

The Canadian Experiment with Spousal Support Guidelines

CAROL ROGERSON* & ROLLIE THOMPSON**

I. Introduction

Over the course of the past several decades many jurisdictions have legislated mandatory guidelines for the assessment of child support. Highly discretionary regimes, based on individualized determinations of need have been replaced by regimens that utilize formulaic, percentage of income guidelines to achieve more certain and predictable results. The goal has been to improve the substantive fairness of awards, reduce conflict, and promote settlement. Canada took this step in 1997, following a path already taken by several other jurisdictions, such as the United States, England, and Australia.¹ What is unique about the Canadian experience is that we have gone on to develop a guidelines approach to the much more complex and controversial issue of spousal support. Spousal support guidelines are something that only a small number of other jurisdictions have attempted, and even then, often only on a fairly local level.

In Canada the final version of a national set of Spousal Support Advisory Guidelines (SSAG) was released in July 2008. This was the culmination of a seven-year project directed by two law professors (the authors) and supported by the federal Department of Justice.² Unlike child

* Professor, Faculty of Law, University of Toronto.

** Professor, Schulich School of Law, Dalhousie University.

1. Child support guidelines were enacted at both the federal and provincial levels. At the federal level they were enacted as regulations pursuant to the federal DIVORCE ACT, R.S.C. 1985, c. 3 (2nd Supp.). See FEDERAL CHILD SUPPORT GUIDELINES, SOR/97-175 as amended [hereinafter the CSG]. All provinces enacted mirroring guidelines for cases falling under provincial jurisdiction, with the exception of Quebec which enacted its own, quite distinctive, scheme of child support guidelines. All references will be to the federal CSG.

2. CAROL ROGERSON & ROLLIE THOMPSON, SPOUSAL SUPPORT ADVISORY GUIDELINES (Canada, Dep't of Justice, July 2008), available online at <http://www.justice.gc.ca/eng/pi/fcy-fca/spo-epo/g-ld/spag/index.html> [hereinafter the SSAG].

support guidelines, the Canadian spousal support guidelines are not legislated and their application is not mandatory. They are informal, advisory guidelines, developed through consultation with family lawyers and judges and intended to reflect current practice under existing legislation, rather than to radically reform it. Although only advisory, they have received the endorsement of several appellate courts as a useful tool and are now widely used across the country by lawyers, mediators, and judges in spousal support determinations.

What accounts for this innovative and ambitious development? Why has Canada taken a path that few other jurisdictions have? The first part of this article will trace the development of SSAG within the broader context of Canadian family law, and will show that they were the result of a unique convergence of several factors, three of which can be clearly identified at the outset. First, there was the distinct evolution of Canada's spousal support law. Rejecting the "clean break" philosophy that has prevailed in many jurisdictions, Canadian law has come to recognize a very generous basis for spousal support on both "compensatory" and "non-compensatory" (needs-based) grounds. Spousal support is a significant issue in Canada, one that lawyers, judges, and mediators deal with on a daily basis.

The second factor was a fairly strong "rules" orientation in Canada's family law system that had accustomed family lawyers to certainty and predictability when dealing with financial issues and facilitated settlement. Matrimonial property laws, dating from the 1980s, center on a presumption of equal division and, as noted above, we have had child support guidelines since 1997. In this context, the increasing uncertainty surrounding spousal support was problematic.

Finally, despite the existence of local family-law cultures, a national set of guidelines was made possible because of countervailing elements of unity within our family law system. As a result of federal jurisdiction over divorce, Canada has a national law of spousal support in addition to provincial laws and the federal government was in a position to take a leadership role in the development of the advisory guidelines. Additionally, a largely unitary court system has resulted in a fair amount of consistency between federal and provincial support laws, with Supreme Court of Canada decisions articulating the basic principles of spousal support informing the interpretation of both. Although the SSAG were specifically developed under the federal *Divorce Act*, in practice they have been applied without distinction to determinations of spousal support under provincial legislation.

The second part of the paper will focus on the practical challenges of

developing and implementing the spousal support advisory guidelines in light of the complexity of this area of law and the somewhat unusual status of the SSAG as nonlegislated, advisory guidelines. A brief overview of the structure of the advisory guidelines will be followed by a discussion of the ways in which the SSAG are being used by lawyers and judges based on what is now almost three years of experience since the release of the final version in 2008 (and six years since the release of the draft version in January 2005).

II. Setting the Context for the SSAG

A. *The Legal Framework of Family Law in Canada*

Some understanding of the general framework of family law in Canada is necessary as a preliminary matter to understand the context in which the SSAG were developed and operate.³ Canada has a federal system of government in which legislative power is divided between the federal government and ten provincial governments.⁴ Family law is an area of divided (and in some cases concurrent) jurisdiction.

Under the Canadian constitution, marriage and divorce are federal powers.⁵ Our current *Divorce Act*, which dates from 1985, allows for no-fault divorce on the basis of one year of separation.⁶ Despite retention of the fault-based grounds of adultery and cruelty being retained, the vast majority of divorces are brought on the basis of separation, and fault has been removed as a relevant factor in determining financial relief, custody, and access. The divorce power has been interpreted to allow the federal government to deal with matters of “corollary relief” sought in the context of divorce.⁷ The *Divorce Act* thus contains provisions dealing with custody, access, child support, and spousal support, which apply when these issues are being dealt with in the context of a divorce or after the parties have divorced. Furthermore, with respect to the federal power over marriage, in 2005, the federal government enacted legislation to recognize

3. For general overviews of Canadian family law, see JULIEN PAYNE & MARILYN PAYNE, *CANADIAN FAMILY LAW* (3rd ed. 2008) and BEREND HOVIUS & MARY JO MAUR, *FAMILY LAW: CASES, NOTES AND MATERIALS* (7th ed. 2009).

4. In the interests of simplicity, we have not included references to the three northern territories. These fall under federal jurisdiction, but have legislative assemblies that have been granted some of the powers of provincial legislatures.

5. Section 91(2) of the CONSTITUTION ACT, 1867.

6. R.S.C. 1985, c. 3 (2nd Supp.). Our first national divorce act, the DIVORCE ACT, 1968, R.S.C. 1970, c. D-8, combined an extensive list of fault-based grounds for divorce with a no-fault ground, based on a three- or five-year period of living separate and apart.

7. This does not include property division, which is understood as a matter falling exclusively within provincial jurisdiction.

same-sex marriage. Those same-sex couples who have married are subject to the *Divorce Act*, including its spousal support provisions, when their relationships break down.⁸

Provincial governments in Canada also have significant jurisdiction over family law stemming from their powers over “property and civil rights” and “matters of a merely local or private nature in the province”⁹ Provincial laws govern matrimonial property division in addition to governing custody, access, child support, and spousal support. These provincial laws apply outside of the divorce context, in cases involving unmarried couples (both same-sex and opposite-sex),¹⁰ or married couples who have separated but are not seeking a divorce. As shown below, there is a fair amount of similarity between the treatment of child and spousal support under provincial laws and under the federal *Divorce Act*, a factor that facilitated the development of a national set of spousal support advisory guidelines.

Under the Canadian family law system, financial provision after separation or divorce consists of three very distinct claims: division of matrimonial property, child support, and spousal support. While each province has its own matrimonial property scheme, most of which have been in place since the 1970s or 1980s, they all incorporate the basic concept of marriage as an equal partnership which, in turn, justifies a *prima facie* equal division of a defined pool of marital assets, including pensions, when the partnership ends.¹¹ The decision to structure matrimonial property laws around a presumption of equal sharing is an early example of Canadian family law shifting in the direction of rules over discretion and stands in contrast to the much more discretionary equitable distribution statutes so common in American states.

Child and spousal support are treated as distinct claims. In contrast to

8. CIVIL MARRIAGE ACT, S.C. 2005, c. 33 [in force July 20, 2005].

9. Sections 92(13) and (16) respectively of the CONSTITUTION ACT, 1867.

10. In all of the provinces except Quebec, spousal support obligations are imposed on unmarried couples who satisfy the extended definition of spouse, typically based upon a prescribed period of cohabitation. Quebec’s failure to extend spousal support rights to unmarried couples has been successfully challenged on constitutional grounds in a decision that has been appealed to the Supreme Court of Canada: *see* A. c. B., 2010 QCCA 1978. In contrast, in most provinces, matrimonial property legislation applies only to married couples.

11. Although the schemes differ with respect to the pool of marital assets to which this presumption applies, they all include, at the very least, the matrimonial home and pensions. The treatment of business assets varies from province to province. A nice review of history and conceptual underpinnings of matrimonial property law in Canada is found in Justice L’Heureux-Dubé’s dissenting judgment in *Nova Scotia (Attorney-General) v. Walsh*, [2002] 2 S.C.R. 325, 32 R.F.L. (5th) 81 (*sub nom Walsh v. Bona*). It should be noted that in the majority of provinces, matrimonial property legislation, unlike spousal support legislation, does *not* apply to unmarried couples, who must rely upon equitable doctrines of unjust enrichment and constructive trust.

the practice in some American states, child support has priority over spousal support and must be determined first on the basis of the payor's income before the deduction of spousal support.¹² Spousal support will only be ordered if there is ability to pay after the payment of child support. As in the United States, child and spousal support are treated differently for taxation purposes. Periodic spousal support is taxable in the hands of the recipient and deductible by the payor, but the rules for child support were changed in 1997 so that it is no longer subject to the inclusion/deduction rules. Cases involving combined claims for child and spousal support require complex calculations to determine the net effect of the orders. Both the priority to child support and the different tax treatment of child and spousal support were factors taken into account when developing the SSAG and required the creation of a separate formula to deal with cases involving children and a concurrent child-support obligation.

Since 1997, the Child Support Guidelines (CSG) have determined child support amounts.¹³ The federal and provincial governments worked together to implement child support guidelines; they were first introduced at the federal level, with the provinces subsequently enacting guidelines that essentially mirrored the federal guidelines.¹⁴ The basic or "table" amount of support is determined by a fixed percentage of payor income formula. The percentages are not as high as those used in some American states, and in cases involving minor children, spousal support plays a larger role in Canada in compensating for the indirect costs of child-rearing.¹⁵ The basic amount of child support can be increased on an individual, discretionary basis to cover certain special or extraordinary expenses (referred to as s. 7 expenses), which are shared between the parents in proportion to their income, for example, child care expenses, in exceptional cases the table amount can be decreased where it would cause undue hardship. As well, there are special rules for cases involving high incomes¹⁶

12. DIVORCE ACT, s. 15(3).

13. See *supra* note 1. For a more detailed description of the CSG, see JULIEN PAYNE, CHILD SUPPORT GUIDELINES IN CANADA, 2009 (2009).

14. The exception is Quebec, which enacted its own scheme of child support guidelines. The federal guidelines use a percentage-of-payor-income formula, whereas Quebec adopted income shares guidelines. More detail on the Quebec guidelines and the complications this different scheme of child support created for the development of the spousal support advisory guidelines can be found in ch. 15 of the SSAG.

15. The basic amount of child support is determined by published child support tables, based on the payor's income and the number of children. The table amounts are determined by a complex formula that uses *net* income figures, but the tables themselves use *before tax* incomes. The table amounts for a before-tax payor income of \$40,000 in Ontario are approximately 11% for one child, 18% for two children, and 23% for three children.

16. In practice, courts routinely apply the formulas in high-income cases, even though s. 4 of the CSG allows for deviation when incomes exceed \$150,000.

and split and shared custody.¹⁷ It should be noted that the child support obligation in Canada is broader in scope than in the United States. Under both the federal *Divorce Act* and most provincial support legislation, children over the age of majority pursuing post-secondary education are entitled to child support¹⁸ and nonparents who stand in the place of a parent (*i.e.*, stepparents) are obligated to pay child support.¹⁹ Both of these extensions of the child support obligation are also subject to somewhat different rules under the CSG, which in turn necessitated adjustments under the SSAG.

B. The Legal Framework of Spousal Support

Spousal support is undoubtedly a contentious remedy. In Canada, as in other western legal systems, legislators, judges, and academics have been struggling for over three decades with the difficult question of the appropriate role, if any, for spousal support given the basic principles and values of modern family law. The Canadian law of spousal support has answered this question differently from many other jurisdictions, which have emphasized the clean break principle and have largely reduced spousal support to a minimal, transitional remedy. In contrast, Canadian law has come to recognize a much more generous basis for spousal support.²⁰ The SSAG reflect the distinctive patterns of spousal support outcomes that have developed under the existing legal framework in Canada.

Beginning with the governing legislation, at both the federal and provincial level, spousal support legislation takes the form of fairly open-ended legislation that provides checklists of factors and objectives to be taken into account in determining whether spousal support should be awarded (*i.e.*, whether there is entitlement) and if so, in what amount and for what duration. Under the *Divorce Act*, which grants courts the power to make orders for spousal support when sought in the context of a divorce, s. 15.2 (6) sets out four objectives for spousal support, which between them cover all of the competing policy goals at play in this area of law:

- 15.2 (6) An order . . . that provides for the support of a spouse should
- (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
 - (b) apportion between the spouses any financial consequences aris-

17. Shared custody, dealt with in s. 9 of the CSG, is defined as a situation in which each parent has the child for at least forty percent of the time.

18. Under the DIVORCE ACT, s. 2(1) definition of "child of the marriage."

19. Under the DIVORCE ACT, s. 2(2), extended definition of "child of the marriage."

20. For a more detailed overview of the Canadian law of spousal support, see Carol Rogerson, *The Canadian Law of Spousal Support*, 38 FAM. L.Q. 69 (2004). Chapter 1 of the SSAG also provides an overview of the legal framework of spousal support in Canada.

- ing from the care of any child of the marriage over and above the obligation apportioned between the spouses pursuant to subsection (8) [i.e. through child support];
- (c) relieve any economic hardship of the spouses arising from the break-down of the marriage; and
- (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

In addition, s. 15.2 (4) directs courts to consider the “condition, means, needs, and other circumstances” of the spouses, including length of cohabitation and functions performed during the marriage. Section 15.2 (5) is more specific, indicating one factor that may *not* be taken into account—spousal misconduct.

Each province has enacted its own spousal support legislation that applies when spousal support is being sought outside the context of divorce. Despite differences in statutory language between the various provincial support laws and the *Divorce Act*, there are no significant differences in the basic principles that govern the determination of spousal support. Much of the real work of determining appropriate spousal support awards is left to judicial interpretation, guided ultimately, as a result of our unitary court system, by the direction provided by the Supreme Court of Canada.²¹

Through a series of three important decisions, the Supreme Court of Canada has attempted to clarify the general principles that structure the law of spousal support in Canada. The first was *Pelech v. Pelech*²² in 1987, which favored limited support obligations in the interests of promoting clean breaks and finality. *Pelech* began to shift Canadian spousal support law in the direction many other jurisdictions were moving. However, in 1992, in the ground-breaking case of *Moge v. Moge*,²³ Canadian law shifted direction. In *Moge*, the Supreme Court of Canada clearly rejected the clean break model of spousal support and recognized an expansive “compensatory” basis for spousal support,²⁴ primarily

21. Although Canada is a federal state, we have a largely unitary court system within which superior court judges deal with matters arising under both provincial and federal law. Appeals of matters arising under both federal and provincial laws are heard first by provincial courts of appeals and then by the Supreme Court of Canada. The Supreme Court of Canada is thus the ultimate authority on the interpretation of provincial legislation; it is therefore not surprising that its interpretations of federal divorce legislation influence the interpretation of provincial support legislation.

22. [1987] 1 S.C.R. 801. *Pelech* was one of a trilogy of cases decided at the same time; the other two cases were *Richardson v. Richardson*, [1987] 1 S.C.R. 857 and *Caron v. Caron*, [1987] 1 S.C.R. 892.

23. [1992] 3 S.C.R. 813.

24. In endorsing a compensatory model of spousal support, the Court portrayed the main purpose of spousal support as the equitable distribution between the spouses of the *economic* consequences of the marriage—both its economic advantages and disadvantages.

directed at redressing the economic disadvantage suffered by spouses who have sacrificed labor force participation to care for children. The Court ruled that while the goal of promoting spousal self-sufficiency after divorce remains one factor amongst others to be considered in determining spousal support, it is to be approached in a more realistic way than under a clean break model. *Moge* established there is no absolute duty to become self-sufficient.²⁵ Former spouses are obligated to maximize their earning capacity and contribute to their own support, but courts were directed not to underestimate the extent of the postdivorce disadvantage or overestimate the labour market prospects of separated and divorced spouses.

The third decision was *Bracklow v. Bracklow*²⁶ in 1999, in which the Supreme Court of Canada further expanded the law by recognizing a “non-compensatory” basis for spousal support in meeting “needs” which exist when relationships of economic dependency break down. In *Bracklow*, the Court recognized the limitations of a purely compensatory approach to spousal support that would confine the basis of spousal support to compensation for gains and losses in earning capacity as a result of the roles adopted in the marriage. It concluded that both as a matter of statutory interpretation and policy, there is also a noncompensatory basis for spousal support under the *Divorce Act*: entitlement to support can arise from “need alone.” Little guidance was given however on how “need” was to be defined—whether in terms of ability to meet basic needs or by reference to the marital standard of living—and the extent of a former spouse’s obligation to meet the post-divorce needs of his or her former spouse. The Court presented spousal support determinations as first and foremost exercises of discretion by trial judges who were required to “balance” the multiple support objectives and factors under the *Divorce Act* and apply them in the context of the facts of particular cases.

The result of *Moge* and *Bracklow* was a very broad basis for entitlement to spousal support on compensatory and noncompensatory grounds and the potential for generous support awards in terms of both amount and duration. However, the task of implementing and applying the broad and somewhat vague principles of entitlement articulated by the Supreme Court of Canada to the facts of individual cases was left to trial judges and lawyers in their daily work of deciding and negotiating spousal support. *Bracklow’s* emphasis on the highly discretionary nature of the exercise meant that on the ground, the law of spousal support became even more subjective, uncertain, and unpredictable.

25. This was reaffirmed by the Supreme Court of Canada in *Leskun v. Leskun*, [2006] 1 S.C.R. 920.

26. [1999] 1 S.C.R. 420.

III. Developing Spousal Support Advisory Guidelines

After *Bracklow*, many lawyers and judges began to express the view that the highly discretionary nature of the law of spousal support was creating an unacceptable degree of uncertainty and unpredictability. Similar fact situations could generate a wide variation in results. Individual judges were provided with little concrete guidance in determining spousal support outcomes. Their subjective perceptions of fair outcomes often seemed to play a role in determining the spousal support ultimately ordered. Lawyers, in turn, had difficulty predicting outcomes, thus impeding their ability to advise clients and to engage in cost-effective settlement negotiations. For those without legal representation or in weak bargaining positions, support claims were often simply not pursued. In response to these concerns, in 2001, the Federal Department of Justice initiated a project to explore the possibility of developing a set of advisory spousal support guidelines to assist lawyers and judges in determining the amount and duration of spousal support under the *Divorce Act*.

Relatively few jurisdictions have developed spousal support guidelines. The view that had prevailed in Canada in the past, as in many other jurisdictions, was that the complexity of this area of law renders guidelines either impossible or undesirable. However, the Department of Justice was of the view that the time was ripe for reconsideration. The experience with child support guidelines since 1997 had changed the legal culture in Canada. Their formulaic approach had accustomed judges and lawyers to the systemic advantages of *average* justice, rather than individualized justice, to determining support without budgets and to the concept of income sharing after divorce. As well, some concrete models for spousal support guidelines had begun to appear. Some American jurisdictions had successfully experimented with such guidelines for more than a decade.²⁷ Building on these experiences, the influential American Law Institute (ALI) developed a much more sophisticated formulaic approach to spousal support that formed part of its blueprint for a comprehensive rethinking of the law of family dissolution.²⁸ Finally, Canadian spousal support had evolved to the point, after *Bracklow*, where a significant income disparity would, in most cases, signal an entitlement to spousal

27. See "Background Paper" that was prepared for the SSAG project: Carol Rogerson, *Developing Spousal Support Guidelines in Canada: Beginning the Discussion* (Dec. 2002), available on the Department of Justice website at: <http://www.justice.gc.ca/eng/pi/fcy-fea/spo-epo/g-ld/ss-pae/index.html>. Many of the American guidelines deal only with interim maintenance.

28. The ALI project began in the 1990s, culminating in the Institute's final report in 2002: AMERICAN LAW INSTITUTE, *PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS* (2002). The recommendations with respect to spousal support are found in Chapter 5, "Compensatory Spousal Payments." Only a few American jurisdictions have begun to implement the ALI guidelines.

support, if not on compensatory grounds, then on noncompensatory grounds, leaving amount and duration as the main issue in most cases. This was an ideal context for the development of income-sharing guidelines.

Two law professors (the authors) were made directors of the project. Given that the guidelines were to build on current practice and that litigated cases represent only a small percentage of the spousal support cases that make their way through the family law system, it was necessary to draw on practice outside the realm of reported cases. The project directors worked with an advisory group of family lawyers, judges, and mediators who drew upon their experience of spousal support outcomes in negotiations, mediations, and settlement conferences. A draft version of the Spousal Support Advisory Guidelines (SSAG), called the “draft proposal,” was produced and released in January 2005. Then, after an extensive process of consultation with the family law bar and judiciary across the country, a “final version” was released in July 2008.²⁹

Unlike the child support guidelines, the SSAG are not legislated. They are informal, advisory guidelines intended not to change the law, but rather to reflect current practice within the existing legal framework of the *Divorce Act* and the *Moge* and *Bracklow* decisions of the Supreme Court.³⁰ The advisory guidelines project was premised on the assumption that despite the uncertainty and predictability in spousal support outcomes, there were dominant, or sometimes emerging, patterns in the law that could be captured by income-sharing formulas. After the enactment of the CSG, some lawyers and judges had actually begun to develop their own informal guidelines for spousal support.³¹ The advisory guidelines project was intended to build on these developments.

29. See *supra* note 1. All of the documents related to the SSAG project, including reviews of the developing case on the SSAG and a Users Guide that was developed to assist lawyers and judges in applying the SSAG can be found on the SSAG website that is part of Professor Rogerson’s faculty page at the Faculty of Law University of Toronto: <http://www.law.utoronto.ca/faculty/rogerson/ssag.html>. Chapter 2 of the Final Version of the SSAG contains a much more detailed description of the development of the Advisory Guidelines and their reception by judges and lawyers.

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

31. Computer software had become more prevalent after the introduction of the CSG in 1997. That software gave lawyers and judges readily available information on net disposable incomes or monthly cash flow after the payment of support, tax calculations, and household standards of living. Provided with this information, lawyers negotiating spousal support started to look to income sharing and household standards of living, rather than budgets, to resolve

Much of the work in developing the advisory guidelines involved identifying the dominant patterns of outcomes across a range of *typical* cases, relying both on reported case law and on the practical experience of the advisory working group. Mathematical formulas were then developed to capture these patterns in the law, both with respect to amount and duration. We began with the easiest categories of marriages where patterns in the current law were the clearest and where we expected the greatest consistency in outcomes. We thus started with long marriages, then moved to short marriages without dependent children, and then to marriages with dependent children. Lastly, we tackled the most difficult category, medium duration marriages without dependent children, where there is the most diversity of outcomes and the least consistency in the current law. Our results suggested two basic formulas, reflecting strong distinctions between cases with and without dependent children. Because results clustered, rather than converged, on precise outcomes, the formulas were constructed to generate *ranges* rather than precise numbers for both amount and duration. Not surprisingly, it proved more difficult to devise formulas for duration than for amount.

IV. A Brief Overview of the Spousal Support Advisory Guidelines

The advisory guidelines are complex. The full text of the final version of the SSAG is 166 pages. The document contains a series of formulas which generate ranges for amount and duration—what many people think of as the “guidelines.” However, the SSAG are in fact a larger scheme that places the formulas in the broader framework of a spousal support analysis and provide important qualifications on the use of the formulas. The SSAG are not a rigid set of guidelines and they do not resolve, or provide clear answers to all of the difficult and complex issues that arise in spousal support cases.

To begin with, they deal only with the issues of *amount* and *duration* of spousal support; they do not deal with threshold issue of *entitlement*. The mere presence of an income difference between the parties that would generate an amount of support under the formulas does not mean that there is entitlement. This must be determined first, before applying the formulas by reference to the *Divorce Act* objectives and the framework of compensatory and noncompensatory support articulated in *Moge* and *Bracklow*.

Even within their own domain, which is the determination of the amount and duration of spousal support, the advisory guidelines do not offer defini-

spousal support issues. Over time this approach began to receive some degree of judicial endorsement.

tive answers. They are not “rigid formulas.” They typically generate *ranges* for amount and duration, rather than precise figures, and ranges are relatively wide, necessitating a fact-specific determination of the precise location within the ranges. Furthermore, amounts and duration can be traded off against each other, to front-end load support or to convert it into a lump sum, a process termed “restructuring.”³² Furthermore, these ranges are intended at best as a starting point for analysis. They represent the dominant patterns of results in typical cases, are subject to limits on the incomes to which they are applicable³³ and to a set of explicitly identified exceptions.³⁴ Being advisory only, the SSAG also allow for individualized departures in exceptional or atypical cases where the formula results would be inappropriate under the current legal framework. The advisory guidelines do not completely eliminate the need for an individualized analysis sensitive to the facts and context of the particular case.

Finally, the SSAG formulas are primarily applicable in the context of initial determinations of spousal support at the time of separation or divorce and have a more limited application in the context of subsequent variation (what other jurisdictions may call “modification”) applications. The SSAG scheme contemplates that these initial arrangements will be subject to the normal process of variation and review to take into account changing circumstances over time that may result in an increase or decrease in the amount of support or even a termination of support if entitlement ends.³⁵ The advisory guidelines have a more limited role to play in this context.³⁶ They can be applied on applications to reduce spousal support because of changes in income, for example, when the payor spouse’s income goes down, or the recipient spouse’s income goes up (or ought to have gone up, in which case income may be imputed). However, given the uncertain state of the current law, issues such as a significant

32. Restructuring is dealt with in ch. 10 of the SSAG.

33. They are not intended to apply to payor incomes below \$20,000 or above \$350,000. These “ceilings” and “floors” are dealt with in ch. 11 of the SSAG.

34. Exceptions are dealt with in ch. 12 of the SSAG. The twelve identified exceptions include debts, disability, large compensatory loss after a short marriage, and prior support obligations.

35. Variation of spousal support orders is provided for by statute (DIVORCE ACT, s. 17(4.1)) and requires, as a threshold matter, a “material change” in circumstances. Review orders are a judicial creation. They allow for reassessments of support without the requirement of a material change in circumstances. The Supreme Court of Canada approved the use of review orders in *Leskun, supra* note 25. Review orders are justified where there is “genuine and material uncertainty at the time of the original trial” as to the spouses’ finances in the near future. “Common examples are the need to establish a new residence, start a program of education, train or upgrade skills, or obtain employment.”

36. The application of the SSAG in the context of variation and review, remarriage, and second families is dealt with in ch. 14 of the SSAG.

increase in the payor's income after separation or divorce, the recipient spouse's remarriage or repartnering,³⁷ or second family obligations taken on by the payor are not amenable to a formulaic treatment.

In the limited space available, we are not able to deal in any detail with all of the components of the advisory guidelines. We will simply focus on describing in general, the way the formulas provide for determining the amount and duration of spousal support. Readers should keep in mind the important qualifications for the use of the formulas as they have been sketched out above.

The advisory guidelines are structured around two basic formulas: the without-child support formula and the with-child support formula.³⁸ The dividing line between the two is the absence or presence of a dependent child or children of the marriage, and a concurrent child-support obligation at the time spousal support is determined. Each will be examined in turn.

A. The Without-Child Support Formula

The without-child support formula applies in cases in which there are no dependent children. It applies both to cases where there were no children of the marriage and also to cases where there were children, but they have become financially independent.³⁹ A summary of the without-child support formula is set out in the box on page 254.

The without-child support formula is built around two crucial factors: the income difference between the parties (or more precisely the difference between their gross incomes) and the length of marriage (or more precisely, the length of the relationship, including periods of premarital cohabitation). The formula relies heavily on the length of the relationship: both the amount and duration of support increase incrementally as the length of the relationship increases.

Assuming entitlement, the formula provides that the higher-income payor would pay 1.5% to 2% of the gross income difference for each year of cohabitation to the lower-income recipient spouse. After ten years of marriage, for example, the payor would pay between 15% to 20% of the gross income difference to the recipient; after twenty years of cohabitation, the payor would pay 30% to 40%. Thus, for example, if a husband earns \$90,000 and the wife earns \$30,000, resulting in a gross income difference of \$60,000, and the marriage lasted ten years, the husband would pay \$9,000 to \$12,000 annually, or \$750 to \$1,000 monthly. If they were

37. Under Canadian law, the recipient's remarriage does not automatically result in a termination of spousal support.

38. There are also several variations on these formulas which we will not discuss here.

39. The without-child support formula is dealt with in ch. 8 of the SSAG.

The Without-Child Support Formula

Amount ranges from 1.5% to 2% of the difference between the spouses' gross incomes (**the gross income difference**) for each year of marriage (or, more precisely, years of cohabitation), up to a maximum of 50%. The maximum range remains fixed for marriages twenty-five years or longer at 37.5% to 50% of income difference. (The upper end of this maximum range is capped at the amount that would result in equalization of the spouses' net incomes—the **net income cap**.)

Duration ranges from one half to one year for each year of marriage. However, support will be **indefinite (duration not specified)** if the marriage is **twenty years or longer** in duration or, if the marriage has lasted five years or longer, when the years of marriage and age of the support recipient (at separation) added together total sixty-five or more (**the rule of 65**).

married twenty years, the husband would pay in the range of \$18,000 to \$24,000 annually, or \$1,500 to \$2,000 monthly. This amount would be taxable in the hands of the recipient, whereas the husband would be allowed to deduct it for tax purposes.

To determine the *duration* of support, the formula provides one-half to one year of support for each year of cohabitation. Any period of interim support is included in the calculation of duration. If the couple has cohabited for ten years, as in the example above, the range for duration would be between five and ten years. If the couple has cohabited for twenty years or longer, as in the second example above, support would be indefinite. "Indefinite" does not necessarily mean permanent. "Indefinite" simply means an order without a specific time limit at the time it is made, subject to the usual processes of variation and review. Support will also be indefinite where the marriage or relationship has lasted five years or longer and the years of cohabitation and the age of the support recipient at separation added together total sixty-five or more. This "rule of 65" takes into account the effect of a spouse's age on ability to become self-sufficient.

The basic idea that underlies this formula is "*merger over time*," a phrase that captures both the compensatory and noncompensatory grounds for support from *Moge* and *Bracklow*. As a marriage or relationship lengthens, spouses merge their economic and noneconomic lives more deeply, in both direct and indirect ways, with each spouse making countless decisions to mould his or her skills, behavior, and finances around those of the other spouse. The longer the marriage or relationship,

the greater is the claim by the recipient spouse to maintain the marital standard of living and for a longer period after separation. This formula puts some structure on the concept of “need” from *Bracklow*: “need” relates to the marital standard of living, but the extent to which spousal support will ameliorate the drop in standard of living after marriage breakdown depends upon the length of the marriage.

Under the without-child support formula, long marriages (many of which will be marriages in which there were children who are now grown, cases with strong compensatory as well as noncompensatory claims) will generate significant spousal support obligations. The amounts will be a relatively high percentage of the income difference, leaving the parties with fairly similar, even if not equal, standards of living, and the support will be paid on an indefinite basis (with no specified time limit, but subject to the normal process of review and variation). For short and medium-length marriages (most of which will be marriages without children), the formula generates more modest amounts for a time-limited, transitional period only, with the transition period being longer or shorter depending upon the expectation and reliance interests for which the length of the marriage operates as proxy measure. The outcomes generated by the guidelines can be “restructured” to provide higher amounts (i.e., closer to the marital standard-of-living) for shorter periods of time.

B. The With-Child Support Formula

The with-child-support formula applies in cases where there are dependent children and child support is being paid.⁴⁰ The with-child support formula is actually a family of formulas, with a number of variations, based upon the custodial and child support arrangements. The “basic” with-child support formula applies to the most common fact situation; where the higher-income spouse is paying both child and spousal support to the lower-income spouse, who is also the parent with custody or primary residential care of the children.⁴¹

The formula reflects the distinct concerns in cases involving minor children. First priority must be given to child support over spousal support, with the result that there is usually reduced ability to pay spousal support, and particular tax and benefit issues arise in cases involving minor children. Finally, the rationale for spousal support is also different

40. The with-child support formula is dealt with in ch. 9 of the SSAG.

41. There are two variants on this basic formula for situations of shared custody or split custody. There is also another, hybrid formula (the “custodial payor” formula) where the higher income payor spouse is also the parent with custody or primary care of the children. And finally, there is a separate formula for cases involving adult children, where child support is often calculated on an individualized basis, rather than using the CSG.

in these cases, captured by the concept of “parental partnership.” The formula is profoundly compensatory in nature, reflecting the need in these cases, not only to compensate for the economic disadvantages that result from past care-giving roles, but also the continuing, indirect costs of child care on the custodial or primary-care parent.⁴² Given the importance of providing ongoing care and support of dependent children in these cases, length of marriage does not play as large a role under this formula as under the without-child support formula. The amount of spousal support under this formula does not vary with the length of the marriage, and duration is influenced not just by the length of the marriage, but also by the ages of the children at separation, which determine the length of the post-separation child-rearing period.

The calculations under the with-child support formula are complicated and require computer software. They are done with net income to take into account the different tax consequences of child and spousal support. The formula reflects the priority given to child support, with spousal support being paid out of what is left over after payment of child support. The main concept under the formula that captures this idea of working with what is “left over,” is “INDI” or “Individual Net Disposable Income:” the net amount of money each spouse has after the deduction of their respective child-support obligations. The calculation of INDI takes into account taxes and deductions, as well as government credits and benefits. The with-child support formula divides up the pool of combined net incomes,⁴³ calculating an amount of spousal support that will leave the recipient with between 40% to 46% of the pool of combined net incomes.⁴⁴ The box on page 257 provides a summary of the formula.

A couple of examples will illustrate the kinds of spousal support generated by this formula. Assume an eleven-year marriage with two children, ages eight and ten, who are with their mother after separation. The father earns \$65,000, and the mother \$20,000. The table amount of child support

42. Section 15.2(6)(b) of the *Divorce Act* provides that one of the objectives of spousal support is to “apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage.” This objective focuses upon the *continuing* indirect costs of child care for a custodial parent(s). Under the *Child Support Guidelines*, child support only compensates a spouse for the direct costs of child care (and not even all of those).

43. In this way it is unlike the without-child support formula, which divides the income difference between the parties. This formula divides the *pool* of combined net incomes.

44. The calculations cannot be done by “arithmetic,” by adding and subtracting, but only by the repeated calculations or “iterations” of software. After the calculation of each spouse’s INDI, spousal support amounts are transferred from the payor to the recipient, by the process of “iteration,” until the recipient spouse is left with 40% to 46% of the pooled individual net disposable income. Because of tax effects and government benefits tied to income, this involves hitting a moving target, as net income changes with each transfer of spousal support.

The Basic With-Child Support Formula for Amount

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

that the father pays under the CSG for two children is \$972 monthly.⁴⁵ The with-child support formula would generate a range of spousal support, from zero at the low end of the range (reflecting the father's limited ability to pay after payment of child support) to \$380 per month at the high end of the range. If the father's income increases to \$80,000, he would pay child support of \$1,159 per month. The with-child support formula would generate a range of spousal support of \$300 to \$859 per month. It may be helpful, in assessing these spousal amounts, to compare the *household incomes* of the parties *after payment of child and spousal support* and take into account taxes and government benefits. In both cases, payment of spousal support at the low end of the range, plus child support, would leave the mother's household (three persons) with 52% of the net household income and the father's household (one person) with 48%. Payment at the high end of the range would leave the mother with approximately 57% of the net household income and the father with 43%.

Duration under the basic with-child support formula also reflects the underlying "parental partnership" rationale. Mirroring current practice, initial orders under the formula are *indefinite* (*i.e.*, duration not specified), subject to the usual process of review or variation. Reviews are common in these cases, based upon considerations, such as ages of the children, the labour market experience of the custodial parent, and the passage of time after separation. The formula does, however, provide a durational range, which is intended to structure the process of review and variation and to limit the cumulative duration of spousal support. The durational limits under this formula can be thought of as "soft" time limits. There are two

45. For purposes of simplicity, these calculations do not include any s. 7 special or extraordinary expenses. The calculations are based on the assumption that both parties live in the province of Ontario.

tests for duration, and whichever produces the longer duration at each end of the range is to be employed: one test employs length-of-marriage, and as under the without-child support formula provides for one half to one year of support for each year of cohabitation, with duration becoming indefinite after twenty years. The second, the age-of-children test, relates to the period of postseparation child-care responsibilities, the lower end of the range is the age at which the youngest child starts full-time school, and the upper end of the range is when the youngest child completes high school. The age-of-children test is most relevant in cases of shorter marriages with young children, cases where the length-of-marriage test would generate a very short duration, which does not adequately recognize the implications of ongoing child-care responsibilities.

To illustrate the operation of the durational range, we can go back to the example above of an eleven-year marriage with two children, ages eight and ten. The length-of-marriage test would suggest a durational range of five and a half to eleven years. Under the age-of-children test, the lower end of the range would not be relevant because the youngest child is already in full-time school, and the upper end of the range, determined by when the youngest child completes high-school, would be ten years. Combining the maximum duration under each range, the durational range would be five and one-half to eleven years. The initial order would be indefinite, and the durational range of five and one-half to ten years would be brought into play to terminate or time-limit the order on a subsequent variation or review when various changes in circumstances will be taken into account, such as the mother's efforts and capacity to improve her earning power and the remarriage or repartnering of one or both of the parties.

V. The Early Response and Use of the SSAG

The "draft proposal" released in January 2005, was a complete draft version of the advisory guidelines and was 120 pages long. At the same time, thanks to advance consultation, the three major Canadian family law software suppliers were also ready to release add-on software to do SSAG calculations, thus facilitating immediate application and experimentation. The early response to the SSAG was immediate, and divided. Most lawyers were delighted to obtain some practical guidance on amount and duration. The SSAG offered a "ballpark" estimate used with clients, other lawyers, and mediators. For these lawyers and for some judges too, the words "advisory" and "draft" were not barriers to immediate adoption and use of the SSAG. Over time, the group of SSAG users grew.

There were also early SSAG critics, more vocal than the users. Three

criticisms of the advisory guidelines were frequently voiced. First, spousal support was properly seen as an area for individualized decision. Guidelines were too rigid, fettered judicial discretion, and would lead to “cookie-cutter” justice. Second, advisory guidelines were seen as illegitimate, with no statutory basis: not “law,” or “evidence,” but some kind of law reform that bypassed the legislative process and was inconsistent with the statute. Third, spousal support is a highly-contested area of family law, and the advisory guidelines became a focus for various critics of the law, each of whom saw some “hidden agenda” within the SSAG.

A major shift took place after the leading British Columbia Court of Appeal decision in *Yemchuk v. Yemchuk* was released in August of 2005, only eight months after the release of the draft proposal.⁴⁶ In *Yemchuk*, the trial judge denied spousal support to the lower-income husband after a thirty-five-year marriage. The court of appeal reversed, finding entitlement to support on both compensatory and noncompensatory bases.⁴⁷ The judge, Prowse J.A., then had to determine the amount of spousal support at the appellate level and used the advisory guidelines as part of her careful analysis.⁴⁸ The SSAG were described as a “useful tool,” “part of counsels’ submissions,” rather than evidence, and “intended to reflect the current law, rather than to change it.” Their status was described as analogous to a compilation of precedent. Immediately, *Yemchuk* gave legitimacy to the SSAG throughout British Columbia, one of Canada’s largest provinces. The decision also had a radiating effect upon submissions by counsel across Canada and decisions by courts in other provinces.

Two other appellate courts followed *Yemchuk* and its strong endorsement, in New Brunswick in April 2006 and Ontario (Canada’s largest province) in January 2008.⁴⁹ By contrast, the Quebec Court of Appeal was quite critical of the idea of the guidelines in a June 2006 decision, which halted their use in that large province.⁵⁰ In the other six Canadian provinces, the advisory guidelines in their draft version were used to varying degrees by lawyers, mediators, and trial judges.⁵¹ As they became

46. 2005 BCCA 406.

47. The husband had taken early retirement from his employment to move to a different province to accommodate his wife’s promotion and then moved back to B.C. for her next posting with the federal government, giving rise to a compensatory claim. Their long marriage and his much lower income also generated a noncompensatory claim.

48. Duration was not an issue, as the husband only claimed support until the wife’s expected retirement in November 2007, about three and a half years in total.

49. See *S.C. v. J.C.*, 2006 NBCA 46; *Fisher v. Fisher*, 2008 ONCA 11.

50. The court of appeal saw the SSAG as inconsistent with the discretionary nature of spousal support determinations under the *Divorce Act*: *G.V. v. C.G.*, 2006 QCCA 763. The Quebec Court of Appeal is now reconsidering its stance on the SSAG in a decision reserved since April 2010.

51. In Alberta and Nova Scotia, the appellate courts considered and used the advisory

accustomed to using the SSAG formulas, most discovered that the amounts generated were consistent with outcomes in their jurisdiction and with various older methods for determining spousal support outcomes (budgets, percentage-of-payor net income, percentage distribution of the family's net disposable income, etc.).

From 2005 to 2007, the two project directors twice toured the country, once for a series of larger educational programs with lawyers and judges and a second time for small-group consultations with lawyers, mediators, and judges. By this time, the "draft" advisory guidelines had been used in thousands of negotiated and decided cases across the country, and the feedback was positive and quite detailed. The formulas generated ranges that could accommodate outcomes in all parts of the country for typical cases; or more succinctly, "the ranges are about right." In some parts of the country, the SSAG ranges nudged local outcomes a bit higher or lower, longer or shorter, but in ways that were tolerable to practitioners.⁵²

The "final version" of the SSAG was released in July 2008 at the National Family Law Program, a biennial nationwide conference of family law lawyers, mediators and judges.⁵³ The two formulas were not changed from the draft proposal, but there had been some tweaking around the edges and the addition of more exceptions to adjust the formulaic outcomes in particular categories of cases.⁵⁴ At the same time, the project directors created a "user's guide" to provide practical tips and assistance to practitioners, subsequently updated in March 2010.⁵⁵

The Supreme Court of Canada has not yet addressed the use of the advisory guidelines in a contested spousal support case. Four times the Court has denied leave in cases focused upon various aspects of the advisory guidelines. In its most recent decision, involving unjust enrichment claims by common-law couples, the Court made reference to the use of the SSAG to determine spousal support, but no more.⁵⁶

guidelines during this period, but with less consistency and less enthusiasm than the other three appeal courts. As for trial judges, most first used the SSAG in settlement conferences and then progressed to their use in adjudication, where one or both counsel used the SSAG in their arguments.

52. In some localities, even lawyers for payor spouses acknowledged that support amounts were too low and needed to increase. In some provinces, the SSAG were used to support time limits, rather than indefinite support awards.

53. See *supra* note 2.

54. The specific revisions are set out in a shorter report: *Spousal Support Advisory Guidelines: Report on Revisions* (Canada, Dep't of Justice, July 2008).

55. *Spousal Support Advisory Guidelines: A New and Improved User's Guide* (Canada, Dep't of Justice, March 2010).

56. *Kerr v. Baranow*, 2011 SCC 10 at paras. 201 and 214. The only issue was the period of retroactivity of spousal support, but not how support was determined.

VI. An Early Assessment of the Advisory Guidelines

There has not yet been any formal evaluation of the Spousal Support Advisory Guidelines by the Department of Justice, but one is being planned. However, the ongoing reviews of the developing case law under the SSAG⁵⁷ and the extensive consultations that took place between the draft proposal and the final version have yielded a great deal of information on their operation and provide a basis for assessment. We now have six years of practical experience with the advisory guidelines. An early and brief assessment can be divided into three parts: (1) how the SSAG have changed the practice of spousal support in family law; (2) some problems that have arisen in the use of guidelines and the SSAG, in particular, in determining spousal support, and (3) the way in which the SSAG have assisted in identifying the continuing “hard” issues in spousal support law.

A. Changing the Practice of Spousal Support

The objectives of the advisory guidelines were: (i) to reduce conflict and encourage settlement; (ii) to create consistency and fairness; (iii) to reduce the costs and improve the efficiency of the process; and (iv) to provide a basic structure for further judicial elaboration. The SSAG have dramatically changed the day-to-day determination of spousal support, consistent with four objectives. The “guidelines” approach has changed not only how we determine spousal support in Canada, but also how we think about support outcomes.

1. SHAPING CLIENT EXPECTATIONS

The single greatest use of the SSAG has been by lawyers in shaping the spousal support expectations of both payors and recipients. Rather than the payor starting from zero (or as close to zero as possible), the payor is now informed of a “range,” as is the recipient. There is something about “objective” formulas, generated on computer screens, that mollify both spouses.

2. FRAMING NEGOTIATIONS

As expected, the SSAG ranges serve as a starting point for negotiation,

57. Found on the SSAG website, *supra* note 29. For a review of the British Columbia case law that canvasses many of the issues, see Carol Rogerson & Rollie Thompson, *Complex Cases Bring Us Back to Basics: The SSAG Year in Review in B.C.*, 28 CAN. FAM. L.Q. 263 (2009). For two published reviews of the Ontario case law, see Rollie Thompson, *Following Fisher: Ontario Spousal Support Trends 2008–09*, 28 CAN. FAM. L.Q. 241 (2009); and Rollie Thompson, *All Guidelines, All the Time: Spousal Support in Ontario 2009–10*, 29 CAN. FAM. L.Q. 201 (2010).

mediation, or settlement conferences, narrowing the range of outcomes. In those areas where trial judges apply the SSAG consistently, settlements are more common. If a recipient is prepared to accept the low end of the ranges for amount and duration, a payor will readily settle. For example, lawyers for lower-income recipients now make spousal support claims, when they might not have in the past, as the courts will generally award at least the low end of the ranges with little need for sophisticated argument. This is one of the expected effects of the SSAG, as outcomes become more predictable and the cost of proving support claims is reduced.

3. FEWER LITIGATED CASES

It is still early, and the evidence remains unclear, but our periodic case law reviews reveal fewer spousal support cases proceeding to adjudicated outcomes. Those cases that are adjudicated tend to fall into one of two categories: unusual facts or large stakes (substantial property, higher incomes, longer marriages, bigger income disparities).

4. SIMPLIFYING THE RESOLUTION OF TYPICAL, MORE HOMOGENOUS CASES

Not surprisingly, the advisory guidelines show a “better fit” for categories of cases that are more homogenous, more “typical.” Longer marriages under the without-child support formula are a group of predictable outcomes, with marriages of fifteen years or more making up about 70% of the decided cases under this formula. There is much greater factual variation in short and medium-length marriage cases falling under the without-child support formula, and not surprisingly, one sees a somewhat higher number of deviations from the formula ranges in these cases. Further, the reported case law reveals that with-child support cases outnumber without-child support cases by a margin of two to one. And about 70% of all the with-child support cases fall under the “basic formula,” under which a higher-income payor pays both child and spousal support to a lower-income recipient for the primary care of the children. These are the most straightforward spousal support cases, where there are strong compensatory claims, limited only by the payor’s ability to pay spousal support over and above child support.

5. CALCULATING LUMP SUMS

The SSAG readily permit the calculation of lump-sum awards of spousal support. The range for amount and duration of periodic support can be discounted for tax and time to assist the negotiation of a lump sum, clean break settlement.⁵⁸ In shorter marriages, the result is more frequent

58. Under Canadian tax law, the payment of support in a lump sum is neither deductible for the payor nor includible in income for the recipient.

settlement, given the stakes involved. But the SSAG have also assisted in more complex property-and-support settlements.

6. ISOLATING OUTLIER DECISIONS AND PATTERNS

One of the interesting effects of the SSAG has been the identification of “outliers.” Previously, the wide discretion on amount and duration provided “cover” for some judicial decisions that were completely at odds with basic Canadian spousal support law. There were local patterns of settlement, driven by a local bar’s ideas of spousal support, patterns at odds with nationwide trends under a national divorce statute. The formula ranges serve to identify and expose those outcomes, forcing change or explanation.

7. GENDER NEUTRALITY

Claims for spousal support by men have always been treated differently, but the advisory guidelines are gender-blind and force explanations for different outcomes. Where same-sex spouses now separate or divorce, the SSAG are also applied.

8. ESTABLISHING A STANDARD FOR APPELLATE REVIEW

The British Columbia Court of Appeal was the first off the mark, appreciating that the SSAG ranges could inform the standard of appellate review, most notably in *Redpath v. Redpath*.⁵⁹ If a trial decision fell substantially outside the ranges, and there were no exceptional circumstances to explain the anomaly, then the appeal court would likely intervene. By contrast, a decision within the ranges would generally not be disturbed on appeal.

9. PROVIDING A STRUCTURE TO SUPPORT ANALYSIS

One of the early criticisms of the advisory guidelines was that they would generate “cookie-cutter” justice. In practice, the opposite has been the case. Lawyers and judges using the SSAG have tended to be more careful about the steps in the analysis, about entitlement, incomes, location of an amount or duration within the ranges, exceptions, etc. The advisory guidelines provide a structure for the exercise of discretion in the resolution of a support case, making decisions more logical and transparent. The SSAG have also led to the greater use of computer software in spousal support determinations, which means that spousal support awards are more likely to be based upon accurate calculations of net incomes, taxes, government benefits, and credits. It is the non-SSAG decisions that continue to generate the proverbial “\$1,000-per-month” support order in “all the circumstances.”

59. 2006 BCCA 338. To similar effect, *see* *Fisher v. Fisher*, 2008 ONCA 11.

B. Problems in the Use of the SSAG

After six years of experience, it is possible to identify some of the problems that can accompany a guidelines approach to spousal support. Some of them will be familiar to those with experience with child support guidelines. Some of the problems reflect unsophisticated use, which should ease with time and experience. In those provinces where use of the SSAG is mandated by the appeal court or is generally required by trial courts, lawyers and judges do become more adept and sophisticated in their use. Some of the problems with the SSAG do not just reflect unsophisticated use; they also reflect a strong desire for default rules, and an unwillingness on the part of lawyers and judges to engage with the complexity of spousal support law.

1. USING GUIDELINES AS DEFAULT RULES

There is always a risk that “guidelines” will be treated like default rules. One of the early criticisms of the SSAG was that they would create “cookie-cutter” justice. We do see instances of such default behaviour, especially amongst generalist judges or general practice lawyers. Even with the ranges for amount and duration, some lawyers just unthinkingly claim the high end of the range for the recipient, or the low end for the payor. Some judges just default to the midrange, especially on amount. One of the lessons of the SSAG has been the remarkable hunger of lawyers, even specialist lawyers, for default rules. In response to the complexity of spousal support law and its demand for detailed facts, many lawyers just look for an “answer.”

2. FAILING TO CONSIDER EXCEPTIONS

Conversely, the SSAG list eleven exceptions or fact situations identified as warranting departures from the formula ranges. Most lawyers do not argue the exceptions, and most judges ignore them as well, even when the facts clearly fall within an exception. Only recently has an appeal court openly and carefully considered the exceptions.⁶⁰ The non-use of the exceptions is partly a specific example of the broader problem of unsophisticated use, but that is not the whole story. One would think that lawyers and judges would naturally look for exceptions, for discretionary solutions outside of the formula ranges, but that has not proven to be true so far. Instead, they seem to prefer rules.

60. The B.C. Court of Appeal considered two exceptions: the compensatory exception in short marriages and the exception for the nonprimary parent to fulfill his or her parenting role: *R.M.S. v. F.P.C.S.*, 2011 BCCA 53.

3. UNSOPHISTICATED USE GENERALLY

Spousal support law is not simple and the SSAG thus have to be a complex scheme, even with the use of computer software and various prompts within the software.⁶¹ Many lawyers focus only upon the formulas and the ranges generated by the formulas, which may be sufficient for most typical cases with straightforward incomes, but not for atypical or complex cases. Even when using the formulas, the SSAG calculations may be done incorrectly if attention is not paid to important factual wrinkles such as nonstandard sources of income, tax provisions, less common child-custody or child-support provisions, or child benefits.

4. SEEKING RULES EVEN WHERE THE GUIDELINES LEAVE DISCRETION

There are a number of areas where the outcomes are not driven entirely by the formulas, including the exceptions and the “hard” issues identified in the section below. In these areas where discretion prevails, lawyers and judges want to be given rule-based solutions for ways to simplify complexity and reduce the scope of discretion. Some of the critics of the SSAG complain about their failure to solve all the problems of spousal support law, including entitlement, income determination and many of the “hard” issues identified below.

5. MORE FREQUENT CLAIMS FOR RETROACTIVE SPOUSAL SUPPORT

Child support guidelines have changed our thinking about retroactive claims for support. As our Supreme Court pointed out in a series of retroactive child support appeals,⁶² if a parent’s income rises, then every parent knows that higher child support is required under the percentage-of-income formula and the child should get the benefit of increased support. Retroactive child-support claims are now more frequent in Canada, given the ease of calculating amounts under the CSG. That same thinking has been transplanted into spousal support claims, with much more frequent claims for retroactive spousal support, spurred on by the SSAG’s potential for simple recalculations. Often both child and spousal support increases are sought in the same retroactive claim. However, retroactive spousal claims are often fraught with issues of entitlement, not to mention a need for greater stability of spousal support orders. It is not clear that the same retroactive principles should be applied to both forms of support, given the differences between the two kinds of support and their respective guidelines schemes.

61. Scott Booth, *The Spousal Support Advisory Guidelines: Avoiding Errors and Unsophisticated Use* (2009), 28 CAN. FAM. L.Q. 339.

62. D.B.S. v. S.R.G., 2006 SCC 37.

6. ACCOMMODATING UNREPRESENTED LITIGANTS

It was always difficult for unrepresented litigants to address complex issues like spousal support, especially where there are child support, tax, and benefit calculations. While the SSAG can simplify spousal support claims under the without-child support formula, the with-child support formula requires computer software to make the calculations, software that is not readily available to those without lawyers. The software issue is part of a larger issue of access to legal information and advice for unrepresented parties in family law cases. Recently, there has been a proposal by one software supplier to make available a simplified one-time online calculator for these unrepresented litigants. Even if the software is made available, there will be problems of unsophisticated use amongst the unrepresented.

C. Continuing Hard Issues

The advisory guidelines have simplified the resolution of “typical” spousal support cases. Thus, the SSAG have isolated and emphasized the cases that raise the “hard issues” of spousal support law (i.e., issues that require more careful analysis with less formulaic help). Entitlement questions lurk here, and the advisory guidelines offer more limited assistance. In this short space, it is only possible to flag these ongoing, more difficult issues.

1. INCOME

Under a discretionary support regime, the determination of incomes for the spouses is often a bit vague. That can no longer be the case under income-based guidelines. As income becomes more critical to the outcome, income becomes a greater focus for dispute, as it has under the child support guidelines.

2. TWO DIFFERENT INCOMES

As a matter of technical terminology, the SSAG use a definition of income that is generally the same as that for the CSG. There are a number of situations where income for spousal support purposes ought to differ from that determined for child support purposes including, for example, post-separation income increases, high incomes, and imputing of income for under/unemployment.

3. POST-SEPARATION INCOME INCREASES

A child gets to share fully in the payor’s post-separation income increase, but there is no such automatic outcome for spousal support. Whether none, some, or all of the post-separation increase should be

shared under the spousal support formulas raises difficult questions of entitlement.

4. HIGHER INCOMES

The “ceiling” for the formulas is a gross payor income of \$350,000 per year. Cases above that ceiling call for individualized rather than formulaic, determinations. As always, very high incomes push the limits of our understanding of spousal support.

5. HIGH-PROPERTY AWARDS

There is not an explicit exception from the formulas for cases where there is a large amount of property divided between the spouses, as the law is not clear on this subject. In *Chutter v. Chutter*, the British Columbia Court of Appeal held that the post-separation income disparity meant that the wife should receive sizeable spousal support, in addition to her \$4 million property award for the family-run business.⁶³ Courts elsewhere might have found no entitlement to support, or significantly reduced support.

6. DURATION

While lawyers and judges were prepared to adopt the SSAG ranges for amount, they have been somewhat slower to embrace the ranges for duration. Admittedly, duration is a more difficult area, given the uncertain concepts of self-sufficiency (see below) and the prevalence of indefinite orders in some parts of the country. Over time, courts have accepted the durational ranges too, with some exceptions. In some parts of the country, courts still impose time limits that are too short after long traditional marriages. Inappropriate and short time limits are also seen under the with-child support formula, especially in short marriages, a larger problem discussed next.

7. SHORT MARRIAGES WITH YOUNG CHILDREN

Too often, Canadian courts have imposed short time limits for spousal support, despite the recipient’s primary responsibility for preschool children. Courts miss the compensatory rationale here. Most of the economic disadvantage is not found in the past, but in the future, i.e., in the continuing disadvantage flowing from the obligations of child-rearing. Time limits based on the length of the marriage will usually lead to undercompensation. The alternative test for duration in these cases focuses upon the age of the children, but there remains some resistance to the durational implications of future child-care.

63. *Chutter v. Chutter*, 2008 BCCA 507, leave to appeal to SCC denied, [2009] S.C.C.A. No. 41.

8. SELF-SUFFICIENCY

In the final version, a separate chapter was devoted to issues of self-sufficiency, to emphasize its importance to spousal support analysis. Under Canadian law, *Moge* established that self-sufficiency requires an individualized determination. This remains a minefield of competing and often unspoken policies. Self-sufficiency can lead to a finding of no entitlement, to the imputation of income to a recipient thereby reducing the amount of support, or to the imposition of a time limit in the durational analysis.

9. REMARRIAGE OR REPARTNERING OF RECIPIENT

In Canada, the remarriage or repartnering of the recipient does not lead automatically to the termination of spousal support. Its impact on the amount and duration of support will depend upon whether the support is compensatory or noncompensatory, as well as the income of the recipient's new partner. Formulas were considered to resolve this category of cases, but none attracted consensus, as the current law is, at this stage, too uncertain and unpredictable.

10. RETIREMENT

This is a growing category of cases, given the aging population. Issues include imputing income to early retirees, concerns about "double-dipping" where pensions have already been divided as property, and the need for one or both spouses to use their capital in retirement.

11. DISABILITY AND ILLNESS

The SSAG treat these cases as possible grounds for an exception, where a long-term disability or illness occurs in a short to medium-length marriage. There is no consensus of Canadian courts in these cases. Most courts will extend duration to make the order indefinite, but some will order amounts of spousal support at or above the high end of the SSAG range. Others will go to the low end. The project directors suggested that no exception should be made for such cases, but only a minority of courts take that view.

VII. Conclusion

The Canadian Spousal Support Advisory Guidelines are an ambitious scheme. They are national in scope and comprehensive in their coverage. They deal with both amount and duration of spousal support, apply to both interim and final determinations, and can also resolve many issues of ongoing modification. Although only informal and advisory, the SSAG have had a significant impact already in reducing the uncertainty, incon-

sistency and unpredictability that have plagued this area of law. In their first six years, the SSAG have changed the way that lawyers, mediators and judges determine spousal support and the way they think about spousal support issues. Admittedly, the SSAG have not solved all of the “hard issues” of spousal support. There are still problems with unsophisticated use, but these are problems that should ease over time. But for those from other jurisdictions, Canada’s experiences so far demonstrates that spousal support is amenable to a “guidelines” regime, provided the guidelines are not too rigid and are sufficiently sophisticated. Advisory guidelines can serve to resolve the large number of typical cases, while offering a structure that informs the resolution of the more difficult cases and harder issues. Most importantly, in this highly-contested area of family law, the greater consistency and predictability of outcomes ultimately leads to greater fairness and legitimacy for the substantive remedy itself.

FAMILY LAW QUARTERLY

Vol. 45

No. 2

Summer 2011

*To stabilize and
preserve the family*

Published by the
Section of Family Law
American Bar Association

Table of Contents

Volume 45

Number 2

Summer 2011

Current Issues in Child Support & Spousal Support

- vii Editor's Note
- 133 Introduction
J. Thomas Oldham
- 135 Child Support Guidelines: The Good, the Bad, and the Ugly
Douglas W. Allen & Margaret F. Brinig
- 157 Questioning Child Support Enforcement Policy for
Poor Families
Leslie Joan Harris
- 173 Homeless Veterans and Child Support
Steven Berenson
- 191 High-Income Child Support
Lori W. Nelson
- 219 Marriage, Parentage, and Child Support
June Carbone & Naomi Cahn
- 241 The Canadian Experiment with Spousal Support Guidelines
Carol Rogerson & Rollie Thompson
- 271 Alimony Theory
Cynthia Lee Starnes