

Spousal Support in Ontario: a Brief Update

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Appendix: Ontario SSAG Cases, January 2005 – Sept. 4, 2007

Apart from the Supreme Court of Canada's decision in *Leskun v. Leskun*, [2006] 1 S.C.R. 920, the most significant developments in spousal support in Ontario, and indeed, across the country, over the past year have taken place within the framework of the Spousal Support Advisory Guidelines. The Advisory Guidelines are proving to be a very helpful tool for structuring determinations of the quantum of spousal support and, to a lesser extent, duration. Furthermore, in jurisdictions where the Advisory Guidelines are frequently used, such as British Columbia, there has been a noticeable improvement in the overall quality of reasoning in spousal support cases, including the reasoning on issues such as entitlement which are not dealt with by the Advisory Guidelines. This is no surprise as use of the Advisory Guidelines ranges for quantum and duration as a benchmark requires thoughtful consideration of whether the facts of a case might justify a departure outside the ranges and also of how those facts determine placement within the ranges.

The companion paper that has been provided in your materials, Carol Rogerson and Rollie Thompson, "The Advisory Guidelines 31 Months Later", reviews the general developments across the country with respect to the SSAG. This paper is intended as a supplement to that paper, focusing specifically on spousal support developments in Ontario. It will begin with a review of the appellate court rulings in spousal support over the course of the past year, will then move on the use of the SSAG in Ontario, and will end with a focus on some of the current problem areas in spousal support in Ontario. In the appendix you will find summaries of all Ontario SSAG decisions updated to Sept. 4, 2007.

A. Ontario Appellate Court Rulings on Spousal Support

There were five appellate court rulings on spousal support in Ontario (Divisional Court and Ontario Court of Appeal) over the past year. Notably absent from the appellate rulings is any consideration of the Spousal Support Advisory Guidelines. The Advisory

¹ This is a slightly revised version of a paper prepared for the County of Carleton Law Association, 16th Annual Institute of Family Law, Ottawa, June 1, 2007, which was in turn a slightly revised version of a paper originally presented at the Law Society of Upper Canada *Family Law Summit, Toronto, May 10 - 11, 2007*.

Guidelines have already been considered by four provincial courts of appeal—British Columbia, New Brunswick, Quebec and Nova Scotia. Given Ontario’s size and the number of SSAG cases at the trial, it is somewhat surprising that the Ontario Court of Appeal is not included in this list.

None of the five Ontario appellate decisions have broad implications for the law of spousal support. By and large they involve either very fact-specific rulings or cases sent back for re-hearing and provide little by way of guidance to lawyers and judges grappling with spousal support issues on a daily basis.

The case that has received the most attention is *Martin v. Martin*, [2006] O.J. No. 3238, 272 D.L.R. (4th) 266 in which the Court of Appeal upheld a spousal support award of \$27,000 per month, the highest ever in Canada. The husband in that case was a coach in the National Hockey League and was paid a large portion of his salary into a retirement compensation arrangement that was intended to secure the family’s financial future when he no longer received such a high income. Although on one view an extremely atypical case because of the levels of income and support involved, *Martin* is the one appellate court decision in which the court did rule on an issue of principle—the treatment of regular savings from income by the spouses. Drawing on compensatory principles from *Moge*, the court held that the amount of monthly spousal support could take into account savings for future economic security in addition to the amount needed to meet current needs and standard of living, when such savings from income were a regular part of the family’s lifestyle before marriage breakdown. Such provision for savings was found not to be a redistribution of capital as the wife was dependent on the husband not just for her day-to-day needs, but also for her future financial security. In *Martin* one sees the court expanding the concept of “need” to include savings and provision for future economic security. While an important point of principle, it is one that will only be relevant in high income cases.

Lawson v. Lawson, [2006] O.J. No. 3179, 29 R.F.L. (6th) 8 was a significant case only because the Court of Appeal sent a spousal support case back for a re-hearing because the trial judge had provided no reasons for the quantum or duration of spousal support ordered. It was one of those trial decisions that are, unfortunately, all too common, in which it looked like the trial judge had just pulled a number out of the air—the very kind of case that calls out for the structure provided by the SSAG. Interestingly, on the facts of the case the interim spousal support award of \$540 restored by the Court of Appeal pending the re-hearing was within the range generated by the SSAG under the *with child support* formula (husband’s income imputed to be \$60,897; wife’s income assumed to be zero; child support for 3 children \$1194/mo; SSAG range for spousal support \$523-\$780). The trial judge had ordered spousal support of \$465 per month, below the range.

In *Ierullo v. Ierullo*, [2006] O.J. No. 3912, 32 R.F.L. (6th) 246 the Court of Appeal overturned the order of a motions judge reducing the wife’s spousal support on a review application, concluded that the issues could not be determined on affidavit evidence and sent the case back for a full trial. The Court of Appeal’s judgment deals obliquely with

the issue of the impact of custodial responsibilities on the support recipient's obligation to pursue self-sufficiency. In *Ierullo* the parties had separated in 2001 after 16 years of marriage. There were three children of the marriage, the two youngest being 6 and 12 at the time of separation. After separation the wife commenced nursing studies. A final consent order in 2003 provided for spousal support of \$2,200 per month, reviewable after September 2004. On the husband's application for a review the motions judge reduced the wife's spousal support from \$2,200 to \$1,150 per month, based upon the husband's income of \$97,000 and an income of \$25,000 imputed to the wife based on what she could earning following her graduation as a nurse. The wife claimed to be unable to complete her nursing studies because of health issues and child-care responsibilities and a lack of assistance from husband. The husband, on the other hand, claimed that the wife's failure to complete her studies was due to a lack of good faith and commitment on her part. The Court of Appeal found that the case involved significant credibility issues that could not be determined on a motion. Also, citing *Moge*, the Court emphasized the need to consider all the relevant factors, not only the obligation to pursue self-sufficiency, but most importantly the impact of child care responsibilities on the custodial parent. The court also noted several other changes in the parties' financial circumstances since the time of the final order, including increased expenses on the wife's part and the husband's increased income and his new spouse's contribution to household expenses. What result would the SSAG have suggested as a starting point in this case (not taking into account the husband's cohabitation)? Taking the husband's annual income as \$96,000 and assuming child support for three children at \$1778/mo, if the wife's income is taken as zero the spousal support range under the *with child support* formula would be \$1155 to \$1546 per month. This is lower than the initial amount set by the consent order, although the higher amount of the consent order could involve an element of restructuring, *i.e.* front-end loading an award, to facilitate a re-retraining program which will hasten the achievement of self-sufficiency. If an income of \$25,000 were imputed to the wife, the range would be \$324 to \$1046 (again lower than the actual order by the motions judge on review). Quantum patterns in Ontario with respect to the SSAG will be considered in more detail below.

Two appellate decisions decided within weeks of each other dealt with the on-going issue of the appropriateness of time limits on spousal support, coming to different results and providing little by way of guidance. In *Walsh v. Walsh*, [2007] O.J. No. 1115, 2007 ONCA 218, released on March 19, 2007, the Court of Appeal upheld the order of an applications judge stepping down and ultimately terminating spousal support over a six month period. In *Walsh* the parties had separated in 1995 after a nine year marriage and the wife had been left with custody of two young children. The applications judge's order resulted in the termination of spousal support after eleven years. The termination of spousal support was found justified by the "flagrant" conduct of the wife who had failed to make efforts to find employment and had also devoted herself to the relentless pursuit of acrimonious litigation against the husband since the divorce (she had previously been before the Court of Appeal on the issue of retroactive child support). The wife was highly educated and had enjoyed a well-paid career in the financial services sector prior to the parties' adoption of their two children. At trial in 1997 the trial judge had found that the

wife could find a job paying between \$60,000 and \$100,000 per year within 4 to 6 months.

In upholding the decision of the applications judge, the Court of Appeal found that he had considered all the factors, including the length of marriage, the history of proceedings and the conduct of the wife, the availability of child support (the husband's income had increased significantly and he was currently paying child support of \$5560 per month), the wife's failure to produce medical evidence to document her alleged inability to work; and the parties' intentions that the wife would stay at home only until the children were in school. The Court was unable to find that the applications judge had placed an unreasonable emphasis on the self-sufficiency factor. *Walsh* does show that the obligation to pursue self-sufficiency will not be ignored by courts and that spousal support, contrary to prevailing beliefs in Ontario, may sometimes end. However, the case cannot be separated from its facts, including the wife's "flagrant" conduct, her high earning-potential, and the large amount of child support being paid.

More typical of the treatment of time-limits and the termination of spousal support in Ontario is the April 12, 2007 decision of the Ontario Divisional Court in *Foran v. Foran*, [2007] O.J. No. 1340 (per Leitch, Lane and Hambly JJ.). The case involved a 25 year marriage with two adult children. A 2003 order reflecting the terms of a separation agreement provided for spousal support of \$2700 per month with an automatic review after 24 months at either party's request. In 2005 the husband applied for a review seeking the termination of spousal support on the basis of a decrease in his income because of health problems, the fact that the wife was working and earning approximately \$25,000, and the need to avoid double-dipping in relation to his business. His argument about the wife's income ignored the fact that income of \$30,000 had been imputed to the wife at the time of the settlement. He also argued that it was "double-dipping" to consider the income from his business, as the wife had shared in the value of the business under the property division, a value which reflected the ability of the business to generate income. Since 2003 the husband's income had actually increased from \$73,201 to \$105,000, but he led medical evidence that he was under significant stress because of cardiac problems. The reviewing judge decreased spousal support by 50% (25% for the anticipated decrease in the husband's income and 25% for double-dipping) to \$1350 for another 4 years.

The Divisional Court set aside the order, finding insufficient evidence before the reviewing judge of circumstances to justify a time-limited order. Citing from Himl J. in *Schmuck v. Reynolds-Schmuck* (1999), 50 R.F.L. (4th) 429 (Ont. S.C.J.), the Divisional Court repeated what has become a mantra in Ontario--that following *Moge* time-limited orders are made only in unusual cases. There is also a reference to passage from one of Professor Jay McLeod's commentaries in which he stated that courts should not impose a time limit unless satisfied that the dependent will achieve self-sufficiency during the time period and in which he also noted that self-sufficiency is not to be measured simply by finding employment but by the redress of career disadvantage. The Divisional Court found that since amount and duration were intertwined, the appropriate remedy was to set aside the entire order, leaving it open to the parties to bring another review.

On the facts of *Foran* —a long traditional marriage with a strong compensatory claim to spousal support and thus, in terms of Professor McLeod’s comments, continuing career disadvantage from the marriage—a time limit seems clearly inappropriate. But it would have been helpful if the Divisional Court had talked more about these specific issues, rather than simply casting doubt upon the legitimacy of time-limited orders in general. As will be discussed in more detail below, the aversion to time-limited orders in Ontario is linked to a more general unwillingness to deal with issues of the duration and termination of spousal support. Time-limited orders do have an important role to play in spousal support, particularly in shorter and medium length marriages involving non-compensatory support where the purpose of spousal support is to provide the recipient a transitional period to adjust to a lower standard of living. Ontario law often appears to have lost sight of this, in contrast to the approach in other provinces.

B. The Spousal Support Advisory Guidelines in Ontario

Ontario has generated the second highest number of spousal support decisions considering the Advisory Guidelines—81 out of the 359 decisions we have collected as of Sept. 12, 2007. The Ontario cases can be found in Appendix III of the version of the “31 Months Later” paper included in your materials.

In over 60% of the cases the *amount* of support awarded was within the ranges generated by the SSAG. The level of conformity is even higher if one includes a number of cases in which the awards, while seemingly inconsistent with the initial ranges for amount generated by the formulas, are consistent with the global amounts generated by the Advisory Guidelines if restructuring is considered (which is typically ignored). A significant number of the “deviations” involve one of the following:

- non-application of the Guidelines because of a lack of entitlement or an agreement;
- facts clearly falling within an identified exception, such as disability or low income; or
- the kind of unusual and atypical facts that predominant in litigated cases.

In terms of placement within the ranges, generally, Ontario tends to inhabit the higher end of the ranges for amount, although there is a significant degree of regional variation within the province.

The *without child support formula* covers a wide array of fact situations, but the majority of the reported cases falling under this formula involve long marriages. In the Ontario cases the amounts of support in long marriages are generally consistent with the formula ranges, not only in long traditional marriages where the children are grown up, but also in long marriages where there were no children; see *Foley v. Girard*, [2006] O.J. No. 2496 (gay couple together 20 years), *Colquhoun v. Colquhoun*, [2007] O.J. No. 9 (20 year marriage, no kids) and *Briere v. Saint-Pierre*, [2007] O.J. No. 2926 (24 year same-sex relationship). There is admittedly somewhat less consistency in short and medium length marriages which entail a much wider range of factual variation. In some cases the SSAG amounts are seen as too low, but these conclusions often fail to consider

restructuring which does allow for “front-end loading” awards by increasing quantum: see *Lopez v. Tarnocai*, [2006] O.J. No. 5318 (Herman J.) and *Palmer v. Arena*, [2006] O.J. No. 1811 (Gauthier J.) (uses the *custodial payor* formula which is built upon the *without child support* formula). In *Simpson v. Grignon*, 2007 CarswellOnt 3095, [2007] O.J. No. 1915 (S.C.J.) Mackinnon J. did expressly consider restructuring, but found that even with restructuring the SSAG amounts (but not duration) were “too low” after a 4 ½ year marriage where the wife was unable to work because of mental health problems. However, there was no reference to the disability exception, which could also have applied. A recent short marriage case of note where the award was consistent with the Advisory Guidelines in both amount and duration is *Jones v. Wilson* [2007] O.J. No. 896 (Thibideau J.) (parties cohabited for 6½ years; husband earning \$50,000 and wife \$15,000; award of \$350 (low end of range) for 3 years).

The cases under the *with child support formula* tend to be more homogenous and here over 70% of the Ontario SSAG cases fell within the formula range for amount. Several of the deviations were cases involving custodial payors. There are, however, a handful of cases where Ontario courts were willing to award amounts somewhat higher than the Guidelines formula ranges; see *Manning v. Bain*, [2007] O.J. No. 2816 (Belch J.) (order higher than range. Leaving wife with 62.2% of NDI, but disputes about husband’s income and amount ordered in range if use wife’s higher estimate of husband’s income); *Yeates v. Yeates* 2007 CarswellOnt 2107 (Greer J.), *Skirten v. Lengyel*, [2007] O.J. No. 679 (Planta J.), *Vynnk v. Baisa*, [2007] O.J. No. 274 (Klowak J.) (61% of NDI; but here the award was time-limited and could be understood as a restructured award falling within the global range), and *Smylie v. Smylie*, [2006] O.J. No. 4716 (Planta J.) (60% of NDI to wife).

What is most striking about the use of SSAG in Ontario is the number of judgments which do not make reference to them. The use of the SSAG by judges in Ontario varies significantly. In some courts, presentation of the SSAG calculations is expected and judgments consistently refer to the SSAG; see *Elieff v. Elieff*, [2007] O.J. No. 1802 (S.C.J.) (Perkins J.) (case adjourned for SSAG and NDI calculations) and *Celotti v. Celotti*, [2007] O.J. No. 2538 (Olah J.) (parties agree to only look at NDI calculations, court rejects and requires SSAG calculations). And *Damian v. Damian*, 2007 CarswellOnt 3169 (Ont. S.C.J.) (Pazaratz J.) illustrates an interesting extension of the use of the SSAG in the courtroom (to determine the reasonableness of the wife’s spousal support offer in a costs determination).

However, the use of the SSAG is not pervasive in Ontario courtrooms. While I have not done a careful survey, my anecdotal impression is that the SSAG are referred to in only about half of the reported spousal support decisions in Ontario. This is not to say that the results in these cases are not consistent with the SSAG—they may well be—but simply that the SSAG are not mentioned. It would be a mistake to assume from non-use by judges that the SSAG are not being used by lawyers. Our series of recent consultations with groups of lawyers across Ontario have shown that many are regularly using the SSAG as a tool in discussions with clients and negotiations with other lawyers. But somehow, this does not translate into regular use in the courtroom by lawyers or judges

or at least, on judges' part, use that is being explicitly acknowledged in their written reasons (it is possible that some judges look at the SSAG calculations but do not explicitly refer to them).

Several factors contribute to the degree of non-use of the SSAG by Ontario judges and by lawyers in their court-room arguments:

- the lack of appellate endorsement of the Advisory Guidelines, in contrast to British Columbia or New Brunswick;
- the mix of specialist and generalist judges dealing with family law issues specialist family judges have tended to shown more willingness to consider the Advisory Guidelines than generalist judges; and
- the well-entrenched use of DIVORCEmate (more specifically SUPPORTmate) and NDI calculations in the determination of spousal support in Ontario prior to the release of the Advisory Guidelines, a methodology some judges and lawyers prefer to rely upon exclusively.

The pervasive use of SUPPORTmate calculations and the NDI figures that they generate, to the point where many lawyers and judges refer to the “DIVORCEmate guidelines” or the “SUPPORTmate guidelines”, is a peculiar feature of Ontario spousal support law that requires some comment. Even in spousal support cases in Ontario where the SSAG are considered, there is often a comparison with the NDI calculations; see *Lopez v. Tarnocai*, [2006] O.J. No. 5318 (Herman J.) and *Dunning v. Dunning*, [2006] O.J. No. 1927 (Wood J). This in and of itself is not problematic. A hard look at NDI numbers is important. However, while net household income comparisons at various levels of spousal support are seen as a useful piece of information in spousal support determinations in other parts of the country too², they are not treated as “guidelines”. The transformation of NDI calculations into “guidelines” in Ontario seems to flow from the Ontario Court of Appeal decision in *Andrews v. Andrews* (1999), 50 R.F.L. (4th) 1 which endorsed an award of spousal support that, when combined with child support, resulted in an allocation of 60% of the family’s net disposable income to the custodial parent in a case involving three children and a high payor income.

The use of NDI calculations as a spousal support “guideline” is rife with problems. First, the NDI figures are simply numerical calculations of the net income consequences of different hypothetical amounts of spousal support.. There are no “SUPPORTmate guidelines”.

Second, the appropriate distribution of household income between the spouses is an issue of principle, the answer to which is not contained in the calculations themselves and which has not been the subject of any explicit, sustained analysis. Even in cases involving minor children, while some seem to read *Andrews* as establishing a general norm of a 60/40 allocation of NDI, others see it as an atypical case establishing a ceiling and not a generally applicable guideline. Although there is some general sense that child

² The terminology in *Childview* is “net monthly cash flow”.

and spousal support together should leave between 50 and 60 per cent of the family's NDI in the hands of the recipient, this establishes a very wide range. We have found no consensus amongst lawyers or judges on any narrower, more specific ranges in Ontario, or even in any particular area within Ontario.

Furthermore, the bundling together of child support and spousal support, while intuitive to some, masks the impact of spousal support and the principles for its determination. We have argued that the SSAG *with child support* formula, which unbundles child and spousal support through the use of INDI (*individual* net disposable income after backing out child support) rather than NDI (which is essentially *family* net disposable income) offers a much more sophisticated formula that adjusts better across income levels and numbers of children.³ In a typical two-child case in Ontario, the amounts of spousal support generated by the SSAG *with child support formula* leave the custodial parent with 52% to 58% of NDI. The results will change with different numbers of children, about 48 to 53 per cent of NDI for one child or 55 to 61 per cent for three children.⁴

The problems with the use of NDI calculations as a “guideline” are exacerbated when their use is extended to cases without minor children. In medium-to-long marriages, some Ontario lawyers suggest that the recipient spouse should be left with somewhere between 40 and 50 per cent of NDI after payment of spousal support, again a very wide

³ This is what we wrote in the *Draft Proposal*:

Thanks to ... 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. 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 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.

⁴ Some lawyers have even suggested to us that the “SUPPORTmate guidelines” suggest that the NDI proportions should be reversed in cases where the custodial parent is paying spousal support to the lower income non-custodial parent, so that the custodial payor parent should retain 60 per cent of the NDI and the non-custodial recipient of spousal support should be left with 40 per cent of NDI after payment of spousal support. This approach reflects some of the same difficulties identified for *without child support* cases.

range. But, upon further inquiry, there turns out to be simply no agreement on the appropriate distributions of NDI in different kinds of cases *without child support*. The chosen distributions often appear to be drawn out of thin air, particularly in cases that depart from the paradigm of the long traditional marriage where a norm of equalization often seems to operate.

C. The Spousal Support “Trouble Spots” in Ontario: Duration and Entitlement

Generally, quantum is not a major issue in spousal support cases in Ontario. The problematic issues are *duration* and *entitlement*, which are closely intertwined. Let’s begin with duration, which is the more widely-acknowledged problem.

1. Duration

There is great uncertainty in Ontario about when spousal support should end. As noted in my earlier discussion of the *Foran* decision of the Divisional Court, time -limits are not favoured by the Ontario case law, and most spousal support orders, apart from short marriage cases, involve indefinite orders. The ranges for duration provided by the SSAG under the *without child support* formula thus often tend to be ignored at the stage of initial orders.

As discussed with reference to *Foran*, the concept of the transitional support order in cases involving non-compensatory support claims seems to have become lost in Ontario. A couple of examples to the contrary, where time limits have been imposed, involved shorter marriages: see *Palmer v. Arena*, [2006] O.J. No. 1811 (Gauthier J.) (applying the *custodial payor* formula which is built upon the *without child support* formula; spousal support for husband limited to 3 years after 8 year marriage) and *Jones v. Wilson* [2007] O.J. No. 896 (parties cohabited for 6½ years; husband earning \$50,000 and wife \$15,000; award of \$350 (low end of range) for 3 years).⁵

The *with child support* formula under the SSAG does not generate time limits for initial orders and provides for indefinite orders, subject to maximum outside time-limits through variation and review. There are a couple of Ontario cases where courts have imposed time-limits in such situations: see *Vynnk v. Baisa*, [2007] O.J. No. 274 (Klowak J.) (time-limited order to provide for period of education; amount higher than SSAG range but time-limited and within global range if restructuring taken into account) and *Dunning v. Dunning*, [2006] O.J. No. 1927 (Wood J.) (6 year marriage with 2 children; duration indefinite but to cease when youngest child turns 18).

With most initial spousal support orders in Ontario being indefinite in form, issues of duration are left to be dealt with through payor requests for termination in the context of subsequent reviews and variations. In these contexts, Ontario law provides

⁵ See also *Reitsma v. Reitsma-Leadsom*, [2005] O.J. No. 5577 (Mazza J.) which involved a 7 year marriage. The termination of the award after 7 years under the SSAG was acknowledged but not followed because of the wife’s disability.

little guidance, with the resulting sense in Ontario that once a support order is made it is likely to be forever if there continues to be a significant income gap between the payor and recipient. The most a payor can hope for over time is a reduction in amount. Here the link between the problems in Ontario law with duration and the problems with entitlement becomes clear. Requests for termination of support essentially raise entitlement issues. Because there is almost no analysis of entitlement in Ontario, there is no basis (apart from the income disparity between the parties disappearing) on which to determine when a spousal support order has filled its purpose and can appropriately be terminated.

2. Entitlement

Ontario spousal support decisions stand out from those in the rest of the country by the absence of any serious analysis of the basis for entitlement to spousal support. The proper use of the Spousal Support Advisory Guidelines requires an analysis of entitlement. More to the point, even without the use of the Guidelines, there must be a finding of entitlement before a court moves on to amount and duration.

In some cases the entitlement analysis will determine that there is no entitlement to spousal support and hence that the SSAG are not even applicable. Admittedly, under current spousal support law the basis for entitlement is broad. Typically a significant disparity in income will create an entitlement to some support, at the very least of a time-limited, transitional nature, if not on a compensatory basis then on the non-compensatory basis of need or hardship created by the loss of the marital standard of living. There will be cases where there is neither disadvantage caused by the marriage nor need and judges and lawyers should remain attuned to this possibility. *Eastwood v. Eastwood*, 2006 CarswellNB 655, 2006 NBQB 413 (Clendening J.) is a recent New Brunswick decision which raised the issue of entitlement (25 year marriage with no children; parties having similar incomes during the marriage but husband moves to Toronto and income increases; no entitlement to support; similar standards of living.)

Recent Ontario law in fact also offers a couple of examples of no entitlement. The first is *Rezel v. Rezel*, [2007] O.J. No. 1460 (S.C.J.) which involved a short second marriage. Both parties were computer analysts at the point of separation, but the wife subsequently lost her job and sought spousal support. Justice Harvison-Young found no entitlement to support, and hence no application of the SSAG, on the basis of the short length of the marriage; the absence of any merger of economic lives and the fact that the wife not serious about return to work. A second entitlement case is *Lamothe v. Lamothe* (2006) 2006 CarswellOnt 8150 (Ont. S.C.J.) in which a husband claimed spousal support after the breakdown of a 22 year marriage with two children. The husband had quit work early in marriage because of an injury and did not return to full-time employment until after separation. The parties shared custody of their youngest child. The husband's annual income was \$36,124 and he was cohabiting with a woman who contributed \$300 per month to household expenses. The wife was a teacher earning \$90,000 who had paid all children's educational expenses since separation. She had paid the husband spousal support since the separation in 2004, first in the amount of \$800 per month later increased

to \$1000 per month. Gauthier J. terminated spousal support on the basis of no entitlement. He found that the husband had no compensatory claim as there was no issue of reduced earning capacity related to marriage and moreover the husband had failed to contribute financially to the relationship for several years when able to do so. With respect to non-compensatory support, Gauthier J. found that there was no significant change in the husband's standard of living from the marriage. Gauthier J. also noted that the wife was bearing all of childcare expenses, including the s. 7 expenses and that the asset that was the basis of the equalization payment to the husband (the wife's pension) was not accessible to wife. Perhaps not surprisingly, *Lamothe* shows that a serious analysis of entitlement is more likely in cases where a husband is claiming spousal support than in the typical case where the claimant is the wife.

What Ontario lawyers and judges fail to recognize is that entitlement is not simply a threshold issue of determining whether any spousal support at all is to be paid. An analysis of the basis of entitlement is a necessary underpinning to the determination of quantum and duration in cases where spousal support is awarded. The compensatory and non-compensatory bases for spousal support need to be delineated as they generate different support outcomes.

The SSAG reflect these different bases. For example, the *without child support* formula reflects non-compensatory support considerations in its application to cases of short and medium length marriages with no children while the *with child support formula* is largely compensatory. In cases of long marriages under the *without child support* formula the awards reflect a mix of compensatory and non-compensatory claims. Effective use of the SSAG requires this delineation both to determine placement within the ranges and to determine whether or not the case justifies a departure from the ranges.

Entitlement issues can also arise in variation and review cases where there are changes in the spouses' incomes or issues of remarriage. For example, the repartnering or remarriage of the recipient may justify termination of support in some cases. A post-separation increase in the income of the payor may raise issues of entitlement to share in that increase by the recipient.

The SSAG cases from other provinces include some excellent examples of reasoning on issues of entitlement from which Ontario lawyers and judges could learn. See for example, the following:

- *Kelly v. Kelly* [2007] B.C.J. No. 324, 2007 BCSC 227 (Barrow J.) (17 year relationship, no children, support terminated 11 years after separation; case involves remarriage and significant increase in husband's income after separation; good analysis of non-compensatory basis for support and when it terminates)
- *Rezansoff v. Rezansoff*, [2007] S.J. No. 37, 2007 SKQB 32 (Sandomirsky J.) (6 year second marriage with no children, wife 60, husband 67; total duration of spousal support 4 years; good analysis of non-compensatory basis for support and extent of entitlement);

- *J.W.J.McC. v. T.E.R.*, [2007] B.C.J. No. 358, 2007 BCSC 252 (Sinclair Prowse J.) (19 year traditional marriage with 3 children; both parties remarried; husband brings application to terminate support; good analysis of continuing compensatory basis for support; likely termination when wife turns 60, 14 years after separation);
- *D.B.C. v. R.M.W.*, [2006] A.J. No. 1629, 2006 ABQB 905 (Topolniski J.) (13 year marriage; two children with wife; husband worked in investment industry in Calgary; during marriage parties left Calgary for Nelson B.C. for 6 years, lived on investments, and home-schooled children; husband then earning \$80,000; after separation, husband returned to Calgary investment work, earned \$213,553 in 2004; child and spousal support based on that income; review January 2008; husband earning over \$700,000; wife's application for increased spousal support dismissed; no entitlement to share of post-separation increase; no contribution by wife to increase; not long traditional marriage, husband out of work force for 6 years before separation)

Appendix

SPOUSAL SUPPORT ADVISORY GUIDELINES CASE SUMMARIES: ONTARIO SSAG DECISIONS

[Note: this is a complete list of all Ontario SSSAG cases from January 2005 to Sept. 4, 2007. For updates see the SSAG website at:

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

]

A. Appeal Cases

no cases

B. The Without Child Support Formula

Seguin v. Seguin, [2007] O.J. No. 2962 (Ont. S.C.J.) (Hennessy J.)

28 year traditional marriage; 3 grown children, separation 2004

Husband retires in 2004, mainly pension income, \$4,392.59 per month

Wife some part-time employment during marriage, but health problems and unemployed since 2003

Property division: pension to be divided at source, w to get 50% of pension income on monthly basis

Spousal support; order for \$1922/mo until pension division,; after pension split at source, \$1922 to made up from pension split plus top-up; middle of SSAG range, leaves wife with 46.5% of income

Briere v. Saint-Pierre, 2007 CarswellOnt 4763, [2007] O.J. No. 2926 (R. Smith J.)

Together 24 years, common-law same-sex couple

Applicant school principal, earns \$100,000

Respondent supply teacher earns \$22,000, could work full-time to earn \$32,000

Respondent had left previous employment, to run two restaurants owned by them, failed

Joint condominium to be sold

Range stated with mandatory pension contribution deduction for applicant of \$8,256,

RRSP deduction of \$5,000 for respondent, incomes \$100,000 and \$24,000: \$2,265-\$3,020

Interim spousal support of \$2,000/mo., if \$32,000 to respondent and pension deducted

[Range if \$100,000/\$32,000, no pension deductions: \$2,040-\$2,720]

[Range if \$100,000/\$32,000, pensions deducted: \$1,942-\$2,589]

Leblanc v. Leblanc, 2007 CarswellOnt 4270 (Rogin J.)

Married 26 years, 3 children adults, one 35-year-old disabled adult, with wife

1996 order: \$300/mo. child support, \$1,600 indexed (now \$2,163/mo.) spousal support

Husband applies to vary, then earning \$108,000, now retired at 62, child support continue at \$300

Pension \$50,000, unequalized portion \$27,256

Wife works part-time at Sears still, \$12,000, CPP \$4,560, \$16,560 total

Husband argues Boston, range \$340-\$453/mo. on unequalized pension, SSAG rejected by judge

Spousal support varied to \$1,000/mo.

[Range on full husband pension: \$1,045-\$1,393]

Simpson v. Grignon, 2007 CarswellOnt 3095, [2007] O.J. No. 1915 (S.C.J.)(J. Mackinnon J.)

Married 4 ½ years, no children, separated December 2005

Husband computer engineer, earns \$78,202

Wife 45, mental health problems, depression and anxiety, deterioration in 2005

Wife was receiving ODSP at marriage, can't work

Wife in matrimonial home, to be sold and equal division, net proceeds \$34,000 each

Since separation, husband paid \$2,228/mo. mortgage/taxes/utilities, plus \$500/mo.

Range \$489-\$652 too low, even with restructuring, but duration range okay
Non-compensatory basis for support
Husband to pay \$2,228 plus \$600 for 3 months, wife then to vacate house
Spousal support increased to \$1,200/mo. until house sold
Husband to pay \$2,228 for house (half to be reimbursed from wife's proceeds on sale)
Spousal support then to be paid at \$1,700/mo. to December 2009 (4 years total)
[No reference to disability exception, interim circumstances exception]

Rezel v. Rezel, [2007] O.J. No. 1460 (S.C.J.)(Harvison Young J.)
Married 5 years, second marriage, wife 61, husband early 60's
Both computer analysts, earning \$100,000 at separation in 1998
Wife loses job in 2004, seeks spousal support
Husband uses Guidelines to argue that duration ended, delay
Short marriage, no merger of economic lives, wife not serious about return to work
No entitlement

Jones v. Wilson, [2007] O.J. No. 896, 2007 ONCJ 93 (Thibideau J.)
Together 6 ½ years, wife 55
Cohabited more than 3 years in marital relationship, despite husband's arguments
Husband earns \$50,000 as long-haul truck driver
Wife earns \$15,000 as cleaner, teenage son
Guidelines ranges provided for different periods of cohabitation
Range: \$306-\$408 for 3 to 6 years, spousal support ordered \$350/mo. for 3 years

Lewis v. Lewis, [2007] O.J. No. 742 (S.C.J.)(Aitken J.)
Married 29 years, husband 50, wife 47, 3 children 30, 29 and 22
Net family property calculated and split
Wife worked part-time and full-time at nursing home, now full-time clerk/receptionist
Wife earns \$35,188, new partner
Husband worked at AECL as fireman, wrongfully dismissed, settlement, \$60,600 (2 yrs. salary)
Husband operates fencing business, earns \$32,000/yr., i.e. \$92,600 to Dec. 2006
Range: \$1,811-\$2,415
Equal partnership, long marriage, equal incomes
Wife only requested \$2,000/mo., less than equalization
Interim spousal support: \$2,000/mo. to Dec. 2006
Nothing from Jan. 2007 when husband's income just from fencing, revisit at trial

Serra v. Serra, [2007] O.J. No. 446 (S.C.J.)(Herman J.)
Together 26 years (married 24), husband 62, wife 56 (50 separation)
1 child of wife's 1st marriage, plus 1 of this marriage, both adults
Wife worked early years, then home since 1983, no income
Interim support \$12,500/mo., December 2002 on
Husband owns marine and textile businesses, decline since separation
Net family property \$10 million, equal division means \$3.3 million payment plus condo
Husband salary imputed at \$250,000
Wife limited skills, but self-sufficiency includes generating income from assets
Her income imputed at \$43,000/yr.
Spousal support \$10,000/mo., until transfer of husband's condo interest, then \$7,500/mo.
Indefinite, but no support while husband pays equalization instalments Sept/07 to Sept/11
(Guidelines range estimated: \$7,812-\$10,416, wife no income; \$6,469-\$8,625 if \$43,000)

Colquhoun v. Colquhoun, [2007] O.J. No. 9, 2007 CarswellOnt 18 (Whalen J.)
Married 20 years, husband 54, wife 49 (41 separation), no children
Husband's job ended 2004, running common law wife's Molly Maid business and rentals
Income imputed of \$50,000
Wife personal care worker and rentals, imputed income \$20,800

Interim support \$1,000/mo., 2 years paid
Guidelines range: \$730-\$973, indefinite
Final order \$1,000/mo., leaves husband 52.6% net income, wife 47.4%

Lopez v. Tarnocai, [2006] O.J. No. 5318 (S.C.J.)(Herman J.)
Together 5 years, both from Mexico
Wife medical doctor, but visitor, working as exotic dancer, \$14,400/yr.
Husband geologists, earning \$100,000 (\$208,751 in 2005)
Interim spousal support of \$1,000/mo. ordered
Considered Guidelines, NDIs, different results
(Guidelines range \$537-\$716/mo., 2.5-5 years, restructured \$1,084-\$1,432, 1-2.5 years)

Friend v. Paul, [2006] O.J. No. 5315 (S.C.J.)(Herman J.)
Married 17 years, 4 children, one now at university
1994 order for \$1,500/mo. interim interim child and spousal support, never varied
Last child finishing university in April 2007
Husband earns \$64,604, wife earns \$41,000
Child support, budget, \$244 rent plus \$250 expenses, total \$496/mo.
Wife seeks \$500/mo. spousal support, 13 years since separation, still entitled
Spousal support of \$300/mo. to April 2007, over 50% NDI
After April 2007, \$500/mo. (Guidelines range: \$502-\$669)

Soper v. Soper, 2006 CarswellOnt 7496 (Matheson J.)
Together 24 years (married 20), 1 adult child 23
Husband at Inco, earns \$83,862, wife day care worker \$15,205
Interim support \$1,000/mo. (Sept. 2003), \$1,500/mo. (June 2006)
Guidelines considered, support \$1,800/mo., indefinite
[Range \$2,060-\$2,746, but if only 20 years used, \$1,716-\$2,288]

Fournier v. Burton, [2006] O.J. No. 4084, 2006 CarswellOnt 6201 (S.C.J.)(Smith J.)
Married 20 years, wife 44 (39 separation), 2001 consent order: \$1,200/mo., indefinite
Husband applies to vary to terminate or time limit
Wife took courses for Grade 12, community college, but ill with cancer/depression
Change in circumstances, not making \$20,000 5 years later, unlike expected
Husband's income unchanged, \$53,100 (estimated as not stated)
Guidelines range: \$1,488 - \$1,770, higher than order
Order continued, review in 4 years

Lehtomaa v. Lehtomaa, [2006] O.J. No. 4130 (S.C.J.)(Shaw J.)
Married 40 years, husband 73, wife 65 (63 separation)
Guidelines range: \$442 - \$590, wife seeks income equalization, \$500 spousal support
Equal lifestyles, not incomes, use means and needs
Husband significant medical issues: loss of arm, hip replacement, cancer, cataracts
Uses scooter, his needs greater
Husband's income \$2,828/mo. (OAS, CPP, pension, workers comp)
Wife's income \$1,648 (OAS, CPP, pension)
Interim spousal support: \$100/mo. to equalize [disability exception?]

Kerr v. Magnan, [2006] O.J. No. 4127 (S.C.J.)(Platana J.)
Married 39 years, wife retired (June/06), husband already retired
No spousal support in 2004 divorce
Guidelines not of assistance where low incomes, needs and means used
Husband's "net": \$2,450/mo., wife's "net": \$1,329/mo.
[Grossed up \$38,500 vs. \$19,000, range \$409-\$812]
Interim spousal support \$300/mo.

[*Hance v. Carbone*, 2006 CarswellOnt 7063 (Ont.S.C.J.) (Stayshyn J.)
listed under *with child support* formula; should actually have been *without child support* formula]

Foley v. Girard, [2006] O.J. No. 2496 (Ont.S.C.J.)(Aitken J.)
Gay couple, together 20 years, both 50, no children
Applicant earns \$51,899, respondent \$106,280
Interdependent, applicant supported respondent's Ph.D. studies
Guidelines range: \$1,351-\$1,801
Interim support of \$1,500/mo., analysis of expenses, esp. shelter

Leger v. Schultz, [2006] O.J. No. 1313, 2006 ONCJ 103 (C.J.)(Wolder J.)
ISO enforcement case, 18-year-old German order made in 1987
17-year marriage, reference to 17 year maximum duration under Guidelines
Against public policy to enforce in Canada

Stewart v. Tudorachi, [2006] O.J. No. 898 (S.C.J.)(Platana J.)
Together 22 years, no children, wife 50 (47 at separation), husband 48
No unjust enrichment, house in both names, sold and proceeds divided equally
Wife not worked since 1996, fibromyalgia, separated 2003, now student
Grade 12 equivalency, finished in 2008, then intention to do 3-year program
Husband married, 2 step-children, wife earns \$47,000 as teacher
Husband earns \$75,209, interim support \$2,400/mo.
Guidelines range \$2,004-\$2,673, husband offers \$1,800
Order for \$2,250, review in 2008

Girouard v. Girouard, [2006] O.J. No. 762, 2006 CarswellOnt 1089 (Sedgwick J.)
Married 38 years, wife 57, husband 62, 2 adult children
Wife on CPP Disability, \$6,960/yr., many medical problems, seeks \$1,000/mo.
Husband retired from Armed Forces, \$26,846, lives with new partner in her house
Recently resigned as rural mail carrier (\$18,711/yr.)
\$625 ordered, indefinite (range \$621-\$828)

Bourget v. Bourget, [2006] O.J. No. 419 (S.C.J.)(Smith J.)
Married 27 years, wife 51 (49 at separation), husband 52, no children
Husband earns \$32,500 as janitor
Wife receives \$8,124 on CPP Disability
Range \$775-\$1,007, wife seeks \$1,000, but lower incomes involved
Interim support of \$600 ordered, based upon Mackinnon paper, 40% NDI to wife

Barrick v. Barrick, [2006] O.J. No. 219 (S.C.J.)(Mazza J.)
Married 33 years, children ?, income issues
Husband receiving WSIB grossed up to \$40,000
No imputing income for failure to appeal unfavourable decision
No income imputed from alleged marijuana grow-op
Wife makes \$14,300 from CPP disability, part-time work, investment income
Range stated by husband's lawyer as \$555 to \$740, rejected as too low
Spousal support of \$1,000 per mo. ordered, to equalize incomes
(Range actually \$803 to \$1,070, indefinite)

Simpson v. Simpson, 2005 CarswellOnt 7025, [2005] O.J. No. 5119 (S.C.J.)(Cusinato J.)
Married 26 years, 2 children adults, wife 48 (46 separation), husband 50
Interim spousal support \$1,500/mo.
Wife earns \$18,050 driving school bus, etc.
Husband truck driver, income imputed, could work more, earn \$60,000
Adopts ChequeMate mid-point, \$1,531/mo., indefinite
(Range \$1,311 to \$1,748 indefinite)

Galambos-Towers v. Towers, 2005 CarswellOnt 6953 (S.C.J.)(Lofchik J.)
Together 16 years (married 12)

Wife receives \$46,190 from CPP and disability pension, cancer after separation
 Husband earns \$38,554 plus \$20,500 imputed return on assets, for \$59,054
 Top end of range stated as \$182, orders \$200 indefinite (range \$138 to \$171)

Collin v. Collin, 2005 CarswellOnt 7754 (S.C.J.)(Fragomeni J.)

Married 29 years, 2 adult children

1998 separation, spousal support \$2,600, then \$1,800 in 1999, then suspended
 2002 order for \$1,000/mo., terminating review order for 24 months

Wife earns \$32,850 at WeightWatchers and dog sitting

Husband earns \$50,000, disabled wife receives \$6,000/year

Wife states range as \$594 to \$792 indefinite (range seems to be \$536 to \$714)

Spousal support continued, at \$500/mo. indefinite

Reitsma v. Reitsma-Leadsom, [2005] O.J. No. 5577 (S.C.J.)(Mazza J.)

Together 7 years, married 4, no children

1998 separation, interim order for \$1,200, then 2001 order for \$840/mo.

Husband brain injured, receives CPP and WSIB (not-taxable), gross income \$39,084

Wife also brain injury (1982), other health problems, unemployable, no income

Application by husband to terminate, by wife to increase, spousal support

Support continued, not reduced from \$840/mo.

Ordinarily would terminate after 7 years, following *Bracklow*

But not here as wife totally disabled and incident of violence by husband

Advisory Guidelines not sufficient reason to vary downwards

(Range would be \$342 to \$456, for 3.5 to 7 years)

McNamara v. Infantino, [2005] O.J. No. 5148 (S.C.J.)(Henderson J.)

Application to vary, 2004 order \$1,800 spousal support, no details of marriage

Husband's income reduced from \$80,000 to \$43,710 upon retirement

Wife no income, applications to CPP and LTD plan for disability

Guidelines considered to reduce support to \$1,275/mo.

Poirier v. Poirier, [2005] O.J. No. 4471 (Ont.S.C.J.)(Charbonneau J.)

Married 34 years, 2 children

Husband earns \$420,000 from businesses, wife \$10,800 in interest income

Husband's income fixed at "ceiling" of \$250,000, wife imputed income of \$50,000

Support of \$7,000/mo., indefinite (40 per cent of gross income difference)

Cunningham v. Montgomery-Cunningham, [2005] O.J. No. 4297 (Ont.S.C.J.)(Fragomeni J.)

Married 22 years, 1 child 20 and independent

Wife says husband's 2004 income \$347,000, income at least \$139,000

Wife's income \$101,800, says husband, at least \$92,200

Order of \$1,500 interim, "guided by" Guidelines

[Range estimated as \$1,292 to \$1,733]

Hesketh v. Hesketh, [2005] O.J. No. 4053 (Ont.S.C.J.)(Heeney J.)

Married 17 years, wife 54 (49 at separation)

Entitled on compensatory (many moves and lost job) and non-compensatory grounds

Wife earns \$13,000, working 35 hours per week

Husband earned \$85,667 in 2004

Interim voluntary support of \$1,500

Range \$1,544 to \$2,059, indefinite (rule of 65)

Husband's new partner makes \$56,000, reason to go higher than range

Order for \$2,200, indefinite, plus \$424/mo. for 10 years for equalization payment

Rossi v. Rossi, [2005] O.J. No. 4136 (Ont.S.C.J.)(Flynn J.)

Married plus cohabited 23 months, husband and wife both 48

Voluntary support of \$5,400 total over 4 months, then \$2,000 interim for 15 mos.

Wife disabled, CPP plus business \$16,000

Husband earns \$71,000 plus

Maximum guidelines range \$224 for 23 months, or \$5,152, vs. \$35,400 paid

Husband paid enough, support terminated

Adams v. Adams, [2005] O.J. No. 4117 (Ont.S.C.J.)(Platana J.)

Together/married for 10 years

Husband workers compensation \$28,295 tax-free

Wife accident benefits and business \$11,830 tax-free

Wife seeks \$299 mid-point of range \$256-\$341

[Range \$295-\$393 if incomes properly grossed up]

Guidelines rejected and lower amount of \$75/mo. ordered

Zedi v. Ristic, [2005] O.J. No. 3827, 2005 ONCJ 250 (Ont.C.J.)(Spence J.)

Married 9 years, no children, wife 59 and husband 46 at separation, wife now 63

Husband earns \$32,500 as machinist, but “self-employed”, so taxed on \$10,000

Wife makes \$10,000-\$13,000 at deli

Guidelines range stated as \$208-\$278, “too low”, \$500/mo. ordered, indefinite

(If husband’s income grossed up for tax position, range would be \$367-\$489)

Woodall v. Woodall, [2005] O.J. No. 3826, 2005 ONCJ 253 (Ont.C.J.)(McSorley J.)

Married 11 ½ years, wife 42 and husband 33 at separation

Wife disabled, husband paid \$1,200 every 2 weeks under 2002 separation agreement

Now \$1,264 with COLA plus drug coverage

Husband earned \$89,500 in 2002, then \$115,000 in 2004

Changed to less stressful job paying \$90,700, application to vary to reduce

Husband paying unconsolidated debts, new common-law wife not working

Guideline ranges (\$1,565-\$2,086) no application because of agreement

No variation clause, no *Miglin*, no change in circumstances

Maitland v. Maitland, [2005] O.J. No. 2252 (Ont.S.C.J.)(Pardu J.)

Married 29 years, 4 adult children, wife 45 at separation

Wife has health problems, can’t work, no income

Husband works as truck driver, \$28,439

Interim support \$1,344, husband also pays \$135/mo. for wife’s health insurance

Range \$889-\$1185 (or \$754-\$1050 deducting health ins.)

Exception for payor income \$20-\$30,000 noted, concerns re ability to pay

Support of \$700 ordered

Romaniuk v. Romaniuk, [2005] O.J. No. 1818 (Ont.S.C.J.)(Maranger J.)

Together 9 years (married 3), wife 38 at separation, husband \$72,400

Wife in school til June 2006, husband went bankrupt, left with with debt

\$2,000 ordered til June 2006, then \$400 til debt paid in full

Guidelines “considered”, but no details (range would have been \$815-\$1,086)

(ii) The *With Child Support* Formula

Ahern v. Ahern, [2007] O.J. No. 3439 (Ont. S.C.J.) (Blisshen J.)

Married 20 years; separation 2005; 3 children with wife, one university, two high school

Wife bus driver, \$40,000

Husband inadequate income disclosure, income imputed as \$96,000

No support paid since separation

Child support: \$1762/mo (table amount for 3 children)

Spousal support: \$270/mo, low end of SSAG range, leaves wife with 57.9% NDI

Retroactive child and spousal support to date of separation

Manning v. Bain, [2007] O.J. No. 2816 (Belch J.)

Cohabited 11 years, separated Nov. 2002, 3 children, with wife

Husband self-employed, radiator/cooling business, income on tax return plus retained earnings

Income fixed at \$74,201 in 2004, \$63,227 in 2005, no 2006 return yet

Wife works at Sears call centre now, home during relationship, earns \$19,313

Child support \$1,236 for income \$63,227

Wife claims \$400/mo. spousal support, in SSAG range (using \$71,071 for husband's income)
Order for \$400/mo., leaves wife with 62.6% NDI
[Range if \$63,227: 0-\$96/mo.; range if \$71,071: 0-\$415]

Celotti v. Celotti, [2007] O.J. No. 2538 (Olah J.)

Married 12 years, 3 children 9, 7 and 5, with wife, husband very involved
Interim child and spousal support, tax-neutral, \$6,000/mo.
Husband in family construction company, earns \$221,000
Child support \$3,639/mo., s. 7 expenses for hockey/dance \$1,000/mo., paid by husband
Spousal support: wife home, no income, child of a subsequent relationship
Wife some obligation towards self-sufficiency, delayed by 4th child
Wife seeks "income equalization", rejected, in part using SSAG
Parties agree to only look at NDI, court rejects
Court estimates SSAG range, low to mid: \$3,014-\$3,534 (61.8-63.8% NDI)
Order for \$1,950/mo. , review in 13 months

Martin v. Blanchard, [2007] O.J. No. 2713 (Taylor J.)

Married 22 years, husband 46, wife 44, 3 children 22, 20 and 15, youngest with wife
2005 "kitchen-table" agreement: \$20,000 equalization payment and \$5/mo. spousal support
Husband earns \$56,000
Wife laid off from part-time bus driver job, now in community college until 2008/2009,
Wife also works as part-time limo driver, earns \$11,232
Miglin: no substantial compliance, also no legal advice and other "concerns"
Child support \$519/mo.
Wife entitled to spousal support, seeks mid-point of SSAG range \$723/mo.
Order for \$723/mo., review earlier of 1 year after program completed or 6 mos. after full-time employment

Georgiou v. Georgiou, [2007] O.J. No. 2201 (Ont.S.C.J.)(Pierce J.)

Married 13 years, child 16 with husband, wife 49
2003 order: \$2000/mo. spousal support, child support \$62/mo, not paid by wife
Husband then earned \$86,000, wife \$8,000
Husband now earns \$102,960, wife earns \$12,480 at grocery store (24 hours/week)
Husband applies to terminate or reduce spousal support
Range \$1205-\$1607 for 6.5 to 13 years
Order for \$1500/mo., review in 18 mos. , wife should work more hours

Damian v. Damian, 2007 CarswellOnt 3169 (Ont.S.C.J.)(Pazaratz J.)

Costs decision after trial, issues of custody, spousal support, property division
Medium term relationship, husband teacher, earns \$82,050, self-represented,
Wife unemployed, one child 9, completely successful on all issues, reasonable offers to settle
Husband rigid and narrow-minded approach to litigation
Spousal support ordered of \$1400, with review in 3 years
Wife offered time-limited support, \$1300 for 3 years
Wife's offer should have been particularly attractive, as Guidelines range \$1682-\$2112
Substantial indemnity costs awarded of \$10,646

Elieff v. Elieff, [2007] O.J. No. 1802 (S.C.J.)(Perkins J.)

Spousal support and costs, wife and 4 children, husband's income \$150,000
Child support \$3,064/mo., plus \$200 for orthodontics
Case adjourned for Guidelines and NDI calculations
High end of Guidelines range chosen, \$2,654/mo., leaves 63.7% NDI to wife

Stoyshin v. Stoyshin, 2007 CarswellOnt 2825 (S.C.J.)(Cusinato J.)

Interim support, 2 children, wife doing B.Ed., graduating June 2007
Husband works in family business with 3 others, income issues
Husband's income \$83,417, including benefits, but not family gifts, rent-free house

Child support \$1,481/mo., including some s. 7 contribution
Spousal support \$1,350, based on Guidelines

Clement v. Clement, 2007 CarswellOnt 2225 (S.C.J.)(Gordon J.)

Husband applies to set aside minutes of settlement from day-long settlement conference
Husband earns \$65,000, child support \$601
Guidelines range used, \$1,318-\$1,638, parties used mid-point, review in 4 years
Both parties represented, no unfairness in settlement, upheld

Yeates v. Yeates, 2007 CarswellOnt 2107 (S.C.J.)(Greer J.)

Married 15 years, husband and wife 48, 3 children 17, 14 and 11, with wife
Child 17 has cerebral palsy/epilepsy and child 14 autism
Wife home with little respite, access issues
Husband accountant with CRA, earns \$108,872
Child support \$1,964
Section 7 expenses: wife gets \$16,500/yr. subsidies for special needs, list “unattainable”; husband to pay \$1,300/mo. for expenses
Interim spousal support \$2,500/mo., wife seeks permanent spousal support of \$3,500, can’t work
Husband argues Guidelines, *Andrews*, maximum 60/40 NDI split
Order for \$2,500 indefinite, well above Guidelines range (estimated \$848-\$1,233)
(Special needs exception?)

Fell v. Fell, [2007] O.J. No. 1011, 2007 CarswellOnt 1604 (S.C.J.)(Linhares de Sousa J.)

Married 12 years, 3 children 12, 9 and 4
Shared custody, equal time, interim for 18 mos., continued
Wife part-time nurse, \$43-44,000, secondary earner in marriage
Would earn \$70-80,000 if full-time
Husband pilot in Armed Forces, earns \$95-96,000
Child support set-off: \$1,762 - \$816 = \$946/mo.
Interim spousal support \$400/mo.
Wife can keep working part-time until youngest in full-time school, given history
Mid-point of Guidelines range leaves consistent standard of living, \$450/mo.
(Guidelines range estimated: \$99-\$784, mid-point \$444)
Review when full-time school, wife’s income expected to be \$70,000 then

Ansara v. Ansara, [2007] O.J. No. 783 (S.C.J.)(Del Frate J.)

Married 17 years, 1 child 8, with wife
Husband lawyer and director, community legal clinic, \$106,000
Wife deputy town clerk, earns \$49,143
Child support \$924 interim
Guidelines range: \$642-\$1,435, \$1,000/mo. interim spousal support ordered

Martin v. Martin, [2007] O.J. No. 467 (S.C.J.)(Linhares de Sousa J.)

Married 9 years, children 13 and 8
Property divided 75/25 to wife, husband’s debts to wife reduces payment to zero
Husband alcohol and cocaine problems, now working for Dell, \$36,000
Child support \$518, 27% of s. 7 expenses (\$165/mo.)
Husband seeks spousal support, wife earns \$90,000
Husband claims \$300-\$400/mo for 3 years, based on Guidelines
Entitlement, lump sum of \$15,000 for disadvantage from marriage breakdown
(Guidelines range estimated, custodial payor: \$414-\$552, 4.5 to 9 years)
(Lump sum awarded, after tax adjustment, at low end of global range)

Vynnk v. Baisa, [2007] O.J. No. 274 (S.C.J.)(Klowak J.)

Married 10 years, husband 39, wife 33, 1 child aged 3 with wife
Husband critical care nurse, paid through own company, earns \$87,000

Child support \$774
Wife earns \$39,000
Compensatory basis: wife waitressed, two jobs, to put husband through school,
Delayed her own education, now likely to return to school
Periodic spousal support \$2,000/mo. for 5 years, 61% NDI
Increased for education, not adequately addressed by Guidelines
Plus lump sum support \$75,000 [all within global range at Guidelines maximum]

Skirten v. Lengyel, [2007] O.J. No. 679 (S.C.J.)(Platana J.)
Unmarried couple, together 5 years, 1 child 3, with wife
Husband labourer, earns \$24,960, wife earns \$16,682
Child support \$224/mo.
Guidelines range: zero to zero
Husband not appearing, owns house and motorcycle, wife seeks \$112/mo.
Court looks at household standard of living comparison
“Notwithstanding Guidelines”, husband should pay something, \$50/mo.

Davies v. Davies, [2007] O.J. No. 388 (S.C.J.)(Herman J.)
Married 11 years, 2 children 9 and 6, with wife
Husband Environment Canada scientist, earns \$66,388
Wife earns \$32,000
Child support \$992/mo. plus child care
Wife home 7 years, til last in school (2004)
Mid-point of Guidelines range is zero, leaves wife with 56% NDI (range: zero to \$247)
No interim spousal support

Johal v. Johal, [2006] O.J. No. 5264 (S.C.J.)(Hambly J.)
Married 12 years, 3 children 10, 9 and 5, interim interim custody with wife
2005 incomes used: husband police officer earns \$81,071, cohabiting, new home
Wife labourer, earns \$33,015
Interim child support \$1,528/mo., plus \$280 s. 7 expenses contribution
Spousal support: Guidelines range zero to \$333 says husband
Interim spousal support \$100/mo., leaves wife with 60%+ NDI

Humphrey v. Humphrey, 2006 CarswellOnt 8251 (S.C.J.)(G.P. Smith J.)
Married 17 years, 3 children 20, 18 and 18, husband 48, wife 47 (45 separation)
All with wife, oldest employed part-time, part-time university
Husband in family business, income issues, \$60,000
Wife homemaker, small home-based business, no interim sale of home
Child support \$902 (2 only), Guidelines range: \$1,083-\$1,361
Interim spousal support ordered \$1,300/mo.

Smylie v. Smylie, [2006] O.J. No. 4716 (Ont.S.C.J.)(Shaw J.)
Together 27 years (married 22), 3 children 20, 17, 8, with wife, both 46 years old
Husband lumber yard manager in Timmins, earns \$34,762
Child support \$517 (2), s. 7 child care expenses \$46/mo. by husband
Property: wife keeps home, pays equalization of \$40,326 to husband
Wife 2 part-time jobs, nurses registry and KFC, earns \$16,296
Wife home until 2004 separation, traditional marriage
Husband cohabiting, new partner makes \$40,000
Range: 0 - \$89, spousal support of \$200/mo., 60% NDI to wife

Ghahrai v. Mohammed, [2006] O.J. No. 4651 (Ont.S.C.J.)(Fragomeni J.)
Married 9 years
2004 settlement: \$1,000/mo. for 18 mos., 26 mos. paid interim, plus \$6,000 lump sum
Wife applies to vary and seeks interim, support stopped April 2006, s. 17(10) applies

Wife wants to complete B.Sc. Nursing, 4 more years, \$14,000 OSAP loan
 Husband earns \$80,000, has 2 (?) children, \$700/mo. day care
 Husband says Guidelines range \$692-\$922, 4 ½ to 9 years, paid \$50,000 (\$692x6 yrs.)
 Application dismissed

Verbey v. Verutis, [2006] O.J. No. 4267 (S.C.J.)(Turnbull J.)
 Married 18 years, 2 children 13 and 8
 Custody issues, interim equal shared custody
 Husband engineer, earns \$109,000
 Wife primary school teacher, disability, no benefits, no income
 Child support not stated (estimated as \$1,514/mo.)
 Guidelines range: \$1,880-\$2,483
 Interim spousal support \$1,800/mo.

Hance v. Carbone, 2006 CarswellOnt 7063 (Ont.S.C.J.) (Stayshyn J.)
 Married 17 ½ years, husband 46, wife 43 (36 separation)
 4 children: 24, 22, 22, 20, traditional marriage
 1999 separation agreement: total support of \$1,083, \$611 child, \$472 spousal
 Spousal support for 6 years only
 Wife working part-time at Walmart, \$13,500, husband earns \$38,500
 Guidelines range stated to be \$367-\$582, *with child support* formula
 Spousal support of \$472/mo. ordered, 15 years
 But no child support, no proof children of marriage
 [Without child support formula range: \$547-\$729]

Nemi v. Maier, [2006] O.J. No. 2676 (S.C.J.)(Timms J.)
 Cohabited 12 years, 2 children with mother
 Husband earns \$235,000, child support \$2,998, no s. 7 expenses
 Wife seeks \$100,000 lump sum spousal support, husband's interest in home (based on support of \$5,500/mo for 12 years discounted.)
 Wife earns \$60,000 in contract job
 Guidelines range: \$3,039-\$4,339,
 Appropriate level of periodic support would be \$4,000/mo.; converts to lump sum of \$100,000 (no calculations provided)

Neilson-Sewell v. Neilson-Sewell, [2006] O.J. No. 2580 (Ont.S.C.J.)(Smith J.)
 Together 23 years (married 21), 2 children with father in Vienna
 Wife at last minute decided to stay in Ottawa house, had left job, unemployed
 Income imputed to wife of \$14,000 (but no child support paid)
 Husband working for UN, income tax-free, increased for living costs, boarding school
 Wife claims his income \$158,241, so Guidelines range \$5,409-\$7,212
 Boarding school excluded, income is \$143,652 Cdn.
 Guidelines not apply, as support not deductible for husband
 Spousal support: mortgage of \$1,606 plus \$1,200, total \$2,806
 (custodial payor range: \$5,100-\$6,800, indefinite)
 (if pay for living costs excluded from income, range \$3,395-\$4,527)

Borger v. Jan, [2006] O.J. No. 2075 (Ont. S.C.J.) (A.L. Harvison Young J.)
 Interim order
 Married 9 or 10 years (date of separation in dispute); 2 children with wife
 Wife has exclusive possession of matrimonial home
 Husband income set at \$1,296,430/yr (average of past 3 yrs)
 Order for interim child support under guidelines of \$15,291/mo
 Wife submits advisory guideline range is \$10,000 - \$20,000/ mo (no details on calculation) and seeks lower end of range at \$10,000/mo; no discussion of "ceiling" of \$350,000.
 Order for interim spousal support of \$9,000/mo

[range if husband's income at ceiling of \$350,000: \$7,667 - \$9,219/mo]

McCarthy v. McCarthy, [2006] O.J. No. 2308 (Ont. S.C.J.) (D.S. Crane J.)

Married 12 years; 2 children

Husband's income between \$54,000 and \$55,000/yr; child support \$750/mo

Wife earning \$27,000/yr (in home daycare), some health issues

Seeking \$300/mo spousal (giving her 58.2% NDI)

No spousal support awarded; reference to consistency with Spousal Support Guidelines [range zero to zero]

With no spousal support wife stated to be at 54.8% NDI and husband 45.2% NDI [DivorceMate actually shows wife at 57% with no spousal]

Brisebois v. Brisebois, [2006] O.J. No. 906 (Ont. S.C.J.) (S. Rogin J.)

Divorced 2002; one child now 11; 2002 spousal support order of \$500/mo based on imputed income of \$30,000 to wife and husband's income of \$56,000/yr

Variation application; husband's income increased to \$83,187/yr; wife now earning \$24,351/yr

Child support increased to \$660/mo

Spousal support increased to \$750/mo; court declines to increase support as per "Check Mate" and Divorcemate calculations provided by counsel (no details given); concern's wife's income understated

[Ranges: using husband's 2002 income (\$56,000) and \$30,000 (imputed) for wife: zero to \$334;

using husband's 2006 income (\$83,187) and \$30,000 (imputed) for wife: \$740 - \$1,337

using actual 2006 incomes for both (husband \$83,187, wife \$24,351): \$916 - \$1540]

Philip v. Philip, 2006 CarswellOnt 1591 (Ont. S.C.J.) (Henderson J.)

Together 10 years (married 8); wife 2 children from previous marriage (only 1 remaining child of marriage) and 1 child of their own

Husband's income \$58,000/yr; child support for 2 children \$799/mo, but deducts \$200 CPP benefits older child receives as a result of death of her father

Wife's income \$20,200/yr (\$15,100 employment and \$5,100 CPP survivor benefits)

Spousal support of \$650/mo; court "considered" many factors, including Advisory Guidelines and Check Mate calculations

[range assuming child support of \$599: \$227 - \$646]

Crewe v. Crewe, 2006 CarswellOnt 772 (Ont.S.C.J.)(Sills J.)

Interim order, 1 child (3) with mother

Husband earns \$67,185, child support \$554/mo.

Wife student loans and bursaries, issue re inclusion in income

Wife seeks \$1,564/mo. based on Guidelines

(Range estimated \$1,220-\$1,564, if her income \$2,000/yr.)

Interim spousal support of \$1,000/mo.

Dunning v. Dunning, [2006] O.J. No. 1927 (S.C.J.) (T.M. Wood J.)

Together 6 years (married 5), 2 children (ages 3 and 1) with wife

Application to vary 2005 consent order for child and spousal support

Father employed in U.S., income in \$Can set at \$160,893 resulting in child support of \$2,118

Mother registered nurse, moved back from U.S. after separation; presently earning \$20,000 from 2 part-time jobs

Uses SSAG range of \$2,568 to \$3,411 spousal support (giving wife 53.7% to 58.2% NDI); duration indefinite but ceases when youngest child turns 18

Spousal support set at lower end of range (\$2,568) because wife's income will increase as children get older and should be allowed to do so within reason without support being affected.

Review after 5 years at instance of either party

Palmer v. Arena, [2006] O.J. No. 1811 (S.C.J.)(Gauthier J.)

Together 8 years (married 3 plus), child 5 with wife, husband 47, wife 48

Husband bipolar disorder, CPP disability, \$11,520, no child support (table \$111)

Wife earns \$75,000, child care \$200-\$250/mo.

Interim spousal support of \$750 paid for past 2 years

Custodial payor range rejected as "insufficient", support ordered at \$1,000 for 3 years

[Range estimated \$473 to \$630, for 4 to 8 years, order within global range by restructuring]

Yetman v. Yetman, [2006] O.J. No. 926, 2006 CarswellOnt 1374 (S.C.J.) (Henderson J.)
 Variation of interim order, 3 children, now only 2 dependent, incomes increased
 Husband now earns \$89,388, wife earns \$21,300
 Child support \$1,128 plus \$2,000/yr. for s. 7 education expenses
 Advisory Guidelines considered, for order of \$1,400/mo.
 (Range estimated: \$1,061-\$1,645)

McGahey v. McGahey, [2006] O.J. No. 738, 2006 CarswellOnt 1081 (S.C.J.) (MacKenzie J.)
 One child, 7, with wife, child support \$648
 Husband \$81,000, wife \$25,000 imputed, range \$1,078-\$1,684
 Interim spousal support \$1,200

Verscheure v. Verscheure, 2006 CarswellOnt 832 (S.C.J.) (Marshman J.)
 Together 11 years (10 married), 2 children
 Wife little employment effort in 5 years, no income
 Husband earns \$240,060
 Child support \$2,698 til Sept./05, then children with husband
 Spousal support paid for 5 years already
 Custodial payor range \$2,469-\$3,292
 Interim order \$3,750 for 6 months, \$3,000 for 6 mos., then \$2,500 til trial

Cornish v. Bacic, [2006] O.J. No. 397 (S.C.J.) (Pepall J.)
 Married 10 years, 2 children 10 and 7 with husband
 Husband earns \$95,626
 Wife no income, previously earned \$22,620, that amount imputed
 Range \$660-\$880, "too low", orders interim support of \$1,000/mo.
 (But wife not paying child support, table amount on imputed income would have been \$318)
 (Custodial payor range if wife's income taken as zero: \$874-\$1,165)

Pollock v. Pollock, [2006] O.J. No. 504 (S.C.J.) (Shaw J.)
 Married 22 years, wife 43, husband 49
 3 children, one with wife (age 14), 2 with husband (21/18)
 Husband receives \$50,700 workers' compensation and CPP Disability
 CPP payments to children too, husband paying debts
 Wife no income, in mortgage-free family home
 Counsel agree Advisory Guidelines "not of assistance"
 Spousal support \$850/mo. (Range: \$776-\$966)

Ignacy v. Ignacy, [2005] O.J. No. 5264 (S.C.J.) (Gordon J.)
 Interim interim decision, 2 teenagers
 Husband earns \$127,286, wife \$66,640
 Guidelines used, spousal support of \$1,000 ordered
 No child support stated, but table \$1,524/mo.
 (Range \$214 to \$1,177)

Moggy v. Spry, [2005] O.J. No. 4939 (S.C.J.) (Del Frate J.)
 Together 6 years (married 3), 1 child 8 months, with wife
 Husband earns \$70,000, child support \$572, plus \$75/week child care
 Wife 25 years old, student, only income Ontario Student Assistance Program (\$9,800?)
 Range stated as \$975-\$1500, \$1,200 ordered on interim basis

Socan v. Socan, [2005] O.J. No. 3992 (Ont.S.C.J.) (Blisshen J.)
 Together 16 years (married 13), 2 children 19 and 13, oldest not "child of marriage"
 Child with wife, wife 45 at trial (39 at separation)
 Wife cashier at Walmart, health problems, earns \$20,401
 Husband Canada Post, health problems, earns \$44,904
 Child support \$387 (1), husband paid all matrimonial debts
 Range \$111 - \$293, request for \$200 by wife
 \$150 ordered, due to husband's payment of debts, expenses, equalization payment

Fancett v. Deprato, [2005] O.J. No. 3860 (Ont.S.C.J.)(MacKenzie J.)
 Together 4 ½ years, 1 child 6 with wife, wife 36 at separation
 Husband now disabled, off job, but no evidence, 2004 income \$65,318
 Child support \$545, plus \$332 for s. 7 expenses
 Wife clerical job \$12,486, now cohabiting, seeks spousal for past 18 months
 Unable to use Guidelines because of changing incomes (?), \$600/mo. ordered
 Child and spousal support used to offset husband's equity in home

Dench v. Dench, [2005] O.J. No. 2646 (Ont.S.C.J.)(Heeney J.)
 Married 16 years, 4 children, 1 still dependent, with wife, wife 47 at separation
 Husband owns car dealership, makes \$150,000
 Child support \$1,108
 Wife's income \$51,000 (\$36,000 on investments, plus \$15,000 imputed minimum wage)
 Range \$1,597-\$2,680, spousal support of \$2,000 ordered
 Roughly equal standards of living, wife's lower housing costs

Bielanski v. Bielanski, [2005] O.J. No. 2171 (Ont.S.C.J.)(Gauthier J.)
 Married 14 years, 2 children, 16 and 14, with mother
 Interim order: child support \$1,049; spousal support \$850
 Husband's income \$90,900 at Inco, wife \$34,500 in retail
 Order for child support \$1,146 and spousal support \$1,000
 Range \$611-\$1,237

Kerr v. Kerr, [2005] O.J. No. 1966 (Ont.S.C.J.)(Blishen J.)
 Married 16 years, 5 children with mother, husband \$95,014, wife no income
 Child support \$2,085, plus some s. 7 expenses
 Formula range stated as \$794-\$1,189, temporary spousal support of \$1,000 ordered.

Zelko v. Zelko, [2005] O.J. No. 653 (Ont.S.C.J.)(Cusinato J.)
 Married 15 years, 2 children 14 and 12, wife 36 at separation
 2001 order: \$1,031 child support, \$1,500 spousal support
 2 children now with father
 Wife makes \$14,000, i.e. child support of \$211
 Wife still to receive \$1,500 spousal, indefinite
 Discussion of guidelines, but unable to do calculations without software
 (Hybrid formula: \$894-\$1,193 for 7.5 to 15 years)

Araya v. Gaete, [2005] O.J. No. 704 (Ont.S.C.J.)(Young J.)
 Married 23-plus years, 3 children, 1 left with wife
 Husband makes \$50,000, wife laid off, \$10,000 imputed
 No child support, shared custody agreement
 Guidelines cited in discussion on entitlement
 \$800 interim spousal support ordered
 (Range by Divorcemate: \$1,150-\$1,533 indefinite)

McPhee v. McPhee, 2005 CarswellOnt 683 (Ont.S.C.J.)(Gordon J.)
 Application to vary, husband's income reduced, wife's increased
 Child support adjusted, but spousal left unchanged at \$1,500 per mo.
 Support still within range computed using guidelines (no details given)