



DEVELOPING SPOUSAL SUPPORT GUIDELINES IN CANADA: BEGINNING THE DISCUSSION

BACKGROUND PAPER

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by

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The views expressed in this report are those of the author and do not necessarily represent the views of the Department of Justice Canada.

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I. INTRODUCTION

Across the country, continuing legal education programs on spousal support draw record numbers. At the National Family Law Program in Kelowna in July of 2002 any session dealing with the topic of spousal support was scheduled in the Grand Ballroom—and the room was full throughout the day. Lawyers and judges appear desperate for guidance in what has emerged as one of the most difficult areas in current practice. Media coverage of judicial decisions awarding spousal support in the face of a final release in a separation agreement unleashes unending debate about the appropriateness of long-term support obligations. The law of spousal support is confused, uncertain and controversial.

Responding to concerns expressed by lawyers and judges, the federal Department of Justice has decided to initiate a discussion about the possibility of bringing more certainty and predictability into the current law of spousal support. More specifically, the Justice project will facilitate discussions focusing on the possibility of developing guidelines that would assist in the determination of spousal support in individual cases. In short, the project is about moving towards spousal support guidelines.

Any talk of spousal support guidelines evokes the model of the current child support guidelines. Such analogies are not necessarily appropriate. As will be discussed in more detail below, there are many different ways to structure spousal support guidelines and many different ways of conceiving the scope of such guidelines. There is a question, for example, of whether guidelines should only be used to assist in the determination of quantum, or whether they might also provide guidance on issues of duration and even entitlement. There are questions of whether there should be different guidelines for different kinds of fact situations or whether the goal should be a single set of guidelines that would be of more general application. There are also questions about the form of guidelines—whether they should be legislated or informal. And about their force—whether they should be advisory or presumptive.

However, in the context of this paper, which is background document for the Justice project, what any move to guidelines does envision is some degree of reliance on a mathematical formula to determine the portion of spousal income that will be shared after marriage breakdown. More specifically, the paper lays the groundwork for exploring the possibility of developing guidelines based on a methodology of “income-sharing”, whereby spousal support would be determined as a percentage of the income difference between the spouses, with the appropriate percentage to be determined by an array of relevant factors, including length of marriage and the presence or absence of children.

The Justice project springs from the perception that our current law of spousal support, which has developed under the statutory framework of the *Divorce Act*¹ as interpreted by a series of leading judgments by the Supreme Court of Canada (specifically *Moge*² and *Bracklow*³) is excessively discretionary, creating an unacceptable degree of uncertainty and unpredictability.⁴ 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. 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. More generally, the uncertainty and unpredictability that pervades the law of spousal support serves to cast doubt upon the fairness of the outcomes, thus undermining the legitimacy of the spousal support obligation. The widely differing understandings of the nature of the spousal support obligation that are currently in play generate concerns about unfair outcomes at both ends of the spectrum—in some cases awards may be too high, and in others too low.

Somewhat similar concerns about a lack of consistency and predictability in the area of child support led, in 1997, to the enactment of child support guidelines,⁵ which have been largely successful in meeting their goals.⁶ The question thus arises whether a

¹ R.S.C. 1985, c. 3 (2nd Supp.). Although the explicit focus of this paper is on spousal support determinations under the federal *Divorce Act*, similar conclusions could be drawn about determinations of spousal support under provincial legislation. In general, despite some differences in statutory language, the interpretation of provincial spousal support statutes has been guided by the same basic principles, as articulated by the Supreme Court of Canada, that guide determinations under the *Divorce Act*.

² *Moge v. Moge*, [1992] 3 S.C.R. 813.

³ *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420.

⁴ For elaboration of this theme see Carol Rogerson, “Spousal Support Post-*Bracklow*: The Pendulum Swings Again?” (2001), 19 Can. Fam. L. Q. 185 and D.A. Rollie Thompson, “Everything is Broken: No More Spousal Support Principles?” unpublished paper prepared for the Continuing Legal Education Society of British Columbia Family Law Conference, July 12-13, 2001.

⁵ In addition to uncertainty, another perceived problem with child support awards, to which the guidelines were a response, was a sense that they were in general too low. As will be discussed further below, this “fairness” concern is more complex in the spousal support context, with concerns in the current environment both of awards that are in some cases too high and in others, too low.

⁶ See the recent five-year review of the Federal Child Support Guidelines: Department of Justice, Canada, *Children Come First: A Report to Parliament Reviewing the Provisions and Operation of the Federal Child Support Guidelines* (May, 2002), which concludes that the guidelines have achieved their goal of making child support awards more consistent and predictable. The fairness of awards under the guidelines is a more complicated matter to assess. The Department of Justice concludes that the awards are perceived as being fair, but this remains a more contentious issue. Indeed, as will be discussed further below, some of the failures of child support in covering the full range of costs associated with the rearing of children create spillover effects in spousal support.

similar solution might now be appropriate in the area of spousal support. It is readily acknowledged that the exercise of developing guidelines for spousal support is much more difficult than for child support. The very basis of the spousal support obligation is more controversial and spousal support is understood to serve a wider array of objectives.

In the current structure of family law in Canada, spousal support is the last bastion of discretion, providing an opportunity to do “global economic justice” on the facts of a particular case after taking into account awards under the relatively rigid and formulaic schemes of matrimonial property and child support. As the residual economic remedy, spousal support often ends up adjusting for deficiencies in the other remedies. In the past, when the possibility of spousal support guidelines has been considered, Canadian commentators have generally concluded that this loss of flexibility would be detrimental to the family law system and that it would be impossible to draft guidelines with sufficient flexibility to respond to the diversity of marriages and the multiple objectives of spousal support.⁷ The disadvantages of guidelines have generally been found to outweigh any advantages in terms of efficient dispute resolution.

However, a reconsideration of spousal support guidelines may now be appropriate. Child support guidelines, with their formulaic approach to the assessment of child support based upon general estimates of the cost of raising children, have accustomed us both to the notion of aiming for “average” rather than individualized justice and the general philosophy of income sharing after divorce.⁸ In addition, the rising costs of litigation have put individualized justice beyond the reach of most spouses—even middle-class clients.

As well, the law of spousal support has become even more unstructured and discretionary over time, particularly in the wake of *Bracklow*. These developments have undermined the faith that may have been prevalent even five years ago that a principled approach to spousal support was developing through judicial interpretation of the legislation. It is one thing to argue that the law of spousal support needs the flexibility to respond to different fact situations; another to try to defend markedly different outcomes on similar facts, which is now the case. And finally, some of the recent conceptual shifts in the understanding of spousal support, specifically a resurgence of “needs and means” analysis in the post-*Bracklow* world may have rendered the area more appropriate for the

⁷ See for example the study prepared for the Department of Justice, Canada by Danreb Inc., *Spousal and Child Support Guidelines*, October, 1988 (principal researcher: Julien Payne). This study was discussed and relied upon by the Alberta Law Reform Institute in recommending against adoption of a “fixed formula” for the determination of spousal support; see Alberta Law Reform Institute, *Family Law Project: Spousal Support* (Report for Discussion No. 18.2), October 1998, available at <http://www.law.ualberta.ca/alri/>. See also another study prepared for the Department of Justice, Canada by the Canadian Research Institute for Law and the Family, *Options for Reform of the Law of Spousal Support Under the Divorce Act, 1985* (May, 1991) (principal researcher: M.L.(Marnie) McCall).

⁸ For an elaboration of these arguments see D.A. Rollie Thompson, “And ‘Average Justice’ for All: Status and Stereotype in Support Law” unpublished paper prepared for the Law Society of Upper Canada and Ontario Bar Association—Family Law Section Continuing Legal Education Programme, “Child and Spousal Support Revisited” Toronto, May 2-3, 2002.

introduction of “income-sharing” by means of guidelines. Some recent decisions, such as that of the Ontario Court of Appeal in *Andrews v. Andrews*^{8a}, actually show judges beginning to turn to formulas for the calculation of spousal support.

Some American jurisdictions have experimented with spousal support guidelines for more than a decade, and the influential American Law Institute (ALI), in its massive project dedicated to rethinking the principles of the law of family dissolution, has recommended an approach to spousal support that has a significant formulaic or guideline component.⁹ While none of the American guidelines models may in the end be completely appropriate for the Canadian context, they do demonstrate the feasibility in principle of developing some form of spousal support guidelines. The ALI proposal, in particular, also demonstrates that spousal support guidelines can be structured in different ways and can attempt to respond, at least to some extent, to diverse objectives and diverse fact situations, thus meeting some concerns about undue rigidity.

The methodology contemplated in this paper for considering the development of spousal support guidelines is not that of formal legislative reform through which child support guidelines were achieved. The controversial nature of the spousal support obligation suggests that little would be accomplished by opening it up to broad public debate. In the American context, spousal support guidelines have, in general, been the product of bench and bar committees of local bar associations. The guidelines were created with the intention of reflecting local practice and providing a more certain framework to guide settlement negotiations.¹⁰

A somewhat similar process is being proposed here, one which would involve building guidelines “from the ground up.” The process would involve bringing together judges and lawyers with an expertise in family law, with the hope that they would be able to work together to articulate informal guidelines based on emerging patterns (or best practices) embedded in current practice. Such guidelines would be expected to operate on an advisory basis only within the existing legislative framework. They would be intended to provide some common starting points for discussion about appropriate spousal support outcomes in different categories of cases.

Any discussion about the development of guidelines is a challenging project that draws together many complex strands of theory and practice. It is the purpose of this document to provide background information on the many “building blocks” of the project.

^{8a} *Andrews v. Andrews* (1999), 50 R.F.L. (4th) 1 (Ont. C.A.).

⁹ American Law Institute, *Principles of the Law of Family Dissolution: Analysis and Recommendations* (LexisNexis, 2002). The recommendations with respect to spousal support are found in chapter 5, “Compensatory Spousal Payments.”

¹⁰ The exception is the ALI proposals, which involve a blueprint for legislative reform—although the proposals do leave room for some shaping of the principles to reflect local norms.

Part II of the paper will provide a brief overview of the current law of spousal support law in Canada today. This will serve two purposes. First, it will highlight the problems which have generated the need for guidelines, specifically conceptual confusion combined with an excessive emphasis on the discretionary nature of the decision-making process. The second purpose is to establish the broad framework within which any informal guidelines would be required to operate. Here, of particular significance is the shift in the law towards a “needs and means” analysis. While currently a source of uncertainty and confusion, this shift creates fertile ground for the introduction of income-sharing as a methodology for determining spousal support. Indeed, one can find in some of the recent case law, of which the 1999 Ontario Court of Appeal decision in *Andrews* is the leading example, the beginnings of judicial attempts to craft a quasi-formulaic approach to the determination of spousal support based on comparisons of post-divorce net incomes. Not surprisingly, these attempts have arisen in contexts where there are minor children and both child and spousal support are in issue, creating opportunities for the methodology under the child support guidelines to “spill over” into spousal support.

Part III will review the different theories that exist to justify the spousal support obligation, and the implications of each of these theories for developing guidelines. Of particular interest, given the increasing dominance in our case law of a non-compensatory, “needs and means” analysis, will be a set of theories that justify “income-sharing” models of spousal support. The focus on theory in Part III is driven by the conclusion that a major source of the uncertainty in the current law is conceptual confusion. Although this project is ultimately a practical one, rather than a theoretical one, some clarification of the basic principles of spousal support is seen as a necessary step in bringing more structure to the current law.

Part IV of the paper, which moves from theory to practice, examines some spousal support spousal guidelines which have actually been implemented, or in the case of the ALI proposals, which have been drafted with a view to actual implementation. The focus will be on the American experience with spousal support guidelines. The American guidelines, in their specifics, might in the end prove inappropriate for Canada given our different understandings of the nature of the spousal support obligation. But they do illustrate some of the possible ways of structuring guidelines and, at the very least, can assist in identifying the kinds of issues which guidelines need to address. The ALI proposals are of particular interest both because of their comprehensiveness and thoughtfulness, and because of the complexity of the proposed guidelines which recognize different bases for spousal support claims and which attempt to make the extent of the support obligation responsive to a number of factual variations. Much of Part IV is thus devoted to an extensive and detailed examination of the ALI proposals. A Canadian guideline, suggested by Linda Silver Dranoff and used by some lawyers in Ontario, will also be examined. The Dranoff guideline is interesting because its methodology and results are inspired by emerging trends in the Canadian, particularly Ontario, case law reflected by decisions such as *Andrews*—trends which are not part of American law and are therefore not reflected in American guidelines.

Part V will provide some social context for the development and operation of spousal support guidelines. It will review the information available--unfortunately quite limited--about the characteristics of marriages which end in divorce (such as the average duration of marriage and the presence or absence of minor children) and about the actual incidence of spousal support. This will provide useful background information on the context in which spousal support guidelines will operate and allow us to begin to think about the impact of any guidelines that might be proposed.

Part VI of the paper will lay out a process for thinking about the development of spousal support guidelines in Canada. It will discuss in more detail what is entailed in the process of creating informal guidelines which reflect local practice, including the challenges of such a process.

II. THE CURRENT LAW OF SPOUSAL SUPPORT

It is not the purpose of this paper to provide a comprehensive over-view of the current law of spousal support. That has been done elsewhere.¹¹ Rather this portion of the paper will simply provide a brief overview of some of the main features of the current landscape of spousal support in the post-*Bracklow* world. This will serve two purposes. The first is to highlight the problems which have generated the need for guidelines. The second is to establish the broad framework within which any informal guidelines of the sort being proposed here would be required to operate and to show the ways in which recent developments have created fertile territory for the implementation of guidelines. Of particular interest is a series of recent decisions, best represented by the Ontario Court of Appeal decision in *Andrews*, where informal, judicially-crafted guidelines, are beginning to emerge.

Five central features of the current law have been identified:

- multiple theories of spousal support or no theory at all
- increasing dominance of “needs and means” analysis
- expansive basis for entitlement
- reluctance to impose rigid durational limits
- quantum is the “wildcard,” but some patterns are emerging

Each will be discussed briefly in turn.

A. Multiple Theories of Spousal Support or No Theory At All

The current world of spousal support is one of conceptual confusion. Post-*Bracklow* there is no clear sense of what spousal support is about. Expanding on the framework articulated in *Moge*, *Bracklow* not only recognized three different bases for spousal support—compensatory, non-compensatory, and contractual—but left unanswered many questions about the nature of each kind of claim and the inter-relationship between the different kinds of support. In particular, the basis for non-

¹¹ See Rogerson, *supra* note 4 and Thompson, *supra* note 4.

compensatory support is hopelessly confused. Taking the view that there is no dominant model or philosophy of spousal support under the *Divorce Act*, the Supreme Court of Canada eschewed any responsibility to provide conceptual structure and guidance, and delegated to trial judges the determination of which kind of support is appropriate on the facts of any particular case.

Numerous variants of compensatory and non-compensatory theories are being drawn upon by individual judges, or no theories at all—for *Bracklow's* vision of spousal support as largely discretionary and fact-driven has introduced a strong anti-theoretical element into the law of spousal support. *Bracklow* has directed energy away from the challenge of developing coherent explanations of the basis of the spousal support obligation. Many judges have been encouraged by *Bracklow* to simply apply very unstructured and often unarticulated norms of “fairness” (which are typically brought to bear in interpreting the vague concept of “need”). As will be argued in the Part III of the paper, which reviews theories of spousal support in more detail, a crucial step in bringing more structure into the law of spousal support will be the clarification of the basic principles which structure the obligation. Part of this process must involve asking the question of whether all of the concepts currently being used to ground the support obligation are theoretically sound.

B. The Increasing Dominance of “Needs and Means” Analysis

In the spousal support trenches, judges and lawyers have responded to the conceptual confusion in the post-*Bracklow* world in one of two ways. Some continue to place primary reliance on the compensatory principle as the primary analytic tool, reserving non-compensatory support as a narrow, residual category for atypical spousal support cases not involving children and with no claims of earning capacity loss. In the majority of cases, however, courts recognize an expansive role for non-compensatory support. In a number of cases both compensatory and non-compensatory bases for any support obligation are recognized, but increasingly claims are analyzed only in non-compensatory terms. We thus see both the merger of compensatory and non-compensatory claims and the increasing dominance of a non-compensatory analysis. Certainly the non-compensatory language of “needs and means” has come to dominate spousal support discourse. These terms have become the primary analytic tools for determining spousal support, even when it is acknowledged that there may be a compensatory component to the award. This has led to a heavy emphasis on individual budgets as the primary determinant of outcomes.

The “needs and means” analysis of spousal support is the source of much of the uncertainty in the current law. “Need” can be understood in many different ways—basic needs, average needs, or those associated with the marital standard of living. An understanding of the purpose of the support obligation is necessary to structure and give content to the idea of need; but in the post-*Bracklow* world such theorizing has become unpopular. The assessment of need has thus become very subjective, interpreted in light of many unarticulated assumptions about the purpose of spousal support. “Needs and means” is not a theory of spousal support—it is a conduit for many different theories.

The “needs and means” framework has many attractions, particularly from a practical perspective. It avoids the complex issues of evidence and causation raised by a compensatory/economic loss model of spousal support and focuses on what is actually known at the time of the divorce—the parties’ incomes and expenses and deficits. It can easily move in the direction of income-sharing, theoretically defensible models of which have been articulated and which will be reviewed in Part III of the paper, below. However, under the current “needs and means” approach, there is no clear conception of the basis for sharing income, and as a result there is a significant risk of the analysis generating results that are unjustifiable.

At one end of the spectrum, the “needs and means” analysis has led in some quarters to a resurgence of the traditional model of spousal support, generating claims for life-long support at the marital standard of living after the breakdown of any marriage, whatever its length or nature, if breakdown will leave the parties in significantly different financial positions. Such a model is theoretically unjustifiable, absent fault, and will only serve in the long run to de-legitimize the spousal support obligation. As will be shown in the review of theories of spousal support in Part III, below, plausible models of income-sharing exist, but they all in some way link the support obligation to the length and nature of the marriage or the presence or absence of children. They are not based on the fact of marriage itself or any promise or expectation of support flowing from it.

A more realistic fear is that a “needs and means” framework creates significant opportunities for spousal support to be unjustifiably denied or limited. It is very easy for concepts of need to collapse into notions of basic self-sufficiency. There is thus a risk that spouses may be under-compensated for their child-rearing responsibilities because they have managed to attain a basic level of economic self-sufficiency and to recover from any dependency during the marriage, or alternatively because they have managed to maintain a basic level of self-sufficiency during the marriage.

The move to a “needs and means” framework, while appearing to simplify the law of support around a uniform standard, has actually contributed to its fragmentation given the variety of ways in which need can be interpreted. On one view, the “needs and means” approach may ultimately facilitate the introduction of an income-sharing methodology under guidelines by having shifted the focus of spousal support analysis away from the compensatory concept of loss to that of standard of living. However, it also imposes significant impediments to a move in the direction of guidelines. For “needs and means” involves a highly individualized decision-making process in which budgets play a central role. As under the child-support guidelines, a methodology of income-sharing would eliminate the use of individual budgets. It would also eliminate the whole concept of “need,” converting spousal support into an “entitlement” to a share of the other spouse’s income.

C. Expansive Basis for Entitlement

With *Bracklow's* expansion of the basis for spousal support beyond compensation, entitlement has virtually disappeared as a significant issue in spousal support law. Even if there is no compensatory basis for support, “need alone may be enough” to ground an award of support; and if need is interpreted broadly to cover any significant drop in standard of living after marriage breakdown, as it generally has been in the post-*Bracklow* case law, the basis for entitlement is very broad.¹² Disparity in income alone, regardless of type and length of marriage, is usually sufficient to trigger an entitlement to spousal support.

Spousal support law was already moving in this direction after *Moge*, but *Bracklow* has confirmed the trend. Quinn J. of the Ontario Superior Court of Justice recognized the disappearance of entitlement as a serious issue in the following statement from his judgment in *Keller v. Black*:

[para. 22] It seems that *Bracklow* has taken us to the point where any significant reduction in the standard of living of a spouse resulting from the marriage breakdown will warrant a support order—with the quantum and/or duration of the support being used to tweak the order so as to achieve justice in each case.¹³

As Quinn J. recognizes, most of the action in spousal support cases is now with respect to quantum and duration. However, what ultimately structures determinations of quantum and duration is an understanding of the basis for entitlement. Failure to adequately understand or clarify the basis of entitlement—a common feature in the current case law—leads to uncertainty and confusion in shaping actual spousal support awards.

D. Reluctance to Impose Rigid Durational Limits

If one feature of our current law is an expansive basis for entitlement, another feature, which began with *Moge* and has been reinforced by *Bracklow*, is the increasing duration of the spousal support obligation. In general, there is a reluctance or hesitancy on the part of courts to impose durational limits so long as a support claimant can demonstrate economic need. What constitutes need is, of course, open to varying interpretations, but in marriages of any significant duration there is an increasing tendency for need to be measured against the marital standard of living and found

¹² Exceptions can, of course, be found. Some judges, who continue to give primacy to the compensatory framework, would deny any entitlement to spousal support based simply upon drop in standard of living if both spouses have maintained full employment during the marriage and there is thus no claim based on career loss. For judges who take this approach, non-compensatory support would be confined to cases where there is an inability to meet basic needs and could not be claimed by a spouse who is able to sustain a reasonable standard of living. See *Leet v. Leet* (2002), 25 R.F.L. (5th) 302 (N.B.Q.B.) and *Graves v. Graves* (2001), 20 R.F.L. (5th) (B.S.S.C.) for recent examples of cases denying entitlement based solely upon income disparity, without basic need. There are also some cases in which entitlement has been denied even when the claimant has basic need. In some cases conduct appears to be an unspoken factor, in others a concern to maximize resources for children in the payor's custody. For a review of cases see Rogerson, *supra* note 4.

¹³ *Keller v. Black*, [2000] O.J. No. 79, 182 D.L.R. (4th) 690 (S.C.J.).

whenever there remains a significant disparity in the post-divorce economic circumstances of the parties.

Most strikingly, time-limited orders, which were once so common, have become relatively rare. The standard spousal support order is an order for indefinite duration. In many cases it is now contemplated that spousal support will be on a permanent basis, at least of a top-up variety. Even in those cases where an eventual termination of the obligation is contemplated—for example, because of improvements in the economic circumstances of the support recipient—the preference is for such termination to be accomplished by means of a subsequent variation application when circumstances change, or by means of an order for review of spousal support at the time when such a change might be likely, rather than through a time-limit. Where re-training and re-integration into the labour force are contemplated, the time periods now being allowed for the attainment of self-sufficiency are increasingly generous. Post-*Moge*, courts are hesitant to make findings that a spouse has failed to make reasonable efforts to attain self-sufficiency.

Indefinite orders and review orders allow many difficult issues related to duration—such as determination of the income level at which a spouse will be understood to have become “self-sufficient” or to no longer be in “need”—to simply be put off until another day, for determination by another judge. In many ways, uncertainty about duration is tied to uncertainty about quantum. In the absence of a clear sense of what income level former spouses should end up at, there is no benchmark to determine when support is no longer needed. And in the other direction, uncertainty about duration has had an impact on quantum. Given a reluctance to impose stringent duration limits, we often see orders for modest amounts stretched out over indefinite periods, rather than more generous orders for shorter periods of time.

Time-limited orders are now generally confined to exceptional cases where the entitlement to support is clearly perceived to be of a limited and defined nature. They are used most often in very short marriages. However, post-*Bracklow* some judges (still a minority) have also started using time-limited orders to deal with “pure” non-compensatory support claims. In these cases, time limits reflect a particular understanding of non-compensatory support as a limited, transitional obligation, despite on-going disparities in income or even the on-going existence of basic and compelling need.

E. Quantum is the “Wildcard”, but Some Patterns are Emerging

Given an expansive basis for entitlement and a general reluctance to impose rigid durational limits in cases involving significant post-divorce income disparities, most of the serious issues in spousal support come down to issues of quantum. And, not surprisingly, this is where most of the uncertainty in the current law exists. A sense of guiding principles is necessary to determine quantum, and it is thus here that the current lack of clarity with respect to the basis of the support obligation becomes apparent. There is by and large little discussion of the principles being used to determine quantum.

Widely divergent, and often unarticulated, understandings of the purpose of the spousal support obligation determine how the amorphous concept of “need” is understood and thus what amount of spousal support is required to satisfy that need.

There are few discernible patterns with respect to quantum. Even in the most compelling cases for spousal support—very lengthy traditional marriages—one cannot find in the current case law any *widespread* acceptance of a principle of income-equalization. While there is now the occasional reference to a principle of income equalization (more often than not in Ontario),¹⁴ the most generous standard is typically expressed as a principle of rough equivalency of standards of living. Equivalent standards of living rarely translates, in practice, into equalization of income. And many courts even refuse to adhere to that principle, preferring to apply a standard of meeting “reasonable” needs as demonstrated in a budget.¹⁵ Prior research has shown that, in general, in cases of long marriages where there are no longer dependent children former wives are left with gross incomes (taking into account payment of support and their own earnings) that are between 55 and 65 percent of their husband’s incomes (after deduction of support).¹⁶

Outside the range of the “easiest” cases of long marriages with significant income disparities, there are even fewer patterns or principles with respect to quantum. However, there have been some interesting developments in a subset of cases where claims for spousal support are combined with child support claims. These cases show courts adopting a quasi-formulaic approach to assessing spousal support, and moreover an approach which explicitly draws on concepts of income equalization. The methodology used in these cases, which involves a comparison of net disposable household incomes, relies upon computer-generated calculations using programs developed to assist in the calculation of child support under the Guidelines.

In a number of cases involving spousal support claims where there are dependent children, courts have begun to award spousal support in an amount that, when combined with child support and the custodial parent’s earnings, will result in an equalization of net household incomes.¹⁷ Professor Thompson has called this the “weak” version of equalization.¹⁸ The Ontario Court of Appeal decision in *Andrews v. Andrews*¹⁹ (and its subsequent decision in *Adams v. Adams*²⁰) adopt a “stronger” version of equalization. In

¹⁴ For a recent example see *Grant v. Grant* (2001), 22 R.F.L. (5th) 294 (Ont. S.C.J.).

¹⁵ For a recent case clearly rejecting any principle of equalization see *Cook v. Cook* (2002), 27 R.F.L. (5th) 12 (N.S.S.C.).

¹⁶ See Rogerson, *supra* note 4.

¹⁷ The Ontario case law is reviewed extensively in Rogerson, *supra* note 4. For a recent decision from outside of Ontario adopting this approach see *Weisner v. Weisner*, 2002 CarswellAlta 1213.

¹⁸ See Thompson, *supra* note 4.

¹⁹ *Andrews v. Andrews* (1999), 50 R.F.L. (4th) 1 (Ont. C.A.).

²⁰ *Adams v. Adams* (2001), 15 R.F.L. (5th) 1 (Ont. C.A.).

both cases the court endorsed a methodology for assessing spousal support which would provide the wife, when combined with child support and her earnings, with 60 per cent of the parties' net disposable income and the husband with 40 per cent. *Andrews* goes beyond equalization of income and generates results that leave more than half the income in the household of the custodial parent. The principle informing *Andrews* is somewhat unclear. On the surface the decision appears to involve a complete “bundling” of child and spousal support, and a global allocation of 60% of net income to the residential parent. One might read the case as reflecting a principle of equalization of household standard of living (which takes into account the number of people living in each household and hence the greater needs in the custodial parent's household). But equalization of standards of living is not actually being achieved under *Andrews*—the results are simply coming closer to that than would a simple 50/50 division of income. It is unclear how one would justify a 60/40 income split on a principled basis. A better explanation of the *Andrews* result is that it reflects the operation of a principle, as between the spouses, of a 50/50 division of any income which remains after the payment of child support.²¹

Even the “weak” version of equalization is not widely adopted as a method of calculating spousal support in cases where there are dependent children, and the *Andrews* approach is even rarer—being confined largely to Ontario, and even within Ontario to a range of higher-earner cases. Neither version of equalization reflects a dominant trend in the case law, but these cases suggest interesting possibilities for the future development of the law. These cases offer the clearest example in the current case law of courts gravitating towards a guideline approach to the calculation of spousal support. These cases also raise questions, which will be explored further in Part III below, about the basic theory of entitlement which informs them. Is it the presence of dependent children which is moving the law to adopt principles of equalization of income, or do these cases suggest an emerging norm of equalization applicable to a wider range of spousal support cases?

F. Rebuilding the Law: Next Steps

The framework for spousal support that has emerged post-*Bracklow*—one of conceptual confusion that emphasizes multiple bases for spousal support and encourages a large element of discretion in shaping spousal support award—has created significant uncertainty and unpredictability. Spousal support awards reflect the incredible variation generated by differing subjective perceptions of fair outcomes on the part of judges (in cases where spousal support is litigated) and individual lawyers (in cases of negotiated agreements). For every decided spousal support case, one can find another decision in which similar facts resulted in a very different spousal support award. It is this

²¹ See Thompson, *supra* note 4 and Professor Jay McLeod's annotation to the decision at 50 R.F.L. (4th) 1. On Linda Silver Dranoff's calculations, *Andrews* gave the wife 39% of the income that remained after child support, rather than 50%. See Linda Silver Dranoff, “Is there an evolving Spousal Support Formula? And does Need matter?” *The Six-Minute Lawyer*, Law Society of Upper Canada, Dec. 3, 2001.

uncertainty which creates the current support for guidelines and the structure they can bring to a difficult and confused area of law.

However, while there is much uncertainty in the law, some general contours have also been established which might actually facilitate the implementation of a guideline approach. The increasing dominance of a “needs and means” analysis, although a source of much of the uncertainty in the current law, also creates fertile territory for the implementation of guideline-based schemes of income-sharing. An expansive basis for entitlement and a reluctance to impose rigid durational limits have meant that quantum—the issue which guidelines are best able to handle—has become the main issue in spousal support. As might be expected, over time certain some patterns can be discerned in the law, particularly with respect to certain kinds of marriages. Some of the patterns are generally shared across the country, some are more a reflection of local legal and social cultures. Decisions such as *Andrews* show that there are already some attempts within the current system to craft quasi-formulaic approaches to the calculation of spousal support. The emerging patterns in the law will constitute important “building blocks” in any project of trying to develop informal guidelines “from the ground up.”

However, given that conceptual confusion has played such a large role in the fragmentation of the law of spousal, an important first step in the process of “rebuilding” is to go back to basics—back to theory. A review of the competing theories of spousal support will help us understand why the law has evolved in the way it has and assist in clarifying the basic principles which structure the spousal support obligation.

III. THEORIES OF SPOUSAL SUPPORT

An important starting point in any attempt to articulate spousal support guidelines is the identification and clarification of the basic theoretical principles which ground and structure the obligation. Guidelines then involve an attempt to craft practical and easily-administered rules to implement these theoretical principle; they are acknowledged to be “crude approximations” that will inevitably involve some sacrifice of theoretical purity in the interests of efficient dispute resolution.²²

This section of the paper attempts to identify the various theoretical bases which have been put forward to justify the spousal support obligation and the possibilities each offers for the development of guidelines. The focus here will largely be on ideas about the purpose of the spousal support obligation articulated in the burgeoning academic literature on the subject, but it will be readily apparent that the various theories are all reflected, to varying degrees, in the evolving law of spousal support in Canada. While many of the theories of spousal support are presented, at least in the academic literature, as exclusive, in practice multiple theories often operate together. As well, very different

²² In a passage cited by Justice L’Heureux-Dubé in *Moge*, Ira Ellman argued that “Even crude approximations of theoretically defensible criteria are probably better than intuitive estimates of what is “fair” under a system lacking established principles of “fairness” in the first place.” (“The Theory of Alimony” (1989), 77 Calif. L. Rev. 3 at 99)

theories can often lead to similar methodologies for the determination of spousal support outcomes.

It should be kept in mind in reading this section of the paper that the goal in presenting these theories is not to restructure our law of spousal support around a new theory or to force consensus on one particular theory. This project is ultimately a practical one rather than theoretical one. Its goal is to attempt to identify emerging patterns in the current case law and develop a consensus on appropriate outcomes in particular kinds of cases. Part of that process does, however, involve identifying and clarifying the ideas that generate and justify particular support outcomes.

An established feature of our law of spousal support is its recognition of diverse theoretical bases for the spousal support obligation. This diversity has been encouraged in Canada by the multiple purposes for spousal support recognized in our legislation and the significance attached to this legislative choice in *Bracklow*. Any set of proposed guidelines built on the current law would therefore have to recognize the diverse bases for spousal support. However, as discussed above in Part II, we have now reached the unacceptable point, where there is little coherence to the conceptual structure of spousal support. This is a major source of the uncertainty that now pervades this area.

Any attempt to bring more certainty and predictability into the law will require at least some clarification of the basic, theoretical principles that justify and structure the support obligation and the ways in which these different principles might work together. The review of the different theories of spousal support which follows is directed as assisting in that process.

A. Traditional Spousal Support: Status and Fault; The Promise of a Pension for Life

The law of spousal support—or alimony as it was traditionally known—was once relatively straightforward. A wife, innocent of matrimonial fault, was entitled upon the breakdown of the marriage to support in an amount that would allow her to maintain the marital standard of living for the rest of her life, or until remarriage.

The conceptual foundation of this understanding of spousal support—sometimes labeled the “*pension for life*” model—was clear. The support obligation was clearly grounded in the *status* of marriage and was justified through a contractual analysis of the obligations taken on in marriage in which *fault* played a central role. Essentially, spousal support was a form of expectation damages for breach of contract. Marriage was understood to involve, on the husband’s part, a promise of life-long economic support to his wife. If he subsequently decided to abandon the relationship or was responsible for its breakdown through commission of a matrimonial offense, the “innocent” wife was able to claim what she had been promised by marriage—life-long economic security. The traditional law of spousal support involved a large component of “needs and means” analysis. Alimony was intended to provide for the wife’s economic needs; and in

principle, if not in practice,²³ “need” was to be assessed in the context of the marital relationship and the standard of living the wife had enjoyed during its course.

Given the relatively clear understanding of the basis of the support obligation which prevailed in the past, it is not surprising that early versions of what we might now call spousal support guidelines evolved to determine the quantum of support.²⁴ The so-called “one third rule,” which derived from the practice of ecclesiastical courts, was often applied in cases where the husband was the sole income earner, presumptively entitling the wife to spousal support fixed at one-third of the husband’s income. (In practice, the one-third rule often came to encompass both spousal and child support, thus setting an absolute ceiling well-below one half of a payor’s income.) In cases where both the husband and wife earned income, courts sometimes applied a formula under which spousal support was calculated so as to leave the wife, after combining spousal support and her own income, with two-fifths of the parties’ joint income. Other courts equalized the parties’ incomes. Spousal support was never completely fixed and determinate, but some presumptive rules evolved.

B. Modern Spousal Support: The Challenge of Finding New Theories

The introduction of no-fault divorce, which in Canada became available under the 1968 *Divorce Act*, eliminated the rationales of status and fault that sustained the traditional model of spousal support. A status-based support obligation assumes that marriage in and of itself entails a promise of life-long support, an assumption at odds with premise of the terminability of marriage on which no-fault divorce rests. And status was intertwined with fault, which was the linchpin of the traditional model.

With the disappearance of fault, an explanation of spousal support as an innocent wife’s expectation damages for her husband’s breach of his marital obligations was no longer sustainable.²⁵ To the extent that spousal support was understood as simply giving a spouse what he or she would have gotten had the marriage continued, the imposition of the obligation was rendered illegitimate. Absent a finding of wrongful breach of promise, why was one spouse required to use his or her “means” to meet the “needs” of the other post-divorce? Logically, either a new explanation had to be found to justify the obligation, or the obligation had to be eliminated.

²³ In practice, however, awards were often at a more modest level, reflecting more of a concern with basic provision and saving the public purse, rather than with fully protecting the wife’s expectation interest.

²⁴ This discussion of early spousal support formulas draws on summaries provided in the Alberta Law Reform Institute, *supra* note 7 at 69 and McCall, *supra* note 7 at 7-8.

²⁵ For an excellent discussion of the centrality of fault to expectation-based models of spousal support see June Carbone, “The Futility of Coherence: The ALI’s Principles of the Law of Family Dissolution, Compensatory Spousal Payments” (2002), 4 J. of Law and Family Studies 43.

The modern law of spousal support can be seen as a series of on-going responses to the theoretical challenge of justifying the imposition of a post-divorce support obligation between spouses in the context of modern family. The challenge has been to come up with new justifications for the imposition of a continuing spousal support obligation after divorce to replace explanations based on status and fault.

As the following review will show, it is not clear that status has been entirely eliminated from all of the new theories. Some of the more generous theories retain a significant status component. Fault has been eliminated, but elements of status have remained. But serious questions can be raised about whether status-based theories can be theoretically coherent and legitimate without the framework of fault. In the post-*Bracklow* case law one finds a tendency on the part of some judges and lawyers to assume that non-compensatory or “needs-based” support is essentially a revival of the traditional model of spousal support, where the obligation is founded on an expectation of life-long support that is triggered by the fact of marriage and having enjoyed a particular standard of living during the marriage.²⁶ The theoretical basis for such awards, absent a framework of fault which assigns responsibility for marriage breakdown, is dubious.

C. Rehabilitation, Self-Sufficiency and the “Clean Break”

The first response to the theoretical challenge of justifying spousal support in the new world of no-fault divorce is by now a very familiar one: the answer was that it was not possible, given the assumptions of no-fault divorce, to justify the imposition of extensive support obligations post-divorce. Spousal support was to be provided for a limited transitional period to allow spouses a period of time to “rehabilitate.” For unemployed spouses, spousal support would provide a period of time in which they could acquire or upgrade skills to enable them to seek employment and become self-sufficient. In other situations, where no change in a spouse’s earning capacity was contemplated post-divorce, spousal support would provide a period of time for lower-earner spouses to reorganize their lives and “gear down” their standard of living. Under these rehabilitative and transitional theories, the purpose of spousal support was to facilitate spousal self-sufficiency and to encourage a “clean break” between the spouses as quickly as possible.

On these theories, a former spouse’s “needs” were, after a period of transition, to be satisfied by his or her own income, or barring that, the state. The Law Reform Commission of Canada’s very influential 1975 Working Paper on Maintenance²⁷ placed

²⁶ See for example, *Tyerman v. Tyerman*, [1999] B.C.J. No. 2327 (S.C.) in which the parties had been married for only two years. The wife was 61 at time of marriage and husband 71. The wife had operated a hair-dressing salon prior to marriage, but ceased after marriage because the husband was adamant that she no longer work. The wife was unable to work after separation and the husband was ordered to pay support of \$1,325 per month until his death. The court found that the marriage was entered into on the basis that wife’s sole source of financial support would be from husband, with that support to continue for rest of wife’s life. Although it is possible to justify the award in *Tyerman* on compensatory grounds, given that the wife gave up her employment because of the marriage in circumstances where she could never regain it, the actual analysis in the case is based on fulfilling the wife’s expectation interest. See also the cases discussed below under the heading “Basic Social Obligation and Income Security.”

considerable emphasis on the rehabilitative and transitional nature of the spousal support obligation. In 1987 the Supreme Court of Canada's *Pelech* trilogy²⁸ further encouraged wide-spread reliance upon such concepts.

It is possible to imagine a rehabilitative model of spousal support under which awards would be based upon a highly individualized assessment of the amount and duration of support that would be required for the training and integration into the workforce of a particular spouse based on his or her individual capacities. On-going support could also be contemplated where rehabilitation was not possible. In practice, however, the rehabilitative model of spousal support collapsed into a "clean break" model of spousal support characterized by the predominance of time-limited orders and relatively stringent ceilings on quantum. Support was provided for what often appeared to be arbitrarily defined periods of three or five years. Whatever its failings on the fairness front, the clean break model did have an element of predictability and certainty—support was limited, both in terms of duration and quantum, by ideas of spousal self-sufficiency.

Spurred in part by growing evidence of the severe decline in the economic circumstances of women and children after marriage breakdown, the clean break model came under increasing criticism for its unfair treatment of former spouses. Numerous alternative theories, reviewed below, have been put forward to justify a more extensive spousal support obligation. In practice, while transitional or rehabilitative support is no longer the exclusive basis for an award of spousal support, these ideas have not disappeared from the law and still continue to inform spousal support awards in certain circumstances. As alternative theories generate more extensive support obligations, they continue to struggle with the issue of how to maintain incentives for spouses to realize their post-divorce earning capacity. As will be shown in the review below, some of the alternative theories that have been proposed in place of the clean break theory are essentially schemes of transition payments. However, the payments proposed under these newer transitional theories are more generous and more responsive to the length of the marriage than those generated under the clean break model.

D. Compensation for Economic Loss; Forgone Careers and Loss of Opportunity

Compensatory theories have loomed very large in modern attempts to justify the spousal support obligation. These theories, of which Ira Ellman's "The Theory of

²⁷ Law Reform Commission of Canada, *Maintenance on Divorce: Working Paper 12* (Ottawa: Information Canada, 1975). It is somewhat difficult to slot the Commission's recommendations into a theoretical pigeon-hole. While much of the emphasis in the paper is on the rehabilitative and transitional aspect of spousal support, the working paper also places primary emphasis on the notion of spousal support as a response to "needs created by the marriage," a concept which can also be linked to compensatory theories, discussed below. The working paper also recognized that there would be some situations, following a long marriage, where self-sufficiency would not be possible and permanent support would be in order.

²⁸ Consisting of *Pelech v. Pelech*, [1987] 1 S.C.R. 801, *Richardson v. Richardson*, [1987] 1 S.C.R. 857 and *Caron v. Caron*, [1987] 1 S.C.R. 892.

Alimony” is the best-known example,²⁹ draw heavily on economic theory³⁰ to suggest that imposition of a post-divorce support obligation can be justified by the need to compensate a spouse for earning capacity or “human capital” losses arising as a result of the roles adopted during the marriage.³¹ Although the various compensatory theories differ in their details, the central principle is one of compensation for economic loss. Under such theories the marital standard of living or the other spouse’s income is, in principle, irrelevant. The benchmark for assessing spousal support is the earning capacity the spouse would currently have in the paid labour market had he or she not married.

Under compensatory theories, which have an element of “causal connection” built into them, spousal support will not be available in all marriages to respond to post-divorce economic need; rather, it will only be available in cases where an earning capacity loss traceable to the marriage can be established. While offering a fairly restrictive basis for spousal support awards, such theories have the potential to support fairly generous awards in cases where there have been significant losses of earning capacity because of lengthy periods of work-force interruption—certainly more generous awards than those under a strict clean break approach.

In terms of our evolving law of spousal support, compensatory theories have clearly had a significant impact. The Law Reform Commission of Canada’s 1975 working paper on maintenance³² gave indirect support to the compensatory principle in its articulation of the idea that the right to spousal support flows not from the fact of marriage but from a division of functions within the marriage which has had the effect of hampering the ability of a spouse to provide for himself or herself. More direct and explicit endorsement of the compensatory principle came with *Moge*, where the Court actually drew upon the emerging academic literature supporting compensatory theories.

The compensatory principle, as articulated in *Moge*, was admittedly an extremely broad one—at its broadest a principle requiring the equitable distribution between the spouses of the economic consequences of the marriage and its breakdown. This principle could be (and over time has been) interpreted in many different ways in light of many different theories of spousal support. However, at the core of the judgment was a concern

²⁹ Ira Ellman, “The Theory of Alimony” (1989), 77 Calif. L. Rev. 3, reprinted in Canada at (1989), 5 Can. Fam. L. Q 1. Ellman provides further elaboration on his theory in a subsequent article, “Should the Theory of Alimony Include Nonfinancial Losses and Motivations?” [1991] B.Y.U. L. Rev. 259. Another proponent of the compensatory theory is Allan Parkham, *No Fault Divorce: What Went Wrong?* (Boulder, Col: Westview Press, 1992).

³⁰ Many of the compensatory theories are grounded in concerns about economic efficiency and creating incentives for sharing behavior in families that will maximize marital gains.

³¹ Under Ellman’s theory, earning capacity loss claims would be confined to cases either where the earning capacity loss was incurred to further the economic advancement of the other spouse, such as a move to facilitate one spouse’s career, or where it resulted from child care responsibilities. Earning capacity losses incurred for lifestyle reasons would not give rise to claims.

³² *Supra* note 27.

with providing compensation for loss of economic opportunity as a result of roles adopted in the marriage, particularly roles with respect to the past and on-going care of children which had resulted in one spouse's greater sacrifice of labour force participation.

Compensatory theories have attracted substantial support as offering a sound, theoretical justification for a post-divorce spousal support obligation within the structure of modern family law.³³ They have, however, run into problems on both practical and theoretical fronts. These problems manifested themselves in the post-*Moge* case law and paved the way for the subsequent restructuring of the spousal support framework in *Bracklow* so as to encompass alternative theories under the label of non-compensatory support.

On the practical front, compensatory theories are difficult to implement. Establishing a support claim requires individualized evidence of earning capacity loss. This can be costly to the extent it requires expert evidence. Evidence of earning capacity loss can also be difficult to obtain, particularly in cases of long marriages where the spouse claiming spousal support had no established "career" before assuming the role of homemaker.³⁴ Estimates of earning capacity loss thus become very hypothetical. Difficult factual issues of causation can also be raised: Why did a spouse remain out of the labour force or choose lowly-paid employment? Was it because of personal choices and interests, or because of the marriage? And of what choices that were shaped by societal expectations?

Not surprisingly, in the post-*Moge* case law judges responded to these "implementation" problems by developing proxy measures of economic loss. "Need" became a convenient proxy measure of economic disadvantage, such that a spouse in economic need was presumed to be suffering economic disadvantage as a result of the marriage; and conversely a spouse not in need was presumed not to have suffered any economic disadvantage as a result of the marriage. And, at least in longer marriages, need was measured against the marital standard of living. The goal of spousal support was to provide the support claimant, when combined with what she might reasonably be expected to earn, a "reasonable" standard of living judged in light of the marital standard of living.³⁵ Thus the compensatory model of spousal support started to collapse into

³³ See Carbone, *supra* note 25.

³⁴ In his original article, *supra* note 29, Ellman acknowledged the difficulties of implementing the compensatory principle and talked about reliance on proxy measures of loss based on statistical evidence of average outcomes in such cases. He recognized that in the end precision is not obtainable and that the determination of alimony claims will rest upon the rough justice of trial judge discretion. But he asserted, in the passage cited at note 22, *supra*, that we are better off knowing the principle and what we should be doing, even if cannot do it perfectly. As will be discussed further below, as chief reporter for the ALI project on the Principles of Family Dissolution, Ellman endorsed a proxy measure for loss that arguably involves significant compromises of principle—a measure based on income disparity between the spouses at the point of marriage breakdown.

³⁵ In some cases the principle for long marriages has been expressed as providing similar lifestyles for each of the spouses. The use of need and standard of living as proxy measures for loss of opportunity is

something that resembled a more traditional support model where the governing concepts were need and standard of living.

The ALI proposals, which will be discussed in more detail in Part IV, below, also illustrate a resort to proxy measures for earning capacity loss by primary care-givers that appears to be at odds with the basic premises of the compensatory theory. In the case of the ALI, the choice was made to measure loss of earning capacity by the disparity in spousal incomes at the end of the marriage, thus making the income of the payor the measure of economic loss. The explanation offered by the ALI drafters is the somewhat contestable assumption that people tend to choose spouses of similar economic status.^{35a} Income-sharing, a methodology whereby spousal support is determined as a percentage of the difference in spousal incomes, was thus chosen as a practical mechanism to implement the compensatory principle.

The emergence of proxy measures for economic loss which focus on the marital standard of living and the payor's income can be explained as crude compromises driven by the practical need to sacrifice theoretical purity in the achievement of workable principles. However, the gap between the proxy measures and the compensatory theory also suggests that other theories of spousal support may actually be operating. While some have identified implementation problems as the major weakness of the compensatory theory, others have found it wanting on theoretical front, generating an array of alternative theories that are grouped below under the broad label of income-sharing theories.

E. Income-Sharing Theories

On the theoretical front, the early compensatory theories, grounded in the loss of opportunity principle, have been criticized as being based on a distorted and inadequate conception of the marital relationship, one which is unduly individualistic and market-based.³⁶ New theories of spousal support have emerged which emphasize the relational aspect of marriage and the merger of economic (and non-economic) lives that marriage involves. While these theories vary in their details and their basic justificatory principles, they all rest to some degree on a view of marriage as a community or partnership informed by norms of trust and sharing. Marital incomes are understood as being, for one reason or another, joint incomes and the spouses are understood to be entitled to share those incomes for some period of time after marriage breakdown.

discussed by Bastarache J. A. (as he then was) in *Ross v. Ross* (1995), 16 R.F.L. (4th) 1 (N.B.C.A.) where he stated (at 7):

“It is in cases where it is not possible to determine the extent of the economic loss of the disadvantaged spouse that the Court will consider need and standard of living as the primary criteria, together with the ability to pay of the other spouse.”

^{35a} The gist of this assumption is that the wife, had she not assumed primary responsibility for child-rearing, would likely have had the same income as the husband.

³⁶ See Jana Singer, “Alimony and Efficiency: The Gendered Costs and Benefits of the Economic Justifications for Alimony” (1994), 82 *Georgetown Law Journal* 2423.

Generically, these theories may be called “income-sharing” theories, for they focus directly on spouses’ post-divorce incomes, generating an obligation on the higher-income spouse to transfer a portion of his or her income to the lower-income spouse. These theories, as compared to theories directed at compensation for economic loss, more easily generate formulaic rules for post-divorce income sharing, with length of marriage often being a crucial factor in determining the extent of the sharing. Under these theories, income-sharing is justifiable as a matter of principle, not simply as a methodology which serves as a very crude proxy measure for something else (i.e. economic loss). Some of the different variants of income-sharing theories will be reviewed in more detail below.

While the concerns with a principle of compensation for economic loss were perhaps not articulated with the same precision as in the academic literature, the post-*Moge* case law reveals, at least indirectly, the operation of many of these theories. Initially dissatisfaction with a strict economic loss approach manifested itself in reconfigurations of the *Moge* compensatory principle to provide a broader basis for the support obligation. Courts began to stretch the compensatory principle to include the idea of compensation for economic advantages conferred by marriage, as well as the idea of compensation for the economic consequences of the marriage breakdown (i.e. loss of access to the other spouse’s income and drop in standard of living). In *Bracklow*, however, the Supreme Court of Canada responded by explicitly recognizing an alternative basis for spousal support—non-compensatory support based on “need alone”.

Given some of the limitations of a narrow compensatory theory based on economic loss, it was not surprising to see some expansion of the basis for spousal support. However, the basis of *Bracklow*’s non-compensatory support is conceptually confused. The *Bracklow* judgment, which did not draw on any of the academic literature articulating alternative theories of spousal support, failed to articulate a coherent theoretical basis for non-compensatory support, giving rise to widely differing interpretations by judges and lawyers. Some of the newer income-sharing theories reviewed below offer possibilities for developing a more principled approach to thinking about non-compensatory support—in particular the theory of “merger over time”.

(a) Income Sharing Model I: sharing of marital gains; compensation for contributions and advantages; marital partnership

Some versions of income-sharing are still broadly compensatory in orientation, in that they retain a focus on the economic aspects of the marital relationship. In particular, they remain concerned with the economic implications of the gendered division of labour within the family, and are directed to providing compensation for that. But these income-sharing theories reject the individualized calculation of the wife’s loss of earning capacity as an appropriate way to measure or assess the value of her non-financial contributions to the marriage. Rather, these theories draw upon an understanding of marriage as a partnership to which the spouses contribute their joint efforts, entitling them upon breakdown to share equally the profits of the marriage.

This concept of partnership is utilized to justify compensating the wife for her contributions to the marriage through an on-going share of the earning capacity or human capital her husband acquired during the marriage. On this view, the wife's loss of earning capacity is related to the husband's ability to retain and develop his earning capacity. Post-divorce income is understood to involve returns on joint efforts within the marriage, thus justifying sharing. Under these income-sharing theories, which focus on enhancements of human capital, *contribution* replaces *loss* as the primary principle justifying spousal support. Spousal support is thus, like matrimonial property, an earned entitlement; a reward for marital labours. The challenge under such theories is to determine what portion of post-divorce income is attributable to marital efforts, with many relying upon length of marriage as a central factor.

One example of an income-sharing proposal based on sharing marital investments in human capital is that of Jana Singer, who offered an "equal partnership" model of spousal support that would require full income sharing (i.e. income equalization) on a formula of one year of sharing for every two years of marriage.³⁷ Other theories with a similar focus on sharing the product of marital joint efforts have attempted to more precisely identify the gains in spousal earning capacity or human capital during the marriage, with formulas then being developed to share such gains based on the length of the marriage.³⁸

Existing case law certainly offers examples of courts using spousal support to compensate one spouse for contributions to the other spouse's earning capacity. However claims for "reimbursement" support grounded in restitutionary principles have typically only been recognized in cases where one spouse has made a very "direct" contribution, either of labour or money, to the career enhancement of the other spouse. The most common context in which such claims arise is that where one spouse has funded the other's education and received no "return on the investment" because of a marriage breakdown shortly after graduation.^{38a} In cases where the spousal contributions in issue are those of child-care and home-making, the wife's contributions have typically been analyzed in terms of her loss rather than her husband's gain.

³⁷ Jana Singer, "Divorce Reform and Gender Justice" (1989), 67 N.C. L. Rev. 1103; also Singer *ibid.*

³⁸ See for example, Cynthia Starnes, "Divorce, and the Displaced Homemaker: A Discourse on Playing with Dolls, Partnership Buyouts, and Dissociation Under No-Fault" (1993), 60 U. Chic. L. Rev. 67. Starnes does not focus on income equalization, but rather on identifying increases in income over the course of the marriage and dividing the difference according to a sliding scale based on the number of years married. See also Robert Kirkman Collins, "The Theory of Alimony Residuals: Applying an Income Adjustment Calculus to the Enigma of Alimony" (2001), 24 Harv. Women's L.J. 23. Collins adopts a principle of "the equitable sharing of the residual economic benefits from work done during marriage" and proposes a scheme of post-divorce income sharing declining from 50% to zero over five equal periods pegged to the length of the marriage. He also recognizes as a beneficial side-effect of his theory that it would result in equal absorption of the economic shock of the separation. This suggests an alternative set of concerns with reliance and transition, rather than with compensation for work done during marriage.

^{38a} See for example, *Caratun v. Caratun* (1993), 42 R.F.L. (3d) 113 (Ont. C.A.).

However, there are some recent decisions which have adopted a broader “marital partnership” approach to valuing a wife’s non-financial contributions to the marriage, particularly the assumption of a disproportionate share of child-rearing responsibilities. In these cases, of which a good example is the Ontario case of *Marinangeli*,³⁹ the wife’s assumption of responsibility for child-rearing is seen as having provided the husband with the freedom to devote himself to work while being able to enjoy the benefits of children. In these cases, courts have begun to emphasize the economic “advantages” the husband has acquired through the marriage. They have thus justified awarding the wife a portion of his post-divorce earnings on the basis that she has contributed to his earning capacity—even if she is earning what she might have earned apart from the marriage. In *Marinangeli*, for example, this idea of “compensation for advantages” was used to justify an increase in spousal support to allow the wife to share the increase in the husband’s post-divorce income.

While the idea of “compensation for contributions” or “compensation for advantages conferred” may provide an appropriate justification for spousal support in certain fact situations—and one can debate which—it is difficult to use this idea to sustain broad-based schemes of income-sharing that apply to all marriages. In some cases it will simply be difficult to argue, factually, that the higher-income spouse experienced any economic “gains” as a result of the marriage or that his or her earning capacity at the end of the marriage was affected in any significant way by contributions made by the other spouse. Other justifications for broad-based schemes of income-sharing are thus required.

(b) Income Sharing Model II: recognizing marital interdependency, transition payments, marriage as a community, merger over time

In other versions of income-sharing, the justification for sharing does not rest exclusively on the gains and losses in human capital during marriage. Instead the rationale for sharing is the interdependency or merger of lives that takes place during marriage. This might include pooling of efforts and sharing of gains, but also involves significant elements of expectation, reliance, obligation and responsibility. Periods of income sharing are thus provided to recognize the difficulty of unraveling intertwined

³⁹ *Marinangeli v. Marinangeli* (2001), 16 R.F.L. (5th) 326 (Ont. S.C.J.), now on appeal to the Ontario Court of Appeal. At issue in *Marinangeli* was the wife’s entitlement to an increase in spousal support based on a post-divorce increase in the husband’s income. The trial judge ruled that she was so entitled because she had contributed to his earning capacity by caring for the children during the marriage, thus freeing him to work. For other examples see *Waterman v. Waterman* (1996), 16 R.F.L. (4th) 10 (Nfld. C.A.) in which the Court re-conceptualized compensatory support as a form of sharing a marital asset (i.e. income) rather than as compensation for loss. For other recent cases where the spousal support analysis has recognized the wife’s contribution to the husband’s financial success through assumption of responsibility for the home and child care see *Merritt v. Merritt*, [1999] O.J. No. 1732 (S.C.J.); *Schmuck v. Reynolds Schmuck* (1999), 50 R.F.L.(4th) 429 (Ont. S.C.J.); *Lyttle v. Bourget*, [1999] N.S.J. No. 298 (S.C.); and *Weir v. Weir* (2000), 11 R.F.L. (5th) 233 (B.C.S.C.).

lives, with the extent of sharing typical increasing with the length of the marriage. Two different ideas dominate these theories—that of “transition payments” and that of “merger over time”. Each will be described in turn.

(i) *Transition Payments*

Many of these income-sharing theories essentially conceptualize spousal support as a set of “transition payments,” but of a much more generous nature than provided under clean-break theories of spousal support. Many of them generate guidelines which mandate periods of income equalization related to the length of the marriage, while in some cases the quantum of the payments (i.e., the percentage of income shared) is also influenced by the length of the marriage.

Jane Ellis put forward an early proposal for what she explicitly labeled “transition payments” which would provide an initial period of income equalization (for example one year for each five years of marriage) followed by a sharing of declining percentages of income down to zero over the remaining period of time to a maximum of one-half the duration of the marriage.⁴⁰

One of the two models for income sharing subsequently proposed by Stephen Sugarman⁴¹ was based on a concept of “fair notice” (the other—the “merger over time” model—will be discussed below). The “fair notice” model provided for equal sharing of income for a period of time proportionate to the length of the marriage, for example one year of sharing for every two years of marriage.

More recently, Milton Regan has built a justification for spousal support on a vision of marriage as a community involving a shared life identified by norms of collective welfare and obligation rather than self-interest. He envisions spousal support as providing a cushion for the transition from the marital community to a single individual—the longer the marriage the longer the transition period. Specifically, he proposes a model of post-divorce income-sharing that would involve income equalization for a period of time equivalent to the length of the marriage.⁴²

(ii) *Merger over Time*

⁴⁰ Jane Ellis, “New Rules for Divorce: Transition Payments” (1993-94), 32 U. of Louisville J. of Fam. L 601. She writes, for example, that a ten year marriage would have two years of equal sharing, followed by three years in which the sharing went from 50% to zero. She suggests that a table with multipliers could be developed so that the amounts could be computed quickly and easily without professional help.

⁴¹ Stephen D. Sugarman, “Dividing Financial Interests Upon Divorce” in *Divorce Reform at the Crossroads*, Stephen D. Sugarman and Herma Hill Kay, eds. (New Haven: Yale University Press, 1990).

⁴² Milton C. Regan, Jr., *Family Law and the Pursuit of Intimacy* (New York and London: New York University Press, 1993) and *Alone Together: Law and the Meanings of Marriage* (New York: Oxford University Press, 1999). His proposal is therefore similar to that of Singer, *supra* note 37, although justified in a different way.

Stephen Sugarman's second model of income sharing, which is based on the idea of what he calls "merger over time,"⁴³ differs from the "transition payments" models described above in that it is not structured around limits on duration, but rather around limits on quantum. His "merger over time" model would provide for *indefinite* sharing of post-divorce income, but with the percentage related to the length of the marriage. He suggests, by way of example, that each spouse might gain a 1.5 percent or 2 percent interest in the other spouse's human capital/future earnings for each year of marriage, with a possible ceiling of 40 per cent or 20 years. This model of income-sharing is based on the idea that the human capital of spouses merges over time—that over time their human capital becomes intertwined rather than being affixed to a particular individual. In part the "merger over time" theory is based on the idea of joint spousal contributions to human capital. But it also involves recognition of interdependency and the kind of merger of economic lives that takes place over time whereby spouses stop thinking of their human capital as their own, and whereby a dependent spouse "submerges her or his independent identity and earning capacity into the marital collective."⁴⁴

Sugarman's "merger over time" theory of income-sharing has been influential in the American context where, as will be seen in Part IV, it has played a central role in structuring the ALI's proposed guidelines and the guidelines subsequently adopted in Maricopa County, Arizona. In both cases, a central feature, derived from Sugarman's work, is the so-called "durational factor" which relates the percentage of income shared to the length of the marriage.

(iii) *Bracklow and Income-Sharing Theories*

While no explicit reference was made in *Bracklow* to any of the theoretical literature offering alternatives to the compensatory model, some of the language of "interdependency" used to describe the rationale for non-compensatory support⁴⁵ is suggestive of either the "merger over time" or "transition payments" models described above. These theories may offer possibilities for a principled way in which to understand and structure non-compensatory support obligations. Certainly some of the post-*Bracklow* case law on non-compensatory support can be seen as an indirect and at least partial reflection of these theories. Thus in some cases, including the re-trial of *Bracklow*

⁴³ *Supra* note 41.

⁴⁴ At 160.

⁴⁵ The obligation to pay non-compensatory support to meet a former spouse's needs is said, by the Court, not to flow from the fact of marriage, *per se*, but rather from how the spouses have organized their lives. Specifically, the obligation is said to arise from a pattern of economic *interdependence* which developed during the marriage. Marriage is seen, at para. 30, to create interdependencies which cannot easily be unraveled. Non-compensatory support is said, at para. 31, to recognize "the reality that when people cohabit over a period of time in a family relationship, their affairs may become intermingled and impossible to disentangle neatly."

itself,⁴⁶ courts have related the extent of the support obligation to the length of the marriage and have been willing to impose time limits on the obligation to pay non-compensatory support in cases of shorter and even medium-duration marriages. But the language used in *Bracklow* is ambiguous and confusing, suggesting an alternative view that non-compensatory support is grounded in “need alone” and a “basic social obligation” assumed in marriage. Furthermore, the Court refused to unequivocally endorse the use of length of marriage as a “proxy” for interdependency.

(c) Implications of income-sharing theories

Income-sharing theories, whether based on sharing enhancements of human capital or recognizing the interdependency that comes from the merger of lives over time, are clearly attractive in that they generate easily-administered rules for the determination of spousal support. From a theoretical perspective, however, their appropriateness remains a matter of debate. For some these theories more accurately capture the nature of the marital relationship and offer a fairer distribution of economic resources at its end than either the clean break or compensatory (economic loss) theories. The use of the length of the marriage to structure and limit the extent of the support obligation is seen as sufficient to distinguish these theories from the traditional, and now indefensible, model of spousal support that rests on the promise of life-long support flowing from the status of marriage itself.

For others, these income-sharing models entail the re-infusion of too large an element of status-based obligations into spousal support law. This is seen as inconsistent with modern family law’s recognition of the autonomy of spouses and the terminability of marriage. Income-sharing is seen as akin to the traditional model of spousal support, where obligations are based on the fact of marriage itself, but without the system of fault which was the linchpin of the traditional model. Those with such concerns tend to favour a more individualistic compensatory theory that would provide spousal support only in cases where the marriage and marital roles have resulted in an identifiable loss of earning capacity. The competing pulls of the compensatory and income-sharing theories of spousal support create a tension that pervades our current law.

F. Basic Social Obligation: the Income Security Model of Spousal Support

One idea about spousal support has received little support in the academic literature as a justifiable basis for spousal support, but it continues to operate as a justification in practice. This is the idea the families have a fundamental social responsibility to meet the basic income-security needs of their members. This idea has a long history in spousal support^{46a} and continues to exert its influence. On this “income-

⁴⁶ See *Bracklow v. Bracklow* (1999), 3 R.F.L. (5th) 179 in which, after an eight year relationship, a five-year time-limit was imposed on the support obligation despite Mrs. Bracklow’s on-going need. When interim support is taken into account, the length of the support period is roughly equivalent to the length of the relationship.

^{46a} Even in the fault-based era, where the principles of alimony would have suggested that a wife guilty of a matrimonial offense would be completely disentitled from spousal support, in practice public

security” or “basic social obligation” theory, spousal support is understood as an obligation to make provision for a former spouse’s basic needs and is clearly grounded in status—in obligations assumed upon marriage.^{46b} Under this model, there would be no time limits on support if a spouse is unable to meet basic needs, but the concept of basic need would limit quantum.

This justification for spousal support draws on public policy concerns about conserving public resources, requiring that the basic needs of former spouses be first satisfied through private sources of support. The family, rather than the state, is understood to have primary responsibility for meeting the basic income-security needs of its members. As well, in the context of the adjudication of individual cases, this theory inevitably draws on judicial sympathy for spouses in desperate financial circumstances and a recognition of the stigma attached to welfare and the meager levels of support provided by the state.

This “basic social obligation” justification for spousal support raises many difficult conceptual issues. If it is based on the idea of the primacy of the family as a source of income-security for individuals in need, it raises questions about the responsibility of other family members for support of persons in need—such as parents and adult children. As well, the theoretical grounding for this “income-security” theory of spousal support is shaky absent a framework of fault. This theory does not generate awards at the level of the traditional model of spousal support, which promised the marital standard of living. It is, nonetheless, a pure status-based obligation and theoretically vulnerable as such. It continues, however, to find support in the case law.

In *Moge* Justice L’Heureux-Dubé recognized that despite the predominance of compensatory objectives, some the language in the spousal support provisions of the *Divorce Act*, particularly the references to relief of “hardship.” “may embrace the notion that the primary burden of spousal support should fall on family members, *not* the state.”^{46c} *Bracklow* draws on this statement to justify recognition of a non-compensatory basis for support. Although there is language in *Bracklow* suggesting that non-compensatory support can be understood in light of income-sharing theories based on merger of lives over time, there is also language which strongly suggests the “basic social obligation” theory. Non-compensatory support is said to be based on “need alone” and is explicitly described as a “basic social obligation” assumed in marriage. The Court describes the “mutual obligation” model of marriage, on which non-compensatory support rests as

plac[ing] the primary burden of support for a needy partner who cannot attain post-marital self-sufficiency on the partners to the relationship, rather than on the state,

policy concerns prevailed to justify the awarding of some support to keep the wife from becoming a public charge.

^{46b} For a recent example of a case awarding spousal support on this basis see *Skoreyko v. Skoreyko* (2002), 28 R.F.L. (5th) 440 (B.C.S.C.) (both parties employed during 15 year childless marriage; wife loses sight after marriage breakdown; husband ordered to pay support).

^{46c} *Moge*, *supra* note 2 at 865.

recognizing the potential injustice of foisting a helpless former partner onto the public assistance roles.⁴⁷

G. Parental Partnership

A new variant of income-sharing proposals, which has been identified by June Carbone as the “second wave” of income-sharing,⁴⁸ is based on the obligations derived from parenthood rather than the marital relationship *per se*. These proposals, which might be labeled “parental partnership” theories, respond to the situation of younger women who divorce after shorter marriages with the care of children. The income-sharing theories reviewed above focus on obligations flowing from the marital relationship, and use the length of the relationship as a proxy measure of the extent of the merger of economic lives and hence of the extent of the obligation to share income post-divorce. As a result, they generate relatively limited spousal support obligations in cases of shorter marriages. The newer income-sharing proposals base income-sharing on the presence of minor children; the crucial determinant of the extent of income-sharing is not the length of the marriage, but the length of the child-rearing period, which includes the post-divorce period. The period of income-sharing could thus be much longer than the length of the marriage.

Under these income-sharing proposals, which focus on the presence of minor children, spousal support is justified because child support does not take into account the full costs of child-rearing. More specifically, two justifications are offered for spousal income-sharing when there are minor children. First, these proposals recognize that concerns with the impairment of earning capacity continue to be relevant in the post-divorce period. Spousal support is justified by the need to compensate custodial parents for the effect of on-going child-rearing efforts on their earning capacity.⁴⁹ However, many of these proposals also recognize a more direct obligation to children—the obligation of a parent to provide his or her children with a standard of living equivalent to his own. And these theories recognize that the children’s standard of living is a household standard of living determined in large part by the income of the custodial parent. Thus in these versions of income-sharing, the boundary between child support and spousal support becomes blurred, with both serving to sustain the standard of living of the custodial parent and children.

⁴⁷ At para. 31. See also *M. v. H.*, [1999] 2 S.C.R. 3 where, in the course of justifying the extension of the spousal support obligation to same-sex cohabiting couples, the Supreme Court of Canada recognized that one of the purposes of spousal support is to “alleviate the burden on the public purse” by shifting the obligation to provide support for needy persons to spouses.

⁴⁸ See June Carbone, “Income Sharing: Redefining the Family In Terms of Community” (1994), 31 *Houston L. Rev.* 359.

⁴⁹ For cases recognizing this rationale, which is reflected in s. 15.2(6)(c) of the *Divorce Act*, see *Brockie v. Brockie* (1987), 5 R.F.L. (3d) 440 (Man. Q.B.), aff’d (1987), 8 R.F.L. (3d) 302 (Man. C.A.), *Kennedy v. Kennedy* (1994), 98 B.C.L.R. (2d) 287 (B.C.S.C.), and *Weisner*, *supra* note 17.

Joan Williams' proposal for income-sharing reflects the concept of parental partnership. Drawing on a view of the "ideal worker's wage" as a family wage, she proposes an equalization of household standards of living for the duration of the children's dependence, and thereafter an equalization of income for one further year for every two years of marriage.⁵⁰ The principle of equalization Williams adopts while there are minor children present is notably not that of simple income equalization. Rather, the standard is equalization of household standards of living, which takes into account differences in the number of people in each household.

Reflections of the parental partnership theory may be found in decisions such as those of the Ontario Court of Appeal in *Andrews*⁵¹ and *Adams*,⁵² discussed above in Part II. In these decisions courts have endorsed awards of spousal support which, when combined with child support, result in a 60/40 split of net disposable household income in favour of the custodial parent. The principle in *Andrews*, however, is not as generous as the one advocated by Williams. It does not result in an equalization of household standards of living. At best the *Andrews* methodology involves an equalization between the spouses of whatever income remains after payment of child support.

This "second wave" of income-sharing theories, driven by a principle of sharing parental responsibilities, is even more controversial than the first wave. Many would argue that taking children's interests seriously does require equalization of household standards of living in cases where there are minor children. This is not, however, the understanding of parental financial obligation that informs our current law of child support. Income-sharing proposals based on notions of parental partnership are open to the criticism that they involve the use of spousal support to create a more expansive child support obligation. Indeed, the ALI proposals, which will be reviewed in Part IV below, deal with issues related to post-divorce child-rearing through a reconfiguration of the law of child support, rather than spousal support. Making distinctions between marriages with and without children in the context of claims for spousal support also raises concerns that

⁵⁰ Joan Williams, "Is Coverture Dead? Beyond a New Theory of Alimony" (1994), 82 *Georgetown Law Journal* 2227. For an earlier version of such a proposal see Jane Rutherford, "Duty in Divorce: Shared Income as a Path to Equality" (1990), *Fordham Law Rev.* 539 which proposed equal division of income on a per capita basis, with the sharing to be indefinite in duration. Division of income on a per capita basis would fail to take into account the cost savings from sharing of household costs. Both John Eekelaar and Mary Ann Glendon have long advocated a "children-first" principle which would govern the distribution of all financial resources upon marriage breakdown. Such a principle would make provision for the basic or average needs of children's *household* a first claim on all financial resources. What this "second wave" of income-sharing proposals does, by drawing on a norm of equalization of household standards of living, is to provide for more generous income-sharing than that proposed by Eekelaar or Glendon in cases where there are sufficient resources to go beyond meeting basic or average needs.

⁵¹ *Andrews*, *supra* note 19.

⁵² *Adams*, *supra* note 20.

the law is favouring women who are “breeders” and is failing to value other spousal roles and contributions.⁵³

Such proposals also entail a fairly radical shift in norms. Extensive, long-term obligations to a former spouse may be imposed even after a very short relationship if there are children, in order to recognize and support the former spouse’s on-going role as caregiver. On a practical level, long periods of post-divorce life lie ahead for each of the spouses in cases of shorter marriages with minor children, which will likely include re-partnering for one if not both of the spouses. To the extent that the support obligation in these models is directed at equalizing household standards of living, difficult questions will be raised about the impact on the support obligation of the reconfiguration of households through the addition both of new incomes and new financial obligations.

H. Drawing Together the Strands: Where Does the Theory Take Us?

Where does this review of theory take us in terms of the project at hand? Several important themes emerge from the review of theory:

- First, that theory is important. Some understandings of spousal support are inconsistent with the basic premises of modern family law, in particular the removal of fault as a relevant factor in the determination of spousal support. Conceptions of spousal support based on expectations or promises flowing from the fact of marriage are theoretically on shaky ground.
- Second, that compensatory theories have a tendency, in practice, to merge with income-sharing theories because of the need to develop proxy measures of loss. While there is a tension between compensatory and income-sharing theories, there is also a fair amount of overlap. Particularly in cases of longer marriages, compensatory and non-compensatory theories may generate similar results.
- Third, that there are many “income-sharing” theories that offer theoretically defensible possibilities for structuring *Bracklow*-style non-compensatory support, the basis for which is now extremely confused. Particularly promising is the “merger over time” theory. These income-sharing theories are not uncontentious; some see them as bringing too much of an element of “status” back into spousal support. But this does seem to be the direction in which our law has moved, so it seems best to accept this and try to structure income-sharing in theoretically appropriate ways.
- Fourth, that the “parental partnership” theories, the “second wave” of income-sharing theories, may offer a way of understanding the developments in our law represented by decisions such as *Andrews*, where one finds extensive spousal support obligations being imposed in cases where there are minor children. But this theory, as well, is not uncontentious. There is some tension between “first

⁵³ See Cynthia Lee Starnes, “Victims, Breeders, Joy, and Math: First Thoughts on the Compensatory Spousal Payments under the Principles” (2001), 8 *Duke Journal of Gender, Law and Policy* 137.

wave” and “second wave” theories of income-sharing, which hangs on the significance to be given to children, and in particular the on-going responsibility for the care of children after dissolution, as a crucial determinant of the extent of the spousal support obligation.

IV. MODELS FOR SPOUSAL SUPPORT GUIDELINES

This part of the paper moves from theory to practice. It examines existing attempts to craft workable spousal support guidelines. The focus will be on the American experience with spousal support guidelines. While in the end none of the American guidelines may, in their specific incarnations, be appropriate models for Canadian guidelines because of differences between American and Canadian understandings about the nature and role of spousal support, they may at the very least offer some general guidance on possible ways of structuring guidelines.

Of particular interest are the ALI proposals, given their thoughtful and comprehensive treatment of the issue. More complex than any of the other guidelines examined, the ALI proposals attempt to recognize diverse bases for the spousal support obligation and as well try to craft formulas that are more responsive than many other guidelines to factual variations in types of marriages. Specifically, one significant feature of ALI proposals is reliance upon what is called a “durational factor” that renders the quantum of awards sensitive to the length of the marriage. These are important features, given our recognition in Canada of multiple bases for spousal support and the concerns of critics that spousal support guidelines are too rigid and cannot adequately respond the diversity of fact situations. Given the importance of the ALI proposals, they receive an extended analysis.

One Canadian guideline, proposed by Linda Silver Dranoff and used by some lawyers in Ontario, will also be examined. The Dranoff formula is of interest because it is inspired by decisions such as *Andrews* and *Adams*, discussed in Part II above, which have no counterparts in American spousal support law or guidelines.

A. American Guidelines

While not widespread, spousal support guidelines have been adopted in some American jurisdictions, and in some cases have been in existence for more than a decade. The guidelines were typically developed on a local basis as a result of initiatives by bench and bar committees of local bar associations. They were thus intended to operate within the parameters established by state legislation governing spousal support, with the primary purpose of the guidelines being to set a framework for negotiation and discussion. More recently, the influential American Law Institute, as part of its ambitious project to rethink the principles of family dissolution, has endorsed a new set of principles for spousal support which include a significant formulaic component. Unlike earlier versions of American spousal support guidelines, the proposed ALI guidelines are best viewed not simply as a reflection of current practice, but as a more ambitious attempt to reshape the law and offer a blue-print for legislative reform.

In reviewing the American guidelines it will be important to keep in mind the context in which these guidelines were created, both to understand their structure and to assess their applicability in Canada. With the exception of the ALI proposals, the American guidelines are all reflections of current practice under existing legislative regimes. Although generalization is risky when you are talking about spousal support regimes in 50 different states, spousal support is a much more limited obligation in the United States than in Canada. Much state legislation and current practice was influenced, either directly or indirectly by the general principles articulated in the 1970 *Uniform Marriage and Divorce Act*,⁵⁴ which understood property division to be the main vehicle of financial redistribution upon divorce. Entitlement to spousal support was restricted to cases where a spouse lacked sufficient property to provide for his or her reasonable needs and was unable to support himself or herself through appropriate employment or was the custodian of a child whose condition or circumstances made it appropriate that the custodian not be required to seek employment outside the home. As well, even when eligibility for spousal support was established, the *UMDA* contemplated only transitional awards.

Some state legislatures which initially endorsed this “rehabilitative” or “clean break” model of spousal support have in recent years reformed their spousal support laws to allow for the possibility of permanent spousal support in marriages of long duration. However, the American law of spousal support still continues to place a fairly heavy emphasis on values of individualism and self-sufficiency after divorce. Spouses who are employed rarely obtain spousal support and durational limits on spousal support still have wide acceptance. Even the ALI proposals, which are an attempt to reshape and expand the law of spousal support, still reflect these values to some degree.

As a result of the contexts in which they were generated, many of the American guidelines actually play a relatively limited role in the over-all determination of spousal support. (The ALI proposals are an exception, offering a comprehensive blue-print for the reconfiguration of the law of spousal support.) In many cases the guidelines are not applicable until entitlement to support is first established, and the basis of entitlement is often fairly restrictive.

Some of the guidelines only govern applications for interim or temporary spousal support (in the American terminology, alimony “*pendente lite*”), the purpose of which is to create a “holding pattern” until a final determination of support can be made in the context of the divorce and property division. At that point the guidelines no longer necessarily dictate outcomes, and other considerations, such as the need to promote self-sufficiency, are allowed to come into play in determining issues of long-term support.

⁵⁴ Approved by the National Conference of Commissioners on Uniform State Laws in 1970 as a model act proposed for adoption by individual states. See discussion in Grace Ganz Blumberg, “The Financial Incidents of Family Dissolution” in Sanford N. Katz, John Eekelaar, and Mavis Maclean, eds., *Cross-Currents: Family Law and Policy in the United States and England* (Oxford: Oxford University Press, 2000).

Other guidelines, while intended to generate determinations of quantum for final orders, operate in conjunction with fairly stringent durational limits, including automatic termination of support upon remarriage. The durational limits are in many cases not found in the guidelines, which deal only with quantum, but are determined by means of judicial interpretation of the existing legislation. In some cases, however, and this seems particularly true of the more recently developed and more ambitious guidelines, the guidelines themselves also contain a formula for determining duration of the support obligation.

In Canada, given the way our spousal support law has evolved, it is questionable whether any scheme of spousal support guidelines relying either upon rigid durational limits or limited bases of entitlement would be acceptable. Perhaps the main lessons that can be taken from the American guidelines are with respect to their methodologies for determining quantum. There is a danger of distortion, however, in examining these determinations of quantum apart from the durational limits which operate in conjunction with them and determine the ultimate amount of spousal support being transferred,⁵⁵ and apart from the restrictions on entitlement which limit the number of cases in which the guidelines are applicable.

The striking structural feature of all of the American spousal support guidelines is the determination of the amount of spousal support to be paid to the lower income spouse by applying a percentage to the difference between the spousal incomes. The guidelines thus redistribute some portion of that income differential, thereby reducing the extent of the gap between the lower and higher income spouse. Put simply, they implement a form of income-sharing. As will be seen in the more detailed discussion of some specific guidelines which will follow, some guidelines use net income figures and some use gross. The main determination in the structuring of the guideline is the percentage to be applied to the income differential, and whether the percentage will vary to reflect different circumstances. The percentage may be related, for example, to the length of marriage, or the presence or absence of children. Some of the guidelines also have formulas for determining the duration of support, using length of marriage as the primary determinant of duration.

However these issues are resolved, the guidelines dramatically reduce the factors that are relevant to the determination of support quantum. There is no detailed examination of the past history of the relationship or the way in which it was structured. The main focus is on factors that are readily known and obvious at the point of divorce—most obviously the relative income positions of the spouses—with some guidelines also making relevant the length of the marriage and the presence of minor children. The use of budgets to determine either the recipient's needs and the payor's ability to pay is

⁵⁵ Recall McLachlin C.J.'s comments in *Bracklow*, at para. 54, with respect to the inter-relationship between quantum and duration—a modest support order of indefinite duration can be collapsed into a more substantial lump-sum payment.

eliminated. The support recipient is simply allocated a percentage share of the income differential.

The effect of the American spousal support guidelines is thus similar to what we have already experienced in Canada with the child support guidelines, which have moved us away from an individualized, budget-based, cost-sharing approach to a percentage-of-income approach. What is somewhat radical about the adoption of an income-sharing approach in the spousal support context is the elimination of any consideration of the past history of the relationship, of the ways in which the spouses structured their roles, and of the origin and nature of a spouse's economic needs—factors which have conventionally been understood to be relevant to determining both the existence and extent of the spousal support obligation. To the extent that the guidelines attempt to differentiate between marriages, length of marriage is typically the only factor considered. It is important to remember however, that a broader range of factors than those encompassed by the guidelines might still come into play in determinations both of entitlement and duration.

What follows is a more detailed review of some of the American spousal support guidelines. The review will begin with the earliest guidelines developed in California, but which are limited in that they deal only with interim support. This will be followed by a discussion of fairly long-standing guidelines developed in Pennsylvania and Kansas. The Pennsylvania guidelines, although applicable only to temporary support applications, are notable for being the only state-wide legislated guidelines. The Kansas guidelines are notable for their application to the determination of permanent (i.e., post-divorce) support. The review will end with an examination of the more complex guidelines proposed by the American Law Institute and the Maricopa County guidelines in Arizona that have attempted to incorporate a simplified version of the ALI proposals.

1. The California Guidelines—Santa Clara County

In the American context the first spousal support formulas were developed in California in the 1970s at the initiative of the family law committees of local bar associations with the support of local judges. Now over half of the counties in California use spousal support guidelines. All of the California guidelines are expressly understood to be for the purpose of establishing *interim* (or in American terminology “temporary”) support and are intended to maintain the parties' living conditions and standards as close as possible to the *status quo* pending trial and division of their assets. In terms of crafting Canadian guidelines for permanent support, the California formulas may be appropriate for certain kinds of marriages—the most compelling cases for spousal support where there has been a significant merger of economic lives over a lengthy period of time such that equal sharing of income, or something approaching that, is seen to be appropriate on a permanent basis.

One example of the California guidelines are those in Santa Clara County, south of San Francisco, which are actually incorporated into the local rules of court.⁵⁶ The temporary support formula provides that support will “generally” be calculated by taking 40% of the higher earner’s *net income* minus 50% of the lower earner’s net income, adjusted for tax consequences. Thus, in a case where the support claimant has no income, the formula would provide for a maximum transfer of 40% of the payor’s net income. In cases where the support claimant has some income, the amount transferred under the formula will be somewhat less than 40% of the income difference. When contrasted with other American guidelines, it will become apparent that the Santa Clara formula transfers fairly generous spousal support awards in cases of significant income gaps. This is not surprising given that the objective of the guidelines is to preserve the pre-breakdown economic *status quo* between the parties until trial. But even these guidelines do not equalize net incomes; they maintain some income differential between the spouses, the rationale being the need to maintain incentives for the payor to continue earning.⁵⁷ In other California counties the percentages are somewhat lower, with formulas based, for example on 35% of the higher earner’s net income minus 50% of the lower earner’s income.⁵⁸

In cases where child support is also being paid, the formula provides that spousal support is to be calculated after child support on the basis of net income not allocated to child support. In this way, the formula operates in much the same way as the methodology which endorsed by the Ontario Court of Appeal in *Andrews*.⁵⁹

While the Santa Clara guidelines, like all of the California guidelines, are expressly applicable only to the calculation of temporary support, in practice they also influence the quantum of “permanent”⁶⁰ support awards at trial. However, determinations of permanent support involve difficult questions about the duration of the support

⁵⁶ See Superior Court of the State of California, County of Santa Clara, Rules of Court, Rule 3.3 (c), “Temporary Spousal Support Formula” found at <http://claraweb.co.santa-clara.ca.us/sct/rules/summary.htm>

⁵⁷ See George H. Norton, “Support Schedules in California: Selected Custody and Spousal Support Issues” (1987), 4 Calif. Fam. Law Mthly 57, discussed in Appendix A to the Alberta Law Reform Institute report, *supra* note 7.

⁵⁸ See Humboldt County Trial Court Rules (2001), Appendix 9.7—Spousal Support Schedule. While this formula generates the average award, the rules also set a minimum award using 30% of the higher earner’s income in the formula and a maximum award using 40%. In Humboldt County, the formula percentages are also lower in cases where there minor children and a concurrent child support award is in place. In such cases the percentages of the higher earner’s income used in the formula are 30% (average award), 25% (minimum award) and 35% (maximum award). The Humboldt guidelines also make clear that no spousal support will generally be paid if the lower earner spouse has a net income of 60% or more of that of the higher earner.

⁵⁹ *Supra* note 19; discussed in Part II, above.

⁶⁰ “Permanent” simply means final determinations of support at trial (in contrast to temporary or interim awards), and does not necessarily imply orders for permanent or indefinite support.

obligation. Duration remains a serious issue in California despite recognition of the ability of courts to impose permanent support obligations in cases involving lengthy marriages.

California attorney, George Norton, who was involved in drafting the Santa Clara guidelines, has proposed their adoption for the calculation of permanent support awards with the addition of guidelines to establish duration of support. Norton's guideline would impose an "arbitrary" limitation on spousal support with a rule that in no case would the obligation to support a party last for a period of time greater than the period of time the parties were married or lived together.⁶¹ As well remarriage would, with some limited exceptions, terminate spousal support.⁶² Norton's proposal also makes provision for reductions and terminations of spousal support to deal with changing circumstances over time, such as the actual or anticipated earnings of the payee and the retirement of the payor. It should be noted, however, that Norton's model does not contemplate increases in the support amount based on increases in the payor's income; other American guidelines that will be reviewed share a similar assumption. Finally, time limits or drop-downs based on anticipated changes in the income or earning capacity of the payee would be allowed in initial orders, but such orders would have to remain open to modification for a period of time correlated to the length of the marriage.⁶³ Norton's proposals are, of course, a theoretical guideline model that has not yet been implemented, but they offer some interesting ideas about how to incorporate subsequent variation into a guideline model, which most of the American guidelines do not.

2. Pennsylvania State Guidelines

The Pennsylvania support guidelines are unique in being statewide, legislated guidelines found in the Pennsylvania Rules of Civil Procedure.⁶⁴ The origins of the

⁶¹ Of this Norton writes:

"This arbitrary limitation on spousal support would answer the difficult question of how long a spouse who cannot or will not earn remains the responsibility of his or her former spouse. Marriage is not an insurance policy. There is a time when society, rather than the former spouse, should bear this burden if a spouse cannot or will not earn."

⁶² Norton writes at 71:

"Remarriage shall terminate spousal support, except when an order is made that support should not terminate, on a motion by a party intending to remarry and if good cause is shown. If a party remarrying is subsequently divorced, he or she may request reinstatement of support from a prior spouse, if support would have otherwise continued until the time of the motion and the term of the remarriage was less than five years or half the length of the prior marriage, whichever is less. If support is reinstated, the court may consider changes in circumstances, but it may not award support to a point in time later than previously could have been ordered. This reflects a policy of the state to encourage remarriage without undue risk or penalty to the remarrying spouse."

⁶³ For marriages of ten years or less, the period would be not less than half the length of the marriage (calculated in months). For marriages of 10 to 20 years, the minimum period would be determined by the formula of months married times months married/ 240.

⁶⁴ Pa. R. Civ. P., sections 1910.16-1 to 1910.16-4.

Pennsylvania guidelines are in a formula created in Allegheny County in the 1980s by a bar/bench committee to guide determinations of child and spousal support in cases which were diverted out of the court system to hearings before domestic relations officers. In 1989 the Allegheny guidelines were legislated state wide. In so far as they deal with spousal support, the Pennsylvania guidelines are, like the California guidelines, applicable only to applications for alimony *pendente lite*, or temporary support.⁶⁵ Once an entitlement to support has been determined under the *Domestic Relations Act*⁶⁶, the guidelines create a “rebuttable presumption”⁶⁷ that the amount of the award determined under the guidelines is the correct amount of support to be awarded. Deviations from the presumption require a written finding by the trier of fact that the guidelines amount would be “unjust or inappropriate”. These guidelines thus have more force than either the Santa Clara guidelines discussed above or the advisory status of the Kansas county guidelines which will be discussed below.

Like California, Pennsylvania uses *net* rather than gross income figures. However, the Pennsylvania guidelines create a separate formula for cases with minor children.⁶⁸ If there are no minor children, spousal support is 40% of the difference in the parties’ net incomes. The percentage is thus somewhat higher than under the Santa Clara guidelines. If there are minor children, as under the Santa Clara guidelines, child support is to be calculated first, and spousal support determined on the basis of net income figures after the deduction of child support from the payor’s income. But the Pennsylvania formula also uses a different (lower) percentage to calculate spousal support in these cases: 30% of the difference in net incomes, rather than 40%.

While the Pennsylvania guidelines apply only to temporary orders, in practice they often influence the quantum of final support orders as well.⁶⁹ But final orders are subject to durational limits determined under the state spousal support legislation and thus open to on-going debates about the appropriateness of permanent versus rehabilitative support.⁷⁰ The Pennsylvania guideline does not offer any formula for determining duration.

⁶⁵ They also apply to applications for “spousal support” which would appear to refer to permanent support orders applicable during the period of separation prior to a formal divorce. See Rule 1910.16-1. Orders for alimony *pendente lite* are often in place for two or three years.

⁶⁶ See *Domestic Relations Act*, 23 Pa. C.S., section 3701.

⁶⁷ *Supra* note 54, section 1910.16-1(d).

⁶⁸ The formula is found in section 1910.16-4.

⁶⁹ See Marie Gordon, “Spousal Support Guidelines and the American Experience: Moving Beyond Discretion” paper presented at the National Family Law Program, Kelowna, B.C., July 14-18 2002.

⁷⁰ *Domestic Relations Act*, *supra* note 56, section 3701(c) allows a court to determine the duration of the order, “which may be for a definite or indefinite period of time which is reasonable under the circumstances.”

3. Kansas Guidelines—Johnson County

In Kansas, as in California, spousal support guidelines have been created on a local (i.e. county) basis by the family law bench bar committees of county bar associations as one part of more comprehensive “family law guidelines” which also cover custody and parenting arrangements, property division and valuation. The committees are composed of lawyers, judges and mental health professionals. The first such guidelines, which were created in Johnson county (which encompasses suburbs of Kansas City) in the late 1970s, will be described here. Two other Kansas counties have subsequently followed suit: Wyandotte (also the suburbs of Kansas City) and Shawnee (Topeka). Unlike the California and Pennsylvania guidelines, the Kansas guidelines are not confined to temporary support calculations and apply to final maintenance arrangements.

The Johnson County Family Law Guidelines are published,⁷¹ but have not been incorporated as a local court rule. They are presented as a helpful framework for negotiation, but are clearly stated to be advisory rather than binding. The guidelines include the caution that “individual circumstances require individual analysis and may require amounts and terms of maintenance that are greater or less than suggested by these guidelines.”

The Johnson County Guidelines are interesting in that they address the purpose of spousal support. While recognizing that the maintenance legislation and judicial decisions under it encompass a wide range of factors, the guidelines are crafted on the assumption that “[g]enerally, the purpose of maintenance is to rectify an economic imbalance in earning power and standard of living in light of the particular facts of each case, with the primary factors to be considered being the needs of one spouse and the other spouse’s ability to pay.” In general, the drafters of the guidelines believed that the parties, their lawyers, and the court were better served by dealing with “the objective current economic situation”—i.e., the relative incomes of the parties—rather than such “subjective” considerations as each party’s relative economic contribution to the marriage.

The formula offered by the guidelines for the calculation of spousal support distinguishes between marriages in which there are minor children (and a concurrent child support obligation), and those in which there are not. For marriages without minor children, the guidelines provide that support should be determined by calculating 25% of the difference between the *gross* incomes of the parties.⁷² Under this guideline, the percentage of income shared is thus significantly lower than under the Santa Clara or

⁷¹ See “Family Law Guidelines” for Family Law Practice in Johnson County, Kansas, Johnson County Bar Association, Family Law Bench Bar Committee, revised February 2001, available at http://www.jocobar.org/fs_practicetools.htm. The guidelines for maintenance are found in Section V.

⁷² See s. 5.6. This formula applies to a difference of up to \$50,000 per year. For differences in excess of \$50,000, the applicable percentage is 22. The Shawnee County Family Law Guidelines also use 25% of the income difference, reduced to 22% to the extent the difference exceeds \$50,000.

Pennsylvania guidelines. It is a very crude formula that is not responsive to differing lengths of marriages, and it would not provide anything close to equalization of income even after very lengthy, traditional marriages.

In cases where there are minor children, spousal support is to be calculated before the calculation of child support, using a formula of 20% of the difference in *gross* incomes.⁷³ This way of dealing with cases involving minor children differs from that adopted in the Santa Clara and Pennsylvania guidelines, where spousal support is calculated on the basis of *net* incomes after child support amounts are withdrawn. The Johnston County solution is mandated by the Kansas child support guidelines, which use an income-shares formula that requires that spousal support be calculated before the calculation of child support. This way of dealing with cases involving minor children would not be transferable to the Canadian context, where child support calculations are done first and are based on the payor's income prior to payment of spousal support.

The Johnston County maintenance guidelines also address the duration of support by means of a formula based upon length of marriage. This feature of the guidelines reflects the fixed durational limits imposed by the state support legislation.⁷⁴ For marriages under 5 years, duration is to be calculated by dividing the length of the marriage by 2.5. For marriages over 5 years, the formula is two (5 divided by 2.5) plus the number of years in excess of 5 divided by 3. Thus a four year marriage would generate a support duration of 1.6 years or 19 months. A 17 year marriage would generate a duration of 2 years plus 4 years (17 years-5 years=12 years, then divide by 3), for a total of six years. A 30 year marriage would generate a durational period of 10.33 years or 124 months. The durational periods of support are relatively short when compared to current Canadian practice. Maintenance is also terminated by the remarriage or cohabitation of the payee.

4. The ALI Proposals

(a) Overview

The American Law Institute has been engaged in an ambitious project of rethinking the principles which should govern the law of family dissolution in the hope that its recommendations will guide the on-going development and reform of the law by state legislatures. Its recommendations with respect to spousal support, found in chapter 5

⁷³ See s. 5.7. In cases involving minor children the Shawnee County Family Law Guidelines use 20% of the income difference, reduced to 17% to the extent the difference exceeds \$50,000.

⁷⁴ The guidelines for duration were crafted in light of provision in the Kansas spousal support legislation precluding a trial court from awarding maintenance for a period longer than 121 months (i.e. 10 years and 1 month), although allowing for the possibility of a judicial extension in exceptional cases. See K.S.A. 60-1610(2).

of the *Principles of the Law of Family Dissolution*,⁷⁵ represent an attempt to reshape (and not simply reflect) existing American practice based upon emerging trends in the law. Unlike existing American guidelines, the ALI guidelines deal with spousal support in a comprehensive way; and would determine entitlement and duration as well as quantum.

The ALI proposals are of interest to anyone who is trying to think through the conceptual basis of spousal support and develop practical and easily-administered legal rules to implement those concepts. Those involved in the ALI project were very conscious of the value of clear and predictable rules to guide settlement, and their recommendations with respect to spousal support have a significant formulaic component. The ALI drafters, while visionary, were conscious of not making recommendations that strayed so far from existing practice that there was little hope that they could ever be implemented. In the end, their proposals may still reflect aspects of current American practice that are inappropriate for Canada.

On the conceptual level, the ALI recommendations break new ground, at least in the American context, by replacing “need” as the basic justificatory principle for spousal support with the principle of “compensation” for financial losses which are incurred or realized upon dissolution of the spousal relationship. This conceptual shift is reflected in a change in terminology, from “alimony” to “compensatory spousal payments.” For Canadians, who experienced a shift to a compensatory framework after *Moge*, the reconceptualization will not appear so radical, and it is interesting to note that Justice L’Heureux-Dubé is listed as one of the advisors on the project. As will be shown below, however, the concept of compensation utilized by the ALI is very broad and covers much of what we in Canada have started to label non-compensatory support.

Having established “loss” rather than “need” as the basis for entitlement to spousal support, the *Principles* go on to specify five “compensable losses”:

1. In a marriage of significant duration, the loss in living standard experienced at dissolution by the spouse who has less wealth or earning capacity.
2. An earning capacity loss incurred during marriage but continuing after dissolution and arising from one spouse’s disproportionate share, during marriage, of the care of marital children.
3. An earning capacity loss incurred during marriage but continuing after dissolution and arising from the care provided by one spouse to a sick, elderly, or disabled third party, in fulfillment of a moral obligation of the other spouse or of both spouses jointly.
4. The loss either spouse incurs when the marriage is dissolved before that spouse realizes a fair return from his or her investment in the other spouse’s earning capacity.

⁷⁵ American Law Institute, *Principles of the Law of Family Dissolution: Analysis and Recommendations* (LexisNexis, 2002). The recommendations with respect to spousal support are found in chapter 5, “Compensatory Spousal Payments.”

5. An unfairly disproportionate disparity between the spouses in their respective abilities to recover their pre-marital living standard after a short marriage.

The *Principles* would allow claims to be made on multiple bases and “stacked,” although there are provisions precluding double recovery and setting limits on the level of aggregate recovery.

The first and second kinds of losses—generating what are referred to respectively as the “marital duration” claim and the “primary care-giver” claim—will be the focus here, both because they are the kinds of claims implicated in the majority of typical spousal support cases and because it is for these kinds of claims that the *Principles* develop some presumptive guidelines to create certainty and predictability. The third type of loss is essentially a variant of the primary care-giver claim.

The last two losses (4 and 5), which will typically arise in short marriages, are intended to be dealt with on an individual basis. They are recognized as exceptions to the general principle animating the ALI *Principles* that compensable losses increase with the length of the marriage, and that in general short marriages will generate very limited or no spousal support claims. The fourth type of loss covers “reimbursement alimony,” essentially a restitutionary claim in cases where marriage breakdown occurs shortly after one spouse attained an educational degree with the other’s support. The fifth type of loss covers situations where one spouse may have given up employment or moved to facilitate what turned out to be a very short marriage, thus experiencing significant losses that will not be captured by the claim based on marital duration. It allows for an individualized, fact-specific compensatory analysis.

Both the “marital duration” and the “primary care-giver” claims are triggered by the disparate financial circumstances of the spouses after divorce—put simply, by significant disparities in spousal incomes after divorce. For both claims, the *Principles* devise a “presumptive”⁷⁶ income-sharing formula based upon the application of specified percentages to the difference in spousal incomes, with the percentages increasing with the length of the marriage. A formula is also devised to determine the duration of awards such that they correlate with the length of the marriage (or the length of the child-rearing period.) What makes the *Principles* unique among American guidelines is their attempt to delineate two separate bases for claims to post-divorce income-sharing, which may be combined. Each of these two bases will now be examined in somewhat more detail.

(b) Marital duration claim for loss of marital standard of living

⁷⁶ As with the Pennsylvania guidelines, the ALI proposes that its guidelines be presumptive, but that departures from the presumptions be allowed when a trial court makes written findings that establish that the presumption’s application to the case before the court will yield a “substantial injustice.” See sections 5.04(4) and 5.05(6) and the comments thereon.

The “marital duration” claim is based on loss of the marital standard of living in marriages of significant duration.⁷⁷ While labelled “compensatory” by the *Principles*, this kind of claim corresponds, at least in part, to what we in Canada would, post-*Bracklow*, refer to as non-compensatory support based on financial interdependency during marriage. The theory offered by the *Principles* for this claim is neither loss of earning capacity by the lower-income spouse due to marriage nor contribution by the lower-earner to the higher earner’s earning capacity.⁷⁸ While recognizing that some marriages might give rise to such claims, the *Principles* offer a more general rationale based upon a principle of merger of economic lives over time, which also entails significant elements of reliance and expectation.⁷⁹ Stephen Sugarman’s theory of “merger over time,” which has been discussed above in Part III,⁸⁰ is explicitly drawn upon. Claims on this basis could be brought whenever there is a significant difference in spousal incomes after divorce, including childless marriages and those where both spouses were employed during the marriage but earning very different incomes for any number of reasons. As conceptualized, the claim is strongly influenced by the length of the marriage, with the claims intensifying the longer the duration of the marriage.

Entitlement: The rule created to implement the principle of compensation for loss of marital standard of living would grant an entitlement to support on this basis whenever a marriage has lasted a significant duration and there is a substantial disparity in expected⁸¹ spousal incomes after dissolution. States would be required to establish the requisite marital duration and degree of income disparity. The *Principles* offer the example of a rule establishing, for example, a minimum duration of 5 years⁸² and a

⁷⁷ This claim is set out in s. 5.04.

⁷⁸ Justifications based on contract and expectation damages are also rejected given no-fault divorce.

⁷⁹ The rationale offered in the comment (c) on s. 5.04 is :

The obligation recognized by this section thus does not arise from the marriage ceremony alone, but takes longer to develop. As a marriage lengthens the parties assume roles and functions with respect to one another. When adults share enough of their lives together, they may mold one another as surely as parents affect their child. Eventually the molds harden. . . . The obligation assumed by this section thus assumes no blameworthiness for the marital failure, just as the obligation to support one’s child assumes no blameworthiness for the child’s conception. It is enough to recognize that the parties’ situation at the end of the marriage is a consequence of both their acts to conclude that it is their joint responsibility.

⁸⁰ See *supra* note 43 and accompanying text. The Reporter’s notes made explicit reference to Stephen Sugarman.

⁸¹ The rule explicitly refers to *expected* incomes at the time of dissolution to recognize that spouses are expected to realize their earning potential after dissolution, even if they were not employed during the marriage. When parties do not realize their earning potential, income may be imputed. See comment (f) on s. 5.04.

⁸² Although leaving leeway to the states to establish minimum duration, the *Principles* suggests that somewhere in the range between 5 and 10 years would be consistent with the rationale underlying these claims.

situation where the income of the higher earner is at least 25% greater than that of the lower earner.⁸³

Quantum: Quantum would be determined by applying a specified percentage to the difference between the incomes the spouses are expected to have after dissolution. The specified percentage is referred to as the *durational factor* and is intended to increase proportionately with the duration of the marriage up to a stated maximum. States are given discretion as to how they establish a durational factor⁸⁴ As an example, the durational factor could be determined by multiplying the years of the marriage by .01. Under such a formula a 10 year marriage would generate a durational factor of .1 (10 times .01), which would mean a spousal support award of 10% of the income difference; a 20 year marriage would generate a durational factor of .2 (20 times .01) which would mean a spousal support award of 20% of the income difference. If .015 were chosen instead of .01, a 10 year marriage would result in a durational factor of .15 (15% of income difference) and a 20 year marriage a durational factor of .3 (30%).

The formula would require the establishment of a maximum durational factor which would apply to the lengthiest marriages. Here, while once again leaving the determination to the states, the *Principles* suggest that it should fall somewhere between .4 (requiring transfer of 40% of income difference) and .5 (requiring transfer of 50% of income difference, or income equalization). While recognizing the appropriateness of income equalization in some cases involving the lengthiest of marriages, the *Principles* are reluctant to require it on the grounds that in some cases income equalization would transfer more funds than would be required to compensate for the loss of the marital standard of living. (The conclusion is also supported by the finding that income equalization is rarely achieved in existing case law, even in cases of long-term marriages.)

Duration: Duration of the award would be proportional to the length of the marriage. It would be determined by a formula that would multiply the length of the marriage by a “specified factor” to be established by legislation. As an example, a specified factor of .5 would result in a presumption of one year of support for every two years of marriage.⁸⁵ The term of the award would presumptively be indefinite when the age of the recipient and the duration of the marriage were above certain specified minimums, for example 50 years of age and 20 years of marriage.

⁸³ As will be seen below, these are the requirements adopted in Maricopa County.

⁸⁴ Basically states are advised to begin by specifying the maximum value of the durational factor and the duration at which it is reached and then working backwards. Thus a determination that a maximum value of the duration factor would be .4 (which would mean sharing 40% of the income difference) and would be reached after a 40 year marriage would set the durational factor at .01 times the years of marriage.

⁸⁵ It is contemplated that the presumption could be rebutted and an award made for a shorter period if it is shown that the loss will be ameliorated more quickly because of anticipated changes in the financial position of parties.

(c) Primary care-giver claim for loss of earning capacity

The *Principles* establish a separate claim for earning capacity loss related to one spouse's disproportionate assumption of child-rearing responsibilities. The conceptual justification for this claim requires little explanation. It is the paradigmatic compensatory claim and, as discussed above in Part III, has been widely adopted as a legitimate justification for the imposition of a spousal support obligation.

The significant conceptual move in the *Principles* is the method chosen to quantify such claims of loss. In theory quantification of such claims should be based on what the claimant's earning capacity would have been without child-care responsibilities. The marital standard of living or the other spouse's post-divorce earnings should be irrelevant. Recognizing the practical difficulties with measuring earning capacity loss, the *Principles* choose as a "proxy" measure of earning capacity loss the income disparity between the spouses at the point of dissolution in conjunction with the length of the child-rearing period.

In justifying the use of the higher earner's post-marital income as a baseline for measuring earning capacity loss, the *Principles* rely on the questionable assumption that "most people choose mates of similar socioeconomic status." This explanation is bolstered by the argument that the primary caregiver would likely have incurred an earning capacity loss in the expectation of sharing in their spouse's future income.⁸⁶ Perhaps recognizing that these explanations might not prove satisfactory, the drafters offered an alternative explanation--that the disproportionate assumption of child-rearing responsibilities by the primary care-giver has facilitated the other spouse's ability to maintain his earning capacity as well as enjoying the benefit of having children.

Entitlement: Under the rule crafted by the *Principles* to capture earning capacity loss, entitlement would be presumptively established if the marriage was one with children and the claimant's earning capacity at dissolution is substantially less than that of the other spouse. As with the marital duration claim, the main factor triggering entitlement is a disparity in spousal incomes. The *Principles* would allow the presumption of entitlement to be rebutted by a determination that the claimant was not in fact the primary care-giver (*i.e.*, did not provide more than substantially half of the total care that both spouses). However, assuming that the claimant was a primary care-giver, the structure of the entitlement provisions creates an irrebuttable presumption that the disparity in spousal incomes reflects an earning capacity loss because of the disproportionate assumption of child-care responsibilities. Thus, claims for earning capacity loss can be brought not only by primary care-givers who are unemployed or working part-time at the point of dissolution, but also by secondary earners in full-time employment.

The *Principles* attempt to create an easily-administered rule that obviates the necessity of any complex, individualized, factual analysis of causal links between the claimant's disproportionate assumption of child-rearing responsibilities and her earning

⁸⁶ See comment (e) on s. 5.05.

capacity. The *Principles* rely instead upon social science evidence establishing that, in general, responsibility for the care of children has a significant impact on earning capacity.

Quantum: In cases of earning capacity loss, quantum would be calculated, as in cases based on loss of marital standard of living, by applying a specified percentage to the income difference between the parties. In this case, the specified percentage would be a *child care duration factor* which would attempt to correlate the amount of the award to the duration of the child care period during the marriage. This provision is based upon the assumption that the longer the period during which the claimant's market opportunities are impeded by child rearing responsibilities, the larger the resulting earning capacity loss is likely to be. As an example of the operation of this rule, the child care durational factor could be set at the length of the child care period multiplied by .15. In the case of a 10 year marriage with an 8 year child care period, this would yield a child care duration factor of .12 (which translates into a 12% share of the difference in spousal incomes).

The primary-care-giver claim only attempts to compensate for earning-capacity losses because of child-rearing responsibilities during the period of the marriage (and even here it does not provide full compensation). It does not purport to deal at all with earning-capacity losses because of *post-divorce* child-rearing responsibilities. This claim thus does not draw on a full parental partnership theory as outlined in Part III, above. The *Principles* attempt to deal with some of the earning-capacity losses resulting from post-divorce child care through child support rather than spousal support.

Stacking claims: The *Principles* would allow primary care-giver claims based on earning capacity loss to be combined with marital duration claims for loss of the marital standard of living, but would impose a cap on the total percentage of the income difference that can be claimed, that cap being the maximum percentage established for the marital duration claim. Thus combined claims would be capped at somewhere between 40 to 50% of the income difference, but that maximum value would be attained sooner in marriages with children than without.

Duration: Following the model of the rules adopted for determining duration of claims for loss of marital standard of living, the duration of primary care-giver claims for earning capacity loss would be determined by means of a formula that multiplied the years of the child care period by a specified factor, such as, for example, .5.

(d) Other structural features of the ALI guidelines

Some other structural features of the ALI guidelines, which apply to both the marital duration and primary care-giver claims, are worth noting:

- First, the awards would be subject to modification or termination if the financial capacity of either or both of the parties is substantially different from that upon which the original award was based, as a result, for example, of improvements in the recipient's financial position or a decrease in the financial capacity of the payor.

Notably, however, increases in the financial capacity of the payor would not constitute a basis for modification, a result justified by the conceptual framework which measures loss against the marital standard of living at the time of dissolution.⁸⁷

- Second, all obligations to make periodic payments would presumptively terminate with upon the remarriage of the claimant,⁸⁸ and also in certain cases upon cohabitation.⁸⁹
- Third, the guidelines are intended to generate overall values for the spousal support obligation. Although the rules as presented generate awards of periodic payments that last for fixed or indefinite durations, it is contemplated that they can be replaced, in whole or in part, by a single lump sum payment.
- Fourth, in cases where there are minor children and a concurrent child support claim, it is understood that the spousal support will be calculated first, and that child support will be calculated subsequently based on parental incomes taking spousal support into account.
- Fifth, the *Principles'* spousal support guidelines are structured to mesh with their proposed principles of child support, which would include within awards of child support amounts to cover some of the indirect costs of *post-divorce* children-rearing on the earning capacity of the custodial parent.^{89a}

(e) Assessment of the ALI proposals

Standing back from the detail, what general observations can be made about the ALI guidelines?

In terms of objectives and process, the ALI guidelines are an interesting exercise for those of us in Canada contemplating some sort of guidelines. One of the clear objectives of the ALI was to bring certainty and predictability into an excessively discretionary area of law. Their project involved a clarification of the theoretical bases for spousal support, given the perceived inadequacy of the concept of “need,” and then the

⁸⁷ See comment (f) on s. 5.04.

⁸⁸ See s. 5.07.

⁸⁹ See. s. 5.09.

^{89a} The child support recommendations are found in chapter 3. Through use of a supplemental percentage, the ALI child support formula makes some adjustment for parental income disparity. The “compensatory payment” (i.e. spousal support) is determined and transferred first. Initially child support is calculated by a “base percentage” and then a “supplemental percentage” of the payor’s net income. As the recipient parent’s income (in excess of a self-support reserve) rises, the supplemental percentage is reduced, reaching zero when parental incomes are equal (and even the base percentage can be reduced where the recipient parent’s income exceeds that of the payor parent). The net effect of the supplement is to reduce, but not eliminate, disparities in household living standards.

challenge of crafting practical and easily-administered rules to implement those theoretical constructs. At many points in the discussion of the principles ultimately adopted there is a recognition that the chosen proxies are not perfect. That there is some compromise of theoretical principle is acknowledged, but defended on the basis that the chosen proxies are as close as is “administratively practical.”⁹⁰

The ALI *Principles* are self-consciously an exercise in law reform, but are also an exercise in *practical* law reform. Throughout, the drafters were conscious of the need to find some anchorage for their recommendations in current practice. The *Principles* may best be viewed as an exercise in identifying and clarifying emerging trends or best practices, and then building on those. Viewing the ALI *Principles* as a normative exercise of law reform, some have criticized them for their undue conservatism. The ALI methodology may, however, be a useful template for the Canadian guidelines project, which is directed not at legislative reform, but at the creation of informal guidelines that will reflect current practice.

Structurally the ALI guidelines are interesting for their complexity. Certain types of atypical cases, the short marriages involving significant losses, are expressly excluded and left to individualized decision-making. The income-sharing guidelines are clearly crafted to deal with the range of typical spousal support claims. The guidelines themselves, unlike other American guidelines, delineate two separate bases for claims to income-sharing—financial interdependency that increases with marital duration and earning capacity loss by primary caregivers. This complexity, although theoretically appealing, may ultimately be a deterrent to their adoption.⁹¹ As well, unlike other guideline models, the ALI model makes the *quantum* of awards sensitive to the duration of the marriage. Patterns in current awards would suggest such a correlation, although it is often not expressly articulated. Making quantum sensitive to marital duration may be of particular importance in Canada, where courts are generally uncomfortable with the use of rigid durational limits, and quantum is the only area where differences in the nature and extent of support claims can be reflected.

Given the structure of the ALI guidelines, the general pattern of support outcomes produced will be:

- very limited or negligible claims in short marriages;
- fairly significant claims in intermediate length and long marriages with children; and
- significant claims in childless marriages only where the marriages have been lengthy.

Beyond these general reflections, what can be said more specifically? In the United States, the ALI proposals are now beginning to generate extensive commentary

⁹⁰ See comment (e) on s. 5.05 discussing implementing measure for earning capacity loss.

⁹¹ See the Maricopa County guidelines, discussed below, which implemented a simplified version of the ALI guidelines that eliminated the separate primary care-giver claim.

and debate.⁹² Generally, they have been praised by all for their attempt to bring consistency and predictability into an excessively discretionary area of law. Assessing the actual impact of the *Principles* is difficult given that a number of crucial policy determinations, which will significantly affect the actual amount and duration of awards, are left to states in the implementation of the proposals. However, commentators are in general agreement that the *Principles* will result in an increase in the number of support awards as measured against current American practice. In particular, it is recognized that granting awards to primary care-givers in intermediate duration marriages, who may well be employed but earning significantly less than their spouses, would be a departure from current American practice. Beyond this, opinion splits.

The most thoughtful analysis of the ALI proposals is provided by June Carbone.^{92a} Carbone believes that restitution for lost career opportunities and other marital contributions is the only theoretically justifiable basis for spousal support. She acknowledges all the problematic ways in which the ALI proposals depart from that theoretical framework, despite their attempt to convert alimony into a set of “compensatory payments.” However, she concludes, generously, that theoretical coherence may not be the appropriate objective for an exercise in practical law reform, and that the ALI principles offer an appropriate basis for compromise about irreconcilable positions. Other are more critical.

For one group of critics, who believe that compensation for career loss due to marital roles is the only justifiable basis for imposing a support obligation, the ALI proposals have unjustifiably expanded the basis for spousal support. They criticize the ALI proposals both for allowing claims for loss of the marital standard of living unconnected to earning capacity loss and for failing to tie the claim for earning capacity loss more closely to cases where an actual loss has been demonstrated, such as where the primary care-giver is not employed full-time.⁹³ From this perspective, the ALI proposals

⁹² For example, see symposium issues in (2001), 8 *Duke Journal of Gender, Law and Policy*, (2002), *J. of Law and Family Studies*, [2001] *Brigham Young U.L.R* and (2002), 4 *J. of Law and Family Studies*.

^{92a} June Carbone, “The Futility of Coherence: The ALI’s Principles of the Law of Family Dissolution, Compensatory Spousal Payments” (2002), 4 *J. of Law and Family Studies* 43. She summarizes her paper as follows:

In this paper, I will explore the tradeoffs that underlie the ALI’s proposed system of compensatory spousal payments in light of the tortured history of alimony. I will maintain, first, that the ALI is certainly correct that the existing law, with its emphasis on need, is incoherent at best, or insulting or archaic at its worst. Second, I will agree that the idea of compensation provides the alternative to need that has the best hope of bringing a measure of coherence to the existing cases. Third, however, I will show that at the core of the provision for compensatory payments lies a fundamental dilemma; the refusal to recognize fault necessarily limits the provision for compensation, not just with respect to the non-financial losses the ALI principles acknowledge, but with respect to some of the financial concerns at the heart of the proposals. I will nonetheless conclude that bringing fault back into the system is too costly to contemplate for all kinds of reasons, but that the failure to acknowledge it directly will fuel resistance to some of the ALI proposals.

⁹³ See for example J. Thomas Oldham, “ALI Principles of Family Dissolution: Some Comments,” [1997] *U. Ill. L. Rev.* 801. However, Oldham’s critique is complicated. While critical of some aspects of

are viewed as attaching too many obligations to the status of marriage itself or to some notion of marital commitment. They are seen as too much of an infusion of communitarian norms into the spousal relationship; too much of a departure from norms of individualism.

For another group of critics, the expansion of spousal support entailed by the ALI proposals is a move in the right direction, but a modest one which does not go far enough and will not do enough to alleviate the financial distress experienced by women and children after divorce.⁹⁴ The *Principles* have been criticized for a tendency to mimic current decisional patterns rather than proposing the more radical reforms needed for improvement,⁹⁵ and for delegating crucial policy decisions to the state legislatures, which exhibit little enthusiasm for expanding spousal support.⁹⁶ On the basis of the examples offered, the levels of support generated by the ALI guidelines have been criticized for being too low, with suggestions being made for the application of higher percentages which would more quickly reach norms of income equalization.⁹⁷

From a theoretical and structural perspective, the *Principles* have been criticized for basing the marital duration claim on the concept of loss instead of on concepts of contribution and partnership which would view the higher earner spouse's income as a product of the joint efforts of the spouses and thus justify more generous sharing principles.⁹⁸ The marital duration claim has also been criticized for its exclusion of marriages of shorter duration⁹⁹ (although this is not a real problem given provisions for transitional support and interim support).

the expansion of spousal support under the ALI Principles, he also takes the position that insufficient compensation is provided to primary care-givers in short and intermediate duration marriages who have actually sacrificed earning capacity and are in need of economic rehabilitation. For these cases he would provide a more generous remedy. This aspect of his critique will be discussed further below.

⁹⁴ See for example Penelope Eileen Bryan, "Vacant Promises?: The ALI Principles of the Law of Family Dissolution and the Post-Divorce Financial Circumstances of Women" (2001), 8 *Duke Journal of Gender, Law and Policy* 167; Marsha Garrison, "The Economic Principles of Divorce: Would Adoption of the ALI Principles Improve Current Outcomes?" (2001), 8 *Duke Journal of Gender, Law and Policy* 119; and Cynthia Lee Starnes, "Victims, Breeders, Joy, and Math: First Thoughts on the Compensatory Spousal Payments under the Principles" (2001), 8 *Duke Journal of Gender, Law and Policy* 137.

⁹⁵ Bryan, *ibid.*

⁹⁶ Bryan, *ibid* and Garrison, *supra* note 94.

⁹⁷ Starnes, *supra* note 94, suggests using as a model the Uniform Probate Code formula for determining a spouse's elective share of an augmented estate based on the length of the marriage, which would produce a compensatory spousal payment of 15% of income disparity after 5 years, 30% of any disparity after 10 years, and 50% of any disparity after 15 years.

⁹⁸ Bryan and Starnes, both *supra* note 94. Starnes sees the loss principle as based on a "victimization" model of spousal support.

⁹⁹ Bryan and Starnes, both *supra* note 94.

Although there are some exceptions,¹⁰⁰ those who favour an expansion of spousal support generally welcome the ALI's explicit recognition of a separate principle of earning capacity loss for primary caregivers, which would extend to working mothers who are secondary earners.¹⁰¹ However, the structure of the provision and the ways in which it limits the awards have been criticized. For some the problem is the provision's failure to recognize the significant earning capacity loss which primary caregivers who leave the labour force can experience even in short marriages. They would support much more generous transitional awards for all primary caregivers, whatever the length of the marriage, at a level which would equalize living standards for the duration of the transitional period.¹⁰² For others, the problem lies in the failure to recognize the consequences of post-divorce child rearing. From this perspective, support payments are needed to cover the entire child-rearing period, if not beyond, given the unlikelihood that women who compromise workforce participation will ever recover from the loss of earning capacity.

Finally, in terms reminiscent of Canadian debates, the question has been posed of why, if the payments proposed by the ALI are conceptualized as an "entitlement" based on compensation for losses, they should automatically terminate upon remarriage.¹⁰³

From a Canadian perspective, the most relevant features of the ALI *Principles* are the theoretical and structural ones. If the ALI award levels are too low when judged against Canadian standards, it would be a simple matter to increase percentages. But the prior question is whether the basic structure is an appropriate one. Is eliminating an individualized assessment of the economic impact of a particular marriage and instead simply looking at post-divorce disparities in earning capacity as the basis for entitlement an attractive concept? Is it appropriate to measure earning capacity loss by disparities in post-divorce income? Is the basic distinction between marriages with and without children an appropriate one? Is the basic idea that the amount of awards should increase with the length of the marriage or the child-rearing period a good one?

Some of the critiques of the structure of the primary-caregiver claim would likely resonate in Canada, particularly the failure to take into account earning capacity losses due to post-dissolution child care responsibilities. The ALI sought to deal with these through child support, but in Canada a conscious policy choice was made in the drafting

¹⁰⁰ Starnes, *supra* note 94 is concerned about distinctions being drawn between "breeder" and "non-breeder" women.

¹⁰¹ See Bryan and Garrison, both *supra* note 94, and Tonya L. Brito, "Spousal Support Takes on the Mommy Track: Why the ALI Proposal is Good for Working Mothers" (2001), 8 *Duke Journal of Gender, Law and Policy* 151.

¹⁰² See Oldham, *supra* note 93. Oldham is very clear about the need to impose durational limits on such awards, given the frequency of remarriage, suggesting a maximum of 5 years. He, like the ALI, would make an exception and provide for indefinite support if a marriage with children exceeded a certain duration and the claimant exceeded a certain age.

¹⁰³ See Starnes, *supra* note 94.

of the child support guidelines to exclude the so-called “indirect” costs of child-rearing from child support and leave them to spousal support.^{103a} Thus reliance on the length of the marriage (or the child-care period during marriage) to determine the extent of the spousal support claim may not be appropriate for us in cases where there are still minor children. We need a way to recognize that there can be significant post-dissolution losses even in short marriages with children.

Another striking feature of ALI scheme is its reliance on rigid durational limits. The structure the drafters saw themselves as putting in place was one with generous awards (the generosity of the awards is of course open to debate), but which are limited in duration except in exceptional cases. Such a structure would not appear to be easily transferable to Canada where, as reviewed in Part II above, time-limited orders arbitrarily setting the duration of the support obligation have, to a large, extent, become unacceptable. In Canada it is likely that any system of guidelines would have to retain a significant role for permanent orders and indefinite orders open to subsequent review or variation for reduction or termination of the support obligation. But a clearer sense of appropriate levels of quantum generated by guidelines might assist in determinations of when a support entitlement no longer exists or can be reduced.

The ALI’s solutions to the thorny issues of sharing post-divorce increases in income (i.e., no sharing) and the impact of remarriage on support obligations (i.e., automatic termination) would likely be contentious in Canada given the way our law currently deals with these issues.

Finally, in cases where child support is also being sought, the ALI methodology would be inappropriate in Canada given the structure of our child support guidelines. The ALI looks to gross income and calculates spousal support prior to the determination of child support in order to determine parental income levels. Any Canadian spousal support guidelines would need to determine child support first, and then allocate spousal support on the basis of parental incomes not allocated to child support.

5. Arizona—Maricopa County

In April, 2000 spousal support guidelines were adopted in Maricopa County, Arizona (which encompasses Phoenix and the surrounding areas.) by a local committee attempting to create advisory guidelines that would reflect current practice.¹⁰⁴ What

^{103a} See Federal/Provincial/Territorial Family Law Committee’s Report and Recommendations on Child Support (January, 1995), Recommendation 10.3.2: “The Family Law Committee recommends that the non-financial contribution of custodial parents toward their children not be compensated within the child support formula at this point in time” (p. 47). The discussion supporting this recommendation indicated that these contributions “can already be compensated by way of spousal support under the *Divorce Act* as well as under some provincial legislation.”

¹⁰⁴ Superior Court of Arizona, Maricopa County, Family Court Department, *Spousal Maintenance Guidelines*. The full text of the guidelines is not yet available on the web. A summary can be found at <http://www.thefinancialexpert.com/leftpanel2.html>. An extensive discussion of the Maricopa Guidelines and the process of their creation can be found in Ira Ellman, “The Maturing Law of Divorce Finances: Towards Rules and Guidelines” (1999), 33 Family Law Quarterly 801.

makes the Maricopa county guidelines interesting is that they that are based to some degree on ALI proposals, the conduit for this influence being the presence on the committee of Ira Ellman, who was chief reporter on the ALI project.

The guidelines are not incorporated into any rule of court, and clearly state that they are intended to be advisory only.¹⁰⁵ They aim to “provide the court and parties with a starting point for discussion, negotiation or decision-making” and are explicitly stated not to constitute a presumption. They apply only after entitlement to support has been established under the Arizona legislation, which offers a fairly restrictive basis for support.¹⁰⁶ The Maricopa guidelines thus differ from the ALI proposals, where disparity in income in and of itself would trigger an entitlement to spousal support. The guidelines also apply only to marriages that have lasted longer than five years and where the recipient’s gross income is less than 75% of the payor’s gross income.

The Maricopa guidelines implement a “simplified” variant of the ALI proposals in that no distinction is made between marriages with and without children, and there is no separate computation for a compensatory payment for primary care-givers. The failure to make such a distinction will likely result in higher awards for childless couples than under the ALI recommendations and lower awards for couples with children.¹⁰⁷

Otherwise, the basic methodology proposed by the ALI is followed. The guideline amount of support is determined by applying a percentage which reflects the length of the marriage (the durational factor) to the difference in the parties’ gross incomes at the time of dissolution. The durational factor selected by the drafters of the Maricopa guidelines was the duration of the marriage¹⁰⁸ multiplied by a factor of 0.015.¹⁰⁹ Thus a twenty year marriage would yield a durational factor of .30, yielding a spousal support award of 30% of the difference between the parties’ gross incomes. The durational factor cannot exceed 0.50, which means a cap on awards at 50% of the difference in spousal incomes. Child

¹⁰⁵ The following “caution” appears at the beginning of the guidelines:

These guidelines contain a mathematical formula for calculating spousal maintenance. The formula should be used only after a threshold determination of eligibility for spousal maintenance is made under A.R.S. s. 25-319(A)(1), (2), or (4). The guidelines are simply intended to provide the court and parties with a starting point for discussion, negotiation or decision-making. They do not change or create public policy. They do not constitute a presumption. Most importantly, they are not intended to replace the trial court’s obligation to consider specific evidence, as well as all applicable statutory factors.

¹⁰⁶ See A.R.S. para 25-319 where the grounds of entitlement include that a spouse lacks sufficient property; is unable to support himself or herself by appropriate employment; or has had a long marriage and is of an age which precludes employment. These grounds reflect those in the *UMDA*, *supra* note 54.

¹⁰⁷ See Gordon, *supra* note 69.

¹⁰⁸ Calculated or rounded to the nearest whole number of years.

¹⁰⁹ The durational factor is to be calculated or rounded to the nearest hundredth.

support is calculated separately, under an income shares formula, after the calculation of spousal support.

Following the ALI proposals, the Maricopa guidelines also offer a formula for determining duration of the awards. Here, however, the formula generates a range rather than a fixed figure: the length of the marriage¹¹⁰ multiplied by 0.3 to 0.5. The high end of the range would thus represent one year of support for every two years of marriage, or a duration of half the length of the marriage. Under this formula a twenty year marriage would generate an award with a duration of between 6 to 10 years. The guideline goes on to provide that when the duration of the marriage is twenty years or more and the support recipient is 50 years of age or older at the time of the dissolution the award should be of indefinite duration.¹¹¹

Before finalizing the guidelines, the committee wanted to ensure that the guideline awards reflected current practice and thus conducted extensive empirical research comparing the results under their proposed guideline with awards in a sample of actual cases.¹¹² With respect to the amount of the awards, the committee found a strong correlation between actual awards and the guideline awards using their proposed factor of 0.015 of the marital duration.¹¹³ With respect to duration of awards, however, their originally proposed factor of 0.60 of the marital duration yielded a very low correlation, hence the downward adjustment to the range of 0.3 to 0.5. Once again, the message is the stringent durational limits on support that are typical of current American practice.

B. A Suggested Canadian Guideline (Dranoff)

Linda Silver Dranoff, a Toronto family law practitioner, has suggested a spousal support formula that is apparently being used by some lawyers in Ontario.¹¹⁴ Her suggested formula loosely draws its inspiration from the Ontario Court of Appeal decision in *Andrews*,¹¹⁵ discussed in Part II above. That decision endorsed an award of

¹¹⁰ Once again calculated or rounded to the nearest whole number of years.

¹¹¹ An award of indefinite duration may specify that it shall terminate at such time as the payor retires.

¹¹² Correlations between the formula and existing practice was based upon a sample of approximately 160 cases from 1996 to 1998, involving both contested cases and consent orders.

¹¹³ The correlation with quantum was 0.75.

¹¹⁴ See Linda Silver Dranoff, "Suggested Formula for Determining Spousal Support," paper presented at the Canadian Bar Association-Ontario, 2000 Institute of Continuing Legal Education, Toronto, January 28, 2000; the formula is further discussed in Linda Silver Dranoff, "Is there an evolving Spousal Support Formula? And does Need matter?" *The Six-Minute Lawyer*, Law Society of Upper Canada, Dec. 3, 2001. In the latter paper Dranoff also discusses the results of a survey she conducted amongst members of the family law bar to determine if they had used her suggested formula, or any other formula, and if so, whether it had been accepted by a court. Of 36 respondents, 14 had used a formula and reported a fairly high acceptance rate. Some used her formula or variants of it, others used a variety of other formulas.

¹¹⁵ *Supra* note 19.

spousal support that, when combined with child support, left the wife, the residential parent, with 60% of the parties' net disposable income. Rather than "bundling" child and spousal support and dealing with global allocations of household income on a 60/40 basis, which is the "formula" that actually appears to be utilized in *Andrews*, Dranoff's suggested formula separates out child support first, and then deals with the spousal support claim as a separate claim between the spouses themselves with respect to income not allocated to child support.¹¹⁶

Dranoff's formula works with *gross* income figures. Child support is calculated first and grossed up to reflect the tax consequences. The grossed up amount of child support is then deducted from the payor's income. After child support is removed, remaining spousal incomes are combined and totaled, including the recipient spouse's income from other sources. The formula then divides this income between the spouses according to a specified percentage. The applicable percentage would be determined by "negotiation and give-and-take" or by the court's discretion.

Dranoff uses 50% as an example, but recognizes that discretion comes into play in determining the proportion of income to be shared, creating opportunities to factor in many variables. She suggests for example, that in a long term marriage with several children still at home, 50 or even 60% of the income available after child support is the right proportion, but that where there are no children, or in the case of a second marriage lasting 10 years, the appropriate percentage might be 30%. Using an analysis based on her formula, Dranoff found that the wife in *Andrews* was left with 39% of the income available after payment of child support. It should be noted that unlike the American guidelines, Dranoff's formula does not apply a specified percentage to the *income difference* between the spouses; instead the percentage is used to determine the appropriate division of the *total income remaining after child support* between the parties.¹¹⁷

Dranoff's formula has been criticized in some quarters.¹¹⁸ Some of the criticism springs from a hostility to guidelines of any sort; and some is based upon a misreading of the suggested formula as mandating an equalization of spousal income, whereas the proposal expressly recognizes the possibility of a range of applicable percentages. However, the Dranoff proposal can be criticized for its failure to articulate with any specificity the kinds of circumstances in which significant income-sharing is

¹¹⁶ This way of understanding the methodology implicit in *Andrews* is also supported by McLeod and Thompson, as discussed *supra* at note 21.

¹¹⁷ In a case where 50% is used the results will be the same whether the rule is "leave the wife with 50% of the remaining available income" or "give the wife 50% of the income difference between the spouses." But if the percentage is, for example, 40%, the result under Dranoff's formula, which will be to give the wife sufficient spousal support so that she is left with 40% of the remaining available income, will be different than the result that would be achieved by calculating spousal support as 40% of the income difference between the spouses.

¹¹⁸ See John Syrtash and Karen Freiday, "Opposing a Spousal Support Formula and Alternatives" (May 2002), 13 (6) *Matrimonial Affairs* 15.

appropriate—whether it is the presence of children that is the relevant factor justifying a norm of equalization or the length of the marriage. It is not put forward, for example, as a formula that is devised for cases where there are minor children or where there has been a very long marriage. The formula thus leaves itself open to the criticism that it is not appropriate in all cases, and reinforces some of the worst fears about guidelines generating highly inappropriate results because of excessive simplification.

On the other hand, the formula offers a methodology which might well be appropriate in certain kinds of cases, particularly cases like *Andrews* where there are minor children. The *Andrews* development has no counterpart in American spousal support law, and is therefore not taken into account under current American guidelines, or even under the ALI proposals. If this is seen to be a significant development that should be supported, Canadian guidelines will have to be crafted to reflect it.

C. Drawing Together the Strands: Some Basic Issues About Structuring Spousal Support Guidelines

Where does this review of different experiments with spousal support guidelines take us in terms of the project at hand?

The challenge in developing guidelines is how to translate basic principles or theories into proxies which generate “average” or “approximate” justice. Most guidelines are structured around income-sharing as a methodology (i.e., a methodology which is based on the post-divorces incomes of the parties and on sharing a specified portion of that income). A crucial threshold issue in any attempt to create guidelines is whether that methodology can be accepted. This involves eliminating budgets as a primary determinant of spousal support outcomes as well as abandoning any focus on individualized estimates of earning capacity loss.

Once income-sharing is accepted as a methodology, the crucial question is what factors will structure income-sharing. The review of existing guideline models in Part IV raises some basic structural issues:

- Should the main structural factor be length of marriage (as in many American guidelines) or should the presence or absence of children also be important?
- If the presence of children in the marriage is to be a relevant “structural” factor, is it relevant because *during the marriage* one spouse may have assumed disproportionate responsibility for child care? Or is the relevance that there are dependent children at the time of divorce for whom the spouse claiming spousal support has on-going custodial responsibility?
- More generally, to what extent can/should guidelines be structured to respond to diversity of fact situations? Guidelines strive to reduce the number of relevant factors to serve the goals of administrative efficiency. Yet talk of guidelines generates real fears about “one size fits all” formulas. Some fear the reduction of

support to the lowest common denominator if we follow American guidelines. Others assume that guidelines inevitably involve an equalization of incomes model across the board. Making children a relevant factor (see (a) and (b) above) is one way of increasing responsiveness to diversity. Another important structural component may be the “durational factor,” used in both the ALI proposals and the Maricopa County guidelines, that links quantum of support to the length of the marriage.

- Under the American guidelines durational limits are an important mechanism for structuring the extent of the support obligation in US. Is it possible to contemplate guidelines with durational limits in Canada, or is quantum the only factor that guidelines can realistically address? How do quantum and duration interact? Does uncertainty of duration require some downward adjustment of quantum?
- How will child support be integrated with any guideline? Some American guidelines, for example, calculate spousal support before child support. Those models are inappropriate in the Canadian context

V. THE SOCIAL CONTEXT FOR CANADIAN GUIDELINES

This section of the paper provides some social context for the development and operation of spousal support guidelines. An important issue in developing spousal support guidelines is the question of potential impact. Data on the actual incidence of spousal support is important in establishing a benchmark against which to assess the potential impact of guidelines. Length of marriage is likely to emerge as a central structural component in any proposed Canadian guidelines, as is the presence of dependent children. A review of existing data on the nature of marriages which end in divorce may assist in structuring guidelines (for example, help us determine what is a long marriage). To the extent this data reveals what percentage of divorces will fall into different categories, it will also assist in assessing the impact of any proposed guidelines.

What follows is a review of the information available with respect to incidence of spousal support and the characteristics of marriages which end in divorce. Unfortunately, as will become apparent, the information is in many cases limited and of questionable reliability.

A. Incidence of Spousal Support

Current law appears to offer a very expansive basis for spousal support—an expansion that began with *Moge* in 1992 and intensified with *Bracklow* in 1999. Reliable data on the actual incidence of spousal support does not exist, but the scant available suggests that spousal support is present in only a small percentage of divorce cases—ranging from the low twenties at best, to the low teens at worst.

The best data comes from the federal government's 1988 *Evaluation of the Divorce Act*,¹¹⁹ where data based on an examination of court divorce files showed that spousal support was sought in 16% of divorce files, and in only 19 percent of cases where there were dependent children. Data in the same study drawn from surveys of individuals who had gone through the divorce process, a slightly more reliable source, showed only a slightly higher incidence: 22 percent of wives reported that they had sought spousal support at some time since the separation; while 30% of the husbands reported that their ex-wives had sought spousal support.¹²⁰ One of the problems with this data is that it dates from 1988, and hence does not take into account any of the shifts in the law as a result the *Moge*, let alone *Bracklow*.

The more recent data is even more limited in scope. One source of data is provincial maintenance enforcement programs. As part of the Maintenance Enforcement Survey, which is not yet fully implemented, information has been collected on two provinces, Saskatchewan and British Columbia, for orders registered at March 31, 2000.¹²¹ One has to extrapolate from the survey figures. Those conducting the survey estimate that most provincial maintenance enforcement programs are only dealing with 40 to 50% of support orders, with the emphasis being on those orders where there is difficulty with enforcement. As well, welfare recipients are obligated to register their orders for enforcement, thus skewing the data towards low-income recipients.

With respect to Saskatchewan, spousal support only was found in 4.1% of *Divorce Act* orders registered in the program and combined spousal and child support orders represented 7.4% of *Divorce Act* support orders (so a total of 11.5% of all support orders).¹²² For British Columbia, spousal support only was found in 4.1% of *Divorce Act* orders registered in the program and combined spousal and child support orders represented 4.8% of *Divorce Act* support orders (for a total of 8.9% of all *Divorce Act* support orders).¹²³

Another source of data, the survey of child support awards under the *Divorce Act* database, shows spousal support awards in approximately 13% of cases where there are

¹¹⁹ Canada, Department of Justice, *Evaluation of the Divorce Act: Phase II: Monitoring and Evaluation* (Ottawa, 1990).

¹²⁰ The discrepancy might be explained by, at least in part, by the fact that the men and women interviewed were not corresponding spouses.

¹²¹ Canadian Centre for Justice Statistics, *Child and Spousal Support: Introduction to the Maintenance Enforcement Survey* (Statistics Canada, 2002).

¹²² Provincial orders barely had any type of spousal support orders-- .04% with respect to each category.

¹²³ With respect to orders under provincial legislation, 1.3% of all support orders related to spousal support only and 2.5% related to combined child and spousal support orders.

orders for child support.¹²⁴ This data source is limited because it only includes cases in which child support is awarded.

All of these numbers seem low, but American data reveal the same pattern, with percentages in the high teens.¹²⁵

What explains the low incidence of spousal support in the existing studies? One possibility, of course, is that the studies do not reflect the actual incidence of spousal support. Given that spousal support is a higher-income phenomenon, it is likely that a significant amount of spousal support is found in agreements rather than court orders, and hence does not get captured in court-based data.

The other possibility is that uncertainty about the spousal support obligation prevents claims from being made. The 1988 *Divorce Act* evaluation asked women why they had not asked for spousal support: 63% felt that they were self-sufficient or had other sources of support; 24% did not believe in it or wanted a clean break; another 11% wanted support but did not think support would be granted, or if granted, be paid.¹²⁶ These reasons reflect the strong influence of ideas of clean break and self-sufficiency and the limited basis for spousal support in 1988.

One might have expected to see shifts in the willingness and desire to claim spousal support with the expansion of the obligation as a result of *Moge* and *Bracklow*. However, spousal support remains highly discretionary and very uncertain. It is still not a clear entitlement. We know little of what actually goes on in the negotiation of separation agreements, but it may be that spousal support is the first claim to be “pulled off the table” or whittled down in the give and take of negotiation.¹²⁷

If there is some accuracy to the studies showing a relatively low incidence of spousal support, the development of guidelines might have a fairly significant impact in increasing incidence and making spousal support a relatively standard part of many divorce claims, at least in middle and high income cases. This would be consistent with the existing legal framework, but might constitute a fairly dramatic shift in practice.

¹²⁴ The database contains data from 21 selected courts in all provinces and territories except Quebec and Nunavut. The total number of cases, including original orders and variations, collected between November 1998 and February 2002 was 33,240.

¹²⁵ The American studies are reviewed by the ALI, *supra* note 9. The highest incidence found in any American study was 30% in a large sample of divorcing parents in California with at least one child under 16: Maccoby and Mnookin, *Dividing the Child* (Cambridge: Harvard University Press, 1992) at 123-4.

¹²⁶ *Supra* note 119.

¹²⁷ For an extremely thoughtful analysis of the impact of the discretionary nature of the support entitlement on the dynamic of bargaining see Craig Martin, “Unequal Shadows: Negotiation Theory and Spousal Support Under the Canadian Divorce Act” (1998), 56 U.T.Fac.L.Rev. 135.

B. Length of Marriage

Any guidelines, however constructed, will likely have to take marital duration into account. What do we know about how long marriages last?

In 2000, the median duration of marriage, calculated from date of marriage to date of divorce was 11 years.¹²⁸ This figure has remained relatively constant for over decade. Given that most spouses will have been separated for at least one year before divorce, the median period of actual cohabitation could be less than 10 years.¹²⁹

The majority of divorces, (60.8%) involve couples who have been married for less than 15 years. A sizable number (19%) of these are marriages that end within four years.

Only 12% of marriages that end in divorce last 25 years or more. Even if one extends the definition of long marriage to include marriages that last at least 20 years, the number only rises to 22%.¹³⁰

What are the implications of this for structuring guidelines. Under some the guidelines reviewed in Part 1V above, income-sharing does not kick in until the relationship has lasted a minimum of 5 years. Based on Canadian data, that would exclude 19% of the cases. Long marriages are probably the easiest to deal with; depending on one's definition that would include only either 12% or 22%.

The vast majority of marriages that end in divorce are in the middle in terms of duration: 23.5% lasted 5-9 years; 18.5% lasted 10-14 years; and 13.8% lasted between 15 and 19 years. Even within this middle range, there is a much higher incidence of divorce in marriages of shorter duration, with the percentages declining after 15 years. Many of these marriages are likely to still have dependent children (see below). Whatever is done under guidelines for marriages of medium duration will have an impact on a significant proportion of the divorcing population.¹³¹

C. Marriages with Dependent Children

¹²⁸ The source for this data is Statistics Canada, Health Statistics Division, *Divorces 1999 and 2000*, Cat. No. 84F0213XPB (December 2002), Table 15.

¹²⁹ Although given that a significant number of couples cohabit for some period of time before marriage, the median for relationship duration may bump back up to 11 years or even slightly higher.

¹³¹ Thompson, *supra* note 4, provides a more detailed breakdown of the 1998 divorce data. Attempting to classify marriages into three categories of "short," "medium" and "long," he breaks the 1998 divorce data into thirds. His conclusions were: "short" marriages would be those under 7 years, while "long" marriages would be anything 16 years or longer. "Medium" length marriages would range from 8 to 15 years.

Guidelines may provide for different treatment of marriages involving dependent children. Existing studies show that approximately half of divorces involve dependent children.

Data collected under the *Divorce Act* registry indicates that, in 2000, 42.6% of divorces involved dependent children.¹³² This number has slowly been going downward since 1991, when the figure was 53.5%. There is no data, unfortunately, on the age of the dependent children. Falling in the category of marriages without dependent children would be both marriages in which there were children, but they are no longer dependent, and childless marriages.

This data is not complete, however, and must be approached with some caution. It only includes cases where children are noted on the record of divorce. In cases where parties have, for example, reached an agreement about custody beforehand, and the court did not have to adjudicate, the children may not be entered on the record of divorce. Consequently, divorce registration data underestimates the number of cases of divorces involving dependent children.

It is possible, therefore, that well over 50% of marriages involve dependent children. Guidelines need to be developed with the recognition that such cases may well constitute the majority of spousal support cases.

VI. BUILDING CANADIAN SPOUSAL SUPPORT GUIDELINES FROM THE GROUND UP: THE PROCESS

Responding to the concerns of lawyers and judges about the current uncertainty in the law of spousal support, the federal Department of Justice has taken on the role of facilitating a discussion about the possibility of developing spousal support guidelines in Canada. The process that is envisioned for this project takes its inspiration from the process by which many of the American spousal support guidelines were created, as reviewed in Part IV above. These guidelines have largely been generated at the local level. They were, in their origin, the result of local bench and bar committees, composed of judges and lawyers, attempting to articulate informal guidelines which reflected current practice. The goal was not to make new law, but to “crystallize” current practice under existing legislation in order to provide a more certain backdrop for negotiation. Although over time some of the American guidelines have taken on a more formal status,¹³³ they started out as informal rules of practice which operated in an advisory capacity to provide a starting point for negotiation or decision-making.

¹³² See *supra* note 128.

¹³³ See California, where the Santa Clara County guidelines are now found in the Rules of Court, and Pennsylvania, where informal guidelines originally created in Allegheny County were eventually adopted state-wide through legislation.

This project, too, is based on the concept of building informal guidelines “from the ground up” by those who are immersed in current practice. The model of law reform that is being contemplated is not that of formal, legislated guidelines, such as was adopted for child support guidelines. The contentious nature of the spousal support obligation suggests that little would be accomplished by opening it up to broad-based legislative reform. Rather the objective of the project is to facilitate the development of guidelines that will reflect and structure current practice under the existing legislation. It is envisioned that such guidelines would be implemented on a regional basis to guide local practice. The exact status and force of such guidelines would be a matter open to discussion. The most obvious possibility is the route taken in several Kansas counties and Maricopa, County Arizona, where the guidelines are informal rules of practice that are understood to be “advisory” rather than binding. On this model, the guidelines developed through this project would simply constitute a starting point for discussion, negotiation, or decision-making.

As currently conceived, this project of “building guidelines from the ground up” involves several stages. The first stage is to bring together a small group of judges, lawyers and mediators (approximately 10) from across the country with an expertise in family law (the “working group”) to begin the discussion about the development of guidelines. This group will first discuss the feasibility of the project. If there is support for the project, the working group will then begin a focused discussion of some of the specific issues that would arise in trying to develop guidelines. This discussion will take place over the course of several meetings. The process will require clarifying and reaching some rough consensus on the assumptions underlying spousal support and then developing guidelines to implement those assumptions. An essential feature of the process, given that the goal is to work from current practice, will be to identify different categories of cases, and in this way to work from the ground up in articulating basic principles and crafting guidelines that are appropriate for each category of case.

A series of more informal consultations focused on similar issues will also be held with lawyers, judges and mediators outside the working group. For example, similar discussions might be conducted with family law sections of provincial bar associations or with groups of judges in the context of judicial education seminars. These consultations will feed into the discussions of the working group to ensure that views from a range of regions and localities are considered.

If the discussions with the working group and the informal consultations reveal support for the development of guidelines and the ability to reach rough consensus on a number of starting points, the project will move to the next stage. Here the objective would be to pilot guidelines in one or more court sites. The ideas developed in the working group would provide the starting point for discussions in the chosen sites which would focus on developing guidelines responsive to the local norms of practice and which would receive the support of the local bench and bar.

The project as conceived is a challenging one on both the practical and conceptual levels. The project is premised on the hope that consensus is possible, particularly if the

focus is on concrete outcomes in different categories of cases rather than on abstract theories, but there is some risk that it will not be possible to achieve even a rough consensus on underlying assumptions.

There is also, admittedly, a tension built into the project between reflecting current practice and changing the law. The project is put forward as one that builds on current practice. Yet current practice is diverse. In order to bring more structure and certainty into the law choices have to be made as to what are “emerging trends” or “best practices” and the law will thus be “re-structured” along those lines. The project thus contemplates a certain degree of change, but change that is consistent with the current legislative structure and basic framework that comes from decisions of the Supreme Court of Canada interpreting those provisions. One way to see the project is as facilitating or “speeding up” the normal common law process for the development of the law whereby the best understandings or interpretations of the current law eventually rise to the surface. The normal process of legal development has fallen apart in this area of law because of an excessive emphasis on discretion and individualized decision-making and a failure to focus on underlying principles and structure.

An off-shoot of the tension between “reflecting” and “changing” the law is a tension between local and national standards. Currently there are significant regional variations in how spousal support is determined, despite the fact that the *Divorce Act* is national legislation. This project is one that builds on current practice, suggesting that any proposed guidelines will be responsive to variations in local legal cultures. On the other hand, the focus on “best practices” or “emerging trends” envisions some restructuring of the law that will work to reduce regional variation. The project contemplates that a national dialogue on these issues will facilitate a certain amount of “cross-fertilization” of ideas between regions. An initial challenge for the project will be whether regional variations are so significant that there can be no consensus on “best practices” or “emerging trends” on the national working group.

While the project is not without its challenges and tensions, it would appear worthwhile to at least begin the discussion about bringing more structure into the law of spousal support and developing guidelines.