

**FACTORS CONSIDERED BY BRITISH COLUMBIAN COURTS
IN RECENT SPOUSAL SUPPORT CASES:
SPOUSAL SUPPORT GUIDELINES – A NEW ERA**

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I INTRODUCTION

A. Non-Binding

The Spousal Support Advisory Guidelines, set out in *C. Rogerson and R. Thompson, Spousal Support Advisory Guidelines: A Draft Proposal (Ottawa, Dept. of Justice: 2005)* (the “Guidelines”) are an attempt to bring certainty to a previously inconsistent and unpredictable area of the law.

The Guidelines are not legislated and are one factor for the Court to consider in a spousal support application. This means that the Courts are not statutorily obliged to work within the Guidelines framework, and this differentiates the Child Support Guidelines from the Spousal Support Advisory Guidelines.

The leading case on the enforceability of the Guidelines in BC is *Yemchuk v. Yemchuk*, (2005) 44 B.C.L.R. (4th) 77, [2005] B.C.J. No. 1748 (BCCA). Madam Justice Prowse, speaking for the Court, stated as follows in the judgment of the Court:

Rather, their purpose is to be advisory only, with a view to bringing more certainty and predictability to the determination of spousal support under the Act. They are a response to what has been perceived as a significant lack of predictability in spousal support awards, which commentators suggest are even less predictable following the Bracklow decision.

It is also important to note that the Advisory Guidelines do not deal with entitlement to support, but are only relevant to issues of quantum and duration of support once entitlement has been resolved. Nor do they address situations in which there are prior agreements between the parties dealing with spousal support.

...I am satisfied that their intention and general effect is to build upon the law as it exists, rather than to present an entirely new approach to the issue of spousal support. For that reason, like Madam Justice Martinson and many other judges, I have no hesitation in viewing the Advisory Guidelines as a useful tool to assist judges in assessing the quantum and duration of spousal support. They do not operate to displace the courts’ reliance on decided authorities (to the extent that relevant authorities are forthcoming) but to supplement them. In that

regard, they do not constitute evidence, but are properly considered as part of counsels' submissions. (paragraphs 62-65)

B. Mixed Reactions from the Bench

The idea of the Guidelines has been discussed for many years, long before the *Spousal Support Advisory Guidelines* were released.

In the leading case on spousal support, *Moge v. Moge*, [1992] 3 S.C.R. 813, [1992] S.C.J. No. 107 (La Forest, L'Heureux-Dube, Gonthier, Cory, McLachlin, Stevenson and Iacobucci JJ), Madam Justice L'Heureux-Dube, for the majority, stated as follows at paragraphs 88 and 89,

One proposal put forth by Professor Rogerson would be for Parliament to consider enacting a set of legislative guidelines. In "Evidentiary Issues in Spousal Support Cases" (paper presented to the Law Society of Upper Canada 1991 Special Lectures, Applying the Law of Evidence: Tactics and Techniques For the Nineties, 219, at pp. 271-73), concerns about the cost and complexity of litigation were said to be a force to be reckoned with in matrimonial property cases when they were based upon doctrines of resulting and constructive trust. The legislature responded with schemes of matrimonial property legislation which replaced the discretion of individual judges with formulae for the division of property. Professor Rogerson suggests in her paper (at pp. 271-72) that:

... in the long run a similar solution should be contemplated for spousal support. Legislative guidelines could be enacted that allow for the sharing of gains and losses in spousal income-earning capacity due to the marriage. Precise calculations of gains and losses should be avoided, and instead the presumptions for sharing of such gains and losses should be rooted in a normative view of marriage as a sharing relationship. Such schemes would obviously sacrifice precision of calculation, but they would offer ease of administration and result generally in conformity with notions of fair treatment of spouses.

¶ 89 One possible disadvantage of such a solution lies in the risk that it may impose a strait-jacket which precludes the accommodation of the many economic variables susceptible to be encountered in spousal support litigation.

In the past year since their release, BC judges have had mixed reactions to the Guidelines.

In some B.C. cases, the Court has done an independent analysis of spousal support using established principles and then at the end of the judgment the Court uses the Guidelines as a crosscheck.

In other cases, the Court starts with the Guidelines and then adjusts the spousal support figure up or down depending on the circumstances of the particular case.

Of note is a negative decision of the Alberta Court of Queen's Bench in the case called *V.S. v. A.K.* ((13 October 2005) Judicial District of Edmonton, Alberta, Docket: 4803-133713), [2005] A.J. No. 1357 (Alta Q.B.) wherein the Court referred to the Guidelines as a "cause for concern" and warned against a "cookie cutter" approach to spousal support.

II. LEGAL TEST

A. Entitlement to Spousal Support

1. Divorce

Do not assume that the introduction of the Guidelines means that spousal support is appropriate in most, if not all family cases.

The basic test in determining entitlement to spousal support has not changed. An applicant for spousal support must first satisfy the Court that they pass the entitlement hurdle.

In section 15.2 of the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.), the test for entitlement to spousal support is set out and the factors include:

- a) economic advantages or disadvantages from the marriage or its breakdown;
- b) child care responsibilities during the marriage;
- c) economic hardship arising from breakdown of marriage;
- d) self-sufficiency.

a) Compensatory Support

In *W. v. W.* (4 July 2005), Vancouver No. E042021, [2005] B.C.J. 1481 (B.C.S.C.) (Madam Justice Martinson), at paragraphs 42 and 43, the Court held that the wife was entitled to spousal support as compensation for taking the brunt of the child care responsibilities and thereby sacrificing career opportunities during the marriage. Madam Justice Martinson stated as follows:

Therefore, in a typical case, the primary earner has three benefits: the benefit of a share of the assets; the benefit of having had children; and the benefit of a higher

income earning ability because of full participation in the work force, substantially unencumbered by child care responsibilities. The secondary earner has two of these benefits: the benefit of a share of the assets accumulated; and the benefit of having had children. However, that spouse often does not have the same income earning ability at the time of separation because of the role played in the marriage. It is that disadvantage, and the concurrent advantage to the other spouse, that can be addressed by a compensatory spousal support award (paragraph 16)

(i) Generous scope of compensation

In some cases, the Courts take a generous view of compensation and spousal support:

In *A.T. v. C.T.* (13 February 2006) Victoria No. 05 3499, [2006] B.C.J. No. 309 (B.C.S.C) (Madam Justice Sinclair Prowse), at paragraph 103, it was determined that justice was served by causing "...[t]he financial resources of the parties' be pooled and shared as equitably as possible" after their separation (23 year marriage).

The Court of Appeal did not suggest "pooling" the resources of the separated spouses, however in *Yemchuk* paragraph 49, Madam Justice Prowse did state that "the most a support order can do is to attempt to alleviate a significant disparity in their relative standards of living following marriage breakdown" in long term marriages. Note the reference by the Court of Appeal to standards of living, and not incomes.

In *W. v. W.*, Madam Justice Martinson contemplated what is meant by post-separation "standard of living" and stated at paragraph 46:

It is, with respect, not appropriate to assess the wife's standard of living against that of other Canadians, as suggested by the husband. Their lives have been significantly intertwined financially over many years. **The wife is entitled, in the particular circumstances of this case, to a roughly equal standard of living, assessed against her marital standard of living.** She is entitled to indefinite support. The quantum will vary depending initially on whether and when the children become independent. She is entitled to a roughly equal standard of living after the children are independent. [emphasis added].

(ii) Limited scope of compensation

In other BC cases, the Courts have taken a less generous view of the entitlement to compensation.

In *Roberts v. Beresford*, [2006]17 R.F.L. (6th) 189, [2006] B.C.J. No. 29 (BCCA), at paragraph 20, Mr. Justice Donald reasoned that the compensatory aspect of support does not require an attempt to equate the post-separation incomes of the parties. The Court went on to say that the

compensatory aspect of spousal support is not intended to be “a claim of a property interest in the respondent’s income earning capacity.”

In a detailed decision, Madam Justice Bennett stated that equalization of income was not an objective of spousal support. “While a disparity in lifestyle will need to be addressed, no cases have held that lifestyle or incomes have to be equalized. The Spousal Support Advisory Guidelines formula does not result in equalization of incomes.” (*Elias v. Elias* (25 January 2006), Golden Registry No. 3191, [2006 B.C.J. No. 146 (B.C.S.C.) (Madam Justice Bennett) at paragraph 65).

The compensatory argument generally should be used to fix the spousal support at the higher end of the range. The Guidelines report explains itself, in section 6.5:

Compensatory principles would suggest that the more the recipient spouse gave up in the paid labour market, the higher one would go within the range... Given the presence of dependent children under this formula, almost every case will have a compensatory element and the lower and higher ends of the range reflect that. What moves a case up or down the range is the relative strength or weakness of the compensatory claim.

However, although this appears to be accepted in practice, it is not well-articulated in the jurisprudence to date.

B. Using the Guidelines

1. Various Judicial Approaches

In *Marr vs. Marr* (15 February 2006), Victoria Registry No. 04 3163, [2006] B.C.J. No. 339 (B.C.S.C.) at paragraph 18, Mr. Justice Kelleher came to a conclusion regarding the quantum of spousal support and then stated he was using the Guidelines as a “check”.

The other cases, the Court has gone first to the Guidelines, and then considered whether the award should be increased or decreased. “[I]n determining the quantum of spousal support payable, I have relied upon the Spousal Support Advisory Guidelines....I have kept in mind the fact that the Advisory Guidelines are advisory only.” (*A.T. v. C.T.* paragraph 95 Madam Justice Sinclair Prowse).

In late 2005, Master Donaldson stated that the Guidelines were becoming more widely accepted in BC Courts. “The recent authorities indicate increasing confidence by the courts in the spousal support guidelines and they of course provide a range from low to high.” *DeCamillis v. DeCamillis* (29 November 2005) Vancouver No. E051592, [2005] B.C.J. No. 2959 (B.C.S.C.) (Master Donaldson).

2. Spousal support at the higher end of guidelines (or above the range)

The following is a list of the factors the Court found persuasive when determining the quantum and duration of spousal support in the context of the Guidelines:

- a) Debt load of the recipient (*Chepil v. Chepil* (6 January 2006) Kelowna Registry No. E63629, [2006] B.C.J. No. 15 (B.C.S.C.)) (Mr. Justice Ehrcke).
- b) Illness of recipient who is unable to work and 21 year marriage (*Hewko v. Hewko* (15 June 2005), Victoria Registry No. 99 1626, [2005] B.C.J. No. 1416 (B.C.S.C.) (Mr. Justice Curtis).
- c) Income sharing (*A.T. v. C.T.* at paragraph 16). This issue arose also at the entitlement stage.
- d) Standard of living - recipient entitled to “roughly equal standard of living” now as that enjoyed during marriage (22 years, plus lived together 2 years) (*W. v. W.* at paragraph 46, Madam Justice Martinson). This issue arose also at the entitlement stage
- e) Payor’s new spouse has significant income (*Hesketh v. Hesketh* (2005) 20 R.F.L. (6th) 168, [2005] O.J. No. 4053 (Woodstock, Ontario)(T.A. Heeney J)).
- f) Retirement. Recipient retired in 1997 and parties separated in 2001 after a long marriage. Court held the recipient retired in 1997 to enable the payor to relocate for a job. Court of Appeal held that the retirement was a “compensatory factor” in considering spousal support (*Yemchuk*, paragraph 37) and in the end the Court awarded spousal support just below the Guideline range). This issue arose also at the entitlement stage.
- g) Training - Recipient attending course to improve credentials (*A.T. v. C.T.* at paragraph 96).
- h) Unemployment of recipient husband for last years of marriage (*M.K.M. v. T.L.M.* (8 July 2005), Victoria No 05/2367, [2005] B.C.J. No. 1956 (B.S.C.S.) (Master McCallum).

3. Spousal support at lower end of the Guidelines (or not at all)

The following is a list of the factors the Court found persuasive when determining the quantum and duration of spousal support in the context of the Guidelines:

- a) Child rearing responsibilities are ending (*Roberts v. Beresford*, paragraph 22)

- b) Expenses- Payor has increased expenses associated with working, e.g. clothing, transportation (*Yemchuk* paragraph 72)
- c) No reasonable compensatory basis - Recipient has remarried, has new job and put a significant amount of the prior spousal support paid into savings. (*Roberts v. Beresford*, paragraph 22)
- d) Pension - Recipient receives Old Age Pension (*Yemchuk*, paragraph 72)
- e) Reapportionment of assets may lead to no spousal support or lower spousal support to “avoid double recovery” (*W. v. W.* paragraph 38)
- f) Separation agreement whereby the wife accepted lump sum spousal support of \$20,000 and husband had arranged his affairs in reliance on it. Parties signed a consent order nine years earlier dismissing claims for spousal support. Court awarded spousal support below guideline amount (\$1200/month) and for duration of two years (*Santoro v. Santoro* (28 February 2006), Kamloops No. D010670, [2006] B.C.J. No. 453 (B.C.S.C.) (Mr. Justice Powers)). See also *Chepil*.
- g) Unemployment – no efforts by recipient to obtain employment (*Proctor v. Proctor*, 46 B.C.L.R. (4th) 119, [2005] B.C.J. No. 1585 (Mr. Justice Wilson). See also *M.S. v. W.S.* (27 June 2005) Vancouver No. E031966, [2005] B.C.J. No. 1447 (B.C.S.C.) (Mr. Justice Romilly) Note that *M.S.* was decided before *Yemchuk*).

4. Factors not accepted by the Court of determination of quantum/duration of spousal support

Some arguments in favour of decreasing spousal support obligations have been dismissed outright by the Courts. The following are some conclusions by the Court:

It is not sufficient to merely ensure recipient has same standard of living as average Canadian (*W. v. W.* paragraph 48)

The obligation to pay spousal support is not a residual obligation after calculating the payor’s expenses first (*Lawrence v. Lawrence* (1 February 2006) Duncan No. E9919, [2006] B.C.J. No. 210 B.C.S.C. (Madam Justice Ross) at paragraph 87).

The social assistance being received by the recipient should not be included as the social assistance may be terminated upon payment of the spousal support (*Lawrence v. Lawrence* at paragraph 84)

Income of a party will not be accepted when it is clear they worked for cash under the table and received gifts of appliances through work. Also a party can’t rely on the fact they want to work on building their own house as a reason why their income is reduced (*Elias v. Elias* at paragraph 51).

5. Retroactivity

The Court may grant retroactive spousal support (*Yemchuk* paragraph 76, Madam Justice Prowse).

In *Chepil*, Mr. Justice Ehrcke ordered spousal support, but declined to order retroactive spousal support due to the economic self-sufficiency of the parties and their pre-existing separation agreement (paragraph 83).