

TAB 1

Understanding the New Draft Spousal Support Guidelines

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New Developments in Child and Spousal Support



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Spousal Support Advisory Guidelines: Project Description and Status Report

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Growing concerns have been expressed by family law lawyers and judges that the current Canadian law of spousal support is excessively discretionary, creating an unacceptable degree of uncertainty and unpredictability. Responding to these concerns, the federal Department of Justice sponsored a project, which commenced in September of 2001, to explore ways of bringing more consistency and predictability into the current law of spousal support, and in particular the option of developing spousal support guidelines that could be used on an advisory basis only within the existing legislative framework. **Professor Carol Rogerson (Faculty of Law, University of Toronto) and Professor Rollie Thompson (Dalhousie Law School)** were retained by the Department to direct that project. The project is a long-term one that has an over-all time frame of between five and six years.

The first stage of the project involved the preparation of a lengthy background paper by Carol Rogerson: **“Developing Spousal Support Guidelines in Canada: Beginning the Discussion”** (December, 2002). That paper laid the groundwork for developing spousal support advisory guidelines by reviewing emerging patterns in the current law, the various theories of spousal support, as well as various models of guidelines that are in effect or proposed in the United States. The background paper also laid out a process for the development of such guidelines—one of building **informal** (i.e. non-legislated), **advisory** guidelines that would reflect trends or “best practices” in the current law. The process contemplated was one of building guidelines “from the ground up” rather than “from the top down.” The background paper is available on the Department of Justice website at:

<http://canada.justice.gc.ca/en/dept/pub/spousal/index.html>

The second stage of the project, which is still underway, involves working with a small group of family law experts to explore the possibility of developing spousal support advisory guidelines. The federal Department of Justice has constituted a thirteen person Advisory Working Group on Family Law, composed of lawyers, judges, and mediators from across the country, to advise on the spousal support project as well as on other family law matters. The members are: **Justice David Aston** (London, Ont.); **Lonny Balbi** (family lawyer, Calgary, Alta., and chair of CBA National Family Law Section, 2003-2004); **Julia Cornish** (family lawyer and chair of CBA National Family Law Section, Dartmouth, N.S., and chair of CBA National Family Law Section, 2002-2003); **Justice Robyn Diamond** (Winnipeg, Man.); **Philip Epstein** (family lawyer, Toronto, Ont.); **Rhonda Freeman** (Director, Families in Transition, Toronto, Ont.); **Marie Gordon** (family lawyer, Edmonton, Alta.); **Miriam Grassby** (family lawyer; Montreal, Que.); **Justice Richard LeBlanc** (Corner Brook, Nfld.); **M. Justin Levesque** (mediator, Montreal Quebec); Justice **Donna Martinson** (Vancouver, B.C.); **Barbara Nelson** (family lawyer; Vancouver, B.C.); and, **Justice Jennifer Mackinnon** (Ottawa, Ont.).

Four meetings of the Advisory Working Group have been held to date. The Advisory Working Group acts as a sounding board for the project directors who have the responsibility for making the final decisions on the project. The discussions within the Advisory Working Group have been directed at clarifying the assumptions underlying spousal support and then on developing guidelines to implement those assumptions. A central feature of the process, given that the goal is to work from current practice, has been to identify different categories of marriages, and in this way to work from the ground up in attempting to craft guidelines that are appropriate for each category of case.

After the fourth meeting of the Advisory Working Group in April, 2004 sufficient consensus had been achieved to allow the project directors, to begin preparing a “Draft Proposal” for spousal support advisory guidelines. The scheme would be structured around two basic formulas: one which would apply to marriages *without* dependent children and the other which would apply to marriages *with* dependent children. Both formulas would generate ranges rather than precise numbers for quantum and duration. The “Draft Proposal” would serve as the basis for the third stage of the project, involving a wider range of discussions with the bench and the bar.

A preliminary and much abbreviated version of the Draft Proposal entitled, “Spousal Support Guidelines: A Sneak Preview” was presented at the National Family Law Program in La Malbaie, Quebec which took place in July, 2004. The scheme as presented in that document has continued to undergo revision and fine-tuning. The project directors, in consultation with the Advisory Working Group, are continuing to work on completing the full “Draft Proposal”. Initially it had been hoped that the “Draft Proposal” would be released in the early fall of 2004. Completion of the “Draft Proposal” is taking longer than originally anticipated, a not surprising result given the complexity of the project. A fifth meeting of the Advisory Working Group will be held in October, 2004 to review the “Draft Proposal” before its release. Depending upon the nature of the revisions required as a result of that review, the “Draft Proposal” will likely be released either in early December, 2004 or early January 2005.

The release of the “Draft Proposal” will usher in the third stage of the project—one of discussion, consultation and experimentation. The “Draft Proposal” will be widely circulated amongst family lawyers, mediators and judges for the purpose of soliciting their reactions to the proposal. Following the release of the document, the project directors will meet with small groups of bench and bar across the country to explain and discuss the proposed advisory guidelines and to obtain feedback which would lead to revisions of the draft guidelines. The development of “pilot projects” in a small number of localities is also contemplated as part of the third stage of the project. The results from such projects will also inform revisions to the draft advisory guidelines.

Spousal Support Advisory Guidelines: What to Expect When the Draft Guidelines Are Released

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I. INTRODUCTION

In 2001 the federal Department of Justice initiated an exciting project to explore the possibility of developing some form of spousal support guidelines to assist in determinations of spousal support under the *Divorce Act*. The project was a response to growing concerns expressed by family law practitioners and judges about the lack of certainty and predictability in the current law of spousal support, creating daily dilemmas in advising clients, and negotiating, litigating or (in the case of judges) deciding spousal support issues. We were retained to direct that project.

Much hard work has been done in the intervening three years. We are now close to completing a “Draft Proposal” for spousal support advisory guidelines. Initially we had hoped that this “Draft Proposal” would be ready for release in the early fall of 2004. But completion of the “Draft Proposal” is taking longer than originally anticipated, a not surprising result given the complexity of the project. We are now planning on a release either in December, 2004 or January, 2005.

While the details of the draft proposal are still being fine-tuned, we want to take this opportunity to give you some sense of the general structure of the scheme so that you will know “what to expect” when it is finally released. There has already been much talk about the guidelines—and even media coverage—and we also hope to dispel some of the confusion and misconceptions that have arisen about the nature of the guidelines.

The proposed guidelines, which are intended to bring more certainty and structure to this area of law, will not be legislated, but rather will operate as **informal rules** within the existing legislative framework—binding only to the extent that lawyers or judges in an area treat them as such. They will be **advisory** only, providing a **starting point** for negotiations or court determinations of spousal support. As informal rules, they **will not address entitlement**, but will deal only with the amount (or quantum) and duration of support once entitlement has been established. In the same vein they will confer **no power to re-open existing spousal support agreements** beyond what exists under current law.

The proposed advisory guidelines will utilize a methodology of **income-sharing** (which contrary to common perception, **does not mean equal sharing**). They will be

constructed around **two basic formulas** that offer a **range** of outcomes, rather than precise amounts and durations. The outcomes under the formulas will be based on **spousal incomes** and other relevant factors, such as the **presence or absence of dependent children** or **length of marriage**. Under the proposed scheme, **budgets will lose their central role** in determining spousal support outcomes. There will still be considerable room for the exercise of discretion under the advisory guidelines, but it will be exercised within a much more defined structure than now exists—one with clearer starting points. We have also tried, as much as possible, to specify “exceptions”, to further assist the parties in and the courts in framing and assessing any departures from the formulas’ ranges.

In this paper we first describe in more detail the nature of the guidelines being developed, the process that has brought us to this point, and what lies ahead. We then deal with the preliminary question that many will be asking: are spousal support guidelines a good idea? We end with a preliminary overview of the basic structure of the guidelines that will be presented in more detail in the “Draft Proposal”. It is not our intention here to present the actual formulas around which the guidelines are being constructed—those are still being refined and you will see them when the “Draft Proposal” is released—but rather to give you a general sense of the scheme so that you will have some context for evaluating the formulas when you see them a few months hence.

A. The Nature of The Proposed Guidelines: Informal, Voluntary, Advisory

There are many pre-conceptions about what spousal support guidelines are like and how they will work. Any talk of spousal support guidelines immediately brings to mind the Child Support Guidelines. We need to emphasize at the beginning that this comparison should be resisted. The proposed guidelines we are developing are very different, beginning with the process by which they were created.

Unlike the Child Support Guidelines, these guidelines are not being created through a process of formal legislative reform. They are instead **informal** guidelines that will operate on an **advisory** basis only, within the existing legislative framework. They are “guidelines” in the true sense of the word. We call them “*advisory* guidelines” to differentiate them from the Child Support Guidelines.

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

“speed” up the normal common law process for the development of the law, by providing a broad structure which can then be adjusted or tinkered with as tested by individual cases.

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

A somewhat similar process has been adopted for the development of these advisory guidelines and, if the project is successful, their eventual implementation. The draft proposed guidelines are being created by a process that involves working with judges, lawyers and mediators who have an expertise in family law. The goal of the process has been to articulate informal guidelines based on emerging patterns embedded in current practice. Involvement of a wider circle of family law experts will, with the release of the “Draft Proposal”, be the next stage in the development process.

The guidelines being creating through this process will not have the force of “law”. They will be **voluntarily adopted** by lawyers and judges on a local basis and will acquire their force through their usefulness. Only if parties and lawyers and judges find the support ranges helpful and reasonable will the guidelines have any impact on the ground. The wider their use, the more the advisory guidelines can develop some kind of “presumptive” effect (in the loose sense of the word), providing a starting point that would require spouses to make arguments about why another outcome is appropriate in their case. In some local areas, bench and bar may decide to follow the guidelines in a more organized fashion.

There is limited government involvement in this process. The federal Department of Justice is supporting the development of the advisory guidelines, communicating information on the project, participating in the discussions with the working group of family law experts and keeping provincial and territorial governments informed.

We have called this process for creating and implementing the guidelines one of “working from the ground up,” in contrast to the “from the top down” process of formal legislative reform. The process, described in more detail below, is a long one involving many stages and many different forms of consultation and implementation.

The project as thus conceived is a challenging one on many levels. It is not directed at a theoretical re-ordering of the law of spousal support. Its aims are practical rather than theoretical—to provide a practical tool to assist family lawyers, mediators and judges who are confronted daily with the dilemma of determining appropriate levels of spousal support. As *Bracklow* has made clear, the *Divorce Act* does not mandate any one model of spousal support. We have kept this in mind in constructing the guidelines.

Reflecting current practice means reflecting a wide range of competing views of spousal support. No one theory or model or ideology or formula can be used.

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

There is admittedly a central tension in the project between reflecting practice and changing practice. As informal rules of practice without the force of “law”, the guidelines must reflect current practice and cannot stray too far from existing results over-all. That said, there is also much in current practice that is inconsistent, arbitrary, and hard to explain. Guidelines will and should constrain some of these current practices. In building upon current practice, it is the “best practices” or “emerging trends” that the project draws on. The proposed guidelines will incorporate and reflect much of the current practice of spousal support, while at the same time seeking greater consistency and logic in the results. Inevitably, even if there are some changes to current practice under these guidelines, the changes must be incremental.

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

B. How We Got Here: The Process to Date

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

The paper laid the groundwork for exploring the possibility of developing spousal support guidelines. It reviewed in detail the basic “building blocks” that could be drawn upon in creating guidelines: emerging patterns in the current law, the various theories of spousal support, as well as various models of guidelines that are in effect or proposed in the United States and elsewhere. The *Background Paper* also laid out a possible process

for the development of guidelines—one of building informal guidelines that would reflect current practice and that would operate on an advisory basis only within the existing legislative framework.

The background paper has been translated and is available on the Department of Justice website at:

<http://canada.justice.gc.ca/en/dept/pub/spousal/index.html>

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

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

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

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

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

Given the practical nature of the project, the primary focus of the process was on support outcomes rather than on appropriate theories of spousal support. We are of the view that while people might often disagree at the level of theory, there can be a fair amount of consistency in actual award levels. We also began with the easiest categories of marriage, where patterns in the current law are the clearest and where we expected the greatest consistency in outcomes. We thus moved from long marriages to short marriages

without dependent children, and then to marriages with dependent children. The hardest category, medium duration marriages without dependent children, we tackled last.

We are now in the process of preparing a “Draft Proposal” for spousal support guidelines reflecting the discussions within the advisory working group. The proposals have not yet been finalized in all of their details and we continue to consult with the members of the Advisory Working Group as we attempt to “crystallize” and fine-tune the guidelines that emerged from our discussions. A fifth meeting of the Advisory Working Group has been scheduled for October 2004 to review the “Draft Proposal” before its release. Depending upon the nature of the revisions required as a result of that review, the “Draft Proposal” will be released in either December 2004 or January 2005. Given the continued work on the proposal, some aspects of the proposed advisory guidelines will differ from the earlier version found in the “Sneak Preview” presented at the National Family Law Program in La Malbaie, Quebec in July, 2004. These guidelines are definitely a “work in progress”.

When the “Draft Proposal” is released, you will see that we have not been able to accomplish as we had hoped at the beginning. Some issues were too difficult, and some areas of the law so uncertain, that guidelines were not possible. Many compromises had to be made along the way. But we have found what we think is sufficient consensus in a number of areas to warrant moving ahead with the advisory guidelines.

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

C. The Next Stage

With the issuance of the “Draft Proposal,” the next stage of the process will begin—one of discussion, consultation and experimentation. This “Draft Proposal” will be widely circulated amongst family lawyers, mediators and judges. We will be travelling across Canada, to explain and discuss the proposed advisory guidelines and to obtain feedback. Over the next year or so, consultation will begin in earnest. Do the proposed formulas generate tolerable results? How might the advisory guidelines need to be adjusted?

We expect that lawyers may begin to use the proposed guidelines to assist in structuring and guiding negotiations about spousal support, either explicitly as a principled basis for negotiation or at least as a “litmus test” of the reasonableness of offers or counter-offers derived by other methods, by budgets or otherwise.

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

We expect that there will be a number of local areas identified for “pilot projects” where the guidelines will be implemented, as a joint venture of the local bench and bar. Lawyers or judges in other areas may also decide to experiment with use of these guidelines in a more consistent and conscious way, by agreeing to use the guidelines as a starting point for cases in their area.

Over the next year or so, we expect to speak to many groups, to hear back from those using the guidelines, to receive suggestions for changes and improvements. With the advice of the Advisory Working Group on Family Law, we will sift through the responses and comments, to consider revisions to the proposed advisory guidelines.

II. WHY GUIDELINES? HOW WILL THEY WORK IN PRACTICE?

In this part we deal with the preliminary question that many will be asking: are spousal support guidelines a good idea? We begin by briefly setting out the problems in the current law of spousal support and then talk about why the time may now be ripe to reconsider the desirability of spousal support guidelines. We go on to review the advantages and disadvantages of spousal support guidelines, focussing on the particular scheme of informal, voluntary and advisory guidelines we are proposing. We end by sketching how these advisory guidelines might work in practice to illustrate their potential usefulness.

A. The Problem of Spousal Support

The guidelines project springs from the perception that our current law of spousal support—the law that has developed under the statutory framework of the *Divorce Act* as interpreted by the Supreme Court of Canada in leading cases such as *Moge* and *Bracklow*—is excessively discretionary. This has created an unacceptable degree of uncertainty and unpredictability. Multiple theories of spousal support compete with each other while, on the ground, spousal support cases are negotiated and argued under an amorphous “needs and means” framework dominated by budgets. “Need” means many different things to different people. The current culture of spousal support is one which emphasizes individualized decision-making and the absence of rules.

Similar fact situations can generate a wide variation in results. Individual judges are provided with little concrete guidance in determining spousal support outcomes and their subjective perceptions of fair outcomes play a large role in determining the spousal support ultimately ordered. Appeals are of little help because appeal courts dispose of appeals with little explanation, deferring to trial judges on issues of quantum and duration. Lawyers in turn have difficulty predicting outcomes, thus impeding their ability to advise clients and to engage in cost-effective settlement negotiations.

And for those without legal representation or in weak bargaining positions, support claims may simply not be pursued. Despite a very broad basis for entitlement under the current law, many spouses simply do not claim spousal support, unwilling to engage in the difficult and costly process required.

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

B. Why Guidelines Now?

When spousal support guidelines were considered in the past, the idea was rejected as both impossible and undesirable. In our view, the time is now ripe for reconsideration. What has changed, you might ask?

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

Second, our experience since 1997 with the Child Support Guidelines has changed the legal culture. Their formulaic approach has accustomed us to the systemic advantages of “average justice” rather than individualized justice, to determining support without “budgets” and to the concept of income-sharing after divorce.

Third, spousal support guidelines are not simply an abstract concept any more. Some American jurisdictions have successfully experimented with such guidelines for more than a decade, as explained in the *Background Paper*. Most recently, the influential American Law Institute has recommended a formulaic approach to spousal support as part of its comprehensive rethinking of the law of family dissolution, a process begun in the 1990’s and culminating in the Institute’s final report in 2002. Some American jurisdictions have begun to implement the ALI guidelines. Greater experience with guidelines is yielding more sophisticated models.

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

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

C. The Advantages and Disadvantages of Guidelines

In assessing the advantages and disadvantages of spousal support guidelines it is important to keep in mind the specific guidelines being proposed. As noted earlier, in

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

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

First, the **advantages** of spousal support advisory guidelines:

(1) *To Provide a Starting Point for Negotiations and Decisions.* The guidelines would be loosely “presumptive” at their highest, a starting point from which parties would have to give reasons for any departure. The proposed advisory guidelines itemize a series of exceptions, which would further constrain and rationalise departures from the basic ranges. At present, the starting point for spousal support is zero for many claimants. Claimants must then construct individual budgets to demonstrate “need”, in order to justify support. As has been the case with child support guidelines, spousal support advisory guidelines would establish a starting point, and a starting point other than zero. Guidelines would be most helpful in those “typical” or “common” cases which are usually resolved in negotiations.

(2) *To Reduce Conflict and to Encourage Settlement.* All other financial matters on family dissolution are now governed by “rules”—property division, pensions, child support. Spousal support is the last remaining pool of unfettered discretion. It is also typically the last financial issue to be resolved. Spousal support thus becomes the flash-point for unhappiness with all the other financial “rules”, as well as for any remaining bitterness between spouses. Guidelines can limit the range of results and constrain the issues and information required, thereby encouraging settlement and damping down some of the conflict between the parties. Any reduction in conflict in family law, especially where children are involved, must be treated as an advantage.

(3) *To Reduce the Costs, and Improve the Efficiency, of the Process.* In financial matters, it is ultimately dollars weighed against dollars, i.e. the cost of legal fees and disbursements weighed against the money gained or lost in support or property. Advisory guidelines can provide a starting point, from which the parties can each decide whether further negotiation or litigation to push to the limits of the ranges, or beyond, is

warranted. Further, published guidelines are even more important where one or both parties are unrepresented.

(4) *To Avoid Budgets and to Simplify the Process.* Under the current discretionary regime, expense budgets are required. Much time and trouble is taken, in disclosure and discovery, to particularise expenses, past, present and proposed, often of dubious value in the end. Income-sharing is the basis for guidelines, thus avoiding the need to construct individual budgets. Less information is required and the process is simplified considerably.

(5) *To Provide a Basic Structure for Further Judicial Elaboration.* Advisory guidelines may prove to “speed up”, or perhaps more accurately, to “kick start”, the common law process of legal development. Under the current discretionary law, that process has nearly ground to a halt. Guidelines could give basic structure and shape to the law, with room left for lawyers and courts to adjust, modify, identify possible new exceptions, etc. By their very existence, guidelines create pressure to give reasons for any departures, in negotiations or decisions.

(6) *To Create Consistency and Legitimacy.* Advisory guidelines should create greater consistency in outcomes, as well as more open explanations of how those outcomes were reached. In doing so, over time, the amount and duration of support under the advisory guidelines can develop a legitimacy of their own, as has been the case with child support amounts. Eventually, the outcomes generated by the advisory guidelines will be seen as “right”, for both payors and recipients. In turn, then, spousal support becomes as much a defined right as rights to pensions or property or child support, when it comes time to negotiate settlements.

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

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

(2) *Too Complicated.* Many think spousal support is just too complicated for any formulaic approach. Too many legal factors to balance, too many marital facts to be proved, too many “exceptions”, marital fact situations that are just too diverse. Implicit in this view is the assumption that there are very few “typical” or “standard” fact patterns in spousal support, so few that it is not worth even developing guidelines for those “typical” fact patterns. Also implicit in this criticism is often an assumption that guidelines will be built around “one big formula” for all marriages.

(3) *Discretion Allows Intuitive Reasoning.* Spousal support is a residual remedy, the last financial remedy which can be used flexibly to accomplish “global justice” in family matters, argue some. On this view, there are many factors at work, often intuitively, in reaching a “just” result, a result that is sometimes hard to explain.

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

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

Many of these disadvantages depend upon the structure and operation of the specific set of guidelines involved. The advisory guidelines which we are proposing involve more than one formula, ranges for amount and duration, exceptions and other features that keep them in the middle of the rules vs. discretion spectrum.

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

D. How The Advisory Guidelines Might Work in Practice

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

The proposed advisory guidelines will not be legally binding, operating more like “persuasive” law reform. Initially the advisory guidelines might serve as another tool, a litmus test for spousal support determined by more traditional methods, another source of arguments in negotiation and adjudication.

In negotiations, if the advisory guidelines were to suggest a range of \$1,000 to \$1,500 per month for spousal support, a spouse seeking to have support fixed within that

range would argue that the advisory guidelines ought to be used since his or her case is “typical”. The spouse suggesting an amount outside that range, whether higher or lower, would presumably take the position that his or her case falls within an exception or warrants a departure from the guidelines or even that the guidelines numbers are just wrong. If both parties are prepared to work within that range, then the usual arguments would be made why the amount should be fixed at the higher or lower end of that range.

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

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

III: THE BASIC STRUCTURE OF THE GUIDELINES

Spousal support guidelines can be structured in many different ways. For those who are interested, the *Background Paper* reviews in detail other models of spousal support guidelines. Here we present a structural overview of the scheme of advisory guidelines that we are developing. While some of the details of the proposed guidelines remain to be worked out, the basic structure is in place. We begin with some basic issues and then move into an organized, step by step review of the specific components of the advisory guidelines.

A. Some Preliminary Issues In Crafting Guidelines

(a) Income Sharing

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

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

(b) Is Income-Sharing a New Theory of Spousal Support?

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

It is therefore important to emphasize that the use of income-sharing as a **method** for determining the amount of spousal support does not necessarily imply adoption of the income-sharing theories of spousal support cited in the *Background Paper*. These theories, which are admittedly contentious, rest upon a view of marriage as a relationship of trust and community which justifies treating marital incomes as “joint incomes.”

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

These proposed guidelines do not commit to any particular theory of spousal support. They are intended to accommodate the multiple theories that now inform our law and aim to generate results that are in broad conformity with existing patterns in the law.

(c) Determining the Structure of Guidelines

There are many different ways that a set of guidelines based on the methodology of income-sharing can be structured. Different formulas share income in very different ways—we emphasize once again, income-sharing does not inevitably mean equal sharing. Guidelines can also vary in their scope. Some deal with issues of duration and entitlement as well as quantum. Some only apply to interim orders, while others apply to final orders as well. Considerations of administrative efficiency and simplicity also come into play, to be balanced against considerations of individual fairness.

B. THE BASIC FRAMEWORK OF THE GUIDELINES

What follows is a brief overview of the main structural components of the proposed guidelines. In crafting the advisory guidelines we have tried to be responsive to the concern that spousal support guidelines are too crude and will not be able to take account of the diversity of spousal support objectives as they arise in different fact situations. Guidelines inevitably involve some sacrifice of individualized justice. However, our proposed guidelines recognize different categories of marriages and the different kinds of support objectives raised in different kinds of cases. The cost of this responsiveness to diversity is, as you will see, some increased complexity in the structure of the formula—or more accurately, formulas, for our proposed scheme is structured around **two different formulas**.

(a) Form and Force

We repeat here what was said earlier--in contrast to the Child Support Guidelines, the proposed spousal support advisory guidelines will not be legislated. Following the practice in some American jurisdictions, these are informal guidelines that will be adopted on an voluntary basis by lawyers and judges. As non-legislated, informal guidelines, the guidelines will not have binding force. They are intended as a starting point for negotiation and adjudication.

Courts and lawyers will certainly be free to order or negotiate spousal support outcomes that differ from those generated by the guidelines. However, we hope that the guidelines will have significant voluntary “buy-in” because of the structure and

consistency they provide and because they are perceived to generate appropriate outcomes. If so, the guidelines might develop some “presumptive” force, in the loose sense of the word, such that parties would have to make arguments for departing from the starting point provided by the formulas. The guidelines will also explicitly set out a series of exceptions, albeit not exhaustive, providing a structured framework for departures from the formula .

(b) Entitlement

The proposed advisory guidelines will **not** deal with entitlement. The informal status of the proposed guidelines means that they must remain subject to the entitlement provisions of the *Divorce Act*, notably ss. 15.2(4) and (6) as interpreted by the courts. Entitlement therefore remains a threshold issue to be determined before the guidelines will be applicable. **A mere disparity of income alone, which would generate an amount under the advisory guidelines, does not automatically lead to entitlement.**

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

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

(c) Application to Agreements

The advisory guidelines will **not** deal with the effect of a prior agreement on spousal support. This issue, like entitlement, is outside the scope the advisory guidelines and will continue to be dealt with under the evolving post-*Miglin* law. If there is a binding spousal support agreement, the spousal support advisory guidelines will not apply. When the Child Support Guidelines were brought into force, changes were made to the *Divorce Act* providing, in essence, that the Guidelines would prevail over child support agreements inconsistent with the guidelines. No such change is being proposed here, given the informal nature of the guidelines.

We do expect, however, that the advisory guidelines will play an important role in the *negotiation* of agreements by providing a more structured framework for negotiation and some benchmarks of fairness. One possible effect of the guidelines might thus be a reduction in the number of agreements which are subsequently perceived to be unfair by

one of the parties. Another might be that courts will be better able to identify “unfair” agreements when an agreement is subsequently challenged.

(d) Categories of Marriages: With and Without Children and Two Different Formulas

The guidelines will be structured around a fundamental distinction between marriages where there are no dependent children and those where there are; or more specifically around the distinction between cases where there is no concurrent child support obligation, and those where there is. We have crafted **two different formulas** based on this distinction.

In cases where there are no dependent children, what we have called the “**without child support**” formula will apply. This formula will rely heavily upon length of marriage (or more precisely, length of cohabitation) to determine both quantum and duration. As a basic principle, quantum under this formula will be determined by applying a specified percentage (related to the length of the marriage) to the **gross income difference** between the spouses., up to a specified ceiling. We have been working with the idea of 1.5% to 2% of income difference for each year of marriage, but this still subject to further revision and fine-tuning. Duration will also be proportionate to the length of the marriage subject to provisions for indefinite support. Here we have been working with the general idea of one-half to one year of support for each year of marriage, but this is subject to many qualifications and again is still subject to further revision.

In cases where there are dependent children, an alternative formula—the “**with child support**” formula—will apply. The distinctive treatment of marriages with dependent children and concurrent child support obligations is justified by both theoretical and practical considerations. On the theoretical front, marriages with dependent children raise strong compensatory claims based on the economic disadvantages flowing from assumption of primary responsibility for child care, not only during the marriage, but also after separation.

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

On the practical front, child support must be calculated first and given priority over spousal support. As well, the differential tax treatment of child and spousal support must be taken into account, complicating the calculations. Our “with child support” formula” thus has to work with computer software calculations of net disposable

incomes, of the kind often used now by lawyers and judges. Our formula will allocate specified percentages (which are still being fine-tuned) of net income to each of the spouses. The guidelines for duration will be more flexible in cases involving dependent children than in those without, taking into account not only the length of the marriage, but also the ages of the children.

(e) Length of Marriage—Short, Medium, Long

Length of marriage will not be the primary determinant of support outcomes in cases with dependent children, but it will be in cases where there are no dependent children. The “without child support” formula will impose a uniform method of calculating quantum in all marriages without dependent children. Under this formula the percentage of income-sharing will be sensitive to and will increase incrementally with length of the marriage. However, for purposes of analysis we have also divided marriages without dependent children into 3 categories based on length—short (under 5 years); medium (5-19 years); and long (20 years plus).

While everyone will have their own definition of what is a short, medium or long marriage, precise definition is not crucial. One formula for quantum will apply across all three categories. The main value of the categories comes in determining the duration of support, or the availability of “exceptions” to the “without child support” formula.

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

(f) Duration

The proposed guidelines do attempt to offer a “formula” for the determination of duration as well as of quantum. Although judges and lawyers often see quantum and duration as very distinct issues, they are related and both work together in determining the total or global amount of a support award. The proposed guidelines will set out the presumptive conditions for indefinite support. In other cases they will establish time-limits on the duration of awards.

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

Duration remains highly uncertain under the present law, particularly in medium duration marriages. The issue of duration is often put off to the future, to be dealt with

through on-going reviews and variations. Under current practice uncertainty about duration can generate low monthly awards, as judges or lawyers fear that any monthly amount of support could continue for a long time, even indefinitely.

In our view, reasonable time limits are an essential element of spousal support guidelines, especially if the guidelines generate reasonable monthly amounts. Time limits are particularly crucial in the construction of guidelines for medium duration marriages without children. (As explained above, our proposed “with child support” formula will take a more flexible approach to duration in cases involving dependent children.)

If current law cannot allow what we view to be the reasonable and potentially quite generous time-limits proposed by the guidelines, then the quantum amounts generated by the guidelines will have to be lowered.

(g) Ranges

The proposed advisory guidelines will not generate a fixed figure for either amount or duration, but will instead produce a range of possible outcomes which will provide a starting point for negotiation or adjudication. The ranges we have been able to develop for duration under the “without child support” formula are particularly broad, reflecting the variation and uncertainty in current practice. Our hope is that these can be tightened over time.

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

(h) Net vs. Gross Income

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

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

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

In the end, we have chosen to use different methods of calculating income under the two formulas. The “without child support” formula, which will apply in cases where there are no dependent children and hence no concurrent child support obligation, will utilize gross income in the interests of ease of calculation. The “with child support” formula will rely upon net income calculations.

Both formulas, whether they rely upon gross or net income calculations, will in the end generate a gross amount of spousal support that will be subject to the current deduction/inclusion rules for tax purposes. The advisory guidelines, as informal rules of practice, will do nothing to change the current tax treatment of spousal support.

(i) Ceilings and Floors

As with the Child Support Guidelines, the spousal support advisory guidelines will establish “ceilings” and “floors” in terms of income levels. The guidelines will allow more flexibility in amounts over a certain “ceiling” (as with incomes over \$150,000 under the Child Support Guidelines) and will fix a “floor” below which spousal support is not payable (like the \$7,000 floor under the Child Support Guidelines). We are still working on the specific income levels at which the ceiling and floor will be set as we continue to test the impact of different choices.

(j) “Restructuring” Awards

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

Recall that *Bracklow* explicitly recognized that what it termed “quantum” is really a function of both amount and duration which can be configured in different ways. Thus the Court noted that an order for a smaller amount paid out over a long period of time can be equivalent to an order for a higher quantum paid out over a shorter period of time.

“Restructuring” may be used in three ways. First, to “front-end load” awards by increasing the amount beyond the formula’s range and shortening duration. Second, to extend duration beyond the formula’s range by lowering the monthly amount. And third, to formulate a lump sum by combining quantum and duration.

We anticipate that many cases where the guideline outcomes initially appear to be inappropriate will be resolved by this “restructuring.” Awards will thus remain consistent with the overall or “global” amounts generated by the guidelines, and there will be no need to rely upon an “exception” or departure from the formulas.

(k) “Exceptions”

The formulas are intended to generate appropriate outcomes in the majority of cases. We recognize, however, that there will be cases where the formula outcomes will not be consistent with the support objectives under the *Divorce Act*. The guidelines will itemize a series of “exceptions” which, although not exhaustive, are intended to structure and constrain departures from the formula outcomes. The “exceptions” will create room for the operation of competing theories of spousal support that may not be accommodated by “restructuring”.

The “exceptions” include, for example, a “compensatory exception” that would allow for awards greater than the formula amount in shorter marriages where there have been economic losses that are disproportionate to the length of the marriage or uncompensated contributions to the other spouse’s career that exceed the amount generated by the formula. In some circumstances the inability to be self-supporting because of illness or disability may also constitute an “exception”. We continue to refine the “exceptions”.

(l) Interim Orders

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

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

The advisory guidelines will recognize that quantum may need to be set differently during the interim period while parties are sorting out their financial situation immediately after separation, but adjustments can be made at trial to ensure that overall awards remain consistent with the guidelines. To accommodate these short-term concerns, the guidelines will recognize an “exception” for “compelling financial circumstances” in the interim period

(m) Review and Variation

Ideally a truly comprehensive set of guidelines would apply not only to the initial determination of support, but also to subsequent reviews and variations over time. However, these issues have proven the most difficult to reduce to a formula given the uncertainty in the current law concerning the effect of post-separation changes—such as increases and decreases in the parties’ incomes, re-partnering, remarriage and second families.

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

(n) Application to Provincial/Territorial Law

The proposed advisory guidelines are specifically being developed under the federal *Divorce Act*. Provincial/territorial support law is governed by distinctive statutory regimes. However, in practice there is much overlap between federal and provincial/territorial support laws.

The broad conceptual framework for spousal support articulated by the Supreme Court of Canada in *Moge* and *Bracklow* has been relied upon under both provincial and federal legislation. Indeed *Bracklow*, which combined claims under both the *Divorce Act* and provincial legislation, made no real distinction between the two. Given this overlap, it would not be surprising for the advisory guidelines to be used informally under provincial/territorial support legislation, just as the federal child support guidelines were used under provincial law before the enactment of provincial guidelines.

The proposed advisory guidelines, which will in the end be informal and not binding, can be adapted to accommodate any distinctive features of provincial/territorial spousal support regimes. Because they will establish ranges for quantum and duration, the spousal support advisory guidelines will offer a fair amount of flexibility to accommodate any distinctive patterns under provincial/territorial law, just as they are able to respond to local variation under the *Divorce Act*. As well, departures from the advisory guidelines are always possible if the results generated by the formulas are clearly inappropriate in the context of provincial/territorial support regimes.

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

Provincial laws also differ from the *Divorce Act* in their application to unmarried couples as well as married couples, but this will not cause any difficulties with respect to the operation of the guidelines. Although we conveniently refer to length of marriage as a relevant factor in the operation of the formulas, they will actually rely upon the period of

spousal cohabitation (including periods of pre-marital cohabitation), thus providing for easy meshing with provincial/territorial legislation.