SPOUSAL AND CHILD SUPPORT

BRENT D. BARILLA
McDougall Gauley
701 Broadway Avenue
Saskatoon, Saskatchewan S7N 1B3

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I. INTRODUCTION

Child and spousal support issues require consideration of two statutes, namely the *Divorce Act* and the *Family Maintenance Act*. The application for support may be made in either the Family Law Division or the Provincial Court, depending upon the statute involved. Section 109(1) of the *Queen’s Bench Act* gives the Lieutenant Governor in Council the power to make regulations designating:

(a) places or areas in which the Family Law Division has exclusive jurisdiction pursuant to an *Act*;
(b) places or areas in which the Family Law Division has concurrent jurisdiction with the Provincial Court of Saskatchewan pursuant to an *Act*.

At the present time only the Family Law Division in Saskatoon, Regina, and Prince Albert have exclusive jurisdiction to deal with the *Family Maintenance Act*. In all other areas of Saskatchewan applications under the *Family Maintenance Act* can be made in either the Family Law Division or Provincial Court. All applications pursuant to the *Divorce Act* are to be brought in the Court of Queen’s Bench.

The within paper provides an overview of the legislation and case law in relation to spousal support and child support, primarily from a Saskatchewan perspective. There is a wealth of material available, namely articles, annotations, and cases, across the country and this paper is not intended as an exhaustive review of the available material.

II. CHILD SUPPORT

A. ENTITLEMENT

1. Definition of Child

“Child of the marriage” is defined in section 2(1) of the *Divorce Act* as meaning a child of two spouses or former spouses who, at the material time:

(a) is under the age of majority and who has not withdrawn from their charge; or
(b) is the age of majority or over and under the charge, but unable by reason of illness, disability or other cause, to withdraw from the charge or to obtain the necessities of life.
Whether a child is unable to withdraw from their parents’ care for “other cause” has been interpreted to mean children who are still attending school or a post-secondary institution.

In *Jackson v. Jackson*, [1973] S.C.R. 205, the court held that a child is unable, for “other cause” within the terms of the *Divorce Act* to provide for herself or to withdraw herself from the charge of a parent if that child is in regular attendance in a secondary school.

2. Children Over 18 Years of Age

In *Zaba v. Bradley* (1996), 137 Sask. R. 295 the Saskatchewan Court of Appeal outlined the factors to be considered by the court in determining whether a child remains a “child of the marriage” as defined in the *Divorce Act*. In that case the child was 19 years of age and in university. The factors cited were:

(a) whether the child is eligible for student loans or other financial assistance;
(b) whether the child has reasonable career plans;
(c) the ability of the child to contribute to his or her own support through part-time employment;
(d) parental plans for the child’s education, particularly those made during cohabitation;
(e) in the case of a mature child who has reached the age of majority, whether or not the child has unilaterally terminated his or her relationship with the parent from whom child support is sought; and
(f) whether the child could have reasonably expected one or both of the parents to have continued to furnish support if the marriage had not broken down.

Other relevant considerations are the age of the child, academic achievements, the ability to profit from further education and the possibility of securing employment. *Charko v. Charko-Ruhl* (1997), 161 Sask. R. 234

These factors have been considered in numerous cases following the *Zaba and Bradley, supra* decision. For example, in *Chu v. Chu* (1996), 147 Sask. R. 241 (Q.B.) an 18 year old child who was accepted into university, intended to seek summer employment, and whose father appeared to have unilaterally withdrawn from the relationship with his daughter was considered a “child” within the meaning of the definition. See also *Duncan v. Duncan* (1989), 18 R.F.L. (3d) 46
In *Barry v. Barry*, [1995] 136 Sask. R. 277 Q.B., Rothery, J. held that where a child was enrolled in fourth year engineering at the University of Saskatchewan and in his fifth year in University, living with his mother and earning significant amounts during the summer months such that he had savings and a vehicle, he was able to withdraw from the charge of his mother and not only able to obtain the necessaries of life but able to save money.

### 3. Children Under 18 Years of Age

A number of cases have also addressed the same issue but in the context of younger children. In *Jonasson v. Evans* (1997), 153 Sask. R. 154 (Sask. Q.B.), the child, a grade 12 student, left his father’s home in Regina and moved in with his older brother in Moose Jaw. The evidence was that he moved because he did not like the discipline and supervision that came with living in his father’s home. Mother supported him and continued to send $300 per month for the child’s expenses. In the application before the court, she requested reimbursement of his share of child support from the father. Madam Justice Rothery held that the child had not left the charge of his parent and had merely moved from the sphere of influence of his father to the sphere of influence of his mother who lived in Toronto. She held that the child continued under his parent’s charge and was unable to withdraw from their charge. See also *Murray v. Murray* (1997), 155 Sask. R. 123 (Q.B.)

In *Bast v. Dyck* (1997), 155 Sask. R. 123 the child, age 16 and in grade 11, moved out of her mother’s residence to cohabit with her boyfriend. The boyfriend was unemployed and unable to support himself. The child had some part-time employment. McIntyre, J. held that there is ample authority that:

> “Absent the issue of Chandelle’s change of residence, she is unable in the circumstances, by reason of ‘other cause’ to withdraw from her parents’ charge or to obtain the necessaries of life. She is 16, in grade 11, with no job skills or training and no apparent means of providing for herself or otherwise obtaining the necessaries of life.”
The fact that a child may have withdrawn from the charge of his or her parents for a period of time does not preclude the child from resuming the status of a child within the meaning of the *Divorce Act*. *Olsen v. Olsen* (1997), 159 Sask. R. 67 (Q.B.); *Kirkpatrick v. Kendall* (1997), 154 Sask. R. 266 (Q.B.).

4. **Standing in the Place of Parent**

“Child of the marriage” is also defined in section 2(2) of the *Divorce Act* as a child of two spouses or former spouses that includes:

(a) any child for whom they both stand in the place of parents; and
(b) any child of whom one is the parent and for whom the other stands in the place of parent.

Section 3(1) of the *Family Maintenance Act* provides that every parent has an obligation to provide maintenance for his or her child. The definition of parent is sufficiently broad to cover not only the biological parent of the child, but a person who has demonstrated a settled intention to treat that child as a child of his or her own family (see section 2 of the *Family Maintenance Act*).

Accordingly, under both the *Family Maintenance Act* and the *Divorce Act*, a step-parent can be required to pay child support for his or her step-child.

In *Andrews v. Andrews* (1992), 38 R.F.L. (3d) 200 (Sask. C.A.) the Court addressed the issue as to when a step-parent will have a continued obligation to provide support upon the separation of the parties. The court held that a person who has stood *in loco parentis* has a *prima facie* obligation to provide support and cannot unilaterally withdraw from that obligation. The court, however, further determined that the relationship between the parent and children after separation must be examined.
a. Factors to Consider in Determination

In order to make a finding of *in loco parentis* or determination that one stands in the place of a parent, it has been held that the court must objectively review the evidence to determine whether, both expressly and by action, the third party has demonstrated a settle intention to treat the child as his or her own. Although not exhaustive, some relevant factors have been identified by the court. They include an assessment whether there is evidence to the following:

(a) has the third parties last name been given to the child;
(b) does the child refer to the third party as mom or dad;
(c) does the child perceive the third party as a father or mother figure;
(d) does the third party discipline the child;
(e) does the third party provide financially for the child;
(f) does the third party spend time with the child personally;
(g) the extent to which the child participates in the extended family in the same way as a biological child would; and
(h) whether the third party represents the child to the family and to the world, either explicitly or implicitly, that he or she is responsible as a parent to the child.


b. Relationship Between Step-Child/Step-Parent

In *Johb v. Johb* (Sask. C.A.) (Docket No. 2963) (August 28, 1998) it was held that in circumstances where the mother of two children, age 14 and 10, terminated all access and communication between the father (who stood *in loco parentis*) and the children, the parent *in loco parentis* had no further obligation to pay child support. At paragraph 16 of the majority decision, written by Wakeling, J.A., it was stated:
“I hold the view that Ms. Johb, who has the prime and the basic responsibility for the welfare of her children, must be prepared to act in such a manner as to promote the continuance of the legal status of Mr. Johb as a parent in loco parentis if the support that relationship produces is to be maintained. To hold otherwise permits the termination of this relationship while at the same time relying upon the benefit of the continuation of that relationship. It is not enough to say this obvious contradiction must be permitted to exist because the children’s interest is the paramount factor. The Respondent has it in her control to determine what support the children will need and it is not an unacceptable burden to require her to act in a manner which continues the foundation for the obtainment of that support.”

However, in *Campbell v. Campbell* (Q.B. No. 003407/96) J.C.B. (March 17, 1998) Wilkinson, J. held that the “dwindling out” of a relationship in circumstances where the husband departed following separation and was involved in acrimonious proceedings with the wife is not a manifest case of intentional termination of the in loco parentis relationship between step-father and children. See also *Eiswerth v. Eiswerth* (Div. No. 128/1998) J.C.S. (March 27, 1998) Carter, J.

The reasoning of Wilkinson, J. in *Campbell v. Campbell* seems to now be the more accepted view in Saskatchewan. In *Marud* Mr. Justice Krause interpreted the Supreme Court of Canada in Chartier’s as holding that once a finding of in loco parentis is made, there can be no termination of that relationship, by any means, either by the step-parent or the custodial parent. In his view, the law as set out in *Andrews v. Andrews* and *Johb v. Johb* has now changed.

**B. THE OBLIGATION**

1. The *Guidelines*

Both the *Divorce Act* (section 15.1(3)) and the *Family Maintenance Act* (section 3(3)) provide that a child support order shall be made in accordance with the *Federal Child Support Guidelines* (the “Guidelines”).

Although the manner in which the child support order is to be calculated is set out in the *Guidelines*, there is a distinction between children over the age of majority (age 18 in Saskatchewan), step-children, and children under the age of majority.
a. Under the Age of Majority

Section 3 of the Guidelines sets out the presumptive rule. It provides that if a child is under the age of majority, and unless otherwise provided for in the Guidelines, a child support order must:

(a) be an amount as set out in the applicable Table; and

(b) an amount, if any, determined under Section 7.

b. Over the Age of Majority

If the child (or children) is over the age of majority, Section 3(2) of the Guidelines provides the court with a choice. The court can either utilize the Tables (Section 3(2)(a)) or impose any amount it deems appropriate having regard to the condition, means, needs, or other circumstances of the child and the financial ability of each spouse to contribute to the support of the child (Section 3(2)(b)). In other words, there is some discretion in which to deviate from the basic Table amount. Section 3(2)(b) is commonly used when a child is over the age of majority, attending school away from the home of both parents, and remains under the charge of the parent seeking support. The case of Michie v. Michie (1997), 162 Sask. R. 1 (Q.B.) is an example where the court deviated from the Guidelines on the basis of Section 3(2)(b). Essentially, the court determined a budget for the anticipated costs of the child attending university and then considered the student’s resources for contribution towards the costs (i.e., student loans, scholarships, and savings from part-time work). After determining the child’s ability to contribute towards his or her own costs, the shortfall was left to the responsibility of the parents but was divided in proportion to their respective incomes.

c. Step-Children

If the child support order is being sought against a parent standing in the place of parent, Section 5 of the Guidelines also allows the court the discretion to impose any such order it considers appropriate provided that the court takes into account the Guidelines, as well as any other parent’s legal duty to support the child.
The obligation of a step-parent is not necessarily the same as a natural parent when it comes to determining the amount of child support that should be paid on behalf of the child. What if a natural parent of the child is already paying full child support? What should the step-parent’s obligation then be? Is it fair for the recipient to, in effect, receive full child support from both a natural and a step-parent? The recent judicial trend in Saskatchewan has been to reduce the step-parent’s obligation by as much as 50%, particularly when the natural parent is already involved in paying support. See Pevach v. Spalding (2001), S.J. No. 469 (Sask. Q.B.). However, if it can be established that the step-parent’s involvement with respect to the child has been significant and in some cases more than the natural parent’s, in such circumstances the courts have been willing to impose an obligation somewhere between 50% and 100% of the Table amount. (See Widdis v. Widdis (2000), S.J. No. 614 (Sask. Q.B.).)

2. Determination of Income

Probably one of the areas that creates the greatest litigation concerns determination of one’s income. As will be illustrated below, if a payor is a wage earner, determination of his income may be relatively easy. If the payor is self-employed, what is typically shown on his income tax returns and financial documents does not always reveal the financial picture and the payor’s actual earning capacity.

a. Starting Point

The relevant section of the Guidelines for determining income is Sections 16 through 20. Section 16 tells us the spouse’s annual income shall be determined using the sources of income set out under the heading “Total Income” in the T-1 General Income Tax Form filed with Canada Customs and Revenue Agency (formerly, Revenue Canada). This is “Line 150” on a tax return.

The typical sources of income that would be included in total income are employment income, pension income, employment insurance benefits, taxable amount of dividends from Canadian
corporations, interest and investment income, net partnership income, rental income, taxable capital gains, Registered Retirement Savings Plan income, and self-employed income (including farm, professional and business income).

Section 16 of the Guidelines goes on to point out that the total income on Line 150 is only a starting point, and that the total income must be adjusted in accordance with Schedule III of the Guidelines.

There are numerous adjustments found in Schedule III. They are typically relevant to adjusting total income of self-employed persons. Not all of the adjustments in Schedule III will necessarily be applicable and, in fact, in some cases there will be no need for adjustments pursuant to Section III at all. However, one cannot overstate the importance of reviewing and applying (if necessary) the adjustments of Schedule III in each and every child support case. I will not exhaustively list nor discuss all of the Schedule III adjustments, but below is an example of some of the more common adjustments set out in Section III that may be applicable.

i. Dividends from Taxable Canadian Corporations – Section 5
Section 5 of Schedule III of the Guidelines provides that in determining income available for child support, the taxable amount of the dividend as stated on the T-1 must be replaced with the actual amount of the dividend. This is done by multiplying the stated amount by 4/5ths.

ii. Capital Gains and Capital Losses
Section 6 provides that an adjustment must be made to a person’s income by replacing the taxable capital gain reported on the payor’s T-1 with the actual capital gain. This can be done by multiplying the taxable capital gain on the return by 4/3rds.

iii. Business Investment Losses
Section 7 of the Guidelines allows a spouse who suffers a business loss to deduct the full amount of the loss from income for that year, notwithstanding that for income tax purposes only 75% can be deducted. However, not every circumstance will automatically lead to this deduction. For instance, in *Omaha-Mahanajh v. Howard* (1998), A.J. No. 173 (Q.B.) the court relied on Section 17(2) of the Guidelines to justify an adjustment of a large business investment loss where it was clear that it was non-recurring and would effectively distort the payor’s ability to effectively pay child support in the future. Rather than allowing the $100,000 business loss on the payor’s income tax return, the court reduced the available deduction to the annual loan repayment of the payor, which amounted to $24,000 annually.
iv. Net Self-Employment Income – Section 9

Section 9 of Schedule III provides that any non-arm’s length payment for salaries, benefits, wages, management fees or other payments are to be added back in to a payor’s income unless the spouse can establish that the payments are both necessary to earn the employment income and were reasonable in the circumstances.

v. Capital Cost Allowance for Real Property - Section 11


b. Pattern of Income

An obvious issue is what particular tax return should be used to assess an individual’s income. Section 17 of the *Guidelines* offers assistance. It provides that if the amount of the source of income has increased or decreased in each of the three most recent taxation years, the court may then determine the income from the source of income in the payor’s most recent taxation year. It also provides that if it has not increased or deceased as above, the court may then use either an average of the three most recent taxation years or whatever source of income it considers appropriate under the circumstances. Section 17(1)(c) specifically allows the court to utilize whatever portion of non-recurring income it deems appropriate in any given taxation year. Section 17 employs words that are permissible and not mandatory, and therefore leaves the court with a wide discretion to use the fairest indicator of the payor’s most current earning capacity as possible.

Numerous cases have consistently held that the object of the court is to find the fairest indicator of the payor’s most current income earning capacity. *Homenuk v. Homenuk* (1999), S.J. No. 263. When dealing with farmers and other self-employed persons the court’s usual practice is to average the income from a farmer or business person for the three most recent taxation years. However, there can be no doubt that if circumstances warrant, the court will be prepared to deviate from the above method if they are of the view that the ultimate method chosen will achieve the fairest result.
With respect to wage earners, it is typical for the court to rely on the most recent taxation return as a likely indicator of what the payor will earn in the upcoming taxation year. Obviously if there was non-recurring income or a change in employment, then adjustments may need to be made. It is also typical for the court to require the payor to provide a year-to-date statement of their earnings in the year in which the court is actually hearing the child support application. In this way the earnings-to-date can be extrapolated to the year end to arrive at an annual amount.

c. Is There Additional Income?

If you are assessing income tax returns of a wage earner who has been regularly employed by the same employer for a number of years then there is likely no need for much further inquiry beyond the tax returns or year-to-date pay stub of the payor spouse. In contrast, it is very typical to review a self-employed person’s income tax returns for the most recent three taxation years, carry out the necessary Schedule III adjustments, and still query whether the net business income for the year is a true indicator of the payor’s annual income or not. It is here that lawyers must turn their attention to whether there is further income that should be included or expenses capable of being challenged that will lead to an increase in the person’s income.

There has been considerable case law and written material with respect to the assessment of income of self-employed people in Saskatchewan. In this regard, I draw your attention to a paper presented at the Family Law Conference “Economic and Parenting Consequences of Separation and Divorce” held in March of 2000. The paper is entitled “Determination of Income of Self-Employed Persons” and was prepared by Brent Donald Barilla, of McDougall Gauley. I have not reproduced this paper in this material, however the paper should be readily available at The Law Society of Saskatchewan Library or should be attainable from the Saskatchewan Legal Education Society Inc. It provides an in-depth analysis of the issues regarding determination of self-employed person’s income. For the purposes of this paper, I will refer to a few of the usual areas that a practitioner needs to consider when dealing with the above issues.
i. Retained Earnings

The problem is usually easily identifiable. A business person is a sole shareholder in a corporation. His income tax return shows income of $50,000. This is a wage paid to him by his corporation. A review of the financial statements of the corporation shows that the company had a net profit (before tax) of $20,000 in the most recent taxation year and that profit was left in the company in the form of retained earnings. Since the person controls the corporation and therefore has the discretion to utilize this money, an issue arises as to whether this pre-tax income should be added to the payor’s income for the purposes of determination of his child support payments.

Section 18(1)(a) of the Guidelines governs this situation and permits a court the discretion to include all or a part of a corporation’s pre-tax income into the income of a payor. (L.S. v. E.P. (1997), B.C.J. No. 2206 (B.C.Q.B.).) In the above decision Mr. Justice Pittfield recognized that he had a right to add pre-tax corporate income in accordance with Section 18 of the Guidelines, however in his view he was only permitted to do so sparingly, and only if the inference could be drawn that the retained earnings were left in the company to deliberately avoid obligations under the Guidelines. This approach has not been uniformly accepted in Saskatchewan and, in fact, there are several Saskatchewan cases that have taken a much more liberal approach on adding pre-tax corporate income back to the payor. (See Stephen v. Stephen (1999), S.J. No. 479; Ivey v. Ivey (1996), 153 Sask. R. 157.)

It is noteworthy that there are decisions where the courts are not prepared to add back in any of the pre-tax income of a corporation; however, a review of those cases shows that there is either more than one shareholder involved (particularly if they are arm’s length) or there is some sound business reason for accumulating retained earnings (i.e., insistence by the corporate entity’s bank). As stated, the usual case in which pre-tax earnings are added back into income is when there is a sole shareholder, the balance sheet is strong, and there is no sound basis for the spouse not to have utilized those funds to pay to himself a further wage during the year.

One last cautionary note on this issue. Section 18(1)(a) of the Guidelines only allows a court to add back in pre-tax income of a corporation for the most recent taxation year. Seemingly, one cannot then utilize the argument that retained earnings for each of the three most recent taxation years should be added back in and an overall average used.

ii. Wage Payment to Oneself

As a sole shareholder in a corporation a person can set the wage that he or she receives at any amount. The ability to do this, as with retained earnings, is clearly open to abuse and requires careful consideration by counsel and the courts. This is recognized by the court in Rudacyhyk, supra. The court agreed that if the evidence disclosed that a shareholder (payor spouse) was setting his wage unreasonably low, yet had substantial cash flow available to him through shareholder’s loans, it could be open for a judge to employ Section 19(1)(a) of the Guidelines to find that he was intentionally underemployed. However, the court was quick to point out that in order to come to this conclusion there would have to be some evidence led to suggest, that given the skill and responsibility of the job required, the wage paid was unreasonably low.
iii. Personal Expenses

Virtually every analysis of an income tax return of a self-employed person will raise the issue of whether a portion of the particular business expense being claimed has a personal component to it. For instance, it is not uncommon to see a farmer to claim a deduction for utilities and interest on mortgage payments which pertain to not only the farm land but his principal residence. A doctor may claim travel expenses for trips to the United States. Is it reasonable to conclude that the entire time is spent on business or should there be some allocation towards personal benefit?

If in fact there is a personal component to an expense, it can be a basis for requesting that all or a portion of that expense be added back into the payor’s income pursuant to Section 19(1)(g) of the Guidelines. This was exactly what was done with respect to a portion of the payor’s expenses claimed with respect to advertising, motor vehicle, office expenses, travel expenses, and business-use-of-home expenses in Omaha–Mahanajh, supra (see also Hill v. Hill (1999), S.J. No. 145).

iv. Wages and Salaries

A review of corporate financial statements will often reveal an expense described as a wage, salary or management fee. It is imperative that counsel determine who that wage is being paid to in order to determine its legitimacy for child support purposes. If it is being paid to the payor himself, that will be added to his income, and in all likelihood should show up on his income tax return. If the payment is being made to a third party, there still may be an issue as to whether it is being legitimately paid or earned. This issue normally arises when a payment is being made to someone who is not at arm’s length in relation to the payor spouse. A common example is wage payments made to a spouse’s child or new spouse. The question becomes is it really being earned or is the payment simply fictitious to avoid paying further income tax.

As previously stated, Section 9 of Schedule III of the Guidelines provides that the onus is on the payor spouse to prove that any non-arm’s length payments for salaries, benefits, wages, management fees or other payments are both necessary to earn the self-employed income, and reasonable in the circumstances. If the onus is not discharged, they will be added back into income. (See Poff v. Fenell (1998), S.J. No. 608.)

d. Imputing Income

Practitioners will undoubtedly be faced with financial information and tax returns that suggest a payor’s past income earnings were very low. In addition, there are occasions when a spouse, following separation or divorce, leaves a long-held position of employment (and a reasonable level of income) and either obtains a job at a lesser income or returns to school and, therefore, earns
little to no income at all. In these circumstances Section 19 of the *Guidelines* provides the court with the power to impute income. Section 19 provides that the payor’s income can be imputed under any of the following circumstances:

(a) where the spouse is intentionally under-employed or unemployed;
(b) the spouse is exempt from paying federal or provincial income tax;
(c) the spouse lives in a country with a lower tax rate than those in Canada;
(d) income has been diverted;
(e) the spouse’s property is not being reasonably utilized to generate income;
(f) the spouse fails to provide income information;
(g) the spouse unreasonably deducts expenses from income;
(h) the spouse derives a significant portion of income from dividends, capital gains or other sources taxed at a lower rate than employment or business income; and
(i) the spouse is a beneficiary under a trust and receives income or other benefits from the trust.

The Saskatchewan courts have not been reluctant to impute income to a payor spouse in appropriate circumstances utilizing Section 19 of the *Guidelines*. For instance, in *Christant v. Schmitz* (1993), 1 R.F.L. 4th 142 and *Patterson v. Craig* (1995), Sask. D. 1635/03, the court in both of those cases was prepared to impute income to the payor spouse who did leave a long-held position of employment to take another job at a lesser income. See also *Clayton v. Clayton*, [2001] S.J. 340 where the court was prepared to impute income simply on the basis that the payor spouse was young, able-bodied, and clearly had demonstrated no reasonable reason as to why he could not earn a reasonable level of income. Income was therefore imputed to the payor spouse in the amount the court felt that he was capable of earning.
3. The Tables – The Base Amount

Application of the Guidelines Tables is relatively straightforward if the income of the payor is easily determined. For instance, if you have a situation where you have a payor spouse with a gross annual income of $40,000 and he is to pay child support for three children of his former marriage, then his obligation would be determined by referring to the amount of support he should be paying based on that income for three children as set out in the Guidelines Table. As shown it is $717 a month. This is called or referred to as the “Base” or “Table” amount of child support. Obviously if the payor spouse had less children then the amount of child support would be different. The jurisdiction for assessing the payee’s obligation (which Table to use) will be the payee’s resident proviso unless he resides outside Canada, and in such a circumstance it would be the recipient’s province.

Note: To view the Guidelines, go to the Department of Justice (Canada) website at www.canada.justice.gc.ca and click on the Child Support link under Program and Services.

4. Section 7 Expenses

It will be recalled that Section 3 of the Guidelines (the presumptive rule) requires a child support order to apply the Table amount and an additional amount for Section 7 expenses, if applicable.

Section 7 of the Guidelines essentially allows a person claiming a child support order to seek a sharing of special or extra-ordinary expenses of a child. If a court considers it applicable or appropriate, it is an add-on to the base amount of child support. A careful review of the exact wording of Section 7 should be adhered to; however, in a general sense the following are typical Section 7 expenses and are considered special or extra-ordinary:

(a) child care expenses incurred as a result of the custodial parent’s employment, illness, disability, or education or training for employment;

(b) that portion of the medical and dental insurance premiums attributable to a child;

(c) health-related expenses that exceed insurance reimbursement by at least $100 annually per illness or event, including orthodontic treatment, professional counselling, speech therapy, prescription drugs, glasses, contact lenses, etc.;

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(d) extra-ordinary expenses for primary or secondary school education or for educational programs that meet the child’s particular needs;
(e) expenses for post-secondary education; and
(f) extra-ordinary expenses for extra-curricular activities.

If an expense qualifies as a Section 7 expense, the Section further provides that the expense should be shared by the spouses in proportion to their respective incomes. Therefore the party with the higher income will pay the greater share of the expense.

Section 7 of the Guidelines also specifically provides that the court must take into account any subsidies, benefits, income tax deductions, or credits relating to the expense, or the eligibility for same in determining the amount of the expense to be shared.

A good example of a typical Section 7 expense that is almost always added on is the cost of daycare incurred by the recipient spouse. For instance, if a recipient spouse is paying $400 a month for the daycare costs for the children while she works, the court will obligate the payor to pay his proportionate share of the after tax day care cost. If the payor spouse’s income happens to be double that of the recipient spouse, then the payor spouse will pay a much higher proportion of the daycare cost.

The daycare cost example is also illustrative of the importance of the court taking into account income tax deductions as mandated by Section 7(3) of the Guidelines. The recipient spouse is entitled to claim a tax deduction for all daycare expenses incurred on an annual basis. If the income tax deduction is factored in, the actual monthly babysitting cost for the recipient spouse is less than what he or she is paying. For instance a $400 a month daycare cost may work out to be $250 a month after the tax deduction is notionally included. It is therefore very important for practitioners to ensure that any tax deductions are factored in and that the payor spouse is only paying his or her proportionate share of the after-tax amount of the daycare costs.
Another area of Section 7 that usually creates a fair amount of litigation including extra-curricular activities. If, for instance, a child is playing bantam hockey and the recipient spouse is therefore spending $3,000 a year on hockey related expenses, it is likely that a court will determine that this is an extra-ordinary expense with respect to an extra-curricular activity and is therefore shareable by the spouses in accordance with their incomes.

A party making a claim pursuant to Section 7 of the Guidelines must prove that the expense (for which a contribution is sought) is an expense actually being incurred. In *Krislock v. Krislock* (1997), 160 Sask. R. 212 Mr. Justice McIntyre clearly determined that Section 7 was not a basis for submitting a shopping list of estimated expenses for a variety of activities for the purpose of simply increasing the monthly child support payable. The party seeking the Section 7 expense must provide the court with sufficient details to satisfy the court that the expense is being incurred or will be incurred, as well as particulars of the actual expense involved.

The definition of the word “extra-ordinary” found in Section 7(1)(d) and (f) was dealt with by the Saskatchewan Court of Appeal in *Kofoed v. Fichter* (1997), 160 Sask. R. 55; upheld C.A. 2858/98 May 8, 1998. The Court of Appeal adopted a subjective approach to the analysis of whether expenses are extra-ordinary. Accordingly they determined that the nature of the expenditure, as well as the necessity and reasonableness, must be assessed having regard to the financial means and other circumstances of both parents. Using the *Kofoed, supra* analysis, the lower the income of the parties, the more likely the activity will be considered “extra-ordinary”. The decision of Mr. Justice Dickson in *McDonald v. Gross*, [1998] S.J. No. 301 is illustrative of where the court assessed the parties’ joint income earning capacity to determine whether or not expenses were considered “extra-ordinary” within the meaning of Section 7 of the Guidelines. Mr. Justice Dickson held that sporting activities and musical training were not extra-ordinary expenses for a family enjoying a combined income approaching $200,000.
Practitioners should also be cautioned to pay particular attention to the expenses that their clients are seeking to add on pursuant to Section 7 of the Guidelines, particularly when they are trying to rely on extra-ordinary expenses for primary or secondary school or extra-ordinary expenses for extra-curricular activities. The Table amount of child support is expected to cover many of the usual expenses incurred on behalf of the children. In *Engebretson v. Engebretson*, [1998] S.J. No. 676 the Honourable Madam Justice M.E. Wright held that incidental school expenses for sports, pictures, and periodicals are not extra-ordinary either in their nature or in the amount claimed. The applicant’s claim in that case for a contribution to the cost of a computer was also unsuccessful as were the claims for swimming, figure skating, and church youth group having regard to the means and circumstances of the parties and the Table amount already being paid by the payor spouse. Likewise in *Nkwazi v. Nkwazi*, [1998] S.J. No. 571, Wilkinson, J. disallowed claims for soccer and music lessons considering the joint incomes of the parties and the amount of the Table support that the custodial parent would receive for base child support. In the same case a claim under Section 7(1)(e) for expenses for post-secondary education was adjourned with leave to return the matter with further evidence providing an explanation as to why the post-secondary student was incapable of obtaining summer employment to defray the costs of his tuition and books.

As will be noted, a child support order is very much determinative on the payor spouse’s income. When is the recipient spouse’s income important when it comes to determining child support orders? If the recipient spouse is only seeking the Table amount of child support (and nothing for Section 7 expenses) then the court does not need to determine the recipient spouse’s income at all. It is only when the recipient spouse is claiming Section 7 expenses that some determination must be made of the recipient spouse’s income, since as stated, Section 7 expenses are shared in proportion to the spouse’s respective incomes. In this regard, it must not be overlooked that the same remedies available for the court with respect to imputing income apply equally to the recipient spouse.

Returning to the child support calculation example set out on page 15 it will be recalled that the payor spouse had an obligation under Section 3 of the *Guidelines* to pay $717 a month for three children based on an annual income of $40,000. If, in this situation, the recipient spouse also had
annual hockey expenses that she incurred on behalf of one of the children in the amount of $2,000 annually and her annual income was determined to be $20,000, the payor spouse would also in all likelihood be obligated to pay an additional $111 per month as his proportionate share (67%) of the hockey expenses. As such his total child support obligation would be $717 a month for the Table amount (Section 3) and $111 amount per month (Section 7), for total payable of $828..

5. Deviation from the Table Amount

a. Undue Hardship – Section 10

Section 10 of the Guidelines provides as follows:

“10. (1) **Undue Hardship** – On either spouse’s application, a court may award an amount of child support that is different from the amount determined under any of sections 3 to 5, 8 or 9 if the court finds that the spouse making the request, or a child in respect of whom the respect is made, would otherwise suffer undue hardship.

(2) **Circumstances that may cause undue hardship.** – Circumstances that may cause a spouse or child to suffer undue hardship include the following:

(a) the spouse has responsibility for an unusually high level of debts reasonably incurred to support the spouses and their children prior to the separation or to earn a living;

(b) the spouse has unusually high expenses in relation to exercising access to a child;

(c) the spouse has a legal duty under a judgment, order, or written separation agreement to support any person;

(d) the spouse has a legal duty to support a child, other than a child of the marriage, who is:

(i) under the age of majority, or

(ii) the age of majority or over but is unable, by reason of illness, disability or other cause, to obtain the necessaries of life; and

(e) the spouse has a legal duty to support any person who is unable to obtain the necessaries of life due to an illness or disability.

(3) **Standards of living must be considered.** – Despite a determination of undue hardship under subsection (1), an application under the subsection must be denied by the court if it is of the opinion that the household of the spouse who claims undue hardship would, after determining the amount of child support under any sections 3 to 5, 8 or 9, have a higher standard of living than the household of the other spouse.
(4) **Standards of living test.** – In comparing standards of living for the purpose of subsection (3), the court may use the comparison of household standards of living test set out in Schedule II.

(5) **Reasonable time.** – Where the court awards a different amount of child support under subsection (1), it may specify, in the child support order, a reasonable time for the satisfaction of any obligation arising from circumstances that cause undue hardship and the amount payable at the end of that time.

(6) **Reasons.** – Where the court makes a child support order in a different amount under this section, it must record its reasons for doing so."


Step 1: the court must be satisfied that circumstances exist that would cause the applicant or the child to suffer undue hardship; and

Step 2: if a determination of undue hardship is made, the court must still deny the application unless it is satisfied that the applicant household’s standard of living is lower than that of the spouse. The comparison of household standards of living test is set out in Schedule II and requires a step-by-step detailed calculation.

The onus of establishing circumstances of undue hardship and of a lower standard of living is on the person making the application.

If a person claiming undue hardship is able to satisfy both criteria for the two-step analysis, then the court has the discretion to make whatever child support order it deems to be appropriate.

The Saskatchewan case law to date has taken a strict approach when faced with undue hardship applications. Both in *Hansvell v. Hansvell* and *Messier v. Baines*, supra, the court has concluded that there must be compelling reasons for deviating from the presumptive rule in Section 3 of the *Guidelines*, and “undue hardship applications should be the exception and not the norm”.

In *Hansvell*, supra, the applicant suggested that the fact that he was remarried and had a child of the new relationship (and with a second one on the way) was sufficient to ground undue hardship in accordance with Section 10(2)(d) of the *Guidelines*. The court disagreed. Similarly, Madam J. Wright in *Messier, supra* rejected a claim for undue hardship on the basis that “second families” were not uncommon and did not necessarily create “undue” hardship.
In *Nagy v. Tittemore* (1997), 162 Sask. R. 54 Mr. Nagy argued that the *Guidelines* themselves created an undue hardship because it caused him to have a lower standard of living in his household as compared to his ex-spouse. Madam Justice Wilkinson held that Section 10(3) of the *Guidelines* (comparison of households standards of living) was intended as a process of elimination rather than a qualification.

In *Jackson v. Halloway* (1997), S.J. No. 691 the applicant was making an application for undue hardship on the basis of Section 10(a) of the *Guidelines* (unusually high level of debts). Mr. Justice McIntrye rejected the undue hardship argument and held that “it is an accepted principle that the payment of child support must take priority over the payment of debt. It is presumably for this reason that debt as a basis to deviate from the Guidelines has been circumscribed in the way that it has”. He pointed out that the debt load in question was not incurred prior to separation nor incurred to earn a living as the section required, and therefore dismissed the application.

One of the most common undue hardship claims is made on the basis of Section 10(2)(b) of the *Guidelines* (unusually high expenses in relation to exercising access to a child). In *Phaulhus v. Regnier*, [1997] S.J. No. 625 the applicant lived in Fairview, Alberta while the respondent and the children resided in Saskatoon. The applicant estimated his annual access expense (exclusive of long distance telephone charges and accommodation) to be approximately $4,000. The respondent stated that in 1997 the applicant visited the children three times, twice in Saskatchewan when he was working in Saskatchewan or visiting family. On the other occasion, she drove the children to and from Vermillion, Alberta. She indicated a willingness to continue to share the driving of the children for access purposes. Madam Justice Wright dismissed the claim for undue hardship stating that the evidence did not persuade her that the applicant’s access expenses were unusually high or that the application of Section 3 of the *Guidelines* would cause him to suffer “undue” hardship. For a contrary view, see *Williams v. Williams* (1997), B.C.J. No. 1951 (B.C.S.C.) where the court ordered child support at a level of $200 per month less than the Table amount on the grounds of undue hardship due to high access costs.
In *Matthews v. Hancock* (1998), 173 Sask. R. 23 an undue hardship claim was made out where the access parent resided in Creighton, Saskatchewan and his child lived with the mother in Calgary, Alberta, a distance of approximately 1,300 km. The father testified that he exercised access to his son two times per year and on each occasion spent 10 to 14 days. He estimated that he would spend between $1,600 to $4,000 each year on access and argued that an adjustment should be made to take into account these costs. Mr. Justice Gerein was of the view that the access parent was exaggerating his access costs, but recognized that exercising access necessarily involves some costs. The court went on to point out that it is only the excess (above what would be expected) which would fall into the category of “unusually high expenses”. In that case the court considered that $1,000 of the Respondent’s access costs did qualify and create an undue hardship situation. It is notable that the access parent’s claim ultimately failed because in moving to Step 2 of the test (the comparison of household standards) the court found that the standards of living were the same.

b. Split and Shared Custody – Sections 8 and 9

Calculation of child support in accordance with Sections 3 and 7 of the *Guidelines*, as discussed, presumes that the child resides primarily with one parent. If the parties share custody or there is a split custody arrangement, then Sections 8 and 9 of the *Guidelines* provides for a different manner for determination of a child support order.

i. Split Custody

Section 8 of the *Guidelines* deals with split custody. It provides that where each spouse has custody of one or more children, the amount of child support is the difference between the amount that each spouse would otherwise pay the other if a child support order were sought against each of the spouses. For example, if you had a husband who had custody of one child and earned $20,000 per year and the wife had custody of the other child, and earned $30,000 per year, a review of the *Guidelines* Table reveals that the husband would pay to the wife $159 a month while the wife would pay the husband $255 a month. The wife would therefore be required to pay the difference, as a result of being the higher income earner or $96 per month. If Section 7 expenses were applicable, they would be calculated for each child in the same manner as discussed previously.
ii. Shared Custody

Section 9 of the Guidelines deals with situations where the parties share custody of one or more children. Section 9 states as follows:

“9. Where a spouse exercises a right of access to, or has physical custody of a child for not less than 40 percent of the time over the course of a year, the amount of the child support order must be determined by taking into account:

(a) the amounts set out in the applicable tables for each of the spouses;
(b) the increased costs of shared custody arrangements; and
(c) the conditions, means, needs and other circumstances of each spouse and of any child for whom support is sought.”

The rationale for Section 9 of the Guidelines is that if one of the spouses is actually exercising access to the children for over 40 percent of the time over the course of the year, there will be presumably increased costs for that parent with respect to the care of the children while they are with him or her. Accordingly, Section 9 was implemented to address this.

Not surprisingly, Section 9 has led to much criticism as to promoting litigation with respect to custody and access matters. It is not surprising that a custodial parent wishes to block access below the 40 percent threshold, while an access parent wishes to obtain access above the 40 percent threshold to reduce his or her support obligation. It therefore has the potential for creating access disputes that ought not to be.

In a Section 9 analysis the first task is to determine whether or not the 40 percent threshold has been met. This is done on a straight hour calculation of the numbers of hours the child is with each parent or within the responsibility of each parent. The hour calculation will include hours during which the children are sleeping, in school, and presumably the parent whose care they are in will log that amount of time as a credit to them. *(Bowering v. Bowering* (2001), S.J. No. 657.)

If, for example, a father has the children from Friday at 8:00 a.m. to Monday at 4:00 p.m. each week, then all of the time calculated during that time period (including when the children are asleep and in school) will be credited to him. The threshold calculation then becomes a simple matter of calculating the hour comparison the children spend with each parent.

The words “over the course of the year” are also significant and refer to the year going forward and not the past. *(See Solonenko v. Stice,* [1998] S.J. No. 291). However, frequently the onus of proof is met by looking to the previous year *(see Kimber v. Nikkari* (2000), 8 R.F.L. (5th) 125 (Sask. Q.B.)). Because the 40 percent rule operates over the course of a year, it takes into account the fact that the amount of time a parent spends with a child can fluctuate over the course of a year. Accordingly, it is important that when asserting a shared parenting support regime that the access pattern for the upcoming year must be identifiable to ensure that not only is the amount of time 40 percent or more, but that it be based on a calculation of time over the course of the entire year and not (for example) just for one month.
If the 40 percent threshold is met, then there is discretion for the courts in how they arrive at the child support. The only requirement is that the court must still take into account the amount set out in the applicable Table for each parent (Section 9(a)); the increased costs of any shared custody arrangement (Section 9(b)); and the condition, means, needs and other circumstances of the parents and the children (Section 9(c)).

It is very important not to underscore the importance of each of the relevant factors set out in Section 9 and not just Section 9(a) of the Guidelines. Often many practitioners simply determine if the 40 percent threshold has been met and then apply a straight Table set-off as contemplated by Section 9(a) (which is in effect a Section 8 analysis). This was illustrated in *Hubic v. Hubic* (1997), 157 Sask. R. 150 (Sask. Q.B.). In that case, Dawson, J. concluded that the discretion given to the court under Section 9(c) of the Guidelines should be interpreted having regard to Section 26.1(2) of the *Divorce Act* (i.e., the parents have a joint responsibility to support their children and that the total cost of raising the children should be allocated between the parents having regard to the cost each parent incurs and their relative incomes). However, in that case, neither party identified any increased costs of the shared custody nor did they identify specifically the monthly cost each incurred for housing, clothing, food, etc. for the children. As such, and in light of the lack of evidence, Madam Justice Dawson used the formula as set out in Section 8 of the Guidelines to calculate the child support. (Basically Section 9(a)).

In *Wouters v. Wouters* (2001), S.J. No. 232 (Sask. Q.B.) Madam Justice Wright specifically cautions against the importance of not over-emphasizing Section 9(a) of the Guidelines once the 40 percent threshold has been met. As she points out in that case, the straight set-off approach may be inappropriate where there is a great disparity in incomes or a set-off would lead to an unacceptable standard of living in one or both homes.

Once the 40 percent threshold has been met, the calculation of the Table set-off is likely a good starting point, however, counsel must be aware of the necessity for possible adjustments (i.e., large disparity in incomes, incomes below the poverty line (if a straight set-off was made) and the fact that one party may be absorbing a large amount of the children’s costs on their own).

Initially, after the implementation of the Guidelines, it is fair to say that the Saskatchewan courts were applying a straight Section 8 analysis when the 40 percent threshold was met. In my view there has now been a slight shift away from such an analysis, and the courts are no longer reluctant to deviate from such an approach when circumstances permit.
C. DISCLOSURE

As we have seen from the above, assessment of income is crucial to a proper determination of a child support issue. Accordingly, how does one obtain the necessary information to adequately assess a person’s income? First, the Guidelines contain detailed disclosure provisions. Second, the Queen’s Bench Rules of Court (for Family Law Proceedings) have also been significantly changed to assist counsel to address the disclosure problem.

Section 21 of the Guidelines imposes a positive onus on both the applicant and the respondent in any child support proceeding to provide income information which includes the following:

(a) a copy of every personal income tax return filed by the spouse for each of the three previous taxation years;
(b) a copy of every Notice of Assessment or Re-Assessment issued to the spouse in respect to those three taxation years;
(c) where the spouse is an employee, the most recent statement of earnings or where a statement is not available, a letter from the employer setting out the spouse’s current rate of annual salary and remuneration;
(d) where the spouse is self-employed, financial statements of the spouse’s business for the three previous taxation years, together with a statement showing a breakdown of all salaries, wages, management fees or other benefits paid to, or on behalf of, persons with whom the spouse does not deal at arm’s length;
(e) where the spouse is a partner, confirmation of the spouse’s income and draw from, and capital in, the partnership for the three previous taxation years;
(f) where the spouse controls a corporation, financial statements of the corporation and its subsidiaries in respect to the three previous taxation years; and
(g) where the spouse is a beneficiary under a trust, a copy of the trust agreement and the trust’s three most recent financial statements.

Section 21(2) of the Guidelines provides that the income information must be provided within 30 days after an application for a child support order is served on the payor spouse, provided that the payor resides in Canada. If the payor resides in the United States or elsewhere, the timeline is 60 days.
It should be noted that the above financial information is required to be disclosed by both the applicant and the respondent. The respondent’s financial information is clearly most critical to the determination of an appropriate level of child support, however, as has been seen, the applicant’s financial information may also be necessary if you are into a shared or split custody arrangement, or if there is an issue with respect to Section 7 expenses.

As noted, in addition to the obligations set out in the Guidelines, the Rules of Court allow for disclosure. For instance:

(a) Queen’s Bench Rule 640 requires a party requesting a child support order (or varying a child support order) to serve a Notice to File Income Information (in Form 640B) on the opposing party along with the other necessary court documents. A review of this form (which is appended as Appendix A) shows that it requires virtually the same disclosure as that imposed by the Guidelines, and in addition to some further disclosure requirements including a year-to-date pay stub and a Financial Statement. The time line for complying with the income information under Queen’s Bench Rule 640B is the same as the Guidelines, namely 30 days if the person resides in Canada.

(b) Queen’s Bench Rule 616 allows a party, once without leave, and at any time with the leave of the court or written consent of the other party, to serve and file on the other party a Notice to Disclose in Form 616. A copy of the Notice to Disclose is appended as Appendix B. This document allows the requesting party to request such things as a Financial Statement, a copy of the person’s three most recent pay remittance stubs, and various other financial documents. If a Notice to Disclose is served, then the opposing party must serve and file the documentation and information requested within 30 days after service of the Notice (unless objected to in accordance with the Rule).

(c) Queen’s Bench Rule 617 allows a party once without leave, and again at any time with the leave of the court or on the written consent of the opposite party, to serve and file a Notice to Reply to Written Questions in Form 617 setting out a list of questions (to a maximum of 15) relating to financial or property information of the other party. Again, a Notice to Reply to Written Questions must be served and filed within 30 days after service of the Notice (unless objected to in accordance with the Rule). A copy of Form 617 is appended as Appendix C.
1. **Non-Compliance**

If the Request for Disclosure in accordance with the *Rules of Court* is made on an opposing party and they fail to provide a response (or in accordance with the time lines required by the *Rules*), then an application can be made to the court in accordance with Queen’s Bench Rule 619. The court upon hearing such an application can do any number of the following:

(a) where child support is an issue, draw an adverse inference against the party and impute income to that party in an amount the court considers appropriate;
(b) direct payment of support in an amount the court considers appropriate;
(c) direct that the party serve and file, within a specified time, a Financial Statement, property statement or income information as required in the Notice to File Income Information, Notice to Disclose or Notice to Reply to Written Questions;
(d) grant any other remedy requested;
(e) award costs, including costs up to the amount that fully compensates the other party for all the costs incurred in the proceeding.

In the event that a spouse fails to reply to the disclosure obligation as required by the *Guidelines*, similar remedies to those above are available. For instance, Section 22 of the *Guidelines* permits the spouse requesting the information to apply to have the application for a child support order set down for hearing and move for a judgment. It allows the court to order the spouse who failed to reply to provide the required documents. Section 23 allows the court to draw an adverse inference against the spouse who failed to comply, and also gives the court the power to impute income to that spouse in such amount the court considers appropriate for the purpose of making a child support order even in the absence of the information. Section 22(2) allows the court to impose costs.

In the event that a spouse fails to comply with any order requiring financial disclosure, Section 24 of the *Guidelines* allows the court to strike out the spouse’s pleadings, make a contempt order, proceed to a hearing, (and draw the adverse inference referred to above) and award costs. These remedies are not mutually exclusive and therefore as can be seen, the ramifications of failing to comply with the financial disclosure requirements can be severe.
Section 25 of the Guidelines provides for a continuing obligation to give financial information. For instance, a spouse against whom a child support order has been made can be compelled to provide the same disclosure again after the order has been made, however the request for disclosure can only be made once per year after the making of the original order. It should be noted that any failure to comply with such a request may be enforced in the same manner as previously set out.

It will be noted that the income disclosure sections in the Guidelines do not create an obligation on new partners or other household members to provide income information. This information can be important when doing a comparison of household standard of living tests under Section 10 of the Guidelines. Accordingly, Queen’s Bench Rule 621 has been implemented to remedy this potential problem. This rule provides that when a court makes a determination of undue hardship under Section 10 of the Guidelines, the court may order any one of the following persons (residing with the party) to serve or file a Financial Statement with Part I of the Statement completed:

(a) a person who has a legal duty to support the party or whom the party has a legal duty to support;

(b) a person who shares living expenses with the party or from whom the party otherwise receives an economic benefit as a result of living with that person; or

(c) a child whom the party or the person described in clause (a) or (b) has a legal duty to support.

D. MISCELLANEOUS MATTERS

1. Taxation

Amounts ordered for child support under the Guidelines are not taxable to the recipient and therefore not tax deductible to the payor. This is different than pre-Guidelines. If, however, the parties are still abiding by an agreement or court order made prior to the Guidelines, the tax deductibility of the child support order for the payor will still be proper. However, one must be cautioned that any change to the pre-Guidelines agreement or court order will automatically bring the non-taxability into effect. Accordingly, if you have a scenario in which one of your clients is
receiving the benefit of being able to claim a previous child support order as tax deductible and
that client now wants to change the order, you will want to ensure that he or she is made aware
of the tax implications of the change and whether it is truly beneficial or not.

2. Child Tax Benefit

The federal and provincial government pays a Child Tax Benefit to parents of dependant children on a
monthly basis provided they qualify. The amount received is dependent upon the household income.
If two parties are together, it will be based on both incomes and not just one person. As such, when
parties separate and have been separated for a period of 90 days or greater, then it is open for a party
who is receiving the Child Tax Benefit to notify Canada Customs and Revenue Agency of the change
in cohabitation status such that the new amount of the Benefit will now be calculated based on that
person’s income only. This can be significant if you have a low income earner who is not receiving
much in the way of Child Tax Benefits because her spouse is receiving $50,000 to $60,000 a year in
employment income. Accordingly, be sure to notify your client of the right to reapply for a change in
status with respect to the Child Tax Benefit when and if the situation presents itself. You should also
be aware of ensuring that it is made clear in any agreements or court orders as to who will be eligible
to claim the Child Tax Benefit when you are dealing with a situation of shared or split custody.

III. SPOUSAL SUPPORT

A. THE LEGISLATION

The Family Maintenance Act (hereinafter the “FMA”) and the Divorce Act both provide for
spousal support awards. The FMA applies to both married and unmarried people seeking
support, whereas the Divorce Act is only applicable to married spouses. In most cases married
persons seeking spousal support will make application for the same under the Divorce Act. In
some circumstances, however, they may choose to proceed by way of the FMA (i.e., where he or
she is not ready to pursue a divorce). The FMA is primarily used by common-law couples.
B. DEFINITIONS

1. Divorce Act
   a. Corollary Relief Proceeding
   Corollary relief proceeding is defined in Section 2(1) of the Division Act as meaning “a proceeding in a court in which either or both former spouses seek a child support order or a spousal support order or a custody order”.

   b. Divorce Proceeding
   Divorce proceeding is defined as a court proceeding in which either or both spouses seek a divorce along with or together with child support, spousal support or custody.

   c. Court
   Court is defined in Section 2(1) of the Divorce Act as the Court of Queen’s Bench for the Province of Saskatchewan.

   d. Spouse
   Spouse is defined in Section 2(1) of the Divorce Act as meaning either a man or a woman who are married to each other.

   e. Support Order
   Support order is defined in Section 2(1) of the Divorce Act as meaning either a child or spousal support order.

2. The Family Maintenance Act
   a. Court
   Court is defined as the Provincial Court of Saskatchewan or the Family Law Division of the Court of Queen’s Bench. (Please note that in Saskatoon and Regina applications under the Family Maintenance Act can only be brought in the Court of Queen’s Bench Family Law Division.)
b. Spouse

Spouse is defined as a husband or wife and includes:

(a) a party to a marriage that is voidable and has not been voided by a judgment of nullity or dissolution of marriage;

(b) for the purpose of proceedings to enforce or vary an order, a party to a marriage with respect To which an order for divorce, dissolution of marriage or decree of nullity has been made; or

(c) either of a man and woman who are not married to each other and have cohabited as husband and wife:

(i) continuously for a period of not less than two (2) years; or

(ii) in a relationship of some permanence, if they are the birth or adopted parents of a child.

For a discussion of what constitutes cohabitation for the purpose of the Act it may be useful to look at the Ontario case of Molodowicz v. Penttinen (1980), 17 R.F.L. (2d) 376, which was considered by Madam Justice Carter in Nichols v. Hawes (1997), 155 Sask. R. 28. In Molodowicz the Court identified seven factors, involving at least 23 considerations relevant to the determination of whether cohabitation has occurred.

C. RELEVANT PROVISIONS OF THE ACTS

Section 15.2 of the Divorce Act outlines the objectives and factors to be considered in ordering spousal support and provides for the types of support orders which are available:

(a) A court of competent jurisdiction may, on application by either or both spouses, make an order requiring a spouse to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump sum and periodic sums, as the court thinks reasonable for the support of the other spouse.

(b) Where an application is made under subsection (1), the court may, on application by either or both spouses, make an interim order requiring a spouse to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump sum and period sums, as the court thinks reasonable for the support of the other spouse, pending the determination of the application under subsection (1).

(c) The court may make an order under subsection (1) or an interim order under subsection (2) for a definite or indefinite period or until a specified event occurs, and may impose terms, conditions or restrictions in connection with the order as it thinks fit and just.
(d) In making an order under subsection (1) or an interim order under subsection (2), the
court shall take into consideration the condition, means, needs and other circumstances of
each spouse, including
(i) the length of time the spouses cohabited;
(ii) the functions performed by each spouse during cohabitation; and
(iii) any order, agreement or arrangement relating to support of either spouse.

(e) In making an order under subsection (1) or an interim order under subsection (2), the court
shall not take into consideration any misconduct of a spouse in relation to the marriage.

(f) An order made under subsection (1) or an interim order made under subsection (2) that
provides for the support of a spouse should:
(i) recognize any economic advantages or disadvantages to the spouses arising from
the marriage or its breakdown;
(ii) apportion between the spouses any financial consequences arising from the care
of any child of the marriage over and above any obligation for the support of
any child of the marriage;
(iii) relieve any economic hardship of the spouses arising from the breakdown of the
marriage; and
(iv) insofar as practicable, promote the economic self-sufficiency of each spouse
within a reasonable period of time.

Similarly the FMA sets out the factors and objectives to be considered in making a spousal
support award under that Act.

“Section 5(1): On application, the Court may order a person to provide maintenance for
his or her spouse, in accordance with need, to the extent that the person is capable of doing
so.
(2) An order for the maintenance of a spouse should:
(i) recognize any economic advantages or disadvantages to the spouses
arising from the marriage or its breakdown;
(ii) relieve any economic hardship of the spouses arising from the
breakdown of the marriage; and
(iii) insofar as practicable, promote the economic self-sufficiency of each
spouse within a reasonable period of time.

Section 7(1) - In determining the amount, if any, of maintenance to be paid for a dependent
spouse, the Court shall take into account the needs, means and economic circumstances of
the parties, including:
(a) the age and the physical and mental health of the spouses;
b) the length of time the spouses cohabited;
c) the measures available for the dependent spouse to become financially independent
and the length of time and cost involved to enable the dependent spouse to take those
measures; and
d) the legal obligation of the respondent to provide maintenance for any other person.
(2) In determining the amount, if any, of maintenance to be paid for a dependent, the Court shall not take into account any benefit that the Department of Social Services provides to or for the maintenance of the dependent.”

Section 9(1) sets out the various kinds of awards available under the FMA:

“On an application pursuant to this Act, the Court may make an interim or final order on any terms and conditions that the Court considers appropriate, including one or more of the following provisions:

a) that an amount be paid periodically, either for an indefinite or limited period, or until a specified event occurs;
b) that a lump sum be paid or held in trust on any conditions the Court considers appropriate;
c) that maintenance be paid with respect to any period before the date of the order;
d) that a person who has a policy of life insurance as defined in the Saskatchewan Insurance Act:
   i) designate his or her dependent as a beneficiary irrevocably or for the period designated by the Court; and
   ii) pay all premiums on the policy;
e) that a person who has an interest in a pension plan or other benefit plan designate his or her dependent as a beneficiary under the plan and not change that designation;
f) where a father is ordered to pay maintenance for a child and whether or not the mother of the child is a spouse of the father, that the father pay in addition:
   i) expenses of the mother of the child with respect to prenatal care and the birth of the child;
   ii) maintenance for the mother of the child for a period not exceeding three months immediately preceding the birth of the child; and
   iii) maintenance for the mother of the child during any period after the birth of the child, not exceeding six months, that the Court may determine as a period during which, by reason of the birth of the child, the father ought to contribute toward the maintenance of the mother;
g) that costs incurred in obtaining an order pursuant to this Act be paid;
h) that payment pursuant to the order be secured by a mortgage on land, security, deposit or bond in any form that the Court directs.

(2) A provision of an agreement entered into by the parties may be incorporated into an order made pursuant to this Act.

(3) An order for maintenance pursuant to subclauses (1)(f)(i) and (ii) may be made before or after the birth of the child and whether or not the child survives the birth.”

Section 15.3(1) of the Divorce Act and Section 6(1) of the FMA provide that where a court is considering an application for a child support order and an application for a spousal support order, the court shall give priority to child support in determining the application.
Section 15.3(3) of the Divorce Act and Section 6(2) of the FMA provide that where, as a result of giving priority to child support, a spousal support order was not made, or the amount of the spousal support order is less than it otherwise would have been, any subsequent reduction or termination of that child support constitutes a change of circumstances for the purposes of applying for a spousal support order, or a variation order in respect to the spousal support order, as the case may be.

D. TYPES OF ORDERS

1. Interim Awards

The basic test for interim support is need on the part of the applicant and the ability of the respondent to pay. The Manitoba Court of Queen’s Bench in Labelle v. Labelle (1993), 46 R.F.L. (3d) 341 states that interim orders are by their nature “holding orders” and whereas the support objectives outlined in the Divorce Act are strictly speaking, applicable on an interim hearing, common sense dictates that the depth of inquiry at the interim stage of the proceedings is quite different from that expected at trial. A similar decision was made by the Saskatchewan Court of Appeal in Krilow v. Babiy (1992), 100 Sask. R. 35. The Court held that factual determinations and the resolution of when the common-law wife should become self-sufficient should be left for trial and not be determined at the interim stage. See also Doncaster v. Doncaster (1989), 76 Sask. R. 81 (Sask. C.A.) where the court held that it was not necessary to find a casual connection between the marriage and the need for support at the time an interim application is made.

With respect to the quantum of interim spousal support, the courts have been cognizant of the fact that interim support is an interim measure designed to bridge the gap between the time of the application and trial. In Forbes v. Forbes (1994), 117 Sask. R. 299 (Q.B) the court equalized the parties disposable income after taking into account child support. The Forbes decision was appealed and the Court of Appeal did not endorse the income equalization theory, however in the circumstances, they found that the total award to the spouse and child was appropriate.
In *Stefanyk v. Stefanyk* (1994), 1 R.F.L. (4th) 432, a wife was ordered to pay interim support to the husband. The husband had given up his job to move to another province where the wife could pursue a career opportunity as a television anchor on the CBC News. As a result of the husband giving up his job, the court held that he was economically disadvantaged due to the marriage.

As regards variation of interim spousal support orders, in *Kolter v. Kolter* (1991), 88 Sask. R. 127 (Sask. Q.B.) the court dismissed an application for variation of an interim support order. The court held that interim orders should only be varied where there has been a material change in circumstances that could not be anticipated at the time the interim order was made or if one of the parties had withheld material information at the time of the making of the interim order, or the interim order had been obtained by fraud. If a party is dissatisfied with the interim order the party has the right to proceed to trial as opposed to appealing the interim order. An interim order can be appealed to the Court of Appeal, however appeal courts are generally reluctant to hear appeals of interim orders and would rather see the matter proceed to trial.

2. **Retroactive Spousal Support**

The courts generally take the view that support orders should not antedate the making of the interim order. See *Fraser v. Fraser* (1991), 94 Sask. R. 253. However, the courts recognize that in certain circumstances it may be appropriate to make a retroactive order. A recent case on this issue, although in relation to child support under the *FMA*, is *R.W. v. J.M.* (1993), 111 Sask. R. 303. In that case Mr. Justice Halvorsen clearly states that as a general rule “a lump sum award for past maintenance is exceptional”. He then goes on to outline three scenarios where a lump sum award would be appropriate:

(a) money is available from a property division and there is a future risk that support payments will not be made;
(b) the custodial parent has accumulated debt due to the respondent’s failure to pay support; and
(c) the non-custodial parent has deliberately avoided enforcement proceedings.
Mr. Justice Halvorsen also looked at the father’s financial ability to satisfy a $19,500 order when he had approximately seven dependents and had a net income of about $2,000 per month. Therefore, it is clear that even where the court may consider a lump sum award to be appropriate, the ability of the payor spouse to pay such an order is still of equal concern to the court.

It is submitted that the reasoning of Mr. Justice Halvorsen in the case of R.W. v. J.M., supra, would be appropriate to a consideration of retroactive support under the Divorce Act. This issue was also considered by Mr. Justice Dickson in Gerry v. Perry (1992), 95 Sask. R. 224; Anderson v. Engdahl (unreported) Q.B.M. 664/91 J.C.R. (November 6, 1991); Weist v. Zordal (1992), 99 Sask. R. 303. In the latter decision the court noted that in awarding retroactive maintenance under the FMA the court should apply the principles set out under Sections 3 and 5 of that Act. See also C.B.-F. v. G.B.A.S. (1998), 169 Sask. R. 302 where the court reiterated the principle that retroactive support should be made only in rare circumstances. The case itself dealt with child support, however the same principles apply to both spousal and child support. In that case, the court referred to the fact that no adequate explanation was given for the delay in making the application for support and there was no evidence that the mother had gone into debt because of the delay.

In summary, retroactive orders will likely be made where there is a clear need on the part of the applicant and where there is an explanation for the delay in making the application and a reasonable ability to pay.

3. **Lump Sum versus Periodic Awards**

Sections 15.2(1) and (2) of the Divorce Act allow the court to make lump sum orders for spousal support on interim or final applications. Section 9(1)(b) of the FMA allows for lump sum support orders, or a lump sum payment to be held in trust on any conditions the court considers appropriate.

It would appear that lump sum support is only justified if there is a specific or immediate need for the support. An order might be appropriate where the application for support is made a
number of months after separation and, in the intervening period, support was not being paid. A court might then be inclined to order lump sum support and would be particularly interested in knowing whether the applicant had incurred debt in the intervening period and also whether the respondent was in a position to make payment.

Arguably lump sum support is nothing more than interim support awarded retroactively. The awarding of retroactive support creates a lump sum award. Accordingly, the cases dealing with retroactive support are instructive under this heading as well. Lump sum retroactive maintenance is an award to be reserved for exceptional circumstances, as it is more in the nature of a capital contribution than an award for past maintenance. See *Gee v. Ng* [1997] Sask. D. 360.55.15.50-01 where the court held that it is not appropriate to award lump sum support where the receiver of support seems satisfied with the payments she or he has received for a number of years and then asks for retroactive maintenance years later when applying for an order. The leading case in this area is *W.(R.) v. M.(J.)* (1994), 111 Sask. R. 303.

Lump sum interim support will not be granted where it is apparent that the party seeking the lump sum order is doing so in order to obtain a division of assets under the guise of support. See *Hemming v. Hemming* (1983), 145 D.L.R. (3d) 699 and *Mathews v. Mathews* (1991), 34 R.F.L. (3d) 201.

4. **Pre and Post Natal Expenses**

Section 9(1)(f) of the *FMA* allows the court to make orders with respect to prenatal and postnatal expenses of the mother, prior to and after birth. First, the court can order the father of the child to pay the expenses of the mother with respect to prenatal care and birth of the child. Secondly, the father can be ordered to pay maintenance for the mother for the three months preceding the birth of the child. Thirdly, the father can be ordered to pay maintenance for the mother for a period of up to six months after the birth of the child. In *M.(K.) v. B.(GT.)* (1994), 118 Sask. R. 154 the court held that the term “expenses” does not cover the loss of income incurred by a mother following the birth of a child, however loss of income is covered under the provision granting maintenance to the mother.
In *K.(J.) v. B.(K.)* (1996), 133 Sask. R. 245 the court held that the costs of child care, clothing and medication purchased during the child’s first year of life were not incurred for prenatal care and birth. The court held that these costs were ordinary expenses and could not be claimed under Section 9(f)(i). Pre-natal care and birth expenses could include medication required by the mother, expenses associated with the birth, hospital and medical expenses and perhaps some of the initial capital expenses connected with furnishing a baby room in the mother’s home. In the *M.(K.)* case, the court ordered the father to pay one-half of the cost of the pre-natal expenses which included the crib and other necessities.

It is important to note that if the unmarried mother does not fall within the definition of “spouse” in Section 2(l) of the *FMA*, the only support to which she personally is entitled is set for the three months prior to the birth of the child and for the six months after the birth of the child.

**E. ENTITLEMENT**

Section 15.2(4) of the *Divorce Act* directs the court to consider the conditions, means, needs and other circumstances of each spouse, including:

(a) the length of time the spouses cohabited;
(b) the functions performed by each spouse during cohabitation; and
(c) any order, agreement or arrangement relating to support of the spouse.

Similarly, Section 7(1) of the *FMA* instructs the court to consider the needs, means and economic circumstances of the parties, including:

(a) the age and the physical and mental health of the spouses;
(b) the length of time the spouses cohabited;
(c) the measures available for the dependent spouse to become financially independent and the length of time and cost involved to enable the dependent spouse to take those measures; and
(d) the legal obligation of the respondent to provide maintenance for any other person.

Section 5(1) of the *FMA* also allows the court to order spousal maintenance, in accordance with the applicant’s need, to the extent that the payor is capable of doing so.
Under both statutes both a compensatory and needs-based analysis of the facts must be considered. The *FMA* includes three of the objectives enumerated in the *Divorce Act*, but goes further in suggesting that need is relevant. This was noted in *Pomaranski v. Pomaranski* (March 30, 1998) F.L.D., J.C.R. 224 of 1997 (Sask. Q.B.), Dawson, J.

1. **Condition**

The word “condition” is a word of flexible meaning and when applied to a person it is a broad word in undefined application. It includes, *inter alia*, within the scope, the social standing, or position, of the person in the community, but also the person’s physical, mental and moral condition. *Schartener v. Schartener* (1970), 10 D.L.R. (3d) 61 (Q.B.)


2. **Means**

Means does not mean merely income, but would include all of a person’s resources, capital assets, income from employment or incapacity (i.e., disability benefits) and any other sources from which the person gains or benefits together with, in certain circumstances, monies in which the person does not have in possession, but which are available to such person. It is quite clear that an assessment of support will be made upon a potential capacity to provide support where it is found that the spouses possess substantial “means”, but may have an artificially low income. The word “means” should be equated with the word “ability”, *Hastings v. Hastings* (1984), 38 R.F.L. (2d) 462. The ability to earn
an income or potential earning capacity will be taken into consideration. For a recent discussion as to
means and the consideration of income, the Alberta Court of Appeal decision in Levesque v. Levesque
(1994), 4 R.F.L. (4th) 375 is instructive. The court held that what was important was the parent’s
income-earning abilities and not their actual incomes. Thus, if the court believes that a parent is not
working to the best of his or her ability, it should attribute income to him or her.

With reference to property divisions, the court has held that a property settlement should not be
used to carry out the provisions of an order for maintenance, but rather property issues should be
resolved before an order for maintenance is made: Boardman v. Boardman (1978), 2 R.F.L. (2d)
156 (Sask. Q.B.) and Rathwell v. Rathwell (1976), 16 R.F.L. 387 (Sask. Q.B.). However, an
unequal property division in favour of one of the parties may bear upon the support: McPike v.
No. 333 where Halvorsen, J. found “Moge does not purport to sanction an uneven property
division under the guise of compensatory support.”

3. Needs

The needs of a spouse should be considered in the context of the standard of living enjoyed
during the marriage: Morton v. Morton, [1993] 115 Sask. R. 91. However, the quantum of
spousal support ordered does not often reflect that principle. See for example Ondik v. Ondik,
[1994] 118 Sask. R. 216, where a wife received $700 per month even though the husband earned
$78,000 per year and the wife earned $8,400 per year. Also see Messer v. Messer (Messer #4)
(1997), S.J. No. 645 Appeal Docket No. 2599 (October 15, 1997) where the Court of Appeal
found the trial judge had made an error in principle in attempting to maintain the pre-divorce
standard of living of the wife, without giving due consideration to the fact that splitting the same
combined income between two households will invariably lead to a reduced standard of living.
Conversely, some recent decisions have awarded spousal support in an effort to ensure the
applicant spouse continues to enjoy a comparable post-divorce standard of living. See Johsdal v.
4. Other Circumstances

“Other circumstances” provides a catch-all permitting consideration of any other relevant matters apart from other statutory considerations: Schartener v. Schartener, supra. Some of the factors that can be considered other circumstances are as set out in Section 15(5) of the Divorce Act, length of the cohabitation, the functions performed by the spouse during cohabitation and any separation agreements or interspousal contracts already in existence. Other relevant factors may be a payor’s new relationship and obligations, or the fact that the payee commences cohabitation. In Messer v. Messer (Messer #3) (1996), 150 Sask. R. 23, Mr. Justice Gerein also considered the wife’s requirement for retirement income.

5. Length of Cohabitation

In Moge v. Moge, [1992] 3 S.C.R. 813 (S.C.C.) the Supreme Court of Canada viewed the length of cohabitation as an important factor to be considered. The view of the Court is essentially that the longer a marriage lasts, the more of a joint venture the marriage becomes and therefore, the expectation of equal dissolution grows as the length of the marriage grows.

In the case of Robichaud v. Harvey (1989), 98 N.B.R. (2d) 135, a spouse was denied support after a ten-week period of cohabitation and an actual marriage of 26 months. The court felt, in that case, that the wife had reaped financial benefits from the marriage and the marriage was such a short term that she suffered no disadvantage.

6. Functions Performed by Each Spouse During Cohabitation

In Moge v. Moge, supra, the Supreme Court of Canada held that when determining spousal support awards, the court must look to the facts to determine how the division of labour during the relationship was divided and if there were any economic disadvantages or advantages to the spouse claiming support due to the role played by that spouse in the marriage. In Grohmann v. Grohmann (1991), 37 R.F.L. (3d) 73 (B.C.C.A.), the marriage was of six years and the court held
that because the wife had not significantly diverted her time to the development of the marriage, that she was only entitled to a fixed term support order of five months. In that case, the wife was economically independent.

7. **Order, Agreement or Arrangement**

An application for spousal support is not denied simply on the basis of a separation agreement that is already in place. Section 15(5)(c) of the *Divorce Act* states a separation agreement is a factor to be considered: *Paul-Hus v. Paul-Hus* (1994), 115 Sask. R. 294. However, there is significant jurisprudence on the test the court is to use when a party wishes to vary the spouse support provisions of a separation agreement. These cases will be reviewed under the section of this paper dealing with applications to vary.

F. **MISCONDUCT**

Section 15.2(5) of the *Divorce Act* prohibits the court from taking into consideration any misconduct of a spouse in relation to the marriage. Whilst a judge may not consider the conduct of the parties during the marriage in fixing support, the judge can take into account the economic effects that a spouse’s conduct may or may not have had on the spouse seeking support: *Martin v. Martin* (1993), 113 Sask. R. 316 (Sask. Q.B.). However, the fact that a spouse makes the decision to leave the marriage does not disentitle that spouse from being able to make a successful claim for spousal support. *Robichaud v. Robichaud* (1988), 17 R.F.L. (3d) 285 (B.C.C.A.)

G. **OBJECTIVES OF A SPOUSAL SUPPORT ORDER**

Once the criteria to entitlement of a spousal support award is established, Section 15.2(6) of the *Divorce Act* and Section 5(1) of the *Family Maintenance Act* require the court to further consider the following objectives in making a spousal support order:
(a) it should recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
(b) it should apportion between the spouses any financial consequences arising from the care of any child of the marriage, over and above the obligations for the support of any child of the marriage;
(c) it should relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
(d) insofar as practicable, it should promote the economic self-sufficiency of each spouse within a reasonable period of time.

Following the creation of the 1968 *Divorce Act*, the principle criteria for determining spousal support was “means vs. needs”. This was of course subject to conduct consideration.

The first “modern” case on spousal support that went to the Supreme Court of Canada was *Messier v. Delage* (1982), 35 R.F.L. (2d) 337 (S.C.C.). This case was significant, since the dissent in that case has been said to have been the first case to have planted the seeds of the “clean break” theory when it comes to determining spousal support. The “clean break” model of spousal support espouses that spousal support should only be granted for long enough to allow the parties to become independent of one another. Thereafter ongoing need would be the responsibility of the state rather than the former spouse. Where possible, the divorce should allow the parties to have a clean break from one another.

The “clean break” model of spousal support picked up momentum with the enactment of the 1985 *Divorce Act*, the current divorce legislation. Consequently, in the early years following the enactment of the *Divorce Act* of 1985 there was a great deal of focus by courts on the concept of “promoting economic self-sufficiency within a reasonable period of time” and there was a major shift in favour of time-limited support orders. This changed very significantly with the Supreme Court of Canada decision in *Moge v. Moge*, [1992] 43 R.F.L. (3d) 345 (S.C.C.).

The *Moge, supra* decision was written by Madam Justice L’Heureux-Dube. *Moge, supra* is a mandatory “re-read” in every case you take to trial regarding spousal support. The decision really serves to reject the “clean break” model and remind practitioners that spousal support provisions of the 1985 *Divorce Act* had to be read as a whole and that no single one of the objectives for a
spousal support order was now paramount to any of the others. The promotion of economic self-sufficiency was only one consideration (and it was only “insofar as practical”) and that particular consideration of that factor did not warrant greater prominence than the others. Recognition of the “economic advantage or disadvantage to the spouses arising from the marriage or its breakdown” and relief from “any economic hardship of the spouses arising from the breakdown of the marriage” were to become the subject of much more scrutiny by the courts. The decision instructs us to go back and read the *Divorce Act* and look at all of the considerations set out in the *Act.*

It is clear that *Moge*, supra emphasizes the importance of a compensatory model of support with a view that a spouse or former spouse may continue to suffer economic disadvantages as a result of the marriage and its breakdown. In those cases, where there is an economic disadvantage experienced by a spouse, a support order should be made to compensate for same. The court discussed some of the situations where an economic loss would be suffered by a spouse and these are:

(a) the birth of the children, because often a spouse reduces paid employment or abandons it altogether to care for the child and continues to have the child after the parties separate;
(b) the spouse contributed to a business operation; and
(c) the spouse takes on increasing amounts of domestic responsibilities to enable the other spouse to increase their earning potential by way of career advancement or educational opportunities.

The Supreme Court further determined that it would not be necessary to submit economic reports to establish the economic loss suffered by the wife before compensatory support should be ordered. The court determined that the parties should present evidence of the roles played by the parties during the marriage. The court was also prepared to utilize the doctrine of judicial notice. Specifically they stated that the general economic impact of divorce on women is a phenomenon, the existence of which cannot reasonably be questioned, and should be amenable to judicial notice. It is interesting to note that in *Moge, supra* the husband argued that, because the wife had elected to be a homemaker and caregiver on her own free will, he should not be financially punished as a result. The court held that hypothetical arguments about different choices people
could have made are irrelevant and arguments that an ex-spouse should be doing more for herself should be considered in light of her background and abilities as well as physical and psychological well-being.

The most recent Supreme Court of Canada decision to deal with the issue of spousal support following Moge, supra is Bracklow v. Bracklow, [1991] 1 S.C.R. 420 (S.C.C.). There is confusion, post-Bracklow, supra as to whether the decision confirms the existing law, expands it, or possibly encourages greater use of time-limited orders.

In Bracklow, supra the parties had co-habitated for four years and then had married and co-habitated for a further three years for a total relationship of seven years. At the outset, Ms. Bracklow was a fully contributing partner who worked and contributed more than 50% towards the couple’s expenses. However, over time, she experienced deteriorating health. What started as a migraine headache and stress ultimately evolved into bi-polar mood disorder, obsessive-compulsive disorder, and fibromyalgia rendering her unlikely to ever work again. Accordingly, unlike traditional long-term marriages, where compensatory support would normally be looked upon to compensate for foregone careers and missed opportunities during the marriage, the issue was much more different in the Bracklow, supra case. What happens when a divorce – through no consequence of sacrifices, but simply through economic hardship – leaves one former spouse self-sufficient and the other incapable of self-support?

In dealing with that specific issue, the Supreme Court of Canada went on to discuss spousal support in a much more broad fashion. In particular they discussed the theory of marriage and post-marital obligations when marriage a ends. Chief Justice McLachlin, in that decision, describes two theories of post-marital obligations as the basis for spousal support:

(a) the “basic social obligation” model; and
(b) the “independent model of marriage”.

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In the “social obligation model”, the primary responsibility falls on the former spouse to provide for his or her ex-partner rather than the government. As such, the primary purpose of this support model is to replace lost income that the spouse used to enjoy as a partner to the marriage union. Some then espouse this model to support the claim for permanent indefinite support, or to maintain the standard of living enjoyed during the marriage or post-marriage.

The “independent model of marriage” sees each party to a marriage as an autonomous actor who retains his or her economic independence throughout the marriage. While the parties “formally” commit to each other for life at the time of their vows, they continue to regard themselves as free agents in an enterprise that can terminate on the unilateral action of either party. This theory of spousal support therefore compliments the “clean-break” theory.

The court suggests that the independent “clean-break” model of marriage also provides the theoretical basis for compensatory spousal support. On the other hand, the basic social obligation model can be coined as “non-compensatory” support.

The court concluded that both the federal and provincial legislatures, through their respective statutes, have acknowledged the importance of both models and that neither theory alone is capable of achieving a just law of spousal support. They also pointed out that it was not a question of either one model or the other in a spousal support case, rather it was a matter of applying the relevant factors and striking the balance that best achieves justice in the particular case before the court.

Applying the above discussion, Madam Justice McLauchlin determined that the applicant was eligible for spousal support, however she remitted the matter back to trial for the determination of quantum and duration. It is not insignificant that she pointed out the possibility that no further support might be required, i.e., “. . . that Mr. Bracklow’s contributions to date have discharged the just and appropriate quantum . . . .”
What, then, are the factors and considerations that one might consider in determining spousal support post-Bracklow? It has been suggested as follows:

(a) Post-Bracklow – the compensatory concepts enunciated in the Moge, supra decision and are undiluted by Bracklow, supra. In the appropriate case, the compensatory approach will be applied. The compensatory approach focuses on the economic advantages and disadvantages (to both spouses) of the marriage and the breakdown of the marriage.

(b) Secondly, any contractual arrangements by spouses, pre-nuptial or post-nuptial, will be a relevant consideration in determination of spousal support. However, it is now clear that any agreement is but one factor to be taken into consideration by the court and the provisions of such agreement will not necessarily be determinative.

(c) Bracklow, supra indicates that the older concepts of “need and ability to pay” are also alive and well in the law of spousal support. In addition, there is no suggestion that the “need” must be causally connected to the marriage. As stated in Bracklow, supra “where need is established that is not met on a compensatory or contractual basis, the fundamental marital obligation may play a vital role. Absent negating factors, it is available, in appropriate circumstances, to provide just support.”

What, then, is the Saskatchewan trend with respect to cases regarding spousal support post-Bracklow, supra? Kathryn Ford, Q.C. prepared an excellent paper for the CBA Saskatchewan Mid-Winter Meeting (2003) entitled “Spousal Support – Wading in Quicksand?”. The paper provides a much more in depth analysis of the above discussion of the objectives of spousal support, as well as a more detailed discussion of the above Supreme Court of Canada cases. In addition, in that paper, Ms. Ford reviews 19 Saskatchewan cases that were decided in 2001 and 2002 (post-Bracklow, supra). In that paper she appended a brief review of the 19 Saskatchewan cases. In the description of each case, she endeavoured to identify the following factors:

(a) the age of each spouse;
(b) the income of the husband;
(c) the income of the wife;
(d) the number of children, if any, and their ages;
(e) child support payable;
(f) the duration of the relationship;
(g) the extent of the property division; and
(h) the amount and duration of spousal support ordered, if any.
I would urge each of you to obtain and review Ms. Ford’s paper. However, for the purposes of this paper I can do no better than to reiterate what Ms. Ford indicates in her paper, namely, that in Saskatchewan, spousal support will come down to a balancing of a number of very pragmatic and practical considerations. She suggests they are as follows:

(a) **The age of the spouse** – relatively young women (for instance under the age of 30) who are full-time homemakers and stay-at-home moms will continue to likely receive spousal support. However, the amount will be tempered by the amount of child support payable based upon the husband’s income. The greater the amount of child support, the lesser will be the spousal support. The combined total of both child and spousal support will need to be sufficiently reasonable to ensure that the husband is motivated to continue to work and continue to pay.

(b) **The income of the husband** – his ability to pay. This will probably continue to be the most significant factor in the ultimate award of spousal support. Practically speaking, you can’t get blood out of a stone. Therefore, the limit will be set by the limit of the husband’s resources.

(c) **The number of children, if any, and their ages** – again, the children’s ages will determine how quickly the wife should return to the work force. The child support amount will have a significant amount of impact on the amount of money available for spousal support.

(d) **The duration of the relationship** – typically, longer term marriages will warrant a greater likelihood of spousal support. In long term marriages, obviously the wife is older and her capacity to earn income may be affected significantly. Where she has been out of the work force for a long time, her employable skills may have atrophied considerably and she may have very little opportunity to earn a level of income that will allow her to be self-supporting. The husbands, in these cases, have usually had reasonably long careers and are established in terms of higher incomes, pensions, and benefits. These are the kinds of cases where the compensatory approach will likely be applied. Short term relationships are not as compelling.

(e) **The extent of the property division** – it can be said that the extent of the resources available to the “payee” spouse after the division of property is becoming more and more of a consideration in determination of spousal support. (See Messier v. Messier #4 (Sask. Court of Appeal).)

(f) **Review Orders** – only four out of the 19 cases briefed by Ms. Ford provide for indefinite (non-time limited) spousal support awards. In virtually all of those four cases, references are made to the right of the “payor” to apply for a variation in the event of material change of circumstances.
The bottom line is that the law of entitlement to spousal support has “evolved over time” but it cannot be said any better that it really comes down to an analysis of the factual circumstances of each case and how these fit in with the considerations espoused in the Divorce Act and the judicial interpretation of these provisions. There are “no hard and fast rules” of spousal support cases – it is really a question of a case-by-case analysis.

H. VARIATION OF SPOUSAL SUPPORT ORDERS

Section 17(1) of the Divorce Act and Section 8(a) of the FMA allows the Court power to vary, rescind or suspend, either prospectively or retroactively, a support order.

The factors for spousal support variation orders and the applicable principles to be considered by the Court under the Divorce Act are set out in Section 17(4.1) and Section 17(7) as follows:

“Section 17(4.1):
“Before the court makes a variation order in respect of a spousal support order, the court shall satisfy itself that a change in the condition, means, needs or other circumstances of either former spouse has occurred since the making of the spousal support order or the last variation order made in respect of that order, and in making the variation order, the Court shall take that change into consideration.”

Section 17(7):
“A variation order varying a spousal support order should:
(a) recognize any economic advantages or disadvantages to the former spouse arising from the marriage or its breakdown;
(b) apportion between the former spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
(c) relieve any economic hardship of the former spouses arising from the breakdown of the marriage; and
(d) insofar as practicable, promote the economic self-sufficiency of each former spouse within a reasonable period of time.”

Section 10(1) of the FMA requires the Court to satisfy itself that there has been a material change in circumstances since the original order was made.
Section 10(3) of the FMA provides that in the case of spousal maintenance for a definite period or until the occurrence of a specified event, the Court shall not, after the expiration of that period, make a variation order to resume the maintenance unless the Court is satisfied that:

(a) a variation order is necessary to relieve economic hardship arising from a material change in circumstances that is related to the marriage; and

(b) the changed circumstances, had they existed at the time of the making of the maintenance order or the last variation order made with respect to that order, as the case may be, would likely have resulted in a different order.

Section 10(4) of the FMA provides that applications to vary brought under the FMA are to be made to the Court where the original order was made.

As noted from the legislation, there is essentially a two-step process to a variation of a support order. First, the party seeking the variation must be able to establish a material change in circumstances in the condition, means, needs or other circumstances of either former spouse that has occurred since the original support order. If that is established, and only if established, then the court will go on and consider much the same factors as it would on an original spousal support application to determine what change, if any, is required.

_Moge v. Moge supra_ was in fact a variation of spousal support. In that case the husband sought to terminate the spousal support portion of an order. Ultimately the Supreme Court of Canada dismissed his application and in doing so focused on a number of the objectives as set out in the previous sections of the _Divorce Act_ namely:

(a) that Mrs. Moge had substantial economic disadvantage from the marriage and its breakdown;

(b) that her long term responsibility for the children severely impacted on her ability to earn income;

(c) that Mrs. Moge had continued to suffer economic hardship due to the fact that she was unable to find adequate employment and this contributed to the breakdown of the marriage in the court’s opinion; and

(d) Mrs. Moge had failed to become economically self-sufficient due to the economic disadvantage she suffered in the marriage, notwithstanding her efforts at trying to become economically self-sufficient.
*Moge supra* is an example of where the court will not simply cut off spousal support if a former spouse has not become self-sufficient within a certain period of time. In that case the court paid particular attention to the fact that Mrs. Moge was in fact unable to become self-sufficient in great part due to the economic disadvantage arising out of her role adopted during the marriage. For similar results see *Strang v. Strang*, [1992] 2 S.C.R. 112.

1. Variation of Agreements

Up until recently, lawyers were able to, with a fair degree of certainty, give advice to their client that once a spousal support obligation in a written agreement had been reached, it would be virtually impossible for that support agreement to be changed no matter what the circumstance. The basis for this reasoning is known as the *Pelech/Richardson/Caron Trilogy*, three decisions rendered from the Supreme Court of Canada. All three were applications to vary the provisions of a written agreement wherein the wife had given up any further claim to financial support. In *Pelech v. Pelech*, [1997] 7 R.F.L. (3d) 270 (S.C.C.) the wife had fallen on hard times and was dependent upon Social Assistance whereas the husband had flourished financially. The wife applied for financial support. The Supreme Court disallowed her claim.

The basic rule in *Pelech*, supra is that, absent some causal connection between the change of circumstances and the marriage, the decision of the parties to an agreement, as provided in their agreement, should be honoured and respected and not easily varied by the courts. Courts shall only vary spousal support where there is a radical or catastrophic change of circumstance which could not have been contemplated or foreseen at the time of the making of the agreement. Therefore, if a wife waived her claim to spousal support in an agreement, that agreement would be respected unless there was some radical and unanticipated change of circumstance. The Trilogy cases established a three-stage test for determining whether a variation of spousal support in a spousal agreement is appropriate. The test was determined to be as follows:
(a) Was there a change in circumstances following the agreement?
(b) If so, the change must have been unforeseen at the time of the agreement; and
(c) the change must be causally connected to the marriage and the roles adopted during the marriage.

The same reason carried through in the decision of the Supreme Court of Canada in *Masters v. Masters*, [1994] 4 R.F.L. (4d) 1. In that decision the facts disclosed that the parties had entered into a Separation Agreement that contained a spousal support provision whereby the husband had agreed to pay spousal support to the wife in the amount of $700 until the wife either died, remarried or until further order of the court. After a separation of approximately 10 years, the husband applied to terminate the spousal support. His main ground for the change in circumstance was that the wife had become a successful businesswoman and no longer required his financial assistance to be self-sufficient. Both the trial judge, the Court of Appeal, and the Supreme Court of Canada dismissed the husband’s application to terminate spousal support. In doing so, the Supreme Court of Canada held that there was no evidence of an unforeseen or radical change in circumstance that could not have been contemplated by the husband at the time that he reached the agreement with his wife. The Supreme Court of Canada relied on the *Pelech*, “Pelech Trilogy”.

The first “break” in the Pelech Trilogy may be considered the Supreme Court of Canada case *G.(L) v. B.(G,)* [1995] 15 R.F.L. (4th) 201 (S.C.C.). This case was heard by seven judges of the Supreme Court. The case involved the husband’s application for cancellation of spousal support ($2,600 per month) that had been provided for in an agreement. The former wife was now earning around $1,000 - $1,300 per month and was living with a new partner. Madam Justice L’Heureux-Dube wrote on behalf of the minority and took the opportunity to determine whether or not the Pelech Trilogy still had application. Madam Justice L’Heureux-Dube concluded that it should be encouraged that people reach an agreement on the economic consequences resulting from their divorce rather than going through the courts, however, any such agreement would only be one factor, albeit an important factor, if a judge is exercising his or her discretion on the outcome of a variation application.
The majority of the court did not disagree with L’Heureux-Dube’s disposition of the appeal, however they held that this particular case was not an appropriate case for a full review of the application of the Trilogy. Consequently, following the case, there was a debate as to whether or not the Trilogy remained good law or not. For instance, many cases since *G. v. B.*, *supra* followed L’Heureux-Dube’s comments and treated agreements between parties as only one consideration (among the many set out in the *Act*) to be taken into account in assessing the issue of spousal support. The most significant case on this issue is likely the Ontario Court of Appeal case in *Miglin v. Miglin*, [2001] O.J. No. 1510 (C.A.). In that decision, Madam Justice Abella, for the Ontario Court of Appeal, decided that the test for variation of the terms of an agreement (which settled the issue of spousal support) as set out in the Pelech Trilogy was, in fact, dead. She concluded that there was now a much lower threshold to overcome if a party wished to revisit the issue of spousal support following the making of a separation agreement. She concluded that one only needs to establish a material change, and not a radical change that was unforeseen at the time of the signing of the original agreement.

In October of 2003 the Supreme Court of Canada overturned the Ontario Court of Appeal in the *Miglin* case, however in doing so they concluded that the narrow test enunciated in the Pelech Trilogy for interfering with a pre-existing agreement was no longer appropriate. The Court went on to conclude that it will be rare circumstances in which a pre-existing agreement should be overturned but did allow for the opportunity for it to occur in certain circumstances. They concluded that there should now be a two-stage process into this type of inquiry. The first step is for the Court to look at the circumstances in which the agreement was negotiated and executed to determine whether there is any reason to discount it. Here, the Court is looking for evidence of oppression, pressure or other vulnerabilities. Obviously having counsel representing the individuals and providing independent legal advice goes a long way to addressing many of the concerns on this stage of the inquiry. At the second state, the Court is now required to assess whether the agreement still reflects the original intention of the parties and the extent to which it is still in substantial compliance with the objectives of the *Act*. Accordingly, the Supreme Court
of Canada has now held that the parties seeking to set aside the agreement will need to show that there are new circumstances now in existence which were not reasonably anticipated by the parties, and have led to a situation that cannot be condoned. Some degree of change in the circumstances of the parties is always foreseeable, as agreements are prospective in nature. Accordingly, the Supreme Court of Canada has held that parties are presumed to be aware that health, job markets, parental responsibilities, housing markets, and the value of assets are all subject to change. It is only where the current circumstances represent a significant departure from the range of reasonable outcomes anticipated by the parties, in a manner that puts them at odds with the objectives of the Act, that the Court should be persuaded to give the agreement little weight and allow for a change.

Incidentally, in the Miglin case, the Court concluded the separation agreement should be accorded significant and determinative weight for a number of reasons. At the time of the formation, there was nothing in the circumstances that indicated that negotiations or execution of the separation agreement were fraught with vulnerabilities. Of significance was the fact that both parties had engaged the services of expert counsel and negotiations persisted over a lengthy period of time. Furthermore, the Court concluded there was nothing in the substance of the agreement that demonstrated a significant departure from the overall objectives of the Act. As such, the agreement was upheld.

The decision in Miglin v. Miglin rendered by the Supreme Court of Canada is still fairly recent and accordingly, it will be interesting to see how lower courts choose to interpret the findings of our Supreme Court in determining whether or not an agreement should be upheld or not. For the time being there is fairly strong wording coming from the Supreme Court of Canada that barring unusual circumstances, a party should continue to be held to the separation agreement and the issue of spousal support they previously agreed to.
I. TAXATION AND SUPPORT

Spousal support payments, if periodic, made pursuant to a written agreement or court order continue to be tax deductible to the payor and taxable income in the hands of the payee.
APPENDICES
IN THE COURT OF QUEEN'S BENCH FOR SASKATCHEWAN
(FAMILY LAW DIVISION)
JUDICIAL CENTRE OF SASKATOON

BETWEEN:

**

- and -

**

PETITIONER

RESPONDENT

NOTICE TO FILE INCOME INFORMATION

TO: The Petitioner (Respondent) **

YOU ARE REQUIRED to provide to the Respondent and file with the Court within 30 days of service of this Notice:

_____ [if not previously provided to the other party or his or her lawyer] a Financial Statement in Form 609A of the Queen’s Bench Rules for Saskatchewan, including the required income tax documents;

_____ [if you are an employee] your most recent statement of earnings indicating the total earnings paid in the year to date, including overtime, or if such a statement is not provided by your employer, a letter from your employer setting out that information, including your rate of annual salary or remuneration;

_____ [if you are self-employed] for the 3 most recent taxation years:

   (i) the financial statements of your business or professional practice, other than a partnership; and

   (ii) a statement showing a breakdown of all salaries, wages, management fees or other payments or benefits paid to, or on behalf of, persons or corporations with whom you to not deal at arm’s length;
Appendix A – Notice to File Income Information, Form 640B

_____ [if you are a partner in a partnership] confirmation of your income and draw from, and capital in, the partnership for its 3 most recent taxation years;

_____ [if you control a corporation] for the corporation’s 3 most recent taxation years:

(i) the financial statements of the corporation and its subsidiaries; and

(ii) a statement showing a breakdown of all salaries, wages, management fees or other payments or benefits paid to, or on behalf of, persons or corporations with whom the corporation and every related corporation does not deal at arm’s length;

_____ [if you are a beneficiary under a trust] a copy of the trust settlement agreement and copies of the trust’s 3 most recent financial statements.

Dated at ___________________, Saskatchewan, this ____ day of ______________, 20**.

_________________________________
Solicitors for the Respondent/Petitioner

The requested documents are to be:

(a) served on the party seeking disclosure at the address for service set out at the end of this document; and

(b) filed on the Court file

NOTE: If during the course of the proceeding you find out that the information you provided in a response to this Notice is incorrect or incomplete, or there is a material change in the information provided, you must serve on every other party to this claim and file with the Court the correct information, together with any documents substantiating it.
NOTICE:

IF YOU FAIL TO PROVIDE THE REQUESTED DOCUMENTS WITHIN THE TIME GIVEN, the party seeking disclosure of your income information may apply on notice to the Court for any or all of the following:

(a) an Order drawing an adverse inference against you and imputing income to you in such amounts the Court considers appropriate;

(b) an Order for payment of support in such amount as the Court considers appropriate;

(c) an Order that the documents requested be delivered within a specified time;

(d) an Order directed to your employer or other person for disclosure of financial information;

(e) an Order for costs, including costs up to an amount that fully compensates the party seeking disclosure for all costs incurred in the proceeding;

(f) an Order granting the party seeking disclosure any other remedy requested.

Or

Where the party seeking disclosure of income information wishes an immediate Order in the event of non-compliance with this Notice to File Income Information, include a Notice of Motion in Form 47 of the desired Order.

This document was delivered by: **

Whose address for service is: Same as above
Lawyer in charge of file: **
Telephone (306) **
Facsimile (306) **
File No. *

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Div. No. of 20**

IN THE COURT OF QUEEN'S BENCH FOR SASKATCHEWAN
(FAMILY LAW DIVISION)
JUDICIAL CENTRE OF SASKATOON

BETWEEN:

** PETITIONER

- and -

** RESPONDENT

NOTICE TO DISCLOSE

TO: The Respondent (or Petitioner), (name) _______________________________

YOU ARE REQUIRED to provide to the Petitioner (or Respondent) and file with the Court within 30 days of service of this Notice:

_____ a Financial Statement in Form 609A of the Queen’s Bench Rules for Saskatchewan;

_____ a Property Statement in Form 609B of the Queen’s Bench Rules for Saskatchewan;

_____ a copy of each of your 3 most recent pay remittance stubs;

_____ a copy of each of your 3 most recent employment insurance benefit statements;

_____ a copy of each of your 3 most recent worker’s compensation benefit statements;

_____ a copy of your most recent pension plan statement;

_____ current documentary evidence confirming the amount of social assistance that you receive;

_____ a copy of the most recent assessment notice issued for real property you own;

_____ particulars or copies of every cheque issued to you during the last 6 weeks from any business or corporation in which you have an interest or to which you have rendered a service;

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_____ copies of all bank account statements in your name for the past 3 months;

_____ copies of the most recent statement for all R.S.S.P.’s, term deposit certificates, guaranteed investment certificates, stock accounts and other investments in your name or in which you have an interest;

_____ copies of credit card statements for all credit cards in your name for the last 3 months;

_____ an authorization to the appropriate person or institution to obtain any of the above information that you have not provided; and

_____ (a copy of any other item being specifically requested)

(The party seeking disclosure may request one or more of the above depending on the nature of the proceeding.)

** IF YOU OBJECT ** to disclosing any of these documents, you must make an objection in writing setting out the reasons for your objection, and serve it with the information which you do not object to disclosing in response to this notice, within 30 days of service of this Notice.

Dated at _____________________, Saskatchewan, this _____ day of _____________. 20**.

**

Per: __________________________________

**, Solicitor for the Petitioner

The requested documents are to be:

(a) served on the party seeking disclosure at the address for service set out at the end of this document; and

(b) filed on the Court file
NOTE: If during the course of the proceeding you find out that the information you provided in a response to this notice is incorrect or incomplete, or there is a material change in the information provided, you must serve on every other party to this claim and file with the court the correct information, together with any documents substantiating it.

NOTICE:

IF YOU FAIL TO PROVIDE THE REQUESTED DOCUMENTS WITHIN THE TIME GIVEN, the party seeking disclosure may apply on notice to the Court for any of all of the following:

(a) an Order drawing an adverse inference against you and imputing income to you in such amount as the Court considers appropriate;

(b) an Order for payment of support in such amount as the Court considers appropriate;

(c) an Order that the documents requested be delivered within a specified time;

(d) an Order directed to your employer or other person for disclosure of financial information;

(e) an Order for costs, including costs up to an amount that fully compensates the party seeking disclosure for all costs incurred in the proceeding;

(f) an Order granting the party seeking disclosure any other remedy requested.

Or

Where the party seeking disclosure wishes an immediate order in the event of non-compliance with this Notice to Disclose, include a Notice of Motion in Form 47 for the desired order.

This document was delivered by: **

Whose address for service is: Same as above

Lawyer in charge of file: **

Telephone (306) **

Facsimile (306) **

File No. *

Revised May 2004

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IN THE COURT OF QUEEN'S BENCH FOR SASKATCHEWAN
(FAMILY LAW DIVISION)
JUDICIAL CENTRE OF SASKATOON

BETWEEN:
**

PETITIONER

- and -

**

RESPONDENT

NOTICE TO REPLY TO WRITTEN QUESTIONS

TO: The Respondent (or Petitioner), (name) ____________________

YOU ARE REQUIRED to provide to the Petitioner (or Respondent) and file with the Court within 30 days of this Notice, answers, in the form of an Affidavit, to the following questions:

1. (here set out a maximum of 15 questions relating to financial or property information)

2.

IF YOU OBJECT to answering any of these questions, you must make an objection in writing setting out the reasons for your objection, and serve it with the Affidavit answering those questions which you do not object to answering, within 30 days of service of this Notice.

Dated at _______________, Saskatchewan, this ______ day of _______________, 20**.

__________________________________
Party or Party’s lawyer

The requested documents are to be:

(a) served on the party seeking answers to these questions at the address for service set out at the end of this document; and

(b) filed on the Court file.
NOTE: If during the course of the proceeding you find out that the information you provided in a response to this Notice is incorrect or incomplete, or there is a material change in the information provided, you must serve on every other party to this claim and file with the Court the correct information, together with any documents substantiating it.

NOTICE:

IF YOU FAIL TO PROVIDE THE REQUESTED ANSWERS WITHIN THE TIME GIVEN, the party seeking answers to these questions may apply on notice to the Court for any or all of the following:

(a) an Order drawing an adverse inference against you and imputing income to you in such amount as the Court considers appropriate;

(b) an Order for payment of support in such amount as the Court considers appropriate;

(c) an Order that the answers requested be delivered within a specified time;

(d) an Order directed to your employer or other person for disclosure of financial information;

(e) an Order for costs, including costs up to an amount that fully compensates the party seeking answers to these questions for all costs incurred in the proceeding;

(f) an Order granting the party seeking answers to these questions any other remedy requested.

Or

Where the party seeking answers to these questions wishes an immediate order in the event of non-compliance with this Notice to Reply to Written Questions, include a Notice of Motion in Form 47 for the desired order.

This document was delivered by: **

whose address for service is: Same as above

Lawyer in charge of file: **

Telephone (306) **

Facsimile (306) **

File No. *