 years = **20 percent**
- Apply the applicable percentage to the income difference:
15 percent X \$40,000 = \$6,000/year (**\$500/month**)
to
20 percent X \$40,000 = \$8,000/year (**\$667/month**)

Duration of spousal support = $(.5-1) \times 10$ years of marriage = 5 to 10 years

The result under the formula is support in the range of \$500 to \$667 per month for a duration of 5 to 10 years.

Consistent with current law, the formula essentially generates modest top-up support for a transitional period to assist Sue in adjusting from the marital standard of living.

An award of \$500 per month, at the low end of the range, would leave Sue with a gross annual income of \$31,000 and Bob with one of \$59,000. An award of \$667 per month, at the high end of the range, would leave Sue with a gross annual income of \$33,000 and Bob with one of \$57,000. In a marriage of this length the formula does not equalize incomes.

Some might find the amounts generated by the formula too low, even at the high end of the range. An argument could be made that, consistent with current law, any transitional order should put Sue somewhat closer to the marital standard of living for the period of gearing down.

As will be discussed in more detail below, such a **restructuring** of the formula outcome is possible to produce larger amounts for a shorter duration.

If the facts were changed so that the marriage were shorter—seven years in length—the percentage range of the gross income difference to be shared would fall to 10.5 to 14 percent and the duration would be shorter. The result under the formula would be spousal support in the range of \$350 to \$467 per month (\$4,200 to \$5,600 per year), for 3.5 to 7 years.

Example 5.4

David and Jennifer were married for 12 years. It was a second marriage for both. David was 50 when they met. He is a businessman whose gross annual income is now \$100,000 per year. Now 62, he is in good health, loves his work, and has no immediate plans to retire. Jennifer was 45 when they met, while Jennifer was working in his office. She had been a homemaker for 20 years during her first marriage and had received time-limited support. When they met she was working in a low-level clerical position earning \$20,000 gross per year. Jennifer, now 57, did not work outside the home during the marriage.

Entitlement is a threshold issue before the advisory guidelines are applicable. Given the length of the marriage and Jennifer's lack of income, entitlement to support on non-compensatory grounds would be relatively uncontentious.

To determine the **amount** of support:

- Determine the **gross income difference** between the parties:
 $\$100,000 - 0 = \$100,000$
- Determine the **applicable percentage** by multiplying the length of the marriage by 1.5-2:
 $1.5 \times 12 \text{ years} = \mathbf{18 \text{ percent}}$
to
 $2 \times 12 \text{ years} = \mathbf{24 \text{ percent}}$
- Apply the applicable percentage to the income difference:
 $18 \text{ percent} \times \$100,000 = \$18,000/\text{year} (\mathbf{\$1,500/\text{month}})$
to
 $24 \text{ percent} \times \$100,000 = \$24,000/\text{year} (\mathbf{\$2,000/\text{month}})$

This is a case where the rule of 65 would govern duration. Because Jennifer's age at separation plus years of marriage is 65 or over ($57+12=69$), the formula provides for indefinite support, rather than the durational range of 6 to 12 years based on length of marriage alone. A variation in amount would, however, be likely when David retires.

The result under the formula is support in the range of \$1,500 to \$2,000 a month for an indefinite duration, subject to variation and possibly review.

Support at the low end of the range would leave Jennifer with a gross annual income of \$18,000 and David with one of \$72,000. Support at the high end of the range would leave Jennifer with a gross annual income of \$24,000 and David with one of \$66,000. Again, because of the length of the marriage (12 years), the formula does not generate results that approach income equalization.

Given that David's source of income is a business, in reality this fact situation would raise many complex issues of determining his income. It is unlikely that any income would be imputed to Jennifer for the purposes of making an initial order of support given her age and the length of time she has been out of the workforce. Income might be imputed on a subsequent variation or review if the evidence established that Jennifer was capable of earning income and was not appropriately contributing to her own support. If Jennifer were to earn income in the future, support would be adjusted under the advisory guidelines on a variation application as discussed in Chapter 10.

Now, let's assume that the marriage was shorter and only lasted seven years. As in the original facts, Jennifer is 57 at the point of separation and David is 62. For a 7 year marriage the percentage range of the gross income difference to be shared would fall to 10.5 to 14 percent. The rule of 65 would no longer apply to determine duration. Spousal support under the formula would thus be in the range of \$875 to \$1,167 per month (or \$10,500 to \$14,000 per year), for a duration of 3.5 to 7 years. Restructuring might be used in this case to extend the maximum duration by one year to take Jennifer to 65, when pension benefits will become available.

5.4.3 Some long-marriage examples

In cases of long marriages (20 years or longer) the formula generates generous levels of spousal support for indefinite periods, reflecting the fairly full merger of the spouses' lives. The long marriages covered by the *without child support* formula fall into two categories: those where there have been children who are no longer dependent and those where the couple did not have children.

Current case law yields a fairly consistent pattern of generous, indefinite support in cases of long traditional and quasi-traditional marriages with children, intended to provide roughly equivalent standards of living. Admittedly, however, the standard of what is considered generous varies across the country. It is more difficult to find consensus on appropriate outcomes in cases of long marriages where there have not been children or where both spouses have been fully employed, with or without children. The ranges under our proposed formula were developed with the recognition that they would have to cover cases of long marriages of both categories, where there was significant income disparity but no strong compensatory claim.

Example 5.1 provides an example of the formula's application to a long marriage with children where the wife was a secondary earner. *Example 5.5*, presented below, involves the familiar scenario of a very long traditional marriage.

Example 5.5

John and Mary were married for 28 years. Theirs was a traditional marriage in which John worked his way up the career ladder and now earns \$100,000 gross per year, while Mary stayed home and raised their two children, both of whom are now grown up and on their own. Mary is 50 years of age and has no income. John is 55.

Entitlement to spousal support is clear on these facts and thus the advisory guidelines are applicable. Because the length of the marriage is over 25 years, the maximum range for amount applies—37.5 to 50 percent of the gross income difference.

To determine the **amount** of support under the formula:

- Determine the **gross income difference** between the parties:
 $\$100,000 - 0 = \$100,000$
- The maximum range for amount is 37.5 to 50 percent of the gross income difference
- Apply the applicable percentage to the income difference:
 $37.5 \text{ percent} \times \$100,000 = \$37,500/\text{year}$ (**\$3,125/month**)
to
 $50 \text{ percent} \times \$100,000 = \$50,000/\text{year}$ (**\$4,167/month**)

Duration is indefinite because the marriage is 20 years or over in length.

The formula results in a range for support of \$3,125 to \$4,167 per month for an indefinite duration, subject to variation and possibly review.

An award of \$3,125 per month, at the low end of the range, would leave Mary with a gross income of \$37,500 per year and John with one of \$62,500. An award of \$4,167 per month, at the high end of the range, would leave both parties with a gross annual income of \$50,000. In this case an award at the highest end of the range would not be appropriate given the need to recognize John's costs of earning an income. An award of 50 percent of the gross income difference would actually leave Mary with a higher net income than John.

It would be inappropriate to **impute income** to Mary in an initial order given her long absence from the work, especially if the order is being made near the time of separation. However, at some point in the future, on a variation or review, income may be imputed to Mary, and spousal support re-determined, if evidence establishes that she is not making reasonable efforts to contribute to her own support. As will be discussed further in Chapter 10, the order would also be open to variation over time in response to many other changes in the parties' circumstances, the most likely being John's retirement.

Example 5.6 involves a long marriage without children.

Example 5.6

Richard is a teacher with a gross annual income of \$75,000. He is in his late forties. His wife, Judy, is the same age. She trained as a music teacher but has worked as a freelance violinist for most of the marriage, with a present gross income of \$15,000 a year. Judy has also been responsible for organizing their active social life and extensive vacations. They were married 20 years. They had no children.

Entitlement will easily be established in this case given the significant income disparity, Judy's limited employment income, and the length of the marriage.

To determine the **amount** of support under the formula:

- Determine the **gross income difference** between the parties:
 $\$75,000 - \$15,000 = \$60,000$

- Determine the **applicable percentage** by multiplying the length of the marriage by 1.5-2:
 - 1.5 X 20 years = **30 percent**
 - to
 - 2 X 20 years = **40 percent**
- Apply the applicable percentage to the income difference:
 - 30 percent X \$60,000 = \$18,000/year (**\$1,500/month**)
 - to
 - 40 percent X \$60,000 = \$24,000/year (**\$2,000/month**)

Duration would be indefinite because the marriage was 20 years in length.

The result under the formula is support in the range from of \$1,500 to \$2,000 per month for an indefinite duration, subject to variation and possibly review.

An award at the lower end of the range would leave Judy with a gross annual income of \$33,000 and Richard with one of \$57,000. An award at the high end of the range would leave Judy with a gross annual income of \$39,000 and Richard with one of \$51,000.

Judy will certainly be expected to increase her income and contribute to her own support. The issue in applying the formula will be whether a gross income of \$30,000 a year, for example, should be attributed to Judy for the purposes of an initial determination of support. If so, support under the formula would be lowered to a range of \$1,125 to \$1,500 per month (or \$13,500 to \$18,000 per year).

More likely, Judy would be given some period of time (for example one or two years) before she would be expected to earn at that level, with support to be adjusted at that point, after a review.

5.5 Using the Ranges

The *without child support* formula generates **ranges** for amount and for duration as well unless the conditions for indefinite support are met. The ranges allow the parties and their counsel, or a court, to adjust amount and duration to accommodate the specifics of the individual case in light of the support factors and objectives found in the *Divorce Act*.

In this section we can only highlight in the most general way the sorts of factors that could be taken into account in fixing precise amounts and time periods and that might push a determination up or down within the ranges. Most of the relevant factors will be the same as those that now operate within the present discretionary case law, the difference being that here they will operate within the boundaries created by the formula. Also, as under current law, no single factor will be determinative and several factors may be at play in any given case, sometimes pushing in different directions.

First, a **strong compensatory claim** may be a factor that favours a support award at the higher end of the ranges both for amount and duration. A spouse who has suffered significant economic disadvantage as a result of the marital roles and whose claims are based on both compensatory and non-compensatory grounds may have a stronger support claim than a spouse whose

economic circumstances are not the result of marital roles and who can only claim non-compensatory support based upon loss of the marital standard of living. In *Examples 5.1* and *5.5*, both of which involved long marriages where one spouse sacrificed employment opportunities as a result of child care responsibilities, this factor of a strong compensatory claim could weigh in favour of an award at the higher end of the range in as compared to some of our other examples where there were no children.

Second, in a case where the recipient has limited income and/or earning capacity, because of **age** or other circumstances, the **recipient's needs** may push an award to the higher end of the ranges for amount and duration. Conversely, the absence of compelling need may be a factor that pushes an award to the lower end of the range. In *Example 5.4*, where Jennifer is unemployed at the age of 57, this need factor might weigh in favour of an award at the higher end of the range. *Example 5.2*, in contrast, where Sue is only 38 and earning \$25,000 per year, the need factor may not be as compelling, suggesting an award at the lower end of the range. In *Example 5.1* the absence of compelling need on Ellen's part, given her income of \$30,000 per year, might suggest an award at the lower end of the range, but this would be counter-balanced by Ellen's strong compensatory claim.

Third, **property division** may affect where support is fixed within the ranges for amount or duration. For example, an absence of property to be divided might suggest an award at the higher end of the range; an unequal division in favour of the recipient spouse may suggest an award at the lower end of the range.

Fourth, **need and limited ability to pay on the part of the payor spouse** may push an award to the lower ends of the ranges. These factors will clearly have special importance at the lower end of the income spectrum, even above the floor of \$20,000. (The floor is discussed further in Chapter 7.) In some cases where the need of the recipient spouse is pressing, the payor spouse may also be struggling to maintain some modest standard of living. A situation where debts exceed assets and where the payor spouse is carrying a disproportionate share of those debts, may also push an award to the low end of the range. Often, however, it will be necessary to go outside the formula to accommodate this situation, and a more extensive treatment of debt as a factor is thus found in the discussion of exceptions below. As has been previously noted, in long marriages where the recipient spouse was not employed and stayed home full time, income equalization (the highest end of the range) fails to recognize that the payor spouse has costs of going out to paid work (over and above any deductions), and an award somewhat lower in the range for amount would be required.

Fifth, **self-sufficiency incentives** may push in different directions. As often happens under the current case law, support might be fixed at the lower end of the ranges to encourage the recipient to make greater efforts to self-sufficiency, although imputing income also goes a long way towards responding to this concern. On the other hand, the need to promote self-sufficiency might lead to an award at the higher end of the range where this could mean that a recipient spouse obtains re-training or education leading to more remunerative employment and less support in the long term.

This is not an exhaustive list, but rather an attempt to identify some of the more obvious factors that might affect how and where amount and duration are fixed within the ranges. The ranges

also allow room for local and regional differences in support outcomes, recognizing that awards in some parts of the country (Ontario, and more specifically Toronto) are higher than in others (for example, the Atlantic Provinces).

5.6 Restructuring

The *without child support* formula generates separate figures for amount and duration. In Chapter 4 we introduced the concept of restructuring, which allows amount and duration to be traded off against each other, as long as the overall value of the restructured award remains within the global—or total—amount generated by the formula when amount is multiplied by duration. A certain degree of adjustment of amount against duration will occur when precise amounts and duration are being fixed within the ranges. However, in particular cases an appropriate award will require an adjustment **beyond the limits of the formula's ranges**. **Restructuring** allows the formula to continue to act as a tool to guide such deviations from the ranges because the overall value of the award remains within the global amounts set by the formula. In this way restructuring differs from **exceptions**, discussed below, which involve an actual departure from the outcomes suggested by the formula.

As noted in Chapter 4, restructuring can be used in at least three different ways:

- to **front-end load** awards by increasing the amount beyond the formula's range and shortening duration;
- to **extend duration** beyond the formula's range by lowering the monthly amount; and
- to formulate a **lump sum** payment by combining amount and duration.

Restructuring will have its main application under these advisory guidelines in cases governed by the *without child support* formula. To trade off amount against duration requires a fixed duration for the award. As a result, restructuring will generally only be possible in cases where the formula generates time limits rather than indefinite support. It will thus have limited application under the *with child support* formula, discussed in Chapter 6, where duration is often uncertain.

As we were developing the *without child support* formula we discovered that many of the problem cases, where the outcomes generated by the formula initially appeared to be out of line with current cases, were resolved by restructuring. We similarly anticipate that in practice many cases where the formula outcome initially appears inappropriate will be resolved through the adjustment of amount and duration. Awards will thus remain consistent with the overall or global amounts generated by the formulas.

Restructuring will inevitably involve a certain amount of guesswork in determining equivalencies between restructured awards and formula outcomes. But this is already familiar to family law lawyers who frequently make tradeoffs between amount and duration in settlement negotiations and spousal support agreements. Restructuring by means of a lump sum payment or an increase in amount above the formula amounts will also require a finding of ability to pay on the payor's part.

We now provide some examples of the different ways restructuring might be used. We have used very simplified calculations that do *not* take into account the time-value of money, the various future contingencies that could affect the value of awards over time, or tax consequences. We have assumed that the third use of restructuring—converting a periodic order to a lump sum in a short marriage—is familiar and straightforward, and so have not provided a specific example. Its use was suggested in *Example 5.2*.

Our first example involves front-end loading to increase the amount outside the formula's range by reducing duration. This involves choosing a durational limit at the low end of the formula's range or below it. Front-end loading may be appropriate in shorter marriages where the monthly formula amounts are relatively modest. Restructuring would allow a generous but relatively short transitional award. Under current practice, spousal support awards in such cases would be shaped by the goal of cutting the ties between the parties fairly quickly and allowing them to go their separate ways. Front-end loading may also be desirable in cases where the recipient spouse needs significant support for a short period to undertake a program of retraining or education, to earn a higher income.

Example 5.7

Here we return to the case of Bob and Susan in *Example 5.3*, who were married 10 years and had no children. They are both in their late thirties and employed full time. Bob's gross annual income as a computer salesman is \$65,000; Sue's as a hairdresser is \$25,000.

Under the *without child support* formula a 10 year marriage such as this gives rise to a range for amount of 15 to 20 percent of the gross income difference. Under the formula, spousal support would be in the range of \$500 to \$667 per month (or \$6,000 to \$8,000 per year) for a period of 5 to 10 years.

Given the parties' ages and employment situations and the length of the marriage, the appropriate award in this case would likely be one that cut the ties between the parties fairly quickly. The monthly amounts generated by the formula might also appear low when assessed against current practice. Both of these concerns could be met by providing transitional support at a higher level than the formula allows, for example \$1,300 per month (which represents roughly 39 percent of the income difference) for only 3 years, rather than the 5-year minimum duration under the formula.

Restructuring requires the calculation of the global or total amounts generated by the formula when amount is multiplied by duration. Here the minimum and maximum global awards under the formula are as follows:

- \$500 per month for 5 years ($\$500 \times 60 \text{ months}$) = \$30,000
- \$667 per month for 10 years ($\$667 \times 120 \text{ months}$) = \$80,040

The proposed award of \$1,300 per month for three years, which has a total value of \$46,800 ($\$1,300 \times 36 \text{ months}$), would be allowed under restructuring as it falls within the global ranges generated by the formula, even though it falls outside the formula's specific ranges for amount and duration.

Although this example uses a fixed monthly amount for the duration of the restructured award, it would also be possible to restructure using step-down awards, as long as the total amount of the award falls within the range set by the formula. In the example above, restructuring would allow an award of \$1,500 per month for the first year, 1,000 per month for the second year, and \$750 per month for the third year. The total value of the award—\$39,000—falls within the global amounts generated by the formula.

Our second example shows the use of restructuring to extend duration by cutting back on amount. Depending on how much of an extension of duration is required, this can be accomplished either by choosing an amount at the lower end of the formula's range for amount or by setting an amount *below* the formula's range. This use of restructuring might be desirable in medium-length marriages where the recipient spouse will have long-term need and would be better off with modest supplements to income over a longer period of time than with more generous payments over the time period suggested by the formula.

Example 5.8

Brian and Gail were married for 15 years and had no children. Both are 45. Gail is a phys ed teacher earning \$70,000 gross per year. Brian worked as a trainer in the early years of the marriage but was forced to stop working because of a debilitating illness. He now receives CPP disability of \$10,000 per year.

For a 15-year marriage, the formula generates an amount ranging from 22.5 to 30 percent of the gross income difference. Here the formula results in the range for spousal support of \$1,125 to \$1,500 per month (or \$13,500 to \$18,000 per year), for a duration of from 7.5 to 15 years.

An award of 15 years' duration would take Brian to the age of 60. The desirable result in this case might be to provide support until Brian reaches age 65 when he will start to receive pension benefits. Restructuring would permit this.

The global amounts generated by the formula range from \$101,250 to \$270,000, calculated as follows:

- \$1,125 per month for 7.5 years ($\$1,125 \times 90 \text{ months}$) = \$101,250
- \$1,500 per month for 15 years ($\$1,500 \times 180 \text{ months}$) = \$270,000

Because of Brian's need and the length of the marriage, this would likely be a case where the award would be at the upper end of the ranges for both amount and duration.

Using restructuring, the award could be extended to 20 years to take Brian to age 65 if the amount were set at the lowest end of the formula's range: \$1,125 per month. In this case, the total amount of the award ($\$1,125 \times 240 \text{ months}$) would equal the maximum global amount set by the formula, \$270,000.

Similarly if Brian and Gail were both five years younger and a 25 year award would be required to take Brian to age 65, the amount could be reduced to \$900 per month (18 percent of the gross income difference) as the total value of the award, calculated as follows, would again equal the maximum global amount generated by the formula ($\$900 \times 300 \text{ months} = \$270,000$).

Although this example extends duration for a defined period, it might also be possible to use restructuring to extend duration indefinitely, recognizing, however, that the total value of an indefinite award cannot be calculated with precision. A certain amount of guesswork would inevitably be involved in determining how low the amount of the indefinite award should be set to achieve some rough equivalence with the formula amounts.

5.7 Exceptions

Our formulas are intended to generate appropriate outcomes in the majority of cases without dependent children. The formulas have been designed to cover a wide range of *typical* cases. There will be unusual or atypical cases, however, where the formulas generate results inconsistent with the support factors and objectives found in the *Divorce Act* and an appropriate result can only be achieved by departing from the formula.

The term **exceptions** refers, under these advisory guidelines, to recognized **categories of departures** from the ranges of amounts and durations for spousal support under the formulas. Exceptions are the last step in a support determination in cases covered by the *without child support* formula. The *without child support* formula provides two other opportunities, discussed above, to shape awards that are responsive to the exigencies of individual cases. First, the ranges for amount and duration provide considerable scope to adjust within those ranges to the particular facts of any case. Second, restructuring provides a further means to push and pull amount and duration above and below the ranges generated by the formula. Only if *neither* of these steps can accommodate the unusual facts of a specific case should it become necessary to resort to these exceptions.

As we emphasize throughout this document, these advisory guidelines are informal rules and are not legally binding. In principle, the formulas' outcomes can be ignored whenever they are viewed as inappropriate. Departures from the formulas' outcomes could thus have been left entirely to case-by-case determination, without any need for categorical exceptions. In our view, however, it is important to the integrity of the proposed advisory guidelines that exceptions be listed and defined. It is only the systemic benefits of consistency, predictability, coherence and fairness that encourage all concerned to work within the formulas' ranges. We took the view that exceptions should be stated, to structure and constrain departures from the formula in the interests of consistency and predictability.

We recognize that any list of itemized exceptions will not be exhaustive. There will always be unusual and even one-of-a-kind fact situations in spousal support cases, as in family law generally. We cannot even create categories to encompass all cases. But there are certain familiar categories of "hard" cases that come up with sufficient regularity that an exception can both recognize their existence and offer some guidance to their resolution. Following conventional legal principles, a spouse who claims to fall within one of these exceptions ought to bear the burden of proof.

Our listed exceptions, which we review below, will not be surprising. More likely to attract comment will be the fact situations that we did *not* put on the list. In the next stage of discussions, there will undoubtedly be further discussion of these exceptions.

We focus here on the way that these exceptions will operate in cases *without* dependent children. Their application in cases with dependent children, under the *with child support* formula, will be dealt with in Chapter 6.

5.7.1 The compensatory exception

The merger over time concept, as explained above, incorporates both compensatory and non-compensatory elements. In longer marriages the *without child support* formula generates high percentage ranges for sharing the gross income difference. In these longer marriages, by recognizing strong non-compensatory claims to the marital standard of living, the formula amounts will also fully recognize any compensatory claims based on loss of earning capacity or career damage.

For short- or medium-length marriages, however, the *without child support* formula produces smaller amounts of support, reflecting the reduced importance of compensatory considerations, especially as most of these will be marriages without children. More important in these short-to-medium marriages will be the transitional function of non-compensatory support, with the transition being longer or shorter depending upon the expectation and reliance interests flowing from the length of the marriage.

But some short- or medium-length marriages can involve large *compensatory* claims, disproportionate to the length of the marriage, even without any children involved. These compensatory claims may relate to an economic loss or may involve a restitutionary claim for an economic advantage conferred. Some examples come to mind:

- One spouse is transferred for employment purposes, on one or more occasions, forcing the other spouse to give up his or her job and to become a secondary earner.
- One spouse moves across the country to marry, giving up his or her job or business to do so.
- One spouse works to put the other through a post-secondary or professional program but the couple separates shortly after graduation as in *Caratun v. Caratun*¹⁹ before the supporting spouse has been able to enjoy any of the benefits of the other spouse's enhanced earning capacity.

There could undoubtedly be other examples.

If a claimant spouse can prove such a disproportionate compensatory claim, then this exception would allow for an individualized determination of the amount of spousal support, based upon the size and nature of that claim. The formula will not offer much assistance.

¹⁹ *Caratun v. Caratun* (1993), 42 R.F.L. (3d) 113 (Ont. C.A.). The ALI proposals also contain an exception for disproportionate compensatory losses in short marriages. With respect to *Caratun*-type cases, the ALI's proposals frame these as reimbursement support cases which involve compensation for a *loss*, i.e., the loss either spouse incurs when the marriage is dissolved before that spouse realizes a fair return from his or her investment in the other spouse's earning capacity. Spousal support in these cases, the ALI suggests, ought to be the reimbursement of living and other expenses contributed by the claimant spouse.

The compensatory principles set out in *Moge*, and reaffirmed in *Bracklow*, continue to develop in the case law. Thus, the precise scope of this exception would reflect the evolution of those principles.

5.7.2 Illness and disability

Many cases of illness or disability can be accommodated within the formula. The central concern in many of these cases will be the recipient's need for long-term or indefinite support. Indefinite support would be available under the *without child support* formula after 20 years of marriage or based upon the rule of 65. And, in most medium-to-long marriages, the ranges for duration and amount offer considerable scope to accommodate the needs of an ill or disabled spouse.

In some medium-length marriages, where the formula generates time limits, restructuring may have to be employed. Under restructuring, the monthly amount could be reduced and the duration extended beyond the maximum, especially where spousal support is effectively bridging until retirement, when the recipient's pension and old age benefits become payable. For this to be effective, the support amounts generated by the gross income difference would have to be large enough to allow for a reasonable lower amount of monthly support. *Example 5.8*, the case of Gail and Brian, where Brian is suffering from a chronic illness at the end of their 15-year marriage, illustrates the use of restructuring to deal with the needs of an ill or disabled spouse.

There will be some cases where none of these possibilities within the formula can adequately accommodate a recipient spouse's illness or disability and a departure from the formula may be necessary. Typically these will be cases where the recipient is younger or the marriage is shorter or the payor's income is not high. Under this exception, we suggest that it would be possible to **lengthen the maximum durational limit, while keeping the amount within the range, more specifically at or near the lower end of the range.** That would be our preferred solution to exceptional illness and disability cases, as any support amounts would still remain within the formula ranges.

To use an example, we can change the facts slightly in *Example 5.3*, the case of Bob and Sue.

Example 5.9

Bob and Sue were married for 10 years. Sue is now 38, and Bob earns \$65,000 per year. There were no children. Assume that Sue worked as a hairdresser, earning \$25,000 a year, but then became ill and unable to work towards the end of the marriage, with no prospect of future improvement. She now receives \$10,000 per year thanks to CPP disability.

Under the *without child support* formula, the applicable percentages for amount after a 10 year marriage would still be, as on the original facts, 15 to 20 percent, but now applied to a gross income difference of \$55,000. Spousal support under the formula would be in the range of \$687 to \$917 per month (or \$8,250 to \$11,000 annually) for a duration ranging from 5 to 10 years.

At the maximum duration, Sue would only obtain spousal support until age 48. Suppose Sue wants to receive support until age 60, another 12 years or 22 years in total.

Restructuring could be attempted. The maximum global amount under the formula would be \$110,000 (\$917 per month for 10 years). If this global amount were stretched over 22 years (and ignoring any discounting for time), that could generate an annual amount of \$5,000 per year or \$417 per month.

Since Sue would likely need more than \$5,000 per year, she would argue that she falls within this illness and disability exception. **If Sue's claim for support beyond what the formula provides is accepted as compelling**, our preferred solution would be to extend the duration of support to age 60 as Sue requests, but for an amount at the low end of the range, i.e. \$687 monthly or \$8,250 per year.

However, **this case would not necessarily fall within the illness and disability exception**. Under current law Sue's claim for indefinite support may not be accepted and the formula outcome, subject to restructuring, may be appropriate. In *Bracklow*, for example, which involved a support claim by a disabled spouse on facts quite similar to those in this example, the final result in the case is consistent with our formula, without resort to an exception.²⁰

Bracklow involved a seven-year relationship. At the time of the original trial, Mr. Bracklow was earning \$44,000 gross per year and Mrs. Bracklow's income from CPP was \$787 per month, or roughly \$9,500 per year. The final result in the case, taking into account the interim support paid, was a time-limited order of \$400 per month for slightly more than seven years. Our formula yields a similar result. Under the formula, after a 7 year marriage the range for support is 10.5 to 14 percent of the gross income difference, which in *Bracklow* was \$34,500. The range for support would therefore be \$301 to \$402 per month (or \$3623 to \$4830 per year) for a duration of 3.5 to 7 years duration. Thus the results generated by our formula might also be seen as appropriate for the case of Bob and Sue.

What we propose here is a limited exception for illness and disability cases, as these are the cases that the courts often treat as exceptional. Some might propose that there be a similar and additional exception based upon age for older recipient spouses. In our view, there are sufficient accommodations for age in the *without child support* formula. The recipient's age will be a factor in fixing amount and duration within the ranges and there is also the rule of 65 for indefinite support. Some would even broaden this exception beyond illness and disability, into something more like a basic social obligation exception, where the recipient has basic needs beyond any formula support for one of any number of reasons. We believe that the sheer breadth of a basic social obligation exception would undermine the integrity and consistency of any formula or advisory guidelines.

5.7.3 Debt payment

The existence of marital debts does not necessarily affect spousal support. In many cases debts are adequately taken into account in property division, reducing the amount of shareable property. However, where a couple has a negative net worth (i.e., debts greater than assets) then the allocation of the debt payments can have a dramatic impact upon ability to pay. If the payor

²⁰ The result of the Supreme Court of Canada decision was to return the case to the trial judge for a re-hearing of Mrs. Bracklow's claim for spousal support. That decision is reported at (1999), 3 R.F.L. (5th) 179 (B.C.S.C.).

is required to pay a disproportionate share of the debts, then there may have to be some reduction in support from the amounts generated by the formula. The reduction may only be for a specified period, depending upon the balance remaining to be paid. At the end of that period, support could automatically revert to an amount within the range or, in some cases, a review may be ordered at that time. Where assets exceed debts, however, there can be little reason for a debt exception, as the party responsible for the debt will usually also hold the corresponding asset or other assets.

We also considered, but rejected, broader or additional exceptions based on property division. Some have suggested that a high property award should be grounds for an exception, whether the property award was high because a large total pool of property was divided or because an unequal division of property was effected in favour of the recipient. On this view, property and support are alternative financial remedies that can be substituted, one for the other, so that a high property award can justify lower spousal support, especially in negotiated settlements. While this view does find some acceptance in the case law, so too does the more compelling view that property and support are governed by distinctive laws and serve different purposes and that a high property award should not in and of itself dictate a significant reduction of spousal support. Furthermore, property division is a matter of provincial and territorial law whereas we are dealing with spousal support under the federal *Divorce Act*. Recognizing high property awards as an explicit exception would, in our view, inappropriately entrench a contested view.

The advisory guidelines can already accommodate some of these property concerns. First, each spouse is expected to generate reasonable income from his or her assets and income can be imputed where a spouse fails to do so. The income imputed will affect the operation of the formula. Second, as discussed above, property-related concerns may, in some cases, determine whether support is fixed at the upper or lower ends of the ranges for amount or duration, e.g. an absence of property to be divided or an unequal division in favour of one spouse or continuing equalization payments. Third, many high property cases are also high-income cases, bringing into play the ceiling (discussed in Chapter 7) above which the formula will not necessarily apply.

One last property point: these advisory guidelines on amount and duration do not change the law from *Boston v. Boston*²¹ governing double-dipping, mostly from pensions. That law remains in place, as a possible constraint upon the amount of support, determining if some portion of income should be excluded from the formula because it has been previously shared under property division.

5.7.4 Prior support obligations

An obligation to pay support for a prior spouse or prior children will affect the support to be paid to a subsequent spouse. Generally speaking, the courts have adopted a first-family-first approach for payors in such cases, subject to a very limited exception for low-income payors. Under the current law, courts determine the amount of any support for the second spouse taking into account the prior support obligations and the payor's budget.

²¹ *Boston v. Boston*, [2001] 2 S.C.R. 413.

A move to an income-sharing method of determining spousal support under a formula will require an explicit exception for prior support obligations. The exception could apply to either the payor spouse or the recipient spouse, although the issue comes up most frequently for payors. Most often, the prior support obligation will involve child support but spousal support may also be involved after a longer first marriage and then a shorter second marriage.

Where there are prior support obligations, a spouse's gross income will have to be adjusted to reflect those obligations, *before* computing the gross income difference and applying the percentage ranges to that difference. Adjusting for a **prior spousal support obligation** is simple, as spousal support is paid on a gross or before-tax basis: deduct the amount of spousal support paid from the spouse's gross income to establish the spouse's gross income. For a **child support obligation**, the calculation is slightly more complicated, as child support is now paid on a net or after-tax basis: first, gross up the child support amount to reflect the payor's marginal tax rate on the amount paid and then deduct the grossed up amount from the spouse's gross income.

The effect of this prior support deduction is to leave the affected spouse with a lower gross income. In the typical case of the payor spouse, the payor would thus have a lower income, the size of the gross income difference would be reduced and hence the formula amount of support for the second spouse would be lower.

5.7.5 Interim support

Where there are compelling financial circumstances at the interim stage, an exception can be made, as is explained in more detail in Chapter 8 below.

6 THE WITH CHILD SUPPORT FORMULA

The dividing line between the two proposed formulas under the advisory guidelines is the presence of a child support obligation.²² Where the spouses have not had children or the children have grown up and are on their own, the *without child support* formula will apply. Where a spouse is paying child support, the *with child support* formula will apply.

From a technical perspective, there must be a different formula for spousal support in these cases, a formula that takes into account the payment of child support and its priority over spousal support. Further, because of tax and benefit issues, we have to use net rather than gross incomes. Practically, the payment of child support usually means reduced ability to pay spousal support. And, theoretically, there are different rationales for the amount and duration of spousal support where there are still dependent children to be cared for and supported.

This category of cases dominates in practice, in support statistics and in jurisprudence. Any advisory guidelines must generate a workable formula for amount and duration for this category, a formula that can adjust across a wide range of incomes and family circumstances. For the most part, marriages with dependent children will involve spousal support paid by a parent who is also paying child support to the recipient spouse. The basic formula in this chapter is constructed around this typical situation. Variations on the basic formula are required to accommodate cases of shared and split custody. There are also a sizeable number of cases where the spouse paying spousal support has primary parental responsibility for the children. In these custodial payor situations, an alternative formula must be constructed.

6.1 The Rationales for Spousal Support

Where there are dependent children, the primary rationale for spousal support is compensatory. After *Moge*, spouses must, as Chief Justice McLachlin put it in *Bracklow*, “compensate each other for foregone careers and missed opportunities during the marriage upon the breakdown of their union.” The main reason for those foregone careers and missed opportunities is the assumption of primary responsibility by one spouse for the care of children during the marriage. Where one spouse, in a marriage with children, has become a full-time homemaker or has worked outside the home part time or has worked as a secondary earner, there will be disadvantage and loss at the end of the marriage, usually warranting compensatory support. The compensatory rationale is encompassed by the first of the four objectives of spousal support, in s. 15.2(6)(a) of the *Divorce Act*.

Under compensatory theory, it is usually necessary to estimate the spouse’s disadvantage or loss by determining what the recipient’s career or employment path might have been, had the recipient not adopted his or her role during the marriage—not an easy task. The ideal evidence would be individualized economic evidence of earning capacity loss, but few litigants could afford such evidence and often it would be highly speculative. Some spouses never establish a career or employment history. For others, their pre-marital and marital choices were shaped by

²² The child support obligation must be for a child of the marriage. A child support obligation to a child from a prior marriage or relationship is dealt with as an exception under both formulas, explained in more detail in the exceptions discussion in Chapters 5 and 6.

their future expected role during marriage. And there are short marriages, where past losses are relatively small and most of the spouse's child-rearing and any associated losses are still to come in the future.

As was explained in Chapter 1, after *Moge* courts had to develop proxies to measure that loss where there was no clear and specific career or employment path. Need became the most common proxy, calculated through the conventional budget analysis. Sometimes standard of living was used, with the post-separation position of the recipient spouse measured against the marital standard or some reasonable standard of living. In practice, crude compromises were made in applying the compensatory approach.

More recently, what we have called the parental partnership rationale has emerged in the literature and in the case law. On this approach, the obligation for spousal support flows from parenthood rather than the marital relationship itself. It is not the length of the marriage, or marital interdependency, or merger over time, that drives this theory of spousal support, but the presence of dependent children and the need to provide care and support for those children. Unlike the conventional compensatory approach, parental partnership looks at not just past loss, but also the continuing economic disadvantage that flows from present and future child-care responsibilities. For shorter marriages with younger children, these present and future responsibilities are more telling. Further, the parental partnership rationale better reflects the reality that many women never acquire a career before marriage, or mould their pre-marital employment in expectation of their primary parental role after marriage.

The parental partnership rationale is firmly anchored in one of the four statutory objectives in s.15.2(6) of the *Divorce Act*, where clause (b) states a spousal support order should:

apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage.

The 1997 implementation of the *Federal Child Support Guidelines* has reinforced this rationale. Under the Guidelines, only the direct costs of child-rearing—and not even all of them—are included in child support. The indirect costs of child-rearing were left to be compensated through spousal support, as was recognized by the 1995 Family Law Committee's *Report and Recommendations on Child Support*. Principal amongst these indirect costs is the custodial parent's reduced ability to maximize his or her income because of child-care responsibilities. Now that child support is fixed under the Guidelines and determined by a different method than before 1997, spousal support has to be adjusted to reflect the concerns identified by the parental partnership model.

With the implementation of the *Federal Child Support Guidelines* came the increased use of computer software. The software regularly and graphically displays information like net disposable income, cash flow and household standards of living. This information has made spouses, lawyers and courts more conscious of the financial implications of child and spousal support, in turn reflected in the use of these concepts in determining the amount of spousal support. Before the *Federal Child Support Guidelines*, and even afterwards for a while, most courts were not prepared to award more than 50 percent of the family's net disposable income to the custodial spouse and children, leaving the single payor spouse with the other 50 percent. With the new software, many courts began consciously to allocate more than 50 percent of a

family's net disposable income to the custodial parent and children, and even as much as 60 percent, as in the Ontario Court of Appeal decision in *Andrews v. Andrews*²³ and in numerous trial decisions across the country.²⁴

6.2 Background to the Basic Formula

There is no simple way to construct a formula for spousal support where the support payor is also paying child support. First, child support must be determined, as it takes priority over spousal support in assessing the payor's ability to pay. Second, child support is not taxable or deductible, but spousal support is taxable to the recipient and deductible for the payor. Third, child and spousal support must be determined separately, but it is very difficult in any formula to isolate spousal finances cleanly from support of children.

This formula for cases with child support—the ***with child support formula***—differs from the ***without child support formula*** set out in Chapter 5. First, the *with child support* formula uses the **net incomes** of the spouses, not their gross incomes. Second, the *with child support* formula divides the **pool** of combined net incomes between the two spouses, not just the difference between the spouses' gross incomes. Third, in the *with child support* formula, the upper and lower percentage limits for net income division **do not change with the length of the marriage**.

Unlike the *without child support* formula, this formula must use **net income**. While gross income would be simpler to understand, calculate and implement, nothing remains simple once child support has to be considered. Different tax treatment demands more detailed after-tax calculations, and ability to pay must be more accurately assessed. Net income computations will usually require computer software, another unavoidable complication.

Thanks to that same computer software, many lawyers have become familiar with net disposable income or monthly cash flow calculations. Judges now often use such calculations to underpin their spousal support decisions.²⁵ In the current software programs, these numbers include child and spousal support to produce what we would call **family net disposable income** or cash flow. This larger pool of net income is then divided between the spouses. Often, more than 50 percent of this family net disposable income is allocated to the recipient spouse and children by way of combined child and spousal support, or sometimes as much as 60 percent and occasionally even more. Under the formula proposed here for spousal support, we divide a different and smaller pool of net income, after removing the spouses' respective child support obligations—what we call **individual net disposable income** or **INDI**.

We considered using the more familiar family net disposable income as the basis for our *with child support* formula, rather than this newer variation of individual net disposable income. In the end we opted for individual net disposable income. First, the family net disposable income of the recipient spouse includes both child and spousal support, bulking up the recipient's income in a somewhat misleading fashion and masking the impact of spousal support upon the recipient

²³ *Andrews v. Andrews*, (1999), 50 R.F.L. (4th) 1 (Ont. C.A.).

²⁴ See for example *Gale v. Gale* (2000), 6 R.F.L. (5th) 157 (Man.Q.B.), *Bastedo v. Bastedo*, [2000] P.E.I.J. No. 49 (S.C.T.D.), *Lyttle v. Bourget*, [1999] N.S.J. No. 298 (S.C.), *Tedham v. Tedham*, [2002] B.C.J. No. 1635 (S.C.), *Clark v. Cooper-Clark*, [2002] N.B.J. No. 41 (Q.B.).

²⁵ See the cases listed in Appendix A.

parent's individual income. Second, allocating family NDI between spouses blurs the distinction between child and spousal support, between child and adult claims upon income. Individual NDI attempts to back out the child support contributions of each spouse, to obtain a better estimate of the income pool that remains to be divided between the adults. Third, after separation, the spouses see themselves, not as one family, but more as individuals with distinct relationships with their children and their former spouses. Fourth, separating out each spouse's individual net disposable income, after removal of child support obligations, produced a more robust and sophisticated formula, one that adjusted better across income levels and numbers of children.

6.3 The Basic Formula

Set out in the box below is a summary of how this basic *with child support* formula works. Remember that this formula applies where the higher income spouse is paying both child and spousal support to the lower income spouse who is also the parent with custody or primary care of the children.

The Basic With Child Support Formula

- (1) Determine the **individual net disposable income (INDI)** of each spouse:
 - Guidelines Income *minus* Child Support *minus* Taxes and Deductions = Payor's INDI
 - Guidelines Income *minus* Notional Child Support *minus* Taxes and Deductions *plus* Government Benefits and Credits = Recipient's INDI
- (2) Add together the individual net disposable incomes. Determine the range of spousal support amounts that would be required to leave the lower income recipient spouse with between 40 and 46 percent of the combined INDI.

6.3.1 Calculating individual net disposable income

Basic to this formula is the concept of **individual net disposable income**, an attempt to isolate a **pool** of net disposable income available after adjustment for child support obligations.

We start with the Guidelines income of each spouse. In the interests of uniformity and efficiency, we use the same definition of income as that found in the *Federal Child Support Guidelines*. That definition is a gross income measure (except for some of the Schedule III adjustments, like the deduction of union dues). For the most part, since 1997 courts have used the same measure of income for purposes of both child and spousal support. There is, however, one distinct variation in the calculation of the recipient's income under this formula, discussed further below, namely the inclusion of government benefits and refundable credits.

Next, we deduct or back out from each spouse's income their respective **contributions to child support**.

For the child support **payor**, that would usually be the table amount, plus any contributions to special or extraordinary expenses, or any other amount fixed under any other provisions of the *Federal Child Support Guidelines*. Such support payments are automatically deducted from the payor's income by the current software.

For the child support **recipient**, we propose the deduction of a **notional table amount**, plus any contributions by the recipient spouse to s. 7 expenses. At the moment, the deduction of these amounts from the recipient spouse's income has to be done manually, but the software can be modified to do this in future. In reality, the recipient will likely spend more than these amounts through direct spending for the children in her or his care. But by this means we are making an adjustment, however imperfect, for the recipient's child support obligation. We could construct a formula without this notional child support number, but any formula would then adjust to the number of children and income levels with less precision and with less transparency about the role of the recipient parent.

Second, **income taxes and other deductions** must be subtracted from the incomes of both the payor and the recipient to obtain net incomes. As spousal support is transferred from one spouse to another, because of tax effects, the size of the total pool of individual net disposable income actually changes slightly, which complicates these calculations. The current software does these calculations automatically, as differing hypothetical amounts of spousal support are transferred.

Clearly permissible deductions would be for federal and provincial income taxes, as well as employment insurance premiums and Canada Pension Plan contributions. Union dues and professional fees are already deducted from Guidelines income under the adjustments of Schedule III to the *Federal Child Support Guidelines*. Deductions should be recognized for certain benefits, e.g. medical or dental insurance, group life insurance, and other benefit plans, especially those that provide immediate or contingent benefits to the former spouse or the children of the marriage.

More contentious are **deductions for mandatory pension contributions**. We have concluded that there should **not** be an automatic deduction for such pension contributions, but the size of these mandatory deductions may sometimes be used as a factor to justify fixing an amount towards the lower end of the spousal support range.

We reached this conclusion after considerable discussion. Like EI, CPP and other deductions, pension contributions are mandatory deductions, in that the employee has no control over, and no access to, that money. But, unlike other deductions, pension contributions are a form of forced saving that permit the pension member to accumulate an asset. Further, after separation, the spouse receiving support does not usually share in the further pension value being accumulated by post-separation contributions. Finally, there are serious problems of horizontal equity in allowing a deduction for mandatory pension contributions by employees. What about payors with non-contributory pension plans or RRSPs or those without any pension scheme at all? And what about the recipient spouse—would we have to allow a notional or actual deduction for the recipient too, to reflect her or his saving for retirement? In the end, we decided it was fairer and simpler **not** to allow an automatic deduction for pension contributions.

Third, we **do** propose to **include** in each spouse's income the amounts identified for **government benefits and refundable credits**. Included are the Child Tax Benefit, the National Child Benefit, the GST credit, the refundable medical credit and various provincial benefit and credit schemes.

Under the *Federal Child Support Guidelines* these benefits and credits are generally **not** treated as income. For lower income custodial parents, typically the support recipients, these amounts are significant. As for payors, only low-income payor spouses obtain any of these—basically the GST credit—and most of those low-income spouses will not be paying spousal support. In some circumstances the custodial parent and recipient of these benefits and credits will also be the payor of spousal support.

We did consider backing-out the child portion of these benefits, since the bulk of the benefits and credits are tied to the children in the recipient spouse's care, e.g. the Child Tax Benefit, part of the GST credit, and the various provincial programs. The logic of doing so would be similar to that applied in respect of the spouses' child support obligations, i.e. to get at the remaining net disposable income available to the spouses as individuals.

In the end, we decided to include these amounts in income, for three reasons. First, these benefits and credits reduce with the amount of the spousal support transferred to the recipient spouse, especially through the lower and middle-income brackets. Including these benefits and credits in the recipient's income gives a much clearer picture of the impact of spousal support upon the recipient's actual net disposable income. Second, some fine lines would have to be drawn between child- and non-child-related portions of these benefits and credits. A precise disentanglement would be complicated and for little practical gain. Third, for lower income recipient spouses, these amounts are sizeable, reaching as high as \$7,000 to \$8,000 annually for two children. Their removal would produce significantly higher amounts of spousal support, which would cause significant hardship for payor spouses, especially those with lower incomes, unless the formula percentages were adjusted.

6.3.2 The Basic Formula: Dividing Individual Net Disposable Income

Once the individual net disposable income (INDI) of each spouse has been determined, the next step is to add together these individual net disposable incomes. Then we have to iterate (i.e. to estimate hypothetical spousal support repeatedly) in order to determine the amount of spousal support that will leave the lower income recipient spouse with between 40 and 46 percent of the combined pool of individual net disposable income.

For the examples which follow, these calculations have been done by a mix of software and manual calculations. Once software suppliers make programming changes, it will be possible to obtain these numbers more easily. One important technical point should be noted. Where there are section 7 expenses, the calculations are further complicated by the Guidelines requirement that the spouses' proportionate contributions must be determined *after* the transfer of spousal support from payor to recipient. To derive the s. 7 contributions, you must know the amount of spousal support, another loop for the software to undertake. Accordingly, to simplify the arithmetic and the exposition, there are no s. 7 expenses in the examples below.

How did we arrive at the percentages for the range, from 40 to 46 percent of the individual net disposable income? This was a critical issue in the construction of this formula. In our earlier Sneak Preview, we had suggested a higher range, from 44 to 50 percent of INDI. We have ultimately opted for a lower range, after much discussion with the Advisory Group, some limited feedback from the Sneak Preview, further reviews of the case law in various provinces, and some more hard thought about the upper and lower bounds for these ranges.

We found that a range of 40 to 46 percent of individual net disposable income typically covered spousal support outcomes in the **middle** of the very wide range of outcomes now observed in most Canadian provinces. To capture the middle of the range on a national basis means that some areas will find the upper bound (46 percent) a bit low and other areas will consider even the lower bound (40 percent) at the higher end of their local range.

Prior to the Sneak Preview, we had experimented with a range of 40 to 50 percent of INDI. But that produced far too broad a range in absolute dollar terms. One of the objectives of these advisory guidelines is to develop more predictability and consistency in spousal support outcomes and a ten-percentage point range simply failed to do that. Since then, we have generally worked with five or six percentage point ranges.

The lower boundary of this range—40 percent of INDI—does ensure that the recipient spouse will receive not less than 50 percent of the family net disposable income in all cases involving two or more children, and slightly below that in one-child cases.

The upper end of this range—46 percent of INDI—falls short of an equal split, which would leave both spouses in the same individual position. Despite the intellectual attraction of a 50/50 split, there are a number of practical problems that convinced us that it was not appropriate to set the upper limit of the range there. First, very few courts are currently prepared to push spousal support amounts that high. Second, there was a live concern for the access-related expenses of the payor spouse, expenses that are not otherwise reflected in the formula. Most payors will be exercising access and most will be spending directly upon their children during the time they spend with their children. Third, there were concerns for the payor in the situation where the payor has employment-related expenses and the recipient spouse is at home full time and receiving large spousal support.

It may be that these upper and lower limits of the percentage range will have to be adjusted, after experience with the advisory guidelines and after continued tracking of current trends in support outcomes in this category of cases.

We should repeat here a central difference between this formula and the *without child support* formula: the length of the marriage does not affect the upper and lower percentages in this *with child support* formula.

We also wish to stress the inter-relationship between the percentage limits and the precise elements of our version of individual net disposable income. **If a notional table amount were not removed from the recipient spouse's income, or if government benefits and refundable credits were excluded, then the formula percentages would have to change.** Our objective throughout has been to develop formulas that can capture the bulk of current outcomes, while at

the same time demonstrating robustness in adjusting across incomes and child support amounts and custodial situations.

As a result of computer software, lawyers and courts now have available to them net disposable income or monthly cash flow calculations on a *family* basis: the payor's net disposable income after deduction of child and spousal support and taxes, and the recipient's after addition of child and spousal support (and deduction of taxes). How do these more familiar family NDI percentages compare to our range of individual net disposable income divisions? Typically, the 46 percent of INDI at the upper end of our proposed formula generates a family net disposable income for the recipient spouse of 56 to 58 percent where there are two children. At the lower end of the range, a spousal support amount that leaves the recipient spouse with 40 percent of INDI will typically leave that spouse and the children with more than 50 percent of the family net disposable income. For comparison purposes, we have provided family net disposable income proportions in the examples below.

We recognize that Quebec has a different scheme of determining child support, which in turn has implications for fixing spousal support. As the Quebec child support amounts are often lower at high-income levels than those under the *Federal Child Support Guidelines*, that would leave a slightly larger pool of individual net disposable income available to be divided for spousal support purposes. The application of the advisory guidelines in divorce cases in Quebec is dealt with in more detail in Chapter 9.

6.4 Amounts of Spousal Support: Examples of the Basic Formula

At this point it helps to give a few examples of the ranges of monthly spousal support generated by this basic formula. Afterwards, we will address the factors that might affect what precise amount of support is fixed within that range. Then we will move to the issue of duration.

For illustration purposes, we assume that these parents and children all live in Ontario, as the use of one jurisdiction simplifies the exposition of the formula's operation. We have included, in Appendix C, a detailed explanation of the calculations required for this formula, using *Example 6.1* below. In Appendix D we have provided the ranges of spousal support that the basic formula would generate in each of the other provinces and territories, again using the facts of *Example 6.1*.

Further, as explained above, there are no section 7 expenses in these examples. If there were s. 7 expenses, then the individual net disposable income available to be divided between the spouses would be smaller and the spousal support ranges would be lower.

Because many are familiar with *family* net disposable income (or monthly cash flow) calculations from the existing computer software, we have also shown the impact of the spousal support ranges upon the *family* net disposable incomes of the spouses, as we present and discuss these examples.

Example 6.1

Ted and Alice have separated after 11 years together. Ted works at a local manufacturing plant, earning \$80,000 gross per year. Alice has been home with the two children, now aged 8 and 10, who continue to reside with her after separation. After the separation, Alice found work, less than full time, earning \$20,000 gross per year. Alice's mother provides lunch and after-school care for the children, for nothing, when Alice has to work. Ted will pay the table amount for child support, \$1,031 per month. Alice's notional table amount would be \$285. There are no s. 7 expenses (if there were, the spousal amounts would be lower).

Under our proposed formula, Ted would pay spousal support in the range of \$697 to \$1,287 per month.

Using the *family* net disposable income figures (or the similar monthly cash flow figures) more familiar to current software users, spousal support of \$1,287 monthly along with the child support would leave Alice and the children with \$3,792 per month and Ted with \$2,906 per month, a 56.6/43.4 percentage split of the family's net disposable income in favour of Alice and the children. At the lower end of the range, with spousal support of \$697 per month, the net disposable income of the family would be split 51.6/48.4 in favour of Alice and the children, leaving Ted with \$3,283 monthly and Alice and the children with \$3,505. (For purposes of exposition, if the intention was to split the family NDI equally, as some judges do, with one half for Alice and the children and one half for Ted, then spousal support would have to be reduced to \$512 per month.)

The amount of spousal support is obviously affected by the **number of children**. If Ted and Alice had only one child, the range would be higher, from \$1,048 to \$1,593 per month. If the couple had three children, Ted's ability to pay would be reduced, bringing the range down to \$391 to \$975 monthly. Four children would lower that range even further, down to a range from zero to \$530 per month.

Example 6.2

Bob and Carol have separated after eight years of marriage and two children, now aged 4 and 6, who are both living with Carol. Bob earns \$40,000 gross annually at a local building supply company, while Carol has found part-time work, earning \$10,000 per year. Carol's mother lives with Carol and provides care for the children when needed. Bob pays the table amount of \$570 per month for the children. Carol's notional table amount of child support would be \$119 per month. There are no s. 7 expenses.

Under our proposed formula, Bob would pay spousal support in the range of zero to \$191 per month.

Again, by way of comparison to the more familiar numbers, if Bob were to pay child support of \$570 and spousal support of \$191 monthly, at the upper end of the range, he would be left with \$1,835 per month, while Carol and the two children would have *family* net disposable income of \$2,252 monthly, or 55.1 percent of the family's net disposable income. At the lower end of the range, where no spousal support would be paid, the share for Carol and the children would be 51.2 percent of the family's net disposable income.

Example 6.3

Drew and Kate have been married for four years. Drew earns \$70,000 gross per year working for a department store. Kate used to work as a clerk in the same store, but she has been home since their first child was born. The children are now 1 and 3, living with Kate. Kate has no income (and hence there is no notional table amount for her). Drew will pay the table amount of \$927 per month for the two children.

Under our proposed formula, Drew would pay spousal support to Kate in the range of \$1,157 to \$1,477 per month.

If Drew were to pay spousal support of \$1,477 monthly, he would have \$2,312 per month, while Kate and the children would have *family* net disposable income of \$2,897 monthly, or 55.6 percent of the total family NDI. At the lower end of the range, spousal support of \$1,157 per month would leave Drew with \$2,532 in family NDI, while Kate and the children would have \$2,616 monthly, or 50.8 percent of the family's NDI. (If Kate and the children were to receive 50 percent of the family's NDI, then spousal support would be lower, \$1,107 per month.)

6.5 Fixing an Amount Within the Range

The basic *with child support* formula produces a range for the amount of spousal support. As we did in Chapter 5, here we canvass briefly some of the factors that might be considered in fixing an amount within that range.

First, **compensatory principles** would suggest that the more the recipient spouse gave up in the paid labour market, the higher one would go within the range. To give a simple example, two tax lawyers marry fresh out of law school, but one stays home with the children and the other pursues a career within a large law firm. Compensatory logic would dictate that something close to the maximum 46 percent would make sense here, as the payor spouse's income is a very good proxy measure of where the recipient spouse would have been. Given the presence of dependent children under this formula, almost every case will have a compensatory element and the lower and higher ends of the range reflect that. What moves a case up or down the range is the relative strength or weakness of the compensatory claim.

Second, **the age, number and needs of the children** will affect placement within the range. A child with special needs will usually demand more time and resources from the care-giving parent, thus reducing that parent's ability to earn in the paid labour market and pushing spousal support towards the upper end. The same will generally be true for the parent with primary care of an infant or toddler, as contrasted to care of an older child or adolescent. Generally speaking, when ability to pay is in issue, the larger the number of children, the less income is left available to pay spousal support. As income levels rise, spousal support can be higher to reflect the fact that more children generally mean more care-giving and more restrictions upon the custodial parent's ability to work outside the home.

Third, **the needs and ability to pay of the payor spouse** will have special importance at the lower end of the income spectrum. For example, at this lower end the amount of any mandatory deduction for pension contributions will likely have to be taken into account in determining ability to pay. Also a concern for lower income payors will be their direct spending on expenses

for the children during their time with the children. A lower income payor should be left with sufficient funds to exercise meaningful access to his or her children.

Fourth, **the needs and standard of living of the recipient and the children** will tend to push spousal support awards towards the higher end of the range. Even when spousal support is at the maximum 46 percent of individual net disposable income, a homemaker recipient and the children will be left with a noticeably lower household standard of living (assuming no new partners or children for either spouse). At lower income levels, need will create pressure to move to the higher end of the range, but that will be balanced by the needs of the payor spouse, as mentioned above. By contrast, if the recipient has remarried or re-partnered, then spousal support could be set towards the lower end of the range. Equally, the recipient may have reduced living costs, which might justify support at the lower end.

Fifth, **length of marriage** will still be a factor to help determine where within the range spousal support should be set, but only one of a number of factors. All other things being equal, the longer the marriage, the more likely it is that one might move towards the higher end of the range. But all other things are rarely equal, as a short marriage with very young children and a stay-at-home custodial parent may be a far more compelling case for the maximum amount.

Sixth, **self-sufficiency incentives** might encourage an award at the higher end of the range, where this could mean that a recipient spouse obtains retraining or education, and then remunerative employment and less support in future. Or, as happens under the current case law, a judge might fix an amount at the lower end to encourage the recipient to make greater efforts towards self-sufficiency.

We emphasize that this is not an exhaustive list of factors, just an attempt to identify some of the most prominent factors that might affect the precise amount fixed within the range. For the most part, these are familiar factors in the current discretionary case law.

6.6 Duration under the Basic Formula

In most cases where there are dependent children, the courts order indefinite spousal support, usually subject to review or sometimes just left to variation. Even when the recipient spouse is expected to become self-sufficient in the foreseeable future, courts have not often imposed time limits in initial support orders. Where the recipient spouse is not employed outside the home, or is employed part time, the timing of any review will be tied to the age of the children, or to some period of adjustment after separation, or to the completion of a program of education or training. As the recipient spouse becomes employed or more fully employed, spousal support will eventually be reduced, to top up the recipient's employment earnings, or support may even be terminated. In other cases, support is reduced or terminated if the recipient spouse remarries or re-partners.

In practice, where there are dependent children, few indefinite orders are truly indefinite. Many intervening events will lead to changes or even termination. Some of these issues are canvassed in Chapter 10, which deals with variation, review, remarriage, second families, etc. By making orders indefinite, the current law simply postpones all of the difficult issues relating to duration.

Under the *without child support* formula, discussed in Part 5, we have proposed that durational limits be brought back under any advisory guidelines, provided the limits are reasonably generous. The time limits in that formula are keyed to the length of the marriage, i.e. .5 to 1 year of spousal support for each year the spouses have cohabited, subject to the exceptions for indefinite support.

Under the *with child support* formula, one option was simply to leave duration indefinite in all cases, thereby avoiding all of the difficult issues of duration where there are dependent children. Such an approach would, however, be inconsistent with our durational approach under the *without child support* formula. It would also be inconsistent with the underlying parental partnership rationale for spousal support. This rationale emphasizes the ongoing responsibilities for child-care after separation and the resulting limitations on the custodial or residential parent's earning abilities. When those responsibilities cease, there must be some other reason for support to continue, such as the length of the marriage.

What we propose is an approach to duration for marriages with dependent children that maintains the current practices, while introducing the general idea of a *maximum duration or outside time limit* for the payment of spousal support. **Initial orders would continue to be indefinite in form**, subject to the usual processes of review or variation. That would not change. What would be different would be the acceptance of generally understood **outside time limits** on the cumulative duration of spousal support in these cases that would inform the process of review and variation. These outside time limits would combine the factors of length of marriage and length of the remaining child-rearing period, under two different tests for maximum duration. These time limits are generous, with elements of flexibility built in.

For longer marriages, it makes sense that a recipient spouse should get the benefit of the time limits based upon length of marriage that might be obtained under the *without child support* formula, as these will typically run well beyond the end of any child-rearing period. More difficult is the situation of the custodial or residential parent who has the care of young children after a shorter marriage. Here we have chosen an outside time limit based on the child-rearing period remaining. Thus, we propose two tests for maximum duration under this formula, one for longer marriages and another for shorter marriages.

6.6.1 The longer-marriage test for duration

Our **first test for duration** applies in **longer marriages** and is modelled on the test for duration under the *without child support* formula: where the length of the marriage exceeds the number of years remaining for the last or youngest child to finish high school, then the **maximum duration** under the *with child support* formula will be the length of the marriage, subject to the provisions under the *without child support* formula for indefinite support after 20 years of marriage.

This first test will govern for most marriages of 10 years or more, i.e. most medium and long marriages where there are still dependent children at home at the time of the initial order. Where the dependent children are older and by implication the marriage has been longer, the indefinite support provisions that apply where the marriage has lasted 20 years will often take effect.

We can use *Example 6.1* above to explain this test. Ted and Alice cohabited for 11 years during their marriage and are now in their late thirties or early forties, with two children, aged 8 and 10 at separation. The maximum duration under the *without child support* formula would be 11 years. That is longer than the 10 years remaining to the end of high school for the youngest child. The initial support order would be indefinite in form, but it would be expected that the **maximum duration** for spousal support would be 11 years. Reviews and variations in the meantime may have brought support to an end before then, and certainly the amount may have been reduced significantly during this period. But if support is still in pay after 11 years, there would be an expectation, barring exceptional circumstances, that support would be terminated at that point on an application for review or variation.

Note that this test speaks only of **maximum duration**. We do **not** propose any **minimum duration**, or lower end of a range, for marriages with dependent children. We adopt this approach to duration under both the longer-marriage and shorter-marriage tests. In our view, this different approach to duration in marriages involving dependent children more appropriately reflects the past, present and future demands of child-rearing and the impact of these demands upon the recipient spouse's earning capacities. In the *without child support* formula, the lower end of the range for duration is fixed at one-half year for each year of marriage. That part of the formula would not be imported here, under our longer-marriage test for duration. Practically, most of these cases with children would likely end up at the longer end of the range anyway. Duration shorter than the maximum is possible under both of our tests, but only through the normal process of review or variation, depending upon the individual income and employment situations of the spouses.

6.6.2 The shorter-marriage test for duration

The **second test for duration** under this formula, applicable to shorter marriages, will operate where the period of time until the last or youngest child finishes high school is greater than the length of the marriage. These are mostly short or short-to-medium marriages, typically (but not always) under 10 years in length. The current case law is inconsistent and erratic on duration for these marriages, ranging from indefinite orders without conditions, to indefinite orders with short review periods and sometimes stringent review conditions, and even occasionally to time limits. Despite the language of indefinite support, the reality in most cases is that support does not continue for long, as re-employment, retraining, remarriage and other changes often intervene to bring spousal support to an end.

We too have struggled with duration for this category of cases. On the one hand, many of these custodial parents face some of the most serious disadvantages of all spouses, especially mothers with little employment history who have very young children in their care, all of which militates in favour of no time limits or very long time limits. On the other hand, many recipient spouses do have good education and employment backgrounds, are younger, and are emerging from shorter marriages and briefer periods out of the paid labour market, all indicators of quicker recovery of earning capacity. Inevitably, as under the current law, this means that reviews are a critical means of sorting out the individual circumstances of the recipient spouses.

Under this second, **shorter-marriage test for duration**, where the period of time until the last or youngest child finishes high school is greater than the length of the marriage, any initial order for

spousal support would likely be indefinite in form, **subject to review**, including any conditions stated in the initial order or agreement concerning training, education or employment. The **date for review** would be tied to the age of the children at the time of the initial order or agreement:

- where the children are of pre-school age, then no later than the month after the last or youngest child commences full-time school; *or*
- where the children are under the age of twelve, then no later than the month after the last or youngest child reaches the age of twelve.

Reviews may be fixed more frequently, or at different intervals, or with more or less stringent conditions, under this approach. The starting premise is that the *with child support* formula generates reasonably generous amounts of spousal support and the flip side should be a clear obligation upon recipient spouses to work towards self-sufficiency or at least the maximum of their earning capacity in the context of their child-care responsibilities.

The **maximum duration** for spousal support under this test would be **the date when the last or youngest child finishes high school**. Relatively few cases will reach this outside time limit and those that do will likely involve reduced amounts of top-up support by that date. Hence, extensions beyond that date should only be granted in **exceptional circumstances**, e.g. some cases involving special needs children. In effect, the maximum duration here would operate like a terminating review order, to use the language of *Bergeron v. Bergeron*.²⁶ As with the longer-marriage test for duration, we do not propose any minimum duration.

6.7 Custodial Variations: Shared and Split Custody

The basic formula is constructed around the typical fact situation, where the higher income spouse pays child and spousal support to the lower income spouse who has the primary care of the children. Here we address custodial variations, such as shared custody or split custody.

6.7.1 Shared custody

Where the spouses have **shared custody**, the starting point for the calculation of child support under s. 9(a) of the *Federal Child Support Guidelines* has been the straight set-off of table amounts for the number of children subject to shared custody, based upon current appeal decisions. That amount is then adjusted, usually upwards, but occasionally downwards, based upon s. 9(b) (increased costs of shared custody) and s. 9(c) (other circumstances, including actual spending, assets and debts, etc.).

Under the basic formula, we deduct the child support paid from the payor's income and then we deduct that child support amount paid plus a notional amount for child support from the recipient's income, to obtain individual net disposable income. Shared custody requires some changes to this basic formula.

Assume for the moment that the payor is paying only the straight set-off amount of child support in a shared custody case. If we were only to deduct the smaller set-off amount of child support

²⁶ *Bergeron v. Bergeron* (1999), 2 R.F.L. (5th) 57 (Ont. S.C.J.).

for the payor spouse in a shared custody situation, that would misrepresent and understate the payor parent's contribution to child support. Shared custody assumes that both parents spend directly upon the child in their shared care. We would propose that the full table amount (plus any s. 7 contributions) be deducted from the payor spouse's net disposable income. For the recipient, we would deduct the notional table amount (plus any contribution to s. 7 expenses). This would be done in the calculation of INDI, even though the child support paid by the payor and received by the recipient would be the straight set-off amount.

To make matters more difficult, courts often increase the amount of support beyond the straight set-off amount, sometimes to reflect the increased costs of shared custody (or the respective abilities of the parents to incur those increased costs) and sometimes to adjust for the recipient parent's larger share of actual costs. Occasionally, an amount lower than the set-off will be ordered. The determination of child support in shared custody cases remains uncertain and controversial. The Supreme Court of Canada has heard an appeal from *Contino v. Leonelli-Contino*²⁷ and that decision may provide some greater guidance on the interpretation of s. 9.

In the meantime, there remains the question of what the *with child support* formula should do in a shared custody case where a court orders either more or less than the straight set-off amount. For now, we suggest that no adjustment should be made in either case and that the individual net disposable income for the payor and the recipient be calculated as described above. This method of calculation may have to be changed after the decision in *Contino*.

If we follow the method of calculation described above, it turns out that the spousal support ranges are basically the same in these shared custody situations as in sole custody situations. Shared custody arrangements do not result in any lowering of spousal support. A typical shared custody example can demonstrate this result.

Example 6.4

Peter and Cynthia have separated after nine years together. Peter works as a reporter at the local television station, earning \$65,000 gross per year, while his wife Cynthia works for a local arts organization, earning \$39,000 gross per year. First, assume their two children, aged 8 and 7, are in the sole or primary custody of Cynthia. Peter's table amount of child support would be \$879 per month, Cynthia's \$557 per month. Assume no s. 7 expenses. Under our proposed formula, *assuming entitlement*, which may be contested in this case, Peter would pay spousal support to Cynthia in the range of zero to \$302 per month. (At zero spousal support, Cynthia would have 42.7 percent of INDI.)

But what if Peter and Cynthia shared custody, say on a week about, 50/50 basis? First, assume Peter only paid the straight set-off amount of child support, i.e. $\$879 - \$557 = \$322$. We would still deduct from Peter's income the full table amount of \$879 and we would still reduce Cynthia's income by her notional table amount of \$577, but Cynthia would now be receiving only \$322 per month, an amount removed from her income (no longer the full \$879 paid in the sole custody setting). The result would be the same range for spousal support as above, zero to \$302 per month.

²⁷ *Contino v. Leonelli-Contino* (2003), 42 R.F.L. (5th) 326 (Ont. C.A.).

6.7.2 Split custody

In a **split custody** situation, more significant changes to the basic formula are required. If each parent has one or more children in their primary care or custody, then s. 8 of the *Federal Child Support Guidelines* requires a set-off of table amounts, with each spouse paying the table amount for the number of children in the other spouse's custody. But this means that each parent will also be considered to support the child or children in their care directly, out of their remaining income. Thus, in the split custody situation, a notional table amount must be deducted from *each* parent, not just the recipient but the payor as well. Since there is one child in each household, there are no economies of scale and accordingly larger proportions of their incomes are devoted to child support, leaving a smaller pool of INDI to be divided by way of spousal support. Again, as with shared custody, this would be done in the calculation of INDI, even though the child support paid by the payor and received by the recipient would be the set-off amount directed by the s. 8 formula.

Example 6.5

Take the case of Peter and Cynthia again, and assume that each parent has custody of one child, same incomes, same facts. Peter's one child table amount would be \$543 per month, Cynthia's \$337 per month. Under s. 8 of the *Federal Child Support Guidelines*, these table amounts would be offset, with Peter paying Cynthia \$206 per month. In calculating Peter's individual net disposable income, for spousal support purposes, we would propose to deduct the full one child amount, twice, once for the table amount effectively paid to Cynthia and once for the notional amount spent directly on the child in his care. Similarly, in calculating Cynthia's INDI, we would make a double deduction of her one-child table amount, once for the amount effectively paid to Peter for the child in his care, plus a notional table amount for the child in Cynthia's own care. The actual child support paid by Peter to Cynthia would be \$206, the one-child set-off amount under s. 8. Using the split custody formula for spousal support, Peter would pay spousal support to Cynthia in the range of zero to \$325 per month. (At zero spousal support, Cynthia would have 41.4 percent of INDI.)

6.8 A Hybrid Formula for Spousal Support Paid by the Custodial Parent

The basic formula for marriages with dependent children assumes that the higher income spouse pays both child and spousal support to the recipient parent, who also has sole or primary custody of the children. The spousal support to be paid must then adjust for the payor's child support payments. The shared and split custody situations may change the math, but both still involve the higher income spouse paying both child and spousal support to the recipient.

A different formula is required where the higher income spouse paying spousal support is also the parent with sole or primary custody of the children. Now spousal support and child support flow in opposite directions. The *without child support* formula does not apply, however, as it assumes no dependent children. While we could just leave this situation as an exception, with no formulaic solution, it is common enough that we believe we should construct a formula to guide outcomes in this situation.

We could have chosen either of our two formulas as a starting point and then made modifications to accommodate custodial payors. We chose to start from the *without child support* formula. In this situation the recipient parent does not have the primary care of children and thus more closely resembles the single recipient in the *without child support* formula. The primary rationale for the payment of spousal support in these cases will be merger over time, rather than parental partnership. That said, a number of lower income recipient spouses in this situation will continue to play an important role in their children's lives and any formula must be able to adjust in such cases. The other advantage of the *without child support* formula is ease of calculation, but the formula will have to be modified to back-out child support and to take into account tax implications.

Formula for Spousal Support Paid by Custodial Parent

- (1) Reduce the payor spouse's Guidelines income by the **grossed-up notional table amount** for child support (plus a gross-up of any contributions to s. 7 expenses).
- (2) If the recipient spouse is paying child support, reduce the recipient's Guidelines income by the **grossed-up amount of child support paid** (table amount plus any s. 7 contributions).
- (3) Determine the **adjusted gross income difference** between the spouses and then quantum ranges from 1.5 percent to 2 percent for each year of marriage, up to a maximum of 50.
- (4) **Duration** ranges from .5 to 1 year of support for each year of marriage, with the same rules for indefinite support as under the *without child support* formula.

In reducing gross incomes by grossed-up amounts for child support, this formula does the same thing conceptually as the basic *with child support* formula—it establishes the spouses' available incomes after their child support obligations are fulfilled. To gross up the child support will require a calculation of the gross value of the non-taxable child support, using the appropriate marginal tax rate for the payor or recipient spouse.

Example 6.6

Kathleen and Gordon were married for 21 years. They have two children, one a self-supporting university student, and the other a high school student living with Gordon. Gordon is a pharmacist and earns \$73,500 gross per year. Kathleen was home with the children and, for years, ran a child care operation at home. Kathleen has done some retraining, but has also had serious health problems. She has no income at present and cannot pay child support. Assume no s. 7 expenses.

There would be little question of entitlement to spousal support on these facts. First, we would reduce Gordon's income by the notional table amount of child support, \$595 per month, grossed up to \$936 per month at his marginal tax rate, or \$11,232 on an annual basis. Gordon's adjusted or reduced income would thus be

\$62,268. After a 21-year marriage, Kathleen would receive a range of 31.5 to 42 percent of the adjusted gross income difference of \$62,268.

Under our proposed formula, Gordon would pay spousal support in the range of \$1,635 to \$2,179 per month. Given the length of the marriage (21 years), Kathleen’s support would be indefinite, subject to review or variation.

Example 6.7

Matt earns \$100,000 gross per year and has custody of two teenage children. Anna earns \$30,000 gross per year. The spouses separated after 16 years together. There are no s. 7 expenses.

Assume entitlement to spousal support has been established.

First, Matt’s income is reduced by the table amount for two children, \$1,240, grossed-up to \$2,192 per month or \$26,304 annually. Matt’s reduced income would thus be \$73,696. Anna is required to pay child support at the table amount of \$446 per month, grossed-up to \$572 monthly or \$6,864 annually. Anna’s reduced income would be \$23,136. After a 16-year marriage, Anna would receive a range of 24 to 32 percent of the adjusted gross income difference of \$50,560.

Under our proposed formula, Matt would pay spousal support in a range from \$1,011 to \$1,348 per month, for a duration of 8 to 16 years.

There is one **exception** we would propose to this custodial payor formula, highlighted by the Nova Scotia case of *Davey v. Davey*.²⁸ Where the recipient spouse and non-custodial parent plays an important role in the child’s care and upbringing after separation, yet the marriage was shorter and the child is younger, the ranges for amount and duration applied here (from the *without child support* formula) may not allow that spouse to continue to fulfil that parental role. In our view, in such cases, under this parenting exception, it should be possible to exceed the upper limits on both **amount** and **duration** for that purpose.

6.9 Restructuring

For the most part, restructuring as described in Chapter 5 under the *without child support* formula has less relevance for marriages with dependent children. Under the basic formula above, many of the recipient spouses with older dependent children will qualify for indefinite support. Further, the maximum duration under the second, shorter marriage, test for duration will be much more uncertain, given the review process and the softer nature of the maximum duration. It will thus be more difficult in these cases to establish the global or total amount of the formula outcome as is required for restructuring.

But there will be some medium-term marriages that will attract the length-of-marriage time limits under the first, longer-marriage test for duration. For these cases, restructuring can have some meaning. In some cases, a recipient spouse may want an amount of support above the upper end of the range for a shorter period of time, e.g. to pursue a more expensive educational

²⁸ *Davey v. Davey* (2003), 36 R.F.L. (5th) 297 (N.S.C.A.), affirming (2002), 205 N.S.R. (2d) 367 (N.S.S.C.).

program. Or, in others, a recipient parent may want to receive support for a longer period, in an amount reduced below the lower end of the range, e.g. to bridge a period to the availability of pension and retirement income.

Further, restructuring will have some obvious application in the custodial payor situation described immediately above.

6.10 Exceptions

As explained in Chapter 5, exceptions are recognized grounds for departure from the formula outcomes, our attempt to identify, through a non-exhaustive list, the most common reasons that would warrant departure. Most of the exceptions that apply under the *without child support* formula also apply here. We will only provide brief comments additional to the general descriptions provided in Chapter 5. We have already discussed the parenting exception to the custodial payor formula above.

6.10.1 Compensatory exception

The scope for a compensatory exception will be eliminated under the *with child support* formula, given the weight given to compensatory considerations in the construction of this formula and the generous maximum durations available under the two tests for duration.

6.10.2 Illness and disability

This exception operates on duration under the *without child support* formula, mostly where the marriage is of short-to-medium duration. Under the basic *with child support* formula, there will be much less scope for this exception. There are two settings where this exception will operate:

- where restructuring is not sufficient to accommodate the duration concerns raised by illness and disability in cases governed by the longer-marriage test for duration; and
- where the recipient spouse does not play an important role in the child's care and upbringing, perhaps on account of illness or disability, and thus the parenting exception would not apply under the custodial payor formula.

6.10.3 Debt payments

Where the payor spouse has a disproportionate responsibility for debt payments, some adjustment may be required under the *with child support* formula, as explained in Chapter 5.

6.10.4 Prior support obligations

An obligation to pay support for a prior spouse or prior children will require a slightly different adjustment under this formula, which works with net disposable incomes rather than the gross incomes of the *without child support* formula. Usually this exception will apply to the payor spouse. In calculating the payor spouse's individual net disposable income, this exception will require that any amounts of support paid to prior spouses or children be deducted, thereby reducing the size of the pool of individual net disposable income between the current spouses

and also reducing the payor's share of that smaller pool. Because we are working with net income under this formula, there is no need to gross up any child support amounts and the software can work out the after-tax value of the gross amount of spousal support.

6.10.5 Interim support

Where there are compelling financial circumstances at the interim stage, an exception can be made, as is explained in more detail in Chapter 8 below.

6.11 The Crossover Between Formulas

There is one last issue to be considered, that of crossover between the formulas. The most frequent crossover situation will be in cases where child support ceases after a medium-to-long marriage, where the children were older or even university-age at the time of the initial order. At this point, either spouse could apply to vary, to bring spousal support under the *without child support* formula. In most cases, it will be the recipient spouse making the application, to obtain an increase in spousal support under the *without child support* formula, once child support is no longer payable and the payor's ability to pay improves as a result. Specific examples of crossover will be considered in Chapter 10, which deals with variation, review and other topics.

7 CEILINGS AND FLOORS

Where income sharing is used to determine the amount of spousal support, any guidelines must address the question of ceilings and floors. The **ceiling** is the income level for the paying spouse above which any formula gives way to discretion. The **floor** is the income level for the payor below which zero support is to be paid.

In the case of the *Federal Child Support Guidelines*, to take a familiar example, once the payor's income is over \$150,000, s. 4 provides that the amount of child support is the table amount for the first \$150,000 plus any additional discretionary amount on the balance of the payor's income above \$150,000. In practice courts have been prepared to follow the table formula for child support up to much higher income levels. At the other end, the floor for child support under the table formula is an income of about \$7,000, based upon the personal tax exemption for a single person. This is a true floor in that the paying parent is deemed unable to pay any child support below that income level.

Ceilings and floors are trickier to establish for any spousal support formula. **We propose that the ceiling be set at a gross annual income for the payor of \$350,000 and that the floor be set at \$20,000**, but these proposals are somewhat tentative. We recognize that there are important practical issues here at both ends of the income spectrum. In practical terms, ceilings and floors attempt to define the upper and lower bounds of the typical case, for which guideline formulas can generate acceptable results.

7.1 Ceilings

The shorthand term "ceiling" may be misleading. Under the *Federal Child Support Guidelines*, there is no absolute ceiling, just an income level above which the standard fixed-percentage-of-income formula can be varied, to generate a lesser percentage of income above that level. We propose the same approach here.

Under these spousal support advisory guidelines, a ceiling could be based on the payor's income, or the monthly amount of support paid, or the recipient's income, or some form of standard of living test. Our preference is to use the payor's gross income as the basis for our proposed ceiling.

In thinking about the ceiling it is important to keep in mind that there are already many possible means of adjusting under these advisory guidelines as incomes go higher. First, the formulas themselves offer **ranges** of percentages and, as incomes go up the scale, it is possible to move towards the lower end of the range. Second, where the incomes of both payor and recipient are higher, questions of **entitlement** to spousal support may resolve these issues. Third, these are **advisory** guidelines, so that a ceiling has less telling consequences than with a child support formula, as case-by-case departures always remain possible. The ceiling operates in addition to these.

The ceiling we propose is a gross annual income of \$350,000. After the payor's gross income reaches the ceiling of **\$350,000**, any formulas should no longer be applied to divide income beyond that threshold.

We have considered and experimented with lower numbers such as \$250,000 or \$300,000. In the end, we opted for a higher figure, taking the view that it is important to maintain the predictability and consistency of the formulas as far up the income spectrum as is practically possible. We are also concerned about creating cliffs, i.e., points where there are dramatic increases or decreases in support amounts, with all the incentives to litigate that can accompany such cliffs.

The examples below illustrate the operation of the ceiling.

Example 7.1

In a long-marriage case, assume one spouse earns \$350,000 gross per year and the other has no income, after 25 years of marriage. Under the *without child support* formula, a 25-year marriage would call for sharing between 37.5 to 50 percent of the gross income difference, i.e., annual spousal support in the range of \$131,250 to \$175,000 (or \$10,937 to \$14,583 monthly).

If the payor earned more, say \$450,000, a court could leave spousal support in that same range or, in its discretion, a court might go higher, but no formula would push the court to do so and it would be an individualized decision. These are large numbers for support in this case, but keep in mind that this is the very top end of the formula, with both a long marriage and a high income.

Example 7.2

In a 10-year marriage, assume the higher income spouse earns \$350,000 gross per year and the other earns \$100,000, also a healthy income.

Entitlement could be an issue in this case, with such high incomes. If entitlement were established, the *without child support* formula would suggest sharing 15 to 20 percent of the gross income difference: a range for spousal support of \$37,500 to \$50,000 annually (or \$3,125 to \$4,166 monthly) for a maximum duration of 5 to 10 years. If the payor earned more than \$350,000, a court could go higher, or not, depending upon the facts of the case.

Example 7.3

Take the same facts as *Example 7.1* above, with the payor earning \$350,000 gross per year and the recipient having no income, but add two teenage children living with the recipient. Assume that child support would follow the table formula, with child support of \$3,841 per month (using the Ontario tables).

Spousal support would be determined under the *with child support* formula, based upon sharing 40 to 46 percent of individual net disposable income: a range for spousal support from \$8,050 to \$9,630 per month.

If the payor earns more than \$350,000, a court can decide to go higher or not. Under the *with child support* formula the operation of the ceiling is complicated by the fact that child support increases as incomes rise above the ceiling. We can suggest two possible approaches for these very high income cases using the *with child support* formula. The first approach uses the formula to determine a minimum amount for spousal support, an approach we can call “minimum plus”. A notional calculation would be required to calculate spousal support at the \$350,000 ceiling, using *the child support payable at the ceiling*. This would determine the “minimum” spousal support range. In *Example 7.3*, that range would be \$8,050 to \$9,630. There would be discretion to add to that minimum for incomes over \$350,000, after taking into account the *actual* amount of child support being paid by the payor at that higher income level. This approach might make more sense where the payor’s income is closer to the ceiling. The second approach would be one of pure discretion. Once the payor’s income exceeded the ceiling, then there would be no “minimum” for spousal support, just a dollar figure that would take into account the *actual* amount of child support paid, an amount which can be very large for cases well above the ceiling.

In assessing this ceiling and these examples, keep in mind that the formulas have to operate across a wide range of typical incomes. Here we are operating at one of the extremes. At issue is the ceiling, the point at which the formulas’ ranges cease to generate reasonable outcomes. Is the \$350,000 ceiling about right? Or should it be lower, perhaps \$250,000 or \$300,000? Only a small number of cases will be affected by this choice of a ceiling amount. We know that the larger stakes at these income levels are more likely to lead to litigation and individualized decision making. Still, it is important to fix the ceiling in the right general ballpark.

7.2 Floors

A floor for the advisory guidelines is more significant, if it sets the amount of support at zero below that floor. In our view, that should generally be the effect of the floor. The *Federal Child Support Guidelines* use a very low floor, about \$7,000 gross per year. The floor for spousal support would have to be higher than that, but how much higher?

As with ceilings, the proposed advisory guidelines already offer a number of methods to adjust for the payor’s low income. First, **entitlement** remains a threshold issue. Where the payor has a low income or where there is a modest differential in incomes at lower income levels, a court can decide (or the parties can agree) that there is no entitlement to support. Second, where there are dependent children, the formula gives **priority to child support**, consistent with s. 15.3 of the *Divorce Act*. That priority will often eliminate any ability to pay spousal support at lower income levels, especially at the bottom end of the formula’s range. Third, under the *without child support* formula, even if there is entitlement, the income differentials may be quite small, producing some **very small amounts** at the lower end of the formula’s ranges, particularly in short- and medium-duration marriages.

Our initial view is that **there should not be any amount of spousal support payable until the payor’s gross income exceeds \$20,000 per year**. A minimum wage or poverty line income was considered too low, providing too little incentive for the payor to continue working, given prevailing tax rates. A review of the case law suggests that judges almost never order spousal support where payors make less than \$20,000, or even slightly more. According to child support

database information, where dependent children are involved, if the payor's income is below \$20,000 gross annually, spousal support is only ordered or agreed upon in less than 2 percent of cases and the percentages for incomes of \$20,000 to \$29,000 are only about 2.5 percent.

The examples below illustrate the operation of the floor.

Example 7.4

To take an example at the lower extreme, assume the higher income spouse earns \$20,000 gross per year, after a 25-year marriage, but the other spouse has no income at all.

With a floor of \$20,000, there would be zero spousal support payable despite the income difference. The range for spousal support generated by the *without child support* formula would have been \$625 to \$833 per month. At the top end of this range, using Ontario figures, the payor would be left with a net disposable income of only \$750 per month, a net income that would be lower than that of the recipient (assuming the payor's income comes from employment). The lower amount of this range would generally be less than social assistance rates anywhere in Canada for the recipient, while still leaving the payor spouse with a net disposable income of only \$923 per month.

Example 7.5

Assume the payor earns \$20,000 gross per year, the other spouse has no income and they have one child, which would mean a table amount of child support of \$163 per month in Ontario.

If we applied the *with child support* formula here, spousal support would range from \$349 to \$451 per month. At these levels, the custodial parent and one child would be left at around one half of the already-too-low low-income measure used in Schedule II of the *Federal Child Support Guidelines* to compare household standards of living, while leaving the paying spouse a net monthly income of just above or just below \$900 per month.

These numbers only improve slightly, even in the one-child case, for those earning \$25,000 per year. The table amount of child support would be \$222 per month. After payment of spousal support in the range of \$449 to \$575 per month the payor's net disposable income inches up just below or above \$1,100 per month.

For spouses with low incomes, we must be particularly concerned about work incentives, welfare rates and net disposable incomes. There may be compelling arguments for low-income payors to pay child support at very low income levels, but the same arguments cannot be made for support for adult spouses. If anything, we are worried that the \$20,000 floor may be too low, creating real hardship for payor spouses and ultimately threatening the credibility of the formulas.

We do have one concern with an absolute floor at \$20,000, namely a **cliff effect** for those payors just above the floor. A way to avoid such a cliff would be to have some smoothing of the formulas over a range of lower incomes, e.g. between \$20,000 and \$40,000, with the percentages rising towards the standard range (as was done in the construction of the *Federal Child Support Guidelines*). We would prefer to avoid such complexity at the lower end, at least in this early

stage in the development of advisory guidelines. For now, the cliff effect can be best avoided by an **exception** for cases where the payor spouse's gross income is **more than \$20,000 but less than \$30,000**. For cases within this range, assuming entitlement, consideration should be given to the percentages sought under the applicable formula, the net disposable income left to the payor spouse, and the impact of a spousal support payment upon the work incentives and marginal gains of the payor.

For example, under the *without child support* formula, a shorter marriage would mean a smaller percentage and hence a smaller bite of the payor's income, in contrast to a 25-year marriage. Or, to take another example, for a payor whose income hovers just around or above \$20,000 and whose shifts, overtime hours, or seasonal work are changeable, there will be a realistic concern about disincentives to work.

Another **exception** is probably necessary, this time **below the income floor**. In general, the formulas for amount and duration will not operate where the payor spouse's gross income is less than \$20,000 per year, as it will be rare that there will be sufficient ability to pay. There may, however, be exceptional cases where spousal support might be paid, e.g. where the payor spouse is living with parents or otherwise has significantly reduced expenses. Formulas will be less helpful in determining amounts in such cases. There is another good reason for allowing exceptions below the income floor: these advisory guidelines address amount and duration, not entitlement. An absolute income floor for amount would effectively create an entitlement rule, something that these guidelines should not do, in light of their informal and advisory nature. The issue of entitlement must always remain open, as a threshold issue, to be defined by the legislation and judicial interpretation of that legislation.

8 INTERIM SUPPORT

The interim support setting seems an ideal situation for the use of advisory guidelines. There is a need for a quick, easily calculated amount, knowing that more precise adjustments can be made at trial. Not surprisingly, two of the early American guidelines found their origins in the assessment of interim spousal support, those in California counties and Pennsylvania. Once an income can be established for each party it is possible under the proposed formulas to generate ranges of monthly amounts with relative ease.

Traditionally, interim spousal support has been based upon a needs-and-means analysis, assessed through budgets, current and proposed expenses, etc. All of that could be avoided with the proposed formulas, apart from exceptional cases. Further, conflict between spouses at this interim stage could be significantly reduced and settlements encouraged, another benefit for the spouses and any children of the marriage.

There are some situations where there may have to be an **exception for compelling financial circumstances in the interim period**. When spouses separate, it is not always possible to adjust the household finances quickly. One of the spouses may have to bear large and often unmovable (at least in the short run) expenses, most likely for housing or debts. In most instances, the ranges generated by the formulas will cover these exceptional cases, but there may be some difficulties where marriages are shorter or incomes are lower or property has not yet been divided. Interim spousal support can be adjusted back to the formula amounts once a house has been sold or a spouse has moved or debts have been refinanced.

Below we offer some examples of how this exception might operate.

Example 8.1

In *Example 6.1*, Ted earns \$80,000 gross per year and Alice makes \$20,000. Alice and the two children remain in the family home after the separation. Assume that Alice has to make a large monthly mortgage payment, in the amount of \$2,100 per month, as the couple had recently purchased a new home. Under the *with child support* formula, the range for spousal support would be \$695 to \$1,286 per month, on top of child support of \$1,031 monthly. At the interim stage, spousal support might have to be increased beyond the upper end of the range so that Alice can continue to make the mortgage payments and still have enough money for other expenses.

Example 8.2

In a modification of *Example 5.2*, Karl and Beth were married for only two years. They had no children. Beth was 25 when they met and Karl was 30. When they married, Beth was a struggling artist who earned a meagre gross income of \$12,000 a year giving art lessons to children. Karl is a music teacher with a gross annual income of \$60,000. With Karl's encouragement, Beth stopped working during the marriage to devote herself to her painting. They lived in a house Karl owned before the marriage, which Beth will get some share of when the property is eventually divided. Beth has gone to live with a friend, but wants to rent her own apartment.

The *without child support* formula is used and a two-year marriage would generate a range for quantum of 3 to 4 percent of the gross income difference of \$60,000 (assessing Beth's income as zero, which it would be at the point when interim support is claimed). The result would be support in the range of \$150 to \$200 per month for between one and two years.

Until Beth finds work and gets her share of the property, she is going to require a minimum of \$1000 per month. Even restructuring the award to provide \$400 per month for a year would not meet these needs. The interim exception could be relied upon to make an interim award in a higher amount.

There is another critical way that the advisory guidelines would apply to interim orders. Any periods of interim spousal support are to be included within the **durational limits** fixed by the advisory guidelines under either formula. If the computation of duration did not include the period of interim orders, there would be incentives for some parties to drag out proceedings and for others to speed them up. Further, differing periods of interim support would result in inequities amongst spouses, with some receiving support longer and others shorter, especially in cases of shorter marriages.

9 APPLYING THE ADVISORY GUIDELINES IN QUEBEC

Inevitably, the application of spousal support advisory guidelines to divorce cases in Quebec requires some modifications. The most obvious modifications flow from Quebec's guidelines for the determination of child support, which differ in important ways from the *Federal Child Support Guidelines*. A few other modifications are also noted below.

The bulk of Quebec's guidelines are found in the *Regulation Respecting the Determination of Child Support Payments*, to which are attached as schedules the child support determination form and the table.²⁹ The *Regulation* is made under authority of the *Code of Civil Procedure* and the *Civil Code*, both of which also contain provisions governing the determination of child support.³⁰ These provisions will be referred to here as the child support rules. These rules apply to determine child support under the *Civil Code* and under the federal *Divorce Act*.

For these Quebec rules to become the applicable guidelines for child support in Quebec divorce proceedings, Quebec was designated by the federal government under the *Divorce Act*.³¹ The Quebec rules thus apply to determine child support in divorce proceedings when both spouses are ordinarily resident in Quebec. Where one of the parents resides outside Quebec, then the *Federal Child Support Guidelines* apply. The Quebec child support rules therefore apply to most divorces in Quebec.

In Quebec, the computer software most often used to make income, support and tax calculations is AliForm, along with AliTax.

9.1 The Definition of Income

In our formulas, the starting point for the determination of income is Guidelines income, a measure of gross income defined in considerable detail under the *Federal Child Support Guidelines*. The major reason for this choice was to simplify the determination of income by using the same definition for both child and spousal support.

For the same reason, in the Quebec context, the formulas will start with the definition of annual income (revenue annuel) in section 9 of the *Regulation Respecting the Determination of Child Support Payments*. It too is a gross income measure, with a broad scope very similar to Guidelines income.

²⁹ Decret 484-97, 1997 G.O. II, 2117 and 2605, modified by Decret 777-97, 1997 G.O. II, 3648 and Decret 1312-2003, 2003 G.O. II, 5396. The form is Schedule I and the table is Schedule II.

³⁰ L.Q. 1996, c. 68 and L.Q. 2004, c. 5. Sections 585 to 596 of the *Civil Code* govern the support of children, with sections 587.1 to 587.3 implementing the child support rules. Sections 825.8 to 825.14 of the *Code of Civil Procedure* regulate the procedure for determining child support

³¹ *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp), ss. 2(1) applicable guidelines, (5) and (6). The designation is S.O.R./97-237.

9.2 Length of Marriage Under the *Without Child Support* Formula

Under the *without* child support formula set out in Chapter 5, length of marriage is critical in determining both the amount and the duration of spousal support. Length of marriage is defined as the period of spousal cohabitation, including any period of pre-marital cohabitation, and ending with the date of separation. The inclusion of pre-marital cohabitation in part reflects provincial/territorial family laws accepting cohabitation for a specified period as a basis for spousal support in non-marital relationships.

Under the *Civil Code*, by contrast, there is no entitlement to spousal support for unmarried cohabitants. In Quebec divorce cases, some judges therefore ignore any period of pre-marital cohabitation, while other judges treat that period as a relevant consideration in determining spousal support in divorce proceedings. That difference of opinion will have important implications for outcomes under these advisory guidelines in the application of the *without child support* formula.

9.3 Child Support and the *With Child Support* Formula

In the few circumstances where one party lives outside the province and the federal guidelines apply in a Quebec divorce, no adjustments to the *with child support* formula are necessary. The Quebec child support rules apply in most divorce cases, however, and when these rules apply, some modifications *are* required.

It should be noted that section 825.13 of the Quebec *Code of Civil Procedure* clearly gives priority to child support over spousal support, in language similar to s. 15.3(1) of the *Divorce Act*.³²

While there are some broad similarities between the two schemes, the Quebec child support rules differ from the federal guidelines in significant respects:

- both parents' incomes are taken into account;
- the floor is higher, as there is a \$10,000 basic deduction for self-support;
- the ceiling for the combined disposable incomes of the parents is \$200,000 annually;
- access to the child of between 20 and 40 per cent of the time by the non-custodial parent affects the amount of child support;
- additional expenses are defined somewhat differently, especially for extracurricular activities (which need not be extraordinary);
- the value of the assets of a parent may affect the amount of child support, as may the resources available to the child;

³² Section 825.13 states: "The support to be provided to a child is determined without regard to support claimed by a parent of the child for himself."

- an adjustment can be made if child support is more than 50 per cent of a parent’s disposable income;
- undue hardship does not include a standard-of-living test; and
- only simple hardship is now required for any adjustment for a parent’s support obligations respecting other children.³³

The *with child support* formula set out in Chapter 6 works easily and effectively with the Quebec child support rules. The Quebec rules first generate the respective contributions to child support—the amounts to be backed out in determining each spouse’s individual net disposable income. The percentage ranges under the basic formula are then applied to the remaining pool of INDI to generate the amount of spousal support.

Government benefits and refundable credits also have to be added back to the recipient spouse’s INDI in cases under the Quebec child support rules. As with Guidelines income, these sources of income are not included under the definition of annual income in the Quebec rules.

Step-by-step, here is how the with child support formula works with the Quebec child support rules:

- First, the Quebec rules use an income-shares formula, where the table sets out the basic annual contribution for the child required jointly from the parents based upon their combined disposable incomes as defined in the *Regulation*.
- Second, to this basic annual contribution are added any child-care expenses, post-secondary education expenses and any other special expenses.
- Third, to determine the payor’s child support, the Quebec rules calculate the respective parental child support contributions based upon each parent’s disposable income. The Quebec rules thus calculate an actual contribution for the recipient spouse, avoiding any need to compute a notional table amount.
- Fourth, the Quebec rules adjust parental child support contributions explicitly and mathematically for different custodial arrangements, including sole custody, sole custody with access between 20 and 40 per cent of the time (described as sole custody with visiting and prolonged outing rights), split custody (described as sole custody granted to each parent), shared custody, and any combinations of the foregoing arrangements.

³³ See Jean-Marie Fortin and Jocelyn Verdon, *AliForm annoté Barème québécois: Aspects civils et fiscaux*, 2nd ed. (Brossard: Publications CCH, 2004) and also Dominique Goubau, “Comparison of Federal and Quebec Regulations for Determining Child Support,” and Jean-Marie Fortin, “Quebec Guidelines for the Determination of Child Support,” in *Federal Child Support Guidelines Reference Manual* (Ottawa, 1998) at J-7 to J-25 and J-29 to J-41. The Quebec rules are also explained in Department of Justice, *Children Come First: A Report to Parliament Reviewing the Provisions and Operation of the Federal Child Support Guidelines* (Ottawa, 2002), Volume 2 at 23-28.

The respective contributions, after any such adjustments, then become the basis for calculating individual net disposable income for each spouse and in turn for determining the ranges of spousal support.

Apart from these adjustments, the spousal support advisory guidelines will operate in essentially the same fashion in divorce cases in Quebec as in the other provinces and territories.

10 VARIATION, REVIEW, REMARRIAGE, SECOND FAMILIES

The formulas proposed in Chapters 5 and 6 are intended to apply to initial orders and to the negotiation of initial agreements. Where there is an entitlement to support, the formulas generate ranges for both amount and duration of spousal support at the time of divorce. The formulas will also determine a range of amounts for interim orders under the *Divorce Act*. What role can the proposed advisory guidelines play thereafter, upon variation or review? What about remarriage or re-partnering or second families? These issues proved to be some of the most difficult of all in constructing spousal support advisory guidelines. In the earlier parts we have touched upon some of these issues.

Ideally a truly comprehensive set of advisory guidelines would apply to the full range of issues that can arise on variation and review. The current state of the law renders that impossible at the present time. We opted for a more modest approach at this stage—to apply the guideline formulas as far as consensus and the current case law allow, and no more. We identified certain situations where the advisory guidelines would apply on reviews and variations, including increases in the recipient's income and decreases in the payor's income. We have left others, such as post-separation increases in the payor's income, re-partnering, remarriage and second families, to discretionary, case by case determinations under the evolving framework of current law. We hope that, at some later stage, after a period of experience with the advisory guidelines, it will be possible to develop formulaic ranges to guide resolution of these remaining issues.

10.1 Material Changes, Review and Issues of Continuing Entitlement

We should make clear at the outset that the advisory guidelines do not—and cannot—affect the basic legal structure of variation and review. Under section 17(4.1) of the *Divorce Act*, a material change of circumstances is a threshold requirement for the variation of court-ordered spousal support. Section 17(7) sets out the objectives of an order varying spousal support and section 17(10) addresses variations after spousal support has ended, imposing a condition that the changed circumstances relied upon be related to the marriage. The process of review allows for reassessments of support without the requirement of a material change in circumstances, a process elaborated by appeal and trial courts in case law.

None of this is affected by the proposed advisory guidelines, which deal with the amount and duration of spousal support. The spouse seeking to vary court-ordered support will still have to prove a material change before the advisory guidelines can operate to determine amount and duration. In a similar vein, a review is possible only if a provision for review was included in the initial order and only if any preconditions for review are met, e.g. the passage of a period of time or the completion of a training program. Only then will it be possible for the advisory guidelines to be applied to determine amount and duration.

If spousal support has been negotiated, the result will be a separation agreement that deals with spousal support. The possibilities for reviewing or modifying spousal support that the spouses have agreed upon will depend on many factors, including the drafting of the agreement and whether or not the agreement has subsequently been incorporated into the divorce judgement.

We will deal first with the situation where there has been no incorporation. The effect of subsequent changes in the parties' situation will be governed by the terms of the agreement. If the agreement provides for reviews by the parties at specified times or includes a material change clause, and if the conditions for these are met, it would be possible for the advisory guidelines to apply to determine amount and duration. However, the advisory guidelines would have no application if the agreement is a final agreement in which spousal support has been waived or time-limited.

As has been emphasized at many points in this document, the proposed advisory guidelines do not deal with the effect of a prior agreement on spousal support. As informal guidelines, they confer no power to override agreements. The *Miglin*³⁴ case continues to govern the issue of the effect of a prior agreement on a court's ability to award spousal support. The advisory guidelines would only be helpful *after* the *Miglin* analysis, if a finding were made that the agreement was not determinative and spousal support was to be determined afresh by the court.

In cases where a spousal support agreement has been incorporated into the divorce judgment—as is the practice in many parts of the country—the agreement is treated as a court order. If the agreement provides for review or includes a material change clause, and those conditions are met, the advisory guidelines may be applicable to determine amount and duration. If the agreement is a final agreement, waiving or time-limiting support, the threshold requirement of a change in circumstances under s. 17 of the *Divorce Act* would have to be satisfied before a variation could be granted, as well as the causal connection requirement in s. 17(10) if the spousal support had ended at the time of the application. Given that the court order in these cases rests upon an agreement, the *Miglin* analysis would also be relevant in determining whether the requirement of material change had been met and whether a variation was appropriate.

Apart from the issue of the governing legal framework, **a review or variation may involve issues of continuing entitlement that would determine the application of the advisory guidelines. Entitlement is always a live issue, a precondition to determining amount and duration under the guidelines.** As circumstances change, with changes in employment and income, retirement, remarriage, re-partnering and second families, entitlement may come to the forefront as a threshold issue.

Variations and reviews raise many different issues for resolution. In Chapters 5 and 6, we canvassed some of these issues, especially in our discussions of duration. In what follows we will organize our discussion of this material around the different kinds of issues that are raised on variations and reviews.

³⁴ *Miglin v. Miglin*, [2003] 1 S.C.R. 303

10.2 Applications to Reduce Spousal Support Because of Changes in Income

The largest category of variations and reviews consists of applications seeking a reduction in spousal support based upon a change in the income of one party or the other. One of three reasons provides the foundation for the application:

- (i) the payor spouse's income goes down;
- (ii) the recipient spouse's income goes up; or
- (iii) the payor spouse applies to reduce or terminate support on the grounds that the recipient spouse ought to have a higher income.

In each of these three situations the advisory guidelines can be used to determine the amount of support. In some situations, the advisory guidelines can even result in the termination of spousal support, if the amount of support falls to zero with little or no prospect of future change.

In situations (i) and (iii), difficult questions of imputing income can arise. In situation (i), there can be questions about the good faith and credibility of the payor spouse who alleges an income reduction, which in turn may call for imputing income to the payor. In situation (iii), income may have to be imputed to a recipient spouse who has failed to maximize earning capacity.

Under the *without child support* formula, as the gross income difference between the spouses narrows, spousal support will be reduced. Similarly, under the *with child support* formula, as the disparity between the spouses' net incomes is reduced, so too is the amount of spousal support required to bring the income of the lower income recipient spouse up to the desired percentage. At some point, as the disparity in spousal incomes narrows under either formula, entitlement will disappear.

We provide below some examples of how the advisory guidelines would apply to variation or review applications in this category.

Example 10.1

In *Example 5.2* John and Mary had been married for 25 years in a traditional marriage, with two grown-up children. Mary had no income, but John was earning \$100,000 gross per year. Now assume that John has lost his previous job and changed employers, with a reduction in his annual gross income down to \$80,000, while Mary still has no income.

On a variation application by John, the range for spousal support would be reduced, under the *without child support* formula, from the initial \$3,125 to \$4,167 per month, down to \$2,500 to \$3,333 per month.

Example 10.2

In *Example 6.1* Ted was earning \$80,000 gross per year at the end of an 11-year marriage, with two children aged 8 and 10, while Alice was working part time, earning \$20,000 gross per year. Now assume that Alice has found a full-time job, increasing her gross annual income to \$35,000, while Ted still earns \$80,000.

On a variation or review under the *with child support* formula, Alice's increase in income would reduce the range for spousal support, from the original \$695 to \$1,286, down to \$315 to \$916 per month.

Example 10.3

Again using *Example 6.1* above, now assume that the children are 13 and 14 and Alice is still working part-time, but Ted alleges that Alice was offered a full-time job by her employer and she turned it down.

Upon review or variation, a court might decide to impute the full-time income of \$35,000 per year to Alice and to reduce support to the same range as above, of \$315 to \$916 per month. Or a court might not be prepared to go to that full amount, instead imputing a slightly lower income, such as \$30,000, which would produce a range of \$463 to \$1,073 per month.

10.3 The Payor's Post-Separation Income Increase

There are two possible formulaic extremes here. At one extreme, one could decide that any post-separation income increase of the payor spouse should not affect the amount of spousal support. After all, some would suggest, the recipient is entitled to a sharing of the marital standard of living, but no more. Certainly, this bright-line method would be predictable and administratively simple. At the other extreme, one could argue that the formula should just continue to be applied to any income increase for the payor. This again would offer a predictable result, but one which the basic principles of spousal support would not justify in all cases. This approach is most compelling after a long traditional marriage

Under the current law, it is impossible to maintain either of these approaches to the exclusion of the other. Some rough notion of causation is applied to post-separation income increases for the payor, in determining both whether the income increase should be reflected in increased spousal support and, if it should, by how much. It all depends on the length of the marriage, the roles adopted during the marriage, the time elapsed between the date of separation and the subsequent income increase, and the reason for the income increase (e.g. new job vs. promotion within same employer, or career continuation vs. new venture). The extent of sharing of these post-separation increases involves a complex, fact-based decision.

We can propose one formulaic limit in these cases: the upper limit upon any increased spousal support ought to be the numbers generated by the formulas. As the following examples show, that upper limit offers some help in defining a range of possible results after a post-separation income increase.

Example 10.4

In *Example 5.1*, Arthur and Ellen were married for 20 years and had one grown-up child. At the time of the initial order, Arthur earned \$90,000 gross per year and Ellen earned \$30,000, both working full time. Under the formula, spousal support was indefinite, in the range of \$1,500 to \$2,000 per month. Arthur's income increases to \$110,000 gross per year, while Ellen's remains unchanged.

A court, on an application for variation, might order that none, some or all of Arthur's post-separation income increase be taken into account. If *all* the increase were taken into account, the formula would define the upper limits of any varied spousal support within a range of \$2,000 to \$2,666 per month.

Example 10.5

The arithmetic becomes more complicated under the *with child support* formula. When the payor spouse's income increases, then child support will usually increase too, if requested. Let's go back once again to Ted and Alice in *Example 6.1*. At the time of the initial order, Ted earned \$80,000 gross per year and Alice earned \$20,000, after 11 years together. Their two children were aged 8 and 10 at that time. Spousal support under the formula was in a range from \$695 to \$1,286 monthly. Assume Ted's income subsequently increases, to \$100,000 gross per year. His child support for two children will rise from \$1,031 to \$1,240 per month.

If none of Ted's increase were taken into account for spousal support purposes, then Ted would pay child support of \$1,240 and the range for spousal support would remain unchanged. The result would be that Alice's percentage of family net disposable income would drop, as would her percentage of INDI, calculated using Ted's new income. At the other extreme, the full amount of the increase might be taken into account under the spousal support formula, generating a new and higher range of \$1,295 to \$1,961 per month.

10.4 The Recipient's Reduced Income After Separation

Suppose the recipient loses employment after the initial order, or suffers an illness or disability, or otherwise suffers a reduction in income. If either of the income-sharing formulas were applied, any reduction in the recipient's income after separation would lead to an increase in the spousal support payable. Once again, as with the payor's post-separation increase, some notion of causation seems to operate under the current law, requiring another complex, fact-based decision. While a formulaic solution is thus not possible, the same upper limit can be applied, i.e. the upper limit upon any increased spousal support ought to be the numbers generated by the formulas.

Example 10.6

In *Example 5.1*, Ellen was working full time and earning \$30,000 gross per year at the time of the initial determination. Assume Ellen has been reduced to part-time hours and now earns \$20,000 gross per year, while Arthur's income is unchanged at \$90,000.

The initial range of spousal support was \$1,500 to \$2,000 monthly, where it would remain if none of Ellen's income reduction were taken into account. The range could rise as high as \$1,750 to \$2,333 monthly if the full amount of Ellen's reduction were considered.

10.5 Crossover Between the Two Formulas

At the end of Chapter 6, under the *with child support* formula, we introduced the possibility of crossover between the two formulas. As children get older, finish their education or otherwise cease to be children of the marriage, then the child support obligation ends. What happens at that point? In our view, it should be possible for either spouse to apply to cross over from the *with child support* formula to the *without child support* formula, by way of application to vary or review. This crossover would be entirely consistent with the approach and language of s. 15.3 of the *Divorce Act*, especially s. 15.3(3). Section 15.3(3) provides that in cases where spousal support was reduced or not ordered because of the priority given to child support, any subsequent reduction or termination of child support constitutes a change of circumstances for the purposes of bringing an application to vary spousal support.

The crossover from the one formula to the other will only affect the **amount** of spousal support, but not the duration. Under the first, longer-marriage test for duration under the *with child support* formula, which applies to medium-to-long marriages with dependent children, the support recipient has already been given the benefit of length of marriage in the initial determination of the outside limit of duration.

Crossover situations will mostly arise in medium-to-long marriages, where the children are older at the time of the initial order. These are the cases where duration is driven by the length of the marriage, so that after child support ceases, spousal support will usually remain payable for a further period. In short-to-medium length marriages with dependent children, the outside limit of duration is the end of the child-rearing period, so no spousal support would be payable after child support has ended. Thus there is no potential for crossover between the formulas.

Often the application to vary, to cross over to the *without child support* formula, will come from the recipient spouse in a longer marriage. Consider the following example.

Example 10.7

Take once again the example of Ted and Alice in *Example 6.1*. At the time of the divorce Ted made \$80,000 gross per year and Alice earned \$20,000. They had been married 11 years with children aged 8 and 10 at separation.

Under the *with child support* formula, spousal support was initially in the range of \$697 to \$1,287 per month. Under the longer-marriage test for duration, the maximum duration was 11 years. Recall that the 11-year maximum was derived from the first test

for duration, based upon the length of their marriage, as that was longer than the time remaining to the end of high school for the youngest child (which was 10 years). If their two children pursued any post-secondary studies, then child support would still be payable and the *with child support* formula would continue to apply right to the end of the 11-year maximum for spousal support, although the amount of support would likely have changed based on improvements in Alice's employment situation.

If we change those facts slightly, however, then the potential for crossover emerges. If Ted and Alice had been married for 20 years at separation and thereafter their children finished school and child support terminated, Alice might wish to apply to vary, to cross over.

Under the *with child support* formula, the initial range of spousal support was \$697 to \$1,287 per month. Assuming the spouses' incomes remained the same, that range would be higher under the *without child support* formula: \$1,500 to \$2,000 per month for a 20 year marriage with that gross income difference.

If Ted and Alice had been together for 25 years, the new range after crossover would be even higher. The new range would be between \$1,875 and \$2,500 per month. These higher numbers flow from two factors: the impact of length of marriage upon the *without child support* ranges, and the additional ability to pay freed up by the absence of a child support obligation.

In drawing out these possibilities, we have assumed that both spouses' incomes and circumstances have remained unchanged over time, which is very unlikely. It would be much more likely that Alice's income would be higher, as she was working part time at the time of the initial order. Her higher income would likely have reduced her spousal support. But Ted's income might have gone up too, which may have affected his spousal support, depending upon the treatment of his post-separation income increase as discussed above.

Situations where the payor spouse would be the one applying to vary and cross over to the *without child support* formula would be fewer. Given the way the two formulas operate, for the most part, these would be cases where the marriage lasted 15 years or less. In these cases, the payor spouse would argue that the *without child support* formula, where the percentages are driven by the length of the marriage, would produce a lower range for spousal support compared to the *with child support* formula. We provide an example below.

Example 10.8

Let's start again with Ted and Alice, assuming they have the same incomes they did at the point of separation as in *Example 10.7*. Assume that their children pursue no post-secondary employment and that child support ends after 10 years. Spousal support will still be paid for another year.

Ted might apply to vary, arguing that spousal support should be fixed in the *without child support* range of \$825 to \$1100 if the initial support had been set at the higher end of the range of \$697 to \$1,287 monthly. Again, however, it must be remembered that incomes *will* change over time, which in turn will alter the stakes and the incentives involved in crossover questions.

10.6 The Payor’s Remarriage or Re-partnering

The payor’s remarriage or re-partnering usually is **not** grounds for a reduction in spousal support under the current law, apart from some exceptional cases. There is no need for any formulaic adjustment here.

10.7 The Recipient’s Remarriage or Re-partnering

The remarriage or re-partnering of the support recipient does have an effect on spousal support under the current law, but how much and when and why are less certain. There is little consensus in the decided cases. Remarriage does not mean automatic termination of spousal support, but support is often reduced or suspended or sometimes even terminated. Compensatory support is often treated differently from non-compensatory support. Much depends upon the standard of living in the recipient’s new household. The length of the first marriage seems to make a difference, consistent with concepts of merger over time. The age of the recipient spouse also influences outcomes.

In particular fact situations, usually at the extremes of these sorts of factors, we can predict outcomes. For example, after a short-to-medium first marriage, where the recipient spouse is younger and the support is non-compensatory and for transitional purposes, remarriage by the recipient is likely to result in termination of support. At the other extreme, where spousal support is being paid to an older spouse after a long traditional marriage, remarriage is unlikely to terminate spousal support, although the amount may be reduced.

An ability to predict in some cases, however, is not sufficient to underpin a formula for adjustment to the new spouse’s or partner’s income. Ideally, a formula would provide a means of incorporating some amount of gross income from the new spouse or partner, to reduce the income disparity under either formula. Any such incorporation could increase with each year of the new marriage or relationship. Where the recipient remarries or re-partners with someone who has a similar or higher income than the previous spouse, eventually—faster or slower, depending upon the formula adopted—spousal support would be extinguished. Where the recipient remarries or re-partners with a lower income spouse, support might continue under such a formula until the maximum durational limit, unless terminated earlier.

For the moment, however, we have been unable to construct a formula with sufficient consensus or flexibility to adjust to these situations. This is a fertile area for further discussion in the next stage of the project, especially as people become comfortable with the basic concepts of the advisory guidelines. For now, we have to leave the issues surrounding the recipient’s remarriage or re-partnering to individual case-by-case negotiation and decision making.

10.8 Second Families

Second families—or, more accurately, subsequent children—raise some of the most difficult issues in support law. We have already addressed prior support obligations for prior spouses and prior children as an exception under both formulas. We have also addressed remarriage and re-partnering. Under this heading, we consider a different issue, that of support for subsequent children.

Since the coming into force of the *Federal Child Support Guidelines*, courts have struggled with these issues in the child support setting, left largely to discretionary decision making, mostly under the undue hardship provisions in the *Child Support Guidelines*.³⁵ The issues do not get any easier when the potential conflict between child support and spousal support is added to the mix.

The first-family-first philosophy is the most common approach. On this view, the payor's obligations to the children and spouse of the first marriage take priority over any subsequent obligations. Most who adopt the first-family-first principle will acknowledge a narrow exception: where payment of first-family support would drive the second family onto social assistance or otherwise into poverty, relief may be granted, but only in extreme cases. Other than this narrow exception, first-family-first provides a simple rule for child and spousal support: no change for subsequent children.

If child support is the only issue, there is a strong second philosophy that runs through the cases: to determine child support in a way that treats all the payor's children equally. This is usually done through the use of household standard of living calculations. This equal-treatment-of-children approach gives greater weight to the interests of subsequent children, but gives no guidance to balancing the demands of spousal support to a first spouse vs. support for subsequent children. There is a tendency on this approach to give reduced weight to spousal support, given the concern for equal treatment of the payor's *children*. Reduced spousal support is often used as a means of adjustment between the households.

In the absence of any policy in the *Federal Child Support Guidelines* on this issue, it is difficult, if not impossible to articulate any related policy on spousal support vs. subsequent children. For now, again with some regret, we must leave the issues of quantum and duration to discretion or case-by-case decision making. Any changes in child support policy on second families would have important implications for spousal support issues. Perhaps during the next phase of the project, these second family issues can be discussed and some guidelines developed.

³⁵ See Rollie Thompson, "The Second Family Conundrum in Child Support" (2001), 18 *Canadian Journal of Family Law* 227.

11 CONCLUSION

For those of you who have read this document from beginning to end, we know that it has been a long and winding road to get here. This Draft Proposal is admittedly complex. But spousal support raises many difficult issues. There are no simple solutions and there is no “one big formula”. That is why the Draft Proposal contains two formulas: the *without child support* formula and the *with child support* formula. The formulas generate not precise numbers but ranges for both the amount and the duration of spousal support. The *without child support* formula becomes even more flexible with the use of restructuring. The *with child support* formula adjusts for different custodial arrangements. Then there are exceptions to both formulas.

The proposal introduces many new concepts and creates new terminology. We know there is much to digest. Some aspects of the proposal will only become clear when lawyers, mediators and judges actually begin to work with and apply these advisory guidelines to real cases. This is the best way to test the advisory guidelines—to find out if they are useful, and to discover strengths and weaknesses.

With the release of the Draft Proposal, the next stage of the project begins—one of discussion, experimentation and feedback. Some of you may have immediate comments and suggestions. Others may prefer to work with the advisory guidelines for a while before offering any feedback.

We know that the proposed advisory guidelines are not perfect and we welcome your suggestions for revision. But we also ask you keep in mind the alternative—the current system with all its uncertainty and inconsistency, and the unfairness that results. Our hope is that these advisory guidelines, however imperfect, can improve the current system by providing more certainty, predictability and legitimacy for spousal support determinations.

Over the next year, we will be speaking to many groups. Initially, the main purpose will be to explain the Draft Proposal. We will also inevitably receive comments and suggestions at these sessions. We will also receive written feedback at the addresses set out below at any time during the next year. Towards the end of the year, after spouses, lawyers, mediators and judges have gained some experience with the advisory guidelines, the sessions will involve more discussion and feedback. **We hope to receive your feedback by February 1, 2006.** Your comments, suggestions, criticisms and proposed improvements will be considered with a view to releasing a revised version of the spousal support advisory guidelines in 2006.

Please send your comments on the Draft Proposal in writing to:

Spousal Support Project
P.O. Box 2310
Station D
Ottawa, Ontario
K1P 5W5

The authors appreciate your interest in the project. Please be assured that all comments will be considered.

APPENDIX A

SPOUSAL SUPPORT CASES USING INCOME SHARING

This appendix lists, in chronological order by jurisdiction, cases that have used some form of income sharing in determining spousal support. Many of the cases use net disposable income calculations generated by computer software, but others rely on percentage distributions of gross income or other formulaic methodologies.

Alberta

Lutz v. Vanderlinde, [2001] A.J. No. 923 (Alta. Q.B.)
B.P.D.N. v. C.M.N., [2002] A.J. No. 230 (Alta. Q.B.)
Wiesner v. Wiesner, [2002] A.J. No. 1205, (2002), 325 A.R. 32 (Alta. Q.B.)
Thomas v. Thomas, [2003] A.J. No. 335 (Alta. Q.B.)
McKinney v. McKinney, [2004] A.J. No. 1149 (Alta. Q.B.)

British Columbia

Perris v. Perris, [1997] B.C.J. No. 1134 (B.C.S.C., master)
Lestage v. Lestage, [1999] B.C.J. NO. 601 (B.C.S.C., master)
Jessiman v. Jessiman, [2001] B.C.J. No. 2392 (B.C.S.C.)
Hill v. Magee (2002), 26 R.F.L. (5th) 95 (B.C.S.C.)
Gilsig v. Gilsig, [2003] B.C.J. No. 967 (B.C.S.C., master)
Dextraze v. Dextraze, [2004] B.C.J. No. 266 (B.C.S.C.)

Manitoba

Gale v. Gale (2000), 6 R.F.L. (5th) 157 (Man. Q.B.)

Nova Scotia

Lyttle v. Bourget, [1999] N.S.J. No. 298, (1999), 178 N.S.R (2d) 1 (N.S.S.C.)

Ontario

Andrews v. Andrews (1999), 50 R.F.L. (4th) 1 (Ont. C.A.)
Eddington v. Eddington, [2000] O.J. No. 1131 (Ont. S.C.J.)
Oddi v. Oddi (2000), 7 R.F.L. (5th) 164 (Ont. S.C.J.)
Beatty v. Beatty, [2000] O.J. No. 1755 (Ont. S.C.J.)
Adams v. Adams (2001), 15 R.F.L. (5th) 1 (Ont. C.A.)
Di Manno v. DiManno (2002), 33 R.F.L. (5th) (Ont. S.C.J.)
Masztics v. Masztics, [2003] O.J. No. 504 (Ont. S.C.J.)
Innes v. Innes (2003), 44 R.F.L. (5th) 113 (Ont. S.C.J.)
Snjaric v. Snjaric (2003), 48 R.F.L. (5th) (Ont. S.C.J.)
DiCicco v. DeCicco (2003), 45 R.F.L. (5th) 147 (Ont. S.C.J.)
Guido v. Guido, [2003] O.J. No. 5019 (Ont. S.C.J.)

Palmer v. Palmer, [2003] O.J. No. 4374 (Ont. C.A.)
Damer-Basso v. Basso, [2003] O.J. No. 5048 (Ont. S.C.J.)
Giguere v. Giguere (2003), 46 R.F.L. (5th) 184 (Ont. S.C.J.)
Brophy v. Brophy (2004), 45 R.F.L. (5th) 56 (Ont. C.A.)
Ramdatt v. Ramdatt (2004), 50 R.F.L. (5th) 155 (Ont. S.C.J.)
Horner v. Horner, [2004] O.J. No. 4268 (Ont. C.A.)

P.E.I.

Bastedo v. Bastedo (2000), 191 Nfld. & P.E.I.R. 67 (P.E.I.S.C. T.D.)

Saskatchewan

Stevens v. Stevens, [2004] S.J. No. 510, (2004), 252 Sask. R. 166 (Sask. Q.B.)
Rezansoff v. Rezansoff, [2004] S.J. No. 705 (Sask. Q.B.)

APPENDIX B
MEMBERS OF THE ADVISORY WORKING GROUP ON
FAMILY LAW

Justice David Aston (London, Ont.)

Lonny Balbi (family lawyer and past chair of CBA National Family Law Section, Calgary, Alta.)

Julia Cornish (family lawyer and past chair of CBA National Family Law Section, Dartmouth, N.S.)

Justice Robyn Diamond (Winnipeg, Man.)

Philip Epstein (family law lawyer, Toronto, Ont.)

Rhonda Freeman (Director, Families in Transition, Toronto, Ont.)

Marie Gordon (family lawyer, Edmonton, Alta.)

Miriam Grassby (family lawyer; Montreal, Que.);

Justice Richard LeBlanc (Corner Brook, Nfld.)

Justice Donna Martinson (Vancouver, B.C.)

Barbara Nelson (family lawyer; Vancouver, B.C.)

Justice Jennifer Mackinnon (Ottawa, Ont.)

M. Justin Levesque (mediator, Montreal, Que.)

APPENDIX C

DETAILED CALCULATIONS UNDER THE BASIC *WITH CHILD SUPPORT* FORMULA

In this Appendix, for those who want to know, we provide the details of how calculations are done under the basic *with child support* formula and how the spousal support numbers in the examples were generated. Some calculations were done with the benefit of current computer software. Some others had to be done manually, by iteration or trial and error. In completing these sample calculations, we have used the DIVORCEmate software and its terminology (although the numbers are almost identical using ChildView, even if the terms differ.) Once software developers have made the necessary programming changes the calculations required by this formula will be much easier.

The purpose of these calculations is to obtain a figure for **individual net disposable income** for each spouse, which is net income after adjustment for each spouse's child support obligations. What is left is a **pool** of net income to be divided between the spouses as individuals, by means of spousal support. Here we are presenting the details of a simple case, to illustrate the method and the calculations.

For the purposes of this explanatory appendix, we will use the numbers from *Example 6.1* involving Ted and Alice who reside in Ontario.

Ted and Alice have separated after 11 years together. Ted works at a local manufacturing plant, earning \$80,000 gross per year. Alice has been home with the two children, now aged 8 and 10, who continue to reside with her after separation. After the separation, Alice found work, less than full-time, earning \$20,000 gross per year. Alice's mother provides lunch and after-school care for the children, when required, for nothing.

Ted will pay the Ontario table amount for child support, \$1,031 per month. For simplicity, we assume there are no s. 7 expenses.

(1) Determine the Guidelines incomes of the spouses

We start with the Guidelines income of each spouse, essentially a gross income measure. Ted's gross employment income is \$6,667 monthly (\$80,000 per year), Alice's is \$1,667 monthly (\$20,000 per year).

(2) Deduct child support from the payor spouse's income

Ted will pay child support of \$1,031 per month for two children using the Ontario table amount. There are no s. 7 expenses and hence no contributions. The computer software automatically deducts Ted's child support payments from his net disposable income.

(3) Deduct child support amounts from the recipient spouse's income

The software includes Ted's child support payment in Alice's net disposable income, which is why we call this her *family* net disposable income. To obtain Alice's *individual* net disposable income, our first step must be to back-out or subtract this child support amount from Alice's net disposable income.

But that is not enough. Alice also contributes to the support of the two children, directly through expenditure of her own net income. In a formula, we have to capture that amount and we use Alice's *notional* table amount as a proxy measure for that contribution, as is explained in Chapter 6. In this case, that amount would be \$285 monthly, for two children, on an Ontario income of \$20,000. Thus, a second amount must be backed out or deducted on Alice's side, this notional table amount of \$285. If there were s. 7 expenses, we would also have to deduct Alice's contribution to those s. 7 expenses. These amounts have to be deducted manually, as the current software does not do this.

(4) Do not deduct government benefits and refundable credits from the spouses' incomes

After some uncertainty, we decided **not** to deduct **government benefits and refundable credits** from the spouses' incomes. These amounts are automatically included in the family net disposable incomes used by the software. For the most part, in practical terms, this means we did not deduct these amounts from the recipient spouse's income. As for payors, only low-income payor spouses obtain any of these (basically the GST credit) and most of those low-income spouses will not be paying spousal support.

We did consider backing out the child portion of these benefits, since most of these benefits are tied to the children in the recipient spouse's care, e.g. the Child Tax Benefit, part of the GST credit and the various provincial programs. For the reasons explained in Chapter 6, we decided not to do so.

In our case, only Alice has such benefits. If only the table amount of child support were paid and no spousal support, Alice's government benefits and refundable credits would be \$492 monthly (\$5,900 annually). By contrast, at the upper end of the spousal support range, \$1,287 monthly, those benefits and credits are reduced to \$230 monthly.

(5) Deduct income taxes and other deductions from each spouse's income

The software automatically deducts **income taxes and other deductions** from each spouse's net disposable income, adjusting for the amount of spousal support transferred. Federal and provincial income taxes are calculated, as well as employment insurance premiums and Canada Pension Plan contributions. In our

example of Ted and Alice, there are no deductions other than these statutory deductions. Other permissible deductions are discussed in Chapter 6.

This step and the next step are actually done together, as taxes and other deductions will vary as we iterate to obtain the appropriate division of individual net disposable income for spousal support purposes.

(6) Determine the spousal support required to divide INDI

The next step is to determine the amounts of spousal support required to leave each spouse with the desired amount of individual net disposable income (INDI) at each end of the formula's range, either 46/54 at the upper end or 40/60 at the lower end.

We can start with the calculation at the upper end of the range. On the payor's end, the software deducts child and spousal support and adjusts taxes for various proposed amounts. On the recipient's end, however, the child support amounts (each spouse's) have to be subtracted manually, but the software adjusts taxes as well as government benefits and refundable credits.

Ted starts with a gross income of \$6,667 monthly. Out of that will come \$1,031 child support, an estimate of \$1,287 spousal support, \$1,226 in taxes, \$217 in EI/ CPP deductions, leaving a **net monthly disposable income of \$2,906**. The software does all of these calculations automatically. This amount is also Ted's individual net disposable income.

Alice's family net disposable income is shown as \$3,792 monthly for herself and the children. Her gross monthly income is \$1,667, plus child support received, at \$1,031, plus spousal support at \$1,287, less taxes of \$322, plus benefits and credits of \$230, less EI/ CPP of \$101. To obtain Alice's individual net disposable income, we have to deduct child support paid by Ted of \$1,031 and then deduct her notional table amount of \$285, which leaves Alice with **\$2,476 monthly**.

If we add together the individual net disposable incomes of Ted (\$2,906) and Alice (\$2,476), the total is \$5,382. Alice's share would be \$2,476, or 46 percent of the total INDI of \$5,382.

Here I have used the final spousal support figure of \$1,287, but that number was only obtained by iterating, by trial and error, until the right result is obtained. This process is no different from what the spousal support calculator does with family net disposable income in the DivorceMate software.

For Ted and Alice, the low end of the range turns out to be \$697. According to the software, at that amount of spousal support, Ted's net disposable income is **\$3,283 monthly**. The software shows Alice's family NDI as \$3,505. But Ted's child support of \$1,031 and Alice's notional table amount of \$285 have to be deducted, to leave Alice with an individual net disposable income of **\$2,189 monthly**. This would leave Alice with \$2,189, or 40 percent of the total individual net disposable income of \$5,472.

APPENDIX D

SPOUSAL SUPPORT RANGES BY PROVINCE/TERRITORY UNDER THE *WITH CHILD SUPPORT* FORMULA

The ranges for spousal support generated by the *with child support* formula vary from jurisdiction to jurisdiction within Canada, because of differences in child support amounts, tax rates and provincial benefit programs. The interaction of these three factors can result in sizeable differences across jurisdictions under the formula, because the individual net disposable income (INDI) used by the formula is a very sensitive residual income measure.

For the purposes of this east-to-west cross-Canada trip, we have used *Example 6.1* in Chapter 6. Ted and Alice have separated after 11 years together. Ted earns \$80,000 gross per year, while Alice earns \$20,000 gross per year working part-time. There are two children, now aged 8 and 10, who reside with Alice. There are no section 7 expenses. Under the *with child support* formula, Alice, as the lower income recipient spouse, will receive spousal support that will leave her with between 40 and 46 per cent of the combined individual net disposable income (INDI).

Newfoundland and Labrador

Child support amounts: Ted \$973, Alice \$288 per month

Spousal support range: **\$625 to \$1,238** per month

Prince Edward Island

Child support amounts: Ted \$1,023, Alice \$295 per month

Spousal support range: **\$685 to \$1,264** per month

Nova Scotia

Child support amounts: Ted \$1,026, Alice \$283 per month

Spousal support range: **\$664 to \$1,248** per month

New Brunswick

Child support amounts: Ted \$1,005, Alice \$292 per month

Spousal support range: **\$664 to \$1,248** per month

Quebec

(Software calculations are not available at this time.)

Ontario

Child support amounts: Ted \$1,031, Alice \$285 per month

Spousal support range: **\$697 to \$1,287** per month

Manitoba

Child support amounts: Ted \$998, Alice \$274 per month

Spousal support range: **\$585 to \$1,199** per month

Saskatchewan

Child support amounts: Ted \$984, Alice \$278 per month

Spousal support range: **\$647 to \$1,230** per month

Alberta

Child support amounts: Ted \$1,062, Alice \$300 per month

Spousal support range: **\$607 to \$1,195** per month

British Columbia

Child support amounts: Ted \$1,027, Alice \$297 per month

Spousal support range: **\$750 to \$1,339** per month

Yukon Territory

Child support amounts: Ted \$1,057, Alice \$265 per month

Spousal support range: **\$731 to \$1,282** per month

Northwest Territories, Nunavut

Child support amounts: Ted \$1,095, Alice \$311 per month

Spousal support range: **\$705 to \$1,263** per month

GLOSSARY OF TERMS

Advisory guidelines: Guidelines, for the determination of support, that are not legislated or mandatory but non-legislated, informal and voluntary in nature, sometimes called “true guidelines” to distinguish them from the *Federal Child Support Guidelines*, which are legislated and mandatory. Generally a shorthand reference to the spousal support advisory guidelines proposed in this document.

Agreement: An agreement or contract between the spouses, usually in writing, setting out their respective rights and obligations during their marriage or upon marriage breakdown. The agreement may be negotiated by the spouses on their own, with their counsel, or through mediation. For the purposes of these *Advisory Guidelines*, the agreement would include terms affecting spousal support or child support or both, as well as terms concerning custody, access, parenting and division of family property. Usually the agreement will be in the form of a separation agreement. The agreement may or may not be incorporated into a “consent order.” (See also **consent order**.)

Ceiling: Under the *Advisory Guidelines*, to determine spousal support, the income level for the payor spouse above which the income-sharing formula no longer applies and any additional level of support is determined on a discretionary basis.

Child of the marriage: Under the *Divorce Act*, a child of the spouses who, at the material time, is under the age of majority, or is the age of majority or over but unable by reason of illness, disability, education or other cause, to support himself or herself. Included is a step-child or other child, for whom one parent or both stand in the place of a parent. Sometimes the term **dependent child** is used to describe a “child of the marriage.”

Child support: An amount of money paid by one parent to the other for the support of a child. Under the *Federal Child Support Guidelines*, there is a presumption that this amount consists of the “table amount” of support, determined by the child support tables, plus any contribution to section 7 “special or extraordinary expenses” such as child care, some education and medical expenses, or certain extracurricular expenses. (See also **table amount of child support** and **special or extraordinary expenses**.)

Computer software: Programs intended to assist family law lawyers, judges, mediators and others to calculate child support and spousal support. In Canada three software programs are currently available: DIVORCEmate, ChildView and, in Quebec, Aliform.

Compensatory support: Spousal support intended to compensate spouses for the economic consequences of the marriage. Compensatory support is typically awarded to recognize the economic losses one spouse has incurred as a result of the marriage and marital roles such as the loss of earning capacity, career development, pension benefits, etc. because of a decision to withdraw from the labour force for family reasons. Compensatory support may also be awarded, however, to compensate one spouse for economic benefits conferred on the other spouse during the marriage such as financial support for professional training. Compensatory support also includes spousal support intended to recognize the economic impact of post-divorce child-care

responsibilities on a custodial parent, most commonly limitations on employment. (*See also non-compensatory support.*)

Consent order: An order made by the court based upon the agreement of the spouses. The agreement may take the form of a separation agreement, minutes of settlement, or an agreement stated on the record in court.

Corollary relief: The technical term used by the federal *Divorce Act* to describe orders for custody and access, child support and spousal support.

Crossover: Under the *Advisory Guidelines*, refers to the situation where one spouse applies to vary spousal support after child support has ceased and the *with child support* formula is no longer applicable, to bring spousal support under the *without child support* formula.

Divorce: The proceeding in which legally married spouses are divorced under the federal *Divorce Act*. Often, the term is used to describe the divorce judgment granted at the same time that corollary relief is granted. The divorce takes legal effect 31 days after the divorce judgment. (*See also corollary relief.*)

Duration: When spousal support is paid on a monthly basis, the length of time for which spousal support is to be paid. Duration may be indefinite or time-limited. Duration may be changed upon subsequent review or variation. (*See also indefinite and time-limited.*)

Durational factor: Used in the *without child support* formula under the *Advisory Guidelines*, to determine the percentage of income to be shared, based upon the length of the marriage. The durational factor is 1.5 to 2 percent of the gross income difference for each year included in the length of marriage. (*See also length of the marriage.*)

Entitlement: This is the threshold question in spousal support of whether a spouse has any claim to spousal support at all. After entitlement has been established, issues of amount and duration can be addressed. The issue of entitlement can arise in any context where spousal support is in issue—interim support, initial orders or agreements for support, or reviews or variations of existing support orders.

Exception: Under the *Advisory Guidelines*, a recognized category of commonly recurring facts or circumstances that may justify a departure from the amount or duration of spousal support that would otherwise be determined under the formulas.

Family net disposable income: A measure of the net disposable income of the recipient spouse, which includes both spousal and child support received by that spouse. It measures the net disposable income of the whole family, including that of the spouse and the children, available to meet their needs. For the payor spouse, his or her net disposable income is the same whether described as family net disposable income or individual net disposable income, as both child and spousal support paid are always deducted. (*See also net disposable income and individual net disposable income.*)

Federal Child Support Guidelines: Regulations under the federal *Divorce Act* setting out the rules and tables that determine how much child support a spouse or parent must pay. Most provinces and territories have similar child support guidelines under their family laws, except for Alberta. Quebec has a different scheme of child support guidelines, which applies to determine child support for residents of Quebec.

Floor: Under the *Advisory Guidelines*, the income level for the payor spouse below which the formulas do not apply.

Formula: Under the *Advisory Guidelines*, the specific method of calculating the amount and duration of spousal support for a category of cases, including the percentages of income to be shared. (See also *with child support formula* and *without child support formula*.)

Global amount: Under the *Advisory Guidelines*, the total dollar amount of spousal support payable under the formula when amount is multiplied by duration—the monthly amount can be multiplied by the number of months of duration for which it is paid—to produce this global amount. No adjustment is made in this raw calculation for any discount, present value or tax adjustment.

Government benefits and refundable credits: A category of income that includes the federal Child Tax Benefit, the National Child Benefit, the GST credit, the refundable medical credit and various provincial benefit and credit schemes.

Gross income difference: Under the *Advisory Guidelines*, the difference between the gross or Guidelines incomes of the spouses, which forms the basis for the percentage division under the “without child support” formula. (See also **Guidelines income**.)

Grossed-up amount of child support: Child support is not tax deductible for the payor parent, which means that child support is a “net” amount, paid out of the parent’s after-tax income. In certain cases where gross income is used in the advisory guidelines, it is necessary to gross up the amount of child support, e.g. under the custodial payor formula or the exception for prior support obligations. To gross up child support, the parent’s marginal tax rate is used to calculate a before-tax or gross amount. Software programs can be used to assist in this calculation.

Guidelines income: A measure of gross income, as defined in the *Federal Child Support Guidelines*, including the adjustments found in Schedule III to those *Guidelines*.

Income sharing: A formulaic method used to determine the amount of support to be paid, either spousal support or child support, based upon the incomes of the parents or spouses, rather than expense budgets, budget deficits, or some other method.

Indefinite: Spousal support that has no limit on its duration but is subject to review or variation. Indefinite support does not necessarily mean permanent support, as the amount may be varied over time and the support obligation may even be terminated. Under the *Advisory Guidelines*, there are two tests for indefinite support: where the length of the marriage is 20 years or longer, or where the rule of 65 applies. (See also **rule of 65**.)

Individual net disposable income (INDI): A spouse's *individual* net disposable income reflects the net disposable income available to the spouse after deducting his or her contributions to child support. For the recipient spouse, individual net disposable income will be the net disposable income, including any spousal support received, after deducting the payor's child support paid as well as the recipient's notional table amount of child support plus any contributions by the recipient to special or extraordinary expenses for the child or children. For the payor spouse, his or her individual net disposable income will be the net disposable income after payment of both child support and spousal support. (*See also family net disposable income, net disposable income, notional table amount of child support, and special or extraordinary expenses.*)

Initial order: The order for custody, child support or spousal support made at the time of the divorce or, in some cases, the first order made thereafter. Sometimes referred to as an "original order" and to be contrasted with subsequent orders made on variation or review. Not to be confused with interim orders. (*See also interim support, variation and review.*)

Interim support: An order for child support or spousal support or both, made after a divorce proceeding has been commenced, based upon limited evidence and intended to operate on a temporary basis until the divorce and initial order for corollary relief. An interim support order can be revisited and revised at any time, up to and including the divorce and initial order for corollary relief. (*See also corollary relief, divorce and initial order.*)

Length of the marriage: Under the *Advisory Guidelines*, the total period of time the spouses have cohabited, including any periods of pre-marital cohabitation and ending at the time of separation.

Lump sum spousal support: Spousal support can be paid on a periodic basis, e.g., monthly amounts, or it can be paid in a lump sum, usually just one or a few payments. Lump sum payments are not tax deductible for the payor and are not treated as taxable income for the recipient.

Net disposable income: An after-tax measure of income, after inclusion and deduction of the amounts more fully described in Chapter 6. The starting point is Guidelines income, to which government benefits and refundable credits are added and from which income taxes and other deductions are then subtracted. For the payor spouse, child and spousal support paid is deducted. For the recipient spouse, spousal support will be included, but child support received may or may not be included, depending upon whether the measure is *family* net disposable income or *individual* net disposable income. (*See also family net disposable income, government benefits and refundable credits, Guidelines income, and individual net disposable income.*)

Non-compensatory support: Spousal support based on need and dependency, apart from any compensatory considerations. In its 1999 decision in the case of *Bracklow*, the Supreme Court of Canada held that the spousal support objectives of the *Divorce Act* were not exclusively compensatory, but also encompassed non-compensatory purposes.

Notional table amount of child support: The table amount of child support that a spouse would pay under the *Child Support Guidelines*, based upon the spouse's income, even though that amount is not actually being paid to the other spouse. The notional table amount is used as a

proxy or adjustment in the *with child support* formula to reflect the spouse's direct spending upon a child as a custodial parent. (See also **table amount of child support**.)

Prior support obligation: An obligation to pay child or spousal support for a child or spouse from a prior relationship, when determining child or spousal support to be paid upon the breakdown of a subsequent marriage. Prior support obligations are an *exception* under the formulas.

Property division: Each province and territory has its own statute that provides for the division of family or marital or matrimonial property between spouses upon separation or divorce. Court orders and agreements thus often deal with property division, as well as custody and access, child support and spousal support. Provincial/territorial laws vary in their details. Property to be divided will typically include the family home, its contents, pensions, motor vehicles, investments, bank accounts, etc. Typically, debts will also be considered as part of the property division.

Provincial/territorial family law: Under the Constitution, the federal government has legislative responsibility for divorce, reflected in the federal *Divorce Act*. The *Divorce Act* deals with custody, child support and spousal support for divorcing spouses. All other family law matters fall under the legislative responsibility of the provinces and territories. Provincial/territorial family law is set out in the statutes of each province or territory and the titles of those statutes vary from province to province, e.g. in B.C., the *Family Relations Act* or in Ontario, the *Family Law Act* and the *Children's Law Reform Act*. These provincial/territorial family laws deal with custody and support issues for separated but not divorced married spouses, as well as cohabiting partners and unmarried parents. The division of family property in all cases, including divorcing spouses, is a matter for provincial/territorial family law.

Quantum: A Latin term, used by lawyers and judges, which means the amount of support to be paid, as opposed to the duration of that support. "Quantum" thus usually refers to the monthly amount of spousal support.

Ranges: Under the *Advisory Guidelines*, the upper and lower limits for the amount of spousal support, or the duration of spousal support, as determined by the appropriate formula. The formulas generate ranges for amount and duration, rather than precise numbers as under the *Federal Child Support Guidelines*.

Restructuring: Under the *Advisory Guidelines*, the trading-off of amount against duration to restructure the outcomes generated by the formulas. Restructuring may be used in one of three ways: (1) to increase the amount of spousal support and shorten duration; (2) to extend duration and reduce the monthly amount; or (3) to formulate a lump sum by multiplying amount by duration. In restructuring, the global amount of support remains the same. (See also **global amount** and **lump sum spousal support**.)

Review: A proceeding, provided for by the terms of an order for support that involves the return of a support issue to the court for review, without the need for either spouse to prove a material change of circumstances. A review is thus different from a variation. A review term in a support order will usually direct the timing of the future review. It may attach conditions to be satisfied

by one or both of the spouses prior to the scheduled review. It may also direct the issues to be determined and the evidence to be provided at the review. (*See also variation.*)

Rule of 65: Under the *Advisory Guidelines*, one of the tests for indefinite spousal support under the *without child support* formula, calculated by adding together the age of the support recipient at the time of separation and the length of the marriage in years. (*See also length of marriage.*)

Shared custody: Defined in section 9 of the *Federal Child Support Guidelines* as a situation where each spouse “exercises a right of access to, or has physical custody of, a child [of the marriage] for not less than 40 per cent of the time over the course of a year.”

Special or extraordinary expenses: Expenses for children listed in section 7 of the *Federal Child Support Guidelines*, to which both parents will generally contribute based upon their respective incomes. Included in these expenses are: child care expenses; child-related medical and dental insurance premiums; certain health-related expenses; extraordinary expenses for primary or secondary education or specific educational programs; expenses for post-secondary education; or extraordinary expenses for extracurricular activities. The presumptive amount of child support to be paid under the *Federal Child Support Guidelines* consists of the table amount of child support plus the payor’s contribution to any s. 7 expenses.

Split custody: Defined in section 8 of the *Federal Child Support Guidelines* as a situation “where each spouse has custody of one or more children” of the marriage.

Spouse: Under the *Divorce Act*, spouse means a legally married spouse. Generally, the term “spouse” also includes a person who is a former spouse. At the time of writing, the *Divorce Act* definition of spouse had not been amended to include spouses in same-sex marriages but the term will encompass them if such an amendment is made. Under provincial/territorial family law, the definition of “spouse” varies, but generally has been extended to include certain “common law” or cohabiting couples who are not legally married. Provincial/territorial law may also extend support obligations to certain relationships other than spousal relationships, such as civil unions or same-sex partnerships.

Table amount of child support: The basic amount of child support that a payor parent is required to pay under the *Federal Child Support Guidelines*, based upon the child support tables. The table amount is determined by the payor’s *Guidelines* income, the number of children and the appropriate province/territory, usually the province/territory in which the payor spouse resides.

Time limit: Sets a specified or limited period of time during which the monthly amount of support is to be paid. (*See also duration.*)

Variation: An application by a spouse, after an initial order has been made, to vary or change the terms of a previous order, including the terms relating to child or spousal support. Variation applications are governed by section 17 of the federal *Divorce Act*. There may be a number of variation orders granted over time between spouses or former spouses. In order to obtain a variation, the spouse will have to establish a material change in circumstances since the making of the most recent previous order.

With child support formula: The formula under these *Advisory Guidelines* for calculating amount and duration of spousal support that applies in cases where there are dependent children and hence where there is a concurrent child support obligation to a child or children of the marriage. (*See also formula, child of the marriage and without child support formula.*)

Without child support formula: The formula under these *Advisory Guidelines* that applies in cases where there are no dependent children and hence where there is no concurrent child support obligation to a child or children of the marriage. This formula applies not only to marriages where there were no children of the marriage, but also to marriages where there were children, but the children are no longer dependent. (*See also formula, child of the marriage, and with child support formula.*)