

Following Fisher:
Ontario Spousal Support Trends 2008-09

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Introduction: Now That the Post-*Fisher* Dust Has Settled...

In January 2008, the Ontario Court of Appeal handed down its landmark decision in *Fisher v. Fisher*, [2008] O.J. No. 38, 2008 CarswellOnt 43, 2008 ONCA 11, 47 R.F.L. (6th) 235. For a short while, there was a period of adjustment, not only to *Fisher*'s endorsement of the Spousal Support Advisory Guidelines, but also to its imposition of a time limit after a 19-year marriage. The early response to *Fisher* was canvassed by Carol Rogerson and me in "*Fisher* and After: The Spousal Support Advisory Guidelines in Ontario" (May 28, 2008), prepared for last year's 2nd *Family Law Summit*, including case law summaries for the period September 12, 2007 to May 20, 2008.

Those early cases revealed "a disturbing trend for courts to impose time limits, purportedly following *Fisher*, in cases where there are still dependent children in the care of the recipient of spousal support", we said in "*Fisher* and After" at p. 13. But Ontario courts have gotten over that initial over-reaction to *Fisher*, and time limits are now being used more carefully.

Fisher has also encouraged much more frequent use of the Advisory Guidelines in a wider range of spousal support cases, so that the Ontario case law has become richer and more varied, much more like the British Columbia case law. In *Fisher*, the Ontario Court of Appeal ruled that, if one of the parties argues the Advisory Guidelines, then the trial judge should include "reasons explaining why the Guidelines do not provide an appropriate result", if the judge produces a result outside the Guidelines ranges. Invariably, one of the two parties will like the Guidelines ranges for amount and duration, ensuring that the Advisory Guidelines will be addressed in most spousal support decisions.

In July 2008, seven months after *Fisher*, the federal Department of Justice released the revised *Spousal Support Advisory Guidelines*, what we call the *Final Version*, at the National Family Law Program in Deerhurst, Ontario. At the same time, two other documents were released: the *Report on Revisions*, detailing the specific changes made in the *Final Version*; and the "User's Guide" to the *Final Version*, a compendium of practical suggestions (a copy of which is accompanies this paper).

Last December, at *The Six-Minute Family Law Lawyer*, Carol Rogerson provided an "Ontario Update", which reviewed trends in the Ontario SSAG case law from July 10,

2008 to November 18, 2008, cases summarised in the Appendix. In my paper today, I have updated those summaries up to May 13, 2009. In Appendix A to this paper, I have provided case summaries for the period July 10, 2008 to May 13, 2009, a period of 10 months. Appendix B is the text of a very short article I recently provided to *The Lawyers Weekly*, on myths and tips about the Advisory Guidelines.

By July, most of the early post-*Fisher* dust had settled and we began to see some enduring patterns in the case law. The November paper identified 2 appeal decisions and 32 trial decisions over the period of 4 months from July to November 2008, 10 using the *without child support* formula and 22 using the *with child support* formula. For the next six month period, from November to May 2009, this paper summarises one appeal decision and another 48 trial decisions, 14 using the *without child support* formula and 34 using the *with child support* formula. These 80-plus decisions now provide us with a better sense of what's happening with the Advisory Guidelines in Ontario.

Let me summarise briefly what the recent cases show, following *Fisher*:

- (1) Use of the Advisory Guidelines in a Wider Range of Cases
- (2) Old Habits Die Hard: The *Refcio* Case and Other Appeals
- (3) Mistakes Continue to be Made...
- (4) Interim Support Cases Still Predominate
- (5) Time Limits Now Used More Carefully
- (6) Some Patterns in Amount: Mid-to-High Typical
- (7) Short Marriages Don't Cause Problems under Either Formula
- (8) Lawyers and Courts Sometimes Struggle With Less Common Cases
- (9) Exceptions Now Mentioned, But Not Used Enough

(1) Use of the Advisory Guidelines in a Wider Variety of Cases

There is no question that *Fisher* has led to more frequent, or perhaps more open, use of the Advisory Guidelines in reported decisions. Prior to *Fisher*, from January 2005 to January 2008, decisions citing the Guidelines were reported at the clip of 3 per month. In the 16 months since *Fisher*, that has doubled to a rate of 6 per month over the whole period. In the most recent period of 10 months to May 2009, we are seeing about 8 or 9 Guidelines cases reported per month.

With the larger number of cases reported, inevitably, the Advisory Guidelines are applied to a wider range of cases. Before *Fisher*, one lawyer might argue the Guidelines while the other lawyer usually asked the court to ignore the SSAG. Now, after *Fisher*, both lawyers have to argue the Advisory Guidelines for all practical purposes. We thus find the Guidelines used in shorter marriage cases, for differing custody arrangements, for retroactive support, for exceptions, etc., as a perusal of Appendix A will reveal. Ontario now has a much richer and more useful case law for those using the Advisory Guidelines. And it is now possible to make a better assessment of the general trends and patterns in the Ontario SSAG case law.

In broad terms, the *with child support* formula cases have outnumbered the *without child support* cases by a 2-to-1 margin, in a consistent pattern since late 2007. Amongst the *without child support* formula cases in Appendix A, longer marriage cases dominate, not surprisingly. Of the 23 trial decisions,¹ 16 involved marriages of 15 years or more (12 were 20 years or more), just 2 cases in the 5-15 year range and 5 cases under 5 years of marriage/cohabitation. We see a much wider range of marriage lengths under the *with child support* formula, totalling 51 cases:² 12 were marriages of 20 years or more; 11 were 15-19 years; 12 were 10-14 years; 10 were 5 to 9 years; and 6 were under 5 years. In later parts of the paper, I will look more closely at issues like time limits, amounts and the short marriage cases.

More important under the *with child support* formula are the custodial arrangements for the children. About 70 per cent of all the recent cases, 38 of 56, fall under the “basic” formula, where both child and spousal support are paid to the custodial/residential/primary wife. All the other situations are represented in the mix: 4 shared custody cases, 5 split custody, 4 custodial payor, 2 university cases and 3 step-parent cases. Later I will give particular attention to the “non-basic” cases.

Before look at the trial decisions, the appeal cases deserve mention, especially the *Refcio* case.

(2) Old Habits Die Hard: The *Refcio* Case and Other Appeals

There have now been four post-*Fisher* appellate cases citing the Advisory Guidelines:

- *Pagnotta v. Malozewski*, [2008] O.J. No. 1318, 2008 CarswellOnt 1896 (Div.Ct.): “no articulated basis for departing from the Guidelines” in an interim *with child support* case
- *Jessop v. Wright*, [2008] O.J. No. 3849, 2008 ONCA 673 (C.A.): no reviewable error by trial judge to not mention Guidelines where not argued, but Guidelines used by Lang J.A. to assess and modify trial outcome
- *Vynnk v. Baisa*, [2008] O.J. No. 3747, 2008 ONCA 657 (C.A.): no reference to Guidelines in appeal judgment, but used by trial judge and upheld on appeal
- *Refcio v. Refcio*, [2009] O.J. No. 1539 (Div.Ct.): short marriage, Guidelines not used at trial, trial decision upheld.

The most recent of these, *Refcio*, deserves more careful consideration, as it reveals that old habits die hard, even after *Fisher*. The first three were discussed in our earlier Ontario papers, in May 2008 and November 2008.,

¹ One case of the 24 did not specify the length of the marriage, a variation case: *Kretschmar v. Seguin*, [2008] O.J. No. 2834.

² There were 5 cases of the 56 that did not specify any length of marriage.

Refcio was a short marriage, with the couple cohabiting for 3 ½ years and married for less than two years. No children, so the *without child support* formula would apply, except Justice Granger did not mention the Advisory Guidelines at all and did not appear to have used them, despite the submissions of counsel.³ “Although it would have been helpful” if he had mentioned the Guidelines, “no error” said the Divisional Court.

The husband was a young lawyer, earning \$60,000 per year. The wife had last worked in 2001, earning \$12,000 per year, but she had left her job and returned to school, with the husband’s encouragement. The wife had received interim spousal support of \$875 per month, for the three years before trial. She had suffered anxiety and depression, including a brief period of hospitalization. After separation, the wife had cohabited with another man and gave birth to twins in April 2007. At the time of trial, she was not working and was living with her family. Granger J. ordered spousal support of \$1,500 per month, retroactive to the date of separation (December 2005), with the support to continue for a period of five years to December 2010 “and thereafter until Ms. Refcio finds employment”.

The Divisional Court concluded that “the amount and duration of support may be on the high end of the range”, but “no palpable overriding error or error in principle in the award”. Presumably, the Court meant the amount, as it then proceeded to find error in the indefinite duration and imposed a time limit of five years, in the interests of “finality and a clean break”, terminating the support as of December 2010.

The Divisional Court quotes Guidelines ranges, depending upon the period of cohabitation, as “between approximately \$180 to \$300 per month periodic support for a duration of 22 months”. The Court notes “commentary” that the Guidelines range for short marriages is “quite modest” and “not particularly helpful”, commentary “borne out in the facts of this case”. Even the husband’s proposal was “well outside the guidelines”, in his practical suggestion that he would accept \$875 per month for the three years it had been paid, i.e. he wasn’t going to ask for anything back.

Let’s take a closer look. The Divisional Court wound up ordering five years at \$1,500 per month, or a global amount of \$90,000. The husband would accept paying \$875 per month for three years, or \$31,400. If we take the wife’s claim at its highest under the formula, with four years of cohabitation, the husband earning \$60,000 and her income zero, then the *without child support* range would be \$300 to \$400 per month for two to four years, or a maximum global sum of \$19,200.⁴

Okay, so what about exceptions? The interim exception might explain a larger amount pending trial. Or, the disability exception might explain a larger amount for any period of disability. Or the basic needs/hardship exception for short marriages could be

³ In these discussions, we are limited by the non-publication of the trial judgment and the absence of much factual exposition in the Divisional Court.

⁴ If an income of \$12,000 per year were imputed to the wife, then the range would reduce to \$240 to \$320 per month for 2 to 4 years. Using a period of 3 years, the range would be \$180 to \$240 for 1 ½ to 3 years. None of these numbers quite lines up with the figures for amount and duration cited by the Court.

used, although that would require a more careful analysis of the wife's sources of income and her basic needs, including the birth of the twins, the child support payable by their father and her expenses in her family home.

Refcio may most kindly be remembered for its imposition of a time limit in a short, childless marriage, even if the five year time limit is never explained by the Divisional Court. The rest is just deference on appeal, with little analysis, the very situation that *Fisher* seemed to have remedied. Compare the more recent Divisional Court case, *Hindocho v. Patel*, [2009] O.J. No. 1958, where the Court was a lot less deferential in a very short marriage case, reducing the \$12,000 lump sum at trial to \$4,800 on appeal.⁵

Refcio was a hard case. It deserved more careful analysis. The trial decision adopted an Ontario "old school" approach to short marriages, a generous amount of periodic support for a longish period of time, driven by "need" and status. This approach is at odds with most other Canadian provinces, increasingly at odds with most Ontario trial decisions, and hard to justify on any theoretical grounds. The Divisional Court just let it go on deference grounds, at odds with the appellate approach and directives of *Fisher*.

The three most recent spousal support appeals from the Court of Appeal reveal a similar, disconcerting return to old habits, although none are cases of the magnitude of *Fisher*. In *Hoekstra v. Hoekstra*, [2009] O.J. No. 1731, 2009 ONCA 358, the Court's endorsement upheld a finding of no entitlement to support after a 32-year marriage, where the wife's net worth was \$1.4 million, the husband had lost his job, the wife had remarried and there were work effort issues. There was no mention of the Guidelines in *Harrington v. Harrington*, [2009] O.J. No. 177, 2009 ONCA 39, where the court upheld the trial order of \$2,100 per month, with a review in three years, after a 13-year childless marriage. The trial judge had imputed a part-time income of \$7,600 per year to the 44-year-old wife. (The monthly amount is \$100 per month above the top end of the Guidelines range of \$1,502-\$2,002.)⁶

Most interesting of these three is *Homsi v. Zaya*, [2009] O.J. No. 1552, 2009 ONCA 322. Again, the Advisory Guidelines are not mentioned. The real issues were the custody of the 4-year-old child and the husband's income. The trial judge awarded custody of the child to the wife, imputed an income of \$36,000 to the husband, and then ordered child support of \$333 per month, \$100 per month in s. 7 expenses and \$350 per month in spousal support, all with not much in the way of reasons. The wife had been working as a manager in a jewellery store, earning \$19,000 per year, but she left that job in order to qualify for legal aid and was receiving social assistance. After separation, the husband had moved with the child to Montreal and his T4 slips showed income of only

⁵ The husband returned to Canada from India 9 days after the marriage and there was no cohabitation after that date. The wife was granted a reasonable time to get back on her feet, in light of her inability to work due to post-separation depression. Few details are provided in the Court's decision.

⁶ The real issue in the wife's appeal was the husband's use of his father's assets under a power of attorney, with the Court adding \$140,000 to the husband's NFP.

\$19,000 for the year. On appeal, Epstein J.A. held that the trial judge had wrongly imputed income to the husband, as the onus was on the wife to establish an evidentiary basis for the finding.⁷ The husband's income was fixed at \$19,000 and his table child support at \$164 per month, with no extraordinary expenses. The trial judge had given insufficient reasons for spousal support, which was set aside. The Court of Appeal gave its assessment in one paragraph, paragraph 35:

Moge v. Moge... establishes that since there is no automatic entitlement to spousal support, the evidence must be examined. There was no evidence to support a finding that Zaya [the wife] had suffered any disadvantage as a result of the marriage. The marriage was not long, and there was nothing to suggest that Zaya suffered disadvantage as a result of the marriage. In fact, her employment record during the marriage was stronger than Homsis's. Moreover, the trial judge ignored Homsis's limited ability to pay support. The law is clear that priority should be given to support for Anthony [the child].

Once you find the husband's income is \$19,000, then admittedly the rest of the analysis becomes academic.⁸ Nonetheless, it is going too far to say that the wife, the custodial parent of the child, has not suffered any "disadvantage" and to focus upon the length of the marriage in a case involving a 4-year-old. There is a compensatory claim, even if there is no ability to pay and a need to give priority to child support.

In these recent appeals, we see some of the old habits of spousal support before *Fisher*: inexplicably-generous support in short marriages without children; inconsistency and unpredictability disguised by appellate deference; insufficient attention to the underlying rationale for entitlement, whether compensatory or non-compensatory; and a lack of structured analysis of spousal support issues.

(3) Mistakes Continue to be Made...

Note the passive form above: sometimes the errors are made by the lawyers, sometimes by the judges, sometimes it's hard to tell. My concern is that most of these mistakes are avoidable. Or should have been picked up by the opposing lawyer. Some I might attribute to the excesses of an adversarial approach. Remember that *Fisher* treated the Advisory Guidelines as "a distillation of current case law,... comparable to counsel's submissions about an appropriate range based on applicable jurisprudence" (at para. 98). Counsel have an obligation to be open and even-handed in their presentation of the case law, and so too for the Guidelines: to provide complete printouts, to know what inputs

⁷ The Court cited *Drygala v. Pauli* (2002), 61 O.R. (3d) 711 (Ont.C.A.) for this principle and criticized the evidence used by the trial judge: the husband had earned \$30,000 in 2007 selling cars in Ontario and claimed an income of \$63,000 in a 2004 mortgage application.

⁸ The husband's income is below the "floor" of \$20,000 under the Guidelines. An income could easily have been imputed to the wife of \$19,000 and, if the Court had done so, even the trial income finding of \$36,000 would produce zero spousal support under the *with child support* formula.

were used, to understand any adjustments, to have read the relevant portions of the *Final Version*.

Here are the most common avoidable mistakes found in this last bunch of reported cases (and, where possible and to balance out any negativity, some good examples). I have tried to frame the bullets positively.

- **Use the correct formula.** On the bright side, there are only 4 cases where the wrong formula was used, out of 56 trial decisions. For some reason, lawyers appear to forget the *custodial payor* formula, in those cases where the custodial parent is paying spousal support to a non-custodial parent, and instead try to use the *without child support* formula: *Cunningham v. Montgomery*, [2009] O.J. No. 1310; and *Gardner v. Gardner*, [2009] O.J. No. 340, 2009 CarswellOnt 387 (then adjusted awkwardly for child support). In *Hofmann v. Hofmann*, [2008] O.J. No. 5335, the husband argued the *without child support* formula in a short- marriage step-parent case, despite the presence of child support, and the wife made the correct calculations, but unfortunately the court split the difference. In *Holmes v. Holmes*, [2009] O.J. No. 94, 2009 CarswellOnt 87, the quoted range suggests that the wrong formula was used in a split custody case.
- **Social assistance is not income.** The Ontario Disability Support Program (ODSP) was incorrectly treated as income to the wife in *Macropoulos v. Macropoulos*, [2008] O.J. No. 4534, leaving the wife without retroactive spousal support. Contrast the correct approach by the same judge in *Quattrociocchi v. Quattrociocchi*, [2008] O.J. No. 5341.
- **Section 7 expenses must be considered in determining the range.** Many cases correctly took s. 7 expenses into account in calculating the *with child support* range, but some didn't: *Morey v. Morey*, [2009] O.J. No. 1160, 2009 CarswellOnt 1502; *Boju v. Corr*, [2009] O.J. No. 443; *Enright v. Enright*, [2008] O.J. No. 4949; and *Kemp v. Helfrich*, [2008] O.J. No. 3729.
- **Where prior child support is paid, the range must usually be adjusted.** In three cases, the adjustment under the prior support obligations exception was not made: *De Haney v. De Haney*, [2009] O.J. No. 1569; *Czupiel v. Czupiel*, 2008 CarswellOnt 6969; and *Dickinson v. Dickinson*, 2008 CarswellOnt 6788. For a case where the adjustment was made, see *Lickfold v. Robichaud*, 2008 CarswellOnt 6138.
- **In a step-parent case, the range should not be adjusted downward where child support is reduced under section 5 of the *Child Support Guidelines*.** This oversight meant higher spousal support in *Hansen v. Roy*, [2009] O.J. No. 282.
- **Adjustments should usually be made where one parent is not paying child support in cases under the *custodial payor*, *shared custody* or *split custody* formulas.** For a split custody example, see *Santos v. Santos*, [2008] O.J. No. 5110

(no claim by husband for child support, none paid). For a custodial payor example, see *Gardner v. Gardner*, above.

Far too often there is no reference to applicable exceptions, but these issues will be considered in that later section of the paper.

(4) Interim Support Cases Still Predominate

Interim cases continue to predominate amongst spousal support cases, a pattern that predates the 2005 release of the *Draft Proposal*. This pattern is distinctive to Ontario. Over the past 10 months, 35 per cent of the SSAG cases were interim decisions (40 per cent over the past 6 months). Half of the decisions are initial orders, while 15 per cent are variations or reviews.

Interim decisions are about amount, with issues of duration pushed off to trial. As a result, the predominance of interim cases means less development of the law around durational issues.

There has been remarkably little discussion of the exception for “compelling financial circumstances in the interim period”, even though there are clear fact situations which would raise the exception: *Refcio v. Refcio*, above; *Tenhoeve v. Tenhoeve*, [2009] O.J. No. 1423, 2009 CarswellOnt 1882; and *Clements v. Clements*, 2008 CarswellOnt 5692. Given the prevalence of interim support cases in Ontario, and the incentives for one party to argue the exception, this is surprising.

(5) Time Limits Now Used More Carefully

One of the unnerving early developments after *Fisher* was the indiscriminate use of time limits, especially in compensatory cases where the facts did not resemble those of *Fisher*: “*Fisher and After*” at pp. 13-14. An improvement was noted by Carol Rogerson last November: “Ontario Update” at pp. 7-9. For this paper, I have conducted a detailed analysis of time limits in all the cases over the past 10 months, with some interesting results. In general, Ontario courts are now using time limits more carefully and mostly in suitable cases.

First, consider the *without child support* cases. I divided them up by length of marriage and then had to remove the interim cases. For marriages of 20 years or more, there were only 7 cases left (5 interim cases), with indefinite orders in 5⁹ and time limits in the other two, 10 years in a lump-sum case (*Raymond*) and 7 years in *Cunningham*. For marriages of 10 to 19 years (1 interim), there were 4 cases, one indefinite (*Parker*) and time limits in the other three.¹⁰ For marriages up to 9 years (1 interim, 1 no entitlement),

⁹ *Cecutti, Fritsch, Stewart, Hurst, Wright*.

¹⁰ *Hayes, Gammon, Weatherhead*.

time limits were imposed in every one of the four cases, at the upper end of the duration range under the formula. These results are more or less what one would expect.

Second, what of the *with child support* cases? A similar broad pattern emerges. These are more numerous and I divided them into more categories. For marriages of 20 years or more, once we remove the interim (4), retroactive (1) and no entitlement (3) cases, all the other four cases were indefinite orders.¹¹ For marriages of 15 to 19 years (2 interim, 1 retroactive), 6 of the 8 cases were indefinite.¹² The other two had time limits: 10 years in *Holmes*, after both children would finish university in a split custody case; and an unduly short 4 ½ years in *Pollard* after an 18-year marriage and an agreement that failed the *Miglin* test. For marriages of 10 to 14 years (6 interim, 1 retroactive), two were indefinite¹³ and time limits were imposed in the other three: a dubious 7 years in *Korkola*, a high-income shared custody case; 9 years in *Renton*, mid-range in a custodial payor case; and 10 years in *Vanasse v. Seguin*, another high-income shared custody case.

For marriages of 5 to 9 years (4 interim), support was indefinite in only one case (*Dabrowska v. Bragagnolo*) and time limits were imposed in the other five.¹⁴ Three of the five time limits roughly equated with the length of the marriage. All three cases appeared to give excessive emphasis to the length of the marriage and too little to the age of the children and the obligations of the custodial spouse, in my view. The exceptions were the shorter limit attached in the step-parent case of *Hansen v. Roy* and the longer limit in *Jiwaji*. The short marriage cases (under 5 years) tell us little or nothing about duration: 4 of the 6 were interim cases, one was a case of no ability to pay (*Lickfold v. Robichaud*) and one was indefinite (*Rowley*).

Under both formulas, we see time limits used increasingly as the marriage gets shorter, an appropriate response under the *without child support* formula, but less uniformly so in the *with child support* setting. With some exceptions, the courts are now much more careful in imposing time limits in compensatory cases.

For an excellent analysis of duration under the *with child support* formula, look at Justice Sherr's decision in *Dabrowska v. Bragagnolo*, [2008] O.J. No. 3155, 2008 ONCJ 360. For a couple of good cases on duration under the *without child support* formula, consider *Hayes v. Hanrieder*, [2009] O.J. No. 421 (Vogelsang J.) or *Gammon v. Gammon*, 2008 CarswellOnt 6349 (Nolan J.).

(6) Some Patterns in Amount: Mid-to-High Typical

Historically, spousal support awards in Ontario have been more generous than elsewhere in the country, especially in long-marriage cases and in cases involving dependent children. The cases from the last ten months reveal that most amounts fall in

¹¹ *McFadden, Santos, Lalonde, Danby.*

¹² *Boyd, Enright, Hajir, Spikula, Mann, Arsenault.*

¹³ *Lana, Petit.*

¹⁴ *Cassaday, Hansen, Nicolau, Jiwaji, Durakovic.*

the mid-to-high part of the range, with amounts in the low end reflecting more unusual facts. Once again, in looking at amounts, I have divided the cases by formula and by length of marriage. Interim cases are included in the analysis here.

The *without child support* cases show an interesting pattern. For marriages of 20 years or more, 7 fell in the mid-to-high range, while the other 5 were low or even below the low end of the range. These lower end cases were a mix: a few interim decisions, where courts are often conservative, a high income case, and a variation case. In the 10-to-19 year group, all five cases came in around the mid-point of the range. Of greatest interest were the six shorter marriage cases, under 10 years. The one 8-year marriage was at the mid-point, but all four short marriage cases were at or above the higher end of the range. Above the range were a disability case (*Beardsall v. Dubois*) and an immigration sponsorship case (*Tailor*). At the upper end were another disability case (*Wells*) and one retroactive lump sum claim (*Morrison*).

The *with child support* cases reveal a more consistent pattern for amounts, except for the short marriage cases. For marriages of 5 to 19 years in length, Ontario courts fall in the mid-to-upper end of the range in about 75 per cent of the cases. These are your typical cases, school-age children. Once again, the cases that fall in the low end of the range here are the unusual fact situations. The long marriage cases, 20 years or more, are an odd bunch, with only 3 of 9 in the mid-to-upper range. On reflection, this isn't surprising, as these cases involve older children, with varying child support demands. The short marriage (under 5 years) cases are also all over the map: 1 above the range, 1 at mid-point, 2 at the lower end, and 2 below. I will take a closer look at these cases below.

While there is often not much explanation for the mid-point cases, one would hope for more elaboration of decisions to go high or low within the range, but there are only a few really helpful cases on location of an amount within the range: *Cecutti v. Cecutti*, [2009] O.J. No. 580 (Kane J.) under the *without child support* formula, and *Spikula v. Spikula*, [2008] O.J. No. 3931 (Shaw J.) under the *with child support* formula.

(7) Short Marriages Usually Don't Cause Problems under Either Formula

Short marriages can cause problems under both formulas, but the reasons are different. Under the *without child support* formula, the formula provides modest support, an appropriate range of outcomes in most cases, but not for all short marriages. Think of *Refcio*. Under the *with child support* formula, the difficulty lies in our unwillingness to acknowledge the serious compensatory consequences of very young children in those short marriages, despite the language of s. 15.2(6)(b) of the *Divorce Act* and the ruling in *Moge*. Here think of *Homsi v. Zaya*. It turns out that trial judges don't have problems under either formula.

There are not many short marriage cases reported under the *without child support* formula, as most spouses accept the modest support consequences of a short childless

marriage, often in the form of a lump sum or a period of interim support. The typical short marriage case is not worth litigating, or even negotiating for long. Hence, the cases that do turn up in court are exceptional, even odd, witness the five cases in the last ten months. Two immigration sponsorship cases (*Taylor, Merko*), two disability cases (*Beardsall, Wells*) and one lump-sum claim to trade off against property (*Morrison*). From our discussions of duration and amount above, it is clear that time limits are the norm for these cases, usually at the upper end of the formula range, and the amounts are also at or even above the upper end of the range. Absent an exception, however, these trial decisions do not show anything like the “old school” generosity of *Refcio*.

What about the short marriage cases under the *with child support* formula? I noted above that these are mostly interim decisions, 4 of the 6 cases, so they tell us little about duration. One was a zero-low-end-of-range, no support case (*Lickfold*). The other was an indefinite order (*Rowley*), as would be expected on an initial decision under this formula.

Amount is more interesting. Most of these are at the low end of the range, or even below the low end. A partial explanation is that the low end cases are mostly interim orders. But, in each of these cases, there are other reasons too for the lower amount: an above-ceiling income (*Jackson*), a wife limiting her claim to a lower amount (*Boju v. Corr*), a splitting of the difference between the correct formula range and an incorrect range in a step-parent case (*Hofmann*), a full table amount shared custody case¹⁵ (*Lickfold v. Robichaud*) and an interim interim shared custody/matrimonial home carrying cost case (*Baker*). The other two short-marriage cases were the more typical mid-to-high end: *Rowley* and *Tang v. Li*. The good news is that none of these trial decisions reveal the “no real disadvantage” view expressed by the Court of Appeal in *Homsi v. Zaya*.

(8) Lawyers and Courts Sometimes Struggle With Less Common Cases

It is not surprising that lawyers, mediators and courts struggle with some of the less common categories of cases, even apart from the exceptions. This heading provides an opportunity to flag some of the difficult areas in applying the Advisory Guidelines, and some helpful cases.

- **Incomes Above \$350,000.** Only three of these cases, all under the *with child support* formula: *Korkola v. Korkola*, [2009] O.J. No. 343 (\$540,000, shared custody, full table amount of child support, parties agree to spousal support to produce 50/50 split of NDI after deduction of husband’s RRSP contributions); *Sawula v. Sawula*, [2008] O.J. No. 3672 (\$456,000, full child support, mid-point of spousal support range for \$350,000); *Vanasse v. Seguin*, [2008] O.J. No. 2832 (\$450,000, shared custody, full table amount of child support, spousal support to leave 48% NDI to wife].
- **Shared Custody.** The four cases all demonstrate the close inter-relationship between child support and spousal support in shared custody situations. Where

¹⁵ Plus a prior child support obligation, to depress the range.

incomes are high, like *Korkola* and *Vanasse*, the full table amount of child support leads to less need for spousal support to maintain the household's net disposable income. In *Lickfold v. Robichaud*, 2008 CarswellOnt 6138, even with lower incomes, the full table amount of child support (and a prior child support obligation for the husband) meant no spousal support. And, in *Huska v. Adams*, 2009 CarswellOnt 2073, the tiny one-child set-off amount of child support in a low-income, small-income-disparity case led to an amount of spousal support slightly *above* the SSAG range.

- **Split Custody.** There were four split custody cases. In one case, where each parent had one child, the court opted for the 50/50 NDI split and hence an amount of spousal support at the high end of the range, for a disabled husband: *McFadden v. Sprague*, [2009] O.J. No. 258, 2009 CarswellOnt 294. The other three split custody cases all incorporated various errors, mentioned above: *Cassaday v. Krpan* (very high support, but tough time limit, restructuring?); *Holmes v. Holmes* (wrong formula?); and *Santos v. Santos*, [2008] O.J. No. 5110 (failure to adjust for zero child support by wife).
- **Custodial Payor.** As mentioned above, sometimes lawyers forget this distinct formula, as was the case in *Gardner*. On the other hand, there are two excellent examples of this formula being applied: *Petit v. Petit*, [2008] O.J. No. 5437 and *Renton v. Renton*, 2008 CarswellOnt 6150. Another was a delayed and unsuccessful claim for retroactive spousal support against the custodial husband, who had raised three children without child support: *Shelley v. Shelley*, [2009] O.J. No. 813.
- **Step-parents.** This slight variant of the *with child support* formula was first explicitly addressed in the *Final Version*, at pp. 92-94, which may explain some of the difficulties in these cases, noted above: *Hansen v. Roy* (error in calculating range where reduced s. 5 child support) and *Hofmann v. Hofmann* (husband argues *without child support* formula, judge splits difference). *Vanos v. Vanos*, [2008] O.J. No. 5002, 2008 CarswellOnt 7377 demonstrates why step-parent issues often don't arise, as the husband paid full table amount for the 3 remaining children (there had been 2 children of the prior relationship, treated as his own, as well as the 2 children of the marriage) and then spousal support at the mid-point.¹⁶
- **Miglin Cases.** The Advisory Guidelines can help at two stages where there are agreements about spousal support: to assess "substantial compliance" at the first stage or "significant departure" at the second stage, or to determine the amount and duration of support if the agreement is set aside. An example of the latter would be *Pollard v. Pollard*, [2009] O.J. No. 1744, 2009 CarswellOnt 2279. See

¹⁶ But at the mid-point of a different and lower income for spousal support purposes, i.e. \$150,000 based upon an agreed-upon seven-year average, in contrast to child support based upon the husband's 2007 income of \$301,143. It is possible, even necessary, in some circumstances to use two different incomes for the two different purposes, as is explained in the appended short article from *The Lawyers Weekly*.

also *Boyd v. Boyd*, [2009] O.J. No. 1526 (waiver of spousal support, but only if equalization instalment payments made, support ordered after non-compliance).

- **Restructuring and Lump Sums.** Despite the explicit use of restructuring by Lang J.A. in *Fisher*, the concept is often ignored, although it is sometimes used unconsciously. The most frequent form of restructuring involves the use of the Guidelines range to calculate a lump sum support order: *Raymond v. Raymond*, [2008] O.J. No. 5294 (although the 50 per cent deduction for contingencies on a 10-year order seems steep, especially after a long traditional marriage).
- **Variation and Review.** There is a myth out there that the Advisory Guidelines “do not apply” to variation or review, fed by a passing comment in *Fisher*. That is not correct, but there may be added complexities and entitlement issues arising in some cases that may limit the use of the Guidelines, as the B.C. Court of Appeal explained in *Beninger v. Beninger*, [2007] B.C.J. No. 2657. The best Ontario example of this more nuanced approach would be the decision of Justice Sherr in a variation case: *Mann v. Mann*, [2008] O.J. No. 2942, 2008 ONCJ 231. For another variation, this time upon retirement pursuant to the terms of a consent order, see the discussion in *Hurst v. Hurst*, [2008] O.J. No. 3800 (Ducharme J.). There are many cases in the past 10 months where the courts have used the Guidelines on variation or review, without much soul-searching. For variations, see *Gammon v. Gammon*, 2008 CarswellOnt 6349; *Unruh v. Rakowski*, [2009] O.J. No. 3390; *Enright v. Enright*, [2008] O.J. No. 5110; *Dickinson v. Dickinson*, 2008 CarswellOnt 6788; *Lalonde v. Lalonde*, 2008 CarswellOnt 6710; *Renton v. Renton*, 2008 CarswellOnt 6150; *Danby v. Danby*, [2008] O.J. No. 3659. For reviews, see *Tenhoeve v. Tenhoeve*, [2009] O.J. No. 1423, 2009 CarswellOnt 1882; *Holmes v. Holmes*, [2009] O.J. No. 94, 2009 CarswellOnt 87.

(9) Exceptions Now Mentioned, But Not Used Enough

Prior to *Fisher*, there was that tendency to say, “well, I don’t like these formula ranges for my client, so I guess that means the Advisory Guidelines don’t work in this case and I just won’t use them”. *Fisher* reminded us all that the Guidelines are not just the formulas, but must be “applied in their entirety”, including restructuring and exceptions. One sign of more sophisticated use is the explicit consideration of the exceptions. The exceptions are listed and explained in chapter 12 of the *Final Version*.

The latest bunch of cases reveals the use of a number of exceptions:

- **Compensatory Exception in Short Marriages.** The best example of this exception would be Justice Vogelsang’s reasons in *Beardsall v. Dubois*, [2009] O.J. No. 416: a 4-year marriage later in life, which would generate a range of support of \$463-\$618 per month for 2 to 4 years, which was increased to \$1,500/mo. for 5 years, to compensate the wife, as the wife had left her employment to move to London with the husband.

- **Illness or Disability.** This exception was also mentioned by Vogelsang J. in *Beardsall*, as the wife had alcohol and emotional problems. Power J. also made reference to this exception to order the high end of the range in a split custody case, where the high-income wife was paying spousal support to the husband: *McFadden v. Sprague*, [2009] O.J. No. 258, 2009 CarswellOnt 294.
- **Prior Support Obligations.** Although this has frequently been missed, it has also been picked up and used: *Lickfold v. Robichaud*, 2008 CarswellOnt 6138.
- **Non-Primary Parent to Fulfil Parenting Role under the Custodial Payor Formula.** In a rare example, Justice Platana used this exception, after granting custody to the father in a mobility case, to increase the amount of support above the range in order to recognize the cost of travel for access in northern Ontario and to maintain the mother's involvement with the children: *Petit v. Petit*, [2008] O.J. No. 5437.
- **Section 15.3 Inadequate Prior Compensation.** Where spousal support has previously been reduced in order to give priority to child support, the subsequent reduction of child support can give rise to an *increase* in spousal support: *Hajir v. Farshidfar*, [2008] O.J. No. 4712; *Danby v. Danby*, [2008] O.J. No. 3659.
- **Income Between \$20,000 and \$30,000.** Where the payor's income is just above the "floor", the Guidelines recognize a need to adjust the amount of spousal support below the range, to accommodate ability to pay problems, noted by Pierce J. in *Kajorinne v. Kajorinne*, [2008] O.J. No. 2789.

There still remain obvious exceptions that are overlooked, most commonly the interim exception for compelling financial circumstances in the interim period and the debt payment exception. Both are situations that turn up in the case law, and where adjustments are made in support, but without explicit reference to the "exceptions" in the Advisory Guidelines. A good example where both arose, but no reference was made to the exceptions, is *Tenhoeve v. Tenhoeve*, [2009] O.J. No. 1423, 2009 CarswellOnt 1882.

(10) Where to From Here?

In the foreseeable future, I would expect to see the continued use of the Advisory Guidelines across a wide range of cases, which in turn leads to more sophisticated use by lawyers, mediators and judges. Avoidable mistakes should steadily disappear. The debate over time limits and their proper use will continue. Restructuring and exceptions should be cited and used more often. Most importantly, in my view, the Advisory Guidelines should help lawyers and judges determine the amount and duration of spousal support in typical cases. That would leave more lawyerly energy for some of the harder issues of spousal support law, like entitlement, income determination, incomes above \$350,000, payor's post-separation income increase, termination of support, retirement, repartnering and remarriage, second families, the interaction of child and spousal support in complex cases, illness and disability cases, and some of the other exceptions.

APPENDIX A

SPOUSAL SUPPORT ADVISORY GUIDELINES, ONTARIO DECISIONS [July 10, 2008* – May 13, 2009]

For cases decided prior to July 10, 2008 see the previous update papers at
<http://www.law.utoronto.ca/faculty/rogerson/ssag.html>

[** most noteworthy cases]

A. Appeal Cases

***Refcio v. Refcio*, [2009] O.J. No. 1539 (Ont.Div.Ct.)(Valin, Wilson and Ray JJ.)

Together 3.5 years (married 2), no children, separated Dec. 2005

Husband young lawyer, earns \$60,000/yr., left with family debts of \$63,000

Wife earned \$12,000 in 2001, left employment to go to school, after separation cohabits and then April

2007 has twins by new partner, no income, living at home with parents, emotional problems

Trial decision (June 2006)(Granger J.): spousal support of \$1,500/mo., from date of separation

Indefinite, until wife obtains employment, review in 5 years, no reference to SSAG

Div. Ct.: husband concedes terms of interim order, \$875/mo. for 3 years (already paid)

Failure to refer to SSAG not error, range stated as \$180-\$300/mo., 22 months (?)

Guidelines “not particularly helpful”, “modest”

Trial award “on high end of the range” for amount, but deference

Duration: finality needed, so time limit, 5 years to Dec. 2010

***Jessop v. Wright*, [2008] O.J. No. 3849, 2008 ONCA 673 (Ont. C.A.) (Lang, Rouleau and Watt JJ.A.)
(Sept. 29/08), varying 2008 CarswellOnt 6486 (S.C.J.) (McKinnon J.) (Feb. 21/08)

15 year marriage, 2 children 18 and 15, with wife; date of separation not stated; before 2000

Husband loses job after separation; nominal child and spousal support 2001-2005; finds new employment

April 2005; wife then seeks child and spousal support

Husband’s income: \$135,000 (2005), \$145,500 (2006), \$131,425 (2007)

Wife’s income: \$28,938 (2005), \$35,707 (2006), \$37,870 (2007, income plus severance); lost job in 2007,
unemployed at time of motion

Motions judge: child support \$1772; spousal support \$2000/mo retroactive to May 2005

Appeal court criticizes motions judge for failing to explain how he arrived at the amount of support or
specifying incomes on which award based.

No error to not apply Guidelines, as ranges not provided

Error to award same amount for years when wife working and earning \$25,000 - \$37,000 and years when
unemployed; amount of spousal support should vary depending on recipient’s income

Award reduced to \$1700 per month from May 2005 until Nov 2007 when wife’s severance pay expired;
amount said to fit one of Guidelines ranges provided by husband [SSAG range not provided, but
calculated as \$1261- \$2030, midpoint \$1644, based on h \$131,425 and w \$35,000 as h argued; but
using actual 2005 incomes range is \$1796-\$2575; actual 2006 incomes range is \$1654-\$2472, and
actual 2007 incomes range is \$1261- \$2030]]

Award of \$2000 per month from Dec. 2007 upheld; amount sought by wife; noted to be at low end of
Guidelines range or even below given wife’s unemployment [SSAG range not provided,
calculated as \$2293-\$3125 if h \$131,425 and w zero income]

* Included are a few cases decided before July 10, 2008, which were not included in the last update, “The Spousal Support Advisory Guidelines Three and Half Years Later” (June 16, 2008, revised Aug. 1, 2008) which provides case summaries for the period Sept. 17, 2007- July 10, 2008.

****Vynnk v. Baisa**, [2008] O.J. No. 3747, 2008 ONCA 657 (Ont. C.A.) (Laksin, Simmons and Sharpe JJ.A)
 (Sept. 19, 2008) affirming [2007] O.J. No. 274 (S.C.J.)(Klowak J.)
 Married 10 years, husband 39, wife 33, separation 2005, 1 child aged 3 at date of trial, with wife
 Husband critical care nurse, paid through own company, earns \$87,000
 Child support \$774
 Wife earns \$39,000
 Strong compensatory claim: wife sponsored husband from Ukraine, waitressed, two jobs, to put him
 through school,
 Delayed her own education, now likely to return to school
 Trial judge awarded periodic spousal support \$2,000/mo. for 5 years, 61% NDI
 Higher quantum than if no time-limit; notes Guidelines range \$491-\$1151 but for up to 17 years
 [restructuring by front-end loading to facilitate education, but not noted as such]
 In addition, lump sum support of \$75,000 to recognize strong compensatory elements and support wife's
 education
 Trial judge of view that the Guidelines would only generate periodic award and thus would not adequately
 address all the element of the case [but actually all within global range at Guidelines maximum]
 Combined periodic and lump sum award upheld on appeal in brief reasons deferring to trial judge's finding
 of wife's extraordinary efforts in facilitating husband's educational and career success.
 Award generous, but no error
 No reference to Guidelines in appeal judgment.

B. The Without Child Support Formula

Puckering (Litigation Guardian of) v. Puckering, [2009] O.J. No. 1646, 2009 CarswellOnt 2118
 (Ont.S.C.J.) (Blishen J.)
 Married 30 years, 3 adult children, traditional marriage
 Wife ovarian cancer, palliative care in home, no income (prior to separation)
 Wife's expenses \$7,400/mo., some inflated
 Husband software company, salary and bonus \$235,222/yr.
 Interim spousal support, both compensatory and non-compensatory
 SSAG range \$7,351-\$9,691/mo., indefinite, mid-point \$8,576/mo., \$8752 is 50/50 NDI
 Wife seeks \$9,352, husband offers \$8,000, order for \$8,800/mo.

Soares v. Soares, [2009] O.J. No. 1560 (Ont.S.C.J.)(Ricchetti J.)
 Married 31 years, 2 adult children, interim support
 Wife home, now unable to work, accepted for interim motion
 Husband earns \$76,740/yr.
 Wife says range \$2,356-\$3,012, seeks \$2,500/mo.
 Husband deducts union dues, attributes investment income to wife (\$4,944/yr),
 says range \$2,136-\$2,728/mo.
 Husband offers \$600/mo., youngest daughter (25) with him, her diabetes expenses \$400/mo.,
 wife not sought CPP disability
 Interim order \$2,000/mo.

Cunningham v. Montgomery, [2009] O.J. No. 1310 (Ont.S.C.J.)(Coats J.)
 Married 22 years, husband 59, wife 58, 1 child 23 with husband, separated Jan. 2002
 Interim separation agreement 2002: equal split of property
 Income issues for husband, own business, his accountant's expert evidence accepted
 Child support: daughter in university, graduates in 2009, terminates May 2009
 Interim 4 mos. table amount to father of \$820/mo., then budget \$13,000 less child contribution \$4,000,
 Balance of \$9,000, split equally, i.e. \$375/mo.
 Interim spousal support: \$1,000/mo. from April 2002 to Dec. 2003, terminated by husband,
 Then \$1,500/mo. from Sept. 2004 to April 2009
 Transitional compensatory support, end in April 2009,

Wife member of Immigration and Refugee Board, on disability, income from \$107,000 to \$91,922/yr
Husband own public relations co., 2002-04, earned about \$200,000 per year, now \$22,647
Wife's income greater than husband's since 2005, support should have terminated then
SSAG used to determine past support, compared to that actually paid in 2004 to 2009
Without child support formula used, high end of range \$3,500/mo. 2004, \$3,000 in 2005, zero after
Global amounts about same, no repayment
[*Custodial payor* formula should have been used, 2004 range \$1,826-\$2,435, 2005 range \$1,668-\$2,224]

Goddard v. Goddard, [2009] O.J. No. 1293 (Ont.S.C.J.)(Kershman J.)
Married 32 years, 2 adult children, husband 55, wife 54, interim interim support
Wife earns \$58,000, managing community centre, may lose job in April 2009
Husband manager of securities co. branch, income issues, he says \$120,000, offers \$2,000/mo.
Wife says his income \$240,000, SSAG range \$5,688-\$7,538, or if \$200,000, then \$4,438-\$5,872/mo.
No explanation for reduction in income, income fixed at \$200,000
Long-term traditional marriage, entitled, low end of range for interim interim support, \$4,438/mo.
Clearer picture of husband's income from report at interim hearing

Jennett v. Jennett, [2009] O.J. No. 1226 (Ont.S.C.J.)(Mulligan J.)
Married 27 years (plus cohabitation for "several years"), 2 adult children, husband 55, wife 52
Interim spousal support to be determined, separated March 2008, no support paid
Wife CPP disability, \$12,252/yr.
Husband locomotive engineer, CNR, reduced hours, \$103,000/yr., new partner (earns \$36,000/yr.)
Husband paying mortgage of \$1,200/mo., wife in home
Range \$2,836-\$3,309, order for \$3,309/mo. interim, wife pays mortgage

Durocher v. Treitz, [2009] O.J. No. 856, 2009 CarswellOnt 1079 (Ont.S.C.J.)(Gauthier J.)
Cohabited 15 years, no children, husband 45, wife 40
Wife lost job since separation, was earning \$75,000, now \$23,000, new partner (self-employed)
Husband police officer, earns \$102,000/yr., living with another police officer (\$74,000) and her daughter
Entitlement: non-compensatory only, loss of standard of living, stress of separation, loss of job
Interim spousal support of \$1,750/mo., close to mid-range SSAG [range \$1,481-\$1,975/mo.]

***Cecutti v. Cecutti*, [2009] O.J. No. 580 (Ont.S.C.J.)(Kane J.)
Married 40 years, husband 69, wife 70, 3 adult children
Wife in home, exclusive possession, 2002 interim order \$5,000/mo. spousal support
Traditional marriage, wife no income
Husband accountant in practice, still working, no pension, new partner (\$41,000/yr.)
Equalization of NFPs
Husband agrees to pay spousal support of \$5,000/mo., indefinite, wife seeks \$10,000/mo. (50% gross)
Husband's income averaged over 7 years, \$238,000/yr.
Range \$7,225-\$9,443/mo., lower end of range, factors listed, \$7,225/mo. and \$12,000 retro
Husband needs to slow down in future, variation likely

Cote v. Cote, [2009] O.J. No. 484 (Ont.S.C.J.)(Kane J.)
Married 35 years, 3 adult children, husband 58, wife 51, interim support
Husband works at Vale Inco, says income \$70,000, offers SSAG midpoint \$2,547/mo.
Wife says his income \$150,000, SSAG midpoint \$5,469/mo.
Wife earned \$30,000, but on sick leave for cancer since Sept. 2007, no income
Interim spousal support \$5,000/mo.

***Hayes v. Hanrieder*, [2009] O.J. No. 421 (Ont.S.C.J.)(Vogelsang J.)
Cohabited 15 years, no children, husband 54, wife 58, separated 2004
Wife in house until 2008 sale, also her mother and then her father
Wife employment problems, working at Superstore part-time, \$15,082/yr.
Husband Canada Post, retires July 2009, earns \$49,537/yr. (\$31,000 on pension)
Independent, 50/50 relationship, each autonomous

No compensatory claim, only non-compensatory, transitional support
Range \$631-\$841, midpoint \$736, when retired \$299-\$398, midpoint \$348/mo.
Spousal support \$750/mo. from Feb. 2008 to retirement, \$350/mo. until Sept. 2011
Total duration 7.5 years, 4 years in house after separation, plus 3.5 years

***Beardsall v. Dubois*, [2009] O.J. No. 416 (Ont.S.C.J.)(Vogelsang J.)
Married 4 years (cohabited 30 months), no children, separated Dec. 2005
Husband military, retired 2000 to London, employment and pension \$92,600/yr.
Wife also Armed Forces, medical technician, quit job in Petawawa, moved to London
Wife employment problems, alcohol problems, quit \$12,000 job, to move to mother in Barrie, no income
Entitlement to support conceded, vague agreement by husband to support wife
Temporary spousal support of \$1,600/mo., from Aug. 2006
Range \$463-\$618, 2 to 4 years, but disability exception and compensatory exception
Order \$1,500/ mo. from Feb. 2009 to Nov. 2010, no retro support

Raymond v. Raymond, [2009] O.J. No. 5294 (Ont.S.C.J.)(Hennessy J.)
Married 27 years, 2 adult children, husband 54, wife 52, long traditional marriage
Husband's pleadings struck for non-disclosure
Husband also not paid support \$2,600/mo. ordered in June 2007, satisfied out of house proceeds
Property divided equally
Husband earns \$95,648/yr., including grossed-up Quebec workers' comp payments (payable for 10 years)
Wife various part-time jobs, earns \$31,922/yr.
SSAG midpoint \$3,246/mo., payable from Oct. 2008
Lump sum order: \$2,240/mo. (net after-tax) for 10 years, less 6% for present value, less 50% contingencies
Total amount \$98,585, plus \$21,154 retro support, partially satisfied from remaining house proceeds

Fritsch v. Fritsch, [2008] O.J. No. 5238, 2008 CarswellOnt 7838 (Ont.S.C.J.)(Pazaratz J.)
Married 24 years, 4 adult children, wife and husband both 62
Wife works part-time retail, husband pipefitter
1997 "temporary" order: spousal support \$250/mo., wife cohabiting for 3 years, husband earned \$57,000
Treated by parties as final order, husband now retiring, seeks to terminate support
Wife still cohabiting (17 years together), husband now cohabiting too
Husband's income \$40,728/yr. (down from \$64,000), wife earns \$17,000 max.
SSAG not apply, given age of order and variation, range stated as \$570-\$740/mo. if husband \$36,000
Wife still entitled, support continued at \$250/mo. "very modest", no info re *Boston* argument

Stewart v. Tudorachi, [2008] O.J. No. 5111 (Ont.S.C.J.)(Warkentin J.)
Together 22 years, no children, husband 53, wife 50, separated 2003
Application to vary by husband to reduce or terminate support
2006 order: support \$2,250/mo., husband earning \$73,000, wife no income
Husband pipefitter, income reduced to \$63,000, health problems, married to teacher, she 4 children
Wife has fibromyalgia, intended to upgrade, instead job for 8 months in 2008, \$28,000/yr.
Wife quit job before hearing, income imputed at \$15-\$17,000/yr.
SSAG "rule of 65" applies, no end date, circumstances different from *Fisher*
Range for various incomes \$1,000 to \$1,500/mo. [range estimated at \$1,265-\$1,687/mo. on those found]
Order for \$1,400/mo. for 2 years, then \$1,200/mo. indefinite

Morrison v. Barclay-Morrison, [2008] O.J. No. 4663, 2008 CarswellOnt 6956 (Ont.S.C.J.)(Czutrin J.)
Married 5 ½ years, no children, separate 1995, husband now 40, wife 38
At separation, husband earned \$47,257, wife \$24,627/yr.
SSAG range then \$170-\$227/mo., for 3 to 6 years, lump sum calculator \$4,000-\$12,000 after tax
If interim claim made in 1995, likely higher, \$600-\$800/mo., given property obligations
Property calculations for equalization, house, husband's share \$10,329, home vested in wife

Wallace v. Prince-Cox, 2008 CarswellOnt 6434 (Ont. S.C.J.) (Tulloch J.) (Oct. 31/08)

8 -9 year common law relationship

W has spotty work record; h loaned her \$22,000 during relationship, never repaid

H income \$76,000

H paid interim support of \$800/mo for 14 months plus \$4,500

W in new relationship and plans to move to Calgary; income uncertain; imputed at \$24,00

W seeks spousal support of \$1000/mo for 6 years

No further entitlement to spousal support

SSAG range \$520-\$693/mo for 4-8 years; midpoint \$606/mo for 6 years, or \$33,984 after tax.

H already paid \$36,900 through interim support and \$22,000. W adequately compensated for relatively short relationship that resulted in no economic disadvantage to her

***Wells v. Wells*, [2008] O.J. No. 3961 (Ont. S.C.J.) (Richetti J.) (Oct. 9/08)

3 year relationship (married 1 plus 3 prior cohabitation; separation 2007

W disabled; disability income of \$25,000 after gross up; child from prior relationship; child support from father excluded from her income; after separation sharing home purchased with ex-husband

H income \$70,000

W seeks \$1,200/mo interim spousal support, to give her 41% NDI; rejected; NDI approach not appropriate given short length of marriage

SSAG range: \$225-\$300/mo

Interim support of \$300/mo ordered; top end of range because of disability; by excluding child support received by wife from her income, range effectively increased; had this not been done, amount would have been increased by small amount beyond upper end of range to take account of disability

Taylor v. Taylor, [2008] O.J. No. 3900 (Ont. S.C.J.) (Richetti J.) (Oct. 7/08)

Immigration sponsorship; wife from India; married 2 years; cohabit only 10 months; separation 2006; h signs 3 year sponsorship until May 2008

Wife highly educated; employed now at \$14,000 but plans to seek certification of professional qualifications in Canada; h earns \$33,000 and supports parents

Wife seeks \$500 per month for 2 years (2006 to 2008) from separation to end of sponsorship agreement

Sponsorship agreement not a factor in decision because w did not seek social assistance

Court orders \$100/mo for 20 months for period from separation until Jan. 2008, or \$2000 lump sum plus pre-judgment interest.

Award said to be higher than SSAG, but reasonable given husband's actions in forcing execution of unconscionable separation agreement and leaving w stranded in India without return airfare post-separation [compensatory exception not referred to]

[SSAG range not stated, calculated as \$48-\$63 for 1-2 years, max. global value \$1515]

Parker v. Parker, 2008 CarswellOnt 6381 (Ont. S.C.J.) (Bishop J.) (Oct 6/08)

Variation of consent order

19 year relationship (17 marriage plus 2 cohabitation), separation 1999, wife 16 when married

2 children, now 20 and 18, one special needs, on social assistance but w also pays some expenses

Consent order in 2000 when h's income \$6,240: child support \$4/mo and spousal support \$1/mo; variation clause

H's income increases immediately after order; now \$95,800; w on social assistance (Ont. Disability), \$14,767; h did pay ws' car insurance of \$775/yr until July 2008

W seeks retroactive child and spousal and on-going spousal

Court uses SSAG to calculate arrears and on-going support [calculations not provided]

On-going spousal support of \$2,655 per month

Immaterial that Ont. Disability may recoup disability payments; primary responsibility for child and spousal support with h and not state

Merko v. Merko, 2008 CarwellOnt 6361, 2008 ONCJ 530 (Ont. C.J.) (Maresca J.) (Sept. 30/08)

Immigration sponsorship; wife from Ukraine; married two years, cohabit only 12 months, separation 2006

Each party no income and dependant on family and friends

Both claim spousal support and make arguments using SSAG and imputed incomes
No entitlement to support; very short marriage; economic lives never intertwined

Hurst v. Hurst, [2008] O.J. No. 3800 (Ont. S.C.J.) (Ducharme J.) (Sept. 24/08)

36 year marriage; separation 2000; divorce 2003; 3 grown children

2003 consent order : \$2000 per month spousal support until Aug. 2007 (h's expected retirement date); after retirement first \$2,261.70 of pension income not to be considered as income for spousal support purposes as divided through equalization payment

H does not retire until Dec. 1, 2007; receives \$70,000 lump sum retirement transferred into RRSP

W applies for variation and determination of support after Aug 2007

Retirement incentive not to be included in h's 2007 income for spousal support purposes

H 2007 income \$124,000; w's income imputed at \$23,000 (CPP, rental income; imputed income from hairdressing)

Guidelines may be applicable if agreement provides for review or variation; guidelines taken into account to ensure that support ordered "falls within the appropriate parameters"; \$3600 per month for 4 remaining months of 2007 [SSAG range not stated, calculated as \$3156-\$4143]

Ongoing support for 2008 \$1200/mo: based on h income \$51,790 (including only unequalized portion of pension) and w income \$18,767 [SSAG range not stated, calculated as \$1032-\$1301]

***Gammon v. Gammon*, 2008 CarswellOnt 6349 (Ont. S.C.J.) (Nolan J.) ((Sept. 17/08)

15 year relationship; 7 years marriage, plus 8 prior cohabitation; no children; separation 2004

Separation agreement set aside; 2007 order for spousal support retroactive to separation (2004) based on parties' incomes (actual and imputed) and SSAG; \$1500 per month for 2007 based on w income (imputed) of \$25,956 and h's income (estimated) of \$90,000

H retires Dec. 1, 2007; gross monthly pension \$3700; in property division, 22.6% of pension equalized (based on 7 years of marriage); 77.4% available for support

H also receives retirement incentive of one-time payment of \$85,000, included in 2007 income but which could be sheltered all or in part in RRSP; also \$30,000 car voucher included in 2008 income

Application by H to vary support and set termination date

Neither severance package nor car voucher to be included in h's income (treated as post-separation income increase; w not entitled to share; basis of her support not compensatory; no significant contribution to h's career)

Support for 2007 recalculated using h's actual income (\$117,880) and mid range of Guidelines

Support for 2008 set at \$271/mo based on h income of \$34,365 (unequalized part of pension) and mid-range of Guidelines.

Termination date appropriate; SSAG range 7.5 to 15 years; had spousal support provisions of separation agreement had been negotiated in accordance with Divorce Act objectives, termination at low end of range would have been appropriate; in circumstances and given how long it took w to get the periodic support to which she was entitled, 10 year duration is appropriate; support to terminate in 2014.

***Wright v. Wright*, [2008] O.J. No. 3118 (Ont. S.C.J.) (Langdon J.) (Aug. 11/08)

27 year marriage; separation 2003; 3 grown children

H has gravel business; w worked in business during marriage

Property division dealt with in separation agreement: h to pay w \$213,475 for shares of company by means of monthly payments of \$2,647 for 8 years

H's income from business \$105,000 (\$90,000 plus \$15,000 taxable benefits)

W had worked part-time as book-keeper after separation, now enrolled in on-line course; future income speculative; living with new partner and enjoying higher standard of living than during marriage; annual income of \$35,000 imputed

SSAG range calculated as \$1250 - \$1600

\$800 per month ordered; lower than SSAG to take account of h's monthly obligation to pay wife for her shares out of income generated by business

Kretschmar v. Séguin, [2008] O.J. No. 2834 (Ont. S.C.J.) (Power J.) (July 17/08)
Variation application; agreement providing for variation upon change of circumstances
SSAG generally not applicable on variation (*Fisher*); but more specifically this agreement has specific formula giving wife 35% of husband's base income (result higher than under SSAG)

Weatherhead v. Briant, [2008] O.J. No. 3390 (Ont. S.C.J.) (Hennessy J.) (June 30/08)
10 year common law relationship; separation 2006; wife higher earner;
Husband applying for spousal support; started 3 year college program Sept. 2007
Wife's income from business \$30 - 35,000; husband zero for months in school
SSAG range stated as \$375-\$500 (if w income \$30,000) or \$483-\$583 (if w income \$35,000)
\$450 per month ordered from July 07 to April 08 (almost 3 yrs); low end of range because h capable of earning some income during summer

C. The With Child Support Formula

Mann v. Mann, 2009 CarswellOnt 2631 (Ont.S.C.J.)(Herman J.)
Appeal from Court of Justice, 2 children
2006 order: husband earned \$58,500, child support \$879 (2), spousal support \$150/mo.
Husband loses job, new job lower income, \$42,900, motion to vary
2008 trial decision: child support (1) \$395/mo., dental expenses \$66/mo., spousal support \$350/mo.
Wife's income, 2 part-time jobs, 27 hours/week, dental assistant, \$23,639/yr.
Husband seeks to impute full-time income to wife of \$27,800
Same principles for imputing for spousal support as for child support, according to SSAG
Onus on husband to prove imputation, not met
[Range estimated \$64-\$366/mo.]

Pollard v. Pollard, [2009] O.J. No.1744 (Ont.S.C.J.)(Mossip J.)
Married 18 years, 2 children, son 21 working full-time, daughter 20 living with wife, university
Couple separated 2001, negotiations and legal advice, reconciled, separated again 2004
Negotiated 2004 separation agreement on own: exclusive possession of home to wife until 2007,
property divided, child support \$542/mo., son then with husband, daughter with wife,
shared custody thereafter, no spousal support
Wife challenges agreement in 2007, husband moves to enforce
Equalization calculations close enough to NFP
Child support: parties agreed to amount less than table, husband to continue to pay daughter's rent and tuition at university, no amounts stated, order made
Miglin re support: stage 1, circumstances of negotiation okay, wife's pressure self-inflicted, move on
But release of spousal support not in substantial compliance
Wife home 8 years, relocated with husband during marriage
Husband in 2004 earning \$85,000, \$104,000/yr. in 2008
Wife limited employment in 2004, home staging business, now on EI course, no incomes stated
Wife calculates spousal support of \$1,400/mo. as "fair", using *with child support* formula (?)
Court orders \$1,400/mo., with time limit given her age and employability
Support to begin Oct. 2007, continue for 36 mos. to April 2009, i.e. 4 ½ years total
[Not possible to estimate ranges accurately without wife's income, child amounts]

Unruh v. Rakowski, [2009] O.J. No. 1706 (Ont.S.C.J.)(J. Wright J.)
Application to vary by husband
2002 consent order: husband receiving WSIB of \$37,400/yr. grossed up
child support for 2 of \$537/mo., spousal support \$100/mo.
Retroactive support ordered for 2007 to 2009, SSAG used for retro spousal support
Husband now \$43,700/yr., child support \$661/mo.
SSAG range \$14-\$234/mo., spousal support of \$220/mo. ordered

Huska v. Adams, 2009 CarswellOnt 2073 (Ont.S.C.J.)(Mulligan J.)
Interim support, one child 6, equal shared custody
Husband's income reduced by employer, from \$34,487 to \$23,400/yr.
Wife at home, now part-time at A & W, \$14,800/yr.
Interim child support: agreed to set-off, \$199-\$119, or \$80/mo.
Interim spousal support \$80/mo., "Guidelines are just that"
[SSAG range zero to zero; at zero, wife 51.9% NDI; at \$80 spousal support, 54% NDI]

De Haney v. De Haney, [2009] O.J. No. 1569 (Ont.S.C.J.)(Ricchetti J.)
Together 9 years (married 1), 1 child 9 with wife, husband 39, wife 35, separated Nov. 2007
Wife no income, home, out-of-date medical evidence, \$17,000 income imputed (minimum wage),
wife previously worked as office manager
Husband truck driver in construction, now less overtime, laid off for period, reduced income \$48,000
Child support \$444/mo., retro child support and spousal support ordered
Interim spousal support: wife says range \$1,304-\$1,606 [if husband \$69,000 and wife zero]
Husband says none or \$300/mo., also paying \$308/mo. child support for another child
Interim spousal support of \$900/mo. ordered
[Range estimated at \$48,000 and \$17,000: \$100-\$410/mo.; after prior child support, 0 to \$230/mo.]

Boyd v. Boyd, [2009] O.J. No. 1526 (Ont.S.C.J.)(Cavarzan J.)
Married 17 years, 3 children 19, 14 and 11, separated Aug. 2004, separation agreement
Husband in arrears of child support, and equalization payments under agreement
Husband in matrimonial home, paid \$20,000, then only one of three \$10,000 instalments
Wife agreed to waive spousal support, but only if all instalments paid
November 2005 oldest child to live with husband
Child support resolved, but \$1,064/mo. shown for 2009 (3 child amount, but split custody?)
Order for \$3,400 in retro s. 7 expenses
Husband earns \$54,091 (including grossed-up structured settlement), wife earns \$34,422
Temporary order Oct. 2007: spousal support of \$400/mo.
SSAG calculations provided for 2005-09: zero support 2005, 2008, 2009, \$100/mo. in 2006,
\$125-\$150/mo. in 2007
Spousal support ordered of \$160/mo., calculated at 40% of \$400/mo., now that 60% of instalments paid

Tenhoeve v. Tenhoeve, [2009] O.J. No. 1423, 2009 CarswellOnt 1882 (Ont.S.C.J.)(G.P. Smith J.)
Together 21 years (married 18), 4 children, only 2 dependent, 5 with wife, 18 away at university
Husband hydro power line technician, earns \$118,673/yr.
Wife works 2 part-time jobs, earns \$23,904/yr.
Child support: \$1,021/mo. for one, plus \$500/mo. when 18-year-old home with wife, otherwise no child
support for him as husband owns rental building and pays debt on his apartment
Wife seeks interim spousal support of \$3,027/mo, SSAG range \$2,283-\$3,027/mo.
Amount unrealistic given level of family debt: husband paying \$2,500/mo. on rental building and
\$433/mo. to credit union
Interim spousal support \$500/mo., rental property and home to be sold (husband in home)
[No reference to interim exception or debt exception]

Graham v. Wilson, [2009] O.J. No. 1432, 2009 CarswellOnt 1866 (Ont.S.C.J.)(Shaw J.)
Together 10 years, 2 children 8 and 6, with wife, access issues
Husband plumber, 20-30 hrs/wk, \$47,500/yr., 2 other jobs not available this year
Husband does not have to leave town and children to work out west
Wife bartender, part-time, 12-13 hrs/wk, earns \$10,000/yr.
Child support \$717/mo.
SSAG range \$36-\$306/mo., children with husband 6 nights out of 14, expenses recognized
Interim spousal support \$200/mo.

Lana v. Navarette, [2009] O.J. No. 1201 (Ont.S.C.J.)(Backhouse J.)
Together 12 years, children 13 and 10, with wife, husband 39, wife 38, separated Dec. 2006
Income issues re husband, non-disclosure, works with brother as vice-president, fixed at \$280,450
Child support \$3,505/mo., property issues
Family made 4 moves between Edmonton and Toronto, to accommodate husband
Wife not worked outside home since 1995, no high school, no income
Husband failed to pay support, wife forced onto social assistance
SSAG range \$5,864-\$7,194/mo., 53.5 to 58.1% NDI, indefinite, 5 to 11 years
Spousal support ordered at midpoint, \$6,506/mo., indefinite, 55.8% NDI

Morey v. Morey, [2009] O.J. No. 1160, 2009 CarswellOnt 1502 (Ont.S.C.J.)(Gray J.)
Married 14 years, 2 daughters 13 and 7, with wife
Husband executive Air Canada, earns \$212,000/yr.
Wife employed at ScotiaBank, \$104,000/yr.
Nov. 2008 consent order: sell home, child support \$2,676/mo.
Interim spousal support, range \$700-\$2,150/mo., modest support pending trial, so below midpoint (\$1,450)
Order for \$1,200/mo., s. 7 expenses for private school, day care, summer camp
[S. 7 expense amounts not specified, and not considered in SSAG calculations]

Perrins v. Perrins, [2009] O.J. No. 1143 (Ont.S.C.J.)(Hourigan J.)
Married 7 years, 2 children 14 and 8, with wife
Wife educational assistant, home on disability, back in September, income \$26,585
Husband police officer, earns \$81,348/yr.
Interim child support \$1,175/mo.
Interim spousal support: wife seeks SSAG midpoint \$532/mo., husband says can only afford \$300
Order for \$350/mo., halfway between SSAG low end (\$173/mo.) and midpoint

Jackson v. Boyle-Jackson, [2009] O.J. No. 716, 2009 CarswellOnt 861 (Ont.S.C.J.)(Festeryga J.)
Married 29 years, 1 child 11, with wife, husband 53, wife 51, separated 2007
Wife disabled, brain injury in car accident, structured settlement and CPP, income \$48,804/yr.
Husband earns \$823,322/yr.
Interim child support \$6,237/mo.
Interim spousal support \$18,900/mo., to produce 50/50 split of NDI, midrange SSAG
SSAG range stated as \$18,300-\$22,400 [appears to be partially adjusted for s. 7 expenses]
Each pay share of listed s. 7 expenses, including private school, riding (amounts not specified)

Cassaday v. Krpan, [2009] O.J. No. 651, 2009 CarswellOnt 808 (Ont.S.C.J.)(Mossip J.)
Married 7 ½ years, 2 children, son with husband since Sept. 2008, daughter (15) with mother
Separated Dec. 1998, wife then 44, 2001 separation agreement, support to be reviewed in 2004
Husband imputed income \$120,000, real income lower, wife then \$11,000, spousal support \$2,250/mo.
Review, wife now earns \$40,000, husband's income reduced to \$82,000/yr.
Child support: \$735-\$367=\$368/mo.
Spousal support continued at \$2,250/mo. from 2004 to Dec. 2007, none after that
With child support duration range interpreted as 4 to 8 years
Spousal support for 3 more years, to Dec. 2007, total of 6 years (plus some support 1999-2001)
[SSAG range for amount, split custody formula, using current incomes: \$90-\$628/mo.]

Shelley v. Shelley, [2009] O.J. No. 813 (Ont.S.C.J.)(Reilly J.)
Together 16 years (married 15), wife's child of first marriage now 26, 2 children 21 and 15
Separated 2001, all three children with husband
Husband works construction, with his father and then his son, income issues, no income determined
Retroactive child support from 2001 to 2007 of \$17,000, \$370/mo. for one child going forward
Wife earns \$40,000, seeks retroactive spousal support from Nov. 2001 to April 2004
Wife claims \$13,090, i.e. \$935/mo. for 14 months, midpoint of SSAG range, as "reimbursement"
No entitlement now, 8 years after separation, would have been then, independent by 2004
No retroactive spousal support, property divided, no occupation rent by husband

Calvert v. Stewart, [2009] O.J. No. 528, 2009 CarswellOnt 671 (Ont.S.C.J.)(Matheson J.)
Married 21 years, 3 children 21, 16 and 10, 21-year-old on own, 2 with mother
Husband paying \$1,000/mo. to 21-year-old, retro child support determined
Child support \$3,430/mo. (2)
Section 7 expenses: equestrian for 16-year-old, \$8,000/yr., no, voluntary only by husband
Child (10) learning disability, private school, \$13,088/yr, 1/3 by wife, 2/3 by husband, \$727/mo.
Both spouses doctors, bad financial managers, lots of debts
Husband internist, earns \$274,000/yr., wife pediatrician, earns \$139,667/yr.
Spousal support: no entitlement, not mere disparity in income, quoting SSAG final version,
Guidelines calculations provided by counsel (numbers not stated)
[If consider private school and contributions to daughter, SSAG range estimated as 0 to \$1,559/mo.]

Bentley v. Bentley, [2009] O.J. No. 441 (Ont.S.C.J.)(Linhares de Sousa J.)
Married 31 years, husband 64, wife 62, 3 children, one in university
Sept. 2004 separation agreement: child support \$526/mo., spousal support \$1,275/mo.
husband's income then \$63,000, wife's \$15,000/yr.
Wife now earns \$38,000/yr.
Husband teacher, retired Jan. 2008, income reduced from \$72,000 to \$20,900,
legitimate health reasons to retire, now remarried, moved to Denmark
Income imputed to husband, can work part-time, so \$38,000/yr.
Child support reduced to \$350/mo., each pay 50% of section 7 expenses (not stated)
Spousal support suspended, no ability to pay, despite wife's need and role during marriage
Unless SSAG calculations provided to show otherwise [range estimated, 0 to 0]

Boju v. Corr, [2009] O.J. No. 443 (Ont.S.C.J.)(Harvison Young J.)
Married 4 years, 1 child 2, with wife in Arizona
Husband accountant, Romanian, refugee claim in Canada, work permit in meantime
Husband earns \$52,000/yr., wife not employed, living with well-off parents
Child support \$421/mo. plus \$280/mo. medical s. 7 expenses
Entitlement to spousal support, interim
Wife says range \$1,008-\$1,093/mo. (?), but only claiming \$500/mo., granted
[Range estimated at \$876-\$1,097, if husband paying child support and full medical expenses]
Gardner v. Gardner, [2009] O.J. No. 340, 2009 CarswellOnt 387 (Ont.S.C.J.)(Tulloch J.)
Married 21 years, 2 children 22 and 20, husband 48, wife 47, separated 2004
Both children away at university, with husband in summer months
Wife cook, CAW, earns \$43,500/yr.
Husband welder, Bruce Power, health problems, less overtime, earns \$86,000/yr., paying debts
Entitlement to spousal support continues, wife claims \$1,111-\$1,482 (using *without child support* formula)
No child support paid by wife (would be \$401/mo. for daughter home for 4 months)
Husband paying \$8,000/yr. post-secondary expenses, wife's contribution would be \$3,200/yr. (\$400/mo.)
Low end of range is \$1,111, less \$400/mo. child support, i.e. \$710/mo. interim spousal support
[If correct *custodial payor* formula used, range would be \$428-\$571/mo. if 2 children, \$688-\$917/mo. if 1]

Hansen v. Roy, [2009] O.J. No. 282 (Ont.S.C.J.)(Pazaratz J.)
Together 8 years, husband 50, wife 52, separated Sept. 2007, wife 5 children of previous relationships
Two children 12 and 6 when husband moved in, now son 22 and daughter 15
Son receives \$204/mo. CPP disability, father pays no child support
Daughter's father pays child support of \$355/mo.
Wife receives WSIB \$18,000/yr, grossed-up to \$22,250/yr., housekeeper previously
Husband does autobody work, various employers, problems with disclosure
Husband admits parent for daughter, but not son, found "settled intention" for both
Son in college, graduating April 2009, living at home, income \$15,000/yr. employment and CPP, table only
appropriate, no section 7 expenses
Husband big issues with income, left job, now part-time at lower wages, income imputed as \$43,680/yr.
Child support for 2 is \$659, less \$355 by one father, leaves \$304/mo., reduced in May 2009 to one child,
\$401-\$355, or \$47 per month

Spousal support: both agree support to be time limited, but no SSAG and no budgets
Court says range is 0-\$345/mo., \$300/mo. going forward, for 4 ½ years total, to end in Dec. 2011
Support of \$1,200/mo. for 2007, \$250/mo. for 2008-09
[Error in reducing for lower step-parent child support; if correctly done, range 0 to \$184/mo.]

McFadden v. Sprague, [2009] O.J. No. 258, 2009 CarswellOnt 294 (Ont.S.C.J.)(Power J.)
Married 20 years, husband 56, wife 50, son (16) with husband, daughter (23) with wife
SSAG used to determine spousal support for 2004-2007, using equal NDI where split custody
Husband did earn \$70,000, now physical and emotional problems, no income
Wife earned \$187,000 in 2007 in U.S.
Child support \$1,528/mo. by wife to husband
Big section 7 expenses for troubled children, \$24,611/yr. in 2007
Spousal support to be paid by wife to husband, from 2004 to 2007
Illness or disability exception applies, also debt payment exception, amount should fall within range
Spousal support set at \$4,500/mo. from Jan. 2007 on
[Range difficult to determine due to s. 7 expenses; without expenses, estimated at \$3,495-\$4,303/mo.]

Korkola v. Korkola, [2009] O.J. No. 343 (Ont.S.C.J.)(Gilmore J.)
Together 14 years (married 12), 2 children 10 and 7, husband 39, wife 35, separated 2005
Wife dental assistant, then home, now in 4-year nursing program
Husband orthopaedic surgeon, 2004 incorporated practice, income issues, \$540,000 in 2008
Shared custody, husband pays full table amount, \$7,444/mo.
Agreement between parties that NDI split 50/50 via child and spousal support (and deduct husband's RRSP contributions)
Lump sum for compensatory spousal support \$12,000 (half of tuition, etc. for nursing program)
Includes consideration of post-separation income increase, "advantage" to husband
Periodic support "non-compensatory" (?), \$9,212/mo. to get 50/50 split, to be recalculated each year
Duration: agree time limited, husband says 2 more years (5+ total), wife 6 years (9+ total)
June 2012 wife graduates, plus 1 year to find employment (7 years total), \$50,000 imputed to wife last yr.
[SSAG shared custody formula range \$9,968-\$14,486/mo., without any RRSP deduction]

Holmes v. Holmes, [2009] O.J. No. 94, 2009 CarswellOnt 87 (Ont.S.C.J.)(Nolan J.)
Married 16 years, husband 48, wife 36 when separated in 2002
Two children 18 and 16, older with wife, younger with husband (2007)
2005 order: husband earned \$81,285, wife \$20,900, child support \$1,024 plus s. 7 expenses
spousal support \$1,000/mo., review in 3 years
Income issues, husband now earns \$80,000 at CNR
Wife real estate appraiser, imputed income \$20,900
Child support: \$719-\$179=\$540/mo. plus s. 7 tuition for older of \$5,786/yr.
Spousal support: compensatory, *Fisher* distinguished
Another review not warranted, \$1,000/mo. continued (SSAG midpoint stated to be \$960/mo.)
Termination after 6 more years, Dec. 2014, i.e. 10 years total, both children finished university
[Split custody formula range estimated as \$1,035-\$1,460/mo.]

Hofmann v. Hofmann, [2008] O.J. No. 5335 (Ont.S.C.J.)(Matheson J.)
Married 3 ½ years, wife 2 children of previous marriage, aged 20 and 17, separated Dec. 2006
Wife receives \$408/mo. from natural father
Husband sponsored wife and 2 children, short marriage but wife moved from U.S.
Wife can't work, motor vehicle accident in 2005, benefits until 2008, then social assistance
Interim child support: \$743-\$408=\$335/mo. for one child
Interim spousal support: husband earns \$83,000, income issues
Wife's income from social assistance, child tax benefit, child support
Wife says SSAG range \$1,719-\$2,180/mo. [correctly calculated]
Husband says \$401-\$535 (using incorrect *without child support* formula)
Interim order for \$1,250/mo. spousal support

Quattrociocchi v. Quattrociocchi, [2008] O.J. No. 5341 (Ont.S.C.J.)(Lemon J.)
Married 17 years, 3 children, son 13 and twins 6, interim support
Husband contractor, serious income issues, he says \$60,000, used for interim
Interim child support \$1,177/mo.
Wife on social assistance, so income zero, deficit \$600/mo.
SSAG range \$505-\$762
Interim spousal support \$600/mo.

Rowley v. Rowley, [2008] O.J. No. 5342 (Ont.S.C.J.)(Lemon J.)
Married 3 ½ years, 1 child 5 months
Husband financial advisor, changed employers, 2008 income \$67,000
Wife on maternity leave, EI, 2008 income \$38,000, but EI \$18,288/yr.
Return to work July 2009, income then \$58,000
Child support \$620/mo.
Spousal support: range 0 to \$409/mo., husband paying \$1,200/mo. on consent, no tax benefit
Order for \$500/mo., indefinite
[Range estimated if wife \$38,000: 0-\$353/mo., if \$18,288: \$376-\$879/mo.]

Tang v. Li, [2008] O.J. No. 5343 (Ont.S.C.J.)(Lemon J.)
Married 2 years plus cohabitation (?), 1 child 4
Husband earns \$32,000, wife earns \$15,320
Interim child support \$293/mo.
SSAG range 0 to \$44/mo., described as “low”, interim spousal support of \$100/mo. ordered

***Petit v. Petit*, [2008] O.J. No. 5437 (Ont.S.C.J.)(Platana J.)
Together 12 years (married 8), 2 children 8 and 6, wife 37, separated Dec. 2006
Husband in Dryden, wife in Smooth Rock Falls (1000 km away)
Husband moved to Dryden after mill closed in Falls
Wife moved there, no employment, Anglophone community, returned to Falls in Dec. 2006
Interim order March 2007: children in primary care of husband, continued
Entitlement to spousal support non-compensatory, wife earns \$29,120/yr.
Child support \$431/mo.
Husband earns \$121,212/yr., SSAG range \$942-\$1,256 for 6 to 12 years
Wife seeks \$2,000/mo., ordered by judge, review in 5 years
Exception for non-primary parent to fulfil parenting role, cost of travel for access

Santos v. Santos, [2008] O.J. No. 5110 (Ont.S.C.J.)(Sproat J.)
Husband earns \$100,000, child support \$1,404/mo.
Child 18 with husband, no claim for child support (wife would have to pay \$211/mo.)
Husband carrying debt of \$154,000
Wife earns \$25,000
SSAG range stated by wife as \$449-\$1,283, spousal support of \$400/mo. ordered (debt exception?)
[Split custody formula range \$217-\$920/mo. if zero child support by wife]

Enright v. Enright, [2008] O.J. No. 4949 (Ont.S.C.J.)(Lauwers J.)
2 children 19 and 17
2003 consent order: child support \$846/mo., spousal \$775/mo., husband then \$62,000, wife \$22,000
Husband seeks to vary child support, review spousal support
Husband earns \$73,370, wife earns \$33,925/yr.
Oldest child in 2nd year university
Child support \$875/mo. (1 ½ children), plus \$815/mo. for university expenses of older child
For younger child, equestrian lessons and driving lessons not qualify as s. 7 expenses
Wife seeks \$1,000/mo. spousal support (\$1,087/mo. stated to be upper end under SSAG?)
Spousal support reduced to \$425/mo., leaving wife with 56% NDI
[if 1 child home, section 7 expenses, range 0-\$371/mo.; if 1 child, no s. 7 expenses, range \$164-\$764/mo.]

Hajir v. Farshidfar, [2008] O.J. No. 4712 (Ont.S.C.J.)(Horkins J.)
Married 18 years, 2 children 23 and 19, husband 51, wife 49
Married in Iran, husband to Canada in 2000, wife and children in 2003, separated then
Husband cab driver, real estate agent, security guard, renovating and selling houses
Wife seeks to impute income of \$60,000, but court only imputes \$18,000/yr.
Husband paid \$450 to \$600/mo. support informally, plus apartment rent of \$500/mo.
Wife unable to hold steady job, poor English
19-year-old at York U., works part-time, student loans, living at home
Child support \$156/mo. table amount
Spousal support: SSAG range \$257-\$368/mo., upper end 51% NDI to wife and children, compelling
Spousal support ordered of \$368/mo., increased when child support ends

Shepherdson v. Shepherdson, [2008] O.J. No. 4703 (Ont.S.C.J.)(Kershman J.)
3 children, 2 adults, one dependent
Husband's income, accounting practice, income splitting before, personal and vehicle expenses
Income for 2008 is \$86,360, child support for one child \$769/mo.
Wife earns \$70,000, similar incomes in 2007
SSAG: wife at 47.8% INDI, range is zero to zero, no interim spousal support

Macropoulos v. Macropoulos, [2008] O.J. No. 4534 (Ont.S.C.J.)(Lemon J.)
Together 25 years (21 married), 2 children 19 and 17, wife 53, separated 2003
Husband's income imputed at \$40,000, living with new partner in her home
Previously worked in investment business, now on EI, few educational credentials
Husband and wife "rollercoaster" work histories
Child support of \$367/mo. for one child, younger, with wife
Older child cocaine problems, in treatment, paid by husband's new partner
now with husband, no child support
Wife has cancer, in wheelchair, ODSP (assistance) \$18,996/yr
Entitled to spousal support, living rent free in parents' condo
Amount: husband unable to pay now, SSAG zero [incorrectly treated ODSP as wife's income]
SSAG used re retro support 2003-2006, low end close to zero, no retro spousal support
[If wife zero income, split custody range \$571-\$738/mo., if only child with wife, range \$735-\$927/mo.]

Vanos v. Vanos, [2008] O.J. No. 5002, 2008 CarswellOnt 7377 (Ont.S.C.J.)(Flynn J.)
Together 16 years (married 14), 1 children 13 and 10, separated 2005
Wife 2 children of previous relationship, now 23 and 22, all four living with wife
Husband's 2007 income \$301,143/yr.
22-year-old in university treated same, biological father never paid
Child support for 3 is \$4,087/mo.
Wife unemployed, part-time jobs, imputed \$15,000/yr.
Wife accepts husband's income averaged over 7 years is \$150,000/yr. for spousal support purposes
SSAG range \$2,063-\$2,831, interim spousal support of \$2,412/mo. ordered (midpoint)

Czupiel v. Czupiel, 2008 CarswellOnt 6969 (Ont.S.C.J.)(Ricchetti J.)
Interim, 3 children 17, 16 and 12, with wife
Husband appliance service business, income issues, \$120,000/yr. attributed
Child support for prior child \$800/mo., husband now living with mother of 5th child
Temporary child support \$2,135/mo.
Temporary spousal support: wife earns \$20,000/yr, SSAG range \$802-\$1,680/mo.,
order for \$1,000/mo.
[No adjustment made for prior child support; if adjusted, range would be \$219-\$846/mo.]

Dickinson v. Dickinson, 2008 CarswellOnt 6788 (Ont. S.C.J.) (Gauthier J.) (Nov 17/08)
Variation
11 year marriage, separation 2005, 3 children 12, 10 and 8 with w
H support for prior child, \$300/mo

2007 interim order based on h income \$107,000 and w \$29,000: \$1,935 child support and \$850 spousal
H brings application to vary based on income decrease for 2008
H income found to be \$84,000; w income now \$35,488, material change
Child support for 3 children: reduced to \$1575
Interim spousal support; SSAG range stated as 0 -\$464; \$500/mo ordered
[If h prior child support obligation of \$300 taken into account and assumed to be non-deductible, SSAG range would be 0-\$171]

Lalonde v. Lalonde, 2008 CarswellOnt 6710 (Ont. S.C.J.) (Gordon J.) (Nov 12/08)

Variation

25 year marriage, 2 children, 1 adult, 1 university

2005 consent order based on h income \$100,000 and w income \$32,000: child support \$773 and spousal \$1,130; increases in incomes to constitute material change

Both incomes increase; w seeks retroactive and prospective increase in spousal and child support

H income \$139,304; w. income \$44,447

Child support: \$1,175.25 (no s. 7, post-secondary expenses covered by RESP and child's income)

Spousal support: SSAG range stated as \$1813 - \$2,723; \$1825/mo ordered; lower end of range chosen because h income based on significant overtime; he should be rewarded for his efforts

Retroactive spousal: h underpaid at least \$700/mo from what SSAG would suggest since 2005; total \$32,900, discounted for tax to \$17,750.

Nikolaou v. Nikolaou, 2008 CarswellOnt 6640 (Ont. S.C.J.) (Sheppard J.) (Nov 12/08)

Duration, time-limits

6 year marriage, separation 2005, 1 child now 9 with w

H income found to be \$50,000 and w \$16,560

Child support: \$462

Spousal support: \$460/mo, based on SSAG calculations provided by counsel; to terminate in 2011 (i.e. 6 years after separation) based on evidence that w has educational training that will allow her to be self-sufficient

[SSAG range not provided, calculated as \$171-\$496]

Jiwaji v. Jiwaji, 2008 CarswellOnt 6537 (Ont. S.C.J.) (Wood J.) (Nov 4/08)

Duration

7 year marriage, separation 2002, 2 children now 9 and 12 with w; 1 special needs

W from Kenya, no employment experience in Canada, plus health problems, now 50

2002 interim order based on h income \$43,000: child support \$609 and spousal \$800/mo

H's income \$62,100 (\$40,980 plus imputed benefits); w no effort to work, \$8000 imputed based on limited earning capacity

Child support: \$931

Spousal support: SSAG range \$450 - \$745, max 15 years [note duration based on Draft Proposal, revisions to durational range in final version of Guidelines not recognized]

Spousal support for further 4 years (10 years total): 2 years at \$597 per month (mid-range) and then 2 years at \$450, then review

Initial figure gives w 53.1% NDI, court acknowledges seems low, but 61.9% of actual dollars available

Lickfold v. Robichaud, 2008 CarswellOnt 6138 (Ont. S.C.J.) (Linhares de Sousa J.) (Oct 21/08)

Shared custody

5 year common law relationship; separation 2006, 1 child 6, shared custody (w not allowed to move child back to N.B.)

H income \$54,243; w \$18,000; h prior child, pays \$300/mo child support

Child support; h table amount \$500; w table amount \$156; h wants set-off; court finds w not able to pay any child support; h to pay \$500/mo; h to pay all s. 7 expenses

Spousal support: SSAG range presented as 0 - \$336; no spousal support ordered

Renton v. Renton, 2008 CarswellOnt 6150 (Ont. S.C.J.) (Arell J.) (Oct 21/08)

Custodial payor, duration

12 year marriage; separation 1997; 2 children, with father since 2000; older child in college since Sept. 2007

Informal support, then 2002 minutes of settlement and 2003 consent order: \$1000/mo spousal support

H remarried and 1 new child; w's income steadily increased

H applies to terminate spousal support

H income \$103,500 (2007) and \$93,300 (2008); W \$45,500 and \$46,500.

W now paying child support of \$688, plus share of s. 7 (college expenses)

SSAG range for duration 6 -12 years; 9 years reasonable period in light of h's major responsibility for child support and wife's increased income; duration to commence in 2000

Spousal support reduced to \$750/mo as of Sept. 2007; then to \$500 per month as of Sept. 2008 to cease June 2009.

[SSAG calculations for amount under *custodial payor* formula not provided; calculated as \$585-\$780 based on 2007 incomes and no s. 7; \$468-\$624 based on 2008 incomes and no. s.7]

DeVos v. Devos, 2008 CarswellOnt 6145 (Ont. S.C.J.) (Turnbull J.) (Oct 20/08)

11 year marriage, plus 1-2 years prior cohabitation; separation 2005; 2 children 5 and 11

H income \$57,000

W only claims spousal support for 10 months, March – Dec. 2006; claims \$200 per month based on

CHEQUEmate calculations; \$2000 retroactive spousal support awarded

[SSAG calculations not provided; w's income unknown]

Santos v. Santos, [2008] O.J. No. 3899 (Ont. S.C.J.) (Sproat J.) (Oct 6/08)

Interim

20 year marriage; separation 2007; 3 children, 18 (in university, with h), 17 and 14 (with w in mat home)

Dispute about incomes; precise calculations not possible; \$100,000 imputed to h and \$25,000 to w

H to pay w child support of \$1404 (table for 2 children), plus 80/20 sharing of s. 7 expenses(private school, university tuition)

Spousal support: parties to submit SUPPORTmate and CHEQUEmate calculations based upon income levels set my court

Sawula v. Sawula, [2008] O.J. No. 3672 (Ont. S.C.J.) (Matheson J.) (Sept 10/08)

Interim

22 year marriage, separation 2007; 5 children, 3 oldest in university, funded by RESP; 2 remaining with w in mat home

H surgeon, was earning \$600,000; heart attack post-separation, now \$456,000

W income of approx. \$36,000

Interim child support for 2 children at home: \$5,542

Spousal support; w seeks spousal support in accordance with Guidelines; court orders \$7518 as requested by wife

[SSAG range not provided, calculated as \$6491 - \$8170 based on h income at \$350,000 ceiling and child support for 2 children.]

Danby v. Danby, [2008] O.J. No. 3659 (Ont. S.C.J.) (Gordon J.) (Sept 9/08)

Variation

25 year traditional marriage; separation 1994; 5 children; only 2 dependent in 1999 when settlement agreement; since June 2005 only 1 dependent

H, now 59, took early retirement in 2005, pension income \$49,000

W now three jobs, \$42,000, anticipates reduction, court sets at \$34,000

H seeks termination of spousal support and termination of child support for 1 child; w seeks increase of spousal support

H income imputed at \$63,000 (early retirement unreasonable; can earn extra income; use income in year before retirement)

Child support for 1 remaining child: \$900 plus s. 7 university in future

Spousal support: SSAG range 0 - \$438; court orders \$300 as requested by w, but found to be low as prior award did not meet spousal support objectives because priority to child support

Clements v. Clements, 2008 CarswellOnt 5692 (Ont. S.C.J.) (Heeny J.) (Sept 4/08)

Interim support

11 year relationship (8 marriage plus 3 cohabitation); separation 2006; 2 children with mother still in matrimonial home

H \$70,621; w \$29,443

Interim child support \$1036

Spousal support: SSAG range zero to \$573; no interim spousal support payable, h paying mortgage on mat home, \$1,100/mo; court also looks at budgets

***Spikula v. Spikula*, [2008] O.J. No. 3931 (Ont. S.C.J.) (Shaw J.) (Aug 28/08)

16 ½ year relationship (13 marriage plus 4 cohabitation), separation 2007, 1 child 5 with mother;

Father relocates for work reasons to another city 200 km away after separation

Wife at home, then part-time employment; now \$28,544 (2 part-time jobs)

Child support \$719

Spousal support: parties agree on application of SSAG after determination of income; SSAG range \$738-\$1039

\$750 per month ordered; good discussion of why lower end of range chosen; h will have significant travel expenses to exercise access and significant child-care costs; w will get significant equalization payment which can generate income

***Dabrowska v. Bragagnolo*, [2008] O.J. No. 3155, 2008 ONCJ 360 (Ont. C.J.) (Sherr J.) (Aug 11/08)

7 year common law relationship; separation 2006, one child age 5 with mother

W university education in Poland, waitress and factory worker before child; stayed home with child; on social assistance after separation; modest earnings of \$10,780, trying to improve position, no imputation of income

H paid \$1,400/mo interim support for 1 year after separation, then reduced to \$635, then \$270 (child support only); h trucker and hours significantly reduced at end of 2007 because of new regulations

H income set at \$35,000 for 2008 and \$40,000 from 2009, no 3 year averaging; no intentional under-employment, table amount of child support ordered

Spousal support 2008: SAGG range \$1 - \$229 calculated by court, support set at \$229, guideline result reasonable, leaves w with 51.3% NDI

Spousal support 2009: SSAG range \$99-\$356 calculated by court, support set at \$350, leaving w with 51.3% NDI

Duration: good review of revisions in SSAG final version setting durational range under *with child support* formula; notes SSAG provides that duration should not be set in initial order and that limits to apply on subsequent variation or review; notes that here durational range 3 -16 years; order indefinite, subject to variation; w's income likely to increase, affecting both amount and duration of spousal support

Kemp v. Helfrich, [2008] O.J. No. 3729 (Ont. S.C.J.) (Plantana J.) (Aug 1/08)

Interim support

13 year relationship (4 marriage plus 9 cohabitation); separation 2005; 2 children 6 and 13, temporary sole custody to w

H moves to Alberta after separation; high access costs

H income in dispute re amount of overtime and time off work to exercise access; 2007 income \$76,073; income for 2008 set at \$85,850

W income \$33,879 (said to be net, but seems to be used in calculations as gross)

Interim child support: \$1229 (1 child Alta. Table) plus s. 7 (daycare)

SSAG calculations provided based on h income of \$76,073 (0-\$538) and \$93,300 (\$390-\$1075) [s. 7 not taken into account in calculations] [SSAG range for income of \$85,850 not before court but calculated as \$251-\$916, not taking into account s. 7]

Spousal support of \$400 per month ordered, based on SSAG and review of financial statements

Drago v. Catalfo, 2008 CarswellOnt 5250 (Ont. S.C.J.) (Karakatsanis J.) (July 24/08)

Interim support

10 year marriage; separation 2006, 2 children 6 and 4 with mother in mat home

H no payments since separation

H income \$192,300; w \$83,352 (teacher)

Interim child support \$2483 plus significant s. 7; interim spousal \$1000/mo

SSAG not explicitly relied upon but parties using calculations based upon different income assumptions
[SSAG range based on incomes found by court not provided but calculated as \$1045-\$2308, not including s. 7 expenses]

Kajorinne v. Kajorinne, [2008] O.J. No. 2789 (Ont. S.C.J.) (Pierce J.) (July 8/08)

20 year marriage; separation 2004, 2 children 12 and 14, with w

Interim sep. agreement 2005 based on h income \$77,851: child support \$1009 plus s. 7 and \$817/mo spousal

H subsequently unemployed, income \$22,000 from employment insurance

W now employed, income \$27,500

Child support reduced to \$335/mo, plus some s. 7

Spousal support terminated; SSAG calculations provided by h show no spousal support payable [also reference to exception for payor income between \$20,000 - \$30,000]

***Vanasse v. Seguin*, [2008] O.J. No. 2832 (Ont. S.C.J.) (Blisshen J.) (July 4/08)

12 year common law relationship; separation 2005; 2 children now 10 and 8

W employed in first part of marriage; no employed after birth of children and still unemployed

H acquired and sold business during marriage; living off investments

Interim agreement 2006, child support \$2186, spousal \$5000/mo

H income imputed as \$450,000 (using "conservative" 6% figure for return on investment)

W imputed income of \$85,000 as of July 2008 (investment interest on property award for unjust enrichment plus \$45,000 imputed employment income)

Child support \$5472/mo (table amount despite shared parenting arrangement)

SSAG stated not to be applicable because income over \$350,000 ceiling; court uses Murray/Mackinnon study to show dominant pattern of 48.6 – 57.5% NDI in cases where child support in pay

Spousal support of \$3,800 per month ordered, giving w 48% NDI

[SSAG range not provided but calculated using \$350,000 income ceiling for h as \$4817-\$6687]

Time limit appropriate given length of relationship, ages of children, shared parenting, regime, w's age, good health, and past employment record.

Total duration of 10 years support from date of separation appropriate; so further 7 years, when children 17 and 15.

W's request for lump sum spousal rejected

Billingsley v. Billingsley, [2008] O.J. No. 2617 (Ont. S.C.J.) (R.J. Smith J.) (June 30/08)

Interim support

7 year marriage; separation 2006; 2 children; wife 1 prior child; h convicted of sexual abuse of w's child

H income imputed at \$125,000 (w had argued for \$200,000); w income \$32,700

Child support for 3 children, \$1977 (\$2209 table minus \$232 from step-daughter's biological father)

SSAG range, \$811 - \$1654, \$800/mo ordered

***Mann v. Mann*, [2008] O.J. No. 2942, 2008 ONCJ 231 (Ont. C.J.) (Sherr J.) (June 19/08)

Use of SSAG on variation application to recalculate spousal support because of changed incomes

19 year marriage; w primarily at home with 2 children; 2 part-time jobs after separation

2006 order based on h \$58,500 and w \$28,700: child support \$879 (table 2 children) and \$150 spousal

Both parties' incomes drop; h now \$42,900, w. now \$23,693; oldest child ceases to be child of marriage Dec. 2007; court asked to recalculate support for 2007 and 2008

For 2007, SSAG show no spousal support payable; although SSAG only advisory and not designed for variation motions (*Fisher*) provide a useful starting point when court being asked to recalculate spousal support back to time of final order; reasonableness of guideline award needs to be

assessed against individual circumstances of case; here with no spousal has 57.5% NDI, reasonable result; no basis to depart from Guidelines
For 2008, CS for 1 child only, \$395/mo, plus \$66/mo s. 7 (dental), total \$461; SSAG range stated as \$94-\$247; w wants \$815 to give her 61% of NDI; far too high; court orders \$350; leave w with 52.4% NDI (52.7% with s.7); reasonable result [incorrect SSAG calculations used; SSAG range zero to \$27 if no s. 7; no spousal support payable; if include s. 7 expenses; w left with 52.2% NDI before spousal]

****Durakovic v. Durakovic**, [2008] O.J. No. 3537 (Ont. S.C.J.) (Scott J.) (June 11/08)
7 year marriage; separation 2004; 2 children now 10 and 5; h 57 and w 20
Children with w; h supervised access
Interim support \$8,300/mo combined child and spousal; h in arrears; no payment
H doctor, partially retired; engaged in many religious and philanthropic activities; some U.S. employment; many issues re assessing income; determined to be \$225,000
W unemployed but some issues re family trust, income of \$14,400 imputed (min wage)
Child support \$2862, plus \$500/mo s. 7 (mainly private school)subject to accounting at end of year based on actual expenditures
W seeking spousal support for further 5 years (8 ½ yrs total)
Parties did not submit SSAG calculations but court refers to SSAG to confirm its own analysis
Appropriate duration 6 years from date of separation (ct. looks to length of marriage and date youngest child in full time school)
Spousal support \$4,500/mo from May/04 to Jan/06; then \$3,500/mo until April 2010
Result stated to be “not outside of an alternate calculation projected by use of SSAG” (implicit reference to restructuring?) [SSAG range not provided; calculated as \$4024-\$5097, taking into account s. 7 expenses]
On-going support from Jan 2008 converted to lump sum [\$98,000 in periodic payments for 28 months converted to lump sum of \$49,907 after discount of 30% for tax, 3% for present value and 25% for negative contingencies]

Baker v. Baker, 2008 CarswellOnt (Ont. S.C.J.) (Turnbull J.) (June 4/08)
Interim interim support application
4 year marriage; separation 2008; 1 child, 3 yrs. old
H in mat home; w with parents
H income approx \$80,000
Interim interim shared custody
C.S. \$500/mo (lower than table of \$719 bcs shared custody)
SSAG range \$1589 - \$2008
\$1500 interim interim spousal support ordered, but noted no info at this stage re h’s carrying costs on mat home

Arsenault v. Arsenault, [2008] O.J. No. 2782 (Ont. S.C.J.) (Plantana J.) (June 4/08)
17 year marriage; separation 2007; 2 children, 1 adult, younger child in grade 12
W home until youngest child in grade 9, now part-time, \$14,040
H \$99,550, now in B.C.
No child support paid after separation because h paying off debts; now paid off
Child support \$902 (B.C. table)
SSAG range \$1688-\$2329; spousal support of \$2000/mo ordered (amount w requested), indexed to cost of living

APPENDIX B

MYTHS AND TIPS ABOUT THE SPOUSAL SUPPORT GUIDELINES

The Lawyers Weekly, Vol. 28, No. 45 (April 10, 2009)

The Spousal Support Advisory Guidelines have now become part of the standard toolkit of lawyers, mediators and judges across the country. The “final version” of the Advisory Guidelines was released last July, after extensive feedback and some revisions to the 2005 Draft Proposal. In this short piece, I want to identify two “myths” or “misses”, frequently found in the case law. And I also want to offer a couple of “tips”, two quick “hits” that might help in specific cases.

Myth No. 1: The Advisory Guidelines do not apply to variations or reviews.

This myth was reinforced by a passing comment in *Fisher v. Fisher*, [2008] O.J. No. 38, where the Ontario Court of Appeal suggested that the Advisory Guidelines only applied to initial orders and not to variation orders. Occasionally, judges go one step further, treating review orders like variations, as beyond the operation of the Guidelines, e.g. *Cassaday v. Krpan*, [2009] O.J. No. 651 or *Bryant v. Gordon*, [2007] B.C.J. No. 1460.

The Advisory Guidelines can and often do apply to variations and reviews. In *Beninger v. Beninger*, [2007] B.C.J. No. 2657, the B.C. Court of Appeal applied the SSAG in a variation case, but recognized that they must be used “with caution”. There may be entitlement issues at this stage, or other more complex issues, like remarriage, second families, retirement or some post-separation income increases of the payor. Where the issues are amount and duration and changing incomes, the Advisory Guidelines can be used, as in *Beninger*. In Ontario, see *Mann v. Mann*, [2008] O.J. No. 2942.

If reviews are used properly, following *Leskun*, the Advisory Guidelines should usually apply easily at the subsequent review, as many of the more complex variation issues around entitlement should arise less often. A good discussion is found in *Cavanaugh v. Cavanaugh*, [2008] N.B.J. No. 590. See also *Skelly v. Skelly*, [2007] B.C.J. No. 1243.

Myth No. 2: The Advisory Guidelines do not help with the determination of income.

The Spousal Support Advisory Guidelines use the same definition of “income” as that found in the Federal Child Support Guidelines, with some minor modifications. These changes are set out in chapter 6 of the final version. That’s the technical answer.

There are some situations where the income for child support purposes can differ from that used for spousal support. First, when the payor’s income increases after separation, the child will get the full benefit of any income increase, but the same is not

necessarily true for spousal support: see chapter 14.3. Second, where the payor's annual income is above the "ceiling" of \$350,000, it is likely that the table amount formula for child support will be ordered up to \$1 million or more, but the same is not so true for spousal support: see chapter 11.3. Finally, there may be cases where income will be imputed for child support, a strong case for imputing, but not as much for spousal support purposes, e.g. attributing corporate retained earnings to income or treating stock options as income.

In the end, though, income determination is mostly a question of investigation and evidence and fact, for spousal support as it is for child support.

Tip No. 1: Use the right version of the right formula.

Sounds dumb, but I still see instances where the wrong formula is used and then the ranges are rejected as "not helpful". Cases where the *without child support* formula is used, even though the payor parent has the custody of the children and the *custodial payor* formula should be used. Cases where the basic *with child support* formula is used, instead of the *custodial payor* formula.

Or other basic errors. Ranges for amount under the *with child support* formula are often calculated without taking into account section 7 expenses. The *custodial payor* formula assumes that the recipient of spousal support is also paying child support. If not, then a simple adjustment must be made, one that lowers the range for the amount of spousal support.

These basic mistakes should be caught by opposing lawyers, protecting the interests of their clients. And, if not by the lawyers, then they should be picked up by judges. Of course, this does require full disclosure of software calculations by lawyers, to their colleagues and to the courts.

Tip No. 2: What if the payor can't deduct spousal support for tax purposes?

The final version added a new exception, the *non-taxable payor income exception*: chapter 12.8. The formulas assume that the payor can deduct spousal support for tax purposes. But some payors have incomes derived largely from legitimately non-taxable sources, e.g. workers' compensation, disability payments, income earned by an aboriginal person on reserve, or some overseas employment arrangements. For child support, we just "gross up" these incomes. But that simple solution doesn't always work for spousal support, hence the exception.

One new twist, not explicitly flagged in the final version: in some countries, the payor cannot deduct spousal support for tax purposes and this same exception may be extended to resolve these cross-border cases.

Rollie Thompson is a law professor at Dalhousie Law School and, along with Prof. Carol Rogerson, the co-author of the Spousal Support Advisory Guidelines.