THE CANADIAN BAR ASSOCIATION
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Spousal Support Advisory Guidelines

NATIONAL FAMILY LAW SECTION
CANADIAN BAR ASSOCIATION

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PREFACE

The Canadian Bar Association is a national association representing 37,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the National Family Law Section of the Canadian Bar Association, with assistance from the Legislation and Law Reform Directorate at the National Office. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement of the National Family Law Section.

Spousal Support Advisory Guidelines

I. INTRODUCTION

The Canadian Bar Association's National Family Law Section (CBA Section) appreciates the opportunity to comment upon the *Spousal Support Advisory Guidelines – A Draft Proposal* (SSAG)[1] and *Issues for Discussion: Revising the Spousal Support Advisory Guidelines* (Issues Paper)[2]. The CBA Section represents lawyers practicing family law in all parts of Canada, with all types of clients.

The SSAG have developed over several years, primarily through the efforts of Professors Carol Rogerson and Rollie Thompson with the assistance of an advisory committee that includes academics, practicing lawyers and judges. Since the SSAG were released in January 2005, Professors Rogerson and Thompson have met with the CBA Section on several occasions, as well as the CBA Section's various provincial and territorial Branches.

The SSAG have been widely disseminated for comments and consideration. The time elapsed since the SSAG were released has enabled our approximately 2500 members to consider the practical operation of the SSAG. We trust that our comments will be helpful in finalizing the SSAG.

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1 Professors C. Rogerson and R. Thompson, *Spousal Support Advisory Guidelines – A Draft Proposal* (Ottawa: Justice Department, 2005).

2 Professors C. Rogerson and R. Thompson, *Issues for Discussion: Revising the Spousal Support Advisory Guidelines* (Ottawa: Justice Department, 2006) (Issues Paper).

II. BACKGROUND

Before the introduction of the SSAG, spousal support was often simply avoided by family law practitioners in some parts of the country. The lack of certainty, predictability and consistency in the law, not to mention realities such as clients' limited resources, lack of legal aid and personal circumstances such as an imbalance in bargaining power[3], made spousal support claims frequently unadvisable or impractical in some regions. Similar fact situations generated a wide range of results, making it difficult for family law lawyers to predict outcomes. This in turn made it difficult to advise clients and to engage in cost-effective settlement negotiations[4]. Consistent results in similar situations are necessary for an equitable justice system.

The CBA Section's comments are based on our members' practical experience with the SSAG. That experience has varied across Canada. Different provinces and territories, rural versus urban settings, and affluent versus less affluent areas make it difficult to offer a single view on the operation or utility of the SSAG. Given the range of experiences and differing views, the CBA Section will neither endorse nor dismiss the SSAG, but will instead share our experiences of the successes and failures of the SSAG to date and suggest improvements.

We have organized this submission to generally correspond with the organization of the SSAG. We have also integrated CBA Branch responses to the 2006 Issues Paper throughout the submission, and those comments are identified using the name of the province or territory of the respective Branches.

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[3] These factors have a disproportionate impact on women, who continue to be the lower income spouse and primarily responsible for children after divorce.

[4] These problems were identified by Professors Rogerson and Thompson in *Spousal Support Advisory Guidelines*, *supra,* note 1 at 9.

III. THE GUIDELINES PROJECT

The development of the SSAG has been unique. Similar law reform initiatives have generally been developed under the rubric of Justice Canada, and eventually put forward as draft legislation. In contrast, this initiative has been financially supported by Justice Canada, but is not a government initiative. The SSAG are instead attributable to two academics, with an advisory committee of other academics, family lawyers and judges.

The CBA Section was asked to name representatives to the advisory committee when it was initially formed, and those representatives did not participate in this response. As such, it represents an independent critique of the SSAG by the current CBA Section membership.

The unusual process has been characterized by some as developing legislation "through the back door". However, the CBA Section believes that any initiative that results in greater consistency, fairness and equality for the parties in settling disputes on spousal support issues can be another tool to assist clients, aid in settlement discussions or persuade judges of a reasonable outcome.

There was also some initial reluctance around the introduction of child support guidelines, but experience has shown that those guidelines narrow the range of numbers put forward by opposing counsel and bring some predictability to the area of child support. They have proved to be a significant positive development in child support law. In our view, the SSAG can also be a useful tool, and add certainty to an area of law that has previously been so unpredictable that many practitioners avoided it altogether.

IV. PRACTICAL OPERATION OF THE GUIDELINES

The SSAG emulate the common law and are intended to reflect the quantum of spousal support across Canada. As such, they can assist in negotiation and settlement by producing a range of likely outcomes within which negotiation can be fairly and reasonably directed. They can also be an important tool for less experienced lawyers, as they give guidance as to range and direction. To the extent that the SSAG provide a "standard", they have made spousal support more of an issue in cases where it might not have previously been

considered. The SSAG brings gender neutrality to the issue of spousal support, as the sex of the recipient or payor is not a consideration when calculating ranges. Due to cost and uncertainty prior to the SSAG, many clients in places where spousal support was not routinely sought either did not aggressively pursue it or relinquished their claims too readily.

Given the daily pressures of family law courts and law practices, it has become evident that ongoing and accessible education will be required to encourage all members of the Bench and bar to become more knowledgeable about the SSAG. Many lawyers and judges are still not adequately familiar with, or in some cases have even read the SSAG. Misunderstandings and confusion about many important aspects of the SSAG are the unfortunate result.

One of the biggest problems with the SSAG is that, while the threshold question in all spousal support cases should continue to be whether or not an order is appropriate (entitlement), since the introduction of the SSAG, there is too often a leap to the second step of simply determining how much should be ordered (quantum). Some judges and lawyers seem insufficiently aware that the SSAG are only "guidelines", and treat them as *de facto* law, making it difficult for opposing counsel to dispute. This problem of omitting the preliminary question of whether an actual entitlement to spousal support exists was evident in *Carr v. Carr*, where the court commented[5]:

> Adopting the approach advocated in the Guidelines, the court is relieved of any obligation to determine if Ms. Carr is a spendthrift or a miser: the amount of spousal support that she is entitled to receive is the amount to which she has become entitled as a result of the length of the relationship.

The SSAG are clearly intended to be informal, voluntary and advisory. However, we note that:

- although designed to be informal, the SSAG are so complicated that they require family lawyers to purchase computer programs and take additional training to determine the "advised range"

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5 *Carr v. Carr,* [2005] A.J. No.391, 2005 AB.Q.B. 265 (Alta. Q.B.)

- the complexity and need for computer generated calculations makes it difficult for lawyers without the software, and unrepresented or self-represented individuals, to access the SSAG to claim spousal support or responding to a claim for spousal support

- the complexity of the computer generated calculations tends to formalize, legitimize and generally add authority to the outcomes. Lawyers and judges less familiar with the SSAG may adhere too rigorously to the computer outcomes, without adequately considering key issues such as entitlement or exceptional circumstances (for example, ceilings and floors, illness and disability, compensatory, debt payments, prior support obligations and interim support) where the SSAG may be of limited, qualified or no application

- the mathematical formulas may not address the unique circumstances of each divorcing family

The SSAG are also dismissed by some lawyers asking why they would integrate something that is outside of the law. Criticisms of the ranges are that they are inconsistent with actual orders in various jurisdictions, and therefore are an inappropriate attempt to change the law beyond the normal legislative or judicial process. CBA Section members report that, for various reasons, the SSAG have not been widely accepted in, for example, PEI and Quebec, and in the city of Toronto. For example, in one case, the Quebec Court of Appeal[6] criticized the judge of first instance for failing to complete the necessary analysis to determine support, saying that "il n'existe pas de recette magique ni de grille toute faite pour régler ces questions." The court then completed the analysis and reduced spousal support from $4,500 to $2,750, an amount less than the lower range according to the SSAG[7].

The CBA Section notes that the terminology may have generated confusion between the SSAG and the Federal Child Support Guidelines. The latter are legislated and intended to be applied fairly automatically in most cases, while the former are advisory and intended to

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6 *G.V. c. C.G.*, [2006] QC.C.A. 763.

7 While Quebec courts have not embraced the guidelines and many members of the family law bar in that province remain reluctant to raise them in argument, our Quebec members believe they have seen a subtle shift in the quantum of support ordered, so spousal support aware are modestly more generous now than prior to the SSAG.

be used with significant flexibility and discretion. While it seems that the SSAG are more truly "guidelines" in the literal sense of the word, the Child Support Guidelines have already laid claim to that terminology. An alternative like "Spousal Support Advisory Ranges" might be considered, to be more readily distinguishable and avoid confusion.

Finally, we suggest that there should be a process for periodic review of the operation of the SSAG. We recognize that Professors Rogerson and Thompson have surveyed developments in the case law since the introduction of the SSAG, but we recommend a periodic review that would involve regular consultation with the practicing bar, the Bench and family law clients about the practical operation and the accessibility of the SSAG.

V. BASIC STRUCTURE OF THE GUIDELINES

A. Preliminary Issues - Applicability of Advisory Guidelines

The SSAG state repeatedly that they do not deal with entitlement[8], yet there continues to be a general misconception on this important point. The SSAG should not be used to assert an entitlement to spousal support, and the *Divorce Act* must prevail. The CBA Section stresses that if the SSAG are to be a positive development, it must somehow be better communicated to the practicing family bar, judges and other users that the SSAG are intended for use *only after* entitlement to spousal support has been established.

The SSAG should not provide a "one size fits all", automatic response to the complex issue of spousal support. It is logical that the focus of the SSAG is quantum — calculations and ranges of generally appropriate orders. However, the fact that the SSAG do not address entitlement should not be interpreted as indicating that this aspect of spousal support law is not also critical. It would not improve the law if the unintended result of the SSAG is to make entitlement a non-issue, in effect encouraging lawyers, parties and judges to simply plug figures into a computer to produce spousal support ranges. Careful consideration of the

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[8] *Supra*, note 2 at 24.

unique facts of each case, and particularly whether spousal support should be ordered at all, must be the first step. In our view, the persistent problem of too many judges and lawyers applying the SSAG ranges somewhat automatically, without first considering the issue of entitlement, must be addressed by ongoing communication and education.

B. After Formulas Have Been Applied: Restructuring and Exceptions

The CBA Section agrees with the SSAG's suggested approach for restructuring and exceptions depending on the particular family circumstances. The SSAG outline a non-exhaustive list of exceptions. We have identified some situations that may be appropriate to add to that list. While some of these situations may already be covered through restructuring or existing exceptions, such as "debt allocation", our experience is that further clarification is needed. Possible additions to the list include:

- low or high asset value;
- assets traded for spousal support;
- significant age differences between spouses, where the rule of 65 would not apply (for example, where one spouse reaches retirement age much before the other);
- illness or disability of a child;
- short term marriages with unique transition issues.

CBA Branches had divergent views on the issue of whether the debt payment exception should be changed. Ontario finds that the SSAG approach strikes the right balance, while British Columbia and Nova Scotia suggest that the exception be broadened. New Brunswick recommends narrowing the exception, and Quebec notes that "it clearly depends on the nature of the debt" (for example, taking on a mortgage if a house could be sold).

VI. "WITHOUT CHILD SUPPORT" FORMULA

The amounts rendered under the "Without Child Support" and "With Child Support" formulas are different, and the CBA Section agrees that the quantum of spousal support ordered for families with children and without children should not be the same.

This important characteristic of the SSAG should be maintained. It provides guidance as to reasonable outcomes, but allows sufficient flexibility to address the particular circumstances of each case.

The CBA Section appreciates the "Without Child Support" formula for its simple calculations that do not require a special computer program. Most Branches were of the view that the range of the basic formula was about right and should not be changed. Ontario noted that the sliding scale works well. Some Branches, such as New Brunswick, noted that the formula produces spousal support ranges higher than they would expect without the SSAG, while Manitoba said the range was appropriate, though orders were generally at the lower end in that province. Some find the higher outcomes in quantum to be appropriate and long overdue, referring to past cases where they would not have advised aggressive litigation of spousal support, given the risks and uncertainty involved and the amount of spousal support that might reasonably be attained. Quebec mentioned that property division and debt load where debts are marriage related should be considered, and supported the idea of a minimum disparity between incomes before applying the SSAG.

In the case of short term marriages, most Branches agreed that the formula tends to produce spousal support ranges that are too low and too time limited. However, we recognize that exceptional circumstances may dictate that the strict use of the formula is inappropriate in some cases.

The CBA Section supports a model that recognizes that spouses' financial circumstances become increasingly interconnected over time. For very long term marriages, there will be cases where a quantum that equalizes the individual net disposable income of both parties may be appropriate. Because the upper end of the range in the SSAG is actually less than 50%, it may suggest that a recipient spouse *never* deserves an equal income to a payor spouse. The CBA Section does not support that message.

In our view, the "rule of 65" (where the recipient's age at separation and the years of marriage total 65 or more[9]) should be maintained. In marriages of 20 years or more, where spousal support of "indefinite duration" is ordered, we note judges often use review dates to address duration. Making spousal support orders of "indefinite duration" under the current law simply postpones the difficult issues relating to duration. We do not favour lowering the threshold for review below 20 years of marriage, and believe that age is a very relevant consideration.

We suggest a change in terminology to remove any confusion, especially among clients, about the word "indefinite". To clarify that the intent is not to suggest that spousal support will continue forever, but rather that the end date is not yet known, we suggest a term like "undetermined duration" or to orders as being "reviewable", rather than "indefinite".

VII. "WITH CHILD SUPPORT" FORMULA

There is no consensus as to whether the range of 40-46 percent of individual net disposable income for With Child Support cases is appropriate. Most Branches indicated the range was about right.

A. Duration under the Basic Formula

There are also jurisdictional differences of opinion as to whether the duration for spousal support orders in shorter term marriages should be the outside limit of the date that the last or youngest child completes high school, or some shorter duration. Nova Scotia and British Columbia suggested it should be even shorter than age15, but recognized that flexibility is required. Ontario said the time limit should not be shorter, but a change could be implemented for variation proceedings. Years of marriage and the age of children should be considered to ensure that support does not continue longer than it should simply because the children were young when their parents separated.

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9 *Supra*, note 2 at 7.

B. Custodial Variations: Shared and Split Custody

The CBA Section has considered developments in the law of child support in shared custody cases arising out of the decision of the Supreme Court of Canada in *Contino*[10] and its application in subsequent litigation. Changing the "With Child Support" formula to reflect that decision, would provide some welcome guidance in mixed custody cases. We recognize the difficult tension between a formula capable of addressing many cases, and minimizing complexity in the formula.

C. Hybrid Formula for Spousal Support Paid by Custodial Parent

We have not received significant feedback about the proposed hybrid formula for cases where spousal support is paid by the custodial parent to the non-custodial parent, and expect this is simply a matter of the infrequency of these cases.

D. Adult Children

We have considered child support for adult children under section 3(2) (b) of the Child Support Guidelines in an amount other than the table amount. The suggested revision to a hybrid formula to use the Without Child Support formula after adjusting each parent's income for grossed up amounts of child support is appropriate in the circumstances.

E. Government Benefits

The CBA Section has considered the inclusion of government benefits, such as the Child Tax Benefit and the GST Credit, in parties' incomes for the purposes of the With Child Support formula. We support the inclusion of these government benefits in the formula, as it is the only way to truly consider individual net disposable income. The SSAG should be adjustable over time as government benefits are added, deleted or revised.

F. Quebec's Experience

The formula can easily be applied with regard to child support under the Provincial Child Support Guidelines. As the quantum of child support is lower in Quebec than in the

common-law provinces, the result may actually be that spousal support orders are higher than in other jurisdictions. Our general perception is that the SSAG ironically represent amounts somewhat greater than those historically granted by Quebec courts.

VIII. CEILING AND FLOORS

The SSAG suggests an upper limit or ceiling for gross annual income for the payor be $350,000, and a lower limit or floor at $20,000.

There are differing perspectives among CBA Section members on this issue, which may reflect regional economic differences related to the prevalence of incomes in excess of $350,000, for example. Alberta suggested the amount is fine, given that it is discretionary, though noted that some lawyers from Calgary were of the view that it should be higher to reflect income levels in that city. British Columbia and New Brunswick noted that it is very exceptional to earn more than that amount, and suggested that the SSAG should be read with caution in such exceptional circumstances to highlight that deviation is likely. Those Branches also suggested that there should be no imposed ceilings or floors because to do so departs from the philosophy of income sharing. Floors are generally seen as artificial in any event, as low income produces little or no spousal support, and low income cases often trigger the debt payment exception in any event. Ontario and Nova Scotia saw no reason, given the other factors referred to in the SSAG, for changing either the ceiling or the floor.

IX. INTERIM SUPPORT

Where parties' financial situations are relatively stable, we agree that the "interim support setting seems an ideal situation for the use of advisory guidelines"[11]. Judges generally conduct a more cursory needs and means analysis at the interim stage, so a tool to assist in resolving matters without significant expense to the parties is beneficial.

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[10] *Contino v. Leonelli-Contino* (2003), 42 R.F.L. (5th) 326 (Ont. C.A.).

[11] *Supra*, note 1 at 91. See also *M. v. M.*, [2006] B.C.S.C. 1921, paras. 20-21.

In our experience, litigation soon after separation can encourage an ongoing adversarial attitude between the parties, making it more difficult to successfully resolve other matters, and significantly increasing the likelihood of requiring further recourse to the courts.

Again, if the SSAG are to be useful in resolving issues of interim support, it must be clear when they should or should not be applied. The very existence of the SSAG seems to have generated a perception that there is no need to first address issues of entitlement. Education is required to ensure that this misperception is corrected.

X. VARIATION, REVIEW, REMARRIAGE, SECOND FAMILIES

A. Payor's Post-Separation Income Increase

The SSAG wisely did not suggest a formulaic solution to the difficult issues raised by increases in the payor's income after separation. It should be left without a formula, as it would be difficult, if not impossible, to construct a formula to deal with this issue.

B. Recipient's Remarriage or Re-partnering

Remarriage or re-partnering of a recipient of spousal support raises complex issues difficult to address through any specific formula. Still, some guidance as to which considerations should be taken into account in applying the SSAG in such circumstances would be helpful.

C. Second Families

Obligations to "second families" create other complexities that impact on the appropriate quantum of spousal support. Whether spousal support in these circumstances can be assisted by a formula or whether they should be dealt with on the facts on each case, with general guidance from SSAG, is debatable. Alberta suggested that obligations to second families should either be considered through a new provision in the SSAG, an explicit exception to the SSAG or as a consideration when opting for the lower end of the range under the SSAG. Nova Scotia and New Brunswick suggested that a formula would be helpful, and should apply to subsequent biological or adopted children, but not step children.

Whether child support for second families should be given priority over spousal support to former families is also a controversial issue. Most agreed that spousal support should be reviewable when a payor is legally required to support children from a subsequent relationship, but another comment was that payors should consider existing obligations before taking on new ones.

XI. CONCLUSION

The SSAG have potential to be a useful tool to add desperately needed fairness and consistency to the area of spousal support. However, the CBA Section urges ongoing information and education for the Bench and bar to alleviate persistent misconceptions that have plagued the SSAG since their introduction.

With more widespread acceptance of the ranges offered under the SSAG by the Bench and bar, consistency may improve over time while still allowing the judiciary to deal appropriately with more marginal cases. The SSAG must be recognized for the assistance they offer in guiding practitioners and judges in discerning appropriate ranges for spousal support, but should never be a means to disregard consideration of the individual fact circumstances in each particular case.