

## **SPOUSAL SUPPORT IN NOVA SCOTIA 2007-2008: MOSTLY ADVISORY GUIDELINES, SOMETIMES NOT**

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In April 2007, for the CBA Nova Scotia family law conference, I prepared a short paper, analysing the decided Nova Scotia cases from January 2005 to April 2007, to answer the questions: to what extent had the Spousal Support Advisory Guidelines been used and applied by the Nova Scotia courts? what patterns emerged over those two years? Included in these materials is a copy of the paper: “The Spousal Support Advisory Guidelines in the Courts of Nova Scotia 2005-2007” (April 2007).

Over that 27-month period, after the release of the Draft Proposal in January 2005, there had been 49 decisions reported, three in the Court of Appeal. Of the 23 *without child support* cases, 12 had applied the Advisory Guidelines and 11 had not. But 9 of the latter 11 involved threshold “entitlement” issues. Of the 26 *with child support* cases, 13 then applied the Guidelines and 13 did not. Of the 13 that did not apply the Guidelines, 60 per cent still fell within the formula ranges, but there was no pattern to these cases. My conclusion then? Some Nova Scotia judges like the Guidelines, some don’t, and some only like the Guidelines when the results match their own views of a particular case. There was not the same consistent use in Nova Scotia as in other provinces like British Columbia or New Brunswick or Newfoundland and Labrador, or even Ontario.

From April 2007 to November 2008, a 20-month period, I have dredged up 43 reported spousal support cases: 4 appeals, 12 *without child support* cases, 16 *with child support* cases, and 11 “no entitlement” cases. This time, I hived off the “no entitlement” cases, cases that never reach issues of amount and duration. Of the 12 *without child support* decisions, 8 use the Guidelines, 3 don’t (but 2 of the 3 fall within the formula range) and 1 we can’t tell (a brief interim decision). Of the 16 *with child support* cases, 8 use the Guidelines and 8 do not (but 6 of the 8 are in the formula range). Generally, these cases reflect a slight increase in the use of the Advisory Guidelines over time. Even in those cases that don’t mention the Guidelines, the outcomes tend to fall within the formula ranges.

The “final version” of the Spousal Support Advisory Guidelines was released at the July 2008 National Family Law Program in Deerhurst, both the full reference document and a Report on Revisions. Both documents are available on the federal Department of Justice website or at: [www.law.utoronto.ca/faculty/rogerson/ssag.html](http://www.law.utoronto.ca/faculty/rogerson/ssag.html) (our website, which also includes all our update and other papers). At that time, Carol Rogerson and I also released the first draft of a “User’s Guide”, also included in these materials: “The Spousal Support Advisory Guidelines: A User’s Guide to the Final Version” (July 2008).

In this short update paper, I will first look at the *without child support* trial decisions, then the *with child support* cases, and then the handful of appeal cases.

## 1. The *Without Child Support* Cases

As I pointed out in my 2007 paper, most contested cases under this heading involve unusual facts, or “exceptions” or entitlement issues. Of the 8 cases that employed the Advisory Guidelines, only three clearly fell within the formula ranges: *Shurson, B.D.F. v. R.V.F.* and *L.(J.W.) v. M.(C.B.)*. But a fourth fell within the range, once we adjust income downwards: *Nelson v. Weber* (husband can’t keep working overtime, if income reduced to \$60,000, then amount within range). As for the other four, there was a *Miglin* case (*Cooper*), a *Boston* case (*Wong*), a non-taxable income exception (*Paul*) and a s. 15.3 exception (*Wagg*). Nothing easy or formulaic about these last four.

In *Paul*, Justice Wilson carefully analysed the difficulties created by non-taxable aboriginal incomes and came up with a below-range outcome that turns out to be entirely consistent with the new “non-taxable payor income” exception added in the final version of the Guidelines. In fact, *Paul* was one of those cases that helped to illuminate how to deal with these tricky issues in the final version.

What about the cases that didn’t use the Guidelines? In two of them, the outcomes were within the formula ranges: *Whitty* and *Casey*. A third, *Coxon*, was an interim decision, with insufficient information to assess the outcome.

In the other decision, *Gormley v. Ferguson*, Justice Scanlan was critical of the Guidelines in para. 11, stating “I find the Spousal Support tables of very little assistance in this case as in most cases” and finding one of the problems to be that the Guidelines are “just a starting point for the Courts”. In the result, spousal support in this case was reduced from \$750 down to \$400 per month on the husband’s application to vary, despite a continuing large income disparity after a long traditional marriage, a fairly typical situation. It was a 22-year marriage, the husband earned \$52,000 per year and the wife had only been full employed since November 2006 at a call centre earning \$25,000. The husband had paid spousal support for 8 years and that was reason enough for reduction, according to the Court. The *Divorce Act* did not “say they have to be equal”. The Guidelines range was \$743 to \$990/mo. for such a long marriage, which would leave the wife with 45.9 to 49.1 per cent of the family’s net income. At \$400 per month, the wife was left with 41.3 per cent of the net income, certainly nowhere close to “equal”, well below the low end of the range, and well below the results in similar Nova Scotia cases.

One last point worth noting: almost all of these *without child support* cases are long marriage cases, with 9 of 11 involving marriages ranging from 20 to 34 years. The only “shorter” marriages are 17 years (*Wagg*) and 15 years (*Casey*). This is a pattern that repeats itself across the country, as relative few short marriage cases end up before the courts.

## 2. The *With Child Support* Cases

Whether the courts do or don't use the Advisory Guidelines, there is a tendency for Nova Scotia courts to be vague or unclear about their income findings, a noticeable problem in cases under this category.

First, the Guidelines cases. Of the 8 cases using the Advisory Guidelines, 4 ended up within the ranges. Three more would have been within the ranges, had the courts made more careful findings on income or perhaps had they been more open about their findings: *Pelot*, *Marshall* and *Phillips-Curwin*. In *Pelot*, the wife was held to be underemployed, working part-time as a lecturer and earning \$31,741 per year. If she is imputed to earn even another \$10,000 per year, then the \$600 per month interim support would be within the range. In *Marshall*, an income of \$50,000 was imputed to the underemployed husband for child support purposes, but at that income the spousal range would be zero to zero, as acknowledged by Justice Forgeron. Forgeron J. nonetheless ordered spousal support of \$200 per month for the wife, on a very sympathetic set of facts. It is interesting to note that an imputed income of \$60,000, just another \$10,000 per year, would produce a range of zero to \$268 per month.

Most interesting of these three is *Phillips-Curwin v. Curwin*. The wife had quit her restaurant job and proposed a home-based catering business, moves evoking a judicial frown from Justice Dellapinna. The wife claimed a "mid-point" SSAG amount of \$3,683 per month, but it is not at all clear what income she was using for the husband, certainly higher than that found by the Court. The Court ordered \$2,000 per month in spousal support, an amount that falls noticeably below the formula range, if the wife's income is treated as zero or even if the wife's income is imputed at \$15,100 per year, her former part-time earnings. At para. 18 of the decision, however, Dellapinna J. floats the option that the wife would be better off seeking full-time employment in the restaurant business, where she might earn \$25,000 plus gratuities. Even estimating a modest \$5,000 in gratuities (and assuming they were declared and taxed), the formula range becomes \$2,084 to \$2,965 per month and the outcome is now in the ballpark.

There is one interesting Guidelines case that falls within two exceptions, the exception for illness or disability *and* the exception for the non-primary parent to fulfil her parenting role. In *Mumford*, O'Neil J. ordered an amount above the range, to recognise the non-custodial mother's severe disability, her inability to manage money and her significant parenting time and access expenses. These illness/disability cases are amongst the hardest cases, here complicated by the mother's continued parenting role, and it is difficult to argue with the outcome on these facts. Note that the Court did maintain the time limit on support, of 16 years, consistent with the maximum duration under the *custodial payor* formula.

Of all the Guidelines cases, without a doubt the most interesting and precedent-setting case is *Burchill v. Savoie*, a gender-bending example of compensatory spousal support for a husband who gave up his Vancouver high-tech job and agreed to stay home

with the kids while his doctor wife pursued her radiology residency in Halifax. The husband continued with primary care of the children after the 2005 separation and after the trial. Further, the case has even stronger compensatory overtones, as the couple separated before the wife finished her residency and the case was decided before she could begin to earn \$400,000 per year as a specialist. Justice O’Neil ordered periodic spousal support within the range while the husband finished his education and further ordered \$300,000 in lump sum compensatory spousal support, on three grounds: for retroactive spousal support and past losses; for long-term losses in his income-earning capacity; and for his contribution to her career. The latter lump sum may be controversial, but the amount is actually conservative and can be justified on conventional compensatory grounds. (In my view, the recent criticisms of this judgment by Epstein and Madsen in their weekly eCarswell newsletter of December 2, 2008 are not warranted and reflect how soon we forget the theoretical constructs that underpin the pure theory of compensatory support.)

Of the 8 non-Guidelines cases, 6 nonetheless fall within the formula ranges, a familiar pattern. At this point in the development of the Guidelines, almost four years later, it is no longer possible to determine whether this outcome simply flows from the accuracy of the original Guidelines formulas or whether it now reflects an unstated use of the Guidelines themselves. Absent use of the Guidelines, there remains a distinct tendency for judges to just state an amount, with little explanation or, at best, to itemise a long list of factors and then name an amount.

In two of these 8 cases, there are again income determination problems that are glossed over. In *Walker*, the Court finds no entitlement for the husband’s claim for spousal support, but there is no clear finding of the husband’s income. Spousal support was denied by Duncan J. on the basis of the husband’s unwise decision to retire, his ability to earn more income from substitute teaching and the wife’s role as custodial parent. Implicit in the Court’s “no entitlement” finding could be a holding that the husband ought to have his former full-time teacher’s income of \$65,117 imputed to him, which might well be justified on the facts. But, for child support purposes, the husband’s annual income was fixed at \$31,944, his post-division pension income, about as favourable an income finding as he could expect on these facts. In *Bridger*, Justice Gass ordered \$900 per month in spousal support, an amount above the range against a decidedly-unsympathetic husband, but an amount that could fall within the range if the CPP disability pension for the children were not treated as income, certainly a debatable point.

The *Wamboldt* case here deserves comment, as it reveals a trend often seen in custodial payor cases that don’t use the Advisory Guidelines. Too often, courts overestimate the cost of having care of the children, when it is the payor who has custody, usually the father. One of the great advantages of the *custodial payor* formula is that it calculates that child cost burden more carefully. In *Wamboldt*, the Court reduced spousal support from \$650 to \$400 per month, well below the formula range for either possible income for the husband and quite low in light of the wife’s disability and the length of their marriage. The children living with the father were 23 and 20 years of age

and each earned an income about 80 per cent of their mother's disability income, enough to cover their university expenses. In these circumstances, the grossed-up table amounts deducted from Mr. Wamboldt's imputed income seem a pretty reasonable estimate of the father's remaining room-and-board costs. (For another example of this questionable custodial payor tendency, see *Grant v. Grant*, in the "no entitlement" section.)

### **3. Spousal Support in the Appeal Court**

During the past 20 months, five spousal support cases have made their way to the Court of Appeal. In 4 of the 5 cases, the Court upheld the trial judgment, as one might expect given the deferential standard of appellate review in spousal support cases. The Advisory Guidelines figured in three of the five cases.

In one case, *Snyder v. Pictou*, the Court did reverse a time-limited support order from Family Court, substituting an indefinite order that was consistent with the Advisory Guidelines, but fixing an inordinately low amount in the circumstances based on an admittedly-skimpy trial record.

In *Wong*, the Court dismissed an appeal from the trial decision of Justice Stewart, who had taken into account the Advisory Guidelines in fashioning the spousal support order. The facts raised complex issues: a long marriage, the division of the husband's pension in pay, the husband's equalization payment, the wife's likely investment income from that payment, the wife's lack of employment, the husband's payment of health insurance for the wife, and the husband's partially-non-taxable municipal councillor's income. The *Boston* issues around the pension division make this an "exception" case, as that entitlement issue affects the range for amount. The Court of Appeal said little about any of these issues in its four short paragraphs dismissing the spousal support appeal.

*Dowding* is not obviously a Guidelines case, at least if you were to read the brief reasons of the Court dismissing the appeal. No legal error, ruled Cromwell J.A., all support objectives weighed, no misapprehension of evidence, and "not persuaded that the quantum of spousal support, viewed in the full factual context which confronted the judge, was so clearly wrong as to amount to an injustice". More details are found in the unreported trial decision by Tidman J. What is interesting is that the Advisory Guidelines were argued by counsel for the claimant husband at trial, in what amounts to a custodial payor case. The formula range was \$895 to \$1,155 per month based upon the wife's 2006 income, but the husband's lawyer was prepared to accept \$800 per month as there was no order for child support. Here the custodial payor was the wife, who still had the youngest child (age 17) living with her. The wife earned a base salary of \$42,500 per year, but had earned \$55,426 in 2006. The disabled husband lived on CPP disability of \$9,945 per year. It was a 19 year marriage. The trial judge ordered spousal support of \$350 per month, indefinite. Once again, we see a court overestimating the costs of child care in a custodial payor situation. And there remains that nagging feeling about the differential treatment of claims by men. One of the great benefits of the Advisory Guidelines, I would suggest, is their ability to identify and force discussion of these issues, issues usually hidden in cryptic trial judgments and deferential appeal decisions like these.

