Law Society of Ontario | Barreau de l'Ontario

18th Family Law Summit

CO-CHAIRS

Kelly D. Jordan, C.S.
Kelly D. Jordan Family Law Firm

Shawn Richard, TEP
A. Shawn Richard Family and Estate Law

March 20, 2024
March 21, 2024

CLE24-0030801-D-WEB

Law Society of Ontario | Barreau de l'Ontario

CPD Materials Disclaimer & Copyright

These materials are part of the Law Society of Ontario's initiatives in Continuing Professional Development. Their content, including information and opinions, provided by the authors, is that of the authors. The content does not represent or embody any official position of, or statement by, the Law Society of Ontario, except where specifically indicated, nor should any content be understood as providing definitive practice standards or legal advice. The Law Society of Ontario does not warrant the current or future accuracy of the content and expressly disclaims responsibility for any errors and omissions in the content, including inaccuracies that may result due to developments in law.

Law Society of Ontario
130 Queen Street West, Toronto, ON M5H 2N6
Phone: 416-947-3315 or 1-800-668-7380 Ext. 3315
Fax: 416-947-3370
E-mail: cpd@lso.ca
www.lso.ca

Library and Archives Canada
Cataloguing in Publication

18th Family Law Summit
ISBN 978-1-77345-973-8 (PDF)
ISBN 978-1-77345-974-5 (Hardcopy)

cpd

18th Family Law Summit

CO-CHAIRS: **Kelly D. Jordan, C.S.,** *Kelly D. Jordan Family Law Firm*

Shawn Richard, TEP, *A. Shawn Richard Family and Estate Law*

March 20, 2024
March 21, 2024
9:00 a.m. to 4:00 p.m.
Total CPD Hours = 9 h Substantive + 2 h Professionalism
+1 h EDI Professionalism

Law Society of Ontario

SKU CLE24-00308

Agenda

DAY 2: Thursday, March 21

9:00 a.m. – 9:05 a.m. **Welcome**

Kelly D. Jordan, C.S., *Kelly D. Jordan Family Law Firm*

Shawn Richard, TEP, *A. Shawn Richard Family and Estate Law*

9:05 a.m. – 10:00 a.m.	**Keynote Address** **Negotiation Theory – Use of AI in ADR (40 m P)** Associate Professor Samuel Dahan, *Queen's Law*
10:00 a.m. – 10:35 a.m.	**The SCC Decision in *Anderson* v *Anderson*: Case Comment and Round-Up** Associate Professor Mary-Jo Maur, *Queen's Law*
10:35 a.m. – 10:45 a.m.	**Question and Answer Session**
10:45 a.m. – 11:05 a.m.	**Break**
11:05 a.m. – 11:50 a.m.	**Family Violence in Racialized Families: Intersectional Impacts of Culture, the Role of the Extended Family, and Community (30 m e)** Deepa Mattoo, Executive Director, *Barbra Schlifer Commemorative Clinic* Archana Medhekar, C.S, *AM Law Office* Maneesha Mehra, C.S., *Carson Chousky Lein LLP*
11:50 a.m. – 12:20 p.m.	**Children's Treatment** Assistant Professor Claire Houston, *Western Law*
12:20 p.m. – 12:30 p.m.	**Question and Answer Session**
12:30 p.m. – 1:30 p.m.	**Lunch**

1:30 p.m. – 2:05 p.m.	**Pensions Update (10 m Ⓟ)** Lisa Kadoory, *Kadoory Cho Family Law* Kelley McKeating, *McKeating Actuarial Services, Inc.*
2:05 p.m. – 2:40 p.m.	**Costs: A Whirlwind Tour (But Don't Worry We Give You Precedents) (10 m Ⓟ)** Maria Golarz, *Lam Family Law* Vanessa Lam, *Lam Family Law*
2:40 p.m. – 2:50 p.m.	**Question and Answer Session**
2:50 p.m. – 3:10 p.m.	**Break**
3:10 p.m. – 3:50 p.m.	**Spousal Support: Thinking About Entitlement** Professor D.A. Rollie Thompson, K.C, Schulich School of Law, *Dalhousie University*, and Counsel, *Epstein Cole LLP*
3:50 p.m. – 4:00 p.m.	**Question and Answer Session**
4:00 p.m.	**Program Ends**

Fact sheet
Family Law Rights of Appearance Pilot Project

Law Society of Ontario | Barreau de l'Ontario

Issued: September 2023

What is the Family Law Rights of Appearance Pilot Project?

- The Family Law Rights of Appearance Pilot Project allows eligible lawyer licensing candidates to appear in court on an increased number of matters related to family law cases without first needing advance permission of the court pursuant to Rule 4(1)(c) of the Family Law Rules.
- Rule 4 allows that a party may be represented in court by someone who is not a lawyer, but only if the court gives advance permission.
- In matters where advance permission is not required, candidates must have a lawyer with direct knowledge of the file on stand-by availability.

Why was the Family Law Rights of Appearance Pilot Project created?

- The pilot is a joint initiative of the Law Society of Ontario, the Superior Court of Justice and the Ontario Court of Justice.
- The pilot was launched in 2022 as an access to justice initiative to help increase access to family law services for Ontarians and provide additional learning opportunities for lawyer licensing candidates.

Who is eligible to participate in the pilot?

- Candidates who are eligible to participate in the pilot are referred to as Permitted Candidates. Permitted Candidates include:
    - lawyer licensing candidates
    - LPP/PPD students engaged in work placements and
    - Law students enrolled in an Integrated Practice Curriculum program at Lakehead University or Toronto Metropolitan University and who are engaged in a work placement.

How can candidates participate?

- Articling principals overseeing lawyer licensing placements and supervising lawyers who oversee LPP, PPD and IPC placements are responsible for determining which learning experiences are best suited to a candidate's learning goals and are encouraged to consider participating in the Family Law Rights of Appearance Pilot Project.
- Candidates are encouraged to speak to their articling principals and supervising lawyers to consider if they are eligible and what opportunities may be available.

Matters not requiring advance permission

These matters require candidates to have a lawyer with direct knowledge of the file on stand-by availability:

- First appearances.
- Preparing submissions and attendances to address costs.
- Appearances to settle disputed orders.
- Assignment court/audit court, to confirm a trial is ready to proceed.

- Rule 14B motions for consent orders or other procedural, uncomplicated, or unopposed matters, including requests regarding service and extension of timelines.
- Attending on refraining motions either for the Family Responsibility Office, Ontario Works, or the support payor.
- Case conferences (including conferences before Dispute Resolution Officers) and "to be spoken to" lists.
- Form 15D Consent Motions to Change Child Support.
- Any step in a Motion to Change related solely to child support with a T4 employee support payor – (except for discretionary claims pursuant to sections 3(2), 4, 7, 8, 9, or 10 of the Child Support Guidelines).
- Motions to appoint the Office of the Children's Lawyer, except for appointments under the *Child, Youth and Family Services Act (CYFSA).*
- Motions relating to questioning and undertakings.
- Attendances to speak to matters on consent, including consents to incorporate settlements reached through negotiation, mediation, and minutes of settlement.
- Support enforcement proceedings including steps relating to final disposition.
- Motions relating to financial disclosure.
- Contested adjournments.

What is considered stand-by availability?

- When a candidate speaks to a matter not requiring advance permission, a lawyer with direct responsibility for the file must be available on stand-by to speak to the judge, if required.
- Stand-by means that the lawyer is available to appear in court at the scheduled time, either virtually, by telephone, or in person, if required by the court.

Matters requiring advance permission and candidates be accompanied by a lawyer with direct knowledge of the file

- Any matter involving the *CYFSA*, Hague Convention on the Civil Aspects of International Child Abduction, or other concerns related to child abduction or wrongful retention.
- A settlement conference, trial scheduling conference, or trial management conference.
- Any case where a party on either side is under disability.
- Anything that finally disposes of a matter, including motions for summary judgment, except as otherwise provided above.
- Any case that includes an allegation of family violence.
- Focused hearings or trials.

What additional responsibilities are required of articling principals or supervising lawyers when candidates participate in the pilot?

In addition to following the General Guidelines for all Appearances, articling principals and supervising lawyers must ensure:

- candidates are adequately supervised, with ongoing training and monitoring with respect to their court representation and activities, in respect of both substantive and procedural family law.
- candidates are properly prepared and familiar with the client's file and
- the client has granted permission for the candidate to speak to the issues being addressed in the court appearance, including resolution of those issues on consent. If issues arise outside of those that were expected to be addressed by the court, the lawyer with direct responsibility for the file must be available to speak to the matter.

What additional responsibilities do candidates have when appearing in court under the pilot?

In addition to following the General Guidelines for all Appearances, candidates must:

- indicate to the court that they are appearing under the Family Law Rights of Appearance Pilot Project and are within the rights of appearance and
- confirm to the judge at the start of the proceeding that a lawyer with direct responsibility for the file is available on stand-by in matters where the candidate is speaking to a matter not requiring advance permission.

If the presiding judge decides a matter should not proceed, what steps should be taken by a candidate?

- The presiding judge retains discretion to permit or refuse a candidate's attendance.
- If the presiding judge decides the candidate should not proceed with the matter without a lawyer with direct knowledge of the file present, the candidate should ask that the matter be stood down briefly to enable that lawyer to address the matter.
- A lawyer with direct knowledge of the file should be on stand-by and ready to attend court. Where requested, the candidate shall notify the judge if the lawyer with direct knowledge of the file is not immediately available to attend in person and, if so, of the approximate amount of time it will take for them to be available in person.

The Law Society regulates lawyers and paralegals in Ontario in the public interest. The Law Society has a mandate to protect the public interest, to maintain and to advance the cause of justice and the rule of law, to facilitate access to justice for the people of Ontario and to act in a timely, open and efficient manner.

Media contact: Amy Lewis, Senior Communications Advisor, External Relations and Communications, amlewis@lso.ca. Follow us on LinkedIn, Instagram, Twitter and Facebook.

Fiche d'information :
Projet pilote sur les droits de comparution en droit de la famille

Law Society of Ontario | Barreau de l'Ontario

Publié en septembre 2023

Qu'est-ce que le projet pilote sur les droits de comparution en droit de la famille?

- Le projet pilote sur les droits de comparution en droit de la famille permet aux candidats et candidates du Processus d'accès à la profession d'avocat qui sont admissibles de comparaitre dans un plus grand nombre d'affaires portant sur le droit de la famille, sans avoir besoin de la permission préalable du tribunal aux termes de l'alinéa 4 (1) c) des *Règles en matière de droit de la famille*.
- La règle 4 permet à une partie d'être représentée au tribunal par une personne qui n'est pas un avocat, mais seulement avec la permission préalable du tribunal.
- Dans les cas où la permission préalable n'est pas requise, les candidat(e)s doivent avoir à leur disposition un avocat qui connait très bien le dossier.

Pourquoi le projet pilote sur les droits de comparution en droit de la famille a-t-il été créé?

- Le projet pilote est une initiative conjointe du Barreau de l'Ontario, de la Cour supérieure de justice et de la Cour de justice de l'Ontario.
- Le projet pilote a été lancé en 2022 en tant qu'initiative en matière d'accès à la justice dans le but d'augmenter l'accès aux services en droit de la famille pour la population de l'Ontario et d'offrir des occasions additionnelles d'apprentissage aux candidats et candidates à l'accès à la profession d'avocat.

Qui peut participer au projet pilote?

- Les candidats qui sont admissibles au projet sont appelés candidats autorisés et comprennent :
    - Les candidat(e)s au Processus d'accès à la profession d'avocat
    - Les étudiant(e)s du PPD/LPP qui font un stage
    - Les étudiant(e)s en droit inscrit(e)s à un programme de pratique intégrée à l'Université Lakehead ou à l'Université métropolitaine de Toronto et qui font un stage.

Comment peut-on y participer?

- Les maitres de stage et les avocats superviseurs qui sont responsables des stages du PPD, LPP et PPI déterminent l'expérience d'apprentissage convenant le mieux aux objectifs des candidats et sont encouragés à participer au projet pilote sur les droits de comparution en droit de la famille.
- Les candidat(e)s sont encouragé(e)s à discuter avec leur maitre de stage ou superviseur de leur admissibilité au projet et des possibilités d'apprentissage.

Fiche d'information :
Projet pilote sur les droits de comparution en droit de la famille

Law Society of Ontario | Barreau de l'Ontario

Affaires ne nécessitant pas de permission préalable

Les affaires suivantes requièrent que les candidats aient à leur disposition un avocat ayant une très bonne connaissance du dossier :

- Premières comparutions.
- Préparation des observations et des comparutions pour traiter des dépens.
- Requêtes en vertu de la règle 14B pour des ordonnances de consentement ou d'autres questions de procédure, non compliquées ou non opposées, y compris les demandes concernant la signification et la prolongation des délais.
- Comparutions pour des motions d'abstention soit pour le Bureau des obligations familiales, soit pour Ontario au travail, soit pour le payeur de la pension alimentaire.
- Les conférences relatives à la cause (y compris les conférences devant les agents de règlement des différends) et les listes de « personnes à qui parler ».
- Formulaire 15D Motion en modification des aliments pour les enfants sur consentement.
- Toute étape d'une requête en modification liée uniquement à une pension alimentaire pour enfants avec un payeur de pension alimentaire qui est un employé visé par le feuillet T4 (sauf pour les demandes discrétionnaires en vertu des articles 3 (2), 4, 7, 8, 9 ou 10 des *Lignes directrices sur les pensions alimentaires pour enfants*).
- Comparutions pour régler des ordonnances contestées.
- Audiences de mise au rôle/d'audit, pour confirmer qu'un procès est prêt à commencer.
- Motions visant à nommer le Bureau de l'avocat des enfants, à l'exception des nominations en vertu de la *Loi sur les services à l'enfance, à la jeunesse et à la famille* (LSEJF*).*
- Motions relatives aux interrogatoires et aux engagements.
- Comparutions pour parler d'affaires sur consentement, y compris les consentements pour incorporer des règlements obtenus par négociation, médiation, et les procès-verbaux de règlement.
- Procédures d'exécution des ordonnances alimentaires, y compris les étapes relatives à la décision définitive.
- Motions relatives à la divulgation financière.
- Ajournements contestés.

Qu'entend-on par disponibilité?

- Lorsqu'un candidat comparait pour une affaire qui ne nécessite pas une permission préalable, un avocat directement responsable du dossier doit être disponible et prêt à s'entretenir avec le juge au besoin.
- La disponibilité signifie que l'avocat est disponible pour se présenter au tribunal à l'heure qui a été fixée pour l'évènement, soit virtuellement, soit par téléphone, soit en personne, si le tribunal l'exige.

Affaires nécessitant une permission préalable et obligeant les candidat(e)s à être accompagné(e)s d'un(e) avocat(e) directement responsable du dossier :

- Toute question relative à la LSEJF, à la Convention de La Haye sur les aspects civils de l'enlèvement international d'enfants ou à d'autres préoccupations liées à l'enlèvement d'enfants ou au non-retour illicite.
- Une conférence en vue d'un règlement amiable, une conférence d'inscription au rôle des procès, ou une conférence de gestion du procès.
- Toute affaire dans laquelle l'une ou l'autre des parties a un handicap.
- Tout ce qui permet de régler définitivement une affaire, y compris les motions de jugement sommaire, sauf disposition contraire ci-dessus.
- Toute affaire qui comprend une allégation de violence familiale.
- Les audiences ou les procès ciblés.

Quelles autres responsabilités sont requises des maitres de stage ou des avocats superviseurs lorsque les candidats participent au projet pilote?

En plus de suivre les Lignes directrices pour toutes les comparutions, les maitres de stage et les avocats superviseurs doivent s'assurer de ce qui suit :

- Les candidat(e)s sont adéquatement supervisés, suivent une formation continue et sont surveillés dans le cadre de leur représentation et de leurs activités devant la cour, à l'égard du droit de fond et de procédure en droit de la famille.
- Les candidat(e)s sont bien préparés et connaissent le dossier du client à fond.
- Le client a donné sa permission pour que le candidat aborde les questions lors de la comparution, y compris la résolution de ces questions sur consentement. Si des questions se posent en dehors de celles qui devaient être traitées par le tribunal, l'avocat directement responsable du dossier doit être disponible pour en parler.

Quelles autres responsabilités ont les candidats lorsqu'ils comparaissent dans le cadre du projet pilote?

En plus de suivre les Lignes directrices pour toutes les comparutions, les candidat(e)s doivent faire ce qui suit :

- Indiquer au tribunal qu'ils comparaissent dans le cadre du projet pilote sur les droits de comparution en droit de la famille et qu'ils ont des droits de comparution.

- Confirmer au juge, en début d'instance, qu'un avocat directement responsable du dossier est disponible en permanence dans les cas où le candidat s'exprime sur une affaire ne nécessitant pas de permission préalable.

Si le juge s'oppose à l'instruction d'une affaire, quelles sont les mesures à prendre par le candidat?

- Le juge conserve le pouvoir discrétionnaire d'autoriser ou de refuser la présence d'un candidat.
- Si le juge décide que le candidat ne devrait pas intervenir dans l'affaire en l'absence d'un avocat connaissant très bien le dossier, le candidat doit demander que l'affaire soit suspendue brièvement pour permettre à cet avocat de s'exprimer.
- Un avocat connaissant très bien le dossier doit être prêt à se rendre à l'audience. Sur demande, le candidat informe le juge si l'avocat connaissant très bien le dossier ne peut pas être immédiatement présent en personne et, le cas échéant, du temps approximatif dont il aura besoin pour l'être.

This program qualifies for the 2025 LAWPRO Risk Management Credit

What is the LAWPRO Risk Management credit program?

The LAWPRO Risk Management Credit program pays you to participate in certain CPD programs. For every LAWPRO-approved program you take between September 16, 2023 and September 15, 2024, you will be entitled to a $50 premium reduction on your **2025 insurance premium** (to a maximum of $100 per lawyer). Completing any Homewood Health Member Assistance Plan e-learning course available at homeweb.ca/map also qualifies you for a $50 credit.

Why has LAWPRO created the Risk Management Credit?

LAWPRO believes it is critical for lawyers to incorporate risk management strategies into their practices, and that the use of risk management tools and strategies will help reduce claims. Programs that include a risk management component and have been approved by LAWPRO are eligible for the credit.

How do I qualify for the LAWPRO Risk Management Credit?

Attendance at a qualifying CPD program will NOT automatically generate the LAWPRO Risk Management Credit. To receive the credit on your 2025 invoice, you must log in to My LAWPRO and completing the online Declaration Form in the Risk Management Credit section.

STEP 1:	STEP 2:
• Attend an approved program in person or online; and/or • View a past approved program • Completing a Homewood Health e-course*	Complete the online declaration form in the Risk Management Credit section of my.lawpro.ca by September 15, 2024. The credit will automatically appear on your 2025 invoice.

You are eligible for the Risk Management Credit if you chair or speak at a qualifying program provided you attend the entire program.

Where can I access a list of qualifying programs?

See a list of current approved programs at lawpro.ca/RMcreditlist. Past approved programs are usually indicated as such in the program materials or download page. Free CPD programs offered by LAWPRO can be found at www.practicepro.ca/cpd

Whom do I contact for more information?

Contact practicePRO by e-mail: practicepro@lawpro.ca or call 416-598-5899 or 1-800-410-1013.

*One Homewood Health e-learning course is eligible for the credit on a yearly basis.

LawPRO®
Lawyers' Professional Indemnity Company

18th Family Law Summit

March 21, 2024

SKU CLE24-00308

Table of Contents

TAB 7 **AI in ADR (PPT) …… 7 - 1 to 7 - 23**

Associate Professor Samuel Dahan, *Queen's Law*

TAB 8 ***Anderson* v *Anderson***
Untangling and Applying (PPT) …… 8 - 1 to 8 - 57

Associate Professor Mary-Jo Maur, *Queen's University*

Research Help from Maya Kawale, JD Candidate 2025,
Queen's University

TAB 9 **Family Violence in Racialized Families: Intersectional Impacts of Culture, Community, and the Role of the Extended Family ……. 9 - 1 to 9 - 12**

Deepa Mattoo, Executive Director and Counsel
Barbra Schlifer Commemorative Clinic

Archana Medhekar, C.S., *AM Law Office*

Maneesha Mehra, C.S., *Carson Chousky Lein LLP*

TAB 10 **Best Interests Versus Autonomy:**
Health Disputes Involving Young People in
Family Court (PPT) ……10 - 1 to 10 - 13

Assistant Professor Claire Houston, *Western Law*

TAB 11 **Pension Takeaways: Important Items to**
Think About When Dealing with Pensions (PPT) ……11 - 1 to 11 - 13

Lisa Kadoory, *Kadoory Cho Family Law*

Kelley McKeating, FSA, FCIA, *Mckeating Actuarial Services, Inc.*

Pensions Update
Checklists and Important Takeaways –
An Actuary's Perspective ……..11 - 14 to 11 - 23

Settlement Options Involving Pension Division ……11 - 24 to 11 - 25

Kelley McKeating, FSA, FCIA, *Mckeating Actuarial Services, Inc.*

TAB 12 **Annotated Legislation and List of Cases:**
Family Law Costs ……12 - 1 to 12 - 8

Frequently Asked Questions: Family Law Costs ……12 - 9 to 12 - 30

Schedule "A" – *Rules of Civil Procedure* Form 57A:
Bill of Costs ……12 - 31 to 12 - 31

Schedule "B" – *Rules of Civil Procedure* Form 57B:
Costs Outline ……12 - 32 to 12 - 37

Maria Golarz, *Lam Family Law*

Vanessa Lam, *Lam Family Law*

Sample Cost Submissions – Successful Party ……12 - 38 to 12 - 42

Sample Cost Submissions – Unsuccessful Party or Divided Success ……12 - 43 to 12 - 47

Vanessa Lam, *Lam Family Law*

Maria Golarz, *Lam Family Law*

TAB 13 **Spousal Support: Appeals, Entitlement (PPT) ……13 - 1 to 13 - 17**

Ideas of Spousal Support Entitlement ……13 - 18 to 13 - 50

B.C. Court of Appeal struggles with entitlement to spousal support ……13 - 51 to 13 - 53

Professor D.A. Rollie Thompson, K.C, Schulich School of Law *Dalhousie University*, and Counsel, *Epstein Cole LLP*

Law Society of Ontario | Barreau de l'Ontario

TAB 7

18th Family Law Summit

AI in ADR (PPT)

Associate Professor Samuel Dahan
Queen's Law

March 21, 2024

AI in ADR

LSO Conference, 2024

Samuel Dahan,
Law Professor, Queen's Cornell
Director, Conflict Analytics Lab
Founder, OpenJustice.ai

Table of Contents

5 Things You Don’t Know About AI for Law and ADR

1. AI in Legal Productivity: Boon or Bane?

2. AI is Getting Dumber

3. The Quest for Genuine Legal AI

4. There is Hope: Can We Build Reliable Legal AI?

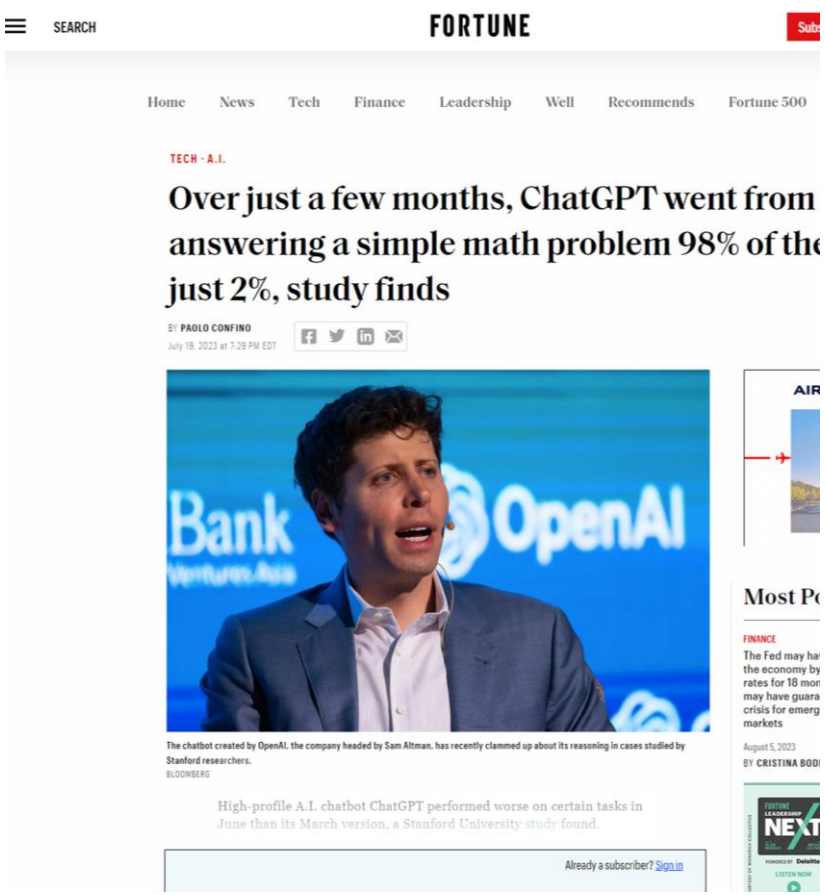
5. AI's Role in Negotiations: Potential or Peril?

Introduction

Tech can’t fix a broken system

1. AI in Legal Productivity: Boon or Bane?

- **Exploring AI's Impact**
  - Does AI truly enhance productivity in the legal profession?
  - Boosts task efficiency, falls short in ADR magic.
- **Not all glitter is gold in AI-enhanced productivity**

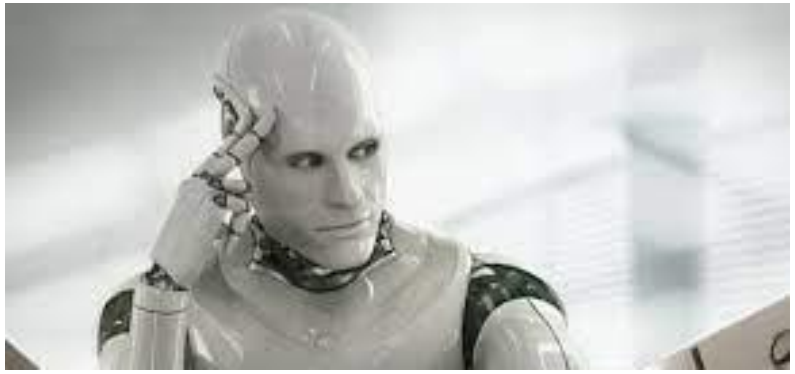


2. AI is Getting Dumber

- AI's Regression: Forgetting math it knew just months ago.
- The Law's AI Dilemma: Overreliance meets underperformance.
- Eye-Opener: Stanford's alarming findings on AI in law.

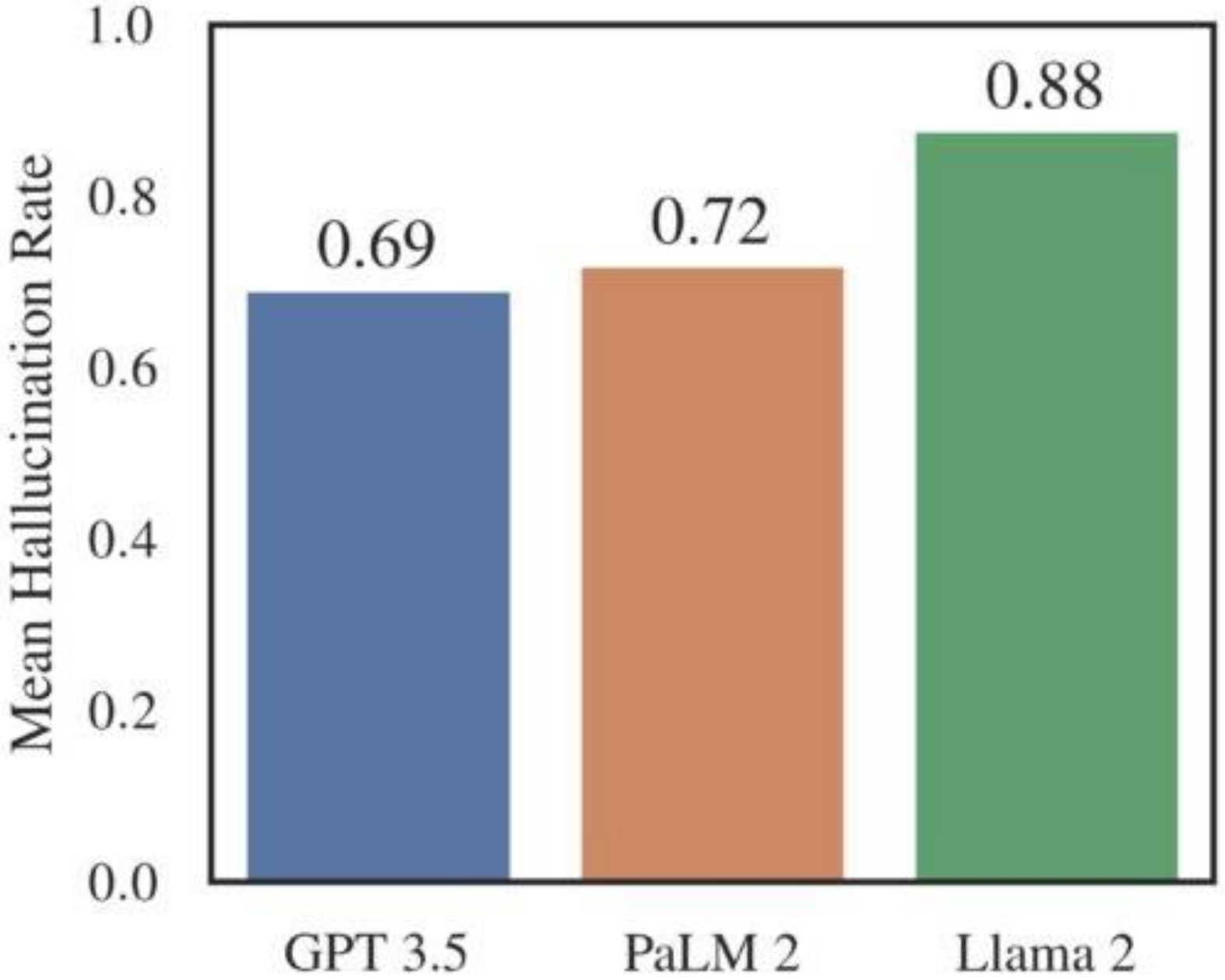
The Law's AI Dilemma

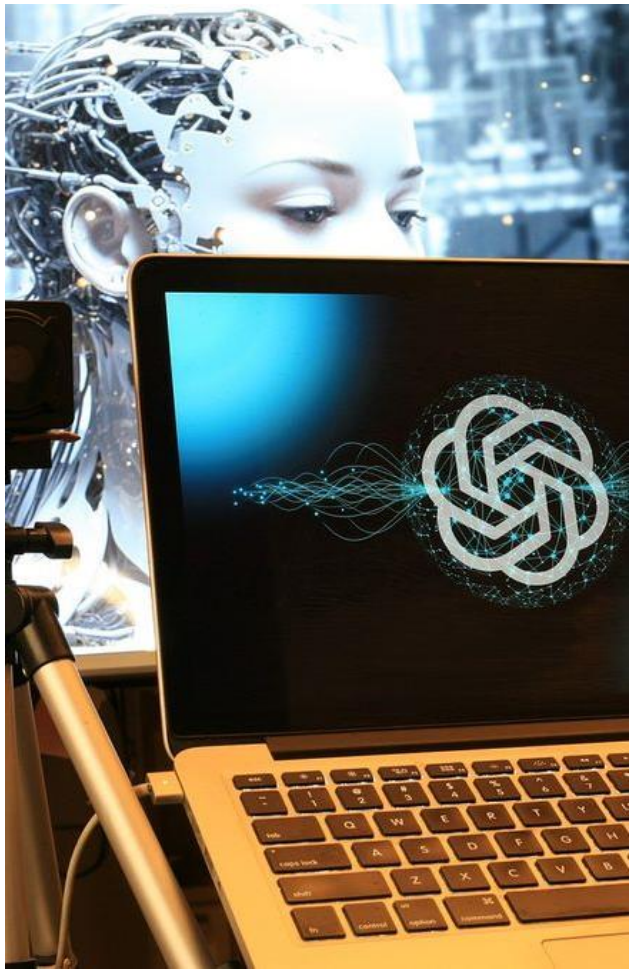
Overreliance meets underperformance.



Stanford's alarming findings on AI in law

Eye-Opener: Hallucinating Law





3. The Quest for Genuine Legal AI

- **The Illusion:** "Fake" legal AI under the microscope.
- **Vendor Solutions:** Are RAG and other technologies meeting the legal sector's needs?

Fake Legal AI

Vendor Solutions

The Washington Post
Democracy Dies in Darkness

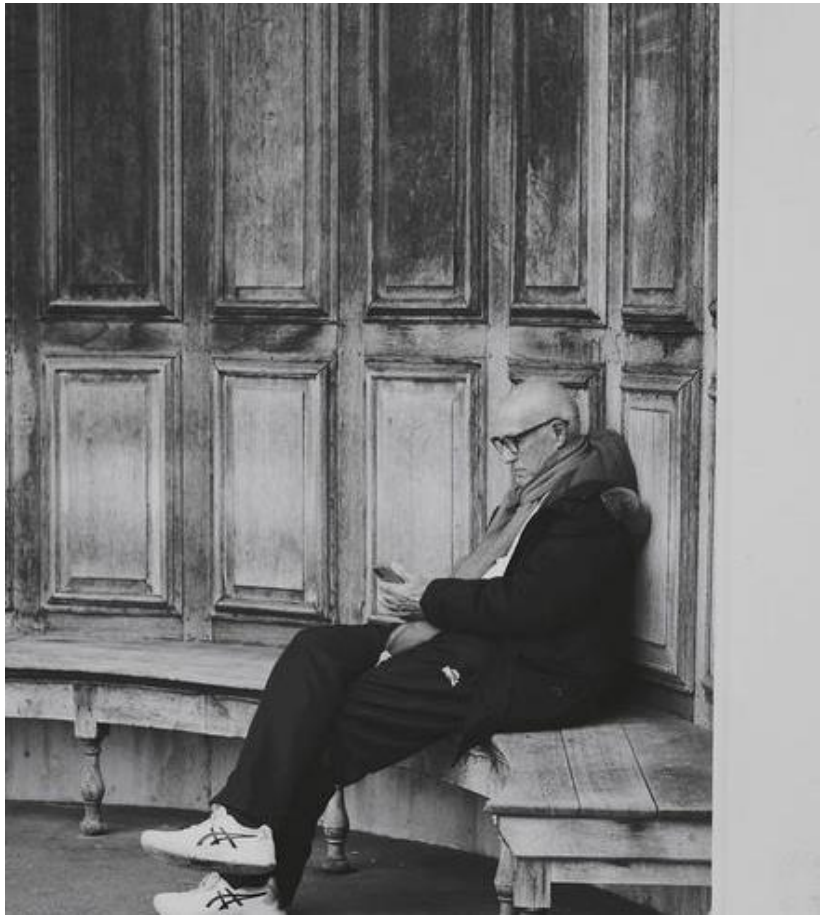
TurboTax and H&R Block now use AI fo tax advice. It's awful.

In our tests, new chatbots in popular tax services were unhelpful or wrong as much as half of the time

Review by Geoffrey A. Fowler

March 4, 2024 at 8:00 a.m. EST

(Illustration by Carmen Casado for The Washington Post)



4. There is Hope: Can We Build Reliable Legal AI?

- **The High Road:** Bloomberg's costly experiment with custom models.
- **The Modest Shortcut:** Fine-tuning
- **Hope Rekindled:** The OpenJustice Initiative

The High Road

Comparison over LLMs. We are able to benchmark the performance of ChatGPT and GPT-4 with four other LLMs on five tasks with eight datasets. ChatGPT and GPT-4 significantly outperforms others in almost all datasets except the NER task. It is interesting to observe that both models perform better on financial NLP tasks than BloombergGPT, which was specifically trained on financial corpora. This might be due to the larger model size of the two models. Finally, GPT-4 constantly shows 10+% boost over ChatGPT in straightforward tasks such as Headlines and FiQA SA. For challenging tasks like RE and QA, GPT-4 can introduce 20-100% performance growth. This indicates that GPT-4 could be the first choice for financial NLP tasks before a more powerful LLM emerges.

The Modest Shortcut:

Fine-tuning

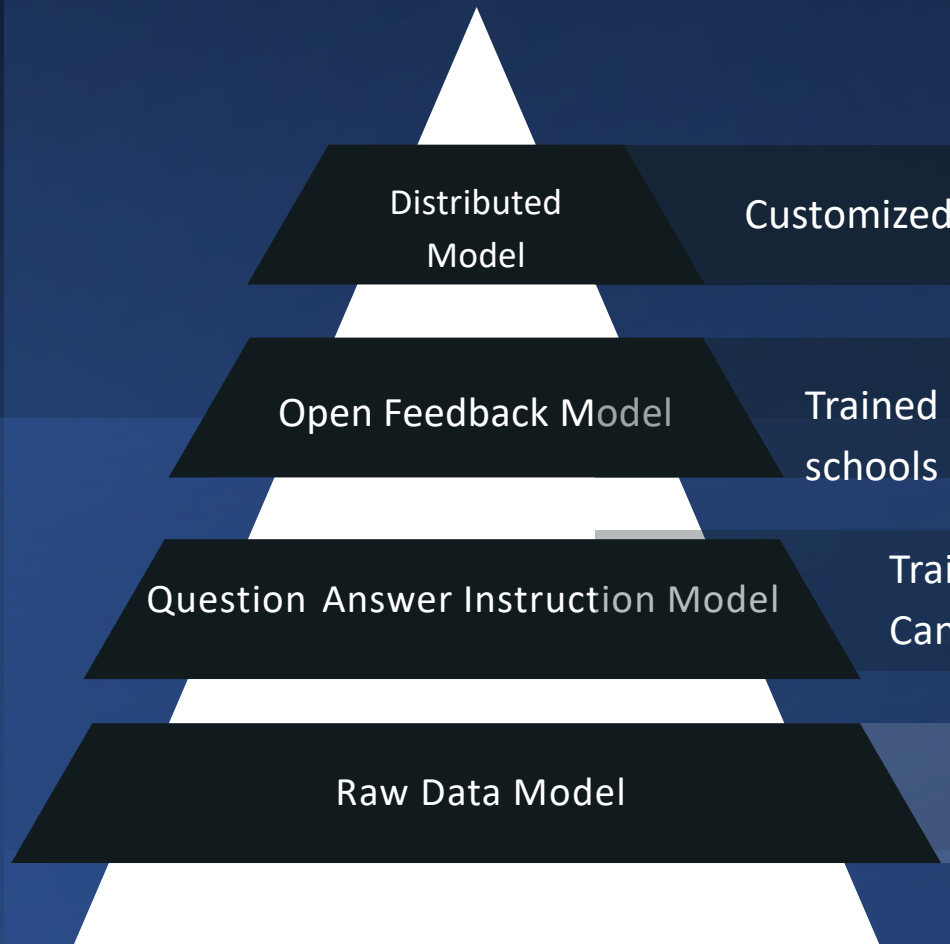
Hope Rekindled

The OpenJustice Initiative

Hope Rekindled

The OpenJustice Initiative

MULTI-LAYERED FINE-TUNING



Customized model trained on proprietary data.

Trained on open-access Open Justice usage from law schools and legal clinics.

Trained on CAL's annotated legal data (US, EU, and Canada).

Trained on raw corpus of unstructured data.

Global Community Project

OpenJustice

US

UCLA | SCHOOL OF LAW

Northwestern PRITZKER SCHOOL OF LAW

University of Wisconsin Law School

Cornell University Law School

FSU Law

Iowa Law

Penn Carey Law University of Pennsylvania

A2J Lab

Canada

Queen's University Faculty of Law

University of Toronto Faculty of Law

McGill Faculty of Law | Faculté de Droit

University of Manitoba Faculty of Law

University of Calgary Faculty of Law

International

ie University

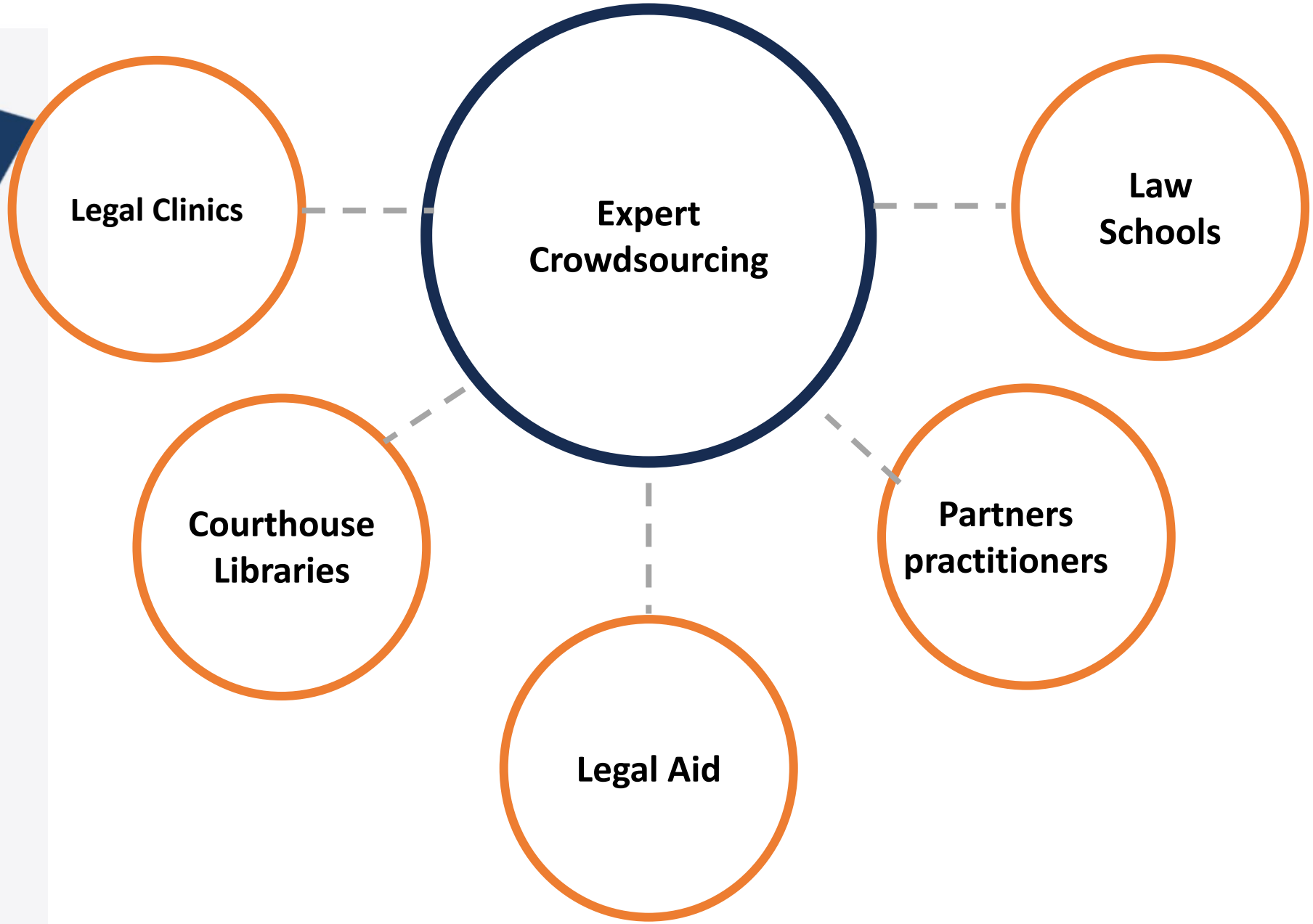
Université de Lille

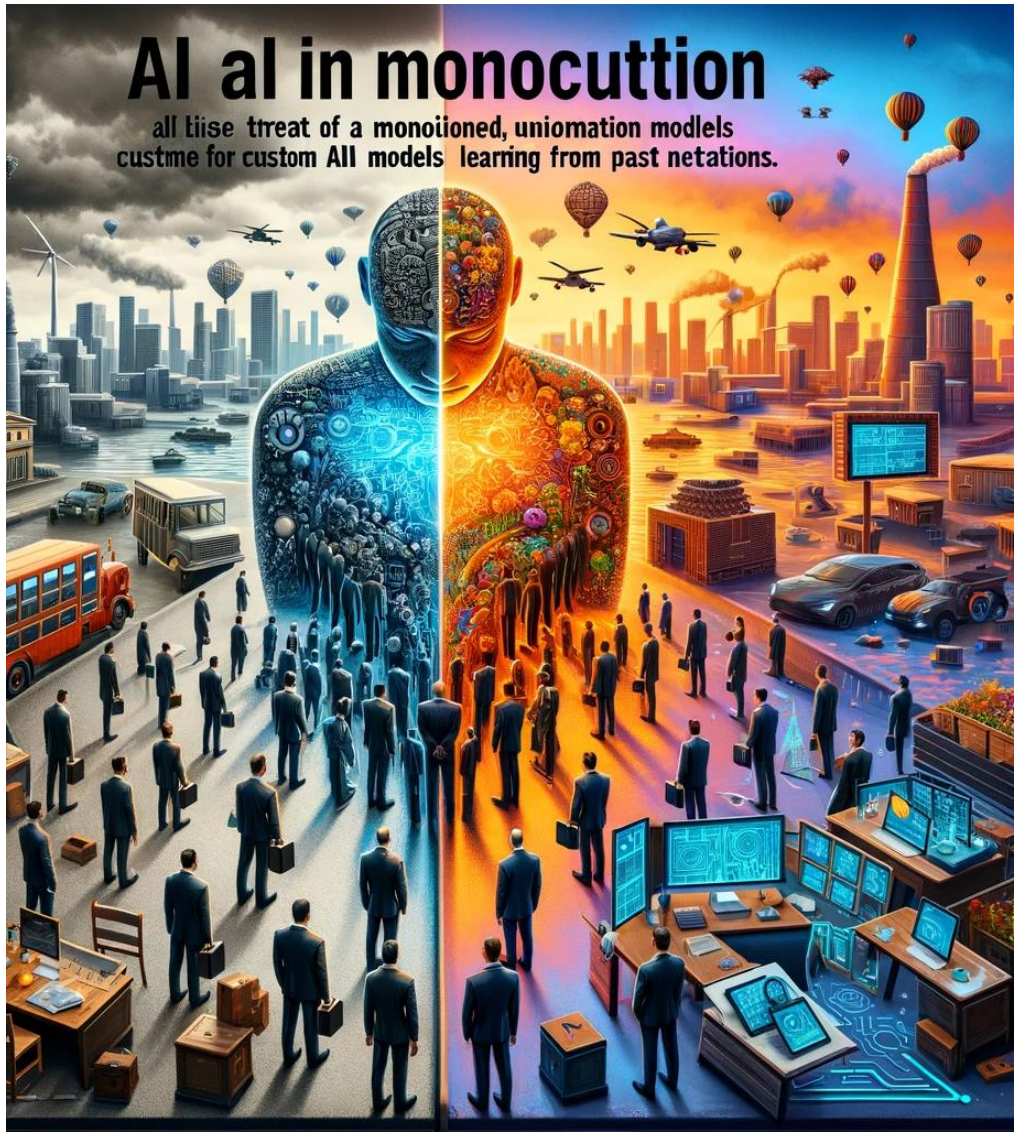
Dauphine | PSL

SMU Singapore Management University

Centre for Computational Law

OpenJustice





5. AI in Negotiations: Potential or Peril?

- The Monoculture Threat: Diversity in AI negotiation models at risk.
- Innovative Vision: AI learning from past deals, reshaping negotiation.
- Potential Unleashed: Custom models as the future of ADR.

Industry Custom-models

Miller Thomson

Banking and Finance Practice Group

Deel Inc.

HR and Employment Compliance

Dentons

Insurance

Osler

AML and Financial Compliance

In Conclusion

- **AI & Law/ADR:** A journey from skepticism to cautious optimism.
- **Final Thought:** Embrace the challenge, leverage AI wisely.

Participating

LINKEDIN

Get the latest news on the Conflict Analytic Lab

OpenJustice

CONFLICT ANALYTICS LAB

THANK YOU

Law Society of Ontario | Barreau de l'Ontario

TAB 8

18th Family Law Summit

Anderson v Anderson
Untangling and Applying (PPT)

Associate Professor Mary-Jo Maur
Queen's University

Research Help from Maya Kawale, JD Candidate 2025
Queen's University

March 21, 2024

cpd

Anderson v Anderson

Untangling and Applying

Mary-Jo Maur, Associate Professor, Queen's University

Research Help from **Maya Kawale**, JD Candidate 2025 Queen's University

Today's Agenda

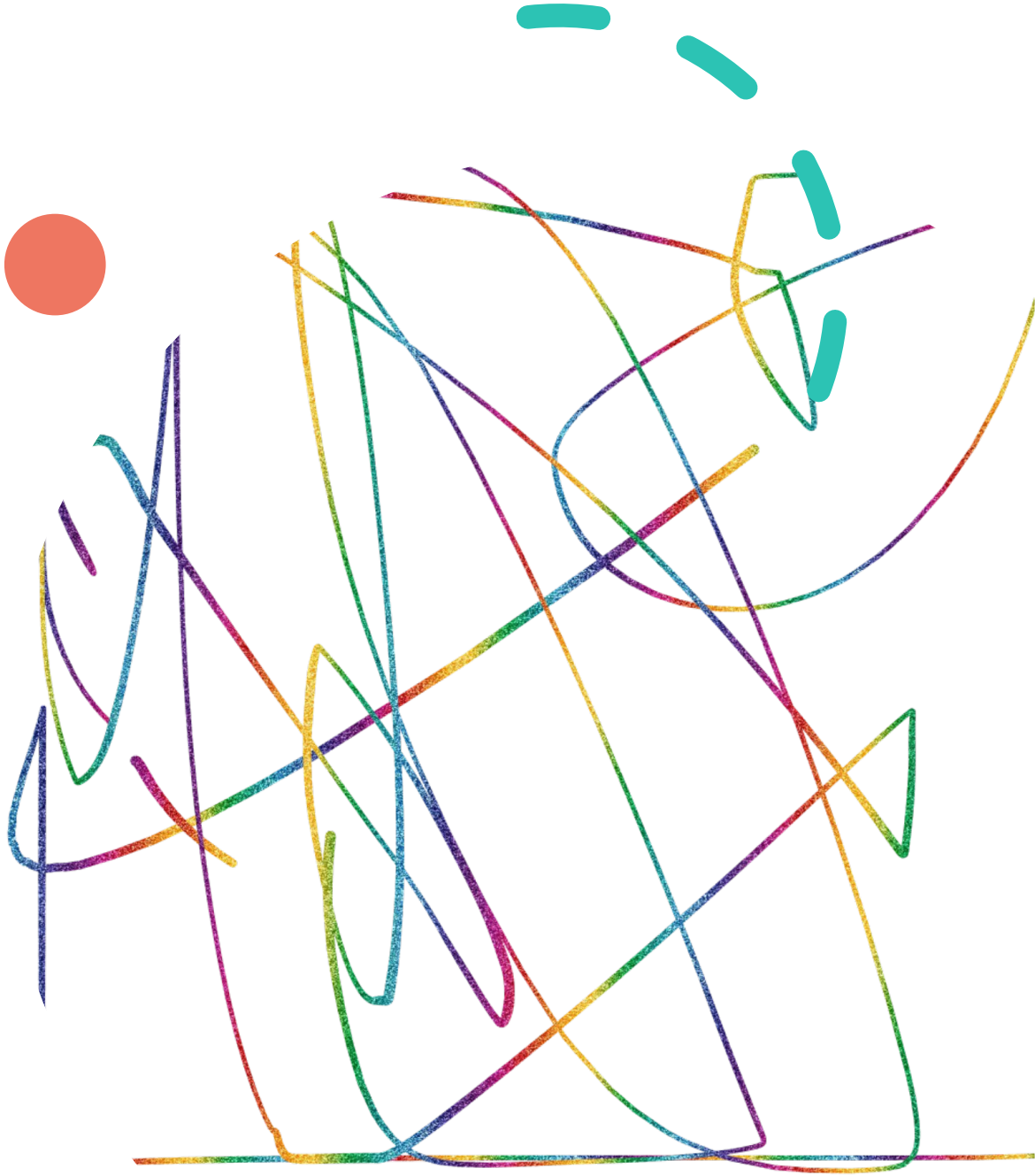
- Intro
- Background
- What *Anderson* says
- How Canadian Judges Are Applying the Decision

Introduction

What's all the fuss about?

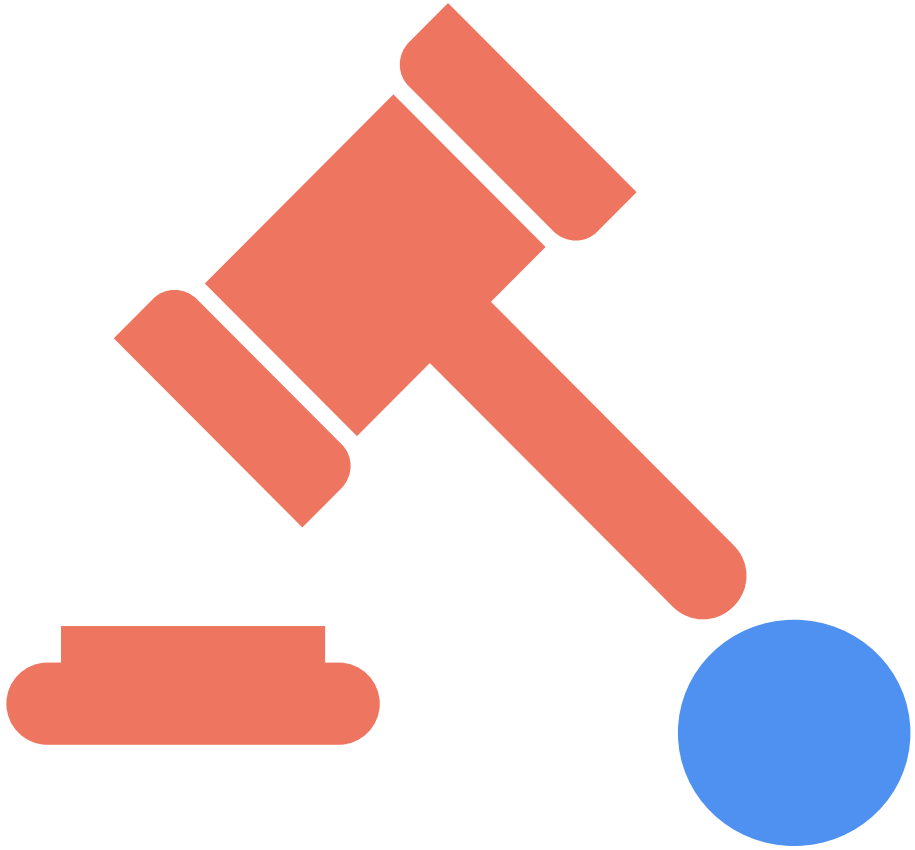
Anderson Is Pretty Simple

- Visual reference courtesy of Jovanna June Raycroft-Wright, my 6-year-old granddaughter.
- *Anderson* is not this complicated!



Court Supervision of Agreements Is About Two Things

- By statute, Ontario judges (and judges in the other provinces) supervise domestic agreements on two main axes:
- s 55(1) FLA – **formation of contract**
- s 56(4) FLA – **substance**, such as lack of disclosure, failure to understand the agreement, or "otherwise in accordance with the law of contract"



Neither s 55(1) nor 56(4) Answers Everything

- We know that if the argument is about opting out of statutory **spousal support provisions** in an agreement, the court will apply the *Miglin* analysis in its supervision
- *Miglin*'s two stages ensure fairness in both the formation and substance of the agreement. That's why it is so tempting to use it for all domestic agreements.
- But what if the argument is about property? Can/should the court apply the *Miglin* analysis to an agreement that purports to opt a couple out of the statutory scheme for property sharing?

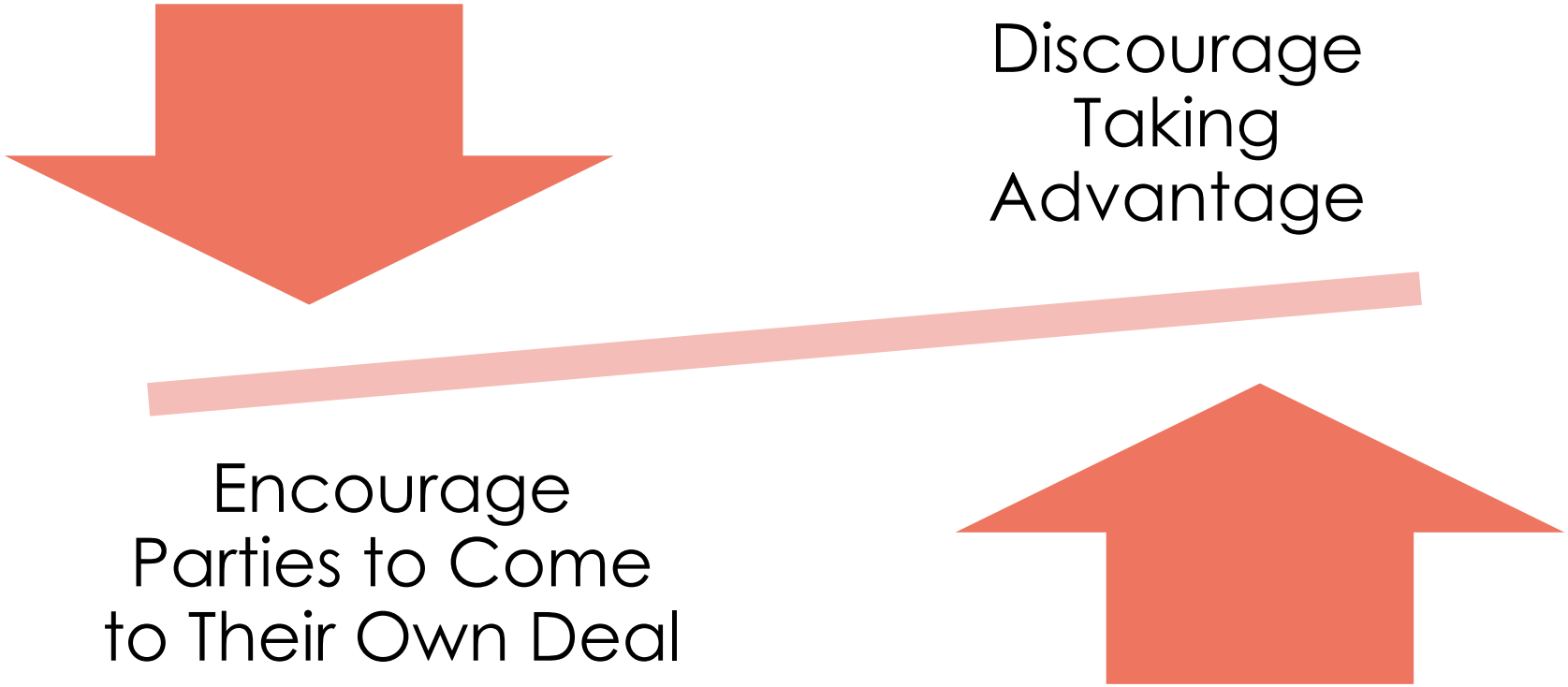
The *Anderson* Decision Looks at Formation **and** Substance

It says it is **inappropriate to apply *Miglin*** generally to property provisions in domestic agreements.

Because legislation about property is, constitutionally, in the domain of the provinces, while spousal support principles are (pretty much) national

BUT we can, and should, apply the basics from *Miglin* – agreements should be **fairly formed**, and should be **substantively fair.**

In Other Words, the Law Should Encourage Private Ordering and Yet Prevent Abuse



Background – Dealing With Section 55(1)

Procedural Fairness in Ontario

We Must Talk About Section 55(1)

We can't have a talk about procedural fairness in the formation of domestic agreements in Ontario without a short discussion of the judicial treatment of this section

55(1) is a statutory "procedural fairness" item

Section 55(1) FLA and Supervision of Formation

"A domestic contract and an agreement to amend or rescind a domestic contract are unenforceable unless made in writing, signed by the parties and witnessed."

Which means the court, in theory, will not enforce the agreement unless it meets the statutory requirements.

It does not mean the agreement is invalid.

Section 55(1) FLA Is Subject to Broad Judicial Discretion

- It *seems* to say agreements will be unenforceable unless the statutory provisions are met
- But that has not been the result in Ontario courts
- Leaving this question – **when will a court "relax" the provisions of s 55(1)?**

Section 55 – Historically Non-Intuitive Treatment By Courts

- **Start with *Gallacher v Friesen*, 2014 ONCA 399:**
  - Parties had a child together
  - The male Appellant moved into female Respondent's home
  - The Respondent gave him a draft agreement to take to his lawyer
  - Appellant testified he signed the agreement when he was all alone in his car on the way home from the lawyer's office
  - The agreement stated he had legal advice and understood his obligations

So Not Witnessed, Meaning Unenforceable, Right? No!

- After the parties split, the male Appellant tried to avoid the agreement by stating it was not "signed and witnessed"
- He brought an application for unjust enrichment, with a constructive trust remedy or a lump sum paying him for his contribution
- The Respondent moved for summary judgment, on the basis there was an enforceable agreement
- So who won?

"Not signed and witnessed" is a guideline, not an actual rule

- **Motion judge agreed with the Respondent** and granted the motion for summary judgment dismissing the Appellant's claim, because there *was* a contract
- And the Appellant's claim was prohibited by the contract
- And even if it wasn't, the Appellant would have lost anyway, because his contributions were just what any partner would do "day to day"

The ONCA agreed

- Section 55(1) should not be read "strictly" - the Act was intended, overall, to encourage parties to come to their own agreements. A strict reading would run counter to this overall objective
- The requirements of s. 55(1) **can be "relaxed"*** if the court is satisfied:
  - The contract was, in fact, signed by the parties
  - The terms are reasonable
  - There was no oppression or unfairness in the negotiation and execution of the contract

* NB – discretionary language alert

There Now Is A Long History of Ontario Courts Treating 55(1) As A Guideline Rather Than a Hard Rule

- The court cites a long list of cases that say this:
  - *Sagl v Sagl* (1997), 31 RFL (4th) 405
  - *Zheng v Jiang*, 2012 ONSC 6043
  - *Virc v Blair*, 2014 ONCA 392
  - *Geropoulos v Geropolous* (1982), 35 OR (2d)763 (Ont CA)
  - *Pastoor v Pastoor* (2007), 48 RFL (6th) 94

Right Up to Today…*El Rassi-Wight v Arnold*, 2024 ONCA 2

- Parties bought a house in joint tenancy in 2019. In 2020, they decided to separate. The house had increased significantly in value since purchase
- When they decided to separate, they signed a document stating the Respondent would give up his right to the house in exchange for $10,000 and the right to keep his motorcycle. The document was not witnessed
- Respondent later refused to obey the agreement, arguing it was unenforceable
- Appellant argued the agreement was enforceable.
- The Respondent won at trial – agreement not enforceable.

When Will A Court "Relax" the Requirements of Section 55(1)?

- A court can, *in its discretion*, "relax" the provisions of s. 55. Citing *Gallacher*:

"The strict requirements of s 55(1) may be relaxed where the court is satisfied that **the contract was in fact executed by the parties, where the terms are reasonable and where there was no oppression or unfairness in the circumstances surrounding the negotiation and execution of the contract.**"

In *El-Rassi-Wight*, Agreement Held to be Unenforceable – **No Relaxation of the Statutory Provision**

Because:

No one had ILA

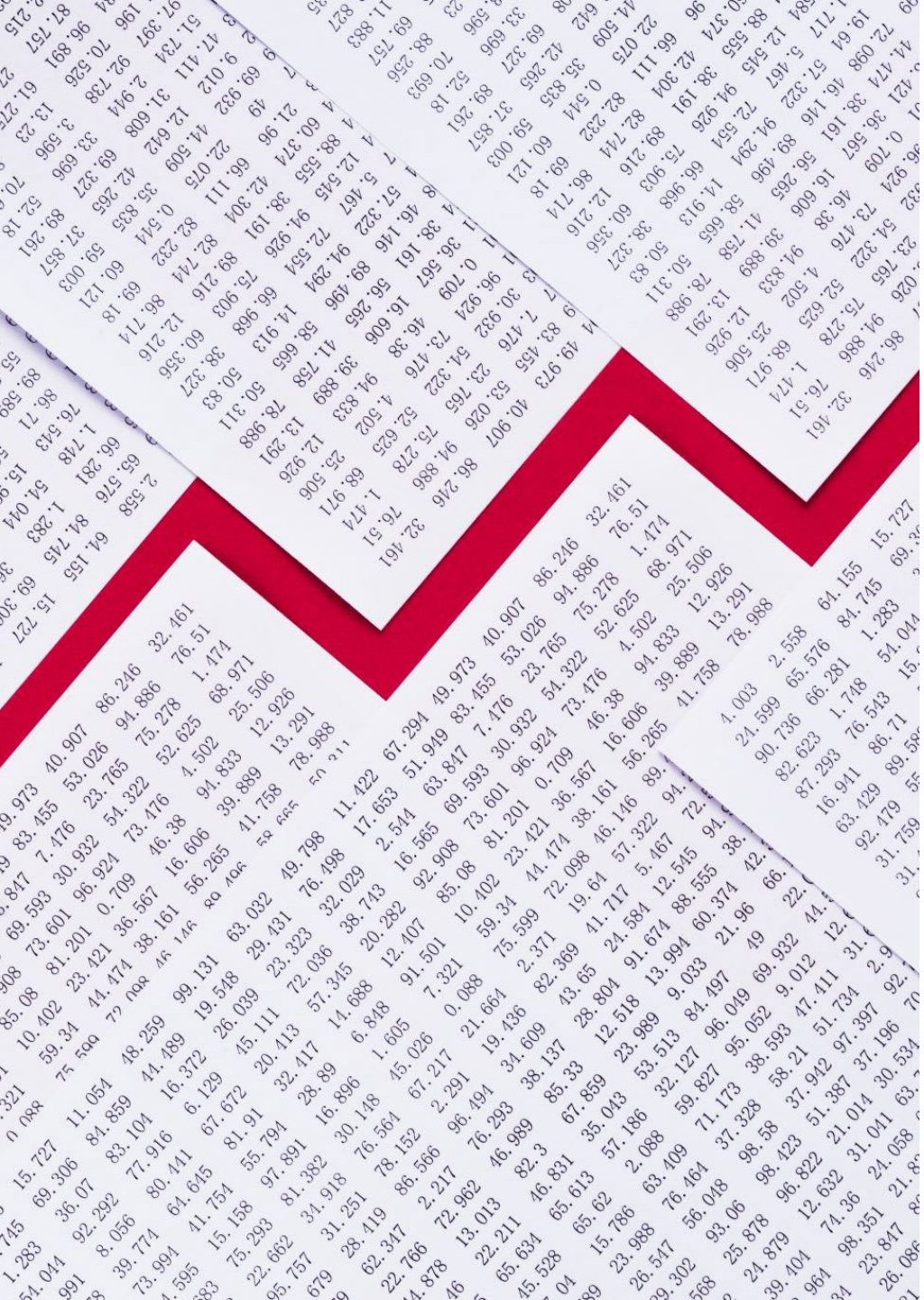
The document was vague

The Appellant did not understand key parts of the agreement

There were important issues left unresolved (how the Appellant was to be removed from the mortgage and who was responsible for the mortgage going forward)

Conclusions About Section 55(1)

1. Section 55(1) doesn't say what it seems to say
2. It *means* that the measures of formality required under the Act are to ensure the parties understand the agreement is serious and binding
3. In cases in which the agreement was executed by the parties but was not witnessed, provided there was no oppression in formation of the agreement, and provided the agreement is "reasonable", the court will not refuse to enforce the agreement for lack of a witness.
4. Of course, if one party has not signed the agreement, it will be harder to "relax" s 55(1), **although not impossible.**



Not Impossible???

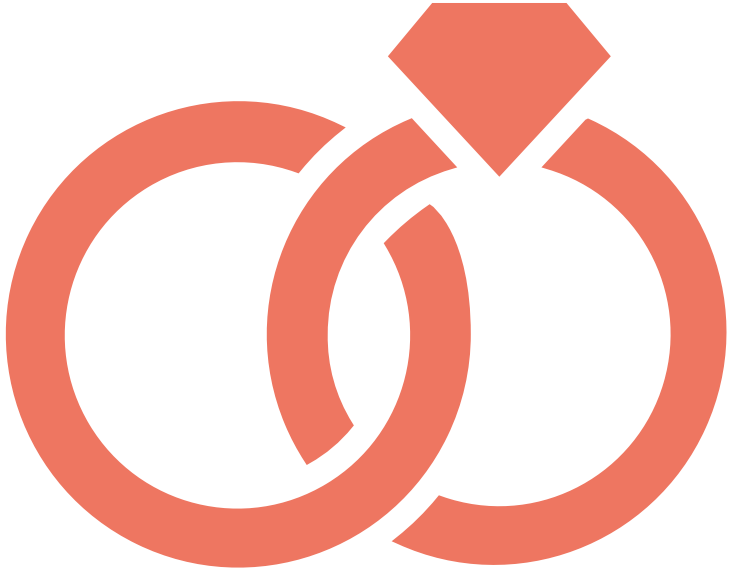
- There is a line of Ontario cases in which courts have enforced agreements when only one party, or neither party, signed the agreement, yet a court enforced it, despite s 55(1). *See Geropoulos* (1981), 23 RFL (2d) 206 (Ont HCJ)
- The lawyers came to an agreement in correspondence
- If lawyers are involved, a court is more likely to consider enforcing an agreement made through correspondence.
- See also *Pastoor v Pastoor* (2007), 48 RFL (6th) 94 (Ont SCJ)

What Does *Anderson* Say?

Important Messages

Facts

- Parties signed an agreement at the end of their three-year marriage without financial disclosure or ILA
- Wife thought agreement was binding. Husband said it wasn't, and when wife applied for divorce, he applied for division of family property
- Trial judge held agreement was NOT binding, and divided family property according to statute
- Court of Appeal applied the *Miglin* analysis to the agreement to see if it was binding – held that it was binding



The Saskatchewan Scheme – Two Kinds of Agreements – Section 38 "presumptively binding" interspousal agreements

Section 38 of *Family Property Act* states that agreements dealing with "possession, status, ownership, disposition or distribution of family property are binding if:

- In writing, signed by each in the presence of a witness
- In which each spouse has acknowledged, in writing, apart from the other spouse, that he or she:
  - Is aware of the nature and effect of the contract
  - Is aware off the possible future claims to property he or she may have pursuant to the Act, and
  - Intends to give up those claims to the extent necessary to give effect to the contract.
- Each spouse must make the acknowledgement in writing before an independent lawyer

Section 40 Agreements

- Any other agreement between spouses that does not conform to s 38, including "verbal" agreements
- Court "may" take it into consideration and may give it "whatever weight it considers reasonable"
- The agreement in *Anderson* was a s 40 agreement, and not a presumptively binding s 38 agreement.

Issue?

- See para 2:

"This appeal raises the issue of how courts should approach and weigh a domestic contract that purports to opt out of a provincial property scheme, but fails to meet the statutory requirements that would entitle it to presumptive enforceability. In particular, this appeal asks whether the analytical framework this Court developed in *Miglin v Miglin*, which dealt with spousal support under the federal *Divorce Act*, is appropriately applied to such a domestic contract."

What Happened?

Held the trial judge erred. The agreement was not "nothing"

The court should have taken it into account

BUT no need to use the two-stage *Miglin* analysis to determine if it should nonetheless be enforced, or whether the court should substitute its own decision on the application for property division.

Right. What does *Miglin* say again regarding attempts to opt out of statutory spousal support provisions…?

- Stage 1(a) – was the agreement fairly formed?
- Stage 1(b) – did it meet the objectives of the DA at the time the agreement was executed?
- Stage 2 – does the agreement still meet the intentions of the parties? Did it foresee the current circumstances? Is it still in substantial compliance with the objectives of the DA? **Has there been a significant change in circumstance that could not reasonably be anticipated at the time of negotiation?**

A framework of some kind is necessary to be fair to "kitchen table" agreements

"In the family law context, private agreements present unique advantages and concerns. On the one hand, individual autonomy to settle domestic affairs should be encouraged, as parties are generally better positioned than courts to understand the distinctive needs and circumstances of their private relationships. On the other, parties to domestic contracts are particularly vulnerable to unfairness and exploitation, given the unique environment in which domestic contracts are negotiated and concluded. As a result, family law legislation typically authorizes judges to review a domestic contract."

Karakatsanis, J. *Anderson*, para 1.

Principles From *Miglin* We Should Borrow

What Is Necessary?

There Are Only Two Principles

Deference to private agreements

Fairness of the agreement, both in its formation, and in its substance

#1 - Deference to private agreements

Deference - The court should encourage and support private agreements between the parties unless there is a compelling reason to discount the agreement

This avoids the “cost and tumult” of protracted litigation – para 33

The “Fairness Review” is Theoretically Simple – and Familiar

Was the agreement formed fairly?

Is the substance fair?

The “Fairness Review” will depend on the underlying statute – para 36

Some provinces create different yardsticks for fairness, so we must always start there:

Ontario legislation states an agreement will only be set aside for unconscionability

Other provinces may use words such as “inequitable” or “undue influence

"Fairness" in the Formation of the Contract Will Come From a Few Sources

Statutory Safeguards, such as requirements for disclosure, which aids in levelling the negotiating field, if the legislation requires it

Independent Legal Advice, which may level any inequality of bargaining power, but just because there was ILA, it doesn't follow the agreement is "fair" – the ILA may help, but it will not "inoculate" an agreement from review. The court must look at the relationship itself to see if there were any on-going imbalances – para 70

Common Law Requirements for Disclosure, as in *Rick v Brandsema*

Review for Substantive Fairness

THE GOVERNING STATUTE WILL CONTAIN A POLICY ABOUT WHAT IS "FAIR"

IT IS REASONABLE TO COMPARE WHAT THE PARTIES DID IN THEIR AGREEMENT TO THE STATUTORY DEFINITION OF WHAT IS "FAIR"

In the End, This Looks Somewhat Like *Miglin* Stage 1

Stage 1(a) – was the agreement negotiated fairly

Stage 1(b) – was the agreement substantively fair at the time of negotiation?

We don't care about *Miglin* stage 2 – Is it still fair? Because property agreements are meant to be final, and are not subject to review once made

Applying the Principles

What happened in *Anderson*?

Procedural Fairness Principles

This was a s 40 agreement, so not presumed to be enforceable

Was it fairly formed?

- Undue pressure?
- Circumstances of oppression or exploitation of a power imbalance?

Because any defects in formation will result in one party not understanding the substance of the agreement para 49

If there are no defects in formation, the court can assume the agreement "represents the autonomous choice of the parties"

Application Regarding Procedural Fairness – Was there prejudice resulting from uneven access to information? (para 67)

- **The lack of ILA is not fatal**
  - This was a simple agreement about a short-term marriage
  - The absence of ILA did not "work to create unfairness"
- **The parties both knew what assets and debts they each had**
  - Therefore, the lack of a formal disclosure process was not fatal
  - The statutory scheme does not require disclosure
  - A party must provide some proof of the lack of information to set an agreement aside for lack of disclosure
  - A court may intervene if the failure to disclosure is "deliberate" or contains misinformation
  - *Because the lack of disclosure will result in an agreement that is substantively unfair* (does not conform to the norms set out in the statute)

The Importance of Evidence – para 69

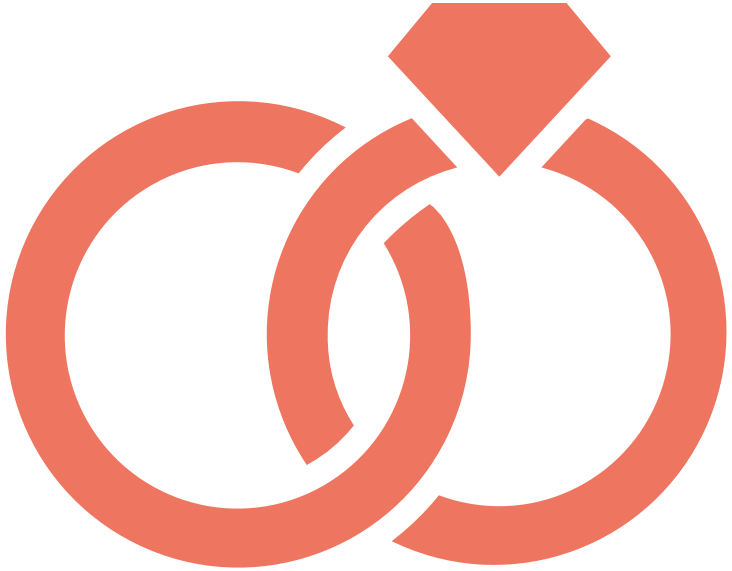
- Just because there was no ILA, and/or no formal disclosure process, the court will not presume the formation of the contract was unfair
- **A party alleging an unfair negotiation process must provide *evidence* of "vulnerability"**
- Here, the husband did not lead evidence of vulnerability

Was the Agreement Substantively Fair?

- As soon as the trial judge determined the agreement was procedurally unfair, he stopped – and did not consider whether the agreement was *substantively* unfair
- This was a (big) error, rendering the trial judge's decision "not entitled to deference" – para 73
- This agreement split the home and goods equally, which aligns with the statute

Delay Was a Big Factor

- The husband delayed for two years before challenging the agreement
- But that may be more a result of the shifting valuation dates in the Saskatchewan statute (separation or trial?)



Overall Takeaways

1. A court must examine an agreement for both procedural and substantive unfairness
2. The "fairness review" regarding procedural fairness should consider
   (a) Whether there were any of the usual safeguards (ILA, full disclosure), but these are not determinative
   (b) The party claiming procedural unfairness **must have some evidence** of "vulnerability", and cannot claim it just because there was no ILA or a formal disclosure process
3. The substantive review requires the court to consider the policy directives in the statute, and compare them with what the parties did
4. If there has been procedural unfairness, there will likely be substantive unfairness, too

What Have Ontario Courts Said So Far?

Only Three Cases So Far - #1

- ***Yin v Feng***, 2024 ONSC 455
  - Court to determine the validity of an agreement the parties signed
  - Husband claimed wife failed to disclose what was in the bank (accounts and investments), leading to an unfair agreement
  - There were lawyers "involved" in drafting and reviewing the agreement on both sides, including exchanging financial information
  - Wife offered to wait to execute the agreement until the husband had appraisals in hand, but husband declined – he wanted title right away
  - The agreement contained acknowledgements by both that in signing they could be taking on obligations and giving up rights
  - A "general understanding" of the financial situations of the parties is enough to avoid setting aside an agreement (para 90)

Something Helpful – A Great List of Facts -> Procedural Unfairness

The indicators of procedural unfairness are based on *Demchuck v Demchuk (1986),* 1986 CanLii 6295 (ONSC). It's a great list:

- Was there concealment?
- Was there duress or unconscionability?
- Did the party alleging unfairness try to obtain disclosure
- Did the party alleging unfairness move quickly to set aside the agreement?
- Did the party alleging unfairness gain "substantial benefits" under the agreement
- Has the other party fulfilled his/her obligations under the agreement?

#2 – *El Rassi-Wight v Arnold*, 2024 ONCA 2

- Unmarried cohabitants in a long-term relationship bought a house together in joint tenancy
- Parties signed a "document" stating the respondent agreed to transfer his interest in exchange for a motorcycle and $10,000
- Trial judge held agreement was not binding for lack of a witness (s 55(1)
- This was not a case to relax the formal requirements of 55(1) because:
  - No involvement of lawyers (procedure)
  - No witness (procedure)
  - Vague provisions in the agreement (substance)
  - Even if there was a procedural problem, trial judge would not have set the agreement aside under s 56(4) anyway

What Happened?

- The ONCA would have set the agreement aside for procedural reasons
- AND did not interfere with the TJ's reasons on substance – that the agreement was vague (56(4)(b) – no understanding of the terms) and/or 56(4)(c) "otherwise in accordance with the law of contract"
- HELD – Agreement was unenforceable.

Agreement was unenforceable on the two main principles from *Anderson* – procedurally unfair, and substantively unfair because the terms were vague

#3 – *McIntyre v McIntyre*, 2023 ONSC 4504

- Parties had extensive help – failed mediation, and 5 years of litigation
- They negotiated a deal at the Settlement Conference
- BOTH PARTIES WERE LAWYERS, but neither practiced family law
- Husband resiled from the agreement
- Was it binding?

This is a decision of Justice Himel, which automatically gives it heft.

Agreement Unenforceable Despite All the Lawyers on Summary Judgment – but might be enforceable at trial

- On procedural fairness, Himel, J added some ideas to the list:
  - Was there a "meeting of the minds"? YES
  - Was it conditional on signing a formal contract (so husband could seek further legal advice)? YES – para 51 – the settlement conference document was conditional upon the husband having the opportunity to talk to a lawyer about final terms
  - There were many remaining terms to consider
  - **She could not conclude on the summary judgment motion evidence before her that the agreement was binding**
  - This was a matter for the trial judge because detailed evidence would be required
  - She "implored" the parties to return to negotiation

There Are Cases in Other Provinces

- There are approximately 10 as of date of writing
- All worth a look, but with the caution that each province has different provisions regarding enforceability of contracts.

Overall Conclusions

How to apply this decision

There are Two Main Principles

Procedural Fairness

Substantive Fairness

Procedural fairness is not necessarily resolved by asking if there was full disclosure and/or a lawyer

Overall Takeaways Again

1. A court must examine an agreement for both procedural and substantive unfairness
2. The "fairness review" regarding procedural fairness should consider
   (a) Whether there were any of the usual safeguards (ILA, full disclosure), but these are not determinative
   (b) The party claiming procedural unfairness **must have some evidence** of "vulnerability", and cannot claim it just because there was no ILA or a formal disclosure process
3. The substantive review requires the court to consider the policy directives in the statute, and compare them with what the parties did
4. If there has been procedural unfairness, there will likely be substantive unfairness, too

Thank you – if we had more time, I would do a hypo

- But I doubt I got all the way through this as it is!
- Thanks for your attention
- See you soon!

Law Society of Ontario | Barreau de l'Ontario

TAB 9

18th Family Law Summit

Family Violence in Racialized Families: Intersectional Impacts of Culture, Community, and the Role of the Extended Family

Deepa Mattoo, Executive Director and Counsel
Barbra Schlifer Commemorative Clinic

Archana Medhekar, C.S.
AM Law Office

Maneesha Mehra, C.S.
Carson Chousky Lein LLP

March 21, 2024

cpd

FAMILY VIOLENCE IN RACIALIZED FAMILIES

Intersectional Impacts of Culture, Community, and the Role of the Extended Family

Deepa Mattoo, Executive Director and Counsel, *Barbra Schlifer Commemorative Clinic*
Archana Medhekar, C.S, *AM Law Office*
Maneesha Mehra, C.S., Counsel, *Carson Chousky Lein LLP*

TABLE OF CONTENTS

A. Assessing and Identifying Family Violence in Diverse Communities 2

B. Family Violence, Racialized Children and Appropriate Parenting Arrangements 2

C. Risk Assessment and Family Violence Identification Tools 3

D. Safety Planning and Triage 3

E. Resources for Male Victims of Family Violence 3

F. Trauma Informed Lawyering 4

PART II –INTERSECTIONAL ISSUES IN FAMILY LAW 4

A. Dowry and Mahr 4

B. Genuine Marriage 6

C. Polygamous Marriages 6

D. Honour Killings 6

E. Forced Marriages/Child Marriages 7

F. Female Genital Mutilation (FGM) 8

I. Spousal Support and Immigration Sponsorship 9

J. Non-Hague Return, Allegations of Abuse and Refugee Claims 11

K. Jewelry and Equalization/Property Issues 11

L. Ownership of Matrimonial Home/Family Residence 11

PART I – RECOMMENDED READING AND RESOURCES

A. Assessing and Identifying Family Violence in Diverse Communities

- *About Family Violence* (2019). Government of Canada.
- *Domestic Violence Death Review Committee: 2019-2020 Annual Report*. Government of Ontario.
- Hou, F., Schimmele, C. & Stick, M. (2023). *Changing Demographics of Racialized People in Canada*. Statistics Canada.
- Stumpf, B. (2023). *Understanding Family Violence in Diverse Communities: What Subject-Matter Experts Think Family Law Legal Advisors Should Know*. Department of Justice Canada.
- Government of Canada – *HELP Toolkit: Identifying and Responding to Family Violence for Family Law Legal Advisors*
- Chaze, F., & Medhekar, A. (2017). *The Intersectional Oppressions of South Asian Immigrant Women and Vulnerability in Relation to Domestic Violence: A Case Study*
- George, P., Medhekar, A., Chaze, F., Osborne, B., Heer, M., Alavi, H. (2022). *In Search of Interdisciplinary, Holistic and Culturally Informed Services: The Case of Racialized Immigrant Women Experiencing Domestic Violence in Ontario*. Family Court Review, An Interdisciplinary Journal (AFCC)
- Korteweg, S., Abji, S., Barnoff, L., Mattoo, D. (2013). *Citizenship, Culture, and Violence Against Women: Social Service Provision in the South Asian Communities of the GTA*. CERIS Research Report.
- Mattoo, D, (2017) *Race, Gendered Violence, and the Rights of Women With Precarious Immigration-Status*. Barbra Schlifer Commemorative Clinic.
- Koshan, J., Mosher, J., & Wiegers, W. (2023). *A Comparison of Gender-Based Violence Laws in Canada: A Report for the National Action Plan on Gender-Based Violence Working Group on Responsive Legal and Justice Systems*
- Arbel, E. *The Culture of Rights Protection in Canadian Refugee Law: Examining the Domestic Violence Cases*, 2013 CanLIIDoc 268

B. Family Violence, Racialized Children and Appropriate Parenting Arrangements

- George, P., Medhekar, A., Chaze, F., et al (2023). *Childhood Experiences of Family Violence Among Racialized Immigrant Youth: Case Studies*. Simple Book Publishing (pressbooks.pub).
- Jaffe, P., Bala, N., Medhekar, A., Scott, K. (2023). *Making Appropriate Parenting Arrangements in Family Violence Cases: Applying the Literature to Identify Promising Practices*. Department of Justice Canada.
- Bala, N. et al. (2021). AFCC-O Parenting Plan Guide and Template.
- Sesame Workshop. *How to Talk to Kids about Tough Topics*

- O'Connor, C., King, B., Alman, I., Chowdhury, R., Sibblis, C., Brown, K., Smith, C., and Cooke, K. (2023). *Child to Parent Violence and Aggression: Reviewing the Research*. Department of Justice Canada.
- Armos, N., Allard, D., Deen, M., Jackson, S., Perrie, V., Weir, V., Heller, L., & Daum, R. (2023). *Experiences of Indigenous Families in the Family Justice System: A Literature Review and Perspectives from Legal and Frontline Family Justice Professionals*. Department of Justice Canada.

C. Risk Assessment and Family Violence Identification Tools

- VAWnet – A Project of the National Resource Centre on Domestic Violence. *Tools & Strategies for Assessing Danger or Risk of Lethality*
- Cross, P., Crann, S., Mazzuocco, K., and Morton, M. (2018). *What You Don't Know Can Hurt You: The Importance of Family Violence Screening Tools for Family Law Practitioners*. Department of Justice Canada, prepared by Luke's Place.
- Government of Canada – *HELP Toolkit: Identifying and Responding to Family Violence for Family Law Legal Advisors*
- Barbra Schlifer Commemorative Clinic (The Law Foundation of Ontario) (2021). *Project Enhanced Safety: Risk Assessment Framework in Family Court*
  Intimate Partner Violence Risk Identification and Assessment Tool – User Guide
  Intimate Partner Violence Risk Identification & Assessment Tool
- Family DOORS App – *Detection of Overall Risk Screen*. Self-screening tool that generates a fully automated report for professionals.

D. Safety Planning and Triage

- Government of Canada. *Find Family Violence Resources and Services In Your Area*
- Tools for Risk (Self) Assessment and Safety Planning (Safety and Risk): iDetermine
- Mulberry: Gender Based Violence Services in Ontario
- Barbra Schlifer Commemorative Clinic. *Emergency Information*

E. Resources for Male Victims of Family Violence

- *Intimate Partner Violence Against Men and Boys: Information and Resources*. Government of Canada.
- Canadian Centre for Men and Families
- CLEO Connect: Training and Tools for Community Workers. *Support Services for Male Survivors of Sexual Abuse*

F. Trauma Informed Lawyering

- *Post-Traumatic Stress Disorder* (2013). Canadian Mental Health Association, British Columbia Division
- Katz, S., & Haldar, D. (2016). *The Pedagogy of Trauma-Informed Lawyering*, 22:2 Clinical L Rev 359.
- OBA CPD Program (2023) – *Trauma Informed Lawyering – A New Standard for Client Service and Lawyer Wellness*
- Randal, M. & Haskell, L. (2023). *Trauma-Informed Approaches to Law: Why Restorative Justice Must Understand Trauma and Psychological Coping*, 36:2 Dal LJ 501.

PART II –INTERSECTIONAL ISSUES IN FAMILY LAW

A. Dowry and Mahr

- *Tshikudi Kayembe v. Canada (Citizenship and Immigration)*, 2009 CanLII 80539 (CA IRB)
  Appeal of rejection for permanent resident visa in the family class filed by appellant's spouse, who is a citizen of the Democratic Republic of Congo. Main issue to be determined was whether the appellant was legally married under Congolese legislation on the date that the appellant's permanent residence status was granted. Appellant submitted that a celebratory marriage took place, but she was not legally married on the material date because the payment of the dowry had not been completed. Court held that despite payment of dowry, marriage was legally binding.
- *Shamboul v. Canada (Citizenship and Immigration)*, 2016 CanLII 102461 (CA IRB)
  Appeal of refusal of the sponsorship application for permanent residence of appellant's spouse and his dependent son. Appellant travelled to the Democratic Republic of Congo ("DRC") in 2012, at which time the "spouse" arranged for the dowry to be paid to the appellant's family in Canada. Appellant was to return to the DRC in 2013 for the religious marriage ceremony and to consummate the marriage, but this was postponed for various reasons. A "dowry event" occurred in Canada – dowry discussions were conducted and there was a small gathering/celebration. There was no further in-person contact between the appellant and the "spouse" after 2012. Determination that "spouse" did not satisfy the requirements as a member of the family class.
- *Amini v. Canada (Citizenship and Immigration)*, 2022 CanLII 70747 (CA IRB)
  Appeal of decision that appellant failed to comply with the residency obligation as a permanent resident (present for 730 days in a 5-year period). The appellant sought relief by relying upon humanitarian and compassionate considerations, and submitted that he could not meet residency requirements because his ex-spouse sued him for

her dowry and he was barred from leaving Iran for a 5-year period. Evidence of travel ban in relation to enforcement of dowry was accepted by the court.

- *Abdollahpour v. Banifatemi*, 2015 ONC 834 (CanLII)
  Husband's parents transferred 50% of the matrimonial home to wife as either dowry or Mahr. Upon separation, husband (along with his parents) argued that 50% of the property should be transferred back to them because the transfer was subject to a condition that the wife not leave the marriage and, if she did, the property would revert back. Summary judgment was granted in favour of the wife on the basis that the transfer was an irrevocable and unconditional gift. On appeal, the appellants sought to introduce fresh evidence of Iranian culture, a translation of the marriage contract which lists the 50% interest in the property was part of the dowry, and an expert report from an Islamic scholar confirming that, in certain circumstances, a dowry (or mahr) is to be returned by the wife upon the breakdown of the marriage. Court noted that Iranian culture and traditions were not at issue, but rather whether the parties agreed to the transfer being subject to the conditions imposed by culture or traditions. Court held that the "expert" cannot speak to intentions of the parties (ie. accepting the conditions of the transfer imposed by culture/tradition), and that the transfer met the legal test for an unconditional gift. There had been negotiations and independent legal advice during that negotiation process. Appeal dismissed.

- *Faizian v. Ashouri*, 2023 ONSC 6703
  Wife argued that Mahr should be treated as outside of the equalization of net family property, and demanded husband provide her with 356 gold coins separate from an equalization payment (ie. strict performance of a domestic contract). Reviewing the decision in *Bakhshi v. Hosseinzadeh*, 2017 ONCA 838 (CanLII), the following guidance is provided:

  (a) The Mahr must be included in the NFP, although it may be excluded property pursuant to section 4(2)6 of the *FLA*.

  (b) Unless it is excluded property, the Mahr has the effect of reducing the husband's net assets and increasing the wife's net assets.

  (c) The Mahr payment is a "demand obligation with a paper value". I interpret that to mean that it is a monetary payment. This makes logical sense as that is how all property is dealt with in the equalization exercise.

  (d) The Mahr is like a "third party's promissory note" that must be paid by the debtor to the creditor.

  As confirmed in *Ramezani v. Najafi*, 2021 ONSC 7638 (CanLII) at para 125, "absent any evidence of an objective intention at the time of the contract to treat the Mahr differently, the Mahr payment must be treated under the *FLA* like any other payment obligation between the spouses."

B. Genuine Marriage

- *Cindi v. Canada (Citizenship and Immigration)*, 2019 CanLII 12976 (CA IRB)
  Appeal of refusal to approve permanent resident application for Appellant's spouse. Visa officer refused the sponsorship application on the basis that the marriage was not genuine and was only entered into for immigration. The marriage occurred just prior to the spouse's departure from Canada after a failed refugee claim, and the Appellant has not visited the applicant since the marriage. The non-exhaustive factors to assess genuineness of marriage include: intent of the parties to the marriage; length of the relationship; amount of time spent together; conduct at the time of meeting, engagement and/or wedding; behaviour subsequent to wedding; knowledge of each other's relationship histories; level of continuing contact and communication; financial support; knowledge about each other's daily lives.

C. Polygamous Marriages

- D Mendes Da Costa, *Polygamous Marriages in the Conflict of Laws*, 1966 CanLIIDocs 35
- Corbin W. Golding, *(Mis)recognition of Customary Marriages: A Comparative Analysis of Canadian and South African Family Law*, 2022 CanLIIDocs 3247

D. Honour Killings

- *Preliminary Examination of So-Called "Honour Killings" in Canada*. Government of Canada.
- Razack, S.H., *Should Feminists Stop Talking About Culture in the Context of Violence Against Muslim Women? The Case of "Honour Killing"*, (2021) 12:1 Intern J of Child, Youth and Family Studies, 31-48. (Click on "PDF")
- *Her Majesty the Queen v. Shafia*, 2012 ONSC 1538 (CanLII)
  Bodies of four (4) women – 3 sisters and their mother – were found in a submerged car. Father/Husband, his second wife, and their eldest son, were arrested and jointly charged with 4 counts of first-degree murder. The motive was a commitment to preserve the family's notion of honour. Crown sought to call a witness to provide evidence as to the relationship between culture, religion, patriarchy, and violence against women in the Middle East, Eastern Asia and around the world, and particularly as it relates to "honour killings". Testimony permitted.
- *Jabbour v. Canada (Citizenship and Immigration)*, 2009 FC 831 (CanLII)
  Application for judicial review of a decision of the Immigration and Refugee Board – Refugee Protection Division, dismissing the Applicants' claim for refugee protection. Principal Applicant is a citizen of Israel and a divorced Muslim Palestinian who is now married to the other Applicant, a Christian Palestinian. Their relationship

initially proceeded in secret in Israel, but when relationship was discovered, both parties were harassed (including by relatives). A brother of the principal applicant threatened to kill the other applicant when the applicants requested to marry. Applicants raised concerns about being victims of honour killings if they were forced to return to Israel. Studies and reports were put forward as evidence regarding honour killings. Panel held that there was nothing leading to the conclusion that the Israeli authorities would not act on a report of a threat of an honour killing. Judicial review was allowed, as it was held that the tribunal was required to address the practical adequacy of state protection when a threat to the life or safety of a refugee applicant is accepted.

- *Tabassum v. Canada (Citizenship and Immigration)*, 2009 FC 1185 (CanLII)
  Applicant for Judicial Review of a decision by a Pre-Removal Risk Assessment Officer, denying the Applicant's application for protection because the lack of adequate state protection (claim of threats of honour killing by other Muslim group and her husband/husband's family). Applicant is a citizen of Pakistan, arrived in Canada and filed a refugee claim. Husband/Husband's family believes that applicant is living with another man in Canada (contrary to Sharia Law), and applicant claims she will be subjected to honour killing if forced to return to Pakistan. Affidavit was provided by Applicant's Husband's brother, who was attacked by his family when he failed to lure Applicant back to Pakistan to be killed. Threatening letters were sent to the Applicant by her husband. Officer determined that Pakistan has made serious efforts to combat honour killings and domestic abuse, and was providing adequate state protection for these issues. Determination that Officer made unreasonable findings of fact, and that objective country evidence shows that the Government of Pakistan is not able to provide adequate state protection against "honour killings".

- *Anwar v. Canada (Citizenship and Immigration)*, 2024 FC 197 (CanLII)
  Applicant seeks judicial review of decision denying her application per s.112 of the *Immigration and Refugee Protection Act*. Applicant claims that she is at risk of persecution in Pakistan based upon her profile as an unwed mother; specifically, her brother threatened to kill her and her children, and that the Taliban directed her family to carry out an honour killing against her. An information was registered in Pakistan accusing her of prostitution. Officer found that honour killings were "not uncommon" in Pakistan, but determined that there was insufficient evidence regarding the Applicant's specific risk. Held that the Officer failed to conduct a section 96 risk assessment based upon the Applicant's profile. Matter was remitted for re-determination by another Officer.

E. Forced Marriages/Child Marriages

- Bendriss, N., *Report on the Practice of Forced Marriage in Canada: Interviews with Frontline Workers: Exploratory Research Conducted in Montreal and Toronto in 2008*, 2008 CanLIIDocs 598

- Sapoznik Evans, K.A., *Forced Marriage in Canada: To Criminalize or Not to Criminalize?*, 2017 CanLIIDocs 97
- Deane, T., *Marrying Young: Limiting the Impact of a Crisis on the High Prevalence of Child Marriages in Niger*, 2021 CanLIIDocs 1936
- Mattoo, D. & Merrigan, S.E. (2021), *"Barbaric" Cultural Practices: Culturalizing Violence and the Failure to Protect Women in Canada.* International Journal of Child, Youth and Family Studies (2021) 12(1): 124-142.
- *X (Re),* 2021 CanLII 150687 (CA IRB)
  Appeal allowed for principal applicant and her daughters, who are citizens of Chad. Applicants fear harm that principal applicant's in-laws will subject the minor applicants to female genital circumcision and child marriage to an adult man if they are forced to return to Chad. Principal applicant also fears aggression from her husband for going against custom/traditions. While in Chad, principal applicant's brother-in-law advised her that it was time to circumcise one of her daughters and for one of her daughters to marry his friend. One of the minor daughters was, in fact, married to an adult man while in Chad. Although a crime in Chad, FGM is widely practiced and those who perform FGM are rarely prosecuted or punished. Reports suggest that over 38% of women have had FGM performed on them, of which less than 1% had a medical professional perform the FGM. Applicants are held to be Convention refugees.

F. Female Genital Mutilation (FGM)

- *Policy on Female Genital Mutilation* (Approved 1996, Revised 2000, Updated 2009), Ontario Human Rights Commission.
- *Child Abuse is Wrong: What Can I Do? (Female Genital Mutilation),* Government of Canada.
- *Female Genital Mutilation/Cutting in Canada: Participatory Research Towards Collective Healing*, Government of Canada.

G. Sex-Selective Abortion

- Clelland, T.D. (2013), *Factors Leading to Sex Selective Abortion in Canada: A Preliminary Investigation,* Simon Fraser University.

H. Passport/Government Documents and Travel

- Court has the authority to dispense with a parent's consent to apply or renew a passport and/or other government documents.
- *Purushothaman v. Radakrishnan*, 2014 ONCJ 300 (CanLII)

There was persuasive evidence that the relationship was characterized by physical and emotional abuse, and the father attempting to exert control over the mother's life and behaviour. Mother had sole custody of the children on a final basis, and brought this motion to travel with the child to India to visit family. Father objects and argues that she will remain in India permanently. India is not a signatory to the *Hague Convention on the Civil Aspects of International Child Abduction* and that is a relevant factor, but not the only factor to be considered. Referencing a decision of Justice Pazaratz, the court noted that cultural enrichment is to be promoted, but primacy is to be given to the child's physical and emotional security. In grating permission to travel outside of Canada with a child, the Court must weigh the benefits of travelling against the "plausible" risks.

- *Karol v. Karol*, 2003 CanLII 2323
  Mother seeks an order permitting travel to Israel with the children to visit friends and family; Father refuses to consent. Standard for determination is the "best interests" of the children per the *Children's Law Reform Act*. Traveling for the purpose of visiting an ancestral home and forming bonds/connections with family and heritage is in the children's best interests, particularly when the children have expressed a desire to visit with extended family. See also *Yacoub v. Yacoub*, 2010 ONSC 4529.

- *Venkatesh v. Venkatesh*, 2010 ONSC 1177 (CanLII)
  Children were ordered to reside primarily with their father, but permitted to travel to India with their mother for the summer months. The children were not returned to Canada by their mother following the summer months. Ontario granted the father sole custody (as it was known at the time) and ordered the children be apprehended and returned to Ontario. At the same time, the mother's parents obtained an order in India for temporary custody without disclosing the existence of the Ontario order. The Indian order was set aside in India. Although the Indian courts moved quickly, the mother did not return to Canada with the children.

I. Spousal Support and Immigration Sponsorship

- Sponsoring an individual as a member of the "family class" requires execution of an undertaking with the Government of Canada to be financially responsible for the sponsored individual for a specified period of time

- The existence of an undertaking to be financially responsible per the sponsorship application is a relevant factor in establishing entitlement to both child and spousal support but it is not the determinative factor – *Achari v. Samy*, 2000 BCSC 1211 at para 13:

  There is no doubt that the sponsorship agreement is a contractual arrangement between the husband the Government of Canada.... It should also be noted that the agreement specifically states that separation or divorce from a sponsored spouse does not cancel sponsorship obligations. Therefore the agreement is very much relevant in

determining entitlement. However, the agreement that would otherwise bind the husband for ten years cannot supersede the specific laws that deal with maintenance. In other words, sponsorship agreements cannot impose obligations greater than those imposed by the family law. The sponsorship agreement must be considered together with the general principles applicable to spousal maintenance. In the circumstances the provisions of both the *Divorce Act* and the *Family Relations Act* are nevertheless applicable.

See also *Kuznetsova v. Flores*, 2016 ONCJ 203 and *Singh v. Singh*, 2013 ONSC 6476

- *Randhawa v. Randhawa*, 2019 ONCJ 271 (CanLII) – litigation abuse
The parties separated after a short marriage which involved immigration sponsorship for the wife by the husband from India to Canada. The wife was granted conditional PR for a 2-year period (per immigration policies at the time). The wife claimed that the separation occurred within the 2-years of cohabitation, and that she was at risk of deportation. An exception to the conditional PR was obtained by the wife. The wife proceeded to the OCJ to claim spousal support as a sponsored spouse, relying upon the immigration undertaking given by the husband. Husband alleged that this was a marriage of convenience for the wife to secure immigration status, and opposed the spousal support claim. The parties consented to the focused hearing regarding spousal support being adjourned to a specific date, and agreed upon timelines for materials. On the day of the focused hearing, the wife was served with an Application for Divorce filed by the husband in the SCJ, seeking a divorce and corollary relief including opposition to any financial support from the government and payment for jewelry that the husband alleged the wife had taken from his family in the perpetration of marriage fraud. Wife's motion to lift automatic stay of OCJ proceeding was successful.

- The *Spousal Support Advisory Guidelines* ("*SSAG*") are used as a guide to determine the quantum and duration of spousal support following the establishment of entitlement. With regard to the applicant of the *SSAG* to cases involving immigration sponsorship in which the marriage breaks down within a short period of time, the Revised User Guide states:

  One category of short marriages, those involving immigration sponsorship agreements, raise some unique issues under the *without child support* formula. These are cases where a marriage breaks down while a sponsorship agreement is in place.

  Most spousal sponsorship agreements now run for a period of 3 years, but in the past the duration was as long as 10 years. In some cases involving very short marriages, courts have used the duration of the sponsorship agreement as the appropriate measure for the duration of spousal support, thus extending duration beyond the durational ranges generated by the Advisory Guidelines.

J. Non-Hague Return, Allegations of Abuse and Refugee Claims

- *M.A.A. v. D.E.M.E.*, 2020 ONCA 486 (CanLII)
  Parties were Jordanian citizens, but were married in Kuwait. Mother brought children to Canada from Kuwait after separation (which occurred in Kuwait), without father's consent and made refugee claims for herself and the children on the basis that the father was abusive. Mother had been convicted of kidnapping in Kuwait. Application judge discounted the children's evidence on the basis that it was the product of the mother's inappropriate influence (contrary to evidence from the Office of the Children's Lawyer that children's views were independent). Application judge ordered the children returned to Kuwait. The Court of Appeal held that the Application judge had erred by ordering the return of the children before the determination of the refugee claim. The principle of non-refoulment applied not only to recognized refugees, but also to asylum seekers whose status had not been determined. The children's right to asylum would be lost if, under the *Children's Law Reform Act*, they were returned to the place from which asylum was sought.

K. Jewelry and Equalization/Property Issues

- Distinguish between household contents and personal belongings – each spouse is entitled to retain his or her own personal belongings upon the breakdown of the relationship but the items must still be accounted for in the calculation of net family property and the value equalized

- Jewellery may be the personal belonging of a spouse, but the value of these assets must be accounted for the dates of marriage and separation to calculate equalization of net family property

- *Mahtani v. Mistry*, 2019 ONSC 5260
  Husband claimed that jewellery belonging to the wife had a value of $100,000 and should be attributed to her in equalization calculation. The wife disputed the existence of the jewellery, and testified that the value of her jewellery was only approximately $6,000. The onus in a family law case of proving the other spouse owned an asset on the valuation date is the on spouse making the claim that the asset existed, and each party has the burden of establishing the value of an asset on a particular date including going to the extent of calling an expert.

L. Ownership of Matrimonial Home/Family Residence

- *Falsetto v. Falsetto*, 2024 ONCA 149 (CanLII)
  Appellant is former Father-in-Law of Respondent. Respondent and Appellant's son were registered joint owners of a residential investment property. Appellant advanced 50% of the purchase money for the property, paid 50% of the expenses and received 50% of the income. The Respondent and the Appellant's son separated. Appellant claims purchase money resulting trust in the property. Application judge rejected the claim and held that the 50% interest was an intended gift to the Respondent. Ultimate

question is what was the transferor's intention at the time of the conveyance? Appellant's evidence was accepted that he did not intend to gift a 50% interest to the Respondent. Appeal allowed and Respondent's 50% interest vest in Appellant.

- *Sidhu v. Sidhu*, 2023 ONSC 5017 (CanLII)
  Matriarch of the family brought a proceeding (as against her son and daughter-in-law) for partition and sale of a residence wherein their multi-generational family was residing together and pooling funds (shared account) to meet household obligations. Son and daughter-in-law brought a cross-Application claiming unjust enrichment and a 50% interest in the property on the basis of a joint family venture. Daughter-in-law holds 1% interest and matriarch holds other 99%. Matriarch paid 100% of downpayment for purchase of the property in which she was (initially) living with 3 unmarried sons. Two (2) sons got married, and their respective wives moved into the property. It was accepted that it is common practice in the South Asian community for daughters-in-law to move into the home of her husband/husband's family. All communal expenses were paid from the "shared family account" into which contributions were made by the matriarch and married sons – such as mortgage, home/auto insurance, groceries, maintenance, phone, internet, etc. Judicial finding that both the matriarch and the son/daughter-in-law benefitted from joint living situation – matriarch had assistance in household management, and son/daughter-in-law saved considerable funds. There was no intention for the son/daughter-in-law to acquire the property during the matriarch's lifetime, and there is no unjust enrichment. Matriarch holds 100% of property legally and beneficially.

- *A.S.1 v. A.A.S.*, 2018 ONSC 5784 (CanLII)
  Wife (#1) brings application for all issues arising from the breakdown of the marriage (very short arranged marriage). Husband claims that he religiously divorced Wife #1 before he married Wife #2. Court held that there was no legal divorce, thus husband had two (2) wives at the same time. Wife #1 was still in Pakistan waiting to travel to Canada to reunite with her husband (unknown to her), when her brother travelled to Canada to live with his wife in the same house as Wife #1's husband. No one advised Wife #1 that Husband had re-partnered/remarried. Wife #1 travelled to Canada with Husband's mother and sister, and Husband retrieved them from the airport and brought them to the family residence in which Husband held a 50%. The Husband asserted that he held in 50% interest (as a tenant in common) for his father, but Court held that he held this interest legally and beneficially. Although Court found that Husband and Wife #1 lived in this house together, it was not found to be "cohabitation" but rather various family members living together in a shared household. As such, this was not found to be a matrimonial home.

Law Society of Ontario | Barreau de l'Ontario

TAB 10

18th Family Law Summit

Best Interests Versus Autonomy: Health Disputes Involving Young People in Family Court (PPT)

Assistant Professor Claire Houston
Western Law

March 21, 2024

BEST INTERESTS VERSUS AUTONOMY: HEALTH DISPUTES INVOLVING YOUNG PEOPLE IN FAMILY COURT

CLAIRE HOUSTON, WESTERN LAW

FAMILY LAW SUMMIT

MARCH 21, 2024

ROADMAP

1) Types of health disputes
2) Legislative framework
3) Significance of *AC v Manitoba*
4) Taxonomy of decisions
5) Concluding thoughts

TYPES OF HEALTH DISPUTES

1) Child Protection (Parent versus State)
2) Domestic (Parent versus Parent)
   - Vaccines (especially COVID)
   - Gender affirming care
   - Reunification therapy
   - Records

LEGISLATIVE FRAMEWORK

1. Divorce Act/Children's Law Reform Act
2. Health Care Consent Act
3. Personal Health Information and Protection Act (PHIPA)

BEST INTERESTS

DA/CLRA

- Parenting decisions made in the **"best interests"** of the child
- Views and preferences of children one factor in determining best interests

AUTOMONY

HCCA

- **Capacity** determines treatment decisions
- Young people are presumed capable of making treatment decisions: s 4(2)
- Capable means "able to understand the information that is relevant to making a decision about the treatment… and able to appreciate the reasonably foreseeable consequences of a decision or lack of decision"
- "Best interests" only applies to incapable

PHIPA

- **Capable** children must consent to disclosure of personal health information, including counseling records

RELEVANCE OF *AC v MANITOBA*

- Almost 15 year old refusing blood transfusion based on religious beliefs; child apprehended
- Manitoba child protection law uses "best interests"; presumption of capacity for 16 year olds, no presumption for under 16
- SCC says "best interests" must reflect increasing capacity of children but avoids wholesale embrace of "mature minor" doctrine
- Limited application to HCCA

TAXONOMY OF DECISIONS

1) Autonomy
2) Best Interests = Autonomy
3) Best Interests

AUTONOMY

***Gegus v Bilodeau*, 2020 ONSC 2242** – father appeals order granting mother "exclusive right to consent" to ADHD medication for 13 year old; appeals court clarifies that father's consent being dispensed with (in event child is not capable); capable child must still consent to treatment according to HCCA

***Warren v Charlton*, 2022 ONSC 1088** – dispute over COVID vaccine for 12 year old; father worried about mother's influence; citing HCCA, court says, *"[d]epending on child, the question may be determined without reference to parental authority."* Court says regardless of which parent has decision-making authority, the child *"will still have the right to withhold his consent. Whether his mother's influence is behind it or not is ultimately irrelevant."*

BEST INTERESTS = AUTONOMY

***MM v WAK*, 2022 ONSC 4580** – father wants 12 year old vaccinated against COVID; child strongly opposed; court says requiring child to be vaccinated would "put her at risk of serious emotional and psychological harm". Court adds that child a "mature minor" according to *AC*, capable under HCCA. Not in best interests to order vaccination.

***JN v CG*, 2022 ONSC 1198** – father wants two children (12 and 10) vaccinated; children opposed; court finds children "not old enough to decide this complicated issue for themselves", however, their "strongly held and independently formulated views" entitled to "significant weight"; "I would be very concerned that any attempt to ignore either child's views on such a deeply person and invasive issue would risk causing serious emotional harm and upset"; not in best interests to order vaccination

BEST INTERESTS

***JN v CG*, 2023 ONCA 77** – OCA disagrees that children's views independently held, says evidence of influence by mother, says error for motions judge to give "any weight" to children's views; father granted decision-making authority re vaccines (no reference to HCCA)

***LS v BS*, 2022 ONSC 5796** – father seeks order compelling production of children's health/counselling records under s 20(5) of CLRA; children refuse to consent, clinicians refuse to release records citing PHIPA; court applies "best interests" test; says PHIPA does not oust court's jurisdiction under CLRA; however, not in best interests of children to grant full disclosure

***AM v CH*, 2019 ONCA 764** – OCA upholds order directing reunification therapy for 14 year old; trial court "entitled to put no weight on child's wishes" because "not his own"; HCCA does not limit courts' jurisdiction to make therapeutic orders in a child's best interests

CONCLUDING THOUGHTS

- Does any of this matter? I think so
  - Children's participation, as well as autonomy
  - Ambiguity for treatment providers
- Context of parental dispute should not change legal test

THANK YOU

CLAIRE.HOUSTON@UWO.CA

Law Society of Ontario | Barreau de l'Ontario

TAB 11

18th Family Law Summit

Pension Takeaways: Important Items to Think About When Dealing with Pensions (PPT)

Lisa Kadoory
Kadoory Cho Family Law

Kelley McKeating, FSA, FCIA
Mckeating Actuarial Services, Inc.

Pensions Update Checklists and Important Takeaways – An Actuary's Perspective

Settlement Options Involving Pension Division

Kelley McKeating, FSA, FCIA
Mckeating Actuarial Services, Inc.

March 21, 2024

cpd

Pension Takeaways: Important Items to Think About When Dealing with Pensions

Lisa Kadoory and Kelley McKeating

18th Family Law Summit
Law Society of Ontario

March 21, 2024

Potential Valuation Issues

- Computational errors
- Questionable interpretations of the Ontario valuation rules
- Fact situations that result is unfairness

Income Tax Adjustments

- Family Law Values are pre-tax
- A deduction for contingent income tax must be applied to reflect the portion of pension lost to tax when received
  - Converts the before-tax FLV to an after-tax, cash-equivalent amount
- Required for DB and DC pensions, RRSPs, DPSPs, LIRAs
- An actuary can perform a precise projection and opine on the appropriate income tax adjustment
  - Or, the lawyers can use an arbitrary rate
- Gross-up calculations
  - Income tax adjustments in reverse, to convert a cash equalization obligation to a before-tax amount be to be transferred from an RRSP or pension plan (as a LIRA transfer)
  - Very complicated, both computationally and from a legal principles perspective

Legal Considerations When Using Pension as Source of Equalization Payment

- Parties may not (unsurprisingly) agree about how equalization payment is to be funded
- Section 10.1(4) of the Family Law Act sets out that:

  In determining whether to order the immediate transfer of a lump sum out of a pension plan and in determining the amount to be transferred, the court may consider the following matters and such other matters as the court considers appropriate:

  1. The nature of the assets available to each spouse at the time of the hearing;
  2. The proportion of a spouse's net family property that consists of the imputed value, for family law purposes, of his or her interest in the pension plan;
  3. The liquidity of the lump sum in the hands of the spouse to whom it would be transferred;
  4. Any contingent tax liabilities in respect of the lump sum that would be transferred.
  5. The resources available to each spouse to meet his or her needs in retirement and the desirability of maintaining those resources. 2009, c. 11, s. 26.

Legal Considerations (continued)

- Collectively, cases like *Nadendla, VanderWal, Fortier, McNeil, and Gielen*[1] *tell us that:*
  - There is no presumption that an equalization payment is to be paid through pension division
  - When deciding how an equalization payment should be funded, the court aims to strike a balance between liquid assets and retirement savings for both parties (to avoid a scenario where one party retains all the liquid assets)
- When considering whether to divide a pension at source, it is important to be mindful of negative NFP value

[1] *Nadendla* v. *Nadendla*, 2014 ONSC 3796 (CanLII)
VanderWal v. *VanderWal*, 2015 ONSC 384 (CanLII)
Fortier v. *Lauzon*, 2017 ONSC 7503 (CanLII)
McNeil v. *McNeil*, 2020 ONSC 1225 (CanLII)
Gielen v. *Gielen,* 2023 ONSC 4157 (CanLII)

Long-term Consequences of Using Pensions for Equalization

- Lawyer perspective:
  - Often seen as the preferred solution, even though not the default and not required
- Member/payor perspective:
  - Delays the pain of the EP
  - Like buying a couch with "no payments until 2042!!!"

Long-term Consequences of Using Pension for Equalization

- Spouse perspective:
  - "I'm entitled to half his/her pension"
  - Often (mis)understood to be the default and/or required
- This actuary's perspective:
  - Divisions at source and lump-sum transfers within a pension plan can be useful equalization tools
  - LIRA transfers, not so much

If Available, is a LIRA Transfer the Best Solution?

- Not a decision to be taken lightly!
  - Locked-in Retirement Account
  - a.k.a. Locked-in RRSP
- Investment risk
  - Can the non-member spouse outperform the professional pension fund managers?
- Longevity risk
  - Run out of money? For a 65-year-old, probability of living to age 90 is 28% (male) and 40% (female).
  - Spend too little? Live more frugally than is necessary.
  - RRIFs, LIFs, and life annuities

Simplistic Example

- Both spouses have identical pensions
  - Family Law Value: $200,000
  - Pension accrued during the marriage: $2,000 per month
  - Both pensions are divided 50/50 via LIRA transfer
- Each spouse leaves the marriage with $1,000 per month pension and $100,000 in a LIRA
- At retirement:
  - Spouse A: $1,700 pm ($700 from the LIRA)
  - Spouse B: $1,500 pm ($500 from the LIRA)

Heringer v. *Heringer*

- The implications arising from this 2014 decision have not gone away. The case was appealed to Court of Appeal of Ontario but then settled.
- *Heringer* deals with the interest payable on a lump sum transfers.
- The wife expected that interest, which had accumulated from valuation day to the date of transfer, would be added to the specified amount to be transferred to her. However, it was the position of the pension plan administrator that interest could not added as the Minutes of Settlement the parties signed were silent on the issue of interest.

Heringer v. *Heringer* (continued)

- The Court ruled that interest accumulated after valuation day is payable only when (1) the court order/separation agreement provides for this or (2) the transfer amount is expressed as a percentage of the Family Law Value
- *Lambert* v. *Peachman*, 2017 ONSC 7450 (CanLII) gives *some* indication of how a court might respond to a request for interest that had accrued on a pension value after valuation day
- Takeaway: It is important to be mindful and intentional when addressing the issue of interest that accrues on a pension value after valuation day

When to Involve an Actuary

- This relates back to potential valuation issues discussed earlier - Does something seem off about the FLV calculation, methodology used, assumptions made (i.e., erroneously characterizing a pension transfer as a buyback)
- An actuary can assist when pension holder refuses to cooperate/participate in court proceedings/when dealing with unique fact situation that involves a pension (see for example, *Talotta* v. *Talotta*, 2022 ONCA 474 (CanLII))
- Overall, as lawyers, we must acknowledge when we are out of our element (i.e., tax adjustment – the larger the pension the more important it becomes to be accurate)

Questions?

lisa@kadoorychofamilylaw.com

(416) 646-1766, ext. 2

KADOORY | CHO
FAMILY LAW

kelley@mckeating-actuarial.com

(519) 857-3305

McKeating Actuarial Services, Inc.
www.mckeating-actuarial.com

McKeating Actuarial Services, Inc.
www.mckeating-actuarial.com

Pensions Update

Checklists and Important Takeaways – An Actuary's Perspective

Kelley McKeating, FSA, FCIA
McKeating Actuarial Services, Inc.
London, Ontario

Prepared for

18th Family Law Summit
Law Society of Ontario
Toronto, ON

March 20-21, 2024

OVERVIEW

According to **Section 4(1)** of the **Ontario Family Law Act**, ""property" means … in the case of a spouse's rights under a pension plan, the imputed value, for family law purposes, of the spouse's interest in the plan". In other words, pensions are property for net family property (NFP) purposes.

Section 4(1) of the FLA does not distinguish between:

- Pensions in pay and pensions not yet in pay,
- Registered and non-registered pensions, or
- Pensions registered in Ontario and those registered in other jurisdictions

Thus, it is generally understood that <u>all</u> pensions are to be treated as property for NFP purposes.

Section 10.1 of the Family Law Act prescribes the method and assumptions to be used in the valuation of a pension for net family property purposes. This is accomplished by pointing to Section 67.2 of the Ontario Pension Benefits Act (or to Section 17 of the new Pooled Registered Pension Plans Act). Section 67.2 then sends the reader to **Regulation 287/11 under the Pension Benefits Act** which outlines the specifics of the prescribed valuation methodology and

assumptions. Section 10.1 is understood to apply to all pensions. Section 10.1(1) applies to Ontario-registered pensions. Section 10.1(2) applies to other pensions on the same basis as Section 10.1(1) applies to Ontario-registered plans "where reasonably possible" "with necessary modifications". The 2020 Court of Appeal decision in *Van Delst v. Hronowky* addressed this issue in the context of two federal civil service pensions.

Section 5(1) of the FLA outlines the equalization regime that applies to net family property in Ontario. In the FLA, there are no provisions that explicitly exclude or even mention pensions in an equalization context. Thus, it is generally understood that the rules that apply to other family property also apply to pensions and that the FLA does not require or permit pensions to be excluded from the established equalization regime. This section is also understood to apply to all pensions.

If the parties cannot agree on how to implement NFP equalization and if one party is seeking a pension division, then **Section 10.1(4)** of the FLA gives guidance to the court regarding what issues to consider in deciding whether or not to order a pension division.

Section 67.2 of the **Ontario Pension Benefits Act** requires the pension administrator to determine the Family Law Value of a pension, if asked by either the plan member or the member's spouse. Ontario-registered pension plans are governed by the provisions of the PBA. Pension plans registered in other jurisdictions and non-registered pension plans are not subject to the PBA. Thus, this section (specifically, the requirement for a pension administrator to provide a family law valuation if asked) is understood to apply only to Ontario-registered pension plans.

Sections 67.3, 67.4, 67.5, and 67.6 of the PBA set out the rules by which an Ontario-registered pension may be divided (by lump-sum LIRA transfer or by division at source) to assist with NFP equalization. These rules apply only to Ontario-registered pension plans. The division options available for other types of pension plans may be more flexible or more restrictive than the options for Ontario-registered plans. See the table at the end of this paper.

In totality, the above provisions are generally referred to as the "Ontario valuation rules".

Note that the Family Law Act uses the term "**Imputed Value**". The Pension Benefits Act and its regulations use the term "**Family Law Value**". These terms are interchangeable.

The rules are clear, aren't they? What could go wrong??

POTENTIAL VALUATION ISSUES

Issues that arise can fall into one of three categories:

- Computational errors (a factual issue, should be easy to rectify once recognized)
- Interpretations of the Ontario valuation rules that may not be correct (a legal issue)
- Fact situations that cause the one-size-fits-all Family Law Value of a pension to be very unfair to one of the parties (another legal issue)

How to recognize computational errors?

If the Family Law Value if much higher or lower than you expected, it may be worthwhile to ask an independent actuary for a review of the valuation.

Administrators who are more likely to make mistakes:

- Plan has few members, administrator therefore has little experience with family law valuations
- Administrator is located outside of Ontario, little experience with the Ontario valuation rules (which are very different from how things are done in other provinces and territories)
- Unusual fact situation (company went bankrupt and plan was wound up shortly before or after separation, annuities have been purchased, plan member terminated employment shortly before or after separation, etc.)

When to consider taking a second look at the administrator's interpretation of the Ontario valuation rules?

- Union-sponsored plan (because the Family Law Value may have been reduced in proportion to the plan's funded status)
- Buy-back of credited service in respect of pre-marriage employment that was paid for during the marriage, or in respect of during-marriage employment that was paid for after the separation date
- Plan member is of retirement age (over 50 or 55) at the time of separation, but not yet retired

What fact situations might merit consideration for the fairness (or lack thereof) of the Family Law Value?

- Plan member has a terminal illness (and is or isn't retired)
- Spouse has a terminal illness (and the plan member is retired)

- Plan member is close to retirement and belongs to a federally-regulated pension plan (i.e., employer is in the transportation, communication, or banking sectors, or is a Crown corporation or federal government spin-off like Canada Post or NavCanada)

INCOME TAX ADJUSTMENTS

The Family Law Value is a before-tax amount. An income tax adjustment or contingent tax adjustment is required in order to convert the Family Law Value into an after-tax, cash-equivalent value in the Net Family Property Statement. In other words, selecting the income tax adjustment rate is part of the asset valuation process.

There are two common approaches:

- Lawyers select an arbitrary tax rate
- An actuary is retained to opine on the appropriate tax rate

In deciding what income tax adjustment to apply and whether or not to retain an actuary, here are some considerations:

- Generally speaking, an arbitrary income tax adjustment selected by a lawyer will be higher than the income tax adjustment that an actuary would recommend.

- If one party has registered (pension, RRSP, etc.) assets worth considerably more than the other party, then it may not be reasonable to use the same income tax adjustment for both.

The income tax adjustments that have been commonly used and accepted by the courts for many years are based on the party's <u>average</u> expected income tax rate in retirement. The income in retirement from pension plans, RRSPs, etc. is then projected, and the income tax that would be payable in each year of retirement is projected from the estimated retirement income. The projected tax rate in each year of retirement is then averaged.

It is usual to use the same income tax adjustment for all of a party's registered retirement savings vehicles. The most common of these "registered" or before-tax assets are as follows:

- Pension plans (RPPs)
- Registered Retirement Savings Plans (RRSPs)
- Locked-in Retirement Accounts (LIRAs)
- Deferred Profit Sharing Plans (DPSPs)

Examples of Income Tax Rates

- Retirement age 65
- Pension and RRSP income will be fully indexed to inflation
- Retirement income will be comprised of pension/RRSP income, maximum CPP pension, and OAS pension

Income at age 65 in today's dollars (other than CPP and OAS)	Average tax rate in retirement
$10,000	6.5%
$30,000	13%
$50,000	18%
$70,000	22%
$90,000	26%

Tax-free Savings Accounts (TFSAs) are not before-tax assets, nor are most (but not all) employee savings plans. Income tax adjustments would not be applied.

There are different considerations to selecting the "gross-up rate" to apply when converting a cash equalization obligation into a before-tax amount when the parties agree that some or all of the obligation is to be satisfied by means of an RRSP transfer or pension division (LIRA transfer, internal transfer with a plan, or at-source division). Best to consult with an actuary.

DIVIDING A PENSION TO ASSIST WITH NFP EQUALIZATION

Once the NFP statement is completed (including the after-tax values of any pensions) and it's been determined "who owes who how much", the parties may agree or the court may order a pension division.

When drafting the pension-related sections of a separation agreement or court order:

1. Confirm that the division approach contemplated (division at source, internal lump-sum transfer within the pension plan, or LIRA transfer) is available and permitted by the plan and its governing legislation. If in doubt, check the attached tables or ask an actuary for assistance.

2. Focus on documenting the intent of the parties and providing clear instructions to the pension plan administrator(s).

3. Avoid extraneous narrative information (such as the steps taken to obtain the family law

pension valuation, and definitions that may or may not be relevant). Also avoid duplication of instructions in multiple paragraphs, as this can lead to contradictory provisions and difficulties implementing the agreement or order.

4. It remains advisable to <u>always</u> provide the administrator with a draft copy of the separation agreement, and to obtain their comments, prior to finalizing and executing the agreement.

5. FSRA Forms FL-5 and FL-6 are covering memos to the separation agreement, to be provided to the pension administrator <u>only</u> if the pension plan is Ontario-registered. These forms are executed only by the non-member spouse and would not typically form part of the formal separation agreement.

If there is to be a division by **LIRA transfer or lump-sum transfer within the plan**, the agreement or order would specify details such as:

- The exact lump sum to be transferred and the "as of" date for the transfer. The "as of" date clarifies whether or not interest is to be paid from the separation date to the date of actual transfer.

- The 2014 *Heringer* decision confirmed that paying interest on an equalization payment that originates in a pension plan is neither the default nor is it required. The legal principles regarding the payment of interest in respect of an equalization payment would presumably be the same, whether the equalization payment is made in cash or from a pension plan or RRSP.

- To minimize the possibility of a transfer that is not in accordance with the intent of the parties (or the intent of the court), it is best to specify a dollar amount for the transfer and <u>not</u> to rely on a percentage:

    - If interest is <u>not</u> to be paid, then words such as "$100,000 as of the date of actual transfer" should achieve the parties' intentions.

    - If interest <u>is</u> to be paid, then words such as "$100,000 as of the separation date, with interest to the date of actual transfer" should achieve the parties' intentions.

The agreement or order should also specify:

- The party who is responsible for informing the pension administrator of the agreement.

- The deadline for informing the pension administrator.

- The remedies if the administrator is not informed in a timely manner.

If the administrator is not advised of a pension division in a timely manner, complications may arise. These could extend to the funds no longer being available for division as a result of the member's termination of employment, retirement, or death.

If there is more than one pension, the separation agreement or court order should deal with each pension in a separate section.

If there is to be a **division at source** of the pension (i.e., a division of the monthly pension while it is in pay), the agreement or order would specify details such as:

- The proportion of the member's pension that will be payable to each party (in percentages). The percentages should take into account, amongst other considerations, the value of the spouse's spousal survivor pension and the amount of the equalization obligation to be satisfied by means of the pension division.

- A numerical example based on the member's current pension (to clarify and confirm the intent of the parties).

- The start date of the division. This would often be the separation date but could be a later date. In Ontario, the deemed arrears and required retroactivity provisions of the legislation create complexity if the parties have been informally dividing the pension pending a formal agreement. Some Ontario-registered pension plans will divide the pension as of a current date if the agreement is clear on this point.

- Whether the spouse's portion will revert to the member (with reversion) or continue to the spouse's estate (no reversion) if the spouse predeceases the member. The 2021 Court of Appeal decision in *Meloche v. Costa-Meloche* confirmed, for Ontario-registered pension plans, that both approaches are possible. Generally speaking, both approaches are possible in <u>any</u> instance where an at-source division of a monthly pension in pay is an available pension division option.

The plan member's pension comes into pay on his or her retirement date and continues until his or her death, regardless of whether or not there is a pension division.

Under a "with reversion" pension division:

- <u>If the plan member predeceases the non-member spouse</u>: The member's pension (and the pension division) would cease on the member's death. The former spouse's spousal survivor pension would commence the plan member's death and then continue for the spouse's remaining lifetime.

- If the spouse predeceases the plan member: The pension division would cease even though the plan member's pension continues (because the member is still alive). The spouse's portion of the member's monthly pension would "revert" back to the plan member and the member would receive the full amount of his or her monthly pension from the date the spouse's death until the date of the member's death.

Under a "no reversion" pension division:

- If the plan member predeceases the non-member spouse: The member's pension (and the pension division) would cease on the member's death. The former spouse's spousal survivor pension would commence the plan member's death and then continue for the spouse's remaining lifetime.

- If the spouse predeceases the plan member: The spouse's portion of the member's pension would not revert back the plan member. Instead, the pension division would continue and the spouse's portion of the member's monthly pension would be paid to the spouse's estate after the spouse's death, for the plan member's remaining lifetime. When the plan member dies, the pension, and thus the pension division, would cease.

Actuarially speaking, the "no reversion" approach is the proper approach for an equitable equalization of net family property. If the parties prefer the "with reversion" approach, then it would be equitable to increase the amount that the spouse receives while alive to compensate for the fact that the division will not continue for the member's entire lifetime.

The agreement or order should also specify:

- Whether any ad hoc or contractual indexing increases will be shared proportionately by the parties.

- The party who is responsible for informing the pension administrator of the agreement.

- The deadline for informing the pension administrator.

- The remedies if the administrator is not informed in a timely manner.

If the administrator is not advised of a pension division in a timely manner, complications may arise. These could extend to the funds no longer being available for division as a result of the member's termination of employment, retirement, or death.

If there is more than one pension, the separation agreement or court order should deal with each pension in a separate section.

REMEMBER:
The plan administrator may be reluctant to send a vaguely-worded agreement back to the parties for clarification. There may be a tendency for the administrator to "read between the lines" and interpret the agreement in a way that the parties did not intend. To ensure that the pension division proceeds as the parties intended, it is important to provide clear and unambiguous instructions to the administrator. If in doubt, ask an independent actuary to review your draft agreement. The actuary speaks "pension" and help you see the agreement through the eyes of the pension administrator.

Understanding LIRA Transfers

Although widely used, LIRA transfers may be the least understood of the pension division options. They have been available for decades under federal government employee plans and federally-registered private sector plans. When the Bill 133 regime came into effect in 2012, LIRA transfers became available to members of Ontario-registered plans who were not retired as of their separation date.

LIRA stands for Locked-in Retirement Account. LIRAs are RRSPs with strings attached. The non-member spouse should understand that locked-in means locked-in. With few exceptions, the LIRA can only be accessed in one's retirement years, and never as a lump sum.

The greatest challenge of managing a LIRA is the drawdown decision. Draw down the balance too slowly, and the non-member spouse's heirs will be basking on a beach in the Cayman Islands after his or her death. Draw down too quickly, and the non-member spouse will run out of money before he or she dies. This is referred to as "longevity risk".

The other difficulty with LIRAs is "investment risk", the challenge of replicating the investment return of the professional pension fund managers. Pension plans pay "institutional" investment management fees which are substantially lower than the "retail" investment management fees that most individuals pay when they invest in mutual funds. Will the non-member spouse be able to make the astute investment decisions necessary to replicate the amount of pension the member gave up in order to implement the LIRA transfer? Will the non-member spouse be able to continue to make astute investment decisions as they age into their 80s and 90s and beyond?

In a defined benefit pension plan, the employer takes on the longevity risk (the risk of outliving one's assets) and the investment risk. In a LIRA, the account holder (the non-member spouse) must shoulder both the longevity risk and the investment risk.

To the plan member, a LIRA transfer is tempting because it defers the pain of equalization. But, the transfer will require the member to give up some pension and once it's gone, it's gone forever.

In this actuary's opinion, a LIRA transfer should be viewed as the equalization solution of last resort in most instances.

One exception to the caveat against LIRA transfers is when the plan member is seriously and terminally ill. If this is the case, a LIRA transfer may actually be the optimal equalization strategy.

HELPFUL RESOURCES

- General background on defined contribution (DC) and defined benefit (DB) plans: https://www.canada.ca/en/financial-consumer-agency/services/retirement-planning/employer-sponsored-pension.html

- Guidance for members and spouses: https://www.fsrao.ca/consumers/how-fsra-protects-consumers/pensions/pensions-and-marriage-breakdown-guide-members-and-their-spouses
    - Includes link to FSRA forms

- Guidance to administrators: https://www.fsrao.ca/industry/pensions/regulatory-framework/guidance-pensions/administration-pension-benefits-upon-marriage-breakdown
    - More technical, but useful

AUTHOR'S CONTACT INFORMATION

Kelley McKeating
McKeating Actuarial Services, Inc.
2 – 165 Oxford Street East
London, Ontario N6A 1T4

Tel: (519) 857-3305
Fax: (519) 858-3300
Email: kelley@mckeating-actuarial.com

Settlement Options Involving Pension Division

Member NOT Retired at Separation

Type of pension plan	**Ontario-registered**	**Federal Gov't Employee**	**Federally-registered**	**Non-registered or Foreign**
Valuation provided by	Plan (usually)	Independent actuary	Independent actuary (usually)	Independent actuary (usually)
Available forms of division	Lump sum to LIRA	Lump sum to LIRA	a. LS to LIRA b. LS within plan c. At source	Depends on plan (often not possible)
Amount assignable to spouse	0 → MTA on page 2 of Form 4	0 → MTA in PBDA estimate statement	Depends on plan, often full value of the pension (including portion accrued pre-marriage)	Depends on plan (often 0)
Compare division options to pre-2012	New option	No change	No change	No change

Notes:

- For federally-registered plans, the member's status at the settlement date determines the division options. For other plans, the status on the separation date is the determinant.
- LS = lump sum
- MTA = maximum transferable amount

Member IS Retired at Separation

Type of pension plan	Ontario-registered	Federal Gov't Employee	Federally-registered	Non-registered or Foreign
Valuation provided by	Plan (usually)	Independent actuary	Independent actuary (usually)	Independent actuary (usually)
Available forms of division	At source, spouse keeps survivor pension	Lump sum to LIRA, spousal survivor pension is cancelled	a. At source, spouse keeps survivor pension b. Establish 2 lifetime pensions	Depends on plan (often not possible)
Amount assignable to spouse	0 → MTA on page 2 of Form 4	0 → MTA in PBDA estimate statement	Depends on plan, often full value of the pension (including portion accrued pre-marriage)	Depends on plan (often 0)
Compare division options to pre-2012	No change, except for introduction of "deemed arrears"	No change	No change	No change

Notes:

- For federally-registered plans, the member's status at the settlement date determines the division options. For other plans, the status on the separation date is the determinant.
- LS = lump sum
- MTA = maximum transferable amount

Law Society of Ontario | Barreau de l'Ontario

TAB 12

18th Family Law Summit

Annotated Legislation and List of Cases:
Family Law Costs

Frequently Asked Questions: Family Law Costs

Schedule "A" – *Rules of Civil Procedure* Form 57A:
Bill of Costs

Schedule "B" – *Rules of Civil Procedure* Form 57B:
Costs Outline

Maria Golarz
Lam Family Law

Vanessa Lam
Lam Family Law

Sample Cost Submissions – Successful Party

Sample Cost Submissions – Unsuccessful Party or Divided Success

Vanessa Lam
Lam Family Law

Maria Golarz
Lam Family Law

March 21, 2024

Annotated Legislation and List of Cases: Family Law Costs

Maria Golarz and Vanessa Lam, Lam Family Law[1]

Explanation of this Document: Note that we started with the cases related to costs listed on the Superior Court of Justice's "Family List of Cases" (available online: https://www.ontariocourts.ca/scj/practice/practice-directions/list/). Then we added:

1. paragraph references (linked to CanLII) and annotations in square brackets to explain the main principle [e.g., this is why the case is frequently relied upon];
2. relevant legislative provisions (also linked to CanLII and with annotations in square brackets); and
3. some extra case annotations, which we highlight by using "(Lam Family Law Case Addition)", that are mostly newer cases given that the "Family List of Cases" is only current as of September 2020.

We also reordered the cases and added more descriptive headings to make a Table of Contents, which we hope will help you more easily navigate the legislative provisions and cases.

Contents

Costs General Principles: Legislation 2
Costs General Principles: Case Law 2
Interim Costs and Disbursements: Legislation and Case Law 3
Unreasonable Behaviour / Misconduct: Legislation and Case Law 4
Bad Faith Conduct: Legislation and Case Law 4
Appeal of Costs: Legislation and Case Law 5
Costs *to* a Self-Represented Litigant: Case Law 6
Costs *Against* a Self-Represented Litigant: Case Law 7
Costs in Child Protection: Legislation and Case Law 7

[1] Vanessa Lam is the principal of Lam Family Law (www.lamfamilylaw.ca), and is a freelance family law strategic advisor and research lawyer (vanessa@lamfamilylaw.ca). Maria Golarz is a senior associate research lawyer (maria@lamfamilylaw.ca).

Costs General Principles: Legislation

1. *Family Law Rules*, O. Reg. 114/99, R. 24 [costs].

2. *Family Law Rules*, *ibid*, R. 24(1) [successful party presumed entitled to costs].

3. *Family Law Rules*, *ibid*, R. 24(6) [if success is divided, court may apportion costs as appropriate].

4. *Family Law Rules*, *ibid*, R. 24(12) [factors court shall consider in setting costs amount].

5. *Family Law Rules*, *ibid*, R. 18(14) [cost consequences of failure to accept offer].

6. *Family Law Rules*, *ibid*, Rr. 2(2)-(4) [primary objective of the rules is to enable the court to deal with cases justly; explains what dealing with a case justly includes; court required to apply rules to promote primary objective, and parties and lawyers required to help the court promote the primary objective].

7. *Courts of Justice Act,* RSO 1990, c C.43, s. 131 [subject to provisions of an Act or rules of court, costs of and incidental to a proceeding or step in a proceeding are in the court's discretion, and court may determine by whom and to what extent costs shall be paid].

Costs General Principles: Case Law

8. *Mattina v. Mattina*, 2018 ONCA 867 (CanLII), at paras 9-11, citing various cases [courts have "broad discretion" to award costs; modern costs rules are designed to foster four fundamental purposes: (a) to partially indemnify successful litigants; (b) to encourage settlement; (c) to discourage and sanction inappropriate behaviour; and (d) to ensure that cases are dealt with justly].

9. *Beaver v. Hill*, 2018 ONCA 840 (CanLII), at paras 11-19 [no provision for a general approach of "close to full recovery costs"; "proportionality and reasonableness are the touchstone considerations to be applied in fixing the amount of costs"].

10. *Serra v. Serra*, 2009 ONCA 395 (CanLII), at para 8 [costs rules are designed to foster three principles: (a) to partially indemnify successful litigants; (b) to encourage settlement; and (c) to discourage and sanction inappropriate behavior].

11. *Islam v. Rahman*, 2007 ONCA 622 (CanLII), at para 2 [trial judge should not make a costs order for any earlier step where no costs were ordered or where there was silence on the issue].

12. *Boucher v. Public Accountants Council for the Province of Ontario*, 2004 CanLII 14579 (ON CA), at para 37 [costs should reflect "fair and reasonable" amount to pay, not simply actual costs of successful litigant].

13. *C.A.M. v. D.M.*, 2003 CanLII 18880 (ON CA), at paras 42-43 [court may consider financial position of both parties, especially unsuccessful custodial parent; cannot ignore impact of a costs award against a custodial parent that would seriously affect interests of the child; court also to consider if costs sought are reasonable and any offers to settle].

Interim Costs and Disbursements: Legislation and Case Law

14. *Family Law Rules*, O. Reg. 114/99, R. 24(18) [court may make an order that a party pay an amount of money to another party to cover part or all of the expenses of carrying on the case, including lawyer's fees].

15. *Peerenboom v. Peerenboom*, 2018 ONSC 5118 (Div Ct), at paras 25-26 [four-part discretionary test for interim disbursements: (a) disbursements are necessary, (b) amount claimed is necessary and reasonable, (c) claimant is incapable of funding the amount, and (d) claim has merit]. (Lam Family Law Case Addition)

16. *Rothschild v. Rothschild*, 2019 ONSC 568 (CanLII), at para 67 [respondent must also have ability to pay]. (Lam Family Law Case Addition)

17. *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71 (CanLII), at para 36 [no CanLII links for later paras] [three requirements for interim disbursements: claimant is impecunious, prima facie case of merit, special circumstances].

18. *Stuart v. Stuart*, 2001 CanLII 28261 (ONSC), at para 8(1-14) [must show disbursements are necessary and reasonable; claims must be meritorious on balance of probabilities].

19. *Ludmer v. Ludmer*, 2012 ONSC 4478 (CanLII), at paras 15-16 [summary of legal principles and evidence required].

Unreasonable Behaviour / Misconduct: Legislation and Case Law

20. *Family Law Rules*, O. Reg. 114/99, R. 24(4) [may deprive successful party of costs where unreasonable].

21. *Family Law Rules*, *ibid*, R. 24(5) [decision on reasonableness].

22. *C.A.M. v. D.M.*, 2003 CanLII 18880 (ON CA), at paras 40-41 [presumption that successful party is entitled to costs, but successful party is not always entitled to costs; unreasonableness of successful party's conduct may rebut presumption].

23. *Mattina v. Mattina*, 2018 ONCA 867 (CanLII), at paras 12-18 [consideration of success is the starting point; however, successful party not always entitled to costs; reasonableness factors].

24. *Van Boekel v. Van Boekel*, 2020 ONSC 7586 (CanLII), at para 2, citing various cases [unreasonable behavior "in relation to the issues" includes behavior that: (1) is disrespectful of other participants or the court; (2) unduly complicates the litigation, (3) increases the cost of litigation]. (Lam Family Law Case Addition)

25. *Pyper v. Schuetz*, 2023 BCCA 334 (CanLII), at paras 49-55 & 87-94, citing various cases [special costs where attacks against counsel]. (Lam Family Law Case Addition)

26. *Shinder v. Shinder,* 2022 ONSC 1121 (CanLII), at paras 32-40 [no costs to successful party due to unreasonable behaviour; divided success overall]. (Lam Family Law Case Addition)

Bad Faith Conduct: Legislation and Case Law

27. *Family Law Rules*, O. Reg. 114/99, R. 24(8) [cost consequences of bad faith].

28. *Biddle v. Biddle*, 2005 CanLII 7660 (ONSC), at paras 13-17 [quantum where bad faith].

29. *Scalia v. Scalia*, 2015 ONCA 492 (CanLII), at para 68 [legal test for bad faith in family law context], citing *S.(C.) v. S.(M.)*, 2007 CanLII 20279 (ON SC); aff'd *C.S. v. M.S.*, 2010 ONCA 196 (CanLII). (Lam Family Law Case Addition)

30. *Kumar v. Nash*, 2024 ONCJ 16 (CanLII), at paras 11-19 [bad faith principles], 20-30 [full recovery costs for bad faith in seeking restraining order against opposing counsel and seeking to remove opposing counsel from record], & 38-47 [quantum principles]. (Lam Family Law Case Addition)

31. *S. v. A.*, 2022 ONSC 55 (CanLII), at paras 49-56 [high and full recovery of costs following pattern of bad faith conduct in parenting dispute] & 56-64 [costs considered for legal team of four lawyers and two law clerks]. (Lam Family Law Case Addition)

32. *M.A.B. v M.G.C*, 2023 ONSC 3748 (CanLII), at paras 47-49, 60-64, 68-71, & 75-77 [bad faith principles and quantum]. (Lam Family Law Case Addition)

Appeal of Costs: Legislation and Case Law

33. *Courts of Justice Act*, RSO 1990, c C.43, s. 133(b) [leave required where appeal is only as to costs].

34. *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9 (CanLII), at para 27 [costs should be set aside on appeal only if trial judge made an error in principle or if award is plainly wrong; trial judge in privileged position to assess first-hand credibility of witnesses and costs analysis are of a highly fact-driven nature]

35. *Cuthbert v. Nolis*, 2024 ONCA 21 (CanLII), at para 21, citing *Hamilton v. Open Window Bakery Ltd.*, *ibid* [leave granted but costs (here to self-represented successful party) an exercise in discretion and will only be set aside where error in principle or if award is plainly wrong]. (Lam Family Law Case Addition)

36. *Jasiobedzki v. Jasiobedzka*, 2023 ONCA 482 (CanLII), at para 23, citing various cases [leave not granted; costs attract a high level of deference]. (Lam Family Law Case Addition)

37. *Climans v. Latner*, 2020 ONCA 554 (CanLII), at paras 85-108 [reconsideration of costs when appeal allowed]. (Lam Family Law Case Addition)

38. *Mete v. Guardian Insurance Co. of Canada*, 1998 CanLII 7177 (ON CA), at paras 15-16 [appeal court will not lightly interfere with trial judge's exercise of discretion in awarding costs; appellant must demonstrate error in principle in the exercise of discretion (e.g., trial judge considered irrelevant factors, failed to consider relevant factors, or reached an unreasonable conclusion)].

Costs *to* a Self-Represented Litigant: Case Law

39. *Parmar v. Flora*, 2023 ONSC 2327 (CanLII), at para 4(10), citing *A.A. v. B.B.*, 2021 ONCA 147 (CanLII) [costs should only be awarded to a self-represented litigant who can prove that: (1) they devoted time and effort to do the work that ordinarily would be done by a lawyer; and, (2) they had to give up remunerative activity in order to perform such work]. (Lam Family Law Case Addition)

40. *Rahman v. Islam*, 2022 ONSC 3531 (CanLII), at paras 138-140, citing various cases [overview of law on costs claimed by self-represented litigant] (Lam Family Law Case Addition)

41. *Jordan v. Stewart*, 2013 ONSC 5037 (CanLII), at paras 74-127 [successful self-represented litigant or "in-person party"; costs of unbundled legal services / limited scope retainer].

42. *Cassidy v. Cassidy*, 2011 ONSC 791 (CanLII), at paras 6-55 [successful self-represented litigant, costs against represented litigant].

43. *Cindy Jahn-Cartwright v. John Cartwright*, 2010 ONSC 2263 (CanLII), at paras 5 & 23-121 [successful self-represented litigant, costs against represented litigant].

44. *Fong v. Chan*, 1999 CanLII 2052 (ON CA), at para 26 [self-represented litigants are not entitled to costs calculated on same basis as represented litigants].

Costs *Against* a Self-Represented Litigant: Case Law

45. *Trotta v. Chung*, 2023 ONSC 7080 (CanLII), at paras 23-27 [full indemnity costs against self-represented litigant where bad faith]. (Lam Family Law Case Addition)

46. *Beaudoin v Stevens,* 2023 ONSC 5265 (CanLII), at paras 18 & 20-26 [high costs award against self-represented litigant where bad faith conduct; self-represented litigant not excused from providing full and frank financial disclosure]. (Lam Family Law Case Addition)

Costs in Child Protection: Legislation and Case Law

47. *Family Law Rules*, O. Reg. 114/99, R. 24(2) [presumption that successful party entitled to costs does not apply in child protection cases].

48. *Children's Aid Society of Hamilton v. K.L. and T.M.*, 2014 ONSC 3679 (CanLII), at para 14 [test for costs against Society].

49. *L. (R.) v. Children's Aid Society of the Niagara Region*, 2003 CanLII 42086 (ON CA), at para 4 [it is not the norm for costs to be awarded in child protection cases where applicant is unsuccessful; it may be appropriate to order no costs where unsuccessful parties are motivated by best interests of child].

50. *S. (D.),* Re, 2003 CanLII 88994 (ON SCDC), at para 3 [Society should not be dissuaded from pursuit of its statutory mandate by costs considerations] & 5 [costs may be ordered as between parents, but entitlement must be based on more than outcome of case].

51. *Children's Aid Society of Ottawa-Carleton v. MR. and MS. V.*, 2001 CanLII 37747 (ONSC), at para 14 [Society should not be penalized for attempting to fulfill its mandate to protect children, unless has acted in "indefensible manner"; Society and parents are not "ordinary litigants"; costs claim by Society against parent dismissed].

52. *T.M. v. CAS et al.,* 2023 ONSC 5048 (CanLII), at paras 6-15 & 34-48 [costs ordered against Society where acted unfairly]. (Lam Family Law Case Addition)

53. *Dnaagdawenmag Binnoojiiyag Child and Family Services v. A.D.-M et al*, 2020 ONSC 5243 (CanLII), at paras 5-15 [costs against Society for motion to add party]. (Lam Family Law Case Addition)

54. *Children's Aid Society of Toronto v. R.G.*, 2019 ONCJ 380 (CanLII), at para 20 [considerations for costs in child protection proceedings]. (Lam Family Law Case Addition)

55. *Catholic Children's Aid Society of Toronto v. C.P.I.,* 2023 ONCJ 293 (CanLII), at paras 3-51 [costs ordered as between parents where travel consent refused]. (Lam Family Law Case Addition)

56. *Children's Aid Society of Peel v. P.D.*, 2021 ONCJ 31 (CanLII), at paras 11-39 [thorough review of costs law as between parents], 46-70 [costs ordered as between parents where unreasonable conduct but not bad faith], & 71-97 [quantum factors]. (Lam Family Law Case Addition)

57. *Children's Aid Society of Haldimand and Norfolk v. J.H. and M.H.,* 2021 ONSC 2851 (CanLII), at paras 13-25 [costs ordered as between parents where mid-trial motion required to enforce existing parenting order]. (Lam Family Law Case Addition)

Frequently Asked Questions: Family Law Costs

Maria Golarz and Vanessa Lam, Lam Family Law[1]

WHAT? (GOES IN BILL OF COSTS OR COSTS SUBMISSIONS) 2

Q1. How much detail needs to be in a Bill of Costs? And does it need to be categorized in a specific way (e.g., by tasks or by issues?) 2

Q2. Should there be forms in the *Family Law Rules* for a Bill of Costs or Costs Outline (like in the *Rules of Civil Procedure*)? 3

Q3. Can you refer to what happened at a Settlement Conference in your costs submissions? 4

Q4. Can you include without prejudice correspondence in your costs submissions? 4

Q5. Can you get costs for a costs hearing? 5

Q6. Can you put information about an offer to settle *costs* in your costs submissions? 5

WHEN? (TIMING ISSUES AND WHEN MAY COSTS IN CERTAIN CIRCUMSTANCES BE ORDERED) 6

Q7. Can costs be ordered following a settlement between the parties? 6

Q8. Can costs be ordered following a conference? 6

Q9. When are costs submissions due? 7

WHO? (CAN AN ORDER OF COSTS BE MADE AGAINST) 9

Q10. Can you seek costs against the CAS? FRO? OCL? 9

WHY? (FACTORS CONSIDERED IN COSTS) 10

Q11. How does the court determine the amount of costs? 10

Q12. When are full recovery costs ordered? 10

Unreasonable behaviour 10

Bad faith 11

A party does as well or better than an offer to settle 12

Q13. What if no offers to settle are made (by one party, or by either party)? 12

Q14. How do courts order costs when success is divided? 13

HOW MUCH? (COUNSEL RATES) 14

Q15. What is the Costs Bulletin? 14

[1] Vanessa Lam is the principal of Lam Family Law (www.lamfamilylaw.ca), and is a freelance family law strategic advisor and research lawyer (vanessa@lamfamilylaw.ca). Maria Golarz is a senior associate research lawyer (maria@lamfamilylaw.ca).

Q16. When representing a legally aided client, what rate goes in the Bill of Costs? (i.e., the Legal Aid rate or counsel's private rate?) 15
Q17. How do courts determine the amount of costs where one party has expensive "out of town" counsel? 16
Q18. What about costs for multiple counsel? 16
WHERE? (ENFORCING OR SECURING COSTS) 17
Q19. Can a costs order be made into a support order, enforceable by FRO? 17
Q20. Can you set-off costs against support arrears? 18
Q21. When can you get security for costs (not for an appeal)? 19
Q22. When can you get security for costs of an appeal, and which Rules apply? 19
Q23. When are costs that have been ordered due? 20
Q24. Can you appeal a costs order? 20
Q25. How do you enforce non-payment of costs (on behalf of a client?) 21
Schedule "A" – *Rules of Civil Procedure* Form 57A: Bill of Costs 23
Schedule "B" – *Rules of Civil Procedure* Form 57B: Costs Outline 24

WHAT? (GOES IN BILL OF COSTS OR COSTS SUBMISSIONS)

Q1. How much detail needs to be in a Bill of Costs? And does it need to be categorized in a specific way (e.g., by tasks or by issues?)

The *Family Law Rules* require any claim for costs respecting fees or expenses to be supported by documentation satisfactory to the court: R. 24(12.1) of the *Family Law Rules*.

Similarly, a party who opposes a claim for costs respecting fees or expenses shall provide documentation showing the party's own fees and expenses to the court and to the other party: R. 24(12.2) of the *Family Law Rules*.

However, there is no form for a Bill of Costs or Costs Outline under the *Family Law Rules* (unlike in the *Rules of Civil Procedure*, see **Q2.**, below).

There is also no absolute requirement that a Bill of Costs must follow an "itemized by date and task" format. But a Bill of Costs should ideally include enough information to determine when fees were incurred, the steps or activities involved that gave rise to the docketed time, and to what issues the dockets relate. It will be difficult, if not impossible, for the court to determine

whether the hours are "reasonably necessary" without a breakdown of the time spent on each task.

The court thus encourages a detailed breakdown of what services were rendered and to which issue those services relate. Further, where a large amount of money is being claimed, the party seeking costs has an obligation to provide sufficient information:

> (a) to particularize what work had to be performed and why;
> (b) to address varying levels of indemnification which may apply to different issues; and
> (c) to reassure the court that costs are not currently being claimed for previous steps or events where costs have already been dealt with (or should already have been dealt with).

See *Tintinalli v. Tutolo*, 2022 ONSC 6276 (CanLII), at paras 52-61, Chown J., citing various cases.

See also the separate document called "**Sample Bill of Costs with Footnote Annotations - Lam Family Law**".

Q2. Should there be forms in the *Family Law Rules* for a Bill of Costs or Costs Outline (like in the *Rules of Civil Procedure*)?

Note: The *Rules of Civil Procedure* Bill of Costs and Costs Outline are, respectively, included as **Schedule "A"** and **Schedule "B"** to this document.

We think it would be helpful and promote access to justice to create a family law Bill of Costs Form and Costs Outline Form to use as permitted, but not mandatory, forms. We would support making them mandatory if they are not too strict in the information required and permit some flexibility for "other" considerations in the Costs Outline (as is already provided for in the *Rules of Civil Procedure* Costs Outline). Forms would assist judges in prompting for consistent information, in a streamlined format. They would assist lawyers to understand the information a court expects to enable it to decide costs justly, and would provide extra guidance to the high number of self-represented litigants in family court.

The *Rules of Civil Procedure* Costs Outline could be adjusted to refer to the factors listed in R. 24(12) of the *Family Law Rules* (and discussed in **Q11.**, below). For the box related to offers to settle, instructions on the form could also prompt you to attach any relevant offers.

Q3. Can you refer to what happened at a Settlement Conference in your costs submissions?

The *Family Law Rules* state that "[n]o brief or evidence prepared for a settlement conference and no statement made at a settlement conference shall be disclosed to any other judge" except in, (a) an agreement reached at a settlement conference; or (b) an order: R. 17(23) of the *Family Law Rules*.

Subrule 17(23) is "clear" that no brief, evidence, or statement made at a settlement conference is to be disclosed unless in an agreement reached at a settlement conference or an order. There is "no exception" for offers to settle in a settlement conference brief to be disclosed in submissions for costs: *G.P. v. R.P.*, 2023 ONCJ 437 (CanLII), at para 34, Sherr J., citing various cases. See also *Hawkins v. Hawkins*, 2020 ONSC 1107 (CanLII), at paras 52-57, Gregson J., citing various cases.

Similarly, no reference should be made to what was said at a case conference: *Sanvictores v. Sanvictores*, 2022 ONSC 1299 (CanLII), at para 5, Pinto J., citing various cases. Or at a closed mediation: *D.S.M. v. R.M.M.*, 2018 ONSC 1197 (CanLII), at para 39, Shelston J., citing *Butler v. Butler*, 2007 CanLII 17023 (ON SC).

Q4. Can you include without prejudice correspondence in your costs submissions?

The *Family Law Rules* permit the court to consider "any offers to settle the matters in issue" but only once the judge has dealt with all the issues in dispute except costs: R. 18(8)(b).

As such, without prejudice offers to settle are admissible in determining costs, so long as the underlying issues have been decided, whether by settlement or by order. The public policy purpose behind without prejudice communications is "to promote settlement negotiations taking place without fear that what is discussed, negotiated, and/or settled will be disclosed at trial." However, once the issues have been adjudicated, the purpose behind disclosing without prejudice communication is not to address liability or frailties in one's case, but to establish that the communication / offer was made. This makes it an exception to settlement privilege, "as it is

relevant to the issue of costs". It is also in the interest of justice that there be consequences for "failing to accept an offer to settle that is beaten at trial or motion": *Howes v. Howes*, 2018 ONSC 6297 (CanLII), at paras 10-32, Desormeau J., citing various cases.

Q5. Can you get costs for a costs hearing?

Yes! In fact, such a practice "should be encouraged" having regard to Rr. 2(2)-(3) and 24 of the *Family Law Rules*: *Berman v. Berman*, 2017 ONSC 4966 (CanLII), at paras 7-18, Fryer J. See also *Kasmieh v. Hannora*, 2023 ONSC 1643 (CanLII), at paras 44-49, McGee J.

Q6. Can you put information about an offer to settle *costs* in your costs submissions?

The case law is divided on this issue.

One line of cases says that the practice of including an offer on the issue of settling costs in a party's costs submissions "is not appropriate and should not be encouraged": *Dabideen v. Ghanny*, 2022 ONSC 5212 (CanLII), at para 15, Kurz J. See also *Brady v. FitzPatrick*, 2022 ONSC 4583 (CanLII), at para 21, Lococo J., citing various cases & *Himyary v Al-Yasiri*, 2017 ONSC 2340 (CanLII), at para 12-14, Sheard J.

For a somewhat contrary view, see *Berman v. Berman*, 2017 ONSC 4966 (CanLII), at paras 10-18, Fryer J. In this case, the court released a supplementary decision on costs after making its costs award (of $132,000 + HST in partial recovery costs to the mother for a trial heard over three weeks). The mother had offered to settle for $100,000 if the father accepted her offer by October 26, 2016 (her cost submissions were due on November 4, 2016). This offer was not accepted by the father. The court held that R. 18(14) applied to the offer and rejected the father's submission that R. 18 does not apply to "costs on costs". Justice Fryer was prepared to increase the costs associated with the preparation of cost submissions (which Her Honour had already provided some amount for in the original costs award) such that the amount was closer to full recovery. The court thus ordered the father to pay an additional $3,500 + HST in costs.

WHEN? (TIMING ISSUES AND WHEN MAY COSTS IN CERTAIN CIRCUMSTANCES BE ORDERED)

Q7. Can costs be ordered following a settlement between the parties?

Yes! (Although courts don't generally love doing this).

Settlement of one, several, or all issues does not pre-empt a full costs analysis. Costs may be awarded on a settlement in certain circumstances, particularly if determination of success is "relatively straightforward": *Beardsley v. Horvath*, 2022 ONSC 3430 (CanLII), at paras 9-15, Summers J. [relevant factors at para 10], citing various cases.

Costs may be awarded even if a case settles if the disposition of costs was not dealt with in the settlement document or the document specifically reserves the issue of costs to be determined. However, the court should be cautious before making an award of costs based on a pre-trial settlement. There should generally be a compelling reason to justify costs in these circumstances: *Casey v. Casey*, 2023 ONSC 2512 (CanLII), at para 5, Pazaratz J., citing various cases.

The fundamental concern for the court is the sufficiency of evidence required for the court to make relevant findings. However, while caution is required, a blanket refusal to award costs may have unintended – and undesirable – consequences for both the parties and the administration of justice. Our family court system consistently encourages parties to settle and costs should not be a barrier to settlement: *Casey v. Casey*, *ibid*, at paras 6-8, Pazaratz J., citing various cases.

See also *Fiorellino-Di Poce v. Di Poce*, 2023 ONSC 854 (CanLII), at para 6, Davies J. [motion settled], citing various cases & *Tintinalli v. Tutolo*, 2022 ONSC 6276 (CanLII) at para 65, Chown J. [partial settlement].

Q8. Can costs be ordered following a conference?

Yes! Subrule 17(18) of the *Family Law Rules* provides that costs shall not be awarded following a conference unless specified circumstances arise – namely, that a party was "not prepared, did not serve the required documents, did not make any required disclosure, otherwise contributed to the conference being unproductive or otherwise did not follow these rules".

For a recent case, see *Mitchell v. Mitchell*, 2023 ONSC 2341 (WL), at paras 12-16 & 19, Kraft J. [high cost award following Settlement Conference where one party unprepared and "otherwise contributed to the Conference being unproductive"]. For a more detailed discussion of this case, see Maria Golarz's blog post on our Lam Family Law website: https://lamfamilylaw.ca/2024/01/30/costs-following-a-conference-are-mandatory-in-certain-circumstances-and-can-be-substantial.

See also *M. S. v B. C*, 2023 ONSC 4026 (CanLII), at paras 16-26 & 36-65, Shore J. [costs of three Settlement Conference attendances]; *Caskie v. Caskie*, 2020 ONSC 7010 (CanLII), at paras 16-20, Price J. [costs of unproductive case conference where delayed and incomplete disclosure]; & *I.S. v. T.C.*, 2020 ONSC 5411 (CanLII), at paras 18-28, Mackinnon J. [high cost award following case conferences for urgent motion].

When opposing costs, see, e.g., *M.A.B. v M.G.C*, 2023 ONSC 3748 (CanLII), at paras 39-40 & 114, Chappel J. [no costs for conferences where no evidence on R. 17(18) criteria].

Q9. When are costs submissions due?

Tom Dart has written a very persuasive article on the problems with having counsel submit a Bill of Costs and present argument on the issue of costs immediately after arguing a motion where the motion is reserved. This practice effectively ousts consideration of offers to settle in determining costs. Instead, the court should consider offers in later submissions, after a decision on the merits has been made: see Tom Dart, "Assessing costs in the new era",

Law360 Canada (2022 May 16) available online: https://www.law360.ca/ca/articles/1758254/assessing-costs-in-the-new-era-tom-dart.

Typically, if costs were not dealt with orally at the motion or trial, the judge will set dates for each party to make written cost submissions (oral submissions after the motion or trial are rare). E.g., the successful party shall file cost submissions within 14 days of the release of the decision, and the unsuccessful party shall file costs submissions within the next 7 days.

If cost submissions are not received on the timeline that the court has set, and no extensions

sought or granted, costs will often be "deemed to have been resolved" and no costs order will be made: see, e.g., *Lusted v. Bogobowicz*, 2021 ONSC 269 (CanLII), at para 36(5), Madsen J. & *Haggerty v. Haggerty*, 2023 ONSC 377 (CanLII), at para 56(d), MacNeil J.

We understand the desire of the court to deal with costs promptly after a step in the proceeding (and in a summary manner), as required by R. 24(10) of the *Family Law Rules*. However, determining costs has important implications for access to justice.

We think more courts should encourage parties to settle the issue of costs, and not only build sufficient time to do so into their timelines, but also explicitly require the parties to make offers to settle costs. This was done in *S.C v. C.C.*, 2022 ONSC 1763 (CanLII), at para 440, O'Brien J. Justice O'Brien ordered as follows after a complicated trial (Her Honour's trial decision was released on March 21, 2022, and costs were eventually settled):

> [440] Success in this case was somewhat divided except with respect to the claims against Resilience Capital [the husband C.C.'s company]. I urge the parties to make efforts to resolve all the costs of the case and of the trial. Toward that end, the timetable below allocates a period of time for such negotiations to occur. If the parties are unable to settle costs and submissions are required, the content and timing of offers to settle throughout the case will be important. In that context, the parties shall proceed as follows:
>
> A. By April 8, 2022, each party shall serve, but not file, a comprehensive bill of costs and a written offer to settle costs.
>
> B. If by April 22, 2022 the parties have not settled costs, then each of S.C. and C.C. shall make written submissions not exceeding 10 pages together with bills of costs and offers to settle (including offers to settle costs) on this timetable:
>
> i. S.C. by May 6, 2022;
>
> ii. C.C. by May 20, 2022;
>
> iii. reply if any by S.C. not exceeding 4 pages by May 27, 2022.
>
> C. If by April 22, 2022, S.C. and Resilience Capital have not settled costs, each of S.C. and Resilience Capital shall make written submissions not exceeding three pages double-spaced together with bills of costs and offers to settle (including offers to settle costs) on this timetable:
>
> i. Resilience Capital by May 6, 2022;
>
> ii. S.C. by May 20, 2022.

WHO? (CAN AN ORDER OF COSTS BE MADE AGAINST)

Q10. Can you seek costs against the CAS? FRO? OCL?

Yes, in appropriate circumstances.

The presumption that the successful party is entitled to costs does *not* apply in a child protection case or to a party that is a government agency: R. 24(2) of the *Family Law Rules*.

However, costs may be awarded against the Society where it has acted unfairly. There must be some accountability for the manner in which the Society investigates its case and presents it to the court: see, e.g., *T.M. v. CAS et al.,* 2023 ONSC 5048 (CanLII), at paras 6-15 & 34-48, Shore J. [costs ordered against Society where acted unfairly] & *Children's Aid Society of Hamilton v. K.L. and T.M.*, 2014 ONSC 3679 (CanLII), at para 14, Chappel J. [principles for costs against Society].

Costs will be awarded against the Family Responsibility Office ("FRO") where FRO does not respond to a payor's request in a timely manner or does not respond at all. The party seeking costs is not required to establish that FRO's actions amount to reprehensible, scandalous, or outrageous conduct. Nor is bad faith required: *Figliola v. Ontario (Director, Family Responsibility Office),* 2008 ONCJ 366 (CanLII), at paras 22-26, Zisman J. & *Emhecht v. FRO and Lake*, 2011 ONSC 2644 (CanLII), at paras 6-7, Coats J.

Costs may also be ordered against the Office of the Children's Lawyer ("OCL"). The OCL, like any litigant, must comply with the *Family Law Rules* and may be sanctioned for conduct that thwarts the primary objective of the *Rules*: *Children's Aid Society of the City of St. Thomas and County of Elgin v. L. S.,* 2004 CanLII 19361 (ON CJ), at paras 55-91, Schnall J.

However, there is no presumption that a successful party is entitled to costs as against the OCL. While it is possible to orders costs if the OCL's position was unreasonable, the courts are generally reluctant to make such orders absent evidence of unreasonable, unfair, or bad faith conduct on the part of the OCL: *GN and DN*, 2018 ONSC 1426 (CanLII), at para 30, McLeod J., citing various cases.

WHY? (FACTORS CONSIDERED IN COSTS)

Q11. How does the court determine the amount of costs?

Subrule 24(12) of the *Family Law Rules* prescribes the factors that the court shall consider in assessing the quantum of costs, namely:

a. the reasonableness and proportionality of each of the following factors as it relates to the importance and complexity of the issues:
    i. each party's behaviour,
    ii. the time spent by each party,
    iii. any written offers to settle, including offers that do not meet the requirements of rule 18,
    iv. any legal fees, including the number of lawyers and their rates,
    v. any expert witness fees, including the number of experts and their rates,
    vi. any other expenses properly paid or payable; and
b. any other relevant matter.

The Court of Appeal for Ontario has held that "proportionality and reasonableness are the touchstone considerations in fixing the amount of costs". Further, the *Family Law Rules* expressly provide that, depending on the conduct of the parties and the presence or absence of offers to settle, a judge may increase or decrease what would otherwise be the appropriate quantum of costs awarded: *Sears v. Coristine*, 2021 ONSC 2010 (CanLII), at paras 12 & 14, citing *Beaver v. Hill*, 2018 ONCA 840 (CanLII).

Q12. When are full recovery costs ordered?

Although full recovery costs are not the default or presumption, the *Family Law Rules* expressly contemplate full recovery costs where a party has behaved unreasonably [Rr. 24(4)-(5)], in bad faith (R. 24(8)], or has beaten an offer to settle under R. 18(14): *Mattina v. Mattina*, 2018 ONCA 867 (CanLII), at para 15.

- Unreasonable behaviour

Despite the presumption that a successful party is entitled to costs, a successful party who has behaved unreasonably during a case may be deprived of all or part of the party's own costs or

ordered to pay all or part of the unsuccessful party's costs: R. 24(4) of the *Family Law Rules*.

In deciding whether a party has behaved reasonably or unreasonably, the court shall examine: (a) the party's behaviour in relation to the issues from the time they arose, including whether the party made an offer to settle; (b) the reasonableness of any offer the party made; and (c) any offer the party withdrew or failed to accept: R. 24(5) of the *Family Law Rules*.

Unreasonable behavior "in relation to the issues" includes behavior that: (1) is disrespectful of other participants or the court; (2) unduly complicates the litigation, or (3) increases the cost of litigation: *Van Boekel v. Van Boekel*, 2020 ONSC 7586 (CanLII), at para 2, Heeney J., citing various cases.

It is not necessary to determine whether the conduct meets the standard of bad faith; it is clear that full recovery costs may be granted if a party acted unreasonably. Full recovery costs may be used to express the court's disapproval of a litigant's unreasonable conduct: *Ignjatov v. Di Lauro,* 2014 ONSC 7362 (CanLII), at para 17, Harvison Young J. & *Ayesh v. Zeidan*, 2018 ONSC 6995 (CanLII), at para 44, Price J.

- Bad faith

If a party has acted in bad faith, the court shall decide costs on a full recovery basis and shall order the party to pay them immediately: R. 24(5) of the *Family Law Rules*.

The legal test for bad faith in the family law context is that the impugned behaviour must be shown to be carried out with "intent to inflict financial or emotional harm on the other party or persons affected by the behaviour, to conceal information relevant to the issues or to deceive the other party or the court". In short, the essential components are intention to inflict harm or deceive: *Scalia v. Scalia*, 2015 ONCA 492 (CanLII), at para 68, citing *S.(C.) v. S.(M.)*, 2007 CanLII 20279 (ON SC), Perkins J.; aff'd *C.S. v. M.S.*, 2010 ONCA 196 (CanLII).

Trial level courts have described bad faith as requiring "some element of malice or intent to harm": see, e.g., *Parry v. Parry*, 2020 ONSC 3437 (CanLII), at para 46, Sheard J. citing *Jackson v Mayerle*, 2016 ONSC 1556 (CanLII), Pazaratz J.

It is the intention that distinguishes bad faith from unreasonable behaviour: *Jackson v Mayerle*, *ibid*, at para 59, Pazaratz J.

- A party does as well or better than an offer to settle

To trigger full recovery costs under R. 18(14), a party "must do as well or better than all the terms of any offer (or a severable section of an offer)". The court is not required to examine each term of the offer with "microscopic precision." What is required is a "general assessment of the overall comparability of the offer as contrasted with the order": *Jackson v Mayerle*, 2016 ONSC 1556 (CanLII), at paras 47-49, Pazaratz J., citing various cases.

For a recent case, see, e.g., *Dabideen v. Ghanny*, 2022 ONSC 5212 (CanLII), at para 8, Kurz J. [also for the proposition that the court may consider other written offers in determining costs under R. 18(16), even though it does not meet the conditions of R. 18(24)]

However, where a party makes a non-severable offer, they must do as well as or better than all of the terms of the offer, in order to take advantage of the full recovery cost provisions of R. 18(24). If some of the terms are less favourable to the order made at trial, R. 18(14) cannot be applied: *M.J.L. v. C.L.F.*, 2022 ONCJ 354 (CanLII), at para 19, Sherr J. & *J.C.M. v. K.C.M.,* 2016 ONCJ 551 (CanLII), at paras 36-39, Sherr J., citing various cases.

Q13. What if no offers to settle are made (by one party, or by either party)?

Rule 18 of the *Family Law Rules* deals with offers to settle, including how offers are to be made and accepted.

An "important consideration" in determining both liability and quantum of costs is "whether any party has served or accepted an Offer to Settle": *M.A.B. v M.G.C*, 2023 ONSC 3748 (CanLII), at paras 50-56, Chappel J.

The failure to make an offer is a factor to be considered. When a party fails to provide a reasonable alternative to a judicial determination, and is unsuccessful, they have put the other party to "significant and unnecessary costs": *Kasmieh v. Hannora*, 2023 ONSC 1643 (CanLII), at

para 14, McGee J.

In that case, Justice McGee went on to say (at para 48, emphasis added) that "[c]osts orders change litigation conduct when they are consistently awarded to a successful party. Costs are necessary to ensure access to justice. Without the prospect of a meaningful sanction of costs, there is no downside to taking a "catch-me-if-you-can" approach to litigation."

There are exceptions, of course, such as when a party does not have sufficient information to make an offer, or where "there was no realistic way of compromising on the central issue(s) in dispute: *Kasmieh v. Hannora*, *ibid*, at para 14, McGee J. & *M.A.B. v M.G.C*, 2023 ONSC 3748 (CanLII), at para 56, Chappel J., citing *Beaver v. Hill*, 2018 ONCA 840 (CanLII).

There are also costs consequences of a failure to accept an offer: see R. 18(14) of the *Family Law Rules*. The onus of proving that that this Rule applies lies on the party seeking to rely on the Rule: see *M.A.B. v M.G.C*, *ibid*, at paras 51-56, Chappel J., citing *Neilipovitz v. Neilipovitz*, 2014 ONSC 4849 (CanLII), Minnema J. See also *Kumar v. Nash*, 2024 ONCJ 16 (CanLII), at paras 31-37, Sherr J. [cost consequences of failure to accept offer to settle].

Q14. How do courts order costs when success is divided?

The starting point for an award of costs is deciding who was the successful party. There is a presumption that each party is entitled to costs for the issues where they succeeded. However, divided success "is not equal success." When success is divided, courts will undertake a "comparative analysis" to consider whether some of the issues were more important, time-consuming, or costly: see *Shinder v. Shinder*, 2022 ONSC 1121 (CanLII), at para 15, Kimmel J., citing various cases & *Kasmieh v. Hannora*, 2023 CanLII 1643 (CanLII), at para 10, McGee J., citing various cases.

Comparative success can be assessed globally in relation to the whole of the case asking:

> (1) How many issues were there?;
> (2) How did the issues compare in terms of importance, complexity and time expended?;
> (3) Was either party predominantly successful on more of the issues?; and

(4) Was either party more responsible for unnecessary legal costs being incurred?

See *R.L. v. M.F*, 2023 ONSC 6941 (CanLII), at para 48, Kurz J., citing *Jackson v. Mayerle*, 2016 ONSC 1556 (CanLII), Pazaratz J.

The determination of success is not merely a mathematical exercise. The court must engage in a "contextual analysis" in which it looks first to the kinds of factors set out above. If it finds that success is divided, the court will then exercise its discretion. It may simply determine costs globally, or it may look first to success in the primary issue, but subject to "adjustments" that consider lack of success in any secondary issues, as well as any other appropriate factors: *R.L. v. M.F*, *ibid*, at para 49, citing *Thompson v. Drummond*, 2018 ONSC 4762 (CanLII), Chappel J.

However, costs are discretionary, and the court will also consider each party's behaviour during the litigation. This means that, even where success is divided, if one party acted unreasonably, the court may exercise its discretion to not award any costs to that party: see *Shinder v. Shinder*, 2022 ONSC 1121 (CanLII), at para 28-31, Kimmel J.

HOW MUCH? (COUNSEL RATES)

Q15. What is the Costs Bulletin?

The *Courts of Justice Act*, RSO 1990, c C.43, provides for a Civil Rules Committee: see R. 65. In 2005, the Costs Sub-Committee of the Civil Rules Committee published a "Notice to the Profession" bulletin, which suggested maximum hourly rates for lawyers based on years of experience. This is often referred to as the "Costs Bulletin". It is available online: https://www.ontariocourts.ca/coa/en/archives/costs/appendixb.pdf.

The Costs Bulletin is "solely advisory" and has not been updated.

Nevertheless, numerous cases continue to rely on the Costs Bulletin, taking into account inflation, in determining whether a lawyer's rates as set out in a Bill of Costs are reasonable: see, e.g., *Kalair v Kabir*, 2023 ONSC 31 (CanLII), at paras 39-46, Price J. & *Snively v. Gaudette*, 2020 ONSC 3042 (CanLII), at paras 37-38, Bondy J.

Other courts have found that the Costs Bulletin, even if adjusted for inflation, is still "somewhat low": see, e.g., *F.K. v. T.R.*, 2016 ONCJ 339 (CanLII), at para 26(c), Zisman J.

Q16. When representing a legally aided client, what rate goes in the Bill of Costs? (i.e., the Legal Aid rate or counsel's private rate?)

The fact that a party has retained counsel on a Legal Aid certificate does not affect the rate to which they are entitled to claim for services provided. In calculating a costs award, regard is to be had to the lawyer's actual hourly rate or the Costs Bulletin (taking into account inflation), not the legal aid rate: *Grujicic and Grujicic v. Trovao*, 2023 ONSC 1518 (CanLII), at para 47 k., Madsen J. [applying lawyer's hourly rate]; *Kalair v Kabir*, 2023 ONSC 31 (CanLII), at paras 39-46 & Price J., citing various cases [applying Costs Bulletin with inflation]. See also *Friesen v. Jillood*, 2022 ONSC 27 (CanLII), at para 44, Price J. [lawyer's actual rates would have been considered if known].

On a similar basis, even when a client is not on Legal Aid, the fact that a lawyer charged less than their regular hourly rate (either a reduced rate or *pro bono*) does not mean their client should be limited to recovering the fees they were actually charged. In this situation, the hourly rate that each lawyer is normally entitled to claim on an assessment of costs should inform the litigants' reasonable expectations as to the costs they will face if unsuccessful: *Friday v. Friday*, 2013 ONSC 6179 (CanLII), at paras 2-4 & 52-55, Price J. [wife successful on motion and her counsel's regular hourly rate of $400 was used to determine costs, which was reasonable for substantial indemnity costs given the Costs Bulletin, rather than the $110 hourly rate the client was actually charged under a CAW Legal Services Plan Fee Agreement].

In the reverse situation, the fact that an unsuccessful party is represented on a legal aid rate or on a *pro bono* basis does not disentitle the successful party from their costs: *Aly v. Khalil*, 2021 ONSC 6846 (CanLII), at para 39, Lemay J.

Q17. How do courts determine the amount of costs where one party has expensive "out of town" counsel?

It depends. The court will consider the reasonableness of the expected fees and disbursements and may reduce them if found to be excessive. The court will also consider what is "fair and reasonable" for the unsuccessful party to pay in the particular proceedings.

Having out-of-town counsel that charges a higher hourly rate than local counsel does not automatically mean the higher rate is excessive or unreasonable. Nor does a disparity in the hourly rate between the two counsel. The court will consider what is "proportional and reasonable" in the circumstances, including what is reasonable for the unsuccessful party to pay. This may lead to a reduction in costs for expensive out-of-town counsel or it may not.

See *Friesen v. Jillood*, 2022 ONSC 27 (CanLII), at paras 43-52, Price J., citing various cases [no evidence that out-of-town rates were excessive]; *Norris v. Morocco*, 2020 ONSC 4103 (CanLII), at paras 100-102, Gregson J. [disparity in counsel's rates not excessive, without evidence] & *Veljanovski v. Veljanovski*, 2018 ONSC 3803 (CanLII), at para 51, Howard J. [both parties had out-of-town counsel].

Contrast *C.T. v. C.S.,* 2021 ONSC 7578 (CanLII), at para 46, Breithaupt Smith J. ["One litigant's choice of expensive Toronto counsel is not the responsibility of the other litigant"].

Q18. What about costs for multiple counsel?

One of the R. 24(12) factors that the court shall consider is the reasonableness and proportionality of "any legal fees, including the number of lawyers and their rates" as it relates to the importance and complexity of the issues.

The reasonableness of including costs for multiple counsel is a matter of discretion. The court will start with the general premise that costs for a second counsel are not recoverable, absent compelling circumstances. If a matter is sufficiently complex or the efficient presentation of evidence requires two counsel, an exception may be made: *S. v. A.,* 2023 ONSC 5579 (CanLII), at paras 14-16, McGee J., citing various cases.

Cost recovery for multiple counsel for a party on a motion and at trial is uncommon. The costs of more than one counsel for a party should not be recovered in costs ***unless*** the factual complexity of the motion or trial dictate a need for additional counsel: *Parmar v. Flora*, 2023 ONSC 2327 (CanLII), at para 4(9), Faieta J., citing *Whiteside v. Govindasamy*, 2021 ONSC 2991 (CanLII), at paras 30-34, Sossin J., which in turn cites *Diamond v. Berman*, 2020 ONSC 4301 (CanLII), McGee J.

However, other courts have held that a "team" approach is appropriate and "to be commended" in circumstances where the general goal of such an approach is delegation of legal work to a level where that work can be done "at the lowest possible rate". Such an approach is "beneficial to all parties, including opposing litigants who may be obliged to pay adverse costs awards." Further, because a team approach invariable entails some duplication, some allowance for duplication of effort is appropriate: *Baker v. Baker*, 2023 ONSC 4860 (CanLII), at para 13(d)(iii)(1), Leach J.

As such, courts may grant costs for junior counsel, where the majority of preparatory work is undertaken by the more junior counsel. Such an allocation of resources seems reasonable and cost-effective: *Sarrafian v. Leksikova*, 2021 ONSC 3905 (CanLII), at para 35, Monahan J.

However, delegating to multiple junior lawyers of similar experience and hourly rates gives "enhanced concern" about the duplication of effort: *Baker v. Baker*, 2023 ONSC 4860 (CanLII), at para 13(d)(iii)(1)(b), Leach J.

Costs for additional counsel or staff that may be duplicative must also be explained in order to be awarded: *S v. A.*, 2022 ONSC 55 (CanLII), at paras 10-13, McGee J. [no costs of administrative or duplicative law clerk time or law clerk attendance at trial absent explanation of why law clerk was required in addition to two counsel].

WHERE? (ENFORCING OR SECURING COSTS)

Q19. Can a costs order be made into a support order, enforceable by FRO?

Maybe. Where the issue of spousal or child support is before the court, the court has discretion

to order costs to be treated as support for the purposes of the *Family Responsibility and Support Arrears Enforcement Act*, 1996, SO 1996, c. 31 ("*FRSAEA*") and to be enforced as such under s. 5(1) of that Act.

Where a support claim is a principal issue in a multi-issue proceeding, the allocation of costs as between support / non-support may be impractical and inappropriate. In such circumstances, a court has the discretion to designate the entire amount of the costs of the proceeding as support for the purpose of FRO enforcement.

However, a costs award cannot be characterized as being "in relation to" a support order when support is neither claimed nor adjudicated upon in that proceeding

See *Parmar v. Flora*, 2023 ONSC 2327 (CanLII), at para 5, Faieta J., citing *Clark v. Clark*, 2014 ONCA 175 (CanLII); *Bartucci v Bartucci*, 2023 ONSC 4114 (CanLII), at paras 29-31, LeMay J.; & *Mahon v Mahon*, 2023 ONSC 1152 (CanLII), at para 20, MacNeil J.

Make sure to spell out any such term very clearly in your draft order. Section 4 of the *Recommended Standard Terms for Support Orders*, O Reg 454/07, made pursuant to the *FRSAEA*, suggests the following standard term:

- "Costs are fixed in the amount of $[insert amount], of which $[insert amount] is related to support and is enforceable as support by the Director, Family Responsibility Office."

Q20. Can you set-off costs against support arrears?

A right of set-off may arise in three circumstances: (1) by agreement of the parties, (2) by operation of statute (i.e., the *Courts of Justice Act*, s. 111), or (3) in equity (at the trial level only in the Superior Court of Justice, not the Court of Justice). It is a matter of judicial discretion and involves a careful consideration of the facts and a delicate balancing of the interests of the parties involved, the best interests of any children in the recipient's care, all of the objectives of costs awards, and the importance of ensuring that costs awards are paid.

For a thorough, recent review of this case law, see *M.A.B. v M.G.C*, 2023 ONSC 3748 (CanLII), at paras 82-87, Chappel J., citing various cases.

Q21. When can you get security for costs (not for an appeal)?

A judge may, on motion, make an order for security for costs that is just, based on one or more of the following factors: (1) a party habitually resides outside Ontario; (2) a party has an order against the other party for costs that remains unpaid, in the same case or another case; (3) a party is a corporation and there is good reason to believe it does not have enough assets in Ontario to pay costs; (4) there is good reason to believe that the case is a waste of time or a nuisance and that the party does not have enough assets in Ontario to pay costs; or (5) a statute entitles the party to security for costs: R. 24(13) of the *Family Law Rules*.

In deciding whether to award security for costs, the court must apply the following analysis: (a) the initial onus is on the party seeking security for costs to show that the other party falls within one of the enumerated grounds; (b) if the onus is met, the court has discretion to grant or refuse an order for security; (c) if the court orders security, it has wide discretion as to the quantum and means of payment of the order; and (d) the order must be "just" and be based on one or more of the factors listed in R. 24(13): *Izyuk v Bilousov*, 2015 ONSC 3684 (CanLII), at para 40, Pazaratz J., citing various cases.

Q22. When can you get security for costs of an appeal, and which Rules apply?

A motion for security for costs of an appeal before the Superior Court of Justice should be made under R. 38(26) of the *Family Law Rules*.

A motion for security for costs of an appeal before the Divisional Court or before the Court of Appeal should be made under R. 61.06(1) of the *Rules of Civil Procedure*, RRO 1990, Reg 194.

The tests are similar. First, the moving party must show that one of the specific provisions of the Rules has been met. Second, the court must take a step back and consider the justness of the order sought holistically, in all the circumstances of the case, guided by the overarching interests of justice.

In considering the justness of the order sought, relevant factors include, but are not limited to, the merits of the appeal, any delay in moving for security for costs, the impact of actionable

conduct by the respondent on the available assets of the appellant, access to justice concerns, the public importance of the litigation, and the amount and form of security sought by the respondent. An order for security for costs is intended to provide "a measure of protection" to the respondent for the costs to be incurred on the appeal, without denying the appellant a chance to pursue an appeal. The court must ensure that an order for security for costs is not used as a litigation tactic to prevent a case from being heard on its merits.

See *Karatzoglou v. Commisso*, 2023 ONCA 295 (CanLII), at paras 5-8, citing various cases; *Hevey v. Hevey*, 2023 ONSC 4864 (Div Ct), at paras 10-16 & 22, Schabas J., citing various cases; & *La Fontaine v. Maxwell*, 2023 ONSC 91 (CanLII), at paras 47-50, Audet J., citing *Yaiguaje v. Chevron Corporation*, 2017 ONCA 827 (CanLII).

Q23. When are costs that have been ordered due?

Unless the court, when making an order for costs, specifically defers the payment of costs, such costs are payable forthwith: *D.L. v. H.L.*, 2008 ONCJ 150 (CanLII), at paras 15-19, Wolder J., citing *Sears v. Sears*, 2005 CanLII 5863 (CanLII) (Div Ct). See also *Hogarth v. Hogarth*, 2016 ONSC 5131 (CanLII), at paras 37-38, Glustein J.

And "forthwith" means immediately. See *Thomson v. Fleming*, 2020 ONSC 3357 (CanLII), at para 10, Baltman J.:

> [10] Let me be clear: a cost order is not a "choice". And "forthwith" means now, not when it suits the party. It is foundational to our system of justice that court orders be obeyed. As O'Connell J. stated in *Jassa v. Davidson*, 2014 ONCJ 698, at para. 44, "[c]ourt orders are not made as a form of judicial exercise. An order is an order, not a suggestion and non-compliance must have some consequences". See also *Cummings v. Cummings*, 2020 ONSC 3093, at para. 46.

Q24. Can you appeal a costs order?

You can appeal costs as part of an appeal on the merits. When an appeal is allowed, the order for costs below is set aside and the appellant is usually awarded costs below and on appeal: *Climans v. Latner*, 2020 ONCA 554 (CanLII), at paras 85-108 [reconsideration of costs order

when appeal allowed].

However, if you want to appeal a costs order alone, you need to get leave (permission) to appeal: *Courts of Justice Act*, s. 133(b). The threshold for leave is high. A costs award is an exercise in discretion and will only be set aside where there was an error in principle or if the award is plainly wrong: *Cuthbert v. Nolis*, 2024 ONCA 21 (CanLII), at para 21, citing *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9 (CanLII). See also *Jasiobedzki v. Jasiobedzka*, 2023 ONCA 482 (CanLII), at para 23, citing various cases.

Note however, that when you bring an appeal of the costs order, all orders for payment of money (including costs) are automatically stayed by virtue of the appeal, pursuant to *Family Law Rules*, R. 38(34) or *Rules of Civil Procedure*, R. 63.01(1).

Q25. How do you enforce non-payment of costs (on behalf of a client?)

There are several remedies available, including:

- seeking to garnish employment earnings: see *Campbell v. Wentzell*, 2018 ONSC 3041 (CanLII), at para 10, Korpan J.;
- filing a writ of execution: see *McIntyre v. Garcia*, 2021 ONCJ 29 (CanLII), at para 119, Sherr J. and *Matijcio v. Killick*, 2020 ONSC 2058 (CanLII), at para 3, Charney J.; or
- seeking security for costs: see *Matijcio v. Killick*, *ibid*, at para 14, Charney J. & *Clark v. Moxley*, 2017 ONSC 7610 (CanLII), at paras 22-39, Shelston J.

Remedies under R. 1(8) of the *Family Law Rules* include:

- adjourning or dismissing (or staying pending compliance) any motion brought by the non-compliant party;
- moving to strike; and
- seeking an order that the non-compliant party is not entitled to any further court orders pending compliance: see *Capar v. Vujnovic,* 2023 ONSC 4150 (CanLII), at paras 23-26, Agarwal J.

Less drastic remedies available to the court include imposing a strict timeline for payment of

outstanding costs, and imposing a financial sanction for failing to make timely payment: see *Parekh v Parekh*, 2022 ONSC 4700 (CanLII), at para 18, Mandhane J.

A more drastic remedy includes seeking a vexatious litigant finding under s. 140(1) of the *Courts of Justice Act*, RSO 1990, c. C.43: see *Fatahi-Ghandehari v. Wilson*, 2021 ONSC 7390 (CanLII), at paras 61-76, Lemay J. & R. 2.1.01(1) of the *Rules of Civil Procedure*, RRO 1990, Reg 194.

However, you cannot bring a motion for contempt to enforce non-payment of costs: R. 31 of the *Family Law Rules*.

Schedule "A" – *Rules of Civil Procedure* Form 57A: Bill of Costs

BILL OF COSTS

AMOUNTS CLAIMED FOR FEES AND DISBURSEMENTS

(Following the items set out in Tariff A, itemize the claim for fees and disbursements. Indicate the names of the lawyers, students-at-law and law clerks who provided services in connection with each item.

In support of the claim for fees, attach copies of the dockets or other evidence.

In support of the claim for disbursements, attach copies of invoices or other evidence.)

STATEMENT OF EXPERIENCE

A claim for fees is being made with respect to the following lawyers:

Name of lawyer	Years of experience

TO: *(name and address of lawyer or party)*

RCP-E 57A (November 1, 2005)

Schedule "B" – *Rules of Civil Procedure* Form 57B: Costs Outline

COSTS OUTLINE

The *(identify party)* provides the following outline of the submissions to be made at the hearing in support of the costs the party will seek if successful:

Fees (as detailed below)	$	
Estimated lawyer's fee for appearance	$	
Disbursements (as detailed in the attached appendix)	$	_____
Total	$	

The following points are made in support of the costs sought with reference to the factors set out in subrule 57.01(1):

- the amount claimed and the amount recovered in the proceeding

- the complexity of the proceeding

- the importance of the issues

- the conduct of any party that tended to shorten or lengthen unnecessarily the duration of the proceeding

- whether any step in the proceeding was improper, vexatious or unnecessary or taken through negligence, mistake or excessive caution

- a party's denial of or refusal to admit anything that should have been admitted

- the experience of the party's lawyer

- the hours spent, the rates sought for costs and the rate actually charged by the party's lawyer

FEE ITEMS *(e.g. pleadings, affidavits, cross-examinations, preparation, hearing, etc.)*	PERSONS *(identify the lawyers, students, and law clerks who provided services in connection with each item together with their year of call, if applicable)*	HOURS *(specify the hours claimed for each person identified in column 2)*	PARTIAL INDEMNITY RATE *(specify the rate being sought for each person identified in column 2)*	ACTUAL RATE*

* Specify the rate being charged to the client for each person identified in column 2. If there is a contingency fee arrangement, state the rate that would have been charged absent such arrangement.

- any other matter relevant to the question of costs

LAWYER'S CERTIFICATE

I CERTIFY that the hours claimed have been spent, that the rates shown are correct and that each disbursement has been incurred as claimed.

Date: _____ _____

Signature of lawyer

RCP-E 57B (July 1, 2007)

ONTARIO

[Court]
(Name of Court)

at [Address]
(Court office address)

Court File Number
[File #]

TAB A[1]

Applicant(s)

Full legal name & address for service — street & number, municipality, postal code, telephone & fax numbers and e-mail address (if any).	*Lawyer's name & address — street & number, municipality, postal code, telephone & fax numbers and e-mail address (if any).*
[Details]	[Details]

Respondent(s)

Full legal name & address for service — street & number, municipality, postal code, telephone & fax numbers and e-mail address (if any).	*Lawyer's name & address — street & number, municipality, postal code, telephone & fax numbers and e-mail address (if any).*
[Details]	Vanessa Lam Lam Family Law (647) 779-8429 / vanessa@lamfamilylaw.ca

RESPONDENT MOTHER'S BILL OF COSTS [*Annotated with Footnotes*]

(FOR MOTION HEARD FEBRUARY 20, 2024)

STATEMENT OF EXPERIENCE		
Lawyer	**Year of Call**	**Hourly Rate**
Vanessa Lam (VL)	2009 (15 years)	$350.00
Second Lawyer (SL)	2020 (4 years)	$250.00

FEE SUMMARY		**HST**	**TOTAL**
Full indemnity (100%)	$6,675.00	$867.75	**$7,542.75**
Substantial indemnity (80%[2])	$5,340.00	$694.20	**$6,034.20**

[1] You should prepare a Bill of Costs prior to the motion being heard. You might not put anything in the top right corner. However, if you are doing written cost submissions, you may wish to put, e.g., "Tab A", so you can refer to and include your Bill of Costs as an attachment to your cost submissions.

[2] There is some confusion about how to determine substantial and partial indemnity. Subrule 1.03(1) of the *Rules of Civil Procedure,* RRO 1990, Reg 194, defines "substantial indemnity costs" as being 1.5 times what would otherwise be awarded in accordance with Part 1 of Tariff A, but doesn't define partial or full indemnity costs. And Tariff A has basically no guidance on %s or maximum hourly rates.

Partial indemnity (60%[3])	$ 4,005.00	$520.65	**$4,525.65**

DETAILED BREAKDOWN			
Date	**Lawyer/Time**	**Particulars[4]**	**Fees**
February 1, 2024	Lawyer: SL 1.0 hrs x $250	Research on shared parenting time schedule and *status quo* parenting time principles	$250.00
February 2, 2024	Lawyer: SL 0.8 hrs x $250	Research on authority of the court to order parenting coordinator	$200.00
February 2, 2024	Lawyer: SL 1.2 hrs x $250	Drafting offer to settle all interim parenting issues	$300.00
February 2, 2024	Lawyer: VL 0.2 hrs x $350	Reviewing and revising offer to settle all interim parenting issues	$70.00
February 4, 2024	Lawyer: SL 0.8 hrs x $250	Telephone call with client to review offer to settle, revisions to same	$200.00

The case law recognizes that substantial is less than full, and generally sets it at between 80-90% of full. 80% is used in the example above because this is generally used more in family law. However, if substantial is 1.5 times the usual scale of partial (see the below footnote) and partial is 60% of full, then substantial would be 90% of full. **The bottom line is that you should be transparent in what % you are using so that the court can then adjust as it sees fit.**

[3] I have also seen a range of percentages used for partial indemnity. However, see *Climans v. Latner,* 2020 ONCA 554 (CanLII), at para 108: "the usual approach" is to treat "partial indemnity costs as 60% of full indemnity costs". **Again, the bottom line is that you should be transparent in what % you are using so that the court can then adjust as it sees fit**.

[4] Some motions are straightforward and limited to one issue – these types of motions might not include such a detailed breakdown by date. But, especially where there are multiple issues, it is generally helpful to provide more details/particulars. To the extent possible, the particulars should allow the judge to consider how much time was spent on each issue (especially in cases of divided success). However, make sure not to include information that would breach solicitor-client privilege.

February 4, 2024	Lawyer: SL 0.2 hrs x $250	Drafting email to opposing counsel and sending offer to settle[5]	$50.00
February 5, 2024	Lawyer: SL 0.2 hrs x $250	Emails from/to opposing counsel and from/to client re: offer to settle and interim parenting motion	$50.00
February 9, 2024	Lawyer: SL 2.0 hrs x $250	Drafting Notice of Motion and draft Order on interim parenting issues	$500.00
February 9, 2024	Lawyer: SL 4.2 hrs x $250	Drafting supporting Affidavit	$1,050.00
February 10, 2024	Lawyer: VL 0.8 hrs x $350	Reviewing and revising draft motion materials (Notice of Motion, Order, and Affidavit)	$280.00
February 11, 2024	Lawyer: SL 1.8 hrs x $250	Zoom call to review all draft motion materials with client, including revisions to draft Affidavit and finalizing Affidavit	$450.00
February 11, 2024	Lawyer: SL 1.0 hrs x $250	Drafting factum, further research re: parenting time impacted by parents' work schedules	$250.00
February 12, 2024	Lawyer: SL 0.5 hrs x $250	Continue drafting factum, interim decision-making	$125.00
February 13, 2024	Lawyer: SL 1.0 hrs x $250	Reviewing other party's Affidavit; emails to/from client and V. Lam	$250.00
February 13, 2024	Lawyer: SL 1.0 hrs x $250	Telephone call with client; drafting reply affidavit re: work schedules and before/after care arrangements impacting parenting time	$250.00
February 13, 2024	Lawyer: SL 2.0 hrs x $250	Continue drafting factum, all issues	$500.00
February 14, 2024	Lawyer: VL 0.5 hrs x $350	Reviewing and revising factum	$175.00
February 14, 2024	Lawyer: SL 1.0 hrs x $250	Finalizing factum	$250.00
February 14, 2024	Lawyer: SL 0.4 hrs x $250	Call with opposing counsel; drafting confirmation form for motion	$100.00

[5] It may be useful in your cost submissions to break down what costs were incurred before vs. after an offer to settle, or at other key points.

February 14, 2024	Lawyer: SL 0.6 hrs x $250	Reviewing other party's factum, summarizing same	$150.00
February 18, 2024	Lawyer: VL 2.5 hrs x $350	Preparing for motion	$875.00
February 20, 2024	Lawyer: VL 1.0 hrs x $350	Attendance at motion (estimate)	$350.00
February 20, 2024	Lawyer: SL 1.0 hrs x $250	Attendance at motion	No charge
		Subtotal	**$6,675.00**
		HST (13%)	**$867.75**
		TOTAL	**$7,542.75**[6]

Dated: February 20, 2024

[6] I have also seen some bills of costs summarize the number of hours per timekeeper. I didn't bother to do that here, but in some cases with multiple timekeepers, this can be quite useful.

Sample Cost Submissions – Successful Party

Vanessa Lam and Maria Golarz, Lam Family Law[1]

APPLICANT'S COST SUBMISSIONS

(for the trial before Justice X on February 1-2, 5-8, & 21-22, 2024)

Contents

Overview 1
The Applicant Was Successful and the Result was Better than Her Offer to Settle 2
The Applicant Acted Reasonably and Her Bill of Costs is Reasonable 3
The Respondent's Conduct was Unreasonable and Increased Costs 4
The Respondent's Ability to Pay 4
The Applicant Requests that Part of the Costs Order Be Enforced as Support 4
Costs Award Sought by the Applicant 5

Overview

1. These cost submissions are made pursuant to the Reasons for Decision of Justice X dated February 29, 2024 ("Trial Decision"). The trial lasted eight days, with decision-making responsibility and parenting time for the parties' two children being the most contentious and time-consuming issues. The trial also dealt with child support, which was complicated because the Respondent's self-employment income was disputed.
2. The Trial Decision granted the parties joint decision-making responsibility, primary residence to the Applicant, generous parenting time with the Respondent, imputed income to the Respondent of $130,000, resulting in child support of $1,838 per month, and fixed the Applicant's income at $100,000 for determining her s. 7 proportionate share.
3. The Applicant seeks costs in the total amount of **$60,000**, inclusive of disbursements and HST, which represents partial indemnity costs up until her offer to settle dated September 5, 2023 and full indemnity costs thereafter.

[1] Vanessa Lam is the principal of Lam Family Law (www.lamfamilylaw.ca), and is a freelance family law strategic advisor and research lawyer (vanessa@lamfamilylaw.ca). Maria Golarz is a senior associate research lawyer (maria@lamfamilylaw.ca).

The Applicant Was Successful and the Result was Better than Her Offer to Settle

4. The "starting point", found in R. 24(1) of the *Family Law Rules*, is that the successful party is presumptively entitled to costs: *Family Law Rules*, O. Reg. 114/99, R. 24(1).

5. In the case at bar, the Applicant was clearly successful considering the claims made by each party in their respective pleadings and as advanced at trial, as summarized at paragraph 3 of the Trial Decision.

6. The Applicant served an offer to settle dated September 5, 2023. A copy of the Applicant's offer to settle is attached at **Tab "A"**.

7. The offer met the requirements of R. 18(14), did not expire and was not withdrawn, was not accepted, and the Applicant obtained an order as favourable or more favourable at trial. She is thus presumptively entitled to her costs to the date the offer was served and full recovery of costs from that date forward: *Family Law Rules*, *ibid*, R. 18(14).

8. If the Respondent had accepted the Applicant's offer, he would have had more time with the children commencing six months prior to trial, and would have paid less child support.

9. The Respondent also served an offer to settle, but his offer was served less than a week before trial, and was not as favourable to him as the order obtained at trial. A copy of the Respondent's offer to settle is attached at **Tab "B"**.

10. The court is not required to examine each term of the offer, as compared to the terms of the order, and weigh, with microscopic precision, the equivalence of the terms. What is required is a general assessment of the overall comparability of the offer as contrasted with the order. That being said, the court may find a chart useful to illustrate success: *Freitas v. Christopher*, 2021 ONSC 5233 (CanLII), at paras 19-20.

11. A review of the Applicant's offer compared to the Order made by the Trial Decision shows that the Order was more or as favourable to the Applicant as her offer:

Issue	Applicant's Offer	Respondent's Offer	Judgment
Decision-making	Joint decision-making	Joint decision-making	*Parties agreed:* Joint decision-making
Primary residence	With Applicant	No primary residence	*Applicant was successful:* With Applicant
Parenting Time	Every other weekend;	Week-about; expanded summer	*Applicant was successful:*

Issue	Applicant's Offer	Respondent's Offer	Judgment
	Wednesdays overnight; shared holidays	access and shared holidays	Every other weekend; Wednesdays after school to 8pm; increased holidays
Child support	$1,660 per month based on an imputed income of $120,000	$1,172 per month based on an income of $80,000	*Applicant was successful:* $1,838 per month based on an imputed income of $130,000
Section 7s	Split 50% : 50%	66% (Applicant) : 33% (Respondent)	*Applicant was successful:* 43% (Applicant) : 57% (Respondent)

The Applicant Acted Reasonably and Her Bill of Costs is Reasonable

12. The Applicant acted reasonably throughout and was well-prepared for trial, as summarized at paragraph 10 of the Trial Decision.

13. Preparation for trial was reasonable and it is not the court's function to second-guess successful counsel on the amount of time if time is not so grossly excessive as to amount to "obvious overkill": *Norris v. Morocco,* 2020 ONSC 4203 (CanLII), at para 104.

14. The lawyers' rates and their time spent on the case were both reasonable. A copy of the Applicant's Bill of Costs is attached at **Tab "C"**.

15. The parenting issues were of utmost importance to the parties in this case. The issues were not overly complex, with the exception of a determination of the Respondent's true income from self-employment.

16. The Applicant's counsel has been practicing family law for over 20 years. She also delegated tasks such as drafting, research, and Exhibit production to junior counsel, a 2019 call, where possible to reduce legal fees. Time has been removed for junior counsel's attendance at trial and for the previous motion dealing with permission for the Applicant to travel with the children (in which costs were already awarded to the Applicant).

The Respondent's Conduct was Unreasonable and Increased Costs

17. The Respondent made numerous unsubstantiated allegations about the Applicant's ability to care for the children, but led no evidence to support these claims. He also delayed in providing timely disclosure and had outstanding undertakings at the time of trial. His behaviour was unreasonable within the meaning of R. 24(5) of the *Family Law Rules*: *Chan v. Chan*, 2014 ONSC 666 (CanLII), at para 11 [court should express disapproval of a litigant who proceeds to court without adequate evidence to prove their claims, and should send the message that the successful party should have redress by awarding costs on a full recovery basis] & *Shalaby v. Nafei*, 2022 ONSC 5615 (CanLII), at para 108 [failing to make financial disclosure unreasonable].

The Respondent's Ability to Pay

18. The Respondent will likely claim that he cannot afford to pay costs. However, the court has held that, unless a party can meet the threshold of undue hardship, that party will not have relief from costs on the basis of affordability where a reasonable offer to settle has been served. These consequences serve to encourage settlement. Further, the concept of proportionality should not normally result in reduced costs where the unsuccessful party has forced a long and expensive trial: *Freitas v. Christopher*, 2021 ONSC 5233 (CanLII), at paras 44-45 & *Stevens v. Stevens*, 2012 ONSC 6881 (CanLII), at para 33; aff'd 2013 ONCA 267 (CanLII), at para 16.

The Applicant Requests that Part of the Costs Order Be Enforced as Support

19. Where the issue of spousal or child support is before the court, the court may order costs enforced as a support order through the Family Responsibility Office ("FRO"): *Family Responsibility and Support Arrears Enforcement Act*, 1996, SO 1996, c. 31, s. 1(1)(g) & *Parmar v. Flora*, 2023 ONSC 2327 (CanLII), at para 5.

20. Where a support claim is a principal issue in a multi-issue family law proceeding, the court has discretion to estimate the percentage of time devoted to child support issues and designate that amount to be enforced through FRO. The court also has discretion to

designate the entire amount of costs of the proceeding as support for the purposes of FRO enforcement: *Parmar v. Flora*, *ibid*, at para 5, citing *Clark v. Clark*, 2014 ONCA 175 (CanLII) & *Freitas v. Christopher*, 2021 ONSC 5233 (CanLII), at paras 25 & 42-45.

21. Although the majority of trial time was spent on parenting issues, significant time was spent determining the Respondent's income so that the proper amount of child support could be determined. Of the eight-day trial, approximately two days were spent on support issues, given the Respondent's delayed disclosure and lack of disclosure. Significant time was also spent reviewing and organizing the Respondent's disclosure. The Applicant requests that 40% of the costs order be designated as support to be enforced through FRO.

Costs Award Sought by the Applicant

22. The Applicant seeks the following costs:

    (a) Costs on a partial indemnity basis prior to service of her offer to settle: $15,000.

    (b) Costs on a full indemnity basis after service of her offer to settle: $35,000.

    (c) Costs to prepare these submissions: $1,500.

    (d) Disbursements and HST: $8,500.

    Total costs payable: $60,000, of which $24,000 (40%) is related to support and is enforceable as support by the Director, Family Responsibility Office.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 2nd DAY OF MARCH 2024.

_____

Counsel
Lam Family Law
Solicitors for the Applicant

Sample Cost Submissions – Unsuccessful Party or Divided Success

Vanessa Lam and Maria Golarz, Lam Family Law[1]

RESPONDENT'S COST SUBMISSIONS

(for the trial before Justice Y on February 1-2, 8, & 20, 2024)

Contents

Overview 1
General Principles on Costs 2
The Costs Award Should Reflect the Parties' Divided Success 2
The Costs Award Should Reflect the Applicant's Unreasonable Behaviour 3
The Costs Award Should Reflect the Respondent's Inability to Pay 3
The Applicant Did Not Serve a Non-Severable Offer to Settle Until the Last Minute 4
The Applicant's Costs Lack Detail and Exceed Reasonable Expectations 4
Costs Award Sought by the Respondent 5

Overview

1. These cost submissions are made pursuant to the Reasons for Decision of Justice Y dated February 29, 2024 ("Trial Decision"). The trial lasted four days. The only issues were the Respondent's claim for a trust interest in the Applicant's home and the Applicant's claim for spousal support. The Trial Decision dismissed the Respondent's trust claim and granted the Applicant spousal support of $3,000 per month for five years.
2. The Respondent respectfully requests that each party bear his or her own costs given that: (a) success was divided; and (b) the Applicant acted unreasonably in taking jointly held funds.
3. In the alternative, the Respondent respectfully requests that the costs requested by the Applicant be reduced given: (a) the Respondent's limited ability to pay; (b) the Applicant's lack of severable offer to settle; and (c) the lack of detail in the Applicant's Bill of Costs and the excessive amounts claimed.

[1] Vanessa Lam is the principal of Lam Family Law (www.lamfamilylaw.ca), and is a freelance family law strategic advisor and research lawyer (vanessa@lamfamilylaw.ca). Maria Golarz is a senior associate research lawyer (maria@lamfamilylaw.ca).

General Principles on Costs

4. The Court of Appeal for Ontario ("ONCA") in several cases has made clear that the overall objective of a costs award is to fix an amount of costs that is objectively proportionate, reasonable, and fair for the paying party to pay in the circumstances of the case, rather than to fix an amount based on the actual costs incurred by the successful litigant. Fixing of costs is not merely a mechanical exercise involving a review of the receiving party's cost outline: *Vadsaria v. Kassam*, 2023 ONSC 6480 (CanLII), at para 16 & *Sonia v. Ratan,* 2023 ONSC 982 (CanLII), at para 27, both cases citing various ONCA cases.

5. There is no provision in the *Family Law Rules* for a general approach of "close to full recovery" costs. Proportionality and reasonableness are the "touchstone considerations" to be applied in fixing the amount of costs. Further, a "close to full recovery" approach is inconsistent with the fact that the *Family Law Rules* expressly contemplate full recovery in specific circumstances, e.g., bad faith or besting an offer to settle: *Beaver v. Hill*, 2018 ONCA 840 (CanLII), at paras 11-13.

The Costs Award Should Reflect the Parties' Divided Success

6. Although a successful party is presumed to be entitled to his or her costs, if success is divided, the court is to apportion costs as appropriate: *Family Law Rules,* O. Reg. 114/99, Rr. 24(1) & (6).

7. The courts have recognized that ***no costs*** may be appropriate where success is divided: *R.L. v. M.F*, 2023 ONSC 6941 (CanLII), at para 65 & *El Ouazzani v. Chabini,* 2023 ONSC 183 (CanLII), at para 22.

8. In the case at bar, measured against the relief sought in her Answer, the Applicant fell short of her claims. The Applicant sought spousal support for an unlimited duration and advanced a claim for a much higher amount of support than was awarded at trial. The Respondent agreed that some support should be payable, but sought a slightly lower amount than was ordered at trial. He was successful, however, in having the support be time-limited, which was a significant dispute between the parties. The Respondent submits that as success was divided, each party should be ordered to bear their own costs.

The Costs Award Should Reflect the Applicant's Unreasonable Behaviour

9. A successful party may be deprived of some or all of their costs if they are found to have behaved unreasonably: *Family Law Rules,* O. Reg. 114/99, R. 24(4).

10. The court will also consider each party's behaviour during the litigation. This means that, even where success is divided, if one party acted unreasonably, the court may exercise its discretion to not award any costs to that party: *Shinder v. Shinder*, 2022 ONSC 1121 (CanLII), at para 28-31.

11. Or the court may order the party who acted unreasonably to pay costs: *Levesque v. Bond*, 2023 ONSC 1895 (CanLII), at para 34 [while success was divided, costs of motion ordered against mother for late disclosure and ongoing non-compliance with costs order].

12. The main factor that the Respondent submits should be considered is the Applicant's unreasonable behaviour. The Applicant removed $150,000 of jointly held funds without the Respondent's consent. She only agreed to return the funds after the Respondent had prepared lengthy motion materials. She also evaded service of the Respondent's motion materials, forcing the Respondent to obtain an order approving irregular service. If the court finds that some costs should be ordered in favour of the Applicant, the Respondent submits that the costs award should be reduced to reflect the Applicant's unreasonable behaviour.

The Costs Award Should Reflect the Respondent's Inability to Pay

13. The court must consider the financial means of the paying party and their ability to pay a costs award, as well as any financial impact on the parties, in setting a costs amount: *M.A.B. v. M.G.C.,* 2023 ONSC 3748 (CanLII), at paras 57-59, citing various cases.

14. In the case at bar, the Respondent acted in good faith throughout the litigation in resisting the scope of the Applicant's claim for spousal support. The Trial Decision ordered time-limited spousal support in part because of the Respondent's ability to pay, as summarized at paragraph 13 of the Trial Decision. A large costs award would financially cripple the Respondent and would impact his ability to pay spousal support to the Applicant.

The Applicant Did Not Serve a Non-Severable Offer to Settle Until the Last Minute

15. An important consideration in determining both liability and quantum of costs is "whether any party has served or accepted an Offer to Settle".

    - *M.A.B. v M.G.C*, 2023 ONSC 3748 (CanLII), at paras 50-56.

16. Further, where a party makes a non-severable offer, they must do as well as or better than all of the terms of the offer, in order to take advantage of the full recovery cost provisions of Rule 18(14). Where some of the terms are less favourable to the order made at trial, R. 18(14) cannot be applied: *M.J.L. v. C.L.F.*, 2022 ONCJ 354 (CanLII), at para 19 & *J.C.M. v. K.C.M.,* 2016 ONCJ 551 (CanLII), at paras 36-39, citing various cases.

17. In the case at bar, the Applicant made a last-minute non-severable offer to settle three days before trial, and made no other offers throughout the litigation (see **Tab "A"**). The Respondent, on the other hand, made three severable offers to settle, dated September 14, 2023, October 15, 2023, and December 16, 2023 (see **Tabs "B-D"**). If the court finds that some costs should be ordered in favour of the Applicant, the Respondent submits that all of these offers should be considered in reducing the amount of costs payable.

The Applicant's Costs Lack Detail and Exceed Reasonable Expectations

18. Where a large amount of money is being claimed, the party seeking costs has an obligation to provide sufficient information: (a) to particularize what work had to be performed and why; (b) to address varying levels of indemnification which may apply to different issues; and (c) to reassure the court that costs are not currently being claimed for previous steps or events where costs have already been dealt with (or should already have been dealt with): *Tintinalli v. Tutolo*, 2022 ONSC 6276 (CanLII), at paras 52-61, citing various cases.

19. In determining the appropriate quantum, the court should also consider the amount that the unsuccessful party could reasonably have expected to pay in the event of lack of success in the litigation: *Tintinalli v. Tutolo*, *ibid*, at paras 15-21, citing various cases.

20. As such, costs may be discounted due to a lack of detail in a party's Bill of Costs, or when the amount cost exceeds the reasonable expectations of the paying party: *Tintinalli v.*

Tutolo, *ibid*, at paras 61 & 65.

21. A useful benchmark for determining whether costs claimed are fair, reasonable, and proportionate is to consider the amount that the unsuccessful party paid for their own legal fees and disbursements in the same matter: *Laidman v. Pasalic and Laidman*, 2020 ONSC 7068 (CanLII), at para 21(a), citing various cases.

22. The Respondent's Bill of Costs (see **Tab "D"**) is only about 75% of the Applicant's Bill of Costs. Further, the Applicant's Bill of Costs lacks specificity as to the amount of time spent on each task relative to each of the issues between the parties. For example, the Applicant's Bill of Costs summarizes only that her counsel spent 25.8 hours preparing for the trial but provides no breakdown of how that time was spent per issue or per task.

Costs Award Sought by the Respondent

23. The Respondent requests that the court exercise its discretion and award no costs.

24. In the alternative, the Respondent requests that costs be significantly reduced to reflect the Applicant's unreasonable behaviour, the Respondent's inability to pay, the fact that the Applicant did not serve a severable offer, and given the lack of detail and high amount of the Applicant's Bill of Costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 2nd DAY OF MARCH 2024.

_____

Counsel
Lam Family Law
Solicitors for the Respondent

Law Society of Ontario | Barreau de l'Ontario

TAB 13

18th Family Law Summit

Spousal Support: Appeals, Entitlement (PPT)

Ideas of Spousal Support Entitlement

B.C. Court of Appeal struggles with entitlement to spousal support

Professor D.A. Rollie Thompson, K.C, Schulich School of Law
Dalhousie University, and Counsel, Epstein Cole LLP

March 21, 2024

cpd

SPOUSAL SUPPORT: APPEALS, ENTITLEMENT

Prof. Rollie Thompson KC

Ontario Family Law Summit
Toronto, March 20-21, 2024

AGENDA

- Ontario Appeal Decisions 2023-24
- Thinking About Entitlement
  - Threshold: No Entitlement Cases
  - Beyond Threshold: Using SSAG
  - Compensatory Analysis
  - Non-Compensatory Analysis
  - Duration: End of Entitlement
- **Materials:**
  - "Ideas of Spousal Support Entitlement" (2015) 34 CanFamLQ 1
  - *Stobo v Cohoon*, Law 360

NAIRNE v NAIRNE

- *Nairne,* 2023 ONCA 478 (Favreau JA)
  - Leave to SCC denied January 11, 2024
  - Married 21 years, 2 adult children, H 62, W68
  - **Faieta J**: SS $2,500/mo, terminate when H retires
  - H took no-interest, no-payments mortgage on MH
  - Mortgage $561,000, after deduction of retro cs/ss
  - W appeals, SS too low, shouldn't terminate
  - Both CAs, H $316,000 W $122,000
  - **ONCA**: appeal dismissed, deference
  - **Para 30: trial J too "narrow" re entitlement, C & NC**
  - SS considers W's benefit from mortgage

TWO MORE ONCA

- *Chhom v Green,* 2023 ONCA 692
  - W's appeal dismissed
  - Cohabited 19 yrs, 2nd marriage, W 64, H 68
  - SS $4,295/mo til H's retirement March 2024
  - $780/mo after retirement
- *Jasiobedzki,* 2023 ONCA 482 (Paciocco JA)
  - H's appeal dismissed, retro SS, $5,979/mo (mid)
  - Married 38 yrs, H 65, W 66, W no income
  - H SRL, wrong re SSAG, not net income in formula
  - H's gross income used $164,461/yr
  - No error in not imputing CPP/OAS to W, not til 70

AND MORE ONCA

- *Tran v Taylor,* 2023 ONCA 858
  - Self-reps, OCJ re spousal support, SCJ re property
  - SS dismissed in OCJ, appeal dismissed
  - ONCA: s 2(2) FLA, all in SCJ, transfer SS claim
- *KK v AM,* 2023 ONCA 823
  - 2 children, together 9+ years, high SSAG, indefinite
  - H's appeal dismissed
- *Barn v Dhillon,* 2023 ONCA 654
  - Lump sum retro SS, no netting down for taxes, H appeals
  - Not error (!), duty on party seeking adjustment
- *Ahluwaliah,* 2023 ONCA 476 (Benotto JA)
  - Retro SS $47,188, plus $2,224/mo til H 65/retires
  - Family law statutory remedies, incl SS, before torts

DIV COURT DECISIONS

- *Abdelsamie v Farid*, 2024 ONSC 694 (McGee J)
  - H claims SS, married 17 yrs, children 19 & 18
  - Immigrated to Canada, Calgary then Toronto
  - W bank job $116,000/yr, H $40,000/yr
  - **Cameron J**: 19 mos SS, $893/mo, 2016-17, no C
  - **Div Ct**: appeal allowed, remitted
  - **Error to dismiss compensatory claim**
  - SSAG duration 8.5-17 yrs, no explanation re 19 mos
- *Spagnolo*, 2023 ONSC 5780
  - Urgent case conference set by TBST J re SS, home poss'n
  - Interim SS motion dismissed by case conference J (!)
  - Appeal allowed, CCJ erred, motion not before him
  - Appeal shouldn't have halted/slowed process either

ENTITLEMENT: ISSUES

- **SSAG NOT about entitlement, just amount and duration**
- **RUG, ch 3**; Thompson, "Ideas" (2015), 34 CFLQ 1
- Entitlement must first be proved, or agreed
  - **3 bases: compensatory, non-compensatory, contract**
  - can be entitlement on more than one ground: eg **both** compensatory and non-compensatory in long marriage
- Income disparity a starting point: but need to ask **why** is there income disparity?
- Positive SSAG range may not mean "entitled"
- Zero SSAG range: may mean "no ability to pay", and not "no entitlement"
- Threshold entitlement: liable to pay *any* support?

ENTITLEMENT ISSUES: BEYOND THE THRESHOLD

- Entitlement not just a threshold issue
- Identifying entitlement (compensatory vs non-compensatory, mix of both?) still important even if there is entitlement
  - location in ranges
  - exceptions
  - variation issues, e.g. repartnering
  - post-separation income changes
  - duration: end of entitlement

ENTITLED? COMPENSATORY

- *Divorce Act,* s. 15.2(6)(a) and (b); FLA, s. 33(8)
- Economic disadvantage/advantage, roles
- *Moge* (SCC 1992); **Markers:**
  - home with children full or part-time
  - secondary earner
  - primary care of children *after* separation
  - moves for payor's career
  - support for payor's education/training
  - work in family business
- Where recipient *would be*, if continued in labour market, not where *was* years ago
- SSAG implications:
  - strong compensatory claim, higher in the range
  - more likely to share post-separation income increases
  - less impact of repartnering

COMPENSATORY ANALYSIS ISSUES

- Backsliding, underestimation
  - "She was a secretary before, so no loss"
  - "She worked throughout the marriage, so no loss"
  - "He received no career advantage because she stayed home with the kids" (benefit of uninterrupted career?)
  - "It was a short marriage so limited compensatory loss" (post-divorce child care?)
- <u>But</u> **not** compensatory just because long marriage or disadvantage from marriage breakdown
- Different roles of equalization vs support
- Good compensatory analysis by CAs:
  - *Gray* (ONCA 2015)
  - *Chutter* (BCCA 2008); *Zacharias* (BCCA 2015)

    Hartshorne (BCCA 2010); *Corbeil* (ABCA 2001)

ENTITLED? NON-COMPENSATORY

- *Divorce Act*, s. 15.2(6)(a), (c); FLA, s. 33(8)
- Needs-based, "merger over time": *Bracklow* (SCC 1999)
- Need relative to marital standard
- **Markers**:
  - length of marriage/cohabitation
  - drop in standard of living
  - economic hardship
- All to assess **"interdependence"**
- Good CA examples: *Emmerson* (ONCA 2017), *Chutter* (BCCA 2008), *Fisher* (ONCA 2008), *McKenzie* (BCCA 2014)
- Implications:
  - lower in range, but disability/extreme need often pushes higher
  - often weaker claim to sharing of post-separation income increases
  - more impact to repartnering

Q: ENTITLED?

Robert and Anita have been married for 15 years. No children. Both are now 41 years old. Anita worked in an administrative job for 4 years, to support them both while Robert finished his science degree and his education degree. Robert has worked as a teacher for over 10 years, now earning $90,000/yr. Anita has continued to work full-time in administrative jobs, now earning $40,000/yr. She's taken some university courses for personal interest.

Is Anita entitled to support?

Compensatory

Non-compensatory

Both

No entitlement

Q: ENTITLED?

Reid and Aleka began cohabiting in 1995, then in their early 20s, hippies. A daughter born 1996, now adult. Aleka home til 2003. Aleka then trained as midwife, worked 2007 on. Married 2007. Reid worked as photographer, then long hours as grip and key grip in film industry, with 2 companies, service co and rental co, earning $200,000/yr. Aleka earns $100,000/yr. Separated January 2019. Reid now 50, Aleka 51. Aleka claims spousal support.

Compensatory?

Non-compensatory?

Both? Neither?

STOBO v COHOON

- Leave sought at SCC, #41123
  filed February 16, 2024
- 2023 BCCA 479 (Voith JA)
  no entitlement (!)
- 2022 BCSC 817 (Francis J)
  compensatory entitlement
  mid-SSAG, indefinite, review

Q: ENTITLED? TERMINATED?

Jim and Kelly were married for 18 years, no children. In 2004, consent order for low-SSAG, $1,600/mo, indefinite. Jim applied to terminate support in 2017, but application dismissed. Jim's income has fluctuated, around $100,000/yr. for many years. Kelly earns $30,000/yr, running her own business. Her income is unchanged for many years. Jim is now 55 years old, Kelly is 48.

Jim applies to terminate support in 2024.

Is there a "material change"? Yes or no?

RECENT ENTITLEMENT DECISIONS

- More careful where husband claims,
  or shorter relationship,
  or both grounds claimed

Kalra, 2024 ONSC 769 (Chown J)
Walker, 2024 ONSC 198 (Audet J)
Smith v Noel, 2023 ONSC 6682 (Jarvis J)
Malone v Cappon, 2023 ONSC 5365 (Audet J)
McArthur v Le, 2023 ONSC 4897 (Sharma J)
MJL v NTP, 2023 ONCJ 495 (Paulseth J)
RAK v MZ, 2023 ONCJ 476 (Sherr J)

DURATION: END OF ENTITLEMENT

- When and how does spousal support end?
- SSAG time limits:
  - *without child support* cases less than 20 years
  - *custodial payor, adult child* formulas
  - cross-over cases, to *without child support* formula
- Indefinite orders:
  - cohabit 20 years or more, "rule of 65"
  - *with child support* cases, initial
  - time limits through variation and review
- Retirement as basis for termination
  - near end of time limits, maxima
  - reduction in payor income
  - *Boston*: impact upon both spouses

Ideas of Spousal Support Entitlement

D.A. Rollie Thompson[*]

1. INTRODUCTION

I was going to use the word "theory" in my title, but I knew that would be off-putting, so I went with the dressed-down, casual term "ideas". Ideas, or "theories", underpin the law of entitlement to spousal support. Not the language of sections 15.2(4) and (6) of the *Divorce Act*, or that of sections 58 and 60 of the Alberta *Family Law Act*, although lawyers and judges will dutifully cite those provisions, "like drunks use lampposts, more for support than for illumination".[1] Theory matters more than statute, even though spousal support is a statutory remedy.

My task in this article is to reconsider our law of entitlement to spousal support. The time is ripe. We are now twenty-one years after *Moge*,[2] fourteen years after *Bracklow*,[3] and eight years after the Spousal Support Advisory Guidelines *Draft Proposal*.[4] The Supreme Court decisions remain the twin pillars of Canadian support law, especially the law of entitlement. Neither case gave much direction on the amount or duration of support. The Spousal Support Advisory Guidelines now dominate the resolution of amount and duration, and inevitably affect our understanding of entitlement too.

My review is essentially a history of ideas about spousal support: some old ideas, some compensatory ideas, some non-compensatory ideas, and some SSAG ideas. To suggest that there is a "Canadian theory" of spousal support would certainly overstate the coherence of either *Moge* or *Bracklow*. Thanks to these two decisions, though, Canada has a broader approach to spousal support entitlement than just about any other jurisdiction, especially compared to countries like the United States, England, Australia, or any European country.

When it comes to "ideas", John Maynard Keynes got it right:

> the ideas of economists and political philosophers, both when they are right and when they are wrong, are more powerful than is commonly understood. Indeed the world is ruled by little else. Practical men, who believe them-

---

[*] Schulich School of Law, Dalhousie University.

1 Judge Robert Sack, speaking about judges' use of law review articles, quoted in the New York Times and repeated in Clisham and Wilson, "The American Law Institute's *Principles of the Law of Family Dissolution*, Eight Years After Adoption: Guiding Principles or Obligatory Footnote", 42 F.L.Q. 573 (2008) at 576.

2 *Moge v. Moge*, 1992 CarswellMan 143, 1992 CarswellMan 222, [1992] 3 S.C.R. 813, 43 R.F.L. (3d) 345 (S.C.C.).

3 *Bracklow v. Bracklow*, 1999 CarswellBC 532, 1999 CarswellBC 533, [1999] 1 S.C.R. 420, 44 R.F.L. (4th) 1 (S.C.C.).

4 Rogerson and Thompson, *Spousal Support Advisory Guidelines: Draft Proposal* (Justice Canada, January 2005), superseded by *Spousal Support Advisory Guidelines* (Justice Canada, July 2008), known as the *Final Version*.

> selves to be quite exempt from any intellectual influences, are usually the slaves of some defunct economist. Madmen in authority, who hear voices in the air, are distilling their frenzy from some academic scribbler of a few years back.[5]

Keynes went on to point out that "there are not many who are influenced by new theories after they are twenty-five or thirty years of age". Thus, old ideas live on and even "new" ideas are often a decade or two old.

Our spousal support law of today still contains remnants of yesterday's ideas. So we must start with old ideas, and work our way forward. Once we allow for divorce, the question is why one spouse should pay support to the other spouse after divorce. The name may change — alimony, spousal maintenance, spousal support, compensatory payments — but it has often seemed to be "a remedy without a rationale",[6] especially after no-fault divorce.

Remember that spousal support after divorce has always been a statutory remedy. There is no "common law" of spousal support. That said, the statutes have always been vague and discretionary, leaving much room for ideas to work. And not always good ideas. As often as not, we see preconceptions, misconceptions, biases, stereotypes, unstated assumptions, and the like.

As we sift through these ideas, we have to recognise tensions between the "lay intuitions" of our clients (or bad or inexperienced lawyers),[7] theoretical articles by academics, court decisions by judges and the practicalities of amount and duration. I would argue these tensions reflect "the history of ideas" about spousal support, much more than any of us realise.

2. OLD IDEAS: STATUS, FAULT, CLEAN BREAK

These are old ideas, but still around, still creeping in here and there, in our thinking and that of our clients. Clients are more likely to talk about these older ideas, as they live on in popular discussions long after lawyers have moved on. These older ideas also turn up amongst the lawyers we call "dabblers", those who do the occasional family law case and still cite *Pelech* as good authority.

(a) Status and Need

Back when spousal support was just "alimony", it was used to describe the payment by a husband to a wife after divorce *a mensa et thoro*, i.e. from bed and board, which today we would call "judicial separation".[8] Divorce was difficult for

---

5 Keynes, *The General Theory of Employment, Interest and Money* (London; Macmillan, 1936, reprinted 1967) at 383.

6 Ellman, "The Maturing Law of Divorce Finances: Toward Rules and Guidelines", 33 F.L.Q. 801 (1999) at 809.

7 For an example of some American lay intuitions on the subject, see Ellman and Braver, "Lay Intuitions About Family Obligations: The Case of Alimony" (July 8, 2011), at ssrn.com/abstract=1737146.

8 See Davies, *Power on Divorce and other Matrimonial Causes*, 3rd ed. (Toronto: Carswell, 1980), Vol. II, Chapter 9, "Alimony as an Independent Remedy".

English spouses before the *Matrimonial Causes Act of 1857*,[9] when judicial divorce first arrived. Until then, divorce could only be obtained by private act of Parliament. Alimony was the payment for support by the still-married husband to the still-married wife, part of his duties during coverture. The alimony obligation flowed from the status of marriage, that simple. He had an obligation to keep her in the style to which she had become accustomed, the marital standard of "need". This old status-based remedy was only available to wives, as their husbands had the property and the income. Alimony would be paid permanently, given the difficulty of getting a parliamentary divorce. A wife could be denied alimony for her own misconduct.

Status is long gone as a basis for support. In *Bracklow*, Justice McLachlin repeated and endorsed the same phrase used in *Moge* and *Messier v. Delage*: "marriage *per se* does not automatically entitle a spouse to support".[10] The term "alimony" survived the creation of judicial divorce, even though technically it referred only to the obligation of support while the legal marriage had not been terminated.

(b) Fault and Contract

The next explanation for the survival of alimony after divorce was "fault". The primary grounds for divorce under the *Matrimonial Causes Act of 1857* were adultery by the wife or adultery with aggravating circumstances by the husband.[11] Adultery as a matrimonial "offence" provided a foundation in fault and morality. If the husband committed adultery, then his wife could seek a divorce and alimony as a remedy upon divorce. Fault worked the other way too: if the wife "misconducted herself", then her husband could seek a divorce and she would forfeit her right to alimony. Alimony remained a wife's remedy.

In its origins, fault-based alimony was not much removed from status-based alimony, as similar principles on amount and duration applied.

More modern judges and writers tried to reframe the obligation to pay alimony in contractual terms, a more objective-looking rationale that fit neatly with fault.[12] The problem was that the terms of the marriage contract had to be implied, as very few actually sign explicit contracts. The implied terms proved to be remarkably simple and general.

---

9 20 & 21 Victoria, c. 85. As Davies explains, the laws of England on divorce applied in the Territories before Alberta joined Confederation and the English laws as of July 15, 1870 were continued by the Alberta Act of 1905: *Ibid.*, Vol. I (1976) at 2. See *Board v. Board*, 1919 CarswellAlta 147, [1919] A.C. 956, [1919] U.K.P.C. 59 (Alberta P.C.).

10 *Bracklow*, above, note 3 at para. 44, *Moge*, above, note 2 at para. 74, and *Messier c. Delage*, 1983 CarswellQue 99, 1983 CarswellQue 60, [1983] 2 S.C.R. 401 (S.C.C.) at pp. 416-7 (S.C.R.).

11 This double standard was only removed in 1925: *Marriage and Divorce Act*, S.C. 1925, c. 41. Adultery was the sole ground of divorce before 1968 in all the provinces, except Nova Scotia which had included cruelty as well as adultery since 1761. Broader grounds for alimony continued to be available after judicial separation, e.g. desertion, cruelty.

12 These contractual concepts are nicely laid out, and criticised, in Ira Mark Ellman, "The Theory of Alimony", 77 Cal.L.Rev. 1 (1989), reprinted at (1989), 5 Can.Fam.L.Q. 1.

Upon marriage, the husband agreed to support the wife. If he committed adultery, i.e. clearly breached the marriage "contract", then he was required to pay his wife what she "expected" when married, i.e. support at the marital standard of living for the rest of her life. Conceptually, it was not about punishing or deterring fault, it was about breach of contract, and the consequential payment of expected damages to the wife.

On the flip side, if the wife "breached the contract", then she forfeited her claim for alimony.

In Canada, the 1968 *Divorce Act* did not completely do away with fault, retaining both fault-based and no-fault grounds in section 4.[13] Section 11 provided for an order of spousal maintenance, if the court "thinks it fit and just to do so having regard to the conduct of the parties and the condition, means and other circumstances of each of them". Thus, "conduct" and "fault" remained relevant as "factors", even if their force waned over time.[14]

The 1986 *Divorce Act* went even further, creating a single ground of divorce in s. 8, "breakdown of the marriage", and explicitly stating in s. 15.2(5) that "the court shall not take into consideration any misconduct of a spouse in relation to the marriage" when making a spousal support order.[15] In *Leskun*, Justice Binnie told us this meant: "Misconduct, as such, is off the table as a relevant consideration."[16] Off the table, but not left the building, as Binnie J. went on: "There is, of course, a distinction between the emotional *consequences* of misconduct and the misconduct itself."[17]

Fault remains an important consideration in many support laws around the world. In some European countries, fault is critical to the support outcome, e.g. Austria, Belgium, Bulgaria, Portugal, while in others it is merely a factor, e.g. England, Czech Republic, Greece, Ireland, Netherlands.[18] In about half of the American states, fault is still a factor in determining alimony, sometimes an important one.[19]

---

13 *Divorce Act*, R.S.C. 1970, c. D-8.

14 For the early case law, see Davies, *Power on Divorce*, above, note 8 at 181–85.

15 *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.).

16 *Leskun v. Leskun*, 2006 CarswellBC 1492, 2006 CarswellBC 1493, 2006 SCC 25, [2006] 1 S.C.R. 920, 34 R.F.L. (6th) 1 (S.C.C.) at para. 20.

17 *Ibid.* at para. 21 (emphasis in original).

18 Boele-Woelki, Braat and Sumner, eds., *European Family Law in Action, Volume II: Maintenance Between Former Spouses* (Antwerpen-Oxford, Intersentia, 2003), especially Question 65. The other European countries do not consider fault at all: Denmark, Finland, Germany, Hungary, Italy, Norway, Russia, Spain, Sweden, Switzerland.

19 See Ellman, "The Place of Fault in a Modern Divorce Law", 28 Ariz.St.L.J.773 (1996); Ellman, "Marriage as Contract, Opportunistic Violence and Other Bad Arguments for Fault Divorce", [1997] U.Ill.L.Rev. 719; and Spain, "The Elimination of Marital Fault in Awarding Spousal Support", 28 Wm.Mitchell L.Rev. 861 (2001). Fault continued to be important in Georgia, North Carolina, South Carolina and Virginia.

(c) Clean Break: Rehabilitation and Formal Equality

Our 1968 *Divorce Act* gave little direction on maintenance for spouses, leaving our law to be infected by popular American ideas of alimony and misplaced ideas about formal equality. Once we allowed no-fault divorce, then both spouses were expected to "move on" and make their own way in the post-separation world. Men and women were formally "equal", and very soon to be substantively "equal". Once the couple divorced and child support established, there was very little need for spousal support. Notably, the 1968 *Divorce Act* allowed either wife or husband to apply for maintenance, another symbol of formal equality.

Our law was very much affected by American ideas of "rehabilitative alimony". This form of alimony was popularised in the 1970s, notably through the proposed *Uniform Marriage and Divorce Act*. Two American authors defined the term:

> an amount of money given to a dependent spouse (usually a homemaker) following divorce for a relatively short period of time to allow that person to obtain additional education or have time to look for work to make the person financially independent.[20]

Alimony became a short-term transitional award, only until the spouse became employed, in any job. Even after long traditional marriages alimony was seen as rehabilitative in nature.

Interestingly, many early feminists supported this approach: it was seen to discourage women from staying home or developing economic dependence upon their husbands, consistent with some notions of equality. To protect herself, a wife would have to stay active in the labour market.

Canadian courts never entirely adopted the rigours of American rehabilitative alimony, but there was a similar strong emphasis upon self-sufficiency in the late "eighties and a willingness to find self-sufficiency at fairly low levels of income, as Carol Rogerson demonstrated.[21] We need only utter the words "*Pelech*" or "causal connection", to bring back bad memories of that whole era, like disco and the Village People.[22]

The 1968 *Divorce Act* continued the process of extricating fault from financial remedies, but then left little explanation for the continuance of support beyond divorce. The "clean break" philosophy may not have been able to explain why support started, but it was very clear about when it should end (when the recipient found any sort of full-time employment, or was otherwise "deemed" to be self-sufficient). Inevitably, the "clean break" approach also reduced the definition of "need", to something like entry-level employment earnings. Time-limited support also limited the demand to explain or justify the entitlement question. The "causal connection" doctrine — such as it was — required the post-divorce "need" to be

---

20 Lyle and Levy, "From Riches to Rags: Does Rehabilitative Alimony Need to be Rehabilitated?", 38 Fam.L.Q. 3 (2004-05).

21 Rogerson, "Judicial Interpretation of the Spousal and Child Support Provisions of the *Divorce Act, 1985*, Part I" (1991), 7 Can.Fam.L.Q. 155.

22 *Pelech v. Pelech*, 1987 CarswellBC 147, 1987 CarswellBC 703, [1987] 1 S.C.R. 801, 7 R.F.L. (3d) 225 (S.C.C.).

"causally connected" to the roles adopted during the marriage. This could be thought about as primitive compensatory thinking, but not really, as it was more a device to limit support for any other reason NOT connected to marriage roles.

The "clean break" idea was rejected as a general theory of spousal support by the Supreme Court of Canada in *Moge*.

3. MOGE: A COLLECTION OF COMPENSATORY IDEAS

The reasons of Justice L'Heureux-Dubé in *Moge* are a landmark in Canadian spousal support law, still, even twenty-one years later. Too many of us "think" we know what *Moge* said, and it is worth rereading the decision every few years, to be reminded of its intellectual force and sweep, especially in contrast to the law of other jurisdictions.

First, I will summarise the main holdings in *Moge*, reminding us what it did and didn't decide. Second, I will draw out its intellectual underpinnings, in three categories: (i) pure compensatory loss; (ii) the broader economic disadvantages flowing from the marriage; and (iii) the gains or economic advantages flowing from the marriage. The Court's idea of "compensation" turns out to be very broad indeed, encompassing just about every possible compensatory theory. And, as we learned later in *Bracklow*, the Court focussed upon the compensatory basis for support, but left open a parallel non-compensatory basis.

(a) The Holdings of Moge

As this is a history of ideas, I won't go over the facts, the lower court decisions or the outcome in *Moge*. A careful reading reveals a judgment that is much clearer in its negative holdings than in its positive holdings. As the amount of support was not cross-appealed by Mrs. Moge, we have little guidance on how to calculate support in a compensatory setting. We do get some general guidance on duration, as the support order is not terminated and remains "indefinite", even after 17-plus years of support.

Let's start with the clear "negative" holdings, then move to the positive ones:

(1) *Pelech* does not state a general model of spousal support.[23]

(2) The "*CPR* trilogy", if it still applies, only applies to "final settlement agreements".[24]

(3) The "clean break" or "self-sufficiency" model is not the only basis for spousal support, nor even the principal basis.[25]

(4) All four objectives of s. 15.2(6) of the *Divorce Act* must be considered and self-sufficiency is only one of several objectives.[26]

(5) The "clean break" model of support is a contributing factor to the feminisation of poverty.[27]

---

23 *Moge*, above, note 2 at paras 24–26.

24 *Ibid.* at paras. 26, 29-30.

25 *Ibid.* at paras. 34, 52-53, 64.

26 *Ibid.* at paras. 34, 52.

27 *Ibid.* at paras. 55–63.

(6) A distinction between "traditional" and "modern" marriages does not assist the support analysis.[28]

(7) Marriage *per se* does not automatically entitle a spouse to support and spousal support is "not a general tool of redistribution which is activated by the mere fact of marriage".[29]

(8) Spousal support ought to be based primarily upon a compensatory model.[30]

(9) This model compensates a spouse for the economic disadvantages and advantages that result from the roles adopted during the marriage.[31]

(10) The compensatory model finds its legislative foundation in the broad language of s. 15.2(6)(a), (b) and (c) of the *Divorce Act*.[32]

(11) The primary source of these disadvantages is the disproportionate obligations of past and future child care borne by the spouse, but there are other compensatory reasons too.[33]

(12) Courts should be careful not to underestimate the depth and duration of the economic disadvantage experienced by the recipient spouse.[34]

(13) Courts should therefore be slow to grant time-limited orders in compensatory cases based upon "deemed" self-sufficiency.[35]

(14) "[G]reat disparities in the standard of living that would be experienced by spouses in the absence of support are often a revealing indication of the economic disadvantages inherent in the role adopted by one party."[36]

(15) "As marriage should be regarded as a joint endeavour, the longer the relationship endures, the closer the economic union, the greater will be the presumptive claim to equal standards of living upon its dissolution."[37]

(16) The grounds for support are not exclusively compensatory, as is indicated by the language of s. 15.2(6)(c). Other considerations are not excluded, "particularly when dealing with sick or disabled spouses".[38]

---

28 *Ibid.* at paras. 35–41.

29 *Ibid.* at para.74.

30 *Ibid.* at paras. 65–74, 78–85.

31 *Ibid.*

32 *Ibid.* at paras. 68, 72, 81

33 *Ibid.* at paras. 79–81 and 82-83.

34 *Ibid.* at paras. 69-70.

35 *Ibid.* at paras. 54, 69, 71, 74

36 *Ibid.* at paras. 84

37 *Ibid.* at para. 84.

38 *Ibid.* at para. 75.

(17) "[T]he real dilemma in most cases relates to the ability to pay of the debtor spouse".[39]

There are a few other subordinate holdings, which I will consider in my analysis of the Court's compensatory model of support below.

The primary impact of *Moge* is nicely captured in the second sentence of Justice McLachlin at the opening of her *Bracklow* reasons: "It is now well-settled law that spouses must compensate each other for foregone careers and missed opportunities during the marriage upon the breakdown of their union."[40] And remember the comment of Boyle J. at trial in *Bracklow*, that *Moge* "requires a trial Court to look upon a marriage in the same manner as a tort claim".[41] Foregone careers and missed opportunities — losses, in compensatory analysis.

(b) Pure Compensatory Loss: The Impact of Ellman

Much of the compensatory analysis in *Moge* tracks the path-breaking 1989 article by Ira Mark Ellman, grandly titled "The Theory of Alimony" and cited more than once by Justice L'Heureux-Dubé.[42] Ellman's "Theory" remains, even today, the single most important article ever written in the history of modern spousal support. It deserves its grand title. Its logic and policy continue to be debated, even today.[43] Its compensatory thinking formed the foundation for the support recommendations of the American Law Institute's *Principles of the Law of Family Dissolution*, for which Ellman was the Chief Reporter.[44] The ALI even changed the language, to "compensatory payments". Every family law lawyer should read this article, in its original version, rather than warmed-over versions from others.[45]

Ellman's "Theory" starts by knocking down other theories attempting to explain spousal support entitlement: need, fault, contract, restitution, partnership. He then suggests that "loss" rather than "need" should be the foundation of any mod-

39 *Ibid.* at para. 76.

40 *Bracklow*, above, note 3 at para. 1.

41 *Bracklow v. Bracklow*, 1995 CarswellBC 86, 13 R.F.L. (4th) 184, [1995] B.C.J. No. 457 (B.C. S.C.); affirmed 1997 CarswellBC 1208 (B.C. C.A.); reversed 1999 CarswellBC 532, 1999 CarswellBC 533 (S.C.C.) at para. 24. His comment was held not an error on appeal, on the doubtful basis that he was speaking to the issue of causation and "causal connection": *Bracklow v. Bracklow*, 1997 CarswellBC 1208, 30 R.F.L. (4th) 313, [1997] B.C.J. No. 1376 (B.C. C.A.) per Proudfoot J.A.

42 *Moge*, above, note 2 at paras. 65, 91.

43 Most recently, for example, in Starnes, "Alimony Theory", 45 F.L.Q. 271 (2011).

44 American Law Institute, *Principles of the Law of Family Dissolution: Analysis and Recommendations* (2002). The Principles were adopted by the ALI in 2000. Various drafts and final drafts circulated during the late "nineties.

45 Ellman, "The Theory of Alimony", 77 Cal.L.Rev. 1 (1989), reprinted in (1989), 5 Can.Fam.L.Q. 1. All references are to the original California Law Review version. A companion article responds to some criticisms and further develops the "Theory" in Ellman, "Should *The Theory of Alimony* Include Non-Financial Losses and Motivations?", [1991] Brigham Young L.Rev. 259. The latter also includes a brief summary of the "Theory" at pages 261–6.

ern theory of spousal support. In his view, "need" was "invoked by courts largely as a conclusion rather than an explanation".[46]

At the end of the marriage, one spouse — usually the wife — is left with a reduction in her earning capacity compared to that which she would have had if she had not married. The post-separation reduction of earning capacity reflects that spouse's "marital investments" in child care, homemaking, moves to accommodate the other spouse's career, etc. During the marriage, these investments result in greater over-all utility for the family. If there were no alimony, then all these losses would fall upon the one spouse.

The purpose of alimony is to remove financial disincentives to this optimal "marital sharing behaviour" during the marriage, by reallocating those losses after marriage breakdown. The measure of alimony is the amount of money required to put the recipient spouse back in the position she or he would have been, had the spouse not made the marital investments and had the spouse remained in the paid labour market in full-time employment.

Ellman then states a series of principles and rules:[47]

> Principle One: A spouse is entitled to alimony only when he or she has made a marital investment resulting in a post-marriage reduction in earning capacity.
>
> Rule 1.1: There is no compensation on divorce for the lost opportunity to have chosen a different spouse, or for the non-financial losses arising from the failed marriage.
>
> Principle Two: Except as provided in Principle Three, only financially rational sharing behaviour qualifies as marital investment giving rise to a compensable loss in earning capacity.
>
> Rule 2.1: A loss of earning capacity incurred to accommodate a spouse's lifestyle preferences, yielding a reduction in aggregate marital income, is not compensable.
>
> Rule 2.2: The claimant spouse is ordinarily entitled to recover the full value of her lost earning capacity. Where, however, no increase in marital income in fact resulted from her marital investment, she has no claim under Principles One and Two.
>
> Principle Three: Notwithstanding Principle Two and Rule 2.2, the homemaker spouse may claim half the value of her lost earning capacity, even though it exceeds the market value of her domestic services, when these services included primary responsibility for the care of children.

A few notes are in order. Principle One requires that the investment be made during the marriage. Any pre-marital career decisions are not taken into account by this "pure theory" of compensation. Here we see the source of the argument that is frequently made by payors: "she was a secretary when we met, and she can go back

---

46 Ellman, "Inventing Family Law", 32 U.C.Davis L.Rev. 855 (1999) at 878.

47 These principles and rules are stated and explained in "Theory", above, note 45 at 53–73.

to being a secretary now, twenty-five years later, so no loss and no entitlement". This hard edge was sanded off by *Moge*.

Only financial losses are considered. A homemaker in a childless marriage will have no automatic claim for lost earning capacity, as the investment was not "financially rational". Losses resulting from the care of children are not "financially rational", but the "Theory" makes it a compensable loss because parental care is valued in our culture.

Ellman acknowledges that his measure of "loss" will generate a different set of claims and entitlements than would "need". If the spouse suffered no "loss" by reason of the roles adopted during the marriage, then there would be no claim for support, despite "need". The most graphic example would be the homemaker spouse in a childless marriage. Another would be a spouse with few skills at the time of marriage. At the end of his article, Ellman flags "three false problems", and his answers:[48]

> (1) Shouldn't the divorced custodial mother who stays home to care for young children be entitled to alimony on that basis alone? No, Ellman says, on his theory, any such amount should be included in "child support", if it's based on the child's needs. [No actual child support formula I know does this, but, hey, this is pure theory.]
>
> (2) Shouldn't the standard of living during the marriage, and the length of the marriage, influence the amount of alimony? No, he says again. The measure is the spouse's loss of earning capacity in the paid labour market. That loss may increase with the length of the marriage, but a long marriage with two earning spouses will not generate a claim. And, says Ellman, the marital standard of living is not directly relevant under the "Theory", although one spouse may sometimes be more likely to sacrifice earning capacity where the other spouse earns a higher income.
>
> (3) Shouldn't wives without talent get more support than those with talent? Again, his answer is no. A "talented" wife will have a larger loss and thus a larger claim. An "untalented" wife will get less, which seems unfair given our views of "need". Needs-based support gives a larger claim to the recipient where the former spouse has more means, e.g. more for the doctor's wife than for the factory worker's wife, "hardly an egalitarian result", says Ellman.

The real problem is the difficulty of calculating the loss, assessing what "might have been" the career and employment path of the recipient spouse. Ellman acknowledges this problem, but points out that the law often has to engage in somewhat speculative damage assessments. Better to ask the right questions, he says, in a passage quoted in *Moge*, including these lines:

> The difficulties involved in proving lost earning capacity are significant but not fatal. 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.[49]

---

48 *Ibid.*, 74–77.

49 *Ibid.*, 79, quoted as part of the longer passage at para. 91 of *Moge*, above, note 2.

Ellman's "Theory" provided an objective, defensible explanation why one spouse was required to pay spousal support to the other spouse after marriage in a no-fault system. His work has been criticised as too amoral and economistic,[50] gender-biased and driving wives back to the home,[51] too focussed on loss and insufficiently upon benefit to the other spouse,[52] or all of the above.[53] Despite all these criticisms, Ellman's "Theory of Alimony" has survived, by the sheer force of his arguments. [Bias alert: my background is in economics.]

It has proven to be more powerful as a theory of entitlement, less so on issues of amount or duration. As *Moge* points out, family litigants cannot afford the expert economic evidence it would require. Some hypothetical career paths are easier to determine than others, e.g. nurses or teachers with clear salary scales. Even then, the calculations are difficult. Courts quickly fell back on "needs-and-means" analysis, based upon budgets and incomes at the end of the marriage, to implement the compensatory approach, as Carol Rogerson demonstrated.[54] In some cases, courts could solve the problem by providing support to a spouse to "make" the career that she or he did not acquire, even though that just looked like a generous form of rehabilitative support. We will return to quantification issues below.

In practical terms, it is fairly easy to identify entitlement based upon Ellman's pure notion of compensatory loss. We look for the following primary markers of loss:

> (a) a spouse stays home full-time or part-time to care for children, while the other spouse maintains full-time employment;
>
> (b) a spouse takes a less-demanding full-time job that permits her or him to assume greater responsibility for child care;
>
> (c) a spouse relocates to further the career or employment of the other spouse, thereby disrupting or modifying her or his own employment;
>
> (d) a spouse earns income in order to support the other spouse while he or she completes education, training or other qualifications to improve income.

You will notice that some familiar markers of loss are missing from this list. Read on.

(c) Economic Disadvantage: A Broader View of Loss

Moge borrowed ideas from Ellman, but Justice L'Heureux-Dubé had a broader agenda to increase spousal support to women. The pure theory of compensation

---

50 Schneider, "Rethinking Alimony: Marital Decisions and Moral Discourse", [1991] B.Y.U. L.Rev. 197, answered by Ellman in his "Nonfinancial Loss" paper, above, note 43.

51 Carbone, "Economics, Feminism and the Reinvention of Alimony: A Reply to Ira Ellman", 43 Vanderbilt L.Rev. 1463 (1991).

52 Williams, "Is Coverture Dead? Beyond a New Theory of Alimony", 82 Georgetown L.J. 2227 (1994).

53 Singer, "Alimony and Efficiency: The Gendered Costs and Benefits of the Economic Justification for Alimony", 82 Georgetown L.J.2423 (1994).

54 Rogerson, "Spousal Support After *Moge*" (1994), 14 Can.Fam.L.Q. 281.

meant that women without "need" could still prove a "loss" — think of a tax lawyer who stays home with the kids and then returns to active practice. Under Ellman's "Theory", however, there were alimony losers as well as winners, thanks to his hard-edged analysis.

Not so in Justice L'Heureux-Dubé's broader view of "disadvantage". First, the wife who did not acquire marketable skills before marriage, precisely because she intended to be home with children and to make that substantial marital investment got left out in the cold by Ellman, although with some unease. She had not "sacrificed" much by leaving the paid labour market. *Moge* does not separate out this group in its analysis of sacrifice, focussing instead upon the division of function and the non-monetary work at home by the spouse.[55]

Second, L'Heureux-Dubé J. recognises that the post-separation demands of parenting are recognised by s. 15.2(6)(b), which in turn provides a statutory recognition that our child support only compensates for the direct costs of child-rearing, and not the indirect costs imposed upon the primary parent after separation.[56] Keep in mind that Ellman left out this group, based upon his theoretical view that such indirect costs should be reflected in child support. That academic view is not reflected in reality, and our Supreme Court properly treats this as an "economic disadvantage" or "loss" that can justify a spousal support claim.

For shorter marriages, with very young children at separation, most of the compensatory "loss" described by Ellman occurs, not during the marriage, but after separation. Take my favourite example, the young mother with twins aged two, who separates after three years of marriage and is almost entirely responsible for their care. Most of her "loss" is not in the past three years, but in the sixteen or seventeen years still to come.

Third is a more dubious category of "disadvantage" suggested by Justice L'Heureux-Dubé, where "even in childless marriages, couples may also decide one spouse will remain at home".[57] This is not compensatory support and the Court is in error to throw this into the middle of a compensatory analysis. Maybe non-compensatory, maybe even contractual, but not compensatory.

So, from *Moge*, we can add two additional markers of "disadvantage" flowing from the marriage roles:

> (a) a spouse enters a relationship before acquiring much in the way of labour market skills and then is home full-time or part-time, or structures her or his employment around the demands of child care;
>
> (b) a spouse is primarily responsible for the care of children after separation.

Both of these can be seen as modest and justifiable extensions of the "pure theory" of "loss" espoused by Ellman.

---

55 *Moge*, above, note 2 at para. 70.

56 *Ibid.* at paras. 72, 81.

57 *Ibid.* at para. 82.

(d) Economic Advantage or Benefit: Restitution

Justice L'Heureux-Dubé does not stop at "loss" or "disadvantage" in her analysis. Here and there the notion of "gain" or "benefit" or "economic advantage" to the payor spouse appears. At one point, there is a reference to the economic disadvantages of marriage for one spouse "while the other spouse reaps its economic advantages".[58] In the next paragraph, after discussing the wife's sacrifices:

> These same sacrifices may also enhance the earning potential of the other spouse (usually the husband) who, because his wife is tending to such matters, is free to pursue his economic goals. . . . In effect, she is left with a diminished earning capacity and may have conferred upon her husband an embellished one.[59]

And it comes up again, inevitably, in a discussion of contribution to the payor's career:

> A spouse may contribute to the operation of a business, typically through the provision of secretarial, entertainment or bookkeeping services, or may take on increased domestic and financial responsibilities that enable the other to pursue licenses, degrees or other training and education. . . . To the extent that these activities have not already been compensated for pursuant to the division of assets, they are factors that should be considered in granting spousal support.[60]

I know I'm parsing phrases here, but note the use of the language "may" each time in these passages. In this last quote, property statutes can compensate the business contribution, but that avenue is often not available in the latter "career asset" situation.

Let's take the latter situation. We are here talking about a *Caratun* set of facts: the wife supports the husband to get his professional licence, his career asset, and then he dumps her.[61] The licence can't be divided as property and the return to that asset will come in future, via a rising income for the husband. At this point, we can identify two theories of entitlement, with two resulting measures of quantum. First, we can treat this as a case of "loss", what the Americans call "reimbursement alimony". The wife should be paid spousal support to compensate her for her loss, measured by the income she devoted to supporting him rather than herself or her own career. Her loss is measured against her income earning ability, as Ellman would have it. Contrast the second approach: the wife made a significant contribution to his career at a critical time and she should be rewarded by a portion of his "gain" or "economic advantage". The wife is more like a venture capitalist. The measure should be a share of *his* increased income over time.

Some have described this approach as one of "restitution", using unjust enrichment language to convey its focus upon "contribution". But concepts of contri-

---

58 *Ibid.* at para. 69.

59 *Ibid.* at para. 70.

60 *Ibid.* at para. 83.

61 *Caratun v. Caratun*, 1992 CarswellOnt 287, 10 O.R. (3d) 385, 42 R.F.L. (3d) 113, [1992] O.J. No. 1982 (Ont. C.A.); leave to appeal refused (1993), 46 R.F.L. (3d) 314 (note).

bution take us into the idea of "causation", dangerous ground. Did the wife's support of the husband "cause" him to acquire his professional licence? Or would he have obtained that licence anyway? We are now a long way from "loss" and the removal of disincentives to marital sharing behaviour. The second approach looks more like a contractual approach, where the professional husband is seen as violating some unspoken agreement, with the wife entitled to recover expectation damages. I leave aside the possible "fault" reading of this situation.

It is also right after this business/licence paragraph that L'Heureux-Dubé J. notes the marital standard of living is "far from irrelevant to support entitlement" and characterises marriage as "a joint endeavour".[62] By now, the judgment has wandered into even more dangerous ground, far from its compensatory home, into the underbrush and tangles of partnership and income-sharing. *Bracklow* went into that same wild territory, got lost and wandered aimlessly.

4. BRACKLOW: A CONFUSION OF NON-COMPENSATORY IDEAS

The Canadian story of "Spousal Support After *Moge*" is brilliantly told by Carol Rogerson in her 1996 article of that name, so I won't retrace the same ground here.[63] But I will quote a long excerpt from her conclusion:

> The landscape of spousal support post-Moge is both radically transformed and strikingly familiar. *Moge* has clearly reversed the trend toward minimalist spousal support awards that took hold with the first wave of modern family law reform. Spousal support awards post-*Moge* are more generous than they were in the past: more spouses are entitled to support and awards are, in general, for longer periods of time and higher amounts. Women who have remained out of the labour force for significant periods of time during marriage can now expect judicial recognition of the long-term economic consequences they will carry with them after marriage breakdown.
>
> Yet from another perspective the current landscape of spousal support is a familiar one. Despite the gloss of a compensatory analysis, the expanded role of spousal support post-*Moge* appears to be driven, in large part, by a concern with responding to post-divorce need and preventing post-divorce poverty, rather than by principles of providing fair compensation to women for their unpaid labour in the home and providing for the equitable sharing between the spouses of the economic consequences of the marriage. Although there are exceptions, many lawyers and judges continue to feel more comfortable with a traditional understanding of spousal support as a private scheme of income security rather than with a compensatory model, and continue to rely upon the conventional concept of need (and its corollary, self-sufficiency) to structure and give content to the compensatory principle. As a result, it is those spouses who demonstrate the greatest economic need and who will experience the greatest economic hardship after marriage breakdown — whether by reason of age, illness, lack of skills, or a poor economy — who are viewed as the most sympathetic candidates for spousal support, while those who have youth, good health, and employability in their

62 *Moge*, above, note 2 at para. 84.

63 Above, note 54.

> favour are seen as self-sufficient economic actors, despite their past and ongoing responsibilities for the care of children.

Moge was focussed upon compensatory support as the primary basis for spousal support in Canadian law, but it left open the scope of non-compensatory entitlement to support, as I have noted above. The entitlement question in *Bracklow* was actually a narrow one, posed in its first sentence: "What duty does a healthy spouse owe a sick one when the marriage collapses?"

That is certainly the classic "hard case" for non-compensatory theory, even noted in *Moge.* There was no compensatory claim in *Bracklow*. It was a pure non-compensatory case. But the illness and disability facts led to a broad, confusing and mostly unhelpful discussion of marriage, interdependence and support. And, in the end, the Court never clearly answered its opening question.[64] Initial entitlement, yes, but maybe not any longer.

(a) The Ratios of Bracklow

Before looking for theoretical antecedents for *Bracklow*, I will first set out, as best as I can the ratios that can be isolated from the reasons. Every family law lawyer has quoted one of these, either for a claimant or a payor, as there's something for everyone in *Bracklow*.[65]

> (1) Compensation is now "the main reason for support", but not the sole basis for support.[66]
>
> (2) There are three conceptual bases for entitlement to spousal support: (i) compensatory, (ii) contractual, and (iii) non-compensatory.[67]
>
> (3) "It is now well-settled law that spouses must compensate each other for foregone careers and missed opportunities during the marriage upon the breakdown of their union."[68]
>
> (4) Marriage per se does not create an obligation to pay spousal support, but the obligation may flow "from the marriage relationship itself".[69]
>
> (5) "But where need is established that is not met on a compensatory or contractual basis, the fundamental marital obligation may play a vital role," revived from its underlying "dormant" state.[70]

---

64 In its "issue" section, the issue was phrased even more broadly, at para. 13: "Is a sick or disabled spouse entitled to spousal support when a marriage ends, and if so, when and how much?" This version incorporates quantum as well as entitlement, but none of the quantum questions were answered either.

65 This list of ratios is adopted from a list in my earlier article, "Rules and Rulelessness in Family Law: Recent Developments, Legislative and Judicial" (2000), 18 Can.Fam.L.Q. 25.

66 *Bracklow*, above, note 3 at para. 49.

67 *Ibid.*

68 *Ibid.* at para. 1.

69 *Ibid.* at para. 44.

70 *Ibid.* at para. 49.

> (6) Section 15.2(6)(c) of the *Divorce Act* refers to "economic hardship . . . arising from the breakdown of the marriage", which is capable of encompassing "the mere fact that a person who formerly enjoyed inter-spousal entitlement to support now finds herself or himself without it".[71] "Need alone may be enough" to establish entitlement to support.[72]
>
> (7) A spouse's lack of self-sufficiency may be related to compensatory disadvantage, or "it may also arise from completely different sources, like the disappearance of the kind of work the spouse was trained to do (a career shift having nothing to do with the marriage or its breakdown) or, as in this case, ill-health".[73]
>
> (8) "The same factors that go to entitlement have an impact on quantum", which includes both amount and duration.[74]
>
> (9) "It does not follow from the fact that need serves as the predicate for support that the quantum of support must always equal the amount of the need." Amount and duration can be inter-related, with a modest amount for an indefinite duration or a substantial lump-sum payment.[75]
>
> (10) "Marriage, while it may not prove to be 'till death do us part', is a serious commitment not to be undertaken lightly. It involves the potential for lifelong obligation. There are no magical cut-off dates."[76]

In setting out these ratios, I have largely ignored the extended discussion in *Bracklow* of the "models of marriage", both "independent" and "interdependent, or mutual obligation" models. That part is very confusing.[77]

Bracklow has been heavily-criticised, and I won't add to that here.[78] Notable for our purposes, however, is the relative absence from the judgment of any supporting case law or academic writing on non-compensatory support, in stark contrast to *Moge*.[79] It will therefore be my task to interpolate the academic writing, but it's not easy.

---

71 *Ibid.* at para. 41.

72 *Ibid.* at para. 43.

73 *Ibid.* at para. 42.

74 *Ibid.* at para. 50.

75 *Ibid.* at para. 54.

76 *Ibid.* at para. 57.

77 Not even Carol Rogerson could make sense out of this discussion. See her article, "Spousal Support Post-*Bracklow*: The Pendulum Swings Again?" (2001), 19 Can.Fam.L.Q. 185.

78 See the comments of Rogerson, *Ibid.* and Thompson, "Everything Is Broken: No More Spousal Support Principles?" in C.L.E. Society of B.C., *Family Law Conference* (Vancouver, July 12-13, 2001).

79 Carol Rogerson's earlier articles get cited, plus a quote from a Report of the Scottish Law Commission, and just two, count "em, two lower court cases.

(b) What Contractual Basis?

One of the many mysteries of *Bracklow* is that third basis of support, the contractual basis. There are references to "agreements" in the relevant statutory provisions. In theory, it is possible for spouses to create an obligation of spousal support in an express contract. In practice, most domestic contracts attempt to limit or to waive any support obligation. McLachlin J. may be intending to refer to implied contracts, but even that is not clear. We will focus here on the non-compensatory basis.

(c) Income-Sharing Theories: Merger Over Time and Other Ideas

Of all the academic theories of income-sharing,[80] the one that most closely approximates the language and intent of *Bracklow* would be that of "merger over time", found in the work of Steven Sugarman.[81] With this idea, Sugarman saw "spouses as merging into each other over time", as "the longer they are married, the more their human capital should be seen as intertwined". Over time, it becomes harder and harder to "distinguish between what was brought into the marriage and what was produced by the marriage".[82] That idea could generate a formula, he wrote, "a percentage interest in the other's human capital/future earnings based upon the duration of the marriage", like "a 1.5 percent or 2 percent interest in other for every year together" to a ceiling such as 40 per cent.[83] Sugarman's idea eventually made its way into the ALI's compensatory payments regime and its "marital duration" claim.[84]

Sugarman's idea was just that, an idea, a couple of pages in a longer article. His idea was just one of many income-sharing theories of spousal support. Prof. Rogerson divides income-sharing theories into three groups in her SSAG *Background Paper*:

> (a) sharing of marital gains, compensation for contributions and advantages, marital partnership;
>
> (b) recognizing marital interdependency, transition payments, marriage as community, merger over time;
>
> (c) parental partnership, children-first, equalization of living standards.

The first group of theories reflect notions of contribution and partnership, treating the payor's income as an "asset", subject to sharing much like property and, much like property, starting from equal sharing.[85] Some of this ground was

---

80 Many of these theories are reviewed in Rogerson, *Developing Spousal Support Guidelines in Canada: Beginning the Discussion* (Background Paper, Justice Canada, December 2002).

81 Sugarman, "Dividing Financial Interests Upon Divorce" in Sugarman and Kay, eds., *Divorce Reform at the Crossroads* (New Haven: Yale University Press, 1990), Chapter 5 at 130.

82 *Ibid.* at 159-60.

83 *Ibid.* at 160.

84 ALI, *Principles*, above, note 44.

85 E.g. Singer, "Divorce Reform and Gender Justice", 67 N.C.L.Rev. 1103 (1989); Starnes, "Divorce, and the Displaced Homemaker: A Discourse on Playing with Dolls,

covered above, in the division of economic gains under the compensatory theory, but this approach is much broader. The second group is typified by Sugarman, Ellis and others who were critical of Ellman's economistic approach.[86] The third group involves a mix of compensatory and standard-of-living concerns, with the latter predominant.[87]

In the end, the *Bracklow* decision is so "anti-theoretical", that it is impossible to find much help in this large income-sharing literature. Sugarman is the closest match, but that's all.

(d) Basic Social Obligation: Public vs. Private Welfare

This isn't really a theory, but a long-standing public policy, one given much play in *Bracklow* and mangled badly there. The policy dates back to the English Poor Laws of 1601 and even earlier. Spousal support is required where the alternative would mean the impoverished spouse wound up on the public dole. The family has primary responsibility, with state support a last resort. At one point, support obligations were extended to ascending and descending relations, as well as spouses.[88] Now, as a matter of law, a spouse who seeks social assistance will be required to sue for spousal support, whether or not she or he has any real claim and, of course, any support obtained will be deducted dollar-for-dollar from the assistance obtained.[89]

In her work, Rogerson confined the "basic social obligation" to a narrow range of cases, providing a subsistence income to avoid hardship.[90] Conceptually, it is hard to explain, given its apparent reliance upon status for the support obligation.

The public policy was recognised in *Moge* in its brief reference to non-compensatory support under s. 15.2(6)(c) of the *Divorce Act*, that it "may embrace the notion that the primary burden of spousal support should fall on family members not the state".[91] In *Bracklow*, unfortunately, the phrase "basic social obligation" is misunderstood and misapplied. The phrase was treated as if it covered the whole

---

Partnership Buyouts, and Dissociation Under No-Fault", 60 U.Chic.L.Rev. 67; Collins, "The Theory of Alimony Residuals: Applying an Income Adjustment Calculus to the Enigma of Alimony", 24 Harv. Women's L.J. 23 (2001).

86 E.g. Ellis, "New Rules for Divorce: Transition Payments", 32 U. Louisville J. of Fam.L. 601 (1993-94); Sugarman, above, note 81 (he also had a "fair notice" model).

87 E.g. Carbone, "Income Sharing: Redefining the Family in Terms of Community", 31 Houston L.Rev. 359 (1994); Williams, "Is Coverture Dead? Beyond a New Theory of Alimony", 82 Georgetown L.Rev. 2227 (1994); Estin, "Maintenance, Alimony and the Rehabilitation of Family Care", 71 N.C.L.Rev. 721 (1993); Rutherford, "Duty in Divorce: Shared Income as a Path to Equality", 58 Fordham L.Rev. 539 (1990).

88 ten Broek, "California's Dual System of Family Law: Its Origins, Development, and Present Status", 16 Stanford L.Rev. 257 (1964), 16 Stanford L.Rev. 900 (1964), 17 Stanford L.Rev. 614 (1996).

89 Thompson, "'Getting Blood From a Stone' or How to Find Ability to Pay When There Isn't Any" (1994), 12 Can.Fam.L.Q. 117, and Thompson, "Who Wants to Avoid the Guidelines? Contracting Out and Around" (2001), 19 Can.Fam.L.Q. 1.

90 See her brief discussion in the *Background Paper*, above, note 80 at 29-30.

91 *Moge*, above, note 2 at para. 75.

"income security", status-based model elaborated by Rogerson rather than a distinct sub-category.[92] Later in the reasons, "basic social obligation" morphed into "mutual obligation",[93] which became identified with the broad non-compensatory basis for support. In turn, McLachlin J. identified "certain policy ends and social values" for non-compensatory support, including:

> Finally, it places 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, recognizing the potential injustice of foisting a helpless former partner onto the public assistance rolls.[94]

Bracklow might have fashioned a narrow range of cases where non-compensatory support could supplement compensatory support. The Court might have focussed its analysis carefully upon the illness or disability situation, and given a clear answer on entitlement, amount and duration, but it didn't. The Court might also have identified and circumscribed this "basic social obligation" idea of support, but it didn't. There is much overlap between these two difficult categories of cases. Instead, the Court chose to create a broad and shapeless entitlement to spousal support and, to make things worse, pushed all the hard issues into amount and duration.

There is an alternative view, or rather the effect of a narrower view of support entitlement. A spouse who cannot obtain spousal support will have to find a job of some kind and, if not, then look to friends and family for help, or to social assistance as a last resort. Think of Mrs. Pelech, who was on social assistance and sought to re-open her final settlement agreement. When unsuccessful, that's where she was left.

(e) The Markers of Non-Compensatory Entitlement After Bracklow

As I did with compensatory support, it is useful to flag the markers of non-compensatory entitlement, even if they are quite broad and require the exercise of considerable discretion on amount and duration:

(a) length of marriage or relationship

(b) drop in standard of living after separation, measured against the marital standard

(c) economic hardship or need.

As Justice McLachlin reminded us, we are not to "fix on one factor to the exclusion of others". Mr. Bracklow had argued that the Court should only look at length of marriage as a measure of interdependency.[95] Thus, these variables are just "markers", with some inquiry into interdependency required. There is, however, "the presumption of intra-marital support that may fairly be imputed to married couples,

---

92 *Bracklow*, above, note 3 at paras. 23, 25.

93 *Ibid.* at para. 27.

94 *Ibid.* at para. 31.

95 *Ibid.* at paras. 52-53.

absent contrary indications", a presumption which the trial judge in *Bracklow* had wrongly turned on its head.[96]

The discussion of "need" in *Bracklow* emphasises the loss of the marital standard of living, so that need is a relative concept, not an absolute one. But raw need is also a consideration, or "hardship" under s. 15.2(6)(c), hence their inclusion above. In applying her abstract analysis to the facts, Justice McLachlin noted a number of factors in a single, more concrete sentence:

> I conclude that Mrs. Bracklow is eligible for support based on the length of cohabitation, the hardship marriage imposed on her, her palpable need, and Mr. Bracklow's ability to pay.[97]

Before and after this pithy sentence, McLachlin J. also flagged some other related factors:

- the shift from independence to interdependence during their relationship;
- seven years of cohabitation, not long, but not very short;
- the wife fully contributed to the family when she was self-sufficient;
- "it would be unjust and contrary to the objectives of the statutes for Mrs. Bracklow to be cast aside as ineligible for support, and for Mr. Bracklow to assume none of the state's burden to care for his ex-wife."[98]

The compensatory and non-compensatory rationales are cumulative, not alternative. In cases involving children, for example, the compensatory claim will usually dominate. Over time, however, as the children grow older and the recipient returns to the labour market, the compensatory rationale may subside and, in a medium to long marriage case, there may remain some non-compensatory basis for support. Or a recipient with a weak compensatory claim may become ill and unable to work, and the non-compensatory claim will then come to the fore. *Bracklow* is clear that the "mutual obligation" model may lie "dormant", but is still available.

Eventually, the difficulties created by *Bracklow* led to the Spousal Support Advisory Guidelines. Before we get there, we have to take a quick look at Supreme Court of Canada spousal support cases after 1999, to see if any of them add to our Canadian "theory" of support.

5. FOUR SUPREME COURT SUPPORT CASES, BUT NO ADDED VALUE

Between 1999 and 2013, the Supreme Court of Canada heard and decided four more spousal support cases, but none of them added much to *Moge* and *Bracklow*. A few quick comments about each might serve as reminders. If there is any theme to the subsequent cases, it is a failure to apply compensatory logic and a lapse back into old ideas about spousal support.

(a) Miglin, 2003

Miglin is about final settlement agreements that include time-limited spousal support provisions and a court's powers to order support in the face of such an

96 *Ibid.* at para. 58.

97 *Ibid.* at para. 60.

98 *Ibid.* at paras. 59-60.

agreement.[99] The best review of the subsequent *Miglin* case law is the recent article by Carol Rogerson, "Spousal Support Agreements and the Legacy of Miglin".[100]

Under the terms of the agreement, Ms. Miglin received spousal support for five years, after a fourteen-year marriage and four children. During the marriage, the Miglins operated a tourist lodge together and, after separation, the husband continued to operate the business while the wife was home with the children and did not work. Through Bastarache and Arbour JJ., the majority upheld the separation agreement support in the face of the wife's challenge. Included was this astonishing statement from the majority:

> During the marriage, Ms. Miglin continued her education (obtaining her B.A.), earned a salary and obtained work experience; a case was therefore not made out for compensatory support.[101]

The majority was much moved by the wife's unwillingness to work, too much so, as it blinded them to the reality of her situation even if she was prepared to work.

Now, I know that the majority are straining to uphold the agreement, but that is still an ingenuous reading of compensatory support, a reading heavily criticised by Justice LeBel in dissent.[102] In his view, Ms. Miglin emerged from the marriage with work experience only in the family business, as part of a marriage-specific partnership with her husband in which child care took priority over her work in the business. As LeBel J. noted, even within the business, her responsibilities in the business were focussed on administrative and housekeeping tasks, with the husband handling the management and finances. Ms. Miglin did not have the work experience of a manager in the hospitality industry, but a very specific set of skills in a specific business with her husband, leaving her "more vulnerable economically" at the end of the marriage than if she worked outside the family business.

The majority analysis is very disappointing, but that of the minority offers another possible marker for compensatory support, a "loss" that even Ellman would recognise:

> a spouse works in the family business, acquiring skills specific to that business and of less general use outside of the business, resulting in a loss compared to where she or he would have been if she or he had pursued a career or employment outside the business.

(b) Leskun, 2006

We have already considered *Leskun* for its best-known point, the place of misconduct or fault in support analysis.[103] *Leskun* made three other important points in support law, but we are only interested in one of them. We will put aside its com-

---

99 *Miglin v. Miglin*, 2003 CarswellOnt 1374, 2003 CarswellOnt 1375, 2003 SCC 24, [2003] 1 S.C.R. 303, 34 R.F.L. (5th) 255 (S.C.C.). See Rogerson's comment on the decision: "'They Are Agreements Nonetheless,' Case Comment on *Miglin v. Miglin*" (2003), 20 Can.J.Fam.L. 197.

100 (2012), 31 Can.Fam.L.Q. 13.

101 *Miglin*, above, note 99 at para. 98.

102 *Ibid.* at paras. 247–254.

103 *Leskun*, above, note 16.

ments on review orders and on the treatment of capital acquired after separation in support determination. Our interest here is the comment of Justice Binnie about self-sufficiency. The husband's lawyer argued an extreme version of self-sufficiency, as a "duty" which could lead to forfeiture of support. Binnie J. responded: "Failure to achieve self-sufficiency is not breach of 'a duty' and is simply one factor amongst others to be taken into account."[104]

(c) L.M.P. v. L.S., R.P. v. R.C., 2011

These two Quebec appeals centred upon the definition of "material change" for variation under s. 17 of the *Divorce Act*.[105] No material change was found in either case, which limited the Court's analysis of the specifics of spousal support. Both support orders could be seen as a mix of compensatory and non-compensatory rationales. The wife in *L.M.P.* was disabled with multiple sclerosis and unable to continue working, but also had primary care of the two teenage children. The couple in *R.P.* separated many years earlier in 1974 after a 16-year marriage and two children, but the wife had been a homemaker and continued to need support at age 80. Nothing was said by the majority or the minority in either case about the basis for support, odd given that both were cases where lower courts had terminated support, i.e. no continuing entitlement.[106]

(d) Eric and Lola, Common-Law Support, 2013

Last in this quartet of support cases is *Quebec (Attorney General) v. A.*, the Quebec common-law case, better known in the media as the "Eric and Lola" case.[107] Lola was challenging the exclusion of common-law partners, known as *de facto* spouses in Quebec, from Quebec's matrimonial property laws and from its spousal support law. Quebec is unique in Canada in denying access to the support remedy for a common-law spouse. The Court found her exclusion from property remedies to be constitutional, by an 8-1 margin, but the ruling on exclusion from support was a close call, with a bare 5-4 majority. There are four separate sets of reasons. A four-judge plurality speaking through LeBel J. found no discrimination

---

104 *Ibid.* at para. 27.

105 *Droit de la famille — 091889*, 2011 SCC 64, 2011 CarswellQue 13698, 2011 CarswellQue 13699, (sub nom. *L.M.P. v. L.S.)* [2011] 3 S.C.R. 775, 6 R.F.L. (7th) 1 (S.C.C.); *Droit de la famille — 09668*, 2011 SCC 65, 2011 CarswellQue 13700, 2011 CarswellQue 13701, (sub nom. *R.P. v. R.C.)* [2011] 3 S.C.R. 819, 6 R.F.L. (7th) 68 (S.C.C.). For a broader discussion of the issues in the cases, see Thompson, "Annotation: *Droit de la famille — 091889* and *Droit de la famille — 09668*" (2012), 6 R.F.L. (7th) 97. For a review of the law on variation and review generally, including these two Supreme Court decisions, see Thompson, "To Vary, To Review, Perchance to Change: Changing Spousal Support" (2012), 31 Can.Fam.L.Q. 355.

106 Even odder, given that both the majority and the minority found time to talk extensively about final settlement agreements and *Miglin*, although nothing in the facts raised those issues.

107 2013 SCC 5, 2013 CarswellQue 113, 2013 CarswellQue 114, 21 R.F.L. (7th) 1, [2013] S.C.J. No. 5 (S.C.C.). For the broader issues in the case, see Thompson, "Annotation: *Droit de la famille — 091768*" (2013), 21 R.F.L. (7th) 325.

under s. 15 on either the property or the support front. They were joined by the Chief Justice, in an elliptical judgment that found discrimination on both, but justifiable under s. 1 of the *Charter*. At the other end, in lonely dissent, Justice Abella found both exclusions discriminatory and not justified. Joining her on support were three more judges, through Deschamps J., holding that the property exclusion was justified under s. 1, but not the support exclusion.

The support analysis was surprisingly poor. For some reason, the three main judgments all emphasised need and non-compensatory support, despite the presence of children in more than 50 per cent of common-law relationships. On the facts of this unusual case, Lola's lack of market skills after a 7–10 year relationship and her primary care of three young children would suggest a compensatory rationale for spousal support, if she ever got that far. Admittedly, she was receiving huge child support and special expenses from the wealthy Eric.

Justice LeBel saw the mutual obligation of non-compensatory spousal support as wrapped up in the "mandatory primary regime" of property and support laws. Justice Deschamps also focussed entirely upon non-compensatory support, in her dissenting reasons on the support issue. Even Justice Abella went on about "need" and "dependency", the better to emphasise her overall theme of property and support laws as "protective", to protect the "economically vulnerable spouse".

As I say in my "Annotation", a compensatory rationale for support would have fortified the constitutional conclusions of the minority. I can understand why the four-judge plurality of LeBel J. wanted to ignore compensatory support, but the minority had no such excuse. The impoverished support analysis is a disappointment, but consistent with the Court's utter failure to consider the place of children in their adults-only universe of common-law couples.

6. THE SPOUSAL SUPPORT ADVISORY GUIDELINES: THEIR IMPACT UPON ENTITLEMENT

The Spousal Support Advisory Guidelines were developed to provide guidance on the amount and duration of spousal support, but only *after* the threshold entitlement issue has been resolved, by finding or by agreement. The SSAG (their unfortunate acronym) can trace their origins back to the confusion left by *Bracklow* after 1999 and our familiarity with "guidelines" in child support matters after 1997.

Given our discussion about income-sharing theories, it is worth repeating: the SSAG use "income sharing" as a method of constructing formulas, but *not* as an adoption of a general philosophy of income sharing after separation, or of any one particular theory of income sharing amongst those listed above. Incomes are used as proxies for "loss", for "economic disadvantage and advantage", for "need", for "standard of living", as individualised budgets can't be used in formulas. After *Moge* and *Bracklow*, judges more and more often used incomes in this same fashion. Incomes are used to construct formulas, which in turn can approximate the dominant patterns of outcomes for amount in the pre-existing case law.

The *Draft Proposal* came out in January 2005 and, after consultations and revisions, the *Final Version* was released in July 2008.[108] The revisions were

---

108 Rogerson and Thompson, *Final Version*, above, note 4. At the time of its release in July 2008, the *Final Version* was accompanied by a *User's Guide*, subsequently re-

mostly tweaking the two formulas and adding some exceptions, so that we have now been working with the SSAG for the past eight years. In a recent article for an American audience, we have provided a summary, explanation and early assessment of the Advisory Guidelines.[109]

The SSAG have also been considered in the 2012 Consultation Paper issued by the English Law Commission on what they call "needs", just another term for spousal support. Their current law is a discretionary mishmash of compensation and need, so they are looking at alternatives and review some of the same ideas covered in this article, but in a distinctive English setting. A report is expected in the fall of 2014.[110]

Inevitably, whether we like it or not, the Advisory Guidelines have had an impact, not always in a good way, upon entitlement and ideas about entitlement.

(a) Isolating and Emphasising Entitlement

One of the four objectives of the project was "to provide a basic structure for further judicial elaboration".[111] After *Bracklow*, spousal support analysis had become sloppy and highly discretionary. The SSAG were intended to "kick start the normal process of legal development in an area of judicial discretion",[112] with its defined steps in the analysis. The early case law revealed, in our words, not "cookie-cutter justice", but the opposite:

> Lawyers and judges using the SSAG have tended to be more careful about the steps in the analysis, about entitlement, incomes, location of an amount or duration within the ranges, exceptions, etc.[113]

A more methodical approach means that good lawyers and judges will isolate the entitlement issue and the basis for entitlement, critical to any good argument about amount and duration. In Alberta, the pre-SSAG courts were probably more careful about entitlement than those in other provinces, notably Ontario.

(c) An Arithmetical Approach to Entitlement: Three Bad Examples

We have consistently identified "unsophisticated use" as the major problem under the Advisory Guidelines.[114] Inevitably, some lawyers will misuse the SSAG,

---

vised and updated, now available as Rogerson and Thompson, *The Spousal Support Advisory Guidelines: A New and Improved User's Guide to the Final Version* (Justice Canada, March 31, 2010).

109 Rogerson and Thompson, "The Canadian Experiment with Spousal Support Guidelines", 45 F.L.Q. 241 (2011).

110 Law Commission, *Matrimonial Property, Needs and Agreements: A Supplementary Consultation Paper* (Consultation Paper No. 208, September 2012).

111 *Final Version*, above, note 4 at 12. The other three objectives were: (1) to reduce conflict and to encourage settlement; (2) to create consistency and fairness; and (3) to reduce the costs and improve the efficiency of the process.

112 *Ibid.*

113 "Canadian Experiment", above, note 109 at 263.

114 *Ibid.* at 265.

and the occasional judge. I will identify three examples of what I call "the arithmetical approach to entitlement".

(a) Bad Math: There's an Income Disparity, So There Must Be Entitlement, Right?

I've identified this error before,[115] but it is a persistent one. Lawyers will just "run the numbers" and come up with a range for amount and duration. As we know, if there is any income disparity at the end of a marriage or relationship, then the *without child support* formula will produce a range of numbers. A larger disparity is necessary to have this effect under the *with child support* formula. Some lawyers just don't "get" entitlement as a required step, but others are trying to frame the issues to the advantage of their recipient client, if in an intellectually dishonest fashion.

Obviously, any first cut at entitlement will consider income disparity after separation. If there's no income disparity, then the argument on entitlement becomes difficult, or even impossible (more on that below). But there must always be a second question: if there is an income disparity, WHY is there an income disparity?

We did not include an income disparity test for entitlement in the SSAG, consistent with their advisory nature and with our narrower purpose to resolve amount and duration. The American Law Institute did suggest an arithmetical test for entitlement in its proposed "marital duration" claim, some percentage income disparity like 25 per cent difference. We didn't.

Once we get past that first cut of income disparity, the question becomes "why?" The reason will either be compensatory or non-compensatory. The markers I've identified above will assist in that inquiry. The difference in incomes may not reflect a difference in standards of living.[116] Or, there is a disparity in actual incomes, but income ought to be imputed to the lower income spouse, for any one of a number of reasons. Or the income disparity may reflect a dramatic post-separation income increase for the payor. We can easily multiply examples.

(b) A Zero Range for Amount, So No Entitlement, Right?

Here is the converse outcome, again using an arithmetical approach, one that crops up with some regularity in *with child support* formula cases. Given the priority to child support, there can be a significant income disparity and yet nothing but zeros for the range — 0 to 0 to 0.

Again, that's a first cut. Zeros may mean no entitlement, if the income disparity at the end of the marriage is not large and that's because both spouses have worked full-time in the paid labour market. But zeros may just mean "no ability to pay" and a significant compensatory entitlement: think of any middle-income family with three or four children, where one spouse works part-time. There is entitlement, just no money, and the claim might revive under s. 15.3 of the *Divorce Act*,

---

115 "Fifteen Spousal Support Errors and Fifteen 'Corrections': How to Avoid SSAG Screwups, *Miglin* Moments and Changing Variations" in Ontario Bar Association, *Institute: Family Law* (Toronto, February 10, 2012).

116 E.g. the husband moved to Toronto from New Brunswick after separation, earning a higher income after a marriage in New Brunswick where both spouses earned about the same: *Eastwood v. Eastwood*, 2006 CarswellNB 655, 2006 NBQB 413 (N.B. Q.B.).

once the children leave home or finish post-secondary education and ability to pay returns for the payor.[117]

(c) The Formula Still Produces an Amount, So There Must Still be Entitlement

Duration is often forgotten in the SSAG analysis. The formulas generate ranges for amount *and* duration. Amount alone is not enough. Duration is nothing more or less than the end of entitlement. When support stops, there may still be — and usually is — an income disparity between the spouses.

Under the *without child support* formula, time limits are generated for relationships of less than twenty years (or for those with an older recipient under the "rule of 65"). Amount and duration are interrelated in assessing quantum, as *Bracklow* reminded us.

Under the *with child support* formula, there are also time limits, but softer and more flexible, only implemented through variation and review. All initial orders for spousal support with children should be "indefinite (duration not specified)", with the length-of-marriage and age-of-child limits used carefully to respond to the compensatory disadvantage of the individual recipient and to effect more realistic notions of self-sufficiency. Again, it is possible, even likely, that support will end despite the presence of income disparity.

Duration is an important element of a support argument. The end of entitlement, like its beginning, has to reflect our ideas of spousal support.

(d) Proxies, Theories and the Effects of Second Best

To acquire the benefits of "guidelines" — certainty, predictability, consistency and legitimacy — it is necessary to avoid budgets, make compromises and choose reasonable proxies. Formulas require a selection of variables to drive the outcomes. Ease of administration is an important consideration, as it was in choosing the percentage-of-payor-income model for the Federal Child Support Guidelines.

Our Spousal Support Advisory Guidelines developed two formulas to determine amount and duration, but only after entitlement was first determined. Two variables drive the *without child support* formula: the gross income difference and the length of marriage/cohabitation. The *with child support* formula is more complex: amount is driven by the allocation of individual net disposable income (INDI), a residual pool of income after benefits, taxes and child support, while duration is driven by length of marriage/cohabitation and the age of the children. Both formulas are intended to reflect the dominant patterns of outcomes in typical cases. Not surprisingly, the *with child support* formula works better, given the greater homogeneity of cases involving children, the constraints of ability to pay and the greater complexity of the formula. By contrast, the *without child support* formula has the benefits of simplicity and ease of calculation, but requires more exceptions for short to medium marriages, which display more heterogeneity.

---

117 Thompson, "The Chemistry of Support: The Interaction of Child and Spousal Support" (2006), 25 Can.Fam.L.Q. 251 at 279–84.

The proxy variables used to construct "guidelines" may be at odds with the basis of entitlement, a point made in his recent book by Patrick Parkinson.[118] He argues that the principles of "justification" (what we call entitlement) should line up with the principles of "quantification" (i.e. amount and duration). I think that may just be academic tidiness, but he has an important point, when those principles diverge in "hard cases".

For the *without child support* cases, there is a reasonable convergence between the principles of non-compensatory entitlement and the variables driving the formula. The ranges for amount and duration for long marriages seem to work, whether the couple did or did not ever have children. The rationale for support in cases with adult children will often be compensatory. In long marriages where the wives were mostly home with children, there will typically be a large gross income difference, producing large amounts for a long duration, which will accomplish the requirement of compensation.

It is more likely that an exception will apply in the *without child support* cases. The exceptions will come into play for different grounds of entitlement. Just think of the compensatory exception in short marriages, illness and disability, or the basic needs/hardship exception. To the extent that an exception is available, then quantification lines up with justification.

In the *with child support* formula, length of marriage is not an important variable on amount, only on one of the two durational tests. Net income matters, as does child support, child custody arrangements and child benefits. Net income is pooled and, after deductions, benefits and child support, a tinier pool of individual net disposable income is divvied up by the formula, ensuring that the recipient spouse receives 40 to 46 per cent of that pool. A higher percentage — something closer to equal sharing — led to concerns for variables that were difficult to track, like access expenses and payor work incentives, not to mention a preference for a cautious view of the precision of the net income calculations. Further, the formula was attempting to reflect the dominant patterns of decided and settled cases, and the 40 to 36 per cent range seemed closer to the mark.

Almost all of the *with child support* cases call for compensatory support. An exception would be the custodial payor situation, where the higher-income parent has the primary care or custody of the children. In that case, the basis for support may be compensatory or non-compensatory, depending upon the past history of care for the children. In a number of these cases, the husband will have custody because of the illness or disability of the wife, in which case a non-compensatory claim is more likely.

It could be argued that the net income pooling in the *with child support* formula means that we are using the payor's income as a means of quantification, rather than only the loss of earning capacity of the recipient, as "loss" theory would mandate. There is some merit to that view, but in my view not enough to undercut the SSAG choice of proxy variables.

In the ALI "compensatory payments" proposal, they used the income difference between payor and recipient incomes to work out their formula for "primary

---

118 Parkinson, *Family Law and the Indissolubility of Parenthood* (Cambridge University Press, 2011), Chapter 11.

care-giver claims", attracting criticism.[119] The American Law Institute reporter attempted to justify use of the payor's income as a proxy in two ways. First, there was a dubious empirical argument that "most people choose mates of similar socio-economic status". True, sometimes a tax lawyer marries a tax lawyer, then one stays home and the other tax lawyer's income becomes an excellent measure of the likely career path of the stay-at-home tax lawyer. And there is some evidence that increasing inequality in Western societies reflects a recent stronger trend of what is called "assortative mating". But that's not enough. Second, the ALI also argued that the primary caregiver's work facilitated the other spouse's earning capacity, which is not the compensatory "loss" theory, but the contribution or partnership idea discussed earlier.

I will not spend much time on the ALI proposals, approved in 2000, as they have had little impact upon legislation or case law in the United States, although they have stimulated debate amongst academics.[120]

Back to the SSAG *with child support* formula. The pooling of incomes does incorporate the income of the payor, and not exclusively that of the recipient. The formula does not use the hypothetical market income of the recipient as the sole measure of support as a pure compensatory theory would demand. As a second-best approach, it has many characteristics that reflect compensatory concerns. First, the real constraint on spousal support amounts under any formula, compensatory or otherwise, is the payor's ability to pay both child and spousal support, so that support will not come close to tracking either a hypothetical career path for the recipient or the actual income of the payor. Second, as the recipient's income rises, then the amount of support will reduce, when measured against the fixed end-points of 40 to 46 per cent of the INDI pool. Third, we should not forget duration and, under this formula, there may still be a disparity and a range for amount, but support entitlement will end when compensation is satisfied. The end of entitlement requires an individualised determination, which will reflect the recipient spouse's employment and career path, consistent with the "loss" theory.

Finally, and this takes us back to the beginning, there is still the initial stage of entitlement. There will be rare cases involving this formula where there might be no entitlement, despite an income disparity. If there is no loss, no disadvantage and no need, then there would be no entitlement.

It is important to distinguish the use of proxies, of second-best measures, for the quantification of amount and duration, from the theory that underpins entitlement. The fit does not have to be perfect, as long as it produces tolerable results. One of the fundamental problems of compensatory theory is the complexity of the evidence required. Guidelines try to solve that problem, in a workable way for the vast majority of typical cases.

---

119 For an excellent and accessible summary of the ALI recommendations on "compensatory payments", as well as the criticisms, see Rogerson, *Background Paper*, above, note 80 at 41–53.

120 See Clisham and Wilson, "Eight Years After", above, note 1. When the *Background Paper* was prepared, the ALI *Principles* looked likely to be more influential, given their comprehensiveness and detail.

(e) The Occasional Backwash Effects of the SSAG Upon Entitlement

There is one other way that the Advisory Guidelines affect entitlement. The SSAG generate ranges for amount and duration. Where appeal courts have endorsed and encouraged their use, in British Columbia, Ontario, New Brunswick and P.E.I., then a finding of entitlement will usually generate an outcome at least at the low end of the range for amount and duration. A court's discretion to go below that low end, absent an exception, is thus limited. In some instances, courts may make a finding of no entitlement, rather than ordering that amount and duration. There is nothing malevolent in this point, just that entitlement remains an escape valve in some cases.

7. SOME HARD CASES THAT TEST OUR ENTITLEMENT IDEAS

The Spousal Support Advisory Guidelines only apply after entitlement has first been determined. The Canadian approach to entitlement, after *Moge* and *Bracklow*, is quite expansive, so "no entitlement" cases are uncommon. When it comes to amount and duration, the basis of entitlement will usually be critical to the outcome, especially on variation and review. To conclude the article, I want to work through a few of the "hard cases", to worry out the ideas that underpin the outcomes.

(a) Guys Seeking Support

The SSAG are gender-blind, with the formulas keying off a limited number of variables to generate ranges for amount and duration. Nonetheless, my research has shown that husbands are granted spousal support less frequently than women, and, if they are entitled, amounts tend to be smaller and durations shorter. Further, it appears that income is imputed more frequently and more aggressively to men seeking support. In my SSAG talks, I have even suggested in jest that "guys seeking support" is an unspoken "exception", to be added to that list.

Old ideas die hard. Until 1968, husbands could not even claim spousal support upon divorce. In general, men continue to earn more than women in the paid labour market, so that fewer payors are women.[121] But that will not be true for specific couples. And husbands will sometimes, not often, turn up in *with child support* cases, claiming compensatory support after being home full-time or part-time.

It is not a surprise to me that the first appellate case to endorse the Advisory Guidelines was also one where the husband claimed support. In *Yemchuk v. Yemchuk*, the trial judge had found no entitlement, despite a 35-year marriage, an income disparity and the husband having left his job and moved twice to accommodate the wife's career.[122] Once the Court of Appeal found entitlement, it then used the SSAG to determine amount and duration.

---

121 For a good recent summary and analysis of the Canadian data, see Julie Cool, *Background Paper: Wage Gap Between Women and Men*, Publication No. 2010-30-E (Ottawa, Library of Parliament, July 29, 2010).

122 2005 BCCA 406, 2005 CarswellBC 1881, 16 R.F.L. (6th) 430, [2005] B.C.J. No. 1748 (B.C. C.A.); additional reasons 2005 CarswellBC 2540 (B.C. C.A.).

There can be very good reasons for different outcomes as between men and women. Most claims by men are non-compensatory in nature. There have been some recent cases where recently-retired men have made support claims against slightly younger wives still working. And they have failed, as they should, at the entitlement stage. A mere difference in income is not sufficient, say the judges, especially when the wife will soon retire herself.

(b) Fault After Medium-to-Long Marriage

Fault or misconduct is "off the table", to quote Justice Binnie in *Leskun*. But, admit it, we find it hard to ignore it, at the stage of amount and duration, if not entitlement. I think the old "fault" ideas haunt us still in medium-to-long marriage cases. Consider the following two scenarios and assume no children, to keep it simple:

> Scenario 1: Adam and Eve have been married for twenty years, and they are both now in their early fifties at separation. Adam earns $120,000 a year, while Eve earns $40,000. Last month, Adam told Eve that he was leaving her, for a younger woman who works in his office, but they have no plans to cohabit. Eve seeks spousal support.
>
> Scenario 2: Same facts, but this time Eve tells Adam that she is leaving him, for a younger man who works in her office. Eve seeks spousal support.

Assume also the support claim is non-compensatory.

Admit it: in the first scenario, we instinctively think of fault, breach and expectation damages. And that outcome can be largely accomplished through the SSAG: a range of $2,000 to $2,666 per month, on an indefinite basis. At the upper end of the range, Eve would be left with $72,000 a year after support, with Adam at $88,000. That is a drop from the marital standard, but not a big one.

Turn to the second scenario. No-fault law says that Eve does not forfeit her claim to support by her "misconduct". On amount and duration, the SSAG range is unmoved by fault, consistent with the law. Discretion operates, but within the ranges. Unlikely that a time limit would be imposed at the initial order. That leaves amount. No exception applies. No room to impute income. Will "silent fault" drive a court to the lower end of the range? Or, over time, will fault have an impact on duration?

In real life, Adam or Eve will likely wind up cohabiting with the new partner. For Adam, repartnering will have little or no effect on the initial support order. For Eve, however, the impact may be significant for a non-compensatory claim, depending upon the new partner's income.[123] In effect, fault and contract ideas can influence the outcome through the medium of repartnering or remarriage.

(c) Shared Parenting

We can hypothesise a no-entitlement shared parenting scenario: both husband and wife work full-time during the marriage, both share parenting responsibilities during the marriage, they separate and maintain a true shared custody arrangement after separation. In most of these cases, these parents would have similar incomes

123 *Final Version*, above, note 4 at 148-49.

and the likely SSAG range would be mostly zeros. Even if there was a large enough income disparity to generate numbers, there would be a good argument for no entitlement in a contested case.

Interestingly, the shared custody cases that crop up in the reported decisions often show large income disparities.[124] Those disparities often reflect the following very different scenario: wife leaves labour force to stay home full-time or part-time with children, husband makes large income and works long hours, they separate and now they agree to a true shared custody arrangement. In this setting, the wife will have experienced a past "loss", which may be large or small depending upon the age of the children and her time out of the labour force. Compensation will be adjusted through amount, depending upon her success in returning to paid employment and her career, and through duration, as the shared parenting going forward will reduce her ongoing disadvantage. These outcomes are informed by compensatory loss theory.

Note that I have used the phrase "true shared parenting" in the above, as we have to distinguish situations where one parent continues to bear a disproportionate share of the parenting, despite the time threshold used by section 9 of the *Child Support Guidelines*. In the scenarios above, I am attempting to exclude any ongoing disadvantage of the kind recognised by s. 15.2(6)(b) of the *Divorce Act*.

(d) Young Parents with Young Children After a Short Marriage

This fact situation continues to cause problems, as spouses, lawyers and judges fail to apply compensatory theory as pronounced in *Moge*. Here I am attempting to focus upon s. 15.2(6)(b) of the *Divorce Act*, the ongoing disadvantage that flows from child care after separation.

The scenario is familiar, mentioned earlier: young husband and wife, together for three years, they have two-year-old twins, she is home, he earns a sizeable income, they separate and she continues as the primary parent for the twins. The husband, and his lawyer, will see a three-year marriage and a limited spousal support obligation. But the bulk of the disadvantage is not behind the wife, but in front of her. The age of the children may complicate her return to the paid labour market and, once she does return to employment, her parenting responsibilities will likely continue to limit her earning capacity for a lengthy period of time.

In decided cases, judges consistently ignore or underestimate the compensatory disadvantage going forward. Too often, we see judges ordering short time limits at first instance, keyed to the length of the relationship, rather than the care of the children, a result utterly inconsistent with *Moge*. This still happens, despite the range for duration under the SSAG for such cases, using the age of children test in shorter marriages, with the lower end tied to the last child commencing full-time school and the upper end fixed by the end of high school.

Why does it still happen? Old ideas again, pre-compensatory thinking. "Clean break" sneaking back, or knee-jerk non-compensatory thinking about short mar-

---

124 Thompson, "The TLC of Shared Parenting: Time, Language and Cash" in National Judicial Institute, *Family Law Seminar* (Vancouver, February 13–15, 2013). See also Murray and Mackinnon, "'Eight Days a Week' Post-*Contino*: Shared Parenting Cases in Ontario" (2012), 31 Can.Fam.L.Q. 113.

riages. Or even primitive, half-formed compensatory thinking, i.e. we look for "past loss" only.

A look at common-law cases often reveals this thinking more often, disconnecting the children from the adult relationship. More than 50 per cent of common-law relationships have children and, because the parents are younger, the children tend to be younger too.[125]

Our statutory definitions for common-law eligibility recognise this, by using not just length of cohabitation as a test for spousal support, but also the presence of children. The *Alberta Interdependent Relationships Act* includes those who have "lived in a relationship of interdependence of some permanence, if there is a child of the relationship by birth or adoption".[126] Alberta is not alone here, as six other provinces and territories also use this secondary definition: Saskatchewan, Ontario, New Brunswick, Prince Edward Island, Northwest Territories, Nunavut. If there is a child of the relationship, two other provinces reduce the cohabitation requirement from three or two years to just one: Manitoba, Newfoundland and Labrador.

From a theoretical point of view, even these "some permanence" definitions focus upon the wrong test. Why require cohabitation at all? Again, "old ideas" at work. If the compensatory claim is based upon the disproportionate obligations of child care, both past and future, and the indirect costs are not compensated by our child support regime, then what matters is having a child, and not whether or not you live together. Any unmarried mother should be able to claim spousal support from the father. If anything, a non-cohabiting mother is even more likely to be saddled with the bulk of the child care than a common-law or married spouse.

Too outlandish, you say? Take a look at New Zealand's *Family Proceedings Act 1980*, section 79:

> Where —
>
> > (a) The natural parents of a child are not married to, or in a civil union with, each other; and
> >
> > (b) The natural father of the child is a person who is a parent from whom the payment of child support may be sought in respect of the child under section 6 of the *Child Support Act 1991*; and
> >
> > (c) Either natural parent has or has had the role of providing day-to-day care for the child, —
>
> the natural parent who has or has had the role of providing day-to-day care of the child may apply for a maintenance order in favour of the natural parent against the other natural parent.[127]

(e) Illness and Disability

Even though this very issue made it to the Supreme Court of Canada in *Bracklow*, the Court did not give direction on amount or duration, sending the issues back to the trial judge. In fact, the Court didn't give much guidance on entitle-

125 Thompson, "Annotation: *Droit de la famille — 091768*", above, note 107 at 6-7.

126 S.A. 2002, c. A-4.5, s. 3(1)(a)(ii).

127 N.Z. *Public Act 1980*, No. 94. See the comments of Parkinson, above, note 118 at 264.

ment, beyond affirming that a non-compensatory basis for support could give rise to entitlement and did so initially on these facts.

I don't propose to retrace the ground covered in the *Final Version* or the *New and Improved User's Guide* on this topic.[128] There we noted that there are three prevailing approaches to cases where a spouse experiences a long-term disability after a short-to-medium marriage or relationship without children, using the SSAG, in order of frequency:

(a) Increase Amount, Extend Duration

(b) No Exception

(c) Lower Amount, Extend Duration.

Each of these reflects "ideas" about spousal support, and not statutes or facts. Those in the first camp that increase the amount above the SSAG range *and* extend duration to be indefinite are driven by traditional status-based "need", with the idea that the payor should meet as much of the need as possible and until it ends. The second group of judges see a limited role for spousal support, with the state to pick up the balance. The third reflect a "basic social obligation" model, with the spouse serving as a source of private "welfare", a subsistence amount for a long period of time.

Drawing upon the John Maynard Keynes quote at the start of this article, these few examples show that we are still ruled by spousal support "ideas", old or new, good or bad, produced by "some defunct legal expert", or some "academic scribbler" of years ago, or in my case, more recently.

March 2013

Legal Education Society of Alberta

---

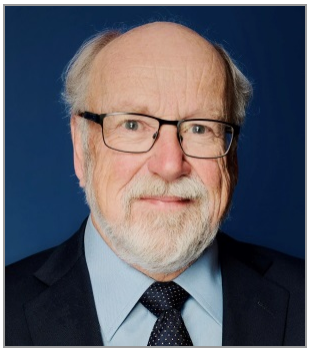
128 *Final Version*, above, note 4 at 121–24; *User's Guide*, above, note 4 at 41-2.

LAW360™ Canada

Law360 Canada | 111 Gordon Baker Road, Suite 900 | Toronto, ON, M2H 3R1 Canada | www.law360.ca
Phone: (800) 668-6481 | customerservice@lexisnexis.ca

B.C. Court of Appeal struggles with entitlement to spousal support

By **Rollie Thompson**



Rollie Thompson

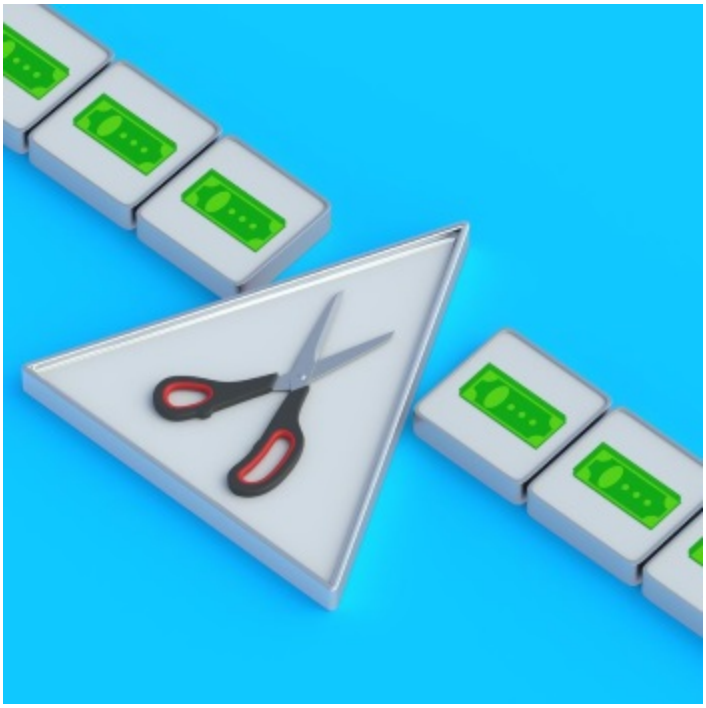
Law360 Canada (February 2, 2024, 10:39 AM EST) -- The B.C. Court of Appeal faced some difficult entitlement issues in its December 2023 decision in *Stobo v. Cohoon*, [2023] B.C.J. No. 2472.

Surprisingly, the court dismissed the wife's claim to spousal support, finding no entitlement. Not compensatory, and not non-compensatory. This despite a 24-year relationship, one child (now an adult), and annual incomes of $200,000 for the husband and $100,000 for the wife. The trial judge had ordered support of $3,000 a month, indefinite, consistent with the Spousal Support Advisory Guidelines, with a review after December 2024.

Whaa? What facts and analysis could lead the Court of Appeal to this outcome?

The parties began cohabiting in 1995, both then in their early 20s. A daughter, born in 1996. Married in 2007. Separated in January 2019. A trial was held in February/March 2022 when they were 51 and 50. The husband was a key grip in the film industry, working long hours, income from two separate companies. Wife trained and worked as a midwife, after being home for seven years.

At trial, Justice Amy Francis found a compensatory claim, held the wife's non-compensatory claim "weak", and then applied the Spousal Support Advisory Guidelines (SSAG), choosing the low end of the range for amount: see *Stobo v. Cohoon*, [2022] B.C.J. No. 873. On the husband's appeal, Justice Peter Voith rejected the compensatory finding, as well as any non-compensatory claim, at times muddling the two.



OlekStock: ISTOCKPHOTO.COM

After stating that a "meticulous accounting" of disadvantages and advantages is not required in a compensatory analysis, the Court of Appeal criticized the trial judge for failing to engage in "a more searching inquiry and analysis of the economic consequences of the parties' respective contributions" (paras. 48, 50). The appeal court's own "meticulous accounting" contains a number of errors. A rereading of *Moge v. Moge*, [1992] 3 S.C.R. 813, would have helped. For more on *Moge* and compensatory analysis, see my article, "Ideas of Spousal Support Entitlement" *Canadian Family Law Quarterly*, 2015, Vol. 34 (1), pp. 1-33.

First, Justice Voith underemphasized the longer-term impact of the wife's being home with their child for the first seven years. And he completely missed her ongoing child care and household role with a husband working long and unpredictable hours in the film industry and her secondary earner role which allowed the husband's career trajectory to be "uninterrupted," in the words of the trial judge.

Second, the Court of Appeal noted that the wife "neither gave up an existing job nor did she suspend pursuing any intended career" to be home with the child. The wife was then in her early twenties, when most people don't have much of a job or career plan. That doesn't mean there is no labour market disadvantage. Remember that the wife in *Moge* was married at age 20, having worked briefly as a sales clerk, then had three children, and wound up working part-time and full-time as a cleaner. Yet she was found to still have a compensatory claim years later.

Third, the Court of Appeal returned, again and again, to whether the parties jointly made marital decisions. Agreement can sometimes strengthen a compensatory or non-compensatory claim. But the foundation of a compensatory claim is the roles adopted during the marriage, not whether those roles came about by agreement.

Fourth, Justice Voith demanded some sort of "causal connection" between the wife's agreed-upon role and the husband's success in the film industry. In an odd use of the term "too narrow", the Court of Appeal held:

> The judge's core conclusion, that Ms. Stobo's compensatory claim was made out because Mr. Cohoon "would have been unable to achieve the substantial success he [had] achieved in the film industry were it not for the contributions of Ms. Stobo", was too narrow.

It was "inaccurate," said the Court of Appeal, "to suggest that his career in the film industry commenced when the parties decided that Stobo would stay at home with their daughter." A fair reading of the rest of that paragraph in the trial judge's reasons makes clear that the wife's domestic role continued even after her return to education and work, with the husband working long and

unpredictable hours: see *Stobo v. Cohoon*, [2022] B.C.J. No. 873 at para. 78.

The wife did eventually obtain training as a midwife during cohabitation and worked successfully as a midwife for 12 years, earning an average income of $100,000 a year. In 2018-2020, the wife chose to change her career, pursuing an MBA and moving into finance. In calculating spousal support, Justice Francis imputed the wife's full-time midwife income.

The husband earned an average of $200,000 a year through his two corporations providing key grip services and equipment rental. Precisely because it was "a modern marriage" and the wife had "ample opportunities to pursue her educational and career aspirations," the trial judge ordered the low end of the SSAG range for amount.

Finally, the Court of Appeal engaged in a long and unclear discussion of relative standards of living, to assess the wife's compensatory claim. I would have thought this comparison more relevant to the wife's non-compensatory claim, and at many points the court wanders into non-compensatory analysis.

The court looked at both property and incomes, but inexplicably assumed that the husband sold or liquidated his equipment rental company, thereby reducing his income to $120,000 a year, to reach a conclusion of "roughly equivalent standards of living."

The Court of Appeal mentioned the wife's "weak" non-compensatory claim only briefly. This ground of relief was complicated by the trial judge's brief and erroneous analysis. Because the spouses "lived so far beyond their means," said Justice Francis, neither could afford the marital standard of living.

This misconstrues the non-compensatory model, which looks to the economic interdependence of the spouses, as indicated by the markers of length of relationship (24 years here), the drop in the recipient's standard of living (from a joint income of $300,000 to living on her own income of $100,000) and any economic hardship (none). Spending excessively during the marriage is not relevant to the analysis.

The Court of Appeal just ignored the wife's non-compensatory claim. I would say that the wife's non-compensatory claim also probably warranted support at the low end of the range, the outcome chosen by the trial judge.

The Court of Appeal decision in *Stobo v. Cohoon* shows how things can go wrong when courts fail to analyze entitlement carefully.

Rollie Thompson KC is professor emeritus at the Schulich School of Law, Dalhousie University, and counsel, Epstein Cole LLP.

The opinions expressed are those of the author and do not reflect the views of the author's firm, its clients, Law360 Canada, LexisNexis Canada, or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

Interested in writing for us? To learn more about how you can add your voice to Law360 Canada, contact Analysis Editor Yvette Trancoso at Yvette.Trancoso-barrett@lexisnexis.ca or call 905-415-5811.