Judicial Reliance on the *Spousal Support Advisory Guidelines*: Spousal Support and Soft Law Across Canadian Jurisdictions

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March 2019

A thesis submitted to McGill University in partial fulfillment of the requirements of the degree of Doctor of Civil Law

Abstract/Résumé

This thesis is a study of the *Spousal Support Advisory Guidelines* [*Advisory Guidelines*] and the related phenomenon of judicial reliance on non-legislated, or soft law, instruments in Canada. The *Advisory Guidelines* are a set of principles detailing the federal law of spousal support upon family breakdown and setting out mathematical formulas for structuring the determination of a spousal support award, both in amount and duration. The *Advisory Guidelines* are not binding — that is, they are not contained or referred to in legislation and they were not written by government. As such, they do not remove the judicial discretion that has historically permeated the law of spousal support and family law more broadly. Despite their unofficial status, the *Advisory Guidelines* have been endorsed by a number of appellate courts across the country and, since their initial release in 2005, have come to play a significant role in the practice of family law in Canada. They are, however, an understudied tool; few scholars have turned their mind to them, be it from the perspectives of feminist legal theory, instrument choice and regulatory theory, comparative family law, or constitutional theory.

This thesis endeavours to fill those gaps through four broad inquiries. First, it revisits the theoretical underpinnings of the law of spousal support and argues that the private support obligation, as interpreted by the Supreme Court of Canada in its leading decisions on the subject — reasoning that the *Advisory Guidelines* incorporate — may be justified pursuant to relational feminist theory. Second, adopting the perspectives of instrument choice and regulatory theory, it argues that the *Advisory Guidelines* constitute an appropriate choice of instrument, and carry the potential to restore legitimacy to spousal support, previously undermined by the uncertainty and inconsistency associated with broad grants of judicial discretion. Third, the thesis undertakes a comparative analysis of Quebec and the rest of Canada, with respect to judicial reception of the *Advisory Guidelines*, as a means of gaining further insight into that province's understanding of the function of spousal support, addressing both substantive and formal objections to their use. Fourth, it examines judicial resistance to the *Advisory Guidelines* on the basis that they are not legislated, and suggests that several constitutional approaches support the view that the *Advisory Guidelines* are not only legitimate, they may also promote foundational constitutional principles such as the rule of law.

This thesis concludes that the *Advisory Guidelines* are an important tool in the pursuit of economic gender equality that grounds the law of spousal support. In doing so, the thesis sets the theoretical groundwork for further empirical inquiry into the utility and success of the *Advisory Guidelines* in ensuring accessible and fair economic outcomes upon family breakdown.

La présente thèse est une étude des *Lignes directrices facultatives en matière de pensions alimentaires pour époux* [*Lignes directrices*], et le phénomène relié de l'utilisation d'instruments non-légiférés, ou « *soft law* », par les juges canadiens. Les *Lignes directrices* consistent en une collection de principes détaillant le droit fédéral portant sur la pension alimentaire pour époux en cas de rupture familiale, et énonçant des formules mathématiques visant à structurer la détermination de l'octroi d'une pension alimentaire, tant en ce qui a trait au montant qu'à la durée. Les *Lignes directrices* ne sont pas contraignantes — c'est-à-dire qu'elles ne sont ni contenues dans, ou référées par, aucune mesure législative, non plus qu'elles n'ont étés rédigées par des acteurs gouvernementaux. Par conséquent, elles n'éliminent pas la discrétion judicaire historiquement présente dans le droit portant sur la pension alimentaire et le droit de la famille de façon plus générale. Malgré leur statut non-officiel, les *Lignes directrices* ont été endossées par plusieurs cours d'appels à travers le pays et, depuis leur publication initiale en 2005, ont acquis une place importante dans la pratique canadienne du droit de la famille. Cependant, les *Lignes directrices* sont un instrument règlementaire peu étudié; peu de chercheurs ne les ont considérées, que ce soit de l'une ou l'autre des perspectives de la théorie juridique féministe, de la théorie du choix des instruments et de la règlementation, du droit de la famille comparé, ou de la théorie constitutionnelle.

La présente thèse cherche à combler ces lacunes, en traitant de quatre grandes questions. Premièrement, elle examine à nouveau les fondements théoriques du droit portant sur la pension alimentaire pour époux et soutient que l'obligation alimentaire privée, telle qu'interprétée par la Cour suprême du Canada dans les arrêts principaux sur le sujet — raisonnement incorporé dans les *Lignes directrices* — peut être justifiée en vertu d'une approche féministe relationnelle. Deuxièmement, adoptant les perspectives de la théorie du choix des instruments et de la règlementation, elle soutient que les *Lignes directrices* constituent un choix approprié d'instrument, et qu'elles sont susceptibles de rétablir la légitimité de la pension alimentaire pour époux, qui jusqu'alors était sapée par l'incertitude et le manque de cohérence liés à une large discrétion judiciaire. Troisièmement, la thèse entreprend une analyse comparative de la réception judicaire des *Lignes directrices* au Québec et dans le reste du Canada, afin de mieux comprendre la vision québécoise de la fonction de la pension alimentaire pour époux, en adressant aussi bien les objections substantielles que formelles à leur utilisation. Quatrièmement, elle examine la résistance judiciaire aux *Lignes directrices* fondée sur le fait qu'elles ne sont pas légiférées, et suggère que plusieurs approches constitutionnelles appuient l'opinion voulant que les *Lignes directrices* sont non seulement légitimes, mais qu'elles peuvent aussi promouvoir des principes constitutionnels fondamentaux, tels que la primauté du droit.

Cette thèse conclut que les *Lignes directrices* forment un outil important dans la poursuite de l'égalité économique des sexes, à la base du droit portant sur la pension alimentaire pour époux. Ce faisant, cette thèse jette les bases théoriques pour une recherche empirique future sur l'utilité et le succès des *Lignes directrices* visant à assurer des résultats économiques équitables en cas de rupture familiale.

Acknowledgements

First, I thank my supervisor, Dean Robert Leckey, for his constant support and for his guidance and advice, not only related to this dissertation, but also to life as a legal scholar. I am also very grateful to the members of my thesis advisory committee, Professor Angela Campbell and Professor Daniel Jutras, for their thoughtful and detailed feedback and support throughout the last five years. I also thank my external examiner, Professor Nicholas Bala, for his insightful comments and questions.

Writing a doctoral thesis can be lonely at times. I am grateful to those who have been through it, especially Bethany Hastie and Stefanie Carsley, for their friendship and support when the task at hand sometimes seemed too big to manage. And to Nayha Acharya, I am grateful not only for the moral support, but also for the thoughtful conversations about the rule of law and for helping me wade through the heavy stuff. I also thank my colleagues at the Schulich School of Law at Dalhousie University for their encouragement and support, and Professor Lucie Guibault, especially, for help translating the abstract to this thesis.

I am grateful to my family. I thank my parents for believing in me, and for believing that this project would one day come to an end, when I was not always as sure.

Finally, I am forever grateful to my husband, Lee, for his unwavering belief in my abilities and his incredible patience with my lengthy academic endeavours. I am privileged to have you as a partner in life.

This work was generously supported by the Social Sciences and Humanities Research Council of Canada and the McGill University Faculty of Law. An earlier version of part of Chapter 3 of this thesis first appeared in the journal *Cahiers de droit*: Jodi Lazare, "Spousal Support in Quebec: Resisting the *Spousal Support Advisory Guidelines*" (2018) 59:4 C de D 929. An article based on part of Chapter 4 is forthcoming in the Canadian Journal of Women and the Law: Jodi Lazare, "The *Spousal Support Advisory Guidelines*, Soft Law, and the Procedural Rule of Law" (2019) 31:2 CJWL [forthcoming December 2019].

Introduction

In March 2015, an Alberta Court of Queen's Bench judge was asked to review a spousal support award, granted the previous year. As part of her case, JAQ, the claimant of support, appears to have relied on the *Spousal Support Advisory Guidelines*.[1] Non-legislated, and therefore, non-binding, the *Advisory Guidelines* are a collection of principles that include a set of formulas meant to assist judges, lawyers, and litigants in determining spousal support awards pursuant to the statutory grant of judicial discretion contained in the federal *Divorce Act*.[2] In awarding an amount lower than that prescribed by the *Advisory Guidelines*, Justice Graesser made no attempt to conceal that the divergence was based in part on geography: "Had JAQ remained in British Columbia" — she had moved to Edmonton to be near her parents when the marriage broke down — "her claim for spousal support based on the [*Advisory Guidelines*] would likely be stronger than it is in Alberta."[3] Indeed, the judge was correct to state that "The [*Advisory Guidelines*] appear to be a routine part of family law practice in BC, according to case law and legal commentators."[4] In Alberta, however, they "are of less weight…."[5] Instead of deferring to the contents of the *Advisory Guidelines*, his calculations were grounded in the discretionary provisions of the *Divorce Act*, which directs judges to balance several factors and objectives in awarding spousal support.[6]

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[1] Family, Children and Youth Section, Department of Justice, *Spousal Support Advisory Guidelines* by Carol Rogerson & Rollie Thompson (Ottawa: Department of Justice, Canada, 2008), online: <http://www.justice.gc.ca/eng/rp-pr/fl-lf/spousal-epoux/spag/index.html> [*Advisory Guidelines*]. More will be said about the *Advisory Guidelines* later in the Introduction and in subsequent chapters of this thesis.
[2] *Divorce Act*, RSC 1985, c 3 (2nd Supp).
[3] *RMQ v JAQ*, 2015 ABQB 392 at para 25 [*RMQ*].
[4] *Ibid* at para 26.
[5] *Ibid* at para 27.
[6] *Divorce Act*, *supra* note 2, s 15.2(4)(6).

The situation in Quebec, Canada's only civil law jurisdiction, is similar to that in Alberta. In Quebec, many judges are unsympathetic to the *Advisory Guidelines* and even more unwilling than their counterparts in other provinces to rely on them to help structure support determinations.[7] Moreover, that resistance persists despite the Quebec Court of Appeal's instruction that trial judges draw inspiration from their common law colleagues, and look to the *Advisory Guidelines* in interpreting and applying the federal law of divorce.[8]

Both JAQ's case and Quebec judges' prevailing attitude toward the *Advisory Guidelines* raise questions about Canadian family law and the nature of different legislative instruments in the broader Canadian legal order. Is it fair, for example, when divorce law is a matter of federal jurisdiction, envisioned as applying uniformly across provincial lines,[9] that JAQ's spousal support award should depend on the fact that she moved with her children to a neighbouring province in order to be close to her family?[10] Likewise, should spouses claiming support in Quebec be subject to a different analysis of the federal law? Related to this, should judges, as is the case in British Columbia, be permitted to sidestep the difficult work involved in exercising their discretion pursuant to the relevant statute? And further, why should they want to? At a more fundamental level, should JAQ, like other women made economically vulnerable by family breakdown, be entitled to support at all, given her ability to work and prior education, which the judge

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[7] See e.g. *Droit de la famille — 123274*, 2012 QCCS 5873, [2012] JQ no 13971 (calling the *Advisory Guidelines* "conceptually defective" [translated by author] in their application to the facts of the case at para 46).
[8] See *Droit de la famille — 112606*, 2011 QCCA 1554, 8 RFL (7th) 1.
[9] See F J E Jordan, "The Federal Divorce Act (1968) and the Constitution" (1968) 14:2 McGill L J 209.
[10] See *RMQ v JAQ*, 2014 ABQB 620.

detailed in coming to his decision?[11] Should the law respond to her lengthy absence from the paid labour force in order to take on the role of primary caregiver to her children?[12] And who, if anyone, should compensate her — and other mothers — for the unpaid work of social reproduction?

This thesis attempts to answer some of these difficult questions. Centred on the *Advisory Guidelines* and their relationship to the law of spousal support, it is largely a study in family law. However, as John Dewar notes, family law is an amorphous area of law, the boundaries of which vary according to constitutional and other considerations.[13] Thus, to describe this thesis as uniquely an inquiry into family law does not tell the whole story.

The *Advisory Guidelines* are a unique regulatory tool, non-binding and yet considered authoritative in many Canadian jurisdictions. Rarely is a non-legislated instrument created outside of government accorded the same level of deference in Canadian courtrooms. Accordingly, they hold insights into the choice of appropriate legislative instrument and contain lessons about the ongoing debate in law between judicial discretion and bright-line rules and the optimal position on the spectrum between those two regulatory poles. Moreover, Canadian work on family law, from a national perspective, is necessarily comparative in nature. This thesis, then, might be described in some part as a study in comparative family law, with the demarcating line sitting at provincial borders, particularly the border between Canada's common law and civil law jurisdictions. Further, the *Advisory Guidelines* also raise issues of constitutional law;

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[11] See *ibid*.
[12] *Ibid*.
[13] See John Dewar, "Families" in Peter Cane & ark Tushnet, eds, *The Oxford Handbook of Legal Studies* (Oxford, UK: Oxford University Press, 2003) at 413 [Dewar, "Families"].

resistance to them, based on the fact that they are not law, forces us to query the constitutional legitimacy of judicial reliance on them and the normative force of soft law instruments more generally. All of these questions might be best incorporated by understanding this thesis as a case study on the regular, and increasing, reliance by judges on a non-legislated family law instrument, created outside of government with the explicit purpose of guiding discretionary determinations of spousal support.

1. Why Study the *Spousal Support Advisory Guidelines*?

Several features about the *Advisory Guidelines* and their use by legal actors make them a subject worthy of in-depth study. First, it has been nearly two decades since the Canadian positive law of spousal support underwent significant change. The Supreme Court of Canada established the general principles of the spousal support obligation in 1999.[14] The relevant legislative provisions are even older; the statute governing the determination of spousal support was adopted in 1985.[15] As later parts of this thesis will detail, however, spousal support is still theoretically challenging, at best. In less flattering lights, the Canadian law of spousal support is philosophically incoherent.[16] Indeed, spousal support has been described as a "jurisprudential embarrassment,"[17] given its lack of "prima facie justification" and the unhelpfulness of positive law in interpreting statutes.[18] There is accordingly an enduring need for theoretical clarity in this area of law,

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[14] *Bracklow v Bracklow*, [1999] 1 SCR 420, 169 DLR (4th) 577.
[15] *Divorce Act*, *supra* note 2.
[16] Carol Rogerson, "Spousal Support Post-*Bracklow*: The Pendulum Swings Again?" (2001) 19 Can Fam LQ 185 at 210.
[17] *Keller v Black* (2000), 182 DLR (4th) 690 at 705, cited in Robert Leckey, "Relational Contract and Other Models of Marriage" (2002) 40:1 Osgoode Hall LJ 1 at 27 [Leckey, "Relational Contract"].
[18] *Ibid* at 11.

while divorce rates around the 40 per cent mark make that need all the more pressing.[19] Moreover, despite legislative inertia, society continues to change; rates of unmarried cohabitants are on the rise,[20] two-income households continue to increase in number,[21] and same-sex marriages have legal recognition.[22] Accordingly, it is important to continuously ask "whether the legal rules that were developed in the past to govern … marriage and spousal relationships continue to best meet the current social, economic, cultural and spiritual needs of society."[23]

In addition to these social changes, and despite the stagnant nature of the positive law, the practices surrounding the granting of spousal support have changed significantly over the last decade. As later parts of this thesis explain, the creation of the *Advisory Guidelines* has had a dramatic impact on the determination of spousal support by trial judges. It might be said that their advent and widespread incorporation into the common law of spousal support represent the beginning of a new chapter in the history of Canadian family law. Moreover, save for contributions by their authors,[24] as well as

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[19] The Vanier Institute of the Family, *Families Count, Profiling Canada's Families IV* (Ottawa: Vanier Institute, 2010) at 44 [*Families Count*].
[20] See *ibid* at 43.
[21] See *ibid* at 82.
[22] See *Reference re Same-Sex Marriage*, 2004 SCC 79, [2004] 3 SCR 698; *Civil Marriage Act*, SC 2005, c 33.
[23] Nicholas Bala, "The History & Future of Marriage in Canada" (2005) 4:1 JL & Equality 20 at 20.
[24] See e.g. Rollie Thompson, "Following *Fisher*: Ontario Spousal Support Trends 2008-09" (2009) 28:3 Can Fam LQ 241; Carol Rogerson & Rollie Thompson, "Complex Issues Bring Us Back to Basics: The SSAG Year in Review in B.C." (2009) 28:3 Can Fam LQ 263; Carol Rogerson & Rollie Thompson. "The Canadian Experiment with Spousal Support Guidelines" (2011) 45:2 Fam LQ 241 [Rogerson & Thompson, "Canadian Experiment"]; Carol Rogerson, "Child Support, Spousal Support and the Turn to Guidelines" in John Eekelaar & Rob George, eds, *Routledge Handbook of Family Law and Policy* (Oxford: Routledge, 2014) 153 [Rogerson, "Turn to Guidelines"]; Carol Rogerson, "Shaping Substantive Law to Promote Access to Justice: Canada's Use of Child and Spousal Support Guidelines" in John Eekelaar, Mavis Maclean & Benoit Bastard, eds, *Delivering Family Justice in the 21st Century* (Oxford: Hart Publishing, 2015) 51 [Rogerson, "Access to Justice"].

pieces directed toward their practical use,[25] little academic scholarship exists on this instrument said to have become an "essential element"[26] of the practice of family law in several Canadian jurisdictions.[27] This development merits revisiting the conceptual issues raised by marriage and divorce. A thoughtful inquiry into both the descriptive and normative aspects of the *Advisory Guidelines* requires a concrete understanding of the theoretical underpinnings of the spousal support obligation that they are meant to guide.

Spousal support is largely a women's issue. While the numbers continue to change, in the vast majority of Canadian households, men are the primary earners; in 2007, just 28 per cent of women in dual-income couples earned more than their male partners.[28] That number decreased to 15 per cent where there were young children at home. As a result, when families break down, women are far more likely to claim spousal support than men. Research into the functioning of spousal support is therefore of particular significance for women, who continue to assume primary care for children,[29] consequently devoting less time to paid labour and increasing their long term earning potential. Thus, while marriage and divorce are not the sole cause of the economic

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[25] See e.g. Scott Booth, "The Spousal Support Advisory Guidelines: Avoiding Errors and Unsophisticated Use" (2009) 28:3 Can Fam LQ 339; Lonny L Balbi QC, "Steps To Using The Spousal Support Advisory Guidelines: With Child Support Formula" (2009) 28:3 Can Fam LQ 359; Lonny L Balbi QC, "Steps To Using The Spousal Support Advisory Guidelines: Without Child Support Formula" (2009) 28:3 Can Fam LQ 365.

[26] Booth, *supra* note 25 at 358.

[27] But see Michel Tétrault, *Droit de la famille : L'obligation alimentaire*, vol 2 (Cowansville: Éditions Yvon Blais, 2010) at 493-519 (on the utility of the *Advisory Guidelines* in Quebec); Jocelyn Jarry et al, "Lignes directrices facultatives en matière de pensions alimentaires pour époux – Pertinence de leur application au Québec?" (2016) 31:2 CJLS 243 (arguing against the use of the *Advisory Guidelines* in Quebec). Note that Chapter 3 of this thesis will engage with these authors in examining the applicability of the *Advisory Guidelines* to Quebec's civil law system.

[28] *Families Count*, *supra* note 19 at 102 (this data includes both married and common law partners).

[29] *Ibid*.

vulnerability that often plagues divorced women,[30] there is a clear connection between the pursuit of economic gender equality and the law's approach to financial obligations upon family breakdown. That connection is of particular importance to women, who are disproportionately impacted by divorce with respect to financial consequences.

The relationship between the financial consequences of family breakdown and economic equality suggests that understanding the law of spousal support, both in theory and in practice, is a matter of justice. The importance of constructing a just — and justifiable — theory of family law, and of spousal support specifically, lies in the idea that "families cannot fully teach justice in the absence of a just family law."[31] At a practical level, the smooth functioning of the spousal support obligation is paramount, as it operates as a response to social inequality.[32] Indeed, for judges to effectively implement post-marital obligations, there must be some consistency at both the theoretical and practical levels about what they are trying to achieve and how best to do so. In short, an inquiry into the theory and application of spousal support law, understood as a means of seeking justice in the form of economic equality in family law, should contribute toward fostering a more just society.

Research into a novel means of applying the law of spousal support is also relevant when their application, as is the case with the *Advisory Guidelines*, is not uniform across provincial lines. Looking at judicial responses to the *Advisory Guidelines* from a comparative perspective helps shed light on the differing understandings of the

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[30] Dewar, "Families", *supra* note 13 at 423.
[31] Martha Minow & Mary Lyndon Shanley, "Relational Rights and Responsibilities: Revisioning the Family in Liberal Political Theory and Law" (1996) 11:1 Hypatia 4 at 25.
[32] See Lucinda Ferguson, "Family, Social Inequalities, and the Persuasive Force of Interpersonal Obligation" (2006) 22:1 Int'l JL Pol'y & Fam 61 at 82.

function of spousal support across jurisdictions and, in the case of Quebec, across legal systems. In looking at jurisdictions like Quebec and Alberta, where the *Advisory Guidelines* have not been as heavily incorporated into judicial practice as they have elsewhere, this thesis attempts to uncover the bases of judicial objections to them. With respect to Quebec specifically, it seeks to uncover lessons about particular understandings of the spousal support obligation and the role of family law more generally, as well as insights about the merits of differing approaches to economic equality. These lessons, both at the levels of theory and practice, might be applicable beyond the questions of spousal support and the *Advisory Guidelines* and might help inform later debates related to federalism, mixed legal systems, and the Canadian legal system as a whole. Moreover, as Quebec may be on the eve of reworking its family law regime,[33] current insight into spousal support, in Quebec and elsewhere in Canada, comes at an opportune time.

Related to federalism, the *Advisory Guidelines* raise another constitutional consideration. In places where they are not regularly used, some judges have impugned the legitimacy of judicial reliance on them. Deference to a non-legislated instrument created outside of Parliament is said to threaten the separation of powers and accordingly undermine the rule of law. Indeed, all regulatory instruments, "particularly those designed and implemented outside of the legislative process, have important repercussions for the legitimacy and accountability of public action."[34] An inquiry into the legitimacy and normative force of judicial reliance on the *Advisory Guidelines*

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[33] See Comité consultatif sur le droit de la famille, Alain Roy (chair), *Pour un droit de la famille adapté aux nouvelles réalités conjugales et familiales* (Montreal: Éditions Thémis, 2015).
[34] Pearl Eliadis, Margaret M Hill & Michael Howlett, "Introduction" in Pearl Eliadis, Margaret M Hill & Michael Howlett, eds, *Designing Government: From Instruments to Governance* (Montreal: McGill-Queen's University Press, 2005) 3 at 6.

accordingly holds important insights about the use of soft law in regulating the family and other areas of social life.

The use of an unofficial and non-binding instrument for determining spousal support awards is also revealing with respect to regulatory theory. The *Advisory Guidelines* represent a compromise between bright-line rules and broad judicial discretion. Their popularity among judges and lawyers thus raises questions about the choice of regulatory instrument, the legitimacy of which, "is bound up with political, legal, ethical, programmatic, social, and economic factors…."[35] This thesis's inquiry into the success of the *Advisory Guidelines*, as measured according to their widespread acceptance among lawyers and judges, therefore aims to enlighten readers with respect not only to the *Advisory Guidelines*, but relative to the choice of instruments more generally, in other fields marked by the struggle between discretion and rules. The design of regulatory instruments is not unique to family law; the discussion here may have broader implications for law and governance.

Finally, the *Advisory Guidelines* are understood today as a tool for accessing justice,[36] an issue to which the Canadian justice system is currently particularly attuned.[37] While this thesis is not an empirical study on the effects of the *Advisory Guidelines* on spousal support adjudication and awards, the study of the *Advisory Guidelines* from multiple perspectives might constitute a fruitful starting point for further research on their concrete impacts.

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[35] *Ibid*.
[36] See Rogerson, "Access to Justice", *supra* note 24.
[37] See Canada, Action Committee on Access to Justice in Civil and Family Matters, *Access to Civil & Family Justice: A Roadmap for Change* (Ottawa: Canadian Forum on Civil Justice, 2013).

At a more general level, the importance of studying family law lies in its centrality to human lives. "Family law, generally, and the law of alimony and marital property particularly, try to regulate two of the most intimate, complex, and consequential things in people's lives — their closest personal relations and their money."[38] When practices have changed, as they have since the creation of the *Advisory Guidelines*, how the law performs its task is of ongoing and fundamental importance. That spouses are unlikely to turn their minds to the prospect of divorce and the question of spousal support in advance of family breakdown,[39] underscores the importance of current and relevant understandings about the functioning of the law, so that it may respond ably to the complexities of family breakdown.

2. The Legislative Context

An overview of the legislative context established the crucial groundwork for the analysis and arguments to follow. Spousal support for divorcing couples is governed by the *Divorce Act*.[40] A federal law, it sets out the available grounds for divorce as well as the factors and objectives that must be taken into account in granting a spousal support award. Grounds for divorce, grouped together by the term "breakdown of a marriage," are both fault-based — adultery and physical or mental cruelty — and, more commonly, no-fault — that is, separation for at least one year, regardless of the reason.[41] Much of the difficulty surrounding divorce law, in Canada and abroad, is rooted in the availability of spousal support when a divorce can be obtained in the absence of spousal fault. The ease

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[38] Carl E Schneider, "Rethinking Alimony: Marital Decisions and Moral Discourse" (1991) 1991:1 BYUL Rev 197 at 243-244.
[39] See Robert Leckey, "Contracting Claims and Family Feuds" (2007) 57:1 UTLJ 1 (on the "unduly optimistic" nature of couples at the time of marriage at 29) [Leckey, "Contracting Claims"].
[40] *Supra* note 2.
[41] *Ibid*, s 8.

of divorce and the frequency of re-partnering mean that marriage is no longer a life-long obligation; why, then, should individuals continue to be financially obligated to former spouses? Neither the legislation nor judicial interpretations of it provide an easy answer to this complex question.

Moreover, the spousal support provisions themselves give rise to confusion. Later parts of this thesis detail the relevant provisions of the *Act*; for present purposes, their significance lies in their indeterminacy. On one hand, the spousal support provisions promote finality, the severing of ties between former partners, and the related values of autonomy and self-sufficiency. On the other, they instruct judges to look at the roles of the spouses during the marriage, to respond to financial advantages and disadvantages resulting from the marriage and its breakdown, and to relieve economic hardship. Thus, the statutory obligation of support is plagued by an internal dilemma — one that judges and scholars of family law have attempted to solve since the legislation was first adopted. The *Advisory Guidelines* are rooted in a particular approach to interpreting the *Divorce Act*. Their popularity among legal actors underlies the need to revisit the legislation, in order to tease out an intelligible theory of spousal support relevant to the current social picture of family life.

While the details of the *Advisory Guidelines* are beyond the scope of this thesis, a brief outline of their creation and general functioning informs the chapters that follow. The *Advisory Guidelines* do not deal with entitlement to spousal support, but rather, guide determinations once entitlement has been established. At their most basic, they contain a number of mathematical formulas that give rise to a range for spousal support awards, in both amount and duration. The formulas take into account variables such as

the spouses' incomes, the length of the marriage (including any prior cohabitation), and the presence of children. Judges — as well as litigants and lawyers using the *Advisory Guidelines* outside the context of litigation — are to select from the ranges, both with respect to amount and duration.[42] As they give rise to ranges, and not exact figures, the *Advisory Guidelines* preserve the discretion that characterizes the determination of spousal support, while aiming to provide a degree of consistency and predictability previously unseen in this realm. The *Advisory Guidelines* were created with a view to ensuring that, depending on the circumstances, judges employ the appropriate model of support, which, broadly speaking, will often result in more generous and predictable awards than in the absence of guidance.[43]

The *Advisory Guidelines* resulted from an unusual process. Supported by the federal Department of Justice, and first released in 2005, the *Advisory Guidelines* were written by two university professors, both experts in family law,[44] in consultation with an "Advisory Working Group on Family Law."[45] The publication of the final version in 2008 marked the culmination of a seven-year project,[46] involving "an extensive process

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[42] This simplified description is not intended as a comprehensive explanation of the *Advisory Guidelines* and their contents, which encompass much more than the formulas. Sixteen chapters in length, the *Advisory Guidelines* contain information on a number of subjects, including their creation, entitlement to spousal support, their applicability, and exceptions to their use. For further detail, see the *Advisory Guidelines*, *supra* note 1.

[43] Rogerson & Thompson, "Canadian Experiment", *supra* note 24 at 242.

[44] Carol Rogerson is a Professor at the University of Toronto. See "Carol Rogerson" University of Toronto Faculty of Law, online:
<www.law.utoronto.ca/faculty-staff/full-time-faculty/carol-rogerson>.
Rollie Thompson is a Professor at the Schulich School of Law at Dalhousie University. See "Rollie Thompson" Schulich School of Law, online: <www.dal.ca/faculty/law/faculty-staff/our-faculty/rollie-thompson.html>.

[45] The Advisory Working Group was composed of family lawyers and judges drawn from eight provinces. The Group did not include members from New Brunswick or PEI, and contained at least one member of the judiciary from British Columbia, Saskatchewan, Manitoba, Ontario, and Newfoundland and Labrador.

[46] Rogerson, "Turn to Guidelines", *supra* note 24 at 159.

of consultation with the family law bar and judiciary across the country."[47] To ensure that the *Advisory Guidelines* reflect current practices, the authors surveyed not only reported judicial decisions, but also "[drew] on practices outside the realm of reported cases," working with "an advisory group of family lawyers, judges, and mediators who drew upon their experience of spousal support outcomes in negotiations, mediation and settlement conferences."[48] The *Advisory Guidelines* project was thus envisioned as building informal guidelines "from the ground up," as opposed to the traditional, "top-down" legislative process.[49]

In contrast with the *Child Support Guidelines*, a binding regulation adopted under the *Divorce Act*,[50] the *Advisory Guidelines* do not purport to create or change the law of spousal support. The creation of the *Child Support Guidelines* was expressly motivated by a desire to reduce instances of child poverty following family breakdown and a belief that in the absence of guidelines, awards were insufficient.[51] The *Advisory Guidelines*, for their part, are intended to "reflect current practice within the existing legal framework" of the applicable legislation and the relevant Supreme Court of Canada decisions, and not to change the law.[52] The formulas thus function to incorporate the law already in place.

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[47] Rogerson & Thompson, "Canadian Experiment", *supra* note 24 at 250.
[48] *Ibid*.
[49] Department of Justice Canada, *Developing Spousal Support Guidelines in Canada: Beginning the Discussion*, Background Paper by Professor Carol Rogerson (Ottawa: Department of Justice Canada, 2002) at 64 [Rogerson, "Background Paper"].
[50] See *Divorce Act*, *supra* note 2, s 2(1); *Federal Child Support Guidelines*, SOR/97-175.
[51] See Vicky Barham, Rose Ann Devlin & Chantale LaCasse, "Are the New Child Support Guidelines 'Adequate' or 'Reasonable'?" (2000) 26:1 Can Pub Pol'y 1; Tina Maisonneuve, "Child Support Under the Federal and Quebec Guidelines: A step Forward or Behind?" (1999) 16:2 Can J Fam L 284; Paul Millar & Anne H Gauthier, "What Were They Thinking? The Development of Child Support Guidelines in Canada" (2002) 17:1 CJLS 139. See also Canada, Department of Justice, *Children Come First: A Report to Parliament Reviewing the Provisions and Operation of the* Federal Child Support Guidelines, vol 1 (Ottawa: Department of Justice, 2002).
[52] Rogerson & Thompson, "Canadian Experiment", *supra* note 24 at 250.

Thus, the *Advisory Guidelines* are distinctive not only for their unofficial status, but for the absence of a clearly articulated rationale, by policy-makers, for that status. While this thesis posits that their informal nature may be seen as one of their strengths, the deference shown to them by many judges and lawyers represents a novel practice in Canadian adjudication, both within and outside the borders of family law, and accordingly merits critical examination.

The *Advisory Guidelines* set out two basic formulas for support, depending on whether there are dependent children of the marriage. Using an income sharing mechanism, the formulas generate ranges of both amount and duration of support, which vary according to factors such as the length of the marriage and any prior cohabitation, the ages of the spouses, and, where applicable, the age of any dependent children. Thus, the *Advisory Guidelines* employ the spouses' income disparity at the time of marital breakdown, "in conjunction with the length of marriage and the child-rearing period" as a "proxy" for measuring a claimant spouse's lost earning capacity.[53] Awards with a concurrent child support obligation are usually indefinite in length, but this does not mean they are permanent. Rather, they are reviewable when a child enters school or graduates from high school, depending on the parents' financial circumstances (or upon another material change in circumstances, as with all support awards).[54]

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[53] Rogerson, "Background Paper", *supra* note 49 at 47. Note that Rogerson is describing the functioning of the American Law Institute's recommendations with respect to compensatory alimony payments in the United States. As discussed in the text, the *Advisory Guidelines* draw substantially on these recommendations.

[54] *Advisory Guidelines supra* note 1 at 81.

Modeled in substantial part on the American Law Institute's recommendations with respect to spousal support,[55] the *Advisory Guidelines* "attempt to create an easily-administered rule that obviates the necessity of any complex, individualized, factual analysis of causal links between the claimant's disproportionate assumption of child-rearing responsibilities and her earning capacity."[56] Instead, they rely on social science evidence of the "significant impact on earning capacity" that typically results from the assumption of responsibility for childcare.[57] Because the *Advisory Guidelines* are not law and because the formulas generate ranges and not amounts of support, judges maintain their discretion to select the final award. The *Advisory Guidelines* are thus part of "a flexible scheme that still has many openings for exercises of judgment and discretion."[58] Non-legislated and non-binding, but containing principles meant to reflect the state of the law, the *Advisory Guidelines* have been described as a "halfway house between rules and discretion."[59]

What is often forgotten in judicial and scholarly discussion of the *Advisory Guidelines* is that their content is not limited to the mathematical formulas. The 166 pages of the final version read more like a comprehensive user manual for the Canadian law of spousal support than a series of numbers or bare legislative provisions. In addition to chapters setting out the formulas, subjects include a background on the law of spousal support; an explanation of the project of creating the *Advisory Guidelines*; entitlement to

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[55] American Law Institute, *Principles of the Law of Family Dissolution: Analysis and Recommendations* (St Paul: American Law Institute, 2002).
[56] Rogerson, "Background Paper", *supra* note 49 at 47-48.
[57] *Ibid*.
[58] Rogerson, "Access to Justice", *supra* note 24 at 64.
[59] DA Rollie Thompson, "Canada's Spousal Support Advisory Guidelines: A Half-way House between Rules and Discretion" (2010) March, Intl Family L 106.

spousal support; income determination; information on how to use the resulting ranges; the concept of restricting awards, and; exceptions to their use. It is in these chapters that users of the *Advisory Guidelines* might seek guidance about how to select an amount from the ranges and when to depart from the formulas entirely.

In recent years, the objectives of the *Advisory Guidelines* have been recast as primarily aimed at "[facilitating] well-drafted agreements … thus avoiding resort to courts."[60] The goal of providing a starting point for cases that do end up in front of a judge is secondary.[61] To date, no data regarding the impact of the *Advisory Guidelines* on out of court negotiation exist; as mentioned, the *Advisory Guidelines* constitute an understudied instrument and their effect on negotiated settlements could ground further empirical research. As this thesis suggests, however, there is evidence that inside the courtroom, the *Advisory Guidelines* have altered the course of spousal support litigation.

3. The Chapters to Come

A meaningful discussion about an instrument designed to guide the functioning of a legal obligation must be grounded in a proper understanding of that obligation. Chapter 1 provides the necessary background to the rest of this thesis by setting out a unified theory of spousal support, something which neither Parliament, nor the Supreme Court, has expressly done. Part literature review, part analysis, Chapter 1 takes readers through a brief history of Canadian spousal support law, beginning with the adoption of the first *Divorce Act*, in 1968, the introduction of the concept of no-fault divorce, and the eventual adoption of the current legislation. It looks at how the legislation has been interpreted by the courts and at the diverse, and at times contradictory, meanings that the

[60] Rogerson, "Access to Justice", *supra* note 24 at 66, n 58.
[61] *Ibid*.

Court has conferred on spousal support, and draws on academic commentary both critiquing and praising the Court's varied approaches.[62] With that in mind, the chapter suggests that the different models of spousal support set out by the Court in interpreting the relevant provisions of the *Act* might be understood as falling under one broad umbrella, that of relational theory.

In setting out the jurisprudential background to the relational approach, much of Chapter 1 is grounded in judicial pronouncements, specifically those of the Supreme Court. In an area where appellate judicial pronouncements are relatively rare, each decision canvassed has had a meaningful impact on the law and is helpful for uncovering the theoretical justifications for support. Thus the focus of Chapter 1 is limited to four leading spousal support cases, which together represent a cycle in the Court's thinking about the support obligation, and which highlight the various issues at play in adjudicating claims for support, such as the privatization of familial responsibilities, the relationship between the family and the social system, and the economic value of non-remunerated work performed in the home.

In confining its discussion to these cases, Chapter 1 looks only at what might be thought of as "pure" spousal support cases interpreting the current version of the *Divorce Act* — that is, decisions on claims for support in the absence of an agreement between the spouses, either pre- or post-nuptial.[63] It does so for two reasons. First, while scholarship on these cases is plentiful, no one has examined these decisions in the context of their

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[62] Unless otherwise indicated, references to "the Court" refer to the Supreme Court of Canada.
[63] See e.g. *Miglin v Miglin*, 2003 SCC 24, [2003] 1 SCR 303; *Hartshorne v Hartshorne*, 2004 SCC 22, [2004] 1 SCR 550. Note, however, that *Pelech* and companion cases dealt with applications to vary agreements, but are relevant in the uncertainty they created with respect to resolving claims in the absence of an agreement.

formation of the theoretical foundation for the *Advisory Guidelines*. This study is fundamental to the discussion of the *Advisory Guidelines* as the choice of instrument for structuring spousal support awards. Indeed, choosing the appropriate instrument to address a particular policy issue requires policy-makers to "be familiar not only with the technical aspects of the menu of instruments before them, but also with the nature of the governance and policy contexts in which they are working."[64] Focusing on pure spousal support cases, and locating them within a relational framework, enables us to understand the very essence of the obligation and, accordingly, the work of the *Advisory Guidelines*. Second, scholars have already applied the relational framework to questions of private ordering in Canadian family law.[65] Literature also exists on the relational approach as it relates to spousal support in the absence of spousal agreements.[66] This thesis adopts the published approaches in order to ground the discussion of the *Advisory Guidelines* as a tool for promoting relational autonomy and substantive gender equality.

Seeking clarity in family law is a tall order. Family law has often been characterized by its chaotic nature and a lack of theoretical coherence.[67] But rather than undermine its internal logic, the varied sources of family law, in the form of rules, guidelines, and discretion — what Dewar calls its normative pluralism — reflect the ongoing uncertainty about its role and purpose.[68] Nevertheless, in the modern, no-fault divorce regime, where morality and determinations of fault no longer govern family law

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[64] Michael Howlett, "From the 'Old' to the 'New' Policy Design: Design Thinking Beyond Markets and Collaborative Governance" (2014) 47:1 Policy Sciences 187 at 196.
[65] See Leckey, "Contracting Claims", *supra* note 39; Lucy-Ann Buckley, "Relational Theory and Choice Rhetoric in the Supreme Court of Canada" (2015) 29:2 Can J Fam L 251.
[66] See Leckey, "Relational Contract", *supra* note 17.
[67] See e.g. John Dewar, "The Normal Chaos of Family Law" (1998) 61:4 Mod L Rev 467.
[68] *Ibid* at 469.

principles, the need for a conceptual underpinning to spousal support is paramount. Indeed, any attempt to understand the content and functioning of the *Advisory Guidelines*, as well as judicial attitudes toward them, must be informed by a genuine understanding of the rationale and function of the law of spousal support itself. Chapter 1 attempts to provide that understanding.

With that background in mind, Chapter 2 gets to the heart of the matter, looking directly at the *Advisory Guidelines* as the choice of instrument to govern spousal support determinations. It first sets out the instrument choice framework, extending its application to family law, and then describes the *Advisory Guidelines* — their form and functioning, the reasons for their creation, and their rapid integration by a number of appellate courts throughout the country. (Refusals to apply them are addressed in Chapters 3 and 4.) Chapter 2 then queries the choice of a non-binding, advisory instrument as the appropriate approach to remedying some of the problems plaguing the Canadian law of spousal support. In doing so, it posits that the success of a regulatory tool, like the *Advisory Guidelines*, may be measured as a function of its acceptance by the relevant stakeholders. Chapter 2 relies on literature on instrument choice, negotiation theory, and regulatory theory, to suggest that the *Advisory Guidelines* represent an appropriate compromise and a proper method for balancing the constant tension in law between the finality and certainty inherent in bright-line, inflexible rules and the exercise of broad discretion necessary to deliver individualized justice. It suggests that in their blending of rules and discretion, the *Advisory Guidelines* provide an appropriate balance between the two approaches, evidenced by their success, as measured by their acceptance among the judiciary. Indeed, if popularity, or general acceptance, is a measure of success,

the *Advisory Guidelines* might be described as an extraordinary feat in the area of family law and governing instruments more generally.

Chapter 3 turns to the comparative question, with a specific eye on judicial attitudes toward the *Advisory Guidelines* in Quebec. While not all judges outside of Quebec have enthusiastically embraced them, some Quebec judges have been particularly critical in their objections to the *Advisory Guidelines*. Given the different nature of Quebec's civil law system, these objections might hold clues about that province's understanding of the spousal support obligation. Chapter 3 accordingly attempts to ground judicial resistance in Quebec to both the substance and the form of the *Advisory Guidelines*, before setting out reasons that these objections are misguided. Drawing on the history of Quebec matrimonial law, the chapter argues that the prevailing approaches to support in that province, with their focus on responding to need and promoting self-sufficiency and individual autonomy, do not align with the applicable provincial legislation and do not conform to the federal law governing divorce, as it has been interpreted by the Supreme Court. The chapter also deals with the question of form, and opposes the notion that judicial reliance on the *Advisory Guidelines* would undermine respect for Quebec's hierarchy of legal sources. It draws on civil law scholarship, and literature on civilian and mixed legal systems to suggest that judicial reliance on the *Advisory Guidelines* would not run counter to Quebec's foundational legal traditions. Comparative and historical in nature, Chapter 3 thus invites a re-questioning of some of the basic premises of Quebec's unique legal system and its approach to family law.

Last, Chapter 4 expands the response to judicial resistance to the *Advisory Guidelines* beyond Quebec, examining the constitutional implications of intense judicial

reliance on a non-legislated instrument — in other words, on soft law. Drawing on administrative law scholarship, it characterizes the *Advisory Guidelines* as a unique instrument of soft law and grounds objections to judicial reliance on them in concerns similar to those already expressed with regard to administrative soft law — that is, in a concern for the democratic principle of the separation of powers and ultimately, the foundational constitutional principle of the rule of law. It then paints the objection as grounded in a thin and formalistic understanding of constitutional principles and offers arguments to suggest that accepting the legitimacy of judicial reliance on the *Advisory Guidelines*, as a number of Canadian jurisdictions have done, does not undermine the rule of law. Chapter 4 looks to scholarship on administrative law and constitutional theory, and draws on the political sciences, to suggest that objections to the *Advisory Guidelines* rooted in the idea that they might offend the constitutional principle of legislative supremacy are based on an idealized, but often fictitious, vision of the legislative process. It suggests that constitutional legitimacy is not limited to questions of form, but might also be understood as a question of process, as well as a question of substance and respect for rights. The chapter thus makes a unique contribution: thinking about constitutional principles as applying to non-legislated instruments adds to the nascent body of Canadian literature on soft law and increasing regulatory creativity, in family law and beyond. Further, applying these ideas to spousal support law, to the *Advisory Guidelines*, and to similar novel soft law tools, the chapter brings something new to discussions about constitutional theory and theories of legitimacy.

4. Theoretical Approach

Without limiting its scope, this thesis may be described as primarily doctrinal in methodology. Its arguments are grounded in case law interpreting the relevant authorities and academic commentary, in family law and beyond. Its orientation is practical and it is concerned with the normativity of a particular legal approach.[69] Moreover, its theories are informed by the legal system itself. Thus the law forms the theoretical background from which the *Advisory Guidelines* are understood.[70] Indeed, one of the primary objectives of this project is to understand the role of the *Advisory Guidelines*, as an instrument of soft law, in guiding judicial determinations, one of the central functions of the legal system. This project, however, should not be understood as exclusively doctrinal in nature. The inquiry contained in the following pages "cannot be quarantined from broader theoretical and institutional questions."[71]

Among those broader questions is how to achieve economic gender equality between divorcing spouses, hence the feminist approach that underlies this thesis. As mentioned above, the *Advisory Guidelines* are understood by some to increase access to justice for individuals made financially vulnerable by family breakdown, and those individuals are overwhelmingly women. Moreover, as will become clear, this thesis argues in favour of judicial reliance on the *Advisory Guidelines*, which are understood as a crucial device in the pursuit of economic justice and substantive economic gender

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[69] See Pauline C Westerman, "Open or Autonomous? The Debate on Legal Methodology as a Reflection of the Debate on Law" in Mark Van Hoecke, ed, *Methodologies of Legal Research: Which Kind of Method for Which Kind of Discipline* (Oxford: Hart Publishing, 2011) 87 at 90.
[70] See *ibid*.
[71] Council of Australian Law Deans, "Statement on the Nature of Research" (May & October 2005) online: <http://www.cald.asn.au>, cited in Terry Hutchinson & Nigel Duncan, "Defining and Describing What We Do: Doctrinal Legal Research" (2012) 17:1 Deakin L Rev 83 at 108.

equality. Accordingly, this project as a whole is meant to advance a feminist legal perspective. It is rooted in a social and historic context in which women's work — that is, domestic and care work, for which women continue to take disproportionate responsibility — is essentially valueless, or "invisible," in national and international measurements of production and growth.[72] This thesis seeks to call that reality into question — to argue for the value of work historically associated with women, and to understand how one particular legal mechanism might be conducive to the societal and legal recognition of that value.

Much of the material canvassed in this thesis with respect to the economic situation of Canadian women is not new. Scholars and statisticians have focused on this question for decades.[73] The economic disparities between men and women are nevertheless relevant today, when, despite higher rates of education and participation in the labour force, women continue to spend more time on childcare than Canadian men, face barriers to entering male dominated professions, and earn less money than men.[74]

In exploring means of achieving economic gender equality, this thesis recognizes that the feminist label has many meanings. The label is a broad one and represents a multiplicity of varying perspectives.[75] Indeed, "there are many differences within

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[72] Margaret Thornton, "The Cartography of Public and Private" in Margaret Thornton, ed, *Public and Private: Feminist Legal Debates* (Oxford: Oxford University Press, 1995) 2 at 14.
[73] See e.g. Brenda Cossman, "Family Feuds: Neo-Liberal and Neo-Conservative Visions of the Reprivatization Project" in Brenda Cossman & Judy Fudge, eds, *Privatization, Law, and the Challenges to Feminism* (Toronto: University of Toronto Press, 2002) ch 4 (citing statistics from the 1990's on gendered economic disparities related to the family); Vanier Institute, *Families Count*, *supra* note 19.
[74] Status of Women Canada, *Women and Girls in Canada: Presentation to the Social Trends, Policies and Institutions Deputy Ministers' Policy Committee*, (Ottawa: SWC, 10 February 2015).
[75] See Katharine T Bartlett, "Feminist Legal Methods" (1990) 103:4 Harv L Rev 829 (on the danger that the "feminist" label might "obscure — even [deny] — important differences among women and among

feminism — difference in approach, emphasis and objectives — that make sweeping generalizations difficult."[76] As mentioned above, this thesis adopts a relational theory of feminism, one that recognizes two paradoxical features of family law that make regulating the family particularly difficult — that individuals are "in part defined by their relationships with others," and that private or family relationships are always "shaped by social practices and state action." [77] A relational understanding of rights and responsibilities is accordingly best suited to family policy, which, in order to respond to people's lived reality, must "[regard] people simultaneously as individuals and as persons deeply embedded in relationships of interdependency and mutual responsibility…."[78] Moreover, despite the obvious connections between social relationships and family law, "the application of relational models to financial ordering within the family has received surprisingly little attention."[79]

The relational feminist approach is unlikely to persuade all readers, given the diverse nature of feminist legal theory. Proponents of a formal equality approach, for example, might disagree with relational theory's "cultural feminism" approach, which focuses on "the uniquely female experiences of … motherhood."[80] However, all feminists will agree that the object of the feminist approach is to challenge "the assertions and

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feminists, especially differences in race, class, and sexual orientation, that ought to be taken into account" at 834).

[76] Martha Albertson Fineman, "Feminist Legal Theory" (2005) 13:1 Am U Gender Soc Pol'y & L 13 at 13.

[77] Minow & Shanley, *supra* note 31 at 5. See also Jennifer Nedelsky, "Reconceiving Autonomy: Sources, Thoughts and Possibilities" (1989) 1 Yale JL & Feminism 7; Jonathan Herring, *Relational Autonomy and Family Law* (Oxford, UK: Springer, 2014).

[78] Minow & Shanley, *supra* note 31 at 5-6.

[79] Buckley, *supra* note 65 at 253.

[80] Cynthia Grant Bowman & Elizabeth M Schneider, "Feminist Legal Theory, Feminist Lawmaking, and the Legal Profession" (1998) 67:2 Fordham L Rev 249 at 252.

assumptions of gender-neutrality and objectivity in received disciplinary knowledge"[81] — in the present case, with respect to the gendered economic impacts of family breakdown. To that end, this thesis employs feminist legal theory as the shared "intellectual means for argument and debate about issues of equality … that continue to resonate … in the world at large."[82] In this respect, feminists of all stripes might identify with this thesis's broader objective.

It is worth nothing that not all chapters of this thesis rely explicitly on feminist scholarship. While the discussions of spousal support and substantive equality in Chapter 1 draw expressly on feminist thinkers, the thesis as a whole, while employing other theories explained below, is meant to advance the feminist legal project more generally. For this reason, the inquiry into the *Advisory Guidelines* as a procedural instrument is not content-neutral, nor is it indifferent to the feminist substance of the *Advisory Guidelines*. Instrumental in its approach, it evaluates procedures according to their ability to maximize particular outcomes,[83] specifically, the goal of achieving economic equality between former spouses. The thesis thus rejects strong distinctions between process and substance, instead treating them as "closely related."[84] In examining the *Advisory Guidelines* as an important tool in the pursuit of equality, it accordingly

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[81] Fineman, *supra* note 76 at 14.
[82] Bowman & Schneider, *supra* note 80 at 254.
[83] See Michael Bayles, "Principles of Legal Procedure" (1986) 5:1 Law & Phil 33 (on "multi-value instrumentalism" as "an approach that evaluates procedures by seeking to maximize several values of outcomes at 45).
[84] *Ibid* at 50. See also David Dyzenhaus and Evan Fox-Decent, "Rethinking the Process/Substance Distinction: *Baker v Canada*" (2001) 51:3 UTLF 193 (on the general difficulty in distinguishing between process and substance in the context of judicial review of administrative decisions).

takes for granted that the feminist politics engrained in them are substantively good, and understands legal procedure as "a means to achieving proper outcomes."[85]

Moreover, this thesis deals with only one small segment of family law, the rationale and functioning of the spousal support obligation between divorcing couples. While the contents of this study may apply to unmarried cohabitants, they are not the subjects of inquiry, although the question of Quebec's differential treatment of *de facto* spouses features somewhat in Chapter 2, insofar as it sheds light on that province's formalistic approach to spousal support. Further, the focus of this thesis is on heterosexual marriage. While its conclusions on the utility and legitimacy of non-legislated guidelines in regulating intimate relationships and family breakdown will extend beyond heterosexual marriage, the bulk of scholarship and case law dealing with the economic consequences of divorce are gendered.[86] It is simply a fact of economic and social life in Canada that women continue to bear disproportionate negative economic effects of family breakdown, although it is reasonable to expect that with time, this will change. Thus, the majority of literature on spousal support and the economic impacts of family breakdown continue to be informed by a feminist perspective.

This thesis also employs the comparative method with respect to the varied judicial responses to the *Advisory Guidelines* across provincial borders and, more specifically, across Canadian legal systems. Comparing judicial attitudes to reliance on these non-binding rules is thought to reveal truths about different understandings of the

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[85] Bayles, *supra* note 83 at 48. (The idea that the *Advisory Guidelines* entrench feminist politics is set out in Chapters 1 & 2.)

[86] But see Charlotte Bendall, "A 'Divorce Blueprint'? The Use of Heteronormative Strategies in Addressing Economic Inequalities on Civil Partnership Dissolution" (2016) 31:2 CJLS 267 (on the use of heteronormative constructs of gendered inequalities in the context of the dissolution of same-sex partnerships in the UK, despite that same-sex couples do not all identify with these constructs).

function of spousal support. More significantly, however, the comparisons in Chapter 3 work to undermine criticisms of the *Advisory Guidelines* on the part of Quebec jurists as well as certain longstanding beliefs about the uniqueness of Quebec's civil law system, at least with respect to the interpretation of federal law. Chapter 3 thus uses comparison in order to reveal more similarity across systems than differences.

Parts of this thesis might also be described as interdisciplinary in nature. The discussion of whether conferring the *Advisory Guidelines* with normative force threatens the constitutional principle of the rule of law draws not only on Canadian constitutional theory, but also on political theory. Chapter 4 thus relies on scholarship in both law and political science.

Finally, this thesis as a whole might be understood as taking a pragmatic approach to law. It is undeniably instrumental in nature, centred, as it is, on the pursuit of substantive economic gender equality. In that respect, its focus is on the welfare of community members; it is less concerned with the "purity or integrity of legal doctrine."[87] While it looks to history — specifically to the history and development of the Canadian law of spousal support — it does so "for entirely future-directed reasons."[88] It is also anti-formalist, as will become clear from later references to the appropriateness of a functional approach to family law. Moreover, its reliance on a cultural understanding of feminism, and the idea that legal thinking and legal institutions are "culturally situated," aligns with legal pragmatism's "perspectivist" approach.[89] Indeed, this thesis's feminist method is premised on the idea that a phenomenon affecting women will be best

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[87] David Luban, "What's Pragmatic About Legal Pragmatism?" (1996) 18:2 Cardozo L Rev 43 at 43.
[88] *Ibid* at 43-44.
[89] Steven D Smith, "The Pursuit of Pragmatism" (1990) 100:2 Yale LJ 409 at 424.

understood from a female perspective — one grounded in the concrete reality of women's experience of the law.[90]

This thesis's participation in the debate between discretion and rules further reflects the pragmatic perspective. According to Richard Posner, "[the] pragmatist rejects the idea that law is not law unless it consists of rules, because that kind of conceptual analysis is not pragmatic."[91] At the same time, the legal pragmatist is open to rules, where she believes, for example, the absence of rules gives rise to unintelligible decisions, "or that decisions based on standards produce uncertainty disproportionate to any gain in flexibility." [92] Moreover, that legal pragmatism is known for its "openness to experimentation" makes it a fitting framework from which to examine a novel approach to adjudication and judicial decision-making.[93]

Legal pragmatism is not immune from criticism. Most commonly, it is said to contribute little as a philosophy of law — to be platitudinous or banal.[94] As Steven Smith points out, however, "platitudes are eminently suited to perform certain functions such as exhortation."[95] As an exhortation, legal pragmatism might help to "sharpen people's sense of and commitment to ideals they already hold."[96] In the context of this thesis, it is hoped that the pragmatic approach to its subject will incite readers — lawyers, judges,

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[90] See Margaret Jane Radin, "The Pragmatist and the Feminist" (1990) 63:3 S Cal L Rev 1699; Daniel A Farber, "Reinventing Brandeis: Legal Pragmatism for the Twenty-First Century" (1995) 1995:1 U Ill L Rev 163.
[91] Richard A Posner, "Pragmatic Adjudication" (1996) 18:1 Cardozo L Rev 1 at 16.
[92] *Ibid*.
[93] Farber, *supra*, note 90 at 185.
[94] See Smith, *supra* note 89 at 444.
[95] *Ibid*.
[96] *Ibid*.

and academics alike — to take seriously the possibilities offered by novel regulatory instruments as a means of advancing our shared commitment to genuine gender equality.

I. Rationalizing Spousal Support

Introduction

This chapter lays out the theoretical and doctrinal groundwork of this thesis's examination of spousal support in Canada and the *Spousal Support Advisory Guidelines*. It attempts to set out the conceptual underpinnings for spousal support in an era of no-fault divorce, characterized by the relative ease of dissolving the marital relationship. It does so by canvassing the evolution of the law of spousal support in the years leading up to and following the adoption of the *Divorce Act, 1985*, which created a unique and all-encompassing ground for divorce: "breakdown of marriage."[1] The new law eliminated the requirement of proving fault before one could obtain a divorce and entrenched the work of the gender equality movement, through legislative recognition of the right of all spouses, male and female alike, to initiate divorce proceedings and seek spousal support. In doing so, the law weakened earlier justifications for spousal support, based primarily on the image of the dependent and innocent wife, entitled to support following her husband's indiscretions, be they in the form of adultery, cruelty, or desertion.[2]

This chapter addresses the theoretical uncertainty that resulted from maintaining the spousal support obligation despite the legislative entrenchment of gender equality, the concomitant rise of women in the workforce, and the resulting reduction of spousal dependence. Legal recognition of these social changes meant that the earlier justifications for spousal support — women's inevitable dependency on men — no longer applied to an

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[1] *Divorce Act*, RSC 1985, c 3, s 8(1) [*Divorce Act*].
[2] See generally Carol Rogerson, "The Canadian Law of Spousal Support" (2004) 38:1 Fam LQ 69" [Rogerson, "Canadian Law"].

increasing number of marriages.[3] Moreover, the *Divorce Act, 1985*, although it sets out the factors to be taken into account in setting spousal support awards as well as the varied objectives of support, does little to explain why, in this new era of equality premised on principles of autonomy and independence, spouses should still be entitled to support upon the breakdown of a marriage.[4] Further, interpreting the relevant provisions of the *Divorce Act*, the Supreme Court has issued two important decisions, setting out the different spousal support models applicable in Canada. As will be seen throughout this chapter, however, the Court's attempts to settle this uncertain area of law may have created more confusion than clarity.

Part 1 briefly exposes the feminist theory underlying the chapter's attempt to justify the obligation of spousal support, setting out the feminist considerations that support ongoing responsibilities for former spouses. Part 2 provides a general introduction to the subject matter, by way of a brief description of the history of spousal support law in Canada leading up to the adoption of the current law in 1985. That history informs the Supreme Court's interpretation of the current legislation. Part 3 looks at the state of the law in the decades before the adoption of the *Divorce Act, 1985* and sets out the Supreme Court's formal equality-based understanding of the purpose of spousal support, grounded in an emphasis on women's personal accountability and the pursuit of self-sufficiency. Part 4 contrasts that approach with the compensatory model of spousal support set out by the Court in 1992, which recognized divorce as one of the primary factors leading to women's economic vulnerability. This part explains the rationale for

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[3] See *ibid*; Rosalie S Abella, "Economic Adjustment on Marriage Breakdown: Support" (1981) 4:6 Fam L Rev 1.

[4] See Carl E Schneider, "Rethinking Alimony: Marital Decisions and Moral Discourse" (1991) 1991:1 BYUL Rev 197 (raising similar questions in the US context).

compensating divorcing spouses for their economic as well as non-economic contributions to the family as well as the limits of that approach. Part 5 looks at the Court's subsequent restatement of the objective of a spousal support award and at the basic social obligation that it is meant to fulfill in addition to compensation for lost opportunities. Drawing on the relevant family law scholarship, it suggests that the introduction of a new approach to spousal support had the effect of both broadening and narrowing its scope. In an attempt to draw this history together and set out an overarching rationale for spousal support, Part 6 examines the implications of the privatization of support and attempts to reconcile the seemingly divergent jurisprudential trends. It draws on the relational feminist theory set out earlier to posit a response to the so-called "riddle of alimony" — that is, "why one former spouse should have to support the other when no-fault divorce seems to establish the principle that marriage need not be for life…."[5] As this relational understanding of spousal support is incorporated into the *Advisory Guidelines*, this chapter sets the stage for their analysis.

The close readings of Supreme Court decisions about spousal support demonstrate that, far from a subject of agreement among judges, the question of spousal support has divided the Court on a host of underlying and related questions. For example, who should bear the responsibility for former spouses and family members: the public or the family unit? And, what is the economic value of work performed in the home? These are some of the questions that lie at the heart of any meaningful discussion of the role, function, and theoretical justifications for spousal support. As this chapter illustrates, many of the questions raised by spousal support do not lend themselves to clear answers.

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[5] *Ibid* at 197.

Nevertheless, informed by a feminist perspective, this chapter attempts to set out an overarching theoretical account of the spousal support obligation — one that aligns with the pursuit of substantive economic gender equality in the context of intimate relationships.

1. Feminist Relational Theory and Spousal Support

Spousal support has confounded legal actors for decades. This is particularly the case in the context of the liberal political philosophy that characterizes Western legal systems, where individualism and personal responsibility take pride of place.[6] Indeed, "[independence] and freedom have become the icons of our age."[7] That emphasis on individualism and economic self-sufficiency — in other words, the formal approach to equality which underscores the Supreme Court's early interpretations of the statutory provisions governing spousal support, and which ignores gendered experiences of the law — is rooted in the liberal political ideology that dominates Western societies, and which views all citizens as autonomous, self-reliant individuals.[8]

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[6] See Jonathan Herring, *Relational Autonomy and Family Law* (Oxford, UK: Springer, 2014) at ch 1 [Herring, *Relational Autonomy*].

[7] *Ibid* at 2.

[8] See Jennifer Nedelsky, "Reconceiving Autonomy: Sources, Thoughts and Possibilities" (1989) 1 Yale JL & Feminism 7 [Nedelsky, "Reconceiving Autonomy"]; Marlène Cano, "La réforme Québécoise sur les rapports pécuniaires entre conjoints (Loi 146): Le concept de 'liberté de choix'" (1990) 4:1 CJWL 190; Brenda Cossman, "A Matter of Difference: Domestic Contracts and Gender Equality" (1990) 28:2 Osgoode Hall LJ 303 [Cossman, "Difference"]; Margaret Thornton, "The Cartography of Public and Private" in Margaret Thornton, ed, *Public and Private: Feminist Legal Debates* (Melbourne: Oxford University Press, 2995) 2; Rebecca Johnson, *Taxing Choices: The Intersection of Class, Gender, Parenthood, and the Law* (Vancouver: UBC Press, 2002); Martha Albertson Fineman, "The Vulnerable Subject and the Responsive State" (2010) 60:2 Emory LJ 251. Note that Hester Lessard characterizes the judiciary's focus on private choice as aligning with neoliberal thought, which views private responsibility as distinct from the market, the latter of which forms the "general organizing principle" of social life, and within which the responsibility for social reproduction is a purely private one. This is as opposed to liberal ideology, which assumes that the "citizen is a self-reliant, autonomous and entrepreneurial person." See Hester Lessard, "Charter Gridlock: Equality Formalism and Marriage Fundamentalism" (2006) 33 SCLR (2d) 291. Brenda Cossman and Judy Fudge also attribute the privatization of choice to neoliberal ideology. See Judy Fudge

Before this chapter highlights how the central tenets of liberalism have imbued the interpretation of the law of spousal support, this part sets out an alternative theory, according to which spousal support might be understood. A feminist response to the individualism inherent in liberal philosophy — and detectable in the early spousal support decisions surveyed below — relational theory recognizes that human beings are inherently social in nature: "… people are not self-made. We come into being in a social context that is literally constitutive of us. Some of our most essential characteristics, such as … the conceptual framework through which we see the world, are not made by us, but given to us … through our interactions with others."[9] Taking the socially embedded nature of individuals as its starting point, relational theory understands that our identities — our decision-making capacities — are formed "within the context of social relationships."[10] By recognizing that autonomy is shaped by social context — by distancing the concept of autonomy from those of isolationism and boundaries[11] — relational theory "[militates] against the likelihood of a marriage in which the partners retain economic self-sufficiency."[12] Moreover, relational theory explains that individuals are "enmeshed in [connections]" that might give rise to unforeseen, or "nonconsenual

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& Brenda Cossman, "Introduction: Privatization, Law and the Challenge to Feminism" in Brenda Cossman & Judy Fudge, eds, *Privatization, Law, and the Challenge to Feminism* (Toronto: University of Toronto Press, 2002) [Cossman & Fudge, *Challenge to Feminism*] 3 [Fudge & Cossman, "Introduction"]. Both ideologies (liberalism and neoliberalism) view decisions about domestic life as confined to the private sphere and as made by autonomous individuals, regardless of social constraints.

[9] Nedelsky, "Reconceiving Autonomy", *supra* note 8 at 8.

[10] Robert Leckey, "Contracting Claims and Family Feuds" (2007) 57:1 UTLJ 1 at 6 [Leckey, "Contracting Claims"]. See also *ibid*; Martha Minow & Mary Lyndon Shanley, "Relational Rights and Responsibilities: Revisioning the Family in Liberal Political Theory and Law" (1996) 11:1 Hypatia 4.

[11] See Nedelsky, "Reconceiving Autonomy", *supra* note 8 at 11-12.

[12] Leckey, "Contracting Claims", *supra* note 10 at 36.

obligation."[13] The theory thus provides an alternative to the liberal individualism at play in early spousal support decisions, and a possible solution to their detrimental effects on women's economic situations, set out below.

Autonomy, in its relational sense, conceives of dependence and relatedness as integral and not antithetical to the concept.[14] Because autonomy is only made possible by relationships,[15] it is not undermined by the privatization of support and the continuation of obligations beyond the life of the marriage. This is contrary to the writings of a number of feminist scholars, who eschew the privatization of familial responsibilities through a private spousal support obligation as a solution to the economic vulnerability that results from traditional domestic roles.[16] Thus, relational theory provides a counterpoint to the "individualistic and atomistic" view of liberalism,[17] which, by emphasizing the pursuit of independence and self-reliance, ignores that individuals are not purely independent beings, but rather, are constituted by their relationships with others.[18] Moreover, relational theory avoids depicting women as "peculiarly powerless" in a "sexist and patriarchal culture," a common critique of the communitarian feminist

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[13] Milton C Regan Jr, *Alone Together* (New York: Oxford University Press, 1999), online: <http://www.myilibrary.com?ID=45328> at 166 [Regan, *Alone Together*].
[14] See Nedelsky, "Reconceiving Autonomy", *supra* note 8.
[15] Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (Oxford: Oxford University Press, 2011) at 5. See also Leckey, "Contracting Claims", *supra* note 10 at 8.
[16] See e.g. Martha Alberston Fineman, "Feminist Legal Theory" (2005) 13:1 Am U J Gender Soc Pol'y & L 13 [Fineman, "Feminist Legal Theory"]; Martha Albertson Fineman, "Gender and Law: Feminist Legal Theory's Role in New Legal Realism" (2005) 2005:2 Wis L Rev 405 [Fineman, "Gender and Law"]; Susan B Boyd, "Can Law Challenge the Public/Private Divide? Women, Work, and Family" (1996) 15 Windsor YB Access Just 161; See Brenda Cossman, "Family Feuds: Neo-Liberal and Neo-Conservative Visions of the Reprivatization Project" in Cossman & Fudge, *Challenge to Feminism supra* note 8, 169 [Cossman, "Family Feuds"].
[17] Cossman, "Difference", *supra* note 8 at 332.
[18] *Ibid*.

approach, which risks denying women agency and capacity to choose.[19] Relational theory does not imply that women are unable to "shape their own lives."[20] Instead, "[relatedness] is seen as a precondition of autonomy, with interdependence one of its constant components."[21] With this theoretical framework in place, the following part sets out the history and legislative background of the Canadian law of spousal support.

2. A Brief History

This part explains the legislative history behind the present state of spousal support law in Canada, which may, given the legislative framework outlined below, be described as an era of no-fault divorce. In today's social and family law context, the idea of gender equality is not controversial: two-income households are increasingly the norm, domestic responsibilities are often shared by both spouses, and divorce is a regular fact of social life. But this state of affairs is relatively recent. Prior to 1968, in most of the common law provinces, divorce was regulated by a patchwork of provincial legislation, while in Quebec and Newfoundland and Labrador, couples seeking a divorce had to ask for the passage of a private member's bill in Parliament.[22] Under the provincial legislation, only "innocent" wives were entitled to spousal support when their "guilty" husbands had committed the fault of adultery, cruelty, or desertion.[23] The theoretical

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[19] Leckey, "Contracting Claims", *supra* note 10 at 8, citing Elizabeth Frazer & Nicola Lacey, *The Politics of Community: A Feminist Critique of the Liberal-Communitarian Debate* (Toronto: Toronto University Press, 1993) at 151.
[20] Nedelsky, "Reconceiving Autonomy", *supra* note 8 at 8.
[21] Leckey, "Contracting Claims", *supra* note 10 at 9.
[22] See F J E Jordan, "The Federal Divorce Act (1968) and the Constitution" (1968) 14:2 McGill L J 209; Jean Pineau & Marie Pratte, *La famille* (Montreal: Thémis, 2006).
[23] Susan Engel, "Compensatory Support in Moge v Moge and the Individual Model of Responsibility: Are We Headed in the Right Direction?" (1993) 57:2 Sask L Rev 397 at 7.

justification for support was the "innate dependency of women."[24] Support was based on need and "premised on an understanding of marriage as a set of lifelong commitments from which one could be released only if one's partner had breached his or her marital obligations…."[25] As the equality movement grew and women joined the workforce at increasing rates, inertia on the part of the legal system was not an option; the law had to respond to social reality.

In 1968, Parliament adopted Canada's first *Divorce Act*.[26] The law set out the grounds for divorce and introduced the concept of formal gender equality by enabling both husbands and wives alike to ask for a divorce and seek spousal support.[27] The *Divorce Act*, *1968* included, in addition to traditional fault-based grounds such as adultery, the new, no-fault ground of "permanent marriage breakdown."[28] With the legislative entrenchment of gender equality, the earlier justifications for spousal support no longer applied to many marriages.

The *Divorce Act*, *1968*, although it provided for spousal support upon divorce, did little to explain why, in this new era of equality and the rejection of outdated thinking about marriage for life and presumed spousal dependence, spouses should still be entitled to support. Nor did it provide much in the way of guidance to trial judges regarding the objectives of spousal support or the considerations to be taken into account when dealing

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[24] *Ibid*.
[25] Carol Rogerson, "Spousal Support After *Moge*" (1996) 14 Can Fam L Q 281 at 287 [Rogerson, "After *Moge*"].
[26] *Divorce Act*, 1968 16 Eliz II, SC 1967-68, c 24. See also Jordan, *supra* note 22.
[27] See Engel, *supra* note 23.
[28] Library of Parliament, *Divorce Law in Canada*, (Ottawa: Parliamentary Information and Research Service, 2008) [*Divorce Law*].

with a claim for support.[29] Further, although it facilitated access to divorce, the *Divorce Act, 1968* was far from a panacea; a divorce could not be granted without a trial, during which a judge had to be satisfied of a number of conditions. The procedure was onerous and costly.[30]

Following the recommendations of the Law Reform Commission of Canada, which criticized the "absence of any principled basis for spousal support after divorce,"[31] Parliament adopted the *Divorce Act*, *1985* still in force today.[32] The *Divorce Act*, *1985* further removed the fault requirement by creating a single ground for divorce, called "marriage breakdown, which could be established by proving separation for at least one year, or one of three fault-based criteria: adultery, physical cruelty, or mental cruelty."[33] The current legislation also brought with it a number of procedural changes, aimed both at facilitating divorce proceedings and encouraging reconciliation.[34]

The most significant inclusions in the *Divorce Act*, 1985, for present purposes, are the "corollary relief" provisions and particularly section 15.2, which governs spousal support and sets out both the factors to be taken into account in granting support, and the varied objectives of a spousal support order. The factors to be considered in making an order for support are "the condition, 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

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[29] Engel, *supra* note 23 at 7.
[30] *Divorce Law*, *supra* note 28 at 3.
[31] Engel, *supra* note 23 at 7.
[32] *Supra* note 1.
[33] *Divorce Law*, *supra* note 28 at 3.
[34] *Ibid* at 9.

arrangement relating to support of either spouse."[35] The objectives of a spousal support order are to:

> (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown; (b) 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; (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.[36]

Taken together, these sub-sections have been the source of the most judicial disagreement and are largely responsible for the unsettled nature of the Canadian law of spousal support.

Although, as will be seen below, the *Divorce Act, 1985* does little to reveal the underlying rationales for the continuing support obligation, one feature of the legislation is readily discernable. While fault-based divorce is still available — where, for example, a spouse seeks a divorce on the ground of adultery — spousal support determinations are not to be based on allocations of fault or blame for the circumstances leading up to the breakdown of the marriage. It is in this sense that it is possible to speak of the "transformation" from fault to no-fault divorce.[37] Moreover, while the justifications for support under this new model may be difficult to uncover, the move away from morality-based determinations of support is readily apparent. Rather than the "exercise in morality [that] it once was," the distribution of finances upon a divorce should be treated as

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[35] *Divorce Act*, *supra* note 1, s 15.2(4).
[36] *Ibid*, s 15.2(6).
[37] See Nicholas Bala, "The History & Future of Marriage in Canada" (2005) 4:1 JL & Equality 20; Ira Mark Ellman, "The Maturing Law of Divorce Finances: Toward Rules and Guidelines" (1999) 33:3 Fam L Q 801.

"primarily a matter of socio-economics."[38] In other words, with the adoption of the current legislation, "[t]he 'axes of regulation' of divorce … shifted from morality (a fault-based system) to economics."[39] With this legislative and historical background in mind, the following parts turn to the evolution of the law that is the necessary basis for any meaningful understanding of the theoretical bases for the spousal support obligation.

3. From Dependency to Self-Sufficiency Under the *Divorce Act, 1968*

This part sets out the two competing models of spousal support as understood by the Supreme Court prior to the adoption of the *Divorce Act, 1985*, with its explicit factors and objectives of a spousal support order. It examines two major Supreme Court decisions, both rendered under the older legislation, although the second, *Pelech v. Pelech*,[40] might be considered a hybrid of sorts; the Supreme Court decision was rendered following the adoption of the *Divorce Act, 1985*, while the divorce proceedings in question were initiated under the former legislation. Thus the case was decided under the old legislation, but with the Court's knowledge of the new legislative approach to spousal support. Both decisions have had vital impacts on the law of spousal support.

3.1. *Messier v. Delage* and Spousal Dependence

The case of *Messier v. Delage*, decided by the Supreme Court in 1983, functioned as a preview of the divisiveness the law of spousal support would create among the judiciary.[41] The introduction of no-fault divorce in Canada created much uncertainty and confusion on the part of judges, lawyers, and litigants alike. In 1981, Justice Rosalie Abella, then a judge of the Ontario Provincial Court (Family Division), wrote: "the law in

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[38] Abella, *supra* note 3 at 1.
[39] John Dewar, "The Normal Chaos of Family Law" (1998) 61:4 Mod L Rev 467 at 473 [Dewar, "Chaos"].
[40] [1987] 1 SCR 801, 38 DLR (4th) 641 [*Pelech*].
[41] [1983] 2 SCR 401, 2 DLR (4th) 1 [*Messier*].

its present state is a Rubik's cube for which no one yet has written the Solution Book. The result is a patchwork of often conflicting theories and approaches."[42]

This was the backdrop against which *Messier*, a leading decision on spousal support under the 1968 legislation, made its way to the Court. Following an application to vary spousal support by Mr. Messier, the Court was divided as to whether a former wife with custody of the couple's dependent child should continue to receive spousal support, despite having become somewhat self-sufficient through retraining following the divorce. The case resulted in a 4-3 split, the majority of the Court finding in favour of Mrs. Delage and a continued support obligation on the part of her ex-husband. By pitting the two prevailing ways of thinking about marriage and divorce against each other, the decision in *Messier* provided a fitting example of Justice Abella's description of the fundamental problem with spousal support law under the *Divorce Act*, *1968*: "The problem really lies with an inability to agree on what the purpose of economic adjustments on divorce or separation should be. And, this, not surprisingly, derives from an inability to agree on what the purpose of marriage should be."[43]

Messier divided the Court into two opposing camps. The majority supported the traditional view of marriage and needs-based support, while the dissent favoured a formal equality approach, promoting the liberal values of independence, self-sufficiency, and individual responsibility.[44] In maintaining Mrs. Delage's support, the majority noted that she had been primarily responsible for the education of the couple's two children and had

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[42] Abella, *supra* note 3 at 1.
[43] *Ibid*.
[44] See Rosanna Langer, "Post Marital Support Discourse, Discretion, and Male Dominance" (1994) 12:1 Can J Fam L 67 (on the connection between liberal thought and the ethic of individualism and self-sufficiency).

never worked outside the home throughout twelve years of cohabitation. Despite earning a Master's degree since the divorce, Mrs. Delage had obtained only part-time employment in the year preceding Mr. Messier's application. The majority found that Mr. Messier was still able to pay support and refused to "[hypothesize] as to the unknown and […] unforeseeable future" of Mrs. Delage's employment prospects.[45] The majority seemed wary of wading deeply into broad questions of social policy, instead looking only at the facts of the specific case and endorsing the Court of Appeal's rejection of categorical rules.

In keeping with its commitment to decide only the case before it, the majority reasons are, in contrast to the dissent, thin on policy, but not completely devoid of guiding principles. Justice Chouinard could not ignore that the law no longer required support for life based simply on the fact of marriage. He stated that his reasons should not be understood to mean that the support obligation should necessarily continue indefinitely or that there is no obligation for a needy spouse to try and achieve a certain level of independence.[46] Despite the majority decision in *Messier*, the ethos of economic independence was evidently on the minds of all of the judges.

In contrast with the majority, the dissenting judges approached the case from a broader perspective, framing the issue in general terms with weighty policy implications. Referring to the "current economic situation, the difficulty in finding work and the resulting high rate of unemployment," Justice Lamer (as he then was) asked whether a divorced spouse should bear the consequences for these societal problems, "and provide for the needs of his unemployed former spouse," or whether it is "for the government, if

[45] *Messier*, *supra* note 41 at 417.
[46] *Ibid* at 416-17.

it cannot remedy, at least to alleviate the effects…."[47] Attempting to eliminate the uncertainty around the purpose of spousal support under the no-fault regime, Lamer J. went on to provide concrete answers to these complex social questions. In a powerful endorsement of the liberal values of individual responsibility and economic independence, he determined, as had the trial judge, that in choosing to file for divorce, Mrs. Delage must accept the consequences of that choice. Further, economic independence is not to be evaluated according to the market or a former spouse's success in entering the workforce. Rather, once an individual has reached independent status, as Mrs. Delage had, the burden no longer falls on the former spouse, but on the government: "The problem [of unemployment among former spouses] is a social one and it is therefore the responsibility of the government rather than the former husband."[48]

The dissent's understanding of spousal support is clear: support has a limited purpose and should be based on need alone and only to mitigate the immediate consequences of a divorce; it should not continue any longer than an individual's need exists. Need is to be assessed objectively, not based on personal circumstances or market barriers to employment. For the dissent, gone were the days when marriage alone entitled a woman to support for life, regardless of whether that woman was gainfully employed throughout the marriage or worked at home, caring for children and maintaining a household. The existence of the welfare state meant that the family was no longer a purely private place; responsibility for the unemployed and underemployed was a social one.

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[47] *Ibid*.
[48] *Ibid* at 419, 427.

Further, gender equality was understood to mean identical treatment by the courts: "Women cannot on the one hand claim equal status without at the same time accepting responsibility for their own upkeep."[49] Although Lamer J. was writing for the dissent in *Messier*, his reasons constituted a vigorous endorsement of the formal equality approach — that is, the similar treatment of similarly situated people, in the case of spousal support, husbands and wives.[50] To the serious detriment of large numbers of divorced women, that approach would dominate spousal support law for the next decade.

Messier set the stage for what has become widely known as the *Pelech* Trilogy,[51] and the endorsement by a unanimous Supreme Court of the policy-driven arguments and the individual responsibility model espoused by the *Messier* dissent. As in that case, *Pelech*, and its companion cases, *Richardson v. Richardson* and *Caron v. Caron*, also dealt with applications for variations of spousal support orders, but unlike *Messier*, the claimants sought variations from agreements, not court orders.[52] If the majority judges in *Messier* could be described as shying away from policy questions and refusing to make wholesale endorsements of a single understanding of modern spousal support, the Court, in *Pelech* and the companion cases, might be described as diving headfirst into the debate, and completely unhesitant to settle the questions left undecided by the split Court in *Messier*.

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[49] *Ibid* at 421.
[50] See Mary Becker, "Prince Charming: Abstract Equality" (1987) Sup Ct Rev 201 (defining formal equality with respect to discrimination based on gender).
[51] *Pelech*, *supra* note 40; *Richardson v Richardson*, [1987] 1 SCR 857, 38 DLR (4th) 699 [*Richardson*]; *Caron v Caron*, [1987] 1 SCR 892, 38 DLR (4th) 735 [*Caron*].
[52] Note that *Richardson* was not a unanimous decision, with La Forest J. dissenting based on his belief that the test established in *Pelech* should not apply to initial orders, where the agreement in question has not received judicial approval.

3.2. The *Pelech* Trilogy and the Rise of Self-Sufficiency

In *Pelech*, the reasoning of the *Messier* dissent became the majority; to the eventual detriment of many divorcing women, the individual responsibility model took hold.[53] The case dealt with an application to vary a validly concluded maintenance agreement, ordering a lump sum payment and incorporated into a divorce order almost twenty years earlier. Following the divorce, Mrs. Pelech's physical and mental health deteriorated so that she was increasingly unable to work and forced to draw on her maintenance fund in order to live. When the fund was depleted, she collected welfare. The trial judge found that at age 53 she would be unlikely to find gainful employment in the future. At the same time, Mr. Pelech became increasingly wealthy, his net worth increasing more than tenfold. Mrs. Pelech made an application to vary the support agreement pursuant to the *Divorce Act*, *1968*.

Justice Wilson, writing for the majority in all three cases (Justice La Forest concurring on the policy questions), saw an opportunity to put to rest the question of the purpose of spousal support in the no-fault divorce regime and its "shift away from moral blameworthiness."[54] As seen, the *Divorce Act, 1968* did not enumerate the objectives of spousal support. It did, however, instruct courts to make orders that are "fit and just" in light of the conduct of the parties, their conditions, their means, and their other circumstances.[55] The difficulty for Wilson J. was in determining what is "fit and just" in the absence of moral or fault-based considerations. Drawing on a report by the Law

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[53] *Richardson* and *Caron* also dealt with applications to vary agreements and both yielded similar results as *Pelech*, which was expressly followed in both companion cases. For reasons of expediency, I will therefore only refer expressly to the facts and statements of principle in *Pelech*.
[54] *Pelech*, *supra* note 40 at 829.
[55] *Ibid* at 827.

Reform Commission of Canada, the answer had to lie in purely economic considerations. Support, then, is aimed at "minimiz[ing] as far as possible the economic consequences of the relationship's breakdown."[56] Spousal support orders are to be determined not by apportioning blame, as in the past, but by assessing "what is reasonable based on the needs and means of the parties."[57] Thus, *Pelech* and its companion cases entrenched the concept of meeting economic need and the pursuit of economic independence as the rationale underlying a spousal support order.

In keeping with the majority in *Messier*, the *Pelech* Court did not envision spousal support as an indefinite obligation. It is useful here to recall that the *Pelech* appeal was based on an application for variation; the Court was thus required to determine what kind of change would be substantial enough to justify overriding the parties' valid agreement in order to vary a support order already performed in full. Accordingly, the question of whether the Court should intervene and order Mr. Pelech to continue paying required consideration of the fact that Mrs. Pelech had become a public charge when she began to receive welfare payments. Consistent with the liberal principle of individual responsibility underlying the *Messier* dissent, Wilson J. rejected what has become known as the "public purse" argument for support: the idea that spousal support, by privatizing responsibility for needy spouses among family members, promotes the conservation of public funds. Spousal support, according to that rationale, benefits not only needy wives, but also third parties, who may indirectly become responsible for supporting "indigent ex-spouses."[58] In dismissing that reasoning, Wilson J. settled the question: unemployed

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[56] *Ibid* at 829.
[57] *Ibid* at 830.
[58] *Ibid* at 842.

former wives, where they had reached independence, were no different than other unemployed individuals. Support was to be understood as a public responsibility.

The *Pelech* Court acknowledged that spousal support might be understood as compensating for "systemic gender-based inequality."[59] But while Wilson J. declared her sympathy for the inequality affecting divorced women, the competing values of finality, and "the right and the responsibility of individuals to make their own decisions," ultimately prevailed: "People should be encouraged to take responsibility for their own lives and their own decisions. This should be the overriding policy consideration."[60] Thus the Court cemented the principles of finality, self-sufficiency, and individual responsibility as the underlying values and principal policy objectives of modern spousal support. In doing so, however, it ignored the fact that "treating women and men as though they are equal when, in fact, they are not [would worsen] the post-divorce economic position of women and children…."[61] This critique will be elaborated below.

With these values in place, the Court had to determine what kind of change would be sufficient enough to justify judicial intervention in a valid support agreement. As a result, the "causal connection" test was created, according to which, in order for changed circumstances to become the responsibility of a former spouse, it was essential that the change be related to the marriage. Thus, where the changed circumstances that ground an application for maintenance or an increase in maintenance are not causally connected to the marriage, the parties' decision to end the relationship should be respected by the

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[59] *Ibid* at 849.
[60] *Ibid* at 850.
[61] Becker, *supra* note 50 at 216.

courts.[62] Only where a spousal support claimant "establishes that he or she has suffered a radical change in circumstances flowing from an economic pattern of dependency engendered by the marriage" should courts vary agreements.[63] Otherwise, the obligation to support former spouses should be "the communal responsibility of the state."[64] Trial judges were instructed to examine the economic patterns created by the marriage; only when economic vulnerability could be directly tied to the marriage should they order continued support. External forces such as the job market and the general economy were of no consequence to awards and it was not the responsibility of former spouses to step in when foreseeable circumstances such as these left individuals in vulnerable financial situations.

Justice Wilson's words, insofar as they relate to evaluating changed circumstances for the purposes of deciding an application for variation, were straightforward enough. The difficulty that would arise following the Supreme Court's release of the *Pelech* Trilogy lay in the ambiguity as to whether the principles enshrined therein applied only to applications to vary agreements or to initial claims for spousal support and variations of court-ordered awards. But decisions on spousal support and family law in general do not take up much room on the Supreme Court's docket; lacking further instruction, lower courts were left to choose whether to apply the causal connection test to every claim for spousal support or merely to applications to vary support following an agreement, in keeping with the facts in *Pelech*. Many judges chose

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[62] *Pelech*, *supra* note 40 at 851.
[63] *Ibid* at 851.
[64] *Ibid* at 852.

the former, with the predictable results that spousal support orders became increasingly limited in both number and substance.

The Court's decision to place the values of finality and self-sufficiency over the goal of correcting the systemic inequality occasioned by modern divorce was followed by forceful criticism, both academic and judicial. In *Story v. Story*, the British Columbia Court of Appeal limited the causal connection test to applications for variation of a final order or agreement. In doing so, Chief Justice McEachern questioned the wisdom of the narrow causal connection test established by the Supreme Court, writing that "it will usually be impossible to say that a marriage, particularly a long one, is in no way causally relevant to the nature and extent of a disability which manifests itself after marriage…"[65] The concurring judges in *Story* also firmly rejected the Supreme Court's inflexible endorsement of the value of spousal independence at the heart of the individual responsibility model and the misfortune it would ultimately engender. Justice Proudfoot wrote that it would be "totally unrealistic to expect that a 45 or 50 year old spouse who has not been in the job market for many, many years to be retrained and to compete for employment in a job market where younger women have difficulty becoming employed." [66] For many women leaving long marriages, "employment and self-sufficiency are simply not achievable."[67]

The Saskatchewan Court of Appeal likewise repudiated the serious injustice that could flow from a strict application of the *Pelech* principles. Justice Sherstobitoff, rejecting the application of the causal connection test on an initial application for spousal

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[65] See *Story v Story*, [1989] BCJ No 2238, 65 DLR 4th 549 at 8.
[66] *Ibid* at 17.
[67] *Ibid*.

support, wrote, "blind application of the *Pelech* principle to all initial applications for maintenance … would lead … to results of unacceptable harshness and injustice."[68] For a sick or disabled spouse, for example, whose illness was unrelated to the marriage, the lack of a causal connection would mean that the "ill spouse could literally be put out on the street penniless and left to fend for himself or herself without any prospect of economic assistance to make the adjustment to a new life in the most distressing and difficult circumstances."[69]

Such forceful judicial critiques of *Pelech* were, however, the exception, and not the norm. The "doctrine of spousal independence" set out by the Supreme Court — commonly known as the "clean break" approach [70] — was increasingly, and indiscriminately, applied, placing a heavy onus on dependent spouses and ignoring the real barriers to economic independence for women whose primary role during the marriage was domestic.[71] Based on the idea of promoting self-sufficiency following the breakdown of a marriage, the overarching objective of the clean break model is to sever the ties between spouses as quickly as possible and to "encourage the economic disengagement of the parties and their assumption of responsibility for their own maintenance."[72] Support, under this model, becomes transitional and rehabilitative, and lasts only as long as it takes for a claimant spouse to gain some responsibility for her own support.

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[68] *Doncaster v Doncaster*, [1989] 5 WWR 723, 21 RFL (3d) 357, cited in *ibid*.
[69] *Ibid*.
[70] Carol J Rogerson, "The Causal Connection Test in Spousal Support Law" (1989) 8:1 Can J Fam L 95 [Rogerson, "Causal Connection"].
[71] Justice Patricia Proudfoot & Karen Jewell, "Restricting Application of the Causal Connection Test: Story v. Story" (1990) 9:1 Can J Fam L 143.
[72] Rogerson, "Causal Connection", *supra* note 70 at 115.

Scholars of family law often took a different view. For many, the harmful effects alluded to above outweighed the benefits of promoting spousal independence. Carol Rogerson has documented the enormous economic losses that result from the typical marriage, which is necessarily characterized by economic interdependency; that is simply "how families function."[73] Distinguishing between which losses are directly attributable to the marriage and which are not is a pointless, if not impossible, exercise. Even where a marriage itself has not directly caused a wife's lower earning potential, the marriage and the breakdown of the marriage combined, will create economic dislocation.[74] The causal connection test and its theoretical ally, the clean break approach to support, are thus based on a false perception of marriage, within which, independent spouses make their own economic choices and are individually responsible for their resulting economic positions. As seen, it is premised in an unrealistic view of all people as traditionally autonomous, self-reliant individuals.[75]

The philosophy underpinning *Pelech* is accordingly blind to the very real ways that marriage affects the economic circumstances of both spouses, typically to the detriment of women, for it ignores that a woman might have ended up in a much stronger economic position were it not for the marriage.[76] As Rogerson explains, the clean break theory "is all too ready to find systemic causes or intervening causes [such as the bad economy in *Messier*] to explain the claimant's position and absolve the other spouse of financial responsibility."[77] Although conceived of as promoting gender equality and

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[73] *Ibid* at 120, 121.
[74] *Ibid* at 120.
[75] See Nedelsky, "Reconceiving Autonomy", *supra* note 8; Herring, *Relational Autonomy*, *supra* note 6.
[76] Rogerson, "Causal Connection", *supra* note 70 at 122.
[77] *Ibid*.

independence, by ignoring the real economic consequences of marriage, the clean break theory did more to harm than to help divorcing women. Rather than encourage women to take responsibility for their economic decisions — the recurring theme of both the *Messier* dissent and the *Pelech* Trilogy — the doctrine forced many women to simply accept responsibility for their condition, even where the result of that acceptance was a life of poverty.[78]

Despite its unpopularity, *Pelech* should not, however, be reduced to a simple "defeat for women."[79] Rather, the decision might be understood as setting the groundwork for subsequent debates about the fundamental principles of spousal support. Further, despite the criticism it garnered, *Pelech* nevertheless stands for a number of important propositions. As will be seen below, the clean break principle espoused by Wilson J., while of diminished importance following *Moge v. Moge* and the Supreme Court's adoption of a compensatory model of spousal support,[80] still has its place in the Court's vision of support. In *Bracklow v. Bracklow*,[81] Justice McLachlin (as she then was) breathed new life into the clean break model, albeit in a weaker sense than that espoused in *Pelech*. By later reformulating the compensatory model of spousal support as motivated by the ultimate objective of an eventual clean break between the spouses, the Court ensured that Wilson J.'s model would remain an enduring feature of the Canadian law of spousal support.

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[78] Martha Bailey, "Pelech, Caron, and Richardson" (1989) 3:2 CJWL 615 at 625.
[79] Robert Leckey, "What is Left of *Pelech*" (2008) 41 SCLR 103 (describing a commonly expressed view of the decision at 108) [Leckey, "*Pelech*"].
[80] [1992] 3 SCR 813, 99 DLR (4th) 456 [*Moge*].
[81] *Bracklow v Bracklow*, [1999] 1 SCR 420, 169 DLR (4th) 577 [*Bracklow*].

It is also questionable whether *Pelech* is correctly described as completely "bad, atomistic, and inattentive to structural gender disadvantage."[82] Despite the outcome, Wilson J. expressly acknowledged that gender inequality might be taken into account when adjudicating spousal support claims, a first for the Supreme Court. Further, *Pelech* met the task of removing spousal support claims from the moral realm and approaching them as economic determinations. Moreover, by emphasizing the private and final nature of spousal support agreements, *Pelech* might be read as paying tribute to the ideal of a progressive social security system. This public charge is precisely the type of solution to women's inequality championed by a number of feminist scholars, who reject the privatization of familial responsibilities as a response to women's economic vulnerability.[83] Further, at least one feminist scholar has suggested that the "ethic of responsibility" set out in *Pelech* works toward addressing women's perpetual dependence on husbands following a divorce.[84] That comment is applicable both under the earlier legislative framework, as well as under the purely compensatory model adopted by the Court in *Moge*, its next meaningful pronouncement on spousal support.

4. The *Divorce Act, 1985*, *Moge*, and the Limits of Compensatory Spousal Support

This part begins to set out the foundations of the jurisprudential framework for the law of spousal support as it is currently understood. At best, the *Pelech* Trilogy prompted serious disagreement. At worst, it endorsed a pattern of vulnerability and poverty among divorced women, unable re-enter the job market in meaningful ways and denied spousal

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[82] Leckey, "*Pelech*", *supra* note 79 at 108.
[83] See e.g. Fineman, "Feminist Legal Theory", *supra* note 16; Fineman, "Gender and Law", *supra* note 16; Boyd, *supra* note 16; Cossman, "Family Feuds" *supra* note 16.
[84] Beverley Baines, "But Was She a Feminist Judge?" in Kim Brooks, ed, *Justice Bertha Wilson: One Woman's Difference* (Vancouver: UBC Press, 2009) 345.

support in the interests of their formal equality and personal responsibility. This push toward individual responsibility and the associated values of certainty and finality dominated the family law landscape for nearly a decade, beginning with Lamer's J.'s vocal dissent in *Messier,* culminating in the *Pelech* Trilogy, and continuing until the Supreme Court delivered a change of course for spousal support law in 1992.

In *Moge*, the Court rejected the formal equality approach, which treats both spouses as economic equals regardless of social or contextual factors that may inhibit a wife's earning potential.[85] The Court acknowledged, for the first time in the context of family law, that gender inequality more often stems from "the social creation of differences, and the transformation of differences into social advantages and disadvantages,"[86] than from individual choices. Justice L'Heureux-Dubé, for the Court, delivered a strong rebuke of the harmful effects of *Pelech*, confined the clean break approach to a limited category of marriages, and limited the causal connection test to variations of existing agreements. *Pelech*, then, was to be understood as promoting freedom of contract; it did not, however, espouse a new model of spousal support.[87] Seen as a "bitter critique of the jurisprudential trend based on the presumed economic independence model,"[88] the effect of *Moge* was to transform the Canadian law of spousal support and usher in a new way of understanding its goals and rationale.

Moge dealt with uncomplicated facts. The parties divorced after a marriage lasting more than 20 years, during most of which, Mrs. Moge, cared for the home and the

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[85] *Supra* note 80.
[86] Becker, *supra* note 50 at 208, citing Catherine A Mackinnon, *Sexual Harassment of Working Women: A Case of Sex Discrimination* (New Haven: Yale University Pres, 1979) at 105.
[87] *Moge*, *supra* note 80 at 836.
[88] Dominique Goubau, "Une Nouvelle Ère pour la Pension Alimentaire Entre Ex-Conjoints au Canada" (1993) 72:3 Can Bar Rev 279 at 286 [translated by author].

couple's three children. Following the divorce, Mrs. Moge, who had a grade seven education, worked as an office cleaner while retaining custody of their children. When she was laid off, her spousal support was increased. When Mrs. Moge secured further part-time and intermittent cleaning work, Mr. Moge applied to terminate support. Mr. Moge was successful at trial, the trial judge relying on the self-sufficiency model of support espoused in *Pelech*.[89] At the Supreme Court, the question was whether Mrs. Moge was entitled to indefinite support.

The timing of the *Moge* appeal was significant. Since the trial in *Pelech*, Parliament had adopted the new *Divorce Act, 1985*, described above. Further, save for Justice La Forest, who sat on both *Pelech* and *Moge*, the composition of the bench had changed in its entirety. Instead of a single female judge on the *Pelech* bench, *Moge* was heard by two women, and written by Justice L'Heureux-Dubé, whose dedication to gender equality was infused by her demonstrated commitment to substantive equality principles and the rejection of myths and stereotypes from rights analyses.[90] In terms of family law, this approach meant taking full account of the social context in which issues arise.[91] Thus, the case went before a fresh panel of judges, eager for the opportunity to interpret the new legislation and, seemingly, to remedy the defective state of spousal support law.

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[89] *Moge v Moge*, (1989), 60 Man R (2d) 281.
[90] Mimi Liu, "A 'Prophet With Honour': An Examination of the Gender Equality Jurisprudence of Madam Justice Claire L'Heureux-Dubé of the Supreme Court of Canada" (2000) 25:2 Queen's LJ 417.
[91] See Claire L'Heureux-Dubé, "Making Equality Work in Family Law" (1997) 14:2 Can J Fam L 103 at 106. Also see *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497, 170 DLR (4th) 1; *Quebec (Attorney General) v A*, 2013 SCC 5, [2013] 1 SCR 61 for the continuity of the established principles of the substantive approach to equality adjudication at the Supreme Court.

Writing for a unanimous Court (McLachlin and Gonthier JJ. concurring on this question and the result), L'Heureux-Dubé J. understood the case as turning on the basic philosophy of spousal support within the *Divorce Act, 1985* as a whole.[92] Attempting to uncover that philosophy, L'Heureux-Dubé J. made three distinct observations about spousal support. First, eschewing stereotypes, L'Heureux-Dubé J. rejected the typical "traditional" and "modern" marriage dichotomy on which the self-sufficiency model is predicated and which creates difficulties for courts when marriages cannot easily be classified as one or the other. Labeling all marriages where both spouses work as modern ignores the indirect costs of domestic life and childrearing. To base support determinations on this perceived dichotomy is to ground support orders on a "mythological stereotype."[93]

Second, L'Heureux-Dubé J. recalled that the spousal support provisions are directed at dealing only with the economic consequences of a marriage or its breakdown. While marriage may serve a number of non-quantifiable personal interests, spousal support is unrelated to these intangible benefits. Instead, its purpose "is to relieve economic hardship that results from 'marriage or its breakdown.'" [94] Accordingly, the inquiry must focus on "the effect of the marriage in either impairing or improving each party's economic prospects."[95] Thus, the Court cemented the idea that when dealing with matters of spousal support, marriage is to be understood as "an economic unit which generates financial benefits … [in which] the partners should and are entitled to

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[92] *Moge*, *supra* note 80 at 824.
[93] *Ibid* at 842, 845-848.
[94] *Ibid* at 848.
[95] *Ibid* at 848-849.

share…."[96] *Moge*, then, interpreted the *Divorce Act*, *1985* as mandating the equitable distribution of the financial benefits of the marriage — benefits which, in many cases, will consist of the spouses' respective incomes.[97]

Third, acknowledging that the legislation entrenches a gender-neutral approach, L'Heureux-Dubé J. nevertheless maintained her commitment to rejecting the formal equality approach, and grounded her reasoning in the reality of women as the economically disadvantaged partners in the great majority of marriages.[98]

At the heart of the matter in *Moge* were the objectives of the spousal support provisions in the *Divorce Act, 1985*. The provisions were understood to represent a significant change in the law and an express move away from the "needs and means" model of spousal support which dominated prior to the introduction of the theory of clean break. The *Divorce Act, 1985* did not eliminate "needs and means" entirely from consideration, but instead, encompassed a "set of factors and objectives which requires courts to accommodate a much wider spectrum of considerations."[99] The reasoning was thus, in essence, a contextual exercise in statutory interpretation. By infusing that exercise with policy ideals, the Court did away with the idea that the goals of self-sufficiency and individual responsibility encompassed by the clean break model should prevail. This rejection of the *Pelech* reasoning was based on the text of the provision; in its enumeration of the objectives of support, each of which must be taken into account,[100] "self-sufficiency is tempered by the caveat that it is to be made a goal only 'in so far as

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[96] *Ibid* at 849.
[97] *Ibid*.
[98] *Ibid* at 849-850.
[99] *Ibid* at 850.
[100] *Ibid* at 851, citing Julien D Payne, *Payne on Divorce*, 2d ed (Toronto: Buttersworth, 1998) at 101.

practicable'. This qualification militates against the kind of 'sink or swim' stance upon which the deemed self-sufficiency model is premised."[101] For the Court, then, Parliament could not have intended that the self-sufficiency model dominate.

The rejection of self-sufficiency was further grounded in the social context surrounding the majority of spousal support applications. Essential to the *Moge* analysis and outcome was the "entrenched social phenomenon" of the "feminization of poverty" in Canada.[102] Although L'Heureux-Dubé J. did not attribute that phenomenon entirely to the financial difficulties affecting divorced women, she wrote that "there is no doubt that divorce and its economic effects are playing a role."[103] Indeed, the record supported the direct links between poverty among women and the financial consequences of divorce. Thus, L'Heureux-Dubé J. concluded that it would be "perverse in the extreme" to understand the legislative intention behind the spousal support provisions of the *Divorce Act, 1985* to "financially penalize women in this country."[104] Further, while cautioning against the oversimplification of the consequences of the "deemed self-sufficiency model" as the "sole cause of the female decline into poverty," L'Heureux-Dubé J. relied on case law and the social science evidence tendered to conclude that by "[disenfranchising] many women in the court room and countless others who may simply have decided not to request support in anticipation of their remote chances of success, [the clean break model] at a minimum, is contributing to the problem."[105] As a result, and

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[101] *Moge*, *supra* note 80 at 853.
[102] *Ibid*.
[103] *Ibid* at 854.
[104] *Ibid* at 857.
[105] *Ibid*.

taking into account the varied objectives of support set out in the relevant provisions, the Court rejected the self-sufficiency model as the underlying rationale for spousal support.

With the self-sufficiency model effectively removed from the analysis, the Court had to determine how to properly replace the ethos of economic independence and the clean break approach to support. Drawing on the relevant literature from Canada and abroad, L'Heureux-Dubé J. observed a move toward spousal support schemes based on compensatory principles.[106] She also found legislative support for a compensatory model in the relevant provisions of the *Divorce Act, 1985*.[107] Moreover, the social and contextual rationale for adopting a compensatory approach was based on the traditional division of labour within most marriages, wherein many women make non-monetary contributions to the partnership in the form of domestic work and, as a result, suffer economic disadvantages and hardships upon marriage breakdown. Further, despite the increase of women in the labour force, paid employment continues to be secondary to the role of women and the sacrifices inherent in "domestic considerations."[108] Women's contributions to the family — often in the form of "[foregoing] educational and career advancement opportunities" — impair wives from maximizing their earning potential, while "[enhancing] the earning potential of the other spouse … who, because his wife is tending to such matters, is free to pursue economic goals."[109] It follows that upon marriage dissolution, a woman's non-monetary contributions to the household result in "significant market disabilities" and a "diminished earning capacity," while her husband,

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[106] *Ibid* at 858.
[107] *Ibid* at 860.
[108] *Ibid* at 861.
[109] *Ibid*.

who was able to remain in the workforce due to the domestic division of labour, is left with an "embellished" earning potential.[110]

The same data grounded the Court's espousal of the doctrine of equitable sharing as the basis for the new law on spousal support. Such a rationale, which, in the Court's view, is promoted by the legislation, "seeks to recognize and account for both the economic disadvantages incurred by the spouse who makes such sacrifices and the economic advantages conferred upon the other spouse."[111] Significantly, the doctrine of equitable sharing, expressed through compensatory support principles, "recognizes that work within the home has undeniable value and transforms the notion of equality from the rhetorical status to which it was relegated under a deemed self-sufficiency model, to a substantive imperative."[112] This qualitative view of the economics of marriage means that the spouses become equal economic and social partners, regardless of function.[113]

Moge also settled a further disagreement stemming from the *Pelech* Trilogy. Justice L'Heureux-Dubé read the compensatory character of the *Divorce Act, 1985* provisions as a rejection of Wilson J.'s reasoning insofar as it placed the burden of caring for needy spouses on the state and not the family. For the *Moge* Court, the objective of relieving economic hardship arising from the marriage or its breakdown was to be read as embracing the "notion that the primary burden of spousal support should fall on family members not the state."[114] But L'Heureux-Dubé J. did not stop at the privatization of compensation, writing that in her view, "an equitable sharing of the economic

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[110] *Ibid* at 862.
[111] *Ibid* at 864.
[112] *Ibid*.
[113] *Ibid*, citing Abella, *supra* note 3 at 3.
[114] *Moge*, *supra* note 80 at 865. Referring to *Divorce Act*, *supra* note 1, s 15.2(4)(6).

consequences of divorce does not exclude other considerations, particularly when dealing with sick or disabled spouses."[115] In effect, these aspects of *Moge*, which expanded entitlement to support to the vast majority of marriages and privatized responsibility for needy spouses, regardless of whether that need could be directly connected to their roles during the marriage, represented a complete about-face in judicial thinking about spousal support and the marital relationship more generally.

It should be clear that *Moge* brought both significant and necessary change to the substantive law of spousal support by changing the prevailing understanding of its purpose. Support was no longer to be understood as merely temporary or transitional, aimed at the speedy pursuit of economic independence. Instead, it was now to be further understood as a means of equalizing the economic consequences of marriage by compensating women for their non-financial contributions to the marriage. The Court recognized the indirect costs of child rearing that are not normally offset by child support, such as the usual requirement that mothers cut back on their paid employment, inevitably jeopardizing their ability to ensure their own economic security.[116] For the Court, given the realities of workplace participation for custodial parents,[117] it was illusory to claim that economic independence could be quickly achieved, regardless of personal factors and market forces. Spousal support, then, must account for the actual situation in which mothers find themselves following the breakdown of a marriage and must compensate for their non-monetary contributions both during and after the union.

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[115] *Moge*, *supra* note 80 at 865.
[116] *Ibid* at 867.
[117] See *Ibid* at 868-869.

The new model of compensatory support was not, however, exclusive to custodial mothers. While entitlement to support would be less common in marriages without children, the compensatory model nevertheless compensates for the economic consequences flowing from the shared decisions of the spouses. For example, in two-income households, where one spouse sacrificed professional opportunities — for example, by leaving a position so that the other spouse could relocate to take advantage of an opportunity for advancement — the spouse who sacrificed in the interests of the family should be compensated for those losses, both past and future.[118] Thus, despite the relative flexibility with which spouses could exit a marriage and the rising rates of divorce, marriage, under the *Divorce Act*, was clearly seen as a partnership, both social and economic, the fruits and losses of which were to be shared equally between the equal spouses.

In setting out the compensatory model, L'Heureux-Dubé J. relied on a long list of authorities. Among them was American family law scholar Ira Ellman, whose theory of compensatory spousal support draws heavily on law and economics.[119] At its core, Ellman's theory understands alimony as compensation for a claimant's identifiable economic losses resulting from the spouses' economically rational conduct during the marriage.[120] Purely economic in nature, spousal support "[reallocates] the postdivorce financial consequences of marriage."[121] Accordingly, "'marital [investments]' for claimworthy conduct [give] rise to a compensable loss in earning capacity."[122]

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[118] See *ibid* at 869.
[119] See Ira Mark Ellman, "The Theory of Alimony" (1989) 77:1 Cal L Rev 1.
[120] See *ibid* at 49.
[121] *Ibid* at 51.
[122] *Ibid*.

"Claimworthy conduct" is conduct such as child rearing, which benefits a woman's family and spouse, but hinders her personal earning capacity upon divorce. Thus viewed, spousal support becomes easier to justify: "When one conceives of alimony as compensation for a particular kind of loss, rather than as a general claim to relieve need, it is much more possible to explain why liability should fall on the former spouse."[123]

By removing moral considerations, the idea of compensation helps to rationalize the obligation of spousal support. But as an exclusively economic concept, Ellman's theory provides an insufficient justification for ongoing post-marital obligations. Premised as it is on compensable losses, the theory implies that former spouses — husbands, for the most part — are only liable for identifiable and quantifiable losses to a woman's earning capacity. Indeed, in setting out his theory, Ellman devotes substantial space to precisely identifying those compensable losses. In doing so, he ignores the non-economic and intangible investments many women make in marriage, as well as the economic sacrifices of non-professional women. While the theory holds promise for women with advanced economic prospects at the beginning of the marriage, its "hard-edged analysis" has little appeal, from a feminist perspective, with regard to homemakers who did not sacrifice high salaries, but nevertheless invested heavily in their families to the economic advantage of their partners.[124] Under the purely economic theory, then, many women would have no significant claim to support.

Insofar as it places compensatory principles at its centre, thus rationalizing the spousal support obligation, purely compensatory theory might help improve the fate of divorcing women. But as an obligation grounded in restitution, it has been criticized "as a

[123] *Ibid* at 49.
[124] Rollie Thompson, "Ideas of Spousal Support Entitlement" (2014) 34 Can Fam LQ 1.

way of encouraging married women to continue to bear the primary responsibility for childrearing and for compromise when two careers clash."[125] Under Ellman's model, the decision for the woman to have primary responsibility for domestic and care work constitutes rational conduct because women are likely to earn less than their husbands outside of the home.[126] Those lower earnings, however, are a result of women's historic role as primary caregiver.[127] June Carbone writes: "Women are most likely to be the lower earning spouse in a marriage *because* they historically have been primarily responsible for childcare."[128] Ellman's theory thus has the effect of upholding the unequal and gendered division of labour and of reinforcing gendered stereotypes, both in the home and the workplace: "A rational divorce policy necessarily entails a choice about whether to perpetuate or dismantle the existing gender-based division of marital responsibilities."[129] By ignoring the "disadvantage that women experience on account of a sexual division of labour,"[130] the economic theory does the former, as a woman's poverty, where it cannot be directly traced to the marriage, will be seen as the "[product] of poor individual choices," thus reinforcing the ethic of individualization at play in *Pelech*,[131] and perpetuating the gendered status quo.

As mentioned, Ellman's theory also disproportionately favours educated, professional women, who can prove that as primary caregivers, they have suffered

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[125] June Carbone, "Economics, Feminism, and the Reinvention of Alimony: A Reply to Ira Ellman" (1990) 43:5 Van L Rev 1463 at 1468.
[126] *Ibid* at 1490. See also Fudge & Cossman, "Introduction", *supra* note 8 at 26.
[127] Carbone, *supra* note 125 at 1490.
[128] *Ibid* at 1490.
[129] *Ibid*. See also Jana B Singer, "Alimony and Efficiency: The Gendered Costs and Benefits of the Economic Justification for Alimony" (1994) 82:7 Geo LJ 2423 at 2437ff.
[130] Fudge & Cossman, "Introduction", *supra* note 8 at 32.
[131] *Ibid* at 21.

quantifiable losses. But for those unable to point to the average earnings of lawyers or accountants, proving loss of income will be costly and difficult, if not impossible.[132] The effect of the purely economic theory is thus to abandon lower income women to the public welfare system — precisely the outcome *Moge* sought to prevent. Moreover, the purely economic approach, in compensating only particularized quantifiable losses, undervalues domestic work.[133] Indeed conceiving of value, as Ellman does, "in terms of lost market opportunities risks perpetuating [labour] market discrimination against women and reinforcing the market's devaluation of work traditionally associated with women."[134]

Perhaps more fundamentally even, a purely economic approach to marriage and divorce ignores the idea that marriage, while in substantial part an economic partnership, might be understood in terms other than measurable dollars and cents. In doing so, it overlooks different categories of marriages and thus "fails to award alimony in a number of cases that seem just as meritorious."[135] While Justice L'Heureux-Dubé, in *Moge*, takes a broader view of compensation, recognizing the economic value of unpaid work in the home, the decision's lasting impact has been the creation of a compensatory basis for spousal support, with the limits that that economic approach entails. As the Supreme Court made clear in *Bracklow*, however, its next major pronouncement on spousal support, the law must recognize that individuals, in marriage, might give up more than quantifiable earning capacity, and that the mutual obligation between spouses might

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[132] See Carbone, *supra* note 125 at 1497.
[133] See *ibid* at 1500.
[134] Singer, *supra* note 129 at 2447.
[135] Schneider, *supra* note 4 at 203.

accordingly do more than compensate for demonstrated financial losses. The following part turns to that question.

5. *Bracklow*'s Basic Social Obligation, Conceptual Confusion, and the Return to Needs and Means

This part suggests that since *Moge*, the Supreme Court's approach to spousal support has involved a retreat of sorts, insofar as subsequent decisions appear to have diminished the importance of the compensatory model espoused therein. In *Bracklow*, a unanimous Court introduced a new model of spousal support, the "basic social obligation" model, premised on the concept of marriage as a solemn commitment, and making spousal support available to spouses who cannot ground a claim in compensatory principles. This was a welcome development, given the difficulties associated with the compensatory model when spouses demonstrate need based on health problems or a general loss of autonomy. As will become clear, however, re-opening the door to needs-based support in *Bracklow* has, in some cases, meant that compensatory principles, because of the complex analysis they often require, have been relegated to second place in the determination of support.[136] Relegating the goal of compensation to second is problematic, given that compensatory support may result in higher awards for women with a valid claim and that compensatory principles have the potential do more justice for those women than support awarded only on the basis of need.

In *Bracklow*, decided seven years after *Moge*, the question was whether a husband has an ongoing obligation to his wife after their divorce, when her financial circumstances are not directly attributable to the spouses' roles during the marriage —

[136] See Carol Rogerson, "Spousal Support Post-Bracklow: The Pendulum Swings Again?" (2001) 19 Can Fam LQ 185 at 203 [Rogerson, "Post-Bracklow"].

that is, in the absence of a compensatory claim. During the better part of their marriage, Mr. and Mrs. Bracklow contributed equally to the household and neither spouse sacrificed earning opportunities for the sake of the family. Moreover, at the start of the marriage, Mrs. Bracklow paid a greater share of the household expenses because her children of a previous marriage lived with the couple and, according to the trial judge, "as a means of expressing her independence and responsibility."[137] Eventually, she stopped working due to health problems, while Mr. Bracklow continued to support the household. When their case went to trial, Mrs. Bracklow was living in subsidized housing and receiving government disability benefits. At trial, Justice Boyle accepted medical evidence that she was unlikely to work again.

Relying on the compensatory principles established in *Moge*, the trial judge's decision gives life to the critique expressed above, that a purely economic approach to spousal support risks abandoning financially vulnerable women to poverty. Indeed, the trial judge was expressly aware of this possibility: "As sad as that is to contemplate for someone whose life should have been fulfilled on her own initiative, it is not consequent upon the marriage or its breakdown."[138] Applying the purely economic approach, the facts of *Bracklow* precluded an ongoing obligation of support: "The terms of this marriage were not of the kind in which a wife places her economic future into her husband's hands by undertaking, on agreement or by implication, to do the family work thereby giving up her own right and ability to earn income from employment outside the

[137] *Supra*, note 81 at para 14.
[138] *Bracklow v Bracklow*, 13 RFL (4th) 184, [1995] BCJ No 457 at para 41.

home."[139] Accordingly, her claim for support was dismissed, a decision upheld by a unanimous Court of Appeal.[140]

At the Supreme Court, the case turned on the question of whether the lower courts had erred in denying Mrs. Bracklow support in the absence of a compensatory claim. In other words, the Court had to determine whether, in addition to the compensatory basis confirmed in *Moge*, support may be awarded on a non-compensatory basis. The answer was a resounding and unanimous yes; the wording of the *Divorce Act* does not limit support to the compensatory approach, applied by the trial judge.[141] A spousal support award is not a purely economic calculation; in addition to compensating demonstrable loss, the obligation of support should also to respond to ongoing need as a result of marriage breakdown, as distinct from need that arises from the spouses' roles and responsibilities during the marriage.

As in *Moge*, the Court treated the appeal as an exercise in statutory interpretation. Accordingly, "compensatory considerations [are] not the only basis for support," because the wording of the *Divorce Act*, *1985*, directs judges "to consider factors like need and ability to pay."[142] In doing so, the legislation "[leaves] in place the possibility of non-compensatory, non-contractual support."[143] As seen, the relevant provisions of the *Divorce Act* mandate that spousal support should "recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown" and "relieve

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[139] *Ibid* at para 34.
[140] *Bracklow v Bracklow*, [1997] 8 WWR 696, 37 BCLR (3d) 375.
[141] *Bracklow*, *supra* note 81 at para 10.
[142] *Ibid* at para 18.
[143] *Ibid*.

any economic hardship of the spouses arising from the breakdown of the marriage."[144] For the Court, that distinction — between the roles of the spouses *during* and *after* the marriage — is critical: while the former might give rise to a compensatory claim, the latter, related to marriage breakdown, might give rise to a claim for non-compensatory spousal support.

During a marriage, spouses are presumed to mutually support each other: "The default presumption of this socio-economic partnership is mutuality and interdependence."[145] But in an era of gender equality and two-income households, that presumption will easily be rebutted. Indeed, many modern marriages are characterized according to the "'independent' model of marriage," where "each party to a marriage [is seen] as an autonomous actor who retains his or her economic independence throughout marriage."[146] This "independent" or "clean break" model of marriage "provides the theoretical basis for compensatory spousal support."[147] Moreover, premised "on the widely accepted modern value of the equality and independence of both spouses," the clean break/compensatory model "encourages rehabilitation and self-maximization of dependent spouses" and "recognizes the social reality of shorter marriages and successive relationships."[148]

At first glance, this recasting of compensatory support looks like a departure from *Moge*, where compensatory support was understood as a denunciation of the clean break model espoused in *Pelech*. Indeed, *Moge*'s rejection of the principles of liberal

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[144] *Supra* note 1, ss 15.2(6)(a)(c) [emphasis added].
[145] *Bracklow*, *supra* note 81 at para 20.
[146] *Ibid* at para 24.
[147] *Ibid* at para 25.
[148] *Ibid*.

autonomy, individualism, and self-sufficiency implied that compensatory support could in fact give rise to a permanent obligation.[149] *Bracklow*, on the other hand, depicts the compensatory model "as reflecting a highly individualistic, selfish, market-based view of marriage."[150] The Court, in other words, understands compensatory support according to the overly narrow, purely economic approach discussed above. Nevertheless, by looking to the spouses' roles during the marriage in order to evaluate claims for support, the compensatory model still responds to dependence resulting from the relationship.

The difficulty for the Court in *Bracklow* was how to justify ongoing support when the source of economic vulnerability arose after the marriage, or independently of the relationship, as it did in the case of Mrs. Bracklow's illness. To do so, the Court returned to the default, or presumed model of marriage, that of interdependence and mutual obligation, which sees "marriage as a union that creates interdependencies that cannot be easily unravelled [and that] in turn create expectations and obligations that the law recognizes and enforces."[151] This "modern version" of the mutual obligation theory of marriage "acknowledges the theoretical and legal independence of each spouse, but equally the interdependence of two co-equals. It postulates each of the parties to the marriage agreeing, as independent individuals, to marriage and all that it entails — including the potential obligation of mutual support."[152] By highlighting the agreement of the spouses to the entangling of their financial lives, the mutual obligation theory understands marriage as a "loss of individual autonomy [that] does not violate the

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[149] Rogerson, "Post-Bracklow", *supra* note 136 at 203.
[150] *Ibid* at 203.
[151] *Bracklow*, *supra* note 81 at para 30.
[152] *Ibid*.

premise of equality, because the autonomy is voluntarily ceded."[153] Thus marriage, an agreement between independent equals, may nevertheless give rise to a mutual obligation of support in the absence of "contractual or compensatory indicators."[154]

Whereas the compensatory approach can be justified according to provable economic losses to a spouse's earning capacity, the rationale for the non-compensatory approach, based on the mutual obligation model of marriage, is considerably less clear. Thus the Court explains three "policy ends and social values" that the approach serves to promote.[155] First, when partners cohabit, "their affairs may become intermingled and impossible to disentangle neatly."[156] When that is the case, "it is not unfair to ask the partners to continue to support each other."[157] Second, the model "recognizes the artificiality of assuming that all separating couples can move cleanly from the mutual support status of marriage to the absolute independence status of single life, indicating the potential necessity to continue support, even after the marital 'break.'"[158] Third, as with compensatory support, "it places the primary burden of support for a needy partner who cannot attain post-marital self-sufficiency on the partners to the relationship, rather than on the state, recognizing the potential injustice of foisting a helpless former partner

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[153] *Ibid*.
[154] *Ibid*. Note that in addition to the compensatory and non-compensatory grounds for spousal support, the Court, in *Bracklow*, expressly recognized a third justification for spousal support, the contractual basis. As this chapter seeks to uncover a theoretical justification for the statutory obligation, it will not focus on the contractual model of spousal support, except in instances where applications of the model may be relied on as indicators of the Court's more general approach to post-marital obligations, as seen in the analysis of the *Pelech* Trilogy.
[155] *Ibid* at para 31.
[156] *Ibid*.
[157] *Ibid*.
[158] *Ibid*.

onto the public assistance rolls."[159] While it is unclear whether that injustice is caused to the public or to the former spouse,[160] the result is the same: a privatized response to economic vulnerability.

The significance of *Bracklow* lies in the Court's endorsement of the "basic social obligation" model of "marriage and post-marital obligation."[161] With respect to spousal support, the model might be understood as the "income replacement model," the primary purpose of which "is to replace lost income that the spouse used to enjoy as a partner to the marriage union."[162] Thus, together with *Moge* and the compensatory model, the Court's theory of spousal support recognizes the need to encourage self-sufficiency and independence, while acknowledging that "the goals of actual independence [may be] impeded by patterns of marital dependence."[163]

While *Bracklow* looks to have broadened the scope of spousal support — an apparent advance for women like Mrs. Bracklow, whose financial vulnerability could not be tied directly to her marriage — the decision, like its predecessors, has been the subject of criticism. *Bracklow* is helpful insofar as it endorses a non-compensatory basis for spousal support, particularly in similar cases dealing with ill former spouses. Indeed, support under this model is required by "justice and considerations of fairness."[164] However, by "[reconfiguring] the entire framework of spousal support law," based on "[an] atypical case, arising at the periphery of spousal support law," the Court "created

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[159] *Ibid*.
[160] See Robert Leckey, "Relational Contract and Other Models of Marriage" (2002) 40:2 Osgoode Hall LJ 1 at 39 [Leckey, "Relational Contract"].
[161] *Bracklow*, *supra* note 81 at para 23.
[162] *Ibid*.
[163] *Ibid* at para 32.
[164] *Ibid* at para 48.

on-going confusion about the nature not only of non-compensatory support, but of compensatory support as well."[165] In doing so, the decision may have created more uncertainties than it settled. Accordingly, *Bracklow* has been read as an impediment to the Court's "noble attempt to achieve some conceptual clarity and coherence" in *Moge*.[166]

When compensatory support is narrowed, non-compensatory awards rise in frequency. Under the *Bracklow* framework, confining compensatory awards to clear-cut instances of quantifiable economic loss meant an increase in the number of cases analyzed according to the "needs and means" approach.[167] While in many cases, support was being awarded based on both the compensatory and non-compensatory models, "in others, rather than grappling with the compensatory principle, judges [would] simply fall back on the conventional concepts of needs and means and self-sufficiency in a search for results that appear fair and just."[168] Compensatory determinations are difficult, after all, involving "cruelly complex and speculative calculations."[169]

For economically dependent women, the move away from compensation, in favour of non-compensatory awards, was problematic. Rogerson writes: "the basis on which entitlement is grounded is very important and ultimately exerts a significant influence on the outcome in terms of the quantum of support awarded."[170] Needs-based support could be expected to result in smaller awards, which could be terminated based

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[165] Rogerson, "Post-Bracklow", *supra* note 136 at 198.
[166] *Ibid* at 224, 198.
[167] *Ibid* at 221. See also Engel, *supra* note 23 at 10.
[168] Rogerson, "Post-Bracklow", *supra* note 136 at 221. See also Leckey, "Relational Contract", *supra* note 160 at 35.
[169] Schneider, *supra* note 4 at 256.
[170] Rogerson, "Post-Bracklow", *supra* note 136 at 250.

on either party's re-partnering.[171] Moreover, it fails to recognize that support, as a compensatory obligation, is earned, regardless of future circumstances.[172] Indeed, *Moge* was clear that "[any] support awarded should not be limited to meeting the day-to-day needs of the dependent [spouse], but should also compensate him or her for any contributions made towards the career of the other."[173] Nevertheless, in the year following *Bracklow*, "needs and ability to pay" was understood "as the fundamental basis of spousal support laws in Canada."[174] Thus "widespread reversion to a means and needs analysis" would have "regressive effects on women" and would weaken the "legitimacy and strength of the support claim."[175]

A significant part of the critique of needs-based support lies in the Court's failure to articulate what is meant by the term. For example, some understand the "basic social obligation" as permanent; for others it need not be. Coupled with a broad grant of discretion to trial judges,[176] the uncertainty around the concept of need meant that in the years following *Bracklow*, spousal support awards would "reflect the values of individual judges and their determination of the appropriate balance of the competing values at play in spousal support law."[177] Indeed, "[needs] are relative, not absolute, and vary according to the financial circumstances of the parties."[178]

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[171] *Ibid*.
[172] *Ibid*.
[173] James G McLeod, "Moge v Moge", Case Comment, 43 RFL (3d) 345 at 7.
[174] Payne, "An Overview of Theory and Reality in the Judicial Disposition of Spousal Support Claims Under the Canadian Divorce Act" (2000) 63:2 Sask L Rev 403 at 416 [Payne, "Theory and Reality"].
[175] Rogerson, "Post-Bracklow", *supra* note 136 at 250.
[176] See generally *Hickey v Hickey*, [1999] 2 SCR 518, 172 DLR (4th) 577. Chapter 2 provides further detail on and analysis of the exercise of judicial discretion in awarding spousal support.
[177] Rogerson, "Post-Bracklow", *supra* note 136 at 250.
[178] Payne, "Theory and Reality", *supra* note 174 at 408. See also E Llana Nakonechny, "Spousal Support Decisions at the Supreme Court of Canada: New Model or Moving Target?" (2003) 15:1 CJWL 102 at 120.

While some judges will interpret need in connection with the marital standard of living, others will link the non-compensatory model with the pursuit of self-sufficiency and economic independence, the primacy of which the Court expressly rejected as an objective of spousal support.[179] Moreover, prior to *Moge*, the needs and means approach saw spousal support become a temporary aid for the realization of economic independence.[180] What is more, under this approach, the focus is not only on the claimant's need; instead, "need is but one factor to be considered" by judges adjudicating claims for support.[181] Others include the payor's ability to pay and the length of the marriage.[182] Thus, a trial judge weighing the factors, and taking into consideration the "variety of marital relationships in modern society,"[183] might reject a claim for support even in the presence of demonstrated need. Following *Bracklow*, then, "[a] spouse who cannot obtain [needs-based] support will have to find a job of some kind and, if not, then look to friends and family for help, or to social assistance as a last resort."[184] Ironically, the same result in *Pelech* led to the Court's restatement of the law in *Moge*, in order to avoid precisely this outcome.

Bracklow had both paradoxical and controversial effects on the Canadian law of spousal support. Paradoxically, in broadening the spousal support obligation to respond not only to quantifiable losses, the decision might well have had the effect of lowering awards for economically dependent women. When judges revert to a needs-based

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[179] See Rogerson, "After *Moge*", *supra* note 25 (on self-sufficiency as the corollary of "the conventional concept of need" at 62).
[180] Goubau, *supra* note 88 at 285.
[181] *Bracklow*, *supra* note 81 at para 54.
[182] *Ibid*.
[183] *Ibid*.
[184] Thompson, *supra* note 124.

approach, making compensatory considerations secondary, women are more likely to end up with less than they are due, as their economic sacrifices and the associated benefits to their husbands get lost in the calculation. Instead of compensation, the focus becomes self-sufficiency and financial autonomy, thus marking a return to the formal equality approach that proved damaging to many divorcing women.

Controversially, it may be difficult for many people to accept an ongoing financial obligation to a former spouse where that spouse's economic vulnerability is unrelated to the marriage. As Mr. Bracklow argued before the Supreme Court, "[in] an age of multiple marriages … the law should permit closure on relationships so parties can move on. Why … should a young person whose marriage lasts less than a year be fixed with a lifelong obligation of support?"[185] While the Court provided an answer — that is, that the desirability of moving on from a marriage is but one of several statutory objectives of the *Divorce Act*[186] — the "basic social obligation" model of spousal support is still conceptually difficult to explain.[187] Indeed, a decade after *Bracklow*, spousal support law was described "as a series of ongoing responses to this challenge of justifying the imposition of a post-divorce support obligation between spouses in the context of modern family."[188] As the following part suggests, however, it is not too late to ascribe a meaningful theoretical foundation to the law of spousal support and to its status as a private obligation.

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[185] *Bracklow*, *supra* note 81 at para 56.
[186] *Ibid* at para 57.
[187] See Thompson, *supra* note 124; Rogerson, "Canadian Law", *supra* note 2.
[188] *Ibid* at 72.

6. Rationalizing the Private Spousal Support Obligation: The Relational Approach

This part attempts to set out a theoretical justification for the spousal support obligation. Despite significant changes to the social and legislative context, "marriage remains one of Canada's most important institutions."[189] As our understanding of spousal support is intimately connected with the meaning of marriage itself,[190] an intelligible theory of marriage might provide needed clarity when the obligation seems increasingly difficult to justify. The ideas set out here — a relational theory premised on the inevitability of interdependency in all aspects of life — helps confer meaning not only on the spousal support obligation, but also on its privatized nature. It is that question, a perpetual difficulty for feminist scholars, that this part addresses first.

6.1. Spousal Support as Private Obligation

Contrary to the critiques of spousal support set out above, feminist legal theory might be understood as supportive of a private obligation meant to mitigate the economic impacts of family breakdown. On their surfaces, *Moge* and *Bracklow* look, in many respects, like complete departures from their predecessor, *Pelech*. Where *Pelech* placed the economic burden for former spouses on the state, emphasizing the temporary nature of support and the objective of self-sufficiency, *Moge* insisted that the obligation should remain a private one, with self-sufficiency being just one of several objectives of support, and a less important one, given the statutory language, than compensation. The reasons in *Bracklow* made the privatization of spousal support even clearer; McLachlin J. was explicit that the obligation should remain a private one, even in the absence of

[189] Bala, *supra* note 37 at 20.
[190] See Abella, *supra* note 3.

compensatory objectives.[191] A close read, however, informed by the literature, demonstrates that *Moge* and *Bracklow* — the jurisprudential foundations for the current law of spousal support and the *Advisory Guidelines* — are not so starkly opposed from their predecessor in this respect.

The *Pelech* Trilogy stands for the idea that the public should shoulder a large proportion of the financial consequences of divorce. For its part, *Moge* furthers the connection between the family — historically understood as a private space — and the public sphere, by addressing the broader context of the societal treatment of women — that is, the social context in which divorcing women continue to face obstacles to financial independence.[192] Justice L'Heureux-Dubé seemed to recognize, as did Wilson J. in *Pelech*, that institutional changes to public spaces — the labour force, post-secondary education, childcare facilities — are essential to improving the fate of women economically disadvantaged by marriage and its breakdown. The difference between the two judges' reasons, then, lies less in their understanding of who bears the responsibility for women impoverished by divorce — both seem to agree that the state should play some role — and more on their perception of the state's ability to effectively meet that responsibility, given the socio-economic realities and the demonstrated challenges associated with being a woman and, in many cases, a parent.

A private support obligation may not inherently be the best way to achieve fair economic outcomes. But reading *Moge* and *Bracklow* as endorsing the privatization of

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[191] *Bracklow*, *supra* note 81 at para 31. It is important to note, however, that the private nature of the obligation is not entirely or exclusively attributable to the Court. As McLachlin J. points out, at para 32, the private nature of spousal support is grounded in the legislation, which directs that families should, to some degree, be responsible for responding to spousal dependence.

[192] See Robert Leckey, *Contextual Subjects: Family, State, and Relational Theory* (Toronto: University of Toronto Press, 2008) at 75 [Leckey, *Contextual Subjects*].

support *because* of the socio-economic challenges faced by women in the public sphere, aligns well with the writings of feminist legal scholars. Those who view traditional gender roles — that is, the woman as primarily homemaker and caregiver — as one of the primary sources of the oppression of women criticize *Moge* on the basis that in prescribing spousal support for life following a marriage where the woman assumed the bulk of the domestic work, the decision reinforces women's perpetual reliance on men.[193] But by acknowledging the structural obstacles divorcing women typically face in re-entering the labour force following the birth of a child, or children, *Moge* nevertheless "went some way towards recognizing the connections between gendered inequalities in both private and public spheres."[194] The decision thus helps to recast the discussion about the economic consequences of marriage and divorce so as to recognize the vital role of the public sector in minimizing the systemic economic imbalance between divorced men and women.

Related to the connection brought out in *Moge* between the public and private spheres is the difficulty that results from the Court's dual role of influencing public policy and reaching fair decisions for the parties to a dispute. While *Moge* was widely viewed as victory for Mrs. Moge (and for women, generally) in the form of a much-needed acknowledgment of the feminization of poverty that results in some part from divorce and the economic value of women's reproductive labour,[195] its practical effect was to ensure that the responsibility for women's poverty remains a private and

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[193] See e.g. Baines, *supra* note 84 at 356; Colleen Sheppard, "Uncomfortable Victories and Unanswered Questions: Lessons From Moge" (1995) 12:2 Can J Fam L 238.
[194] Boyd, *supra* note 16 at 177.
[195] See Fudge & Cossman, "Introduction", *supra* note 8 at 33.

predominantly male responsibility.[196] The same might be said about *Bracklow*, given its emphasis on the private nature of dependence. Rogerson, for example, criticizes what she sees as a move away from feminist principles in *Bracklow* and a "resurgence of conservative values in the larger political arena, including an increasing emphasis on privatization."[197] Further, some feminist scholars argue that *Moge* may have had the undesired consequence of diminishing the incentive for public policymakers to address the cultural, or contextual, obstacles to real gender equality: the obstacles outside of the home.[198] Others suggest that the decision creates a hindrance to women challenging "the state's attempt to privatize the costs of social reproduction."[199] Indeed, the endorsement of the privatization of social responsibilities could have the effect of deterring initiatives to compel the state to assume more responsibility for the economic dependency and vulnerability that often results from the division of household labour.[200] One need only think of the lively debate around the public provision of childcare both in Canada and the United States, and the question of whether affordable childcare will facilitate women's fuller participation in the labour force.[201] As Lucinda Ferguson writes, the focus on "expanding and strengthening these interpersonal obligations has distracted us from the

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[196] Boyd, *supra* note 16 at 177.
[197] Rogerson, "Post-Bracklow", *supra* note 136 at 222.
[198] See e.g. Boyd, *supra* note 16 at 178.
[199] Fudge & Cossman, "Introduction", *supra* note 8 at 33.
[200] See Fineman, "Gender and Law", *supra* note 16 at 423. See also Fineman, "Feminist Legal Theory", *supra* note 16 (on the general paradox of self-identified feminist and progressive scholars' exaltation of private and rather than state responsibility for dependency).
[201] On the debates about publicly-funded childcare and the different feminist narratives associated with the issue, see generally, Lene Madsen, "Citizen, Worker, Mother: Canadian Women's Claims to Parental Leave and Childcare" (2002) 19:1 Can J Fam L 11; Angela Campbell, "Proceeding with 'Care': Lessons to be Learned from the Canadian Parental Leave and Québec Daycare Initiatives in Developing a National Childcare Policy" (2006) 22:2 Can J Fam L 171; Heather S Dixon, "National Daycare: A Necessary Precursor to Gender Equality with Newfound Promise for Success" (2005) 36:3 Colum HRL Rev 561. See also Fudge & Cossman, "Introduction", *supra* note 8.

urgent need to address the root causes of the inequality that these obligations have been adapted to address."[202] The privatized obligation, as set out in *Moge* and *Bracklow*, "[sidelines] the necessary debate about the role of the markets in perpetuating the impoverishment of citizens, who are most often women and children."[203] It is possible, however, to understand the private nature of spousal support as a positive move for women.

While there is obvious disagreement with the legislative and judicial endorsement of a private model of family responsibility, there may also be some benefits to maintaining the private nature of spousal support. Financial orders on divorce may have a symbolic power, given family law's "message sending" function.[204] In this respect, for the law to favour breadwinners over homemakers would be to perpetuate gender discrimination.[205] Discriminatory treatment in the context of marriage breakdown, of course, is precisely what *Moge*, by incorporating principles of substantive equality into the analysis, was trying to prevent. In granting spousal support based on the recognition of Mrs. Moge's contributions to the family, the Court gave voice to the economic value of domestic work and sent a message, at least in the context of the compensatory approach, about "the perception of childcare (and the caring of dependents generally) in the wider society."[206] Thus, "[financial] orders on divorce can therefore impact on the

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[202] Lucinda Ferguson, "Family, Social Inequalities, and the Persuasive Force of Interpersonal Obligation" (2006) 22:1 Int'l JL Pol'y & Fam 61 at 82.
[203] *Ibid* at 84.
[204] See Jonathan Herring, "Why Financial Orders on Divorce Should Be Unfair" (2005) 19:2 Int'l JL Pol'y & Fam 218 at 222 [Herring, "Unfair"]. See also Martha Alberston Fineman, "Our Sacred Institution: The Ideal of the Family in American Law and Society" (1993) 1993:2 Utah L Rev 387.
[205] Herring, "Unfair", *supra* note 204 at 222, citing *White v White* [2001] 1 AC 596 at 605, [2000] 3 WLR 1571.
[206] Herring, "Unfair", *supra* note 204 at 222.

appreciation and value attached to nurturing work."[207] In keeping with this idea, it may be possible to conceive of a privatized obligation as doing something other than perpetuating women's subordination to men. Instead, spousal support might be understood as the law's expression of the economic value of domestic and care work, and thus, as ensuring that women are not disadvantaged by established gender roles.

6.2. A Relational Theory of Spousal Support

Relational theory may provide further justification for the private nature of spousal support, on the basis that marital obligations will often outlast the marriage relationship. As seen, neither theory of spousal support set out by the Supreme Court interpreting the relevant provisions of the *Divorce Act, 1985* provides a satisfying rationale for ongoing post-marital obligations. The purely economic compensatory approach is too narrow in nature. Moreover, and despite the social science evidence relied on by the Court in *Moge* about the typical devastating impacts on women of family breakdown, as a general matter, "there is no conclusive evidence pointing to financial hardship to women *exclusively* … from no-fault divorce."[208] Indeed, "the causes of financial hardship facing women and children after divorce are deep-rooted and systemic, implicating the welfare state, and the labour market, as well as family law."[209] The non-compensatory approach, for its part, presents even greater difficulties, including the

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[207] *Ibid*.
[208] John Dewar, "Families" in Peter Cane & Mark Tushnet, eds, *The Oxford Handbook of Legal Studies* (Oxford: Oxford University Press, 2003) 413 at 423.
[209] *Ibid*.

subjective nature of the concept of "need" and the "exceedingly tricky" task of coming up with a principled application of the term.[210]

Further, thinking about the Court's distinct theories of support as "competing" with one another implies that a judge granting support must expressly select one model to apply — a difficult task given the limits of both approaches and the fact that many marriages might fall under both models. The task might be facilitated, however, by thinking about the individual spousal support models not as standing in opposition to one another, but rather, as encompassed by one theoretical umbrella. Indeed, Rogerson, in setting out the models of support later adopted by the Court in *Bracklow*, separated them "for analytical purposes," but maintained that "they are not pure models," and that all three — compensatory, non-compensatory, and contractual — "interact and modify each other."[211] A relational theory of spousal support functions to encompass both models as set out by the Court.

The relational approach to autonomy, rooted in social relationships, removes the stigma from the interdependence inherent in marriage and reconciles autonomy and the inevitable interdependencies that arise in intimate relationships. It encompasses *Moge*'s symbolic endorsement of interdependency as well as *Bracklow*'s message that spousal support does more than compensate for demonstrated losses. Relational theory's blending of autonomy and dependence thus provides a single theoretical underpinning for the models of support set out by the Supreme Court in *Moge* and in *Bracklow*. The compensatory approach outlined in *Moge* sees spousal support as a response to the

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[210] Stephen D Sugarman, "Dividing Financial Interests on Divorce" in Stephen D Sugarman & Herma Hill Kay, eds, *Divorce Reform at the Crossroads* (New Haven: Yale University Press, 1990) 130 at 154.
[211] Rogerson, "Causal Connection", *supra* note 70 at 107. See also Leckey, "Relational Contract", *supra* note 160 at 28, 34, 46.

economic impacts of the division of labour during the marriage, in a social context characterized by gender inequality. It is premised on the idea that the family structure at the time of marriage breakdown resulted from decisions in which both spouses participated. For relational theorist Jennifer Nedelsky, meaningful participation in relationships is the key to autonomy, even where that autonomy is exercised "within a context of dependence."[212] Spousal support, in a compensatory situation, thus responds to the exercise of both spouses' autonomy, in the context of their relationships and the broader social context. In incorporating a relational approach, *Moge* thus "marks an important progression in the contextualization of subjects in family law."[213] Moreover, using relational theory to "[characterize] a woman's financial disadvantage as the result of the relationship, which she herself helped to structure, rather than of particular behaviour by the man, presents her less as a victim,"[214] and more as an equal participant in the relationship. Spousal support becomes a means of reclaiming the fruits of one's exercise of autonomy, as influenced by the marriage relationship.

That identities are constituted by dependent relationships means that the assumption of unforeseen obligations — those that necessarily arise as a relationship progresses in time — do not undermine personal autonomy. Indeed, as the Court confirmed in *Bracklow*, the interdependencies created by marriage typically give rise to obligations that outlast the relationship. While not expressly acknowledged as such,

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[212] Nedelsky, "Reconceiving Autonomy", *supra* note 8 at 27.
[213] Leckey, *Contextual Subjects*, *supra* note 192 at 75.
[214] Leckey, "Relational Contract", *supra* note 160 at 15.

McLachlin J.'s reasons appear grounded in a relational understanding of marriage.[215] Justice McLachlin writes:

> … marriage [is] a union that creates interdependencies that cannot be easily unravelled. These interdependencies in turn create expectations and obligations that the law recognizes and enforces. … [The] mutual obligation theory of marriage acknowledges … the interdependence of two co-equals. It postulates each of the parties to the marriage agreeing, as independent individuals, to marriage and all that it entails — including the potential obligation of mutual support. The resultant loss of individual autonomy does not violate the premise of equality, because the autonomy is voluntarily ceded.[216]

Thus, the Court applies relational theory's understanding of autonomy within relationships — of autonomous decisions that might nevertheless result in interdependency and give rise to an obligation of support. Robert Leckey describes the reasoning in *Bracklow* as responding to a relational contract — that is, an exchange between individuals, but with "significant elements of non-economic satisfaction" and characterized by the parties' inability to precisely identify the obligations that might arise.[217] Ferguson describes this view of marriage and intimate relationships as simply relational in nature, with the result that individual decisions within a relationship "cannot be severed from the surrounding relationship of intimacy."[218] However one frames the concept, Justice McLachlin, Leckey, and Ferguson all appear to be of the view that "[the] interpersonal rights and obligations that arise in intimate relationships … can only be properly understood as stemming from the relationship as a whole, a sum greater than the

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[215] See *ibid*.
[216] *Bracklow*, *supra* note 81 at para 30.
[217] See Leckey, "Relational Contract", *supra* note 160 at 19-20, citing Ian R Macneil, "The Many Futures of Contracts" (1974) 47:3 S Cal L Rev 691 at 723.
[218] Ferguson, *supra* note 202 at 67.

adding together of all the individual decisions within that relationship."[219] The source of the spousal support obligation, then, lies in the "lived patterns of the relationship."[220]

The relational approach to spousal support is not a novel concept. Jonathan Herring writes: "if parties to a marriage are treated as individuals then financial orders on divorce are difficult to justify."[221] That difficulty stems from the fact that the individualist view "is in direct contrast with how most couples interpret their relationship. … The values of mutual sharing and co-operative interdependence predominate in the marriage of most people…."[222] The interests of intimate partners are necessarily intertwined.[223] Spousal decisions are rarely precise or compartmentalized; instead, marital decisions form a web, weaving together the financial and the relational, and characterized by the difficulty of drawing lines between the two for the purposes of uncovering precise financial obligations upon dissolution.[224] Recognizing this dynamic of marriage, both *Moge* and *Bracklow* instruct judges to examine closely the details of the marriage relationship and the roles of the spouses and their mutual understandings and dependencies — to take an "internal stance" toward the relationship, centred on the spouses' "experience of connection."[225] Understood this way, spousal support obligations simply arise out of our "basic human connectedness" and the "inevitable fact of interdependence."[226] Moreover, the relational approach is apparent not only in the

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[219] *Ibid*. See also Leckey, "Relational Contract", *supra* note 160; *Bracklow*, *supra* note 81 at para 37.
[220] Leckey, "Relational Contract", *supra* note 160 at 30.
[221] Herring, "Unfair", *supra* note 204 at 226 [references omitted].
[222] *Ibid* at 227 [references omitted].
[223] Herring, *Relational Autonomy*, *supra* note 6 at 29.
[224] See Katharine B Silbaugh, "Money as Emotion in the Distribution of Wealth at Divorce" in Robin Fretwell Wilson, ed, *Reconceiving the Family* (New York: Cambridge University Press, 2006) 234.
[225] Regan, *Alone Together*, *supra* note 13 at 166.
[226] *Ibid* at 167.

framework cases of *Moge* and *Bracklow*, but also in the Supreme Court's later treatment of private financial agreements between spouses, both before and after the marriage.[227]

Conceiving of spousal support as relational theory's response to post-marital economic dependence responds to calls for a functional approach to regulating the family.[228] Such an approach "focuses on relationships and roles — what families *do*, not what they look like."[229] This is as opposed to an obligation based on the status of marriage, which, in setting out the models of spousal support, McLachlin J. rejected as a theoretical basis: "it is not the act of saying 'I do', but the marital relationship between the parties that may generate the obligation…."[230] Accordingly, in evaluating Mrs. Bracklow's claim, and pursuant to the legislation, which, for the purposes of determining spousal support, does not distinguish between marriage and cohabitation,[231] McLachlin J. looked at the length of the relationship as a whole, and not just the number of years the Bracklows were married.[232] The approach thus aligns with the broader trend in family law to ground obligations in intimate relationships rather than marriage alone.[233] That nine Canadian provinces allow for the imposition of continuing support obligations between unmarried cohabitants, or common law spouses as they are regularly known, demonstrates that Canadian family law already takes a functional approach to post-

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[227] See Leckey, "Contracting Claims" *supra* note 10; Lucy-Ann Buckley, "Relational Theory and Choice Rhetoric in the Supreme Court of Canada" (2015) 29:2 Can J Fam L 251.
[228] See Lisa Glennon, "Obligations Between Adult Partners: Moving from Form to Function?" (2008) 22:1 Int'l JL Pol'y & Fam 22; Dewar, "Chaos", *supra* note 39; Bala, *supra* note 37.
[229] The Vanier Institute of the Family, "Definition of Family", online: *Vanier Institute*, <http://vanierinstitute.ca/definition-family/>.
[230] *Bracklow*, *supra* note 81 at para 53.
[231] *Divorce Act*, *supra* note 1, s 15.2(4)(a)(b).
[232] *Bracklow*, *supra* note 81 at para 60. See also Leckey, "Relational Contract", *supra* note 160 at 34.
[233] See Milton C Regan, "Marriage at the Millennium" (1999) 33:3 Fam L Q 647 at 658-65.

separation obligations.[234] Indeed, the law's focus on "conjugality," as opposed to marriage, underscores that interdependencies are already understood through a relational lens.[235]

This chapter has endeavoured to set out an overarching theory of spousal support that would promote the pursuit of substantive gender equality — that is, an approach to spousal support aimed at ensuring that spouses experience the economic impacts of divorce in equal ways. The relational approach provides that theory by ensuring that the law treats people according to their experiences within their relationships, and not simply according to their status. Instead of treating the spouses as independent equals, subjecting them to the same treatment regardless of the relational dynamic that gave rise to their interdependencies, it adopts an internal perspective of the relationship in an effort to ensure treatment that corresponds with the spouses' lived reality. In other words, by identifying idiosyncrasies in particular relationships, the relational approach "provides checks against blind reliance on a strict notion of equality."[236] Relational theory thus accommodates the fact that equality before the law does not always amount to economic equality, especially when spouses make sacrifices in the name of the relationship.[237] It provides a workable theory of a private spousal support obligation while eschewing the formal equality approach that grounded the clean break theory espoused in the *Pelech* Trilogy.

This is not the first reading of Canadian spousal support law to uncover a relational foundation to the relevant case law. Fundamentally, although not expressed as

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[234] See Leckey, "Relational Contract", *supra* note 160 at 25-26.
[235] Bala, *supra* note 37 at 41-42.
[236] Leckey, "Relational Contract", *supra* note 160 at 20.
[237] *Ibid*.

such, the *Spousal Support Advisory Guidelines*, which regularly guide spousal support negotiations and awards by judges, appear to be grounded in the relational approach.[238] That spousal interdependency is understood by the authors of the *Advisory Guidelines* as arising from the "merger over time" of the spouses' economic and non-economic lives suggests that the *Advisory Guidelines* are rooted in the relational approach.[239] More specifically, the term refers to Stephen Sugarman's model of income sharing, which is "based on the idea that the human capital of spouses merges over time — that over time their human capital becomes intertwined rather than being affixed to a particular individual."[240] In Sugarman's words, the model "[sees] the spouses as merging into each other over time. … After a while, once can less and less distinguish between what was brought into the marriage and what was produced by the marriage."[241] It is not difficult to see the connection between Sugarman's model of spousal support and relational theory's idea that interdependencies, and the resulting obligations, are formed throughout a relationship.

Given the relational spirit of the Supreme Court of Canada's definitive statements on spousal support, it makes sense that the instrument that guides the majority of spousal support determinations in Canada would be grounded in relational theory. Indeed, the difficult task of awarding spousal support, on both compensatory and non-compensatory

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[238] See Family, Children and Youth Section, Department of Justice, *Spousal Support Advisory Guidelines* by Carol Rogerson & Rollie Thompson (Ottawa: Department of Justice, Canada, 2008), online: <http://www.justice.gc.ca/eng/rp-pr/fl-lf/spousal-epoux/spag/index.html> [*Advisory Guidelines*]. For further discussion of the *Advisory Guidelines*, see Chapter 2.
[239] *Ibid* at 53 (ch. 7.2).
[240] Department of Justice Canada, *Developing Spousal Support Guidelines in Canada: Beginning the Discussion*, Background Paper by Professor Carol Rogerson (Ottawa: Department of Justice Canada, 2002) at 28, citing Sugarman, *supra* note 210.
[241] *Ibid* at 159-160 [emphasis added]. See also Jane Rutherford, "Duty in Divorce: Shared Income As a Path to Equality" (1990) 58:4 Fordham L Rev 539.

grounds, is facilitated by the relational understanding of support, which directs judges to look at the lived relationship of the parties in order to determine what obligations should outlast the marriage. Moreover, understanding spousal support as relational in nature goes some way toward responding to the tension in family law, and matrimonial law in particular, between the individuality, or oneness, of the spouses, and their unity, or "two-ness" in the marriage relationship.[242] The approach thus offers a response to the "disquiet" inherent in legal institutions that "seem to express both values at once."[243] Viewed from a relational lens, premised on the merger of the spouses' economic and non-economic lives, and grounded in the relationship itself, the obligation appears less controversial and goes some way toward answering the "riddle of spousal alimony."[244] Further, viewing spousal support law as grounded in relational theory also helps to understand the structure and functioning of the *Advisory Guidelines*.[245] Moreover, the relational understanding of the spousal support obligation, and of the instrument aimed at facilitating its granting, provides the necessary context for the discussion, in Chapter 2, of the *Advisory Guidelines* as an appropriate choice of regulatory instrument.

Conclusion

Canadian spousal support law is complex. The last four decades have seen a number of shifts — from a model of dependency, to individual responsibility, to privatization, and to equitable sharing of the financial consequences of marriage breakdown. This history has made it difficult to understand the law as expressing a

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[242] Nicholas Kasirer, "The Dance is One" (2008) 21:1 L & Lit 69 at 74.
[243] *Ibid* at 80.
[244] Schneider, *supra* note 4.
[245] The idea that the *Advisory Guidelines* are rooted in a relational approach to spousal support is developed in Chapter 2.

coherent message about the meaning of marriage and, accordingly, how to deal with its lasting impacts on the spouses at the relationship's end. Moreover, the changing law of spousal support has made it difficult for feminist legal scholars to reconcile its existence and meaning with the pursuit of substantive economic gender equality. This chapter has attempted to ease that difficulty by drawing on the diverse approaches to spousal support to create a coherent theoretical foundation that aligns with feminist commitments.

On the surface, the leading Supreme Court decisions interpreting the spousal support provisions of the *Divorce Act* all seem to point in different directions, and rest on distinct, and sometimes opposing, foundations. It is possible, however, to read these cases as together amounting to a principled justification for the continued privatization of spousal support, in a social and policy climate characterized by its inability to adequately support women impoverished following family breakdown. Further, relational theory also provides a coherent theoretical groundwork for a private spousal support obligation that may respond to feminist concerns about perpetuating economic dependence. Understanding spousal support as the natural continuation of the responsibilities created by the dynamics of the relationship itself provides some justification for an obligation that is otherwise difficult to rationalize. Relational theory's conception of autonomy as constituted by and exercised within the context of our relationships might respond to feminist concerns about perpetuating women's dependence on men. Moreover, understanding spousal support as stemming not from the status of marriage, but from the dynamics of the relationship itself, might go some way toward responding to the incongruity between continued obligations to former spouses and the present era of no-fault divorce and regular re-partnering. As far as the substance of spousal support goes,

relational theory thus provides a satisfactory rationale. However, equitable substantive principles alone will often not result in equal outcomes. Where spousal support is concerned, in particular, procedural aspects of obtaining an award have proven a hindrance to fair outcomes. Indeed, instruments aimed at implementing substantive doctrines are often as important as the doctrines themselves. Accordingly, Chapter 2 takes up the question of selecting the appropriate instrument for determining spousal support awards.

II. Instrument Choice in Family Law: The *Spousal Support Advisory Guidelines*

Introduction

This chapter reintroduces the *Spousal Support Advisory Guidelines* and examines them as the government's choice of regulatory instrument for determining spousal support awards.[1] It suggests that from an instrument choice perspective, they constitute an appropriate tool, in terms of effectiveness and efficiency of calculating support, either by parties to a divorce, family law practitioners, or judges presiding over a dispute. In short, it posits that as a midpoint between bright-line rules and broad judicial discretion, the *Advisory Guidelines* are a fitting tool for structuring the granting of awards, and that they may restore some legitimacy to the Canadian law of spousal support, as evidenced by their acceptance among legal actors. The *Advisory Guidelines* thus function as a case study in the application of instrument choice theory to family law.

Part 1 introduces the concept of instrument choice, as it applies to family law. Existing scholarship on instrument choice focuses heavily on economic regulation,[2] in areas such as environmental and fiscal policy.[3] Few authors have relied on instrument choice theory in the context of intimate relationships and their breakdown.[4] By

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[1] See Family, Children and Youth Section, Department of Justice, *Spousal Support Advisory Guidelines* by Carol Rogerson & Rollie Thompson (Ottawa: Department of Justice, Canada, 2008), online: <http://www.justice.gc.ca/eng/rp-pr/fl-lf/spousal-epoux/spag/index.html> [*Advisory Guidelines*].

[2] See e.g. Jonathan B Wiener & Barak D Richman, "Mechanism Choice" in Daniel A Farber & Anne Joseph O'Connell, eds, *Research Handbook on Public Choice and Public Law* (Cheltenham (UK): Edward Elgar, 2010) 363.

[3] See e.g. Jonathan Baert Wiener, "Global Environmental Regulation: Instrument Choice in Legal Context" (1999) 108:4 Yale LJ 677; David A Weisbach, "Instrument Choice Is Instrument Design" (John M Olin Program in Law and Economics, Coase-Sandor Working Paper Series No 490, 2009).

[4] But see Mavis Maclean, "Child Support in the UK: Making the Move from Court to Agency" (1994) 31:2 Hous L Rev 515; Gwynn Davis, "Comments on Child Support in the UK: Making the Move from Court to Agency" Commentary, (1994) 31:2 Hous L Rev 539 [Davis, "Child Support"]; Sarah Whiteford, "Beyond

examining the *Advisory Guidelines* as the government's choice of instrument, this chapter brings something new to the literature on both family law and instrument choice. Thus, Part 1 exposes the traditional binary of instrument choice — the contest between discretion and rules — so as to bring to light some of the issues regulators might consider in choosing an appropriate instrument, and sets out the factors by which the suitability of a family law instrument might be measured. Part 2 looks at the *Advisory Guidelines* themselves, revisiting their creation and content, and detailing the legal community's general response to them. The discussion of their acceptance among legal actors is limited to common law provinces, given the distinctive nature of Quebec's legal system.[5]

Part 3 applies the insights from regulatory and instrument choice theory to the regulation of spousal support. Drawing on the earlier exposition of the traditional approaches to regulation, it suggests that neither bright-line rules, nor broad discretion, are ideal for determining spousal support awards. Part 4 attributes the success of the *Advisory Guidelines* to their blending of the two approaches. It argues that the non-binding character of the *Advisory Guidelines* has a legitimizing effect on spousal support determinations that consider them, which grounds their acceptance among legal actors and makes them an appropriate instrument for carrying out their task.

1. Instrument Choice in Family Law

This part introduces instrument choice theory and the traditional choices of instruments for regulating social life. It then frames the discussion of the *Advisory Guidelines* as a study of the choice of instrument for determining spousal support. It sets

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Instrument Choice: Micro-Level Policy Design in Manitoba's Child Care System" (2015) 38:2 Man LJ 260.

[5] Chapter 3 examines the law of spousal support in Quebec, and connects that discussion with the comparatively tepid response to the *Advisory Guidelines* in that province.

out the context in which the *Advisory Guidelines* were created, as the appropriateness of a regulatory instrument will depend on the problem it is meant to resolve. Last, it describes the considerations that might go into measuring whether a particular instrument for governing the family might be evaluated as a successful tool.

1.1. Instrument Choice, an Overview

Instrument choice theory fills an important gap in the study of family law, where scholarship often focuses on the substantive elements of a particular legislative approach. With respect to spousal support, literature tends to focus on the merits of differing theories and on uncovering its ultimate objective. Absent from much of that discussion is attention to the government's chosen method or mechanism for implementing the substantive law. Instrument choice theory's "focus on the tools of government action rather than on government programs or policies," enables a different kind of examination of regulatory approaches.[6] By focusing on the process for achieving the substantive goals of the law, instrument choice brings new insights to the study of family law, and to spousal support in particular.

Instrument choice recognizes that the government's decision of who decides a particular issue can be as important as the substance of the policy being applied. Indeed, "[scratch] the surface of any important issue of law and public policy, and important and controversial questions concerning the choice between decision-makers will appear."[7] The *Advisory Guidelines*, in places where they are regularly considered, remove some

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[6] Margaret M Hill, "Tools as Art: Observations on the Choice of Governing Instrument" in Pearl Eliadis, Margaret M Hill & Michael Howlett, eds, *Designing Government: From Instruments to Governance* (Montreal & Kingston: McGill-Queen's University Press, 2005) [Eliadis, Hill & Howlett, *Designing Government*] 21 at 23 [Hill, "Tools as Art"].
[7] Neil K Komesar, *Imperfect Alternatives* (Chicago: University of Chicago Press, 1994) at 3.

decision-making power from judges.[8] Accordingly, they raise precisely these questions about who should determine spousal support awards, and why. This is because the decision of who decides, also described as an "institutional choice," is in truth "a decision of *what* decides."[9] Simply put, instrument choice might look at the benefits and drawbacks of the available approaches to determining spousal support — for present purposes, by comparing the broad grant of judicial discretion, on the one hand, with the application of bright-line rules, on the other, and with the compromise between those approaches represented by the *Advisory Guidelines*. Indeed, given the complex nature of social life, wherein "quality of life is dependent on decision-making processes,"[10] insight into the reasoning behind and wisdom of selecting those processes is fundamental to understanding the functioning of a particular area of law.

Some scholars view the choice between the exercise of discretion and the application of inflexible rules as the essence of instrument choice. Jonathan Nash, for example, writes, "[one] of the most fundamental questions of instrument choice is the question of whether to employ a rule or standard."[11] Instrument choice, however, is about more than the decision-maker's approach. In the context of spousal support, the use of non-legislated guidelines represents a number of decisions by the government. Among them are the choice not to adopt legislated guidelines, as in the case of child support,[12]

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[8] More will be said about the differential reception of the *Advisory Guidelines* across provincial jurisdictions below.
[9] Komesar, *supra* note 7 at 3.
[10] *Ibid*.
[11] Jonathan R Nash, "Instrument Choice in Federal Court Jurisdiction: Rules, Standards, and Discretion" (2009) Emory University School of Law Public Law & Legal Theory Research Paper Series No 10-92, Law & Economics Research Paper Series No 10-59 at 2.
[12] See *Federal Child Support Guidelines*, SOR/97-175; *Divorce Act*, RSC, 1985, c 3 (2nd Supp) ss 2(1), 26.1(1) [*Divorce Act*].

and the choice to leave contested spousal support determinations up to judicial review, as opposed to creating an administrative agency, as some other jurisdictions have done with respect to the financial consequence of family breakdown.[13] Moreover, while it leaves the final determination to judicial discretion, Parliament has nevertheless chosen to commission the creation of the *Advisory Guidelines* and the federal Department of Justice makes them available on the federal government's website. The government does not, however, provide the software required to make the calculations set out in the *Advisory Guidelines* — a task left to private service providers.

The recognition that the questions asked by instrument choice theory are broader than the debate between rules and discretion, however, should not undermine the importance of that inquiry. Indeed, "the instrument choice between discretion and rules is complex and uncertain and its outcome cannot be assumed."[14] Both approaches constitute the object of the instrument choice theorist's study — that is, the examination of "alternative options for how government action can be brought to bear on an identified problem."[15] It is accordingly worth looking at what each approach entails.

What, then, is meant by judicial discretion? The term, which has been the focus of scholarly inquiry and debate for decades, might be understood in a number of ways.[16] For

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[13] See Maclean, *supra* note 4 (on the United Kingdom); Freda M Steel, "Maintenance Enforcement in Canada" (1985) 17:3 Ottawa L Rev 491 (on the administrative determination and enforcement of maintenance awards in New Zealand at 496).

[14] Robert Leckey, "But What Is Judicial Guidance? Debating Canadian Judgments on Children" (2010) 23:4 J Soc Welfare & Fam L 381 at 384 [Leckey, "Judicial Guidance"].

[15] Michael Howlett, "From the 'Old' to the 'New' Policy Design: Design Thinking Beyond Markets and Collaborative Governance" (2014) 47:1 Policy Sciences 187 at 192 [Howlett, "Old to New"].

[16] See e.g. Ronald Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977) (discretion as the absence of authoritative standards to bind decision-makers as well as the use of individual judgment in applying authoritative standards at 31); Carl E Schneider, "Discretion and Rules: A Lawyer's View" in Keith Hawkins, ed, *The Uses of Discretion* (Oxford: Clarendon Press, 1992) [Hawkins, *Uses of Discretion*] 47

present purposes, whereas a bright-line rule requires decision-makers to respond to particular facts in a "determinate way," judicial discretion involves a legal directive that "[collapses decision-making] back into the direct application of the background principle or policy to a fact situation."[17] In exercising judicial discretion, then, rather than mechanically apply a pre-determined result to a particular set of facts, judges may take all seemingly relevant factors and circumstances into account in coming to a decision.[18]

The primary feature of judicial discretion might accordingly be understood as judicial freedom. Compared with the application of bright-line rules, judges exercising discretion have more freedom to choose what features of a case to emphasize and what they view as the best result. Inherent in the language of discretion — of judicial choice — is an emphasis on "judicial power and responsibility," for discretion implies the judicial realization of policy objectives.[19] Given that policy making is typically understood as the province of the legislature and the executive branches of government, the exercise of discretion, then, might be viewed as unduly increasing the policy-making role of the judge. Therein lies one of the primary critiques of the discretionary approach to spousal support determinations.

Broad legislative grants of judicial discretion may be understood as an abdication of responsibility on the part of lawmakers. Thus, "rule-compromise discretion" exists where "the members of the governmental body responsible for instructing the decision-maker cannot agree on rules or even guidelines, and … deliberately choose to pass

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[Schneider, "A Lawyer's View"]; DJ Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (Oxford: Clarendon Press, 1986).

[17] Kathleen M Sullivan, "Foreword: The Justice of Rules and Standards" (1992) 106:1 Harv L Rev 22 at 58.

[18] *Ibid* at 54.

[19] George P Fletcher, *Basic Concepts of Legal Thought* (New York: Oxford University Press, 1996) at 52.

responsibility to the decision-maker."[20] Understood this way, legislative inaction, through a broad grant of judicial discretion, effectively gives courts and judges "authority to decide cases without legislative direction." [21] Discretion, in other words, enables lawmakers to "remain as silent as possible on controversial or complex matters of public policy," and allows them "to duck or to fudge hard issues."[22] Left to be decided on a case-by-case basis, these "hard issues" may create a climate of inconsistency and unpredictability.

Bright-line rules, the counterpart to discretionary instruments, can also have many meanings. But all rules share a common feature: by "[specifying] outcomes before particular cases arise,"[23] and by requiring decision-makers "to respond in a determinate way to the presence of delimited triggering facts," [24] rules confine judges to determinations of fact, leaving "arbitrary and subjective value choices to be worked out elsewhere."[25] In minimizing the uncertainty associated with discretion, bright-line rules might be viewed as promoting fairness and consistency; by adhering to the traditional maxim of "[treating] like cases alike,"[26] they give litigants the sense that they have been treated fairly.[27] Unlike discretionary decisions, which are prone to the "objection that they merely reflect the judge's personal and arbitrary preferences," rules tell "litigants

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[20] Schneider, "A Lawyer's View", *supra* note 16 at 65.
[21] *Ibid*.
[22] Keith Hawkins, "The Use of Legal Discretion: Perspectives from Law and Social Science" in Hawkins, *Uses of Discretion*, *supra* note 16, 11 at 12 [Hawkins, "Perspectives"].
[23] Cass R Sunstein, "Problems with Rules" (1995) 83:4 Cal L Rev 953 at 961 [Sunstein, "Rules"].
[24] Sullivan, *supra* note 17 at 58 [footnotes omitted].
[25] *Ibid*.
[26] Frederick Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (Oxford: Clarendon Press, 1991) at 135. See also Schneider, "A Lawyer's View", *supra* note 16 at 74.
[27] *Ibid*.

clearly that the standard under which their case is to be decided has the authority of legitimacy."[28] Thus rules, by providing consistency, ensure uniformity, as well as "predictability and the avoidance of uncertainty."[29]

Because they facilitate predictable outcomes, rules enable people to plan. This feature grounds the pro-rules "argument from reliance," based on the idea that where decision-makers decide cases based on established rules, those affected by the decisions are able to "predict in advance what the decisions are likely to be."[30] Parties are able to rely, in other words, on a particular outcome flowing from a specific set of facts, and plan their behaviour accordingly.[31] Much of the benefit of rules, then, lies in their so-called "planning function."[32]

These features of bright-line rules and judicial discretion might drive policy makers to favour the former. In truth, however, rules might do very little to counteract the value-laden nature of the exercise of judicial discretion. This is because the generalizations underlying particular rules are not objective, but contingent and selective. Rule-makers choose which factual elements should give rise to the application of a rule, and which should not.[33] Confining discretion, through the creation of rules, "inevitably involves moral and political choices."[34] Thus, the choice of regulatory instrument "entails making trade-offs between various desired policy objectives," which different

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[28] *Ibid*.
[29] See Sullivan, *supra* note 17 at 65, citing Antonin Scalia, "The Rule of Law as a Law of Rules" (1989) 56:4 U Chicago L Rev 1175.
[30] Schauer, *supra* note 26 at 137.
[31] *Ibid* at 140. See also Schneider, "A Lawyer's View", *supra* note 16 at 76.
[32] *Ibid*.
[33] See Schauer, *supra* note 26 at 21.
[34] Robert Baldwin & Keith Hawkins, "Discretionary Justice: Davis Reconsidered" (1984) Winter, Public L 570 at 580.

instruments will affect differently.[35] The conception of rules not as a counter to discretion, but rather, as discretion displaced from the judge to the rule-maker is inherent in the conception of rules as expressions of particular social and cultural values, or commitments.[36] Rules, then, cannot be said to supplant the value judgments typically associated with judicial discretion; both approaches must be examined for their appropriateness as a solution to a given problem.

Later parts of this chapter will explore both regulatory approaches as they relate to the spousal support obligation in the doctrinal context of the creation of the *Advisory Guidelines*. Before setting out that context, however, as well as the markers by which the appropriateness of a family law tool might be evaluated, it bears mentioning that in many policy areas, the search for the appropriate instrument will not reveal a single best choice. In many circumstances, there may not be a uniquely optimal approach.[37] Indeed, most instruments are "substitutable" — that is, "[most] policy objectives can … be accomplished by a number of instruments."[38] Moreover, as the following section will discuss, the context-dependent nature of the usefulness of a particular instrument means that "precision" in instrument choice will rarely be achieved.[39] Rather than ask whether the *Advisory Guidelines* are the best tool for achieving the objectives of spousal support, this chapter might be better understood as suggesting that they are, at least, "non-

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[35] Michael J Trebilcock, "The Choice of Governing Instrument: A Retrospective in Eliadis, Hill & Howlett, *Designing Government*, *supra* note 6, 51 at 51-52.
[36] See Cass R Sunstein, "On the Expressive Function of Law" (1996) 144:5 U Pa L Rev 2021 at 2028 [Sunstein, "Expressive Function"]; John Dewar, "The Normal Chaos of Family Law" (1998) 61:4 Mod L Rev 467 [Dewar, "Chaos"].
[37] See Michael Howlett, "Beyond Good and Evil in Policy Implementation: Instrument Mixes, Implementation Styles, and Second Generation Theories of Policy Instrument Choice" (2004) 23:3 Policy & Society 1 at 5 [Howlett, "Good and Evil"].
[38] *Ibid* at 5.
[39] *Ibid* at 5-6.

counterproductive" in terms of the legislative objective.[40] Thus, this chapter understands the *Advisory Guidelines* as one among a number of regulatory options that the government could have selected as its approach to governing spousal support awards, and asks whether and why they might indeed promote the pursuit of gender equality that underlies the law of support.

1.2. The *Advisory Guidelines* as the Choice of Instrument

Instrument choice has an important role to play with respect to devising family law tools. But in order to view the *Advisory Guidelines* from an instrument choice perspective, they must first be understood, despite their unofficial nature, as a governing instrument. That understanding is facilitated by the fact that regulatory instruments go beyond the narrow, or traditional, understanding of regulations as "subordinate or delegated legislation that is derived from statute." [41] Indeed, "[regulation], as an instrument, can be defined both broadly and quite narrowly."[42] As a "mechanism for compelling action," the *Advisory Guidelines* can be understood as regulation in its broader sense.[43] Moreover, broad understandings of regulation capture "other rule-like levers … including guidelines or standards."[44] From an instrument choice perspective, then, the *Advisory Guidelines* merit attention.

Further, while much of instrument choice theory focuses on market regulation and the pursuit of economic efficiency, that need not be the case. Scholarship suggests that the welfare economics perspective, with its commitment to efficiency, "obscures the

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[40] *Ibid* at 8.
[41] Whiteford, *supra* note 4 at 265.
[42] *Ibid* at 264.
[43] *Ibid* (on the broad definition of regulation).
[44] *Ibid* at 265 [references omitted].

importance of a range of noneconomic … values that commonly motivate various participants in collective decision-making processes, including notions of distributive justice, corrective justice, due process, communitarianism, racial and gender equality, and so on."[45] Family law is often understood as aimed at questions of distributive justice, and often informed by a communitarian perspective.[46] Thus, it would be a mistake to ignore the insights of instrument choice theory when it comes to questions of social policy, such as spousal support.

With respect to the regulation of social policy, governing tools perform several functions. "They meet human and social needs through the redistribution of income, redress failures or gaps in economic markets, regulate the actions of individuals and groups, realize certain shared values, and grant official recognition to particular groups in the community."[47] Just as spousal support, in principle, redistributes income, redresses gender inequalities in the labour market, regulates individual action upon family breakdown, attempts to realize the shared value of gender equality, and provides official recognition of the disadvantages faced by divorcing women, the instrument chosen to implement those principles performs various functions. Accordingly, the instrument choice approach should not be limited to market and fiscal regulation; the *Advisory Guidelines* can — and, as a novel approach, should — be examined from the lens of instrument choice.

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[45] Trebilcock, *supra* note 35 at 54.
[46] See e.g. Robert Leckey, "Contracting Claims and Family Feuds" (2007) 57:1 UTLJ 1; Brenda Cossman, "A Matter of Difference: Domestic Contracts and Gender Equality" (1990) 28:2 Osgoode Hall LF 303 at 342ff; Jennifer Nedelsky, "Reconceiving Autonomy: Sources, Thoughts and Possibilities" (1989) 1 Yale JL & Feminism 7.
[47] Michael J Prince, "From Welfare State to Social Union: Shifting Choices of Governing Instruments, Intervention Rationales, and Governance Rules in Canadian Social Policy" in Eliadis, Hill & Howlett, *Designing Government*, *supra* note 6, 281 at 283.

Bringing instrument choice to family law is logical when examining a family law tool as one strategy among other available options. As instruments provide the connection between legislative objectives and the policies chosen to implement them, "[any] analysis of law and policy — economic or not — depends on comparative institutional choice." [48] Moreover, the rationales brought to bear in discussions of economic policy are relevant beyond the pursuit of economic efficiency: "What can be said about efficiency can be said about any goal or end value, whether it is the [principle] of liberty, autonomy, or equality."[49] Thus, examining the connection between goals and policies designed to achieve them "would seem to be essential … no matter what the social goal or end value contemplated."[50] Scholarship on family law, particularly where it is focused on novel regulatory approaches, can only benefit from adopting the perspective of instrument choice.

If instruments are the bridge between goals and regulatory strategies, understanding the legislative and jurisprudential context in which an instrument is selected is fundamental to its evaluation. Instrument choice thus focuses not only on the relative performance of instruments, but also on "the drivers and contexts of instrument choices, as distinct from their effectiveness."[51] To be sure, only "once the government has settled on its objectives, [can it] choose the most appropriate tools for achieving them."[52] Otherwise understood, the determination of the appropriate instrument is in fact the determination that a particular goal will be "best carried out by a particular

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[48] Komesar, *supra* note 7 at 10.
[49] *Ibid* at 30.
[50] *Ibid*.
[51] Pearl Eliadis, Margaret M Hill & Michael Howlett, "Introduction" in Eliadis, Hill & Howlett, *Designing Government*, *supra* note 6 at 9 [Eliadis, Hill & Howlett, "Introduction"].
[52] Hill, "Tools as Art", *supra* note 6 at 23.

institution,"[53] hence the importance of understanding the context of the creation of the *Advisory Guidelines*. Indeed, any discussion of instrument choice would be hollow if it did not consider the policy objectives an instrument is meant to achieve.

The jurisprudential survey of spousal support law prior to the creation of the *Advisory Guidelines* illustrated that the economic disadvantages for divorcing women could in some part be attributed to the substance of the law, and the uncertainty around its objectives. But, as the discussion of the functioning of spousal support law will demonstrate, the process for obtaining an award was just as problematic as the content of the law, if not more so. At least one scholar posits, "[the] injustices of divorce have always lain in large part with the inefficiencies of the process."[54] Those procedural injustices formed the backdrop against which the *Advisory Guidelines* were created; understanding them is crucial to examining the appropriateness of the *Advisory Guidelines*.

1.3. The Context: Conceptual Confusion Meets Discretion

The backdrop to the creation of the *Advisory Guidelines* was characterized by doctrinal confusion and jurisprudential inconsistency. Just as "[policy] development … does not occur in a vacuum,"[55] neither should the critical examination of that policy. Rather, instruments must be understood in their context, both social and legal.[56] Moreover, the utility of instruments themselves, as well as "the calculation of their

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[53] Komesar, *supra* note 7 at 5.
[54] Davis, "Child Support", *supra* note 4 at 541.
[55] Whiteford, *supra* note 4 at 269.
[56] *Ibid* at 263. See also Michael Howlett, "What is a Policy Instrument? Tools, Mixed, and Implementation Styles" in Eliadis, Hill & Howlett, *Designing Government*, *supra* note 6, 31 [Howlett, "What is a Policy Instrument?"].

attractiveness, is heavily context-dependent."[57] For this reason, policy design must take into consideration the existing "instrument environment" and might be better conceived of as extending, expanding, or amending existing structures, than as something new, in the absence of an existing framework.[58]

The problems with spousal support law were a primary driver for the creation of the *Advisory Guidelines*. Indeed, they were adopted in large part as a response to the "subjective, uncertain, and unpredictable" nature of the discretionary granting of spousal support.[59] The situation was the result, in substantial part, of the Supreme Court of Canada's articulation, in the preceding decades, of competing theoretical models of support. In spite of the Court's attempt at clarity in *Bracklow*,[60] where it identified the competing conceptual grounds for entitlement to spousal support, the decision has been read as an impediment to the "noble attempt to achieve some conceptual clarity and coherence" in the earlier *Moge*,[61] creating confusion about both compensatory and non-compensatory support.[62]

In setting out the differing models of spousal support, the Supreme Court established a broad basis for entitlement to support. But with respect to amount and duration of awards, the Court left these complex calculations to discretion on the part of trial judges, "who were required to 'balance' the multiple support objectives and factors

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[57] *Ibid* at 40.
[58] Whiteford, *supra* note 4 at 271. See also Howlett, "Old to New", *supra* note 15 at 198.
[59] Carol Rogerson & Rollie Thompson, "The Canadian Experiment with Spousal Support Guidelines" (2011) 45:2 Fam L Q 241 at 248 [Rogerson & Thompson, "Canadian Experiment"].
[60] [1999] 1 SCR 420; 169 DLR (4th) 577 [*Bracklow*].
[61] [1992] 3 SCR 813; 99 DLR (4th) 456 [*Moge*].
[62] See Carol Rogerson, "Spousal Support Post-Bracklow: The Pendulum Swings Again?" (2001) 19 Can Fam LQ 185 [Rogerson, "Post-Bracklow"].

under the *Divorce Act* and apply them in the context of the facts of particular cases."[63] Indeed, the commitment to discretion aligned with the legislation; the *Divorce Act* provisions dealing with spousal support, while providing some principled direction for trial judges, offer little in the way of concrete numerical guidance in awarding spousal support.[64] The stated preference for discretionary awards also corresponded with broader trends in Canadian family law, which was historically characterized by the pervasiveness of judicial discretion.[65]

While the federal legislation gives some guidance on the objectives of spousal support and the factors relevant to granting it,[66] the highly discretionary nature of awards and the lack of guidance from the highest court created, on some views, an "unacceptable degree of uncertainty and unpredictability." [67] That uncertainty often discouraged unrepresented spouses, or spouses in weak bargaining positions, from pursuing support claims at all.[68] Further, the absence of concrete guidance meant that spousal support

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[63] Rogerson & Thompson, "Canadian Experiment", *supra* note 59 at 248. See also Department of Justice Canada, *Developing Spousal Support Guidelines in Canada: Beginning the Discussion*, Background Paper by Professor Carol Rogerson (Ottawa: Department of Justice Canada, 2002) [Rogerson, "Background Paper"].

[64] As seen in Chapter 1, the *Divorce Act*, *supra* note 12, in s 15.2(4), lists factors for consideration in the determination of support, including the "length of time the spouses cohabited" and "the functions performed by each spouse during the marriage." Section 15.2(6) lists the objectives of spousal support, including the recognition of " any economic advantages and disadvantages to the spouses arising from the marriage or its breakdown," apportionment of the financial consequences of caring for children of the marriage, relief of economic hardship arising from the breakdown of the marriage and, "in so far as practicable," the promotion of "economic self-sufficiency of each spouse within a reasonable period of time".

[65] See e.g. Nicholas Bala, "Judicial Discretion and Family Law Reform in Canada" (1986) 5:1 Can J Fam L 15 [Bala, "Judicial Discretion"]; Marie Gordon, "Spousal Support Guidelines and the American Experience: Moving Beyond Discretion" (2002) 19:2 Can J Fam L 247.

[66] See *Divorce Act*, *supra* note 12, ss 15.2(4), 15.2(6).

[67] Rogerson & Thompson, "Canadian Experiment", *supra* note 59 at 249.

[68] *Ibid*.

orders ultimately depended on trial judges' "subjective perceptions of fair outcomes" and often generated wide variations in support, even in the presence of similar facts.[69]

Further complicating matters, shortly after *Bracklow*, the Supreme Court reiterated the very discretionary nature of spousal support determinations. In *Hickey v. Hickey*, the Court reinforced the paramount role of the trial judge in determining support and raised the threshold for appellate intervention.[70] The effect of the combination of discretion and the high degree of deference to the trial judge's findings was that spousal support orders reflected the "values of individual judges and their determination of the appropriate balance of the competing values at play in spousal support law," and that those "exercises of highly individualized justice [were] effectively immunized from appellate review."[71] In short, the Supreme Court's varied pronouncements on the theoretical justifications for the competing models of spousal support, coupled with the highly discretionary nature of support determinations, left many with a general sense of unfairness and injustice, not only with respect to outcomes, but relative to the uncertainty and unpredictability associated with claiming support.[72] That a change to the means of delivering justice for spousal support claimants was seen as a potential solution reinforces instrument choice theorists' belief that justice depends as much on "the presence of institutions capable of translating high-sounding principles into substance" as it does on the content of the law.[73]

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[69] *Ibid*. See also Rogerson, "Post-Bracklow", *supra* note 62.
[70] [1999] 2 SCR 518, 172 DLR (4th) 577 [*Hickey*].
[71] Rogerson, "Post-Bracklow", *supra* note 62 at 225.
[72] For further background on the history behind the *Advisory Guidelines* see Rogerson, "Background Paper", *supra* note 63.
[73] Komesar, *supra* note 7 at 41.

At the same time that the problems with a discretionary spousal support regime were coming to a head, other areas of family law, both in Canada and abroad, were undergoing a move away from judicial discretion and toward the use of rules and guidelines. Matrimonial property laws, for example, were already based on a presumption of equal division. Child support guidelines (binding rules, despite the nomenclature) had operated in Canada since 1997.[74] Where the same sort of unpredictability plaguing spousal support had once affected child support determinations, the adoption of the *Child Support Guidelines* brought about much-needed certainty, predictability, and consistency in child support determinations; as a general matter, they were widely accepted by family lawyers and judges.[75] Thus, prior to the creation of the *Advisory Guidelines*, the Canadian family law community was already growing accustomed to relying on rules and guidelines in dealing with some of the economic consequences of family breakdown.[76]

With respect to spousal support, however — "a highly arbitrary and unpredictable area of law affecting large numbers of people"[77] — lawyers had difficulty predicting outcomes and were impeded in their ability to advise their clients and engage in effective

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[74] See Rogerson, "Post-Bracklow", *supra* note 62 at 251; Rogerson, "Background Paper", *supra* note 63 at 5. See also Ira Mark Ellman, "The Maturing Law of Divorce Finances: Toward Rules and Guidelines" (1999) 33:3 Fam L Q 801 (on the similar trend toward rules in the US) [Ellman, "Toward Rules and Guidelines"].

[75] See Carol Rogerson, "Shaping Substantive Law to Promote Access to Justuce: Canada's Use of Child and Spousal Support Guidelines" in John Eekelaar, Mavis Maclean & Benoit Bastard, eds, *Delivering Family Justice in the 21st Century* (Oxford: Hart Publishing, 2015) 51 at 60 [Rogerson, "Access to Justice"]; Carol Rogerson, "Child Support, Spousal Support and the Turn to Guidelines" in John Eekelaar & Rob George, eds, *Routledge Handbook of Family Law and Policy* (New York: Routledge, 2014) 153 at 158 [Rogerson, "Turn to Guidelines"].

[76] But see Paul Millar & Anne H Gauthier, "What Were They Thinking? The Development of Child Support Guidelines in Canada" (2002) 17:1 CJLS 139 (for a critical stance on the *Child Support Guidelines*).

[77] Rogerson, "Post-Bracklow", *supra* note 62 at 253.

settlement negotiations.[78] Further, the uncertainty and unpredictability that resulted from the Court's perceived failure to set out a coherent theory of spousal support, coupled with the vastly different exercises of discretion by trial judges, served to "cast doubt upon the fairness of the outcomes, thus undermining the legitimacy of the spousal support obligation."[79] That the *Advisory Guidelines* were conceived of as a means of mitigating the demonstrated problems with the law of spousal support underscores the idea that where law is plagued by ambiguity and discretion, instrument choice becomes of central importance.[80] Thus, the existing instrument environment, characterized by a general move toward rules and guidelines in family law, combined with conceptual confusion and the unpredictability associated with broad discretion, created fertile ground for the introduction of the *Advisory Guidelines*.

1.4. Evaluating the *Advisory Guidelines*

As this chapter argues that the *Advisory Guidelines* constitute a regulatory success, it is worth setting out the meaning of the terms "success" and "legitimacy," as they are employed below. Success, here, is measured by the judicial acceptance of the *Advisory Guidelines* by appellate courts across much of the country. The term "success" is not a legal one. But it is not unusual for legal scholarship to measure the success of a particular legal doctrine or instrument and much scholarship is dedicated to critiquing the law for failing to achieve its objectives. Indeed, if we conceive of law as an instrument for "optimal social planning,"[81] the merit of a particular law or regulatory tool will be measured according to its effectiveness in achieving its underlying plans. With respect to

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[78] Rogerson, "Background Paper", *supra* note 63.
[79] *Ibid* at 5.
[80] See Komesar, *supra* note 7 at 41.
[81] Scott J Shapiro, *Legality* (Cambridge, Mass: Harvard University Press, 2011) at 398, 399.

the *Advisory Guidelines*, then, this chapter suggests that their success lies in their mitigating effects on the above-described challenges to the pursuit of substantive gender equality by way of the discretionary granting of spousal support. As a result, some of the legitimacy that had been lost in the ambiguity and unpredictability of discretionary judicial determinations might be restored.

Success, however, is not limited to outcomes. Indeed, some authors ground the success of a particular legal doctrine or instrument in its ability to attract public confidence in the legal system.[82] Success, in this sense, is linked with the position of courts in the legal system and their legitimacy within the legal order: given that judges are not elected, courts must ensure that the public is accepting of their decisions.[83] This is particularly true where the decisions being issued are controversial or divisive, as is the case with the awarding of spousal support. To speak of the success of the *Advisory Guidelines*, then, is to evaluate their ability to garner public support and acceptance of the decisions that rely on them.

Moreover, whereas "success" has no precise legal meaning, the term "legitimacy" has dominated legal scholarship for as long as the study of law has existed. While Chapter 4 of this thesis weighs in on the question of the constitutional legitimacy of judicial reliance on the non-legislated *Advisory Guidelines*, this chapter does not. Instead, it employs the term in its ordinary sense, as "conformity to sound reasoning; logicality;

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[82] See e.g. Sara C Benesh, "Understanding Public Confidence in American Courts" (2006) 68:3 J Politics 697.

[83] See Nancy Scherer, Sara C Benesh & Amy L Steigerwalt "How Do Lower Federal Courts Attain Institutional Legitimacy When They Are Largely Unknown to the Public?" (Paper delivered at the American Political Science Association Annual Meeting, Washington DC, September 2010).

justifiability."[84] Stated otherwise, this chapter associates legitimacy with transparency and clarity, and contrasts it with the often arbitrary, obscure, and variable nature of the exercise of discretion by individual judges.

While the concept of legitimacy may have many meanings, it is hardly controversial to say that fairness is a central one.[85] Thus, a system that discriminates, "or a system in which the professionals … are out of touch with community values, will not be seen as legitimate in the eyes of the public."[86] Indeed, research in both political science and organizational theory suggest that perceptions of distributive injustice undermine support for the legal system.[87] Describing the United States, Austin Sarat writes, "the perception of unequal treatment is the single most important source of popular dissatisfaction with the … legal system."[88] That perception "is often linked to the fairness of the procedures used to distribute outcomes" instead of to the outcomes themselves.[89] Political scientists likewise suggest that with respect to public opinion of courts, "perceptions about procedural justice weigh heavily,"[90] and that much confidence depends on "one's impression of the ways in which cases are handled and decided."[91] Thus, judicial decisions will be perceived as legitimate — and will garner public support — when litigants feel that a "judge [has treated] them fairly by listening to their

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[84] *The Oxford English Dictionary*, online ed, *sub verbo* "legitimacy".
[85] See Public Safety and Emergency Preparedness Canada, *Public Confidence in Criminal Justice: A Review of Recent Trends* 2004-05 by Julian V Roberts (Ottawa: Minister of Public Safety and Emergency Preparedness, 2004) at 1.
[86] *Ibid* at 1-2 [references omitted].
[87] Tom R Tyler, *Why People Obey the Law* (New Haven: Yale University Press, 1990) at 73.
[88] Austin Sarat, "Studying American Legal Culture: An Assessment of Survey Evidence" (1977) 11:3 Law & Soc'y Rev 427 at 434, cited in *ibid* at 73.
[89] *Ibid*.
[90] Benesh, *supra* note 82 at 699.
[91] *Ibid* at 704.

arguments and considering them, by being neutral, and by stating good reasons for his or her decision."[92] In an important sense, then, legitimacy may be understood as a favourable public orientation toward the system.[93]

Created as a response to a climate of perceived unfairness, the *Advisory Guidelines* would necessarily have an impact on the legitimacy of the spousal support regime. This is because "[all] instruments, particularly those designed outside and implemented outside of the legislative process, have important repercussions for the legitimacy and accountability of public action."[94] As legitimacy provides leaders with the authority for effective governance,[95] the prospect of increased legitimacy is particularly relevant to the question of spousal support, where decision-makers' authority to exercise discretion might have been undermined by the climate of uncertainty leading up to the creation of the *Advisory Guidelines*.

In addition to talk of legitimacy, it may be useful to borrow the language of "efficiency" from instrument choice and its typical orientation to economic regulation and the welfare state. Indeed, the search for efficiency is one of the primary motivators of the development and increased use of alternative forms of regulation.[96] That objective constitutes one of the basic assumptions of instrument choice; instruments are selected because they effectively redistribute benefits and losses.[97] Of course, the concept of

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[92] Tyler, *supra* note 87 at 6.
[93] See *ibid* at 28.
[94] Eliadis, Hill & Howlett, "Introduction", *supra* note 51 at 6.
[95] Tyler, *supra* note 87 at 26.
[96] Daniel Mockle, *La gouvernance, le droit et l'État : La question du droit dans la gouvernance publique* (Brussels: Bruylant, 2007) at 42.
[97] Robert W Hahn, "Instrument Choice, Political Reform and Economic Welfare" (1990) 67:3 Public Choice 243 at 244.

efficiency varies according to the circumstances.[98] Whereas efficiency in the context of economic regulation generally relates to government spending, a regulatory tool meant to assist in devising an appropriate private obligation might manifest its efficiency in terms of costs and benefits to litigants and to the courts. Where, as the *Advisory Guidelines* aim to do, an instrument helps promote fair outcomes between individuals, the public will benefit — both in terms of the reduced strain on the courts and on the public purse. Moreover, while an instrument's effectiveness might influence its legitimacy, the reverse is true as well — "legitimacy in the eyes of the public is a key precondition to the effectiveness of authorities."[99]

Instrument choice theory understands that "a government's desire to alter a policy process," as the federal government did by commissioning the creation of the *Advisory Guidelines*, "is intimately tied to the extent to which existing processes and procedures are considered credible, or *legitimate*, by policy actors."[100] As legitimacy can be understood as a product of public support, "[when] a serious loss of legitimacy or trust occurs, the subject of political conflict often shifts from the actual substantive content of the government actions toward a critique of the processes by which actions are determined."[101] Before turning to the discussion of how the *Advisory Guidelines* have affected the processes related to support, and accordingly, attitudes toward the law of spousal support, the following part provides a fuller explanation of the function and reception of the *Advisory Guidelines*.

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[98] Howlett, "What is a Policy Instrument?", *supra* note 56 at 41.
[99] Tyler, *supra* note 87 at 5. See also Mockle, *supra* note 96 at 116.
[100] Howlett, "What is a Policy Instrument?", *supra* note 56 at 44 [emphasis in original; references omitted].
[101] *Ibid*.

2. The *Spousal Support Advisory Guidelines*

This part focuses on the creation, form, and function of the *Advisory Guidelines* and briefly sets out their reception by judges across the country. With the context of their creation set out above, and their creation and content described in the thesis's Introduction, the following paragraphs elaborate on how the *Advisory Guidelines* have been received and used by legal actors. The part thus provides the necessary background to the subsequent argument that from an instrument choice perspective, the *Advisory Guidelines* are well-suited to their task.

2.1. The Creation and Content of the *Advisory Guidelines*

As detailed at the outset of this thesis, the *Advisory Guidelines* incorporate the models of spousal support set out by the Supreme Court, so as to facilitate their application to concrete situations and assist in determining the most suitable award. Grounded as they are in the case law, the *Advisory Guidelines* can thus be understood as a tool for advancing the pursuit of substantive economic gender equality that animates the Supreme Court's models of spousal support. The *Advisory Guidelines* are express about encompassing the compensatory and non-compensatory models set out in *Moge* and *Bracklow*, respectively.[102] It follows that they are implicitly rooted in a relational approach to marriage and spousal support.[103] Indeed, the *Advisory Guidelines* refer to the concept of "merger over time," which, according to the authors, "captures both compensatory and non-compensatory spousal support objectives that have been

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[102] See *Advisory Guidelines*, *supra* note 1 at 6ff (1.2. "Judicial Interpretation").

[103] On the connection between the Supreme Court's models of spousal support and the relational approach to marriage and divorce, see Chapter 1 of this thesis.

recognized by our law since *Moge* and *Bracklow*."[104] Further, the *Advisory Guidelines* ground their use of this principle in Justice L'Heureux-Dubé's statement in *Moge*: "As marriage should be regarded as a joint endeavour, the longer the relationship endures, the closer the economic union…"[105] Accordingly, the results that flow from the application of the *Advisory Guidelines* formulas "[mirror] what we find in the current law — lengthy marriages involving economic dependency give rise to significant spousal support obligations without regard to the source of the dependency."[106]

The *Advisory Guidelines* thus incorporate the relational principle that autonomy is exercised through relationships, and that identities and dependencies are formed not by individual, or solitary actions, but through relationships.[107] They do so by recognizing that continuing economic obligations do not arise from individual decisions taken during a relationship, but from the relationship itself. As the determination of a continuing support obligation depends on the dynamics of each relationship, the *Advisory Guidelines*, by incorporating that relational reasoning, help to ensure not that spousal support law *treats* spouses equally — that is, in direct proportion to their monetary contributions during the relationship — but instead, that they *experience* the granting of support in genuinely equal ways, and in ways that reflect the intangible losses and gains stemming from the relationship.

Moreover, as touched on earlier, despite their unofficial status, the creation of the *Advisory Guidelines* was similar to governmental policy making. Indeed, where

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[104] *Advisory Guidelines*, *supra* note 1 at viii. See also *Advisory Guidelines*, *supra* note 1 at 53 (7.2 "Merger over Time and Existing Theories of Spousal Support").
[105] *Moge*, *supra* note 61 at 870, cited in *ibid* at 54.
[106] *Advisory Guidelines*, *supra* note 1 at 56.
[107] See Nedelsky, *supra* note 46.

politicians and government bureaucrats make policy, they typically rely on the advice of experts.[108] "This typically involves both official and unofficial sources of advice and … in many countries … a healthy policy-research community outside of government can play a vital role in enriching public understanding and debate of policy issues…."[109] Government, in other words, sits "at the center of a complex web of policy advisors or a 'policy advisory system' which includes both 'traditional' advisors in government as well as non-governmental actors in NGOs, think tanks and other similar organizations, and less formal or professional forms of advice from colleagues, friends and relatives and members of the public…."[110] From the perspective of instrument choice, then, it makes sense to understand these non-binding rules as a regulatory tool, aimed at influencing policy and the behaviour of legal actors.

2.2. Reception and Use of the *Advisory Guidelines*

The unofficial nature of the *Advisory Guidelines* has not precluded them bringing about a clear practice in Canadian family law: while the degree to which the courts defer to them varies provincially, these non-binding guidelines have become the central tool in determining spousal support and an essential element of the practice of family law.[111] Judicial reception of the *Advisory Guidelines* was not only fast, but also largely positive. Among appellate courts, the British Columbia Court of Appeal was first to endorse them, in a decision released eight months after their draft publication in 2005.[112] Justice Prowse stressed the advisory nature of the *Advisory Guidelines* and endorsed them as an

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[108] See Howlett, "Old to New", *supra* note 15 at 195.
[109] *Ibid* [references omitted].
[110] *Ibid* [references omitted].
[111] Scott Booth, "The Spousal Support Advisory Guidelines: Avoiding Errors and Unsophisticated Use" (2009) 28:3 Can Fam L Q 339.
[112] See *Yemchuk v Yemchuk*, 2005 BCCA 406, 257 DLR (4th) 476.

appropriate reflection of the law, analogous to authority, which may be properly considered as part of the parties' submissions.[113]

Less than one year later, the same court issued a more robust endorsement. It held that when argued by the parties, judges should explain a decision not to award support within the range set out by the *Advisory Guidelines* and that the failure to do so was an error meriting appellate intervention.[114] In doing so, the Court of Appeal had to distance itself the from Supreme Court of Canada's warning about the high threshold for appellate intervention in discretionary support determinations. As seen, in *Hickey*, the Court stated that in the absence of a serious error of law or fact, an appeal court "is not entitled to overturn a support order simply because it would have made a different decision or balanced the factors differently."[115] As the *Advisory Guidelines* did not exist when the Supreme Court issued that warning, the British Columbia Court of Appeal felt justified in departing from the Supreme Court's strict threshold for intervention. It thus established the ranges contained in the *Advisory Guidelines* as the new standard for appellate review of support determinations in that province.[116]

Some provinces followed British Columbia's example. The Ontario Court of Appeal approved of the *Advisory Guidelines*' use as a "cross-check" or "starting point" for support and for their assistance in informing the appellate standard of review.[117] Because they are analogous to authority, a trial judge's decision to depart from the *Advisory Guidelines* should be explained, as would a departure, by way of distinguishing,

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[113] *Ibid* paras 62, 64.
[114] *Redpath v Redpath*, 2006 BCCA 338, 33 RFL (6th) 91 [*Redpath*].
[115] *Supra* note 70 at para 12.
[116] *Redpath*, *supra* note 114 at para 42.
[117] *Fisher v Fisher*, 2008 ONCA 11, 288 DLR (4th) 513 at paras 100, 102-103 [*Fisher*].

from an applicable precedent.[118] New Brunswick was equally enthusiastic. Its Court of Appeal adopted a similar approach as Ontario, expressing a clear preference for reliance on the *Advisory Guidelines* by trial judges.[119]

Other jurisdictions were more tepid in their responses. Judges in Alberta, as in British Columbia and Ontario, have agreed that the *Advisory Guidelines* are a useful tool, but have been careful to emphasize their advisory nature. In 2008, the Alberta Court of Appeal stated that the failure to refer to them does not, in itself, constitute a reviewable error.[120] More recently, a unanimous bench wrote: "They are a useful tool … [but] do not and should not truly fetter a trial judge's discretion."[121] Trial judges in Alberta also readily acknowledge that the *Advisory Guidelines* do not carry the same force as in neighbouring British Columbia.[122] Still, orders falling within the ranges produced by their formulas have been upheld as reasonable.[123]

Early decisions from Saskatchewan's Court of Queen's Bench, a trial court, also highlighted the non-binding nature of the *Advisory Guidelines*.[124] More recently, however, that province's Court of Appeal, acknowledging that it was one of the last Canadian appellate courts to pronounce on the *Advisory Guidelines*, recognized their growing importance and impact in Saskatchewan, where "it is a rare case where they are

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[118] *Ibid* at para 103.
[119] See e.g. *Carrier v Carri*er, 2007 NBCA 23, 281 DLR (4th) 740 [*Carrier*]. See also *SC v JC*, 2006 NBCA 46, 27 RFL (6th) 19; *Smith v Smith*, 2011 NBCA 66.
[120] See e.g. *Taylor v Taylor*, 2009 ABCA 354, 312 DLR (4th) 448; See also *Sawatzky v Sawatzky*, 2008 ABCA 355, 302 DLR (4th) 516.
[121] *Neighbour v Neighbour*, 2014 ABCA 62 at para 15, citing *ibid* at para 16.
[122] See *RMQ v JAQ*, 2015 ABQB 392.
[123] See *De Winter v De Winter*, 2013 ABCA 311, [2013] AJ No 972.
[124] See *Maier v Maier*, 2009 SKQB 359, 75 RFL (6th) 152.

not cited for one reason or another."[125] Thus, while the Supreme Court's limits to appellate intervention still apply, the regular use of the *Advisory Guidelines* continues to "influence judicial thinking about what is a clearly wrong award."[126] Accordingly, a judge's unexplained failure to apply them when they are invoked and argued by the parties may merit appellate intervention.

Not all jurisdictions have demonstrated the same openness to the *Advisory Guidelines*. The Nova Scotia Court of Appeal, for example, has refused to intervene where a trial judge did not apply them.[127] Generally speaking, that province has not embraced them with the same enthusiasm as those already discussed. The Quebec judiciary has also been hesitant to rely on them.[128] But as the *Advisory Guidelines* age, they continue to take hold and are increasingly considered by trial judges in provinces slower to adopt them.[129]

The *Advisory Guidelines* have been described by one of their co-authors as a "largely successful policy initiative,"[130] and their acceptance among the judicial and general legal community bears this out. Despite their success, however, the authors of the *Advisory Guidelines* do not deny the existence of some continuing concerns surrounding their use.[131] These are related to the mixed reactions with which the *Advisory Guidelines*

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[125] *Linn v Frank*, 2014 SKCA 87, [2014] SJ No 458 at para 80.
[126] *Ibid* at para 88.
[127] See *Strecko v Strecko*, 2014 NSCA 66, [2014] NSJ No 313; *MacDonald v MacDonald*, 2017 NSCA 18.
[128] Chapter 3 deals with judicial attitudes toward the *Advisory Guidelines* in Quebec.
[129] See e.g. *Morrison v Morrison*, 2015 NSSC 328; *MacPherson v MacPherson*, 2015 NSSC 294; *Thorlakson v Thorlakson*, 2016 ABQB 52; *Pickett v Walsh*, 2016 ABQB 222.
[130] Rogerson, "Turn to Guidelines", *supra* note 75 at 159.
[131] In addition to the concerns listed in the text, the authors of the *Advisory Guidelines* document problems of "unsophisticated use" — that is, "a tendency among lawyers and judges to turn the SSAG into default rules, to ignore the exceptions and choose the midpoint of the ranges by default." See Rogerson, "Access to Justice", *supra* note 75 at 66. In response to demonstrated misuse, the authors have published two "User

were first met. When they were first published, legal actors expressed concerns about their legitimacy as a non-legislated tool aimed at regulating social life, and about the idea of "applying 'cookie cutter' justice to complex, fact-specific issues."[132] With respect to the concern about the legitimacy of intense reliance on a non-legislated instrument, not only by parties to a divorce, but by a significant portion of the country's judiciary, more will be said in the final chapter of this thesis. The latter question, of the suitability of "average justice" at the cost of tailor-made solutions, is the focus of the following part.

3. Individualized and Average Justice: Discretion and Rules in Spousal Support

This part examines the use of broad discretion, on the one hand, and bright-line rules, on the other, specifically with an eye to the granting of spousal support. The examination informs the suggestion that neither a broad grant of judicial discretion, nor a set of pre-established and inflexible rules, provides the optimal means of shaping decisions about spousal support. Rather, what is needed is an instrument that combines the traditional approaches, as the *Advisory Guidelines* do. While legal scholars have debated the relative merits of discretion and rules in regulating social life, few have examined specific instruments of family law or read the literature on discretion and rules with a specific regulatory instrument in mind. By drawing on instrument choice and

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Guides" for judges and practitioners. See Family, Children and Youth Section, Department of Justice, *The Spousal Support Advisory Guidelines: A New and Improved User's Guide to the Final Version* by Carol Rogerson & Rollie Thompson (Ottawa: Department of Justice, Canada, 2010), online: <http://www.justice.gc.ca/eng/rp-pr/fl-lf/spousal-epoux/spag/index.html>; Family, Children and Youth Section, Department of Justice, *Spousal Support Advisory Guidelines: The Revised User's Guide* (Ottawa: Department of Justice, Canada, 2016), online: <http://www.justice.gc.ca/eng/rp-pr/fl-lf/spousal-epoux/ug_a1-gu_a1/pdf/ug_a1-gu_a1.pdf > [*SSAG Revised User's Guide*, 2016].

[132] Rogerson, "Turn to Guidelines", *supra* note 75 at 162.

regulatory theory with a view to applying that theory to the *Advisory Guidelines*, this part attempts to fill that void.

Family law is not alone in grappling with this issue; the "unremitting struggle between rules and discretion" is part of law's story.[133] Indeed, "[discretion] is all-pervasive in legal systems."[134] But the tension between the two approaches might be "more pronounced and more troubling" in family law,[135] as evidenced by the ongoing shift from discretion to rules. At the same time, the comparison between the merits of discretion and binding rules should not be taken as representing the idea that there is some sort of marked divide between the two approaches. Rules and discretion exist on a continuum or spectrum,[136] with intermediate points along the way,[137] and all kinds of possible hybrid combinations;[138] the two approaches "rarely appear in unadulterated form."[139] Rather, different legislative approaches offer different mixes of discretion and rules.[140] The change to the granting of spousal support brought about by the creation of the *Advisory Guidelines* offers a new and concrete platform from which to participate in the debate between discretion and rules.

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[133] Carl E Schneider, "The Tension Between Rules and Discretion in Family Law: A Report and Reflection" (1993) 27:2 Fam L Q 229 at 229 [Schneider, "Tension"].
[134] Hawkins, "Perspectives", *supra* note 22 at 11.
[135] *Ibid*.
[136] See John Dewar, "Reducing Discretion in Family Law" (1997) 11 Austl J Fam L 309 at 313 [Dewar, "Reducing Discretion"]. See also Leckey, "Judicial Guidance", *supra* note 14 at 384; Sunstein, "Rules", *supra* note 23 at 961.
[137] Dewar, "Reducing Discretion", *supra* note 136 at 313.
[138] Sullivan, *supra* note 17 at 61.
[139] Schneider, "A Lawyer's View", *supra* note 16 at 49.
[140] *Ibid*.

3.1. Spousal Support as Judicial Discretion

This section argues that the traditional approach to determining spousal support— a broad grant of judicial discretion — is ill-suited to the task. Set against the above-described context of the creation of the *Advisory Guidelines*, the inquiry into their success as a regulatory instrument is premised on the idea that the uncertainty around spousal support understandably gave rise to perceptions of illegitimacy and unfairness. Critiques of spousal support prior to the creation of the *Advisory Guidelines* were grounded in concerns about its legitimacy.[141] It is thus not surprising that the government would have "[resorted] to the use of procedural instruments as a means of altering network configurations in order to construct or regain legitimacy."[142] Before positing that the chosen "alteration" constitutes an instrument choice success, it is worth looking closely at the situation that led to that choice — that is, at why broad discretion is inappropriate for the granting of spousal support.

The push for the *Advisory Guidelines* was motivated primarily by the discretionary, and therefore unpredictable, nature of spousal support determinations. In creating the statutory grant of judicial discretion, the *Divorce Act* provides factors and objectives that judges might look to in arriving at an award, the idea being that awards will strive to reflect and realize the underlying policy considerations that ground the law of spousal support. Importantly, while the factors for consideration are prescriptive,[143] the objectives of a spousal support order are not, the decision falling to the individual

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[141] See Rogerson, "Post-Bracklow", *supra* note 62.
[142] Howlett, "What is a Policy Instrument?", *supra* note 56 at 44.
[143] *Divorce Act*, *supra* note 12, s 15.2(4) ("In making an order … the court shall take into consideration the condition, means, needs and other circumstances of each spouse…") [emphasis added].

judge.[144] Thus, while the judicial discretion that is the focus of this thesis is grounded in existing standards — both statutory and jurisprudential — the critiques of broad discretion are nevertheless rooted in the perceived "rulelessness" that characterized spousal support prior to the creation of the *Advisory Guidelines*.[145]

In developing the Canadian law of spousal support, courts have not shied away from the responsibility placed on them by government. Indeed, the Supreme Court has gone to some length to explain why the broad grant of discretion in spousal support is appropriate. In *Hickey*, the Court explained the requirement that judges decide support claims "based on certain objectives, values, factors, and criteria" as involving a genuine "appreciation of the particular facts of the case."[146] The unique and specific nature of every family situation means that it is up to the individual trial judge to balance the objectives and factors set out in the legislation with the unique facts before her. The individualized nature of spousal support claims, and the "many economic variables" involved in a spousal support determination, [147] mean that non-discretionary determinations — that is, awards based on formulas or rules — might fail to grasp and accommodate the nuances and difference between each case. There is, in short, "no standard family."[148]

What the Court described was the impossibility of coming up with suitably generalizable rules, given the unique nature of families. This kind of "rule-failure

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[144] *Ibid*, s 15.2(6) ("An order made … that provides for the support of a spouse should…" [emphasis added].
[145] See DA Rollie Thompson, "Rules and Rulelessness in Family Law: Recent Developments, Judicial and Legislative" (2000) 18 Can Fam LQ 25.
[146] *Hickey*, *supra* note 70 at para 10.
[147] *Moge*, *supra* note 61 at 872.
[148] See Katharine K Baker, "Homogenous Rules for Heterogeneous Families: The Standardization of Family Law When There is No Standard Family" (2012) 2012:2 U Ill L Rev 319.

discretion" exists where "it is believed that cases will arise in circumstances so varied, so complex, and so unpredictable that satisfactory rules that will accurately guide decision-makers to correct results in a sufficiently large number of cases cannot be written."[149] Other features of family law also contribute to the failure of rules, making it fertile ground for the exercise of judicial discretion. Family law cases deal with people and not with acts.[150] As individuals with unique stories, people cannot be generalized to fit within the ambit of a pre-determined rule.[151] Moreover, whereas typical civil disputes focus on discrete acts, financial distribution upon family breakdown requires "an assessment of contributions over the course of an entire marriage."[152]

Family law decisions are also prospective. Unlike the past, which is "susceptible of fairly definite analysis," assessments for the future are "inherently uncertain and speculative."[153] Uncertainty and speculation are not conducive to the application of general rules or formulas. Moreover, generalized rules fail to capture the numerous interrelated issues that often characterize family law disputes, each of which affects the other.[154] Where spousal support is concerned, the existence of a concurrent child support obligation, for example, will necessarily impact a court's decision, even in the absence of rules or guidelines.[155] The "polycentric" nature of the issues might be understood as a

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[149] Schneider, "A Lawyer's View", *supra* note 16 at 62.
[150] Bala, "Judicial Discretion", *supra* note 65 at 28.
[151] See Schauer, *supra* note 26.
[152] Bala, "Judicial Discretion", *supra* note 65 at 28.
[153] *Ibid*.
[154] *Ibid*.
[155] While a child support obligation will necessarily affect a spousal support award under the *Advisory Guidelines*, the same is true in the absence of guidelines. Because spousal support is a residual obligation, the last of the economic consequences of family breakdown to be addressed, a child support obligation will affect the evaluation of a payor spouse's ability to pay spousal support. See *Divorce Act*, *supra* note 12, s 15.3 on the residual nature of spousal support. Other issues, such as custody, will also affect spousal

spider web — "a pull on one strand will distribute the tensions after a complicated pattern throughout the web as a whole."[156] Complex and multifaceted in nature, issues related to economic distribution between spouses cannot be decided in binary terms.[157] Whereas rules typically mandate a binary choice — for example, whether or not a spouse is entitled to reside in the family home — discretion is flexible, enabling decision-makers to adapt their reasoning to the changing circumstances before them.[158]

As seen, however, judicial discretion in determining awards can have devastating consequences on spousal support claimants. In the absence of standards to guide them, judges will necessarily seek solutions elsewhere. Indeed, judges have been known to look inward, at their own "personal values, attitudes, experiences and assumptions about reality…."[159] The result is a seemingly arbitrary and uncertain family justice system,[160] where decisions are based on "the personal beliefs and biases of [their authors] toward the marriage relation, divorce, and alimony itself."[161] Judges awarding support will look outward as well, beyond the dictates of the law. In this way, the discretionary nature of

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support; where a custodial parent's ability to work is affected by childcare responsibilities, her need will be higher in order to maintain the marital standard of living for the children.

[156] Bala, "Judicial Discretion", *supra* note 65 at 29, citing Lon L Fuller, "The Forms and Limits of Adjudication" (1978) 92:2 Harv L Rev 353 at 395.

[157] Baldwin & Hawkins, *supra* note 34 at 586.

[158] See Sullivan, *supra* note 17 at 66.

[159] Bala, "Judicial Discretion", *supra* note 65 at 31.

[160] *Ibid*.

[161] Edward W Cooey, "The Exercise of Judicial Discretion in the Award of Alimony" (1939) 6:2 Law & Contemp Probs 213 at 217. Note that Cooey's observations about judicial discretion in family law are no less relevant today than at the time of publication; since publication, his writing on discretion has been cited with regularity on this point. See e.g. Robert H Mnookin & Lewis Kornhauser, "Bargaining in the Shadow of the Law: The Case of Divorce" (1979) 88:5 Yale LJ 950; R Abella, "Economic Adjustment On Marriage Breakdown: Support" (1981) 4:1 Fam L Rev 1; Mary Jane Connell, "Property Division and Alimony Awards: A Survey of Statutory Limitations on Judicial Discretion" Note, (1981) 50:3 Fordham L Rev 415; Bala, "Judicial Discretion", *supra* note 65; Rosanna Langer, "Post Marital Support Discourse, Discretion, and Male Dominance" (1994) 12:1 Can J Fam L 67; Alberta, Alberta Law Reform Institute, *Family Law Project: Spousal Support*, Report for Discussion No 18.2 (1998).

spousal support determinations can reinforce dominant societal beliefs, such as liberalism's emphasis on individualism and self-sufficiency, to the detriment of many women.[162] As seen elsewhere in this thesis, the values of liberalism have not secured favourable results for Canadian women made economically vulnerable by family breakdown. Internationally, it is well documented "that the heavily discretionary regime of financial adjustment accompanying no-fault divorce laws is inadequate to the task of protecting women's economic investments in marriage."[163]

Discretion is an indispensible component of the justice system. Nevertheless, "[p]erhaps nine-tenths of injustice in our legal system flows from discretion…."[164] Family law, and spousal support in particular, has not been immune from that injustice, as the broad grant of judicial discretion means that the outcome of litigation is completely unpredictable: in a discretionary regime like that set out in the *Divorce Act*, lawyers cannot advise their clients as to the best course of action and are forced to tell them that their claims will depend on the "luck of the draw."[165] The effect of this unpredictability is higher costs for litigants, who are, in some cases, encouraged by the unpredictable nature of the law to take their chances in court.[166] Thus, the unpredictability and inconsistency of spousal support awards renders the process arbitrary and has the effect of

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[162] Langer, *supra* note 161.
[163] John Dewar, "Families" in Peter Cane & Mark Tushnet (eds), *The Oxford Handbook of Legal Studies* (Oxford, Oxford University Press, 2003) 413 at 416, citing Ira Mark Ellman, "The Theory of Alimony" (1989) 77:1 Cal L Rev 1. [Dewar, "Families"].
[164] Kenneth Culp Davis, *Discretionary Justice: A Preliminary Inquiry* (Baton Rouge: Louisiana State University Press, 1969) at 25 [Davis, *Discretionary Justice*]. Note that while Davis was referring to the exercise of administrative (as distinct from judicial) discretion in the American context, many of his observations also describe the consequences of the broad exercise of judicial discretion in the Canadian law of spousal support.
[165] Bala, "Judicial Discretion", *supra* note 65 at 34.
[166] See *ibid* at 33.

"[undermining] the faith of litigants in the legal system."[167] If we accept that the legitimacy of a legal system depends on its acceptance by its users,[168] a seemingly arbitrary law of spousal support based on the varied and conflicting views of trial judges, threatens to weaken the legitimacy of Canada's family justice system. Moreover, where other areas of law grant broad discretion to trial judges, the resulting disparity of results has been described as "a disgrace to the legal system."[169]

This inquiry into its drawbacks suggests that a broad grant of judicial discretion may be ill-suited to determining spousal support awards. Given what looks like a clear absence of legitimacy — where legitimacy is measured by public support and the ability to trust in the legal system — it is unsurprising that the government turned to procedural reforms, by commissioning the creation of the *Advisory Guidelines*.[170] In order to understand their success, it is useful to look at why a less flexible approach — the use of bright-line rules — would also not have been the optimal choice.

3.2. Spousal Support as Bright-Line Rules

As with their counterpart, discretion, there are benefits to the use of inflexible rules in determining spousal support awards. On balance, however, the disadvantages of completely eliminating judicial discretion outweigh the positive features of this approach. Just as the broad exercise of discretion is unsuited to awarding spousal support, bright-lines rules, from which judges may not depart, are a poor choice of governing instrument.

Bright-line rules are not all bad; they mitigate some of the inconsistency associated with discretion, and the consequent sense of injustice that flows from the "luck

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[167] *Ibid*.
[168] See Tyler, *supra* note 87 and accompanying text.
[169] Davis, *Discretionary Justice*, *supra* note 164 at 133.
[170] See Howlett, "What is a Policy Instrument?", *supra* note 56 at 44.

of draw" associated with discretion. That rules enable people to plan might alleviate some of the perceived arbitrariness that results from the disparate treatment of similar cases of family breakdown.[171]

In the context of family law, the planning function of rules may be of little benefit at the beginning of, or during, a healthy marriage. Few couples expect their marriages to end in divorce and "many … would find it impractical and perhaps even wrong to shape their marital behaviour and their care for their children with an eye to gaining an advantage in divorce litigation."[172] Once they become involved in a legal dispute, however, "they will surely want to know [the law]."[173] Indeed, one of the principal benefits of rules governing the financial consequences of marriage breakdown is to provide parties with the tools required to negotiate private agreements rather than resort to litigation.[174] Thus, much of the optimism surrounding rules in family law, as compared with discretion, stems from the idea that comprehensible legal rules enable parties to bargain "in the *light* of the law — that is, with a full understanding of its objectives and likely results — rather than in its shadow."[175]

Productive negotiations require a consistent legal model, or framework, to guide parties' bargaining. Parties, in other words, need background rules to frame their negotiations. As seen elsewhere in this thesis, the second half of the last century saw the

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[171] See Rogerson & Thompson, "Canadian Experiment", *supra* note 59; Rogerson, "Post-Bracklow", *supra* note 62; Rogerson, "Background Paper", *supra* note 63; Bala, "Judicial Discretion", *supra* note 65.
[172] Schneider, "A Lawyer's View", *supra* note 16 at 76.
[173] *Ibid*.
[174] See Rogerson, "Access to Justice", *supra* note 75 at 66, n 58.
[175] John Dewar, "Can the Centre hold? Reflections on Two Decades of Family Law Reform in Australia" (2010) 22:4 Child & Family LQ 377 at 385. See also Mnookin & Kornhauser, *supra* note 161 (on the idea that in the absence of rules, parties are left to negotiate against "a bargaining backdrop clouded by uncertainty" at 969).

grounds for divorce broadened from fault-based to no-fault,[176] what some refer to as the "no-fault revolution."[177] Under the fault-based regime, spouses engaged in private negotiations with respect to the economic consequences of family breakdown had a bargaining chip in the form of spousal guilt or innocence: proof of guilt, for example, could be traded for better terms in a spousal support or property settlement.[178] The no-fault reforms, according to which proof of marital misconduct is no longer required to obtain a divorce, had the effect of eliminating that bargaining chip.[179] Parties to a divorce, in the absence of principles to guide financial negotiations, must bargain in the dark. But for spouses attempting to reduce the costs of family breakdown by settling their affairs outside of court, private ordering, coupled with broad discretion in the applicable law, is "[t]he worst of all worlds."[180]

Instrument choice theory posits that the behavioural sciences, such as negotiation theory, are useful in determining the choice of instrument.[181] One of the principal tenets of negotiation theory is that the governing law necessarily affects private ordering.[182] Even where parties negotiate outside of the courtroom, "the influence of the courts is pervasive."[183] Empirical studies in the United States confirm that parties are clearly

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[176] See Nicholas Bala, "The History & Future of Marriage in Canada" (2005) 4:1 JL & Equality 20. For a more in-depth review of the evolution of Canadian divorce law, see Chapter 1 of this thesis.
[177] See e.g. Ellman, "Toward Rules and Guidelines", *supra* note 74 at 804.
[178] *Ibid*.
[179] *Ibid*.
[180] Patrick Parkinson, "The Challenge of Affordable Family Law" (2014) Sydney Law School Legal Studies Research Paper No 14/78, cited in Rogerson, "Access to Justice", *supra* note 75.
[181] See Wiener & Richman, *supra* note 2.
[182] See Mnookin & Kornhauser, *supra* note 161; Marigold S Melli, Harold S Erlanger & Elizabeth Chambliss, "The Process of Negotiation: An Exploratory Investigation in the Context of No-Fault Divorce" (1988) 40:4 Rutgers L Rev 1133; Craig Martin, "Unequal Shadows: Negotiation Theory and Spousal Support Under Canadian Divorce Law" (1998) 56:1 UT Fac L Rev 135.
[183] Melli, Erlanger & Chambliss, *supra* note 182 at 1143.

influenced by their lawyers' predictions of how the court would decide their issue,[184] the idea being that people will not agree to less than what they would get by going to court.[185] The law thus functions as a baseline, or point of comparison, for negotiations.[186]

Where bargaining is clouded by a backdrop of uncertainty,[187] however, support claimants — typically women — are disadvantaged in negotiations.[188] Indeed, negotiation theory's concepts of reference points and norms suggest that in the absence of a fixed legal framework, support claimants become more loss-averse in negotiations than their spouses, and therefore more risk-averse and more likely to make concessions in bargaining.[189] In other words, the vagueness of discretionary standards creates inequality of bargaining power, placing the support claimant in the weaker position.[190] In the context of the private ordering of the financial consequences of divorce, rules can thus be seen as promoting equality. Adopting instrument choice's emphasis on context, the background to the creation of the *Advisory Guidelines* suggests that the ability to rely on fixed rules provides a compelling case for the creation of rules to guide spousal support determinations.

Rules are also useful from a practical perspective. In the context of determining spousal support, they remove the onus on the claimant to advance budgets detailing her

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[184] *Ibid* at 1144.
[185] See Mnookin & Kornhauser, *supra* note 161 at 969; Martin, *supra* note 182 (the "best alternative to a negotiated agreement" at 144).
[186] See Isabelle Sayn, "Les barèmes dans le fonctionnement du droit et de la justice" in Isabelle Sayn, ed, *Le droit mis en barèmes?* (Paris: Dalloz, 2014) 1 at 9.
[187] See Mnookin & Kornhauser, *supra* note 161 at 969.
[188] See Martin, *supra* note 182 at 138. See also Ellman, "Toward Rules and Guidelines", *supra* note 74 (on the "highly entrenched" nature of domestic roles at the close of the last century and the higher likelihood that women will be claimants of financial remedies upon family breakdown at 804).
[189] See Martin, *supra* note 182.
[190] *Ibid* at 139.

need,[191] which can be costly and time-consuming. Where expert evidence is required to demonstrate economic loss, costs might be prohibitive.[192] But the benefits of rules are not only technical. In an important sense, rules are beneficial because they exert normative influence on social life. Indeed, their normative content is inherent in the concept of rules as behavioural guides.[193] For some, the "symbolic or expressive content" of a rule is more important than its actual effects.[194] Thus, debates about regulation, and regulatory choices, are often about the social meaning of the law, rather than its specific content.[195] In controversial areas of social life, rules might function more as legal "'statements' … designed to control social norms" than as controls on behaviour.[196] Family law, imbued with personal values, is a particularly contested area of law. It is thus not surprising that it "increasingly performs an expressive function, designed to influence behaviour…."[197] In the spousal support example, the effects of the content of rules on social and cultural perspectives about how to approach economic dependency might be as important as whether the rules result in real economic equality for divorcing spouses. What is significant is that the existence of rules, public as they are, can serve social purposes that the private nature of discretion cannot.[198]

Examined from the perspective of spousal support, there are clear advantages to the use of bright-line rules to determine awards. But, like judicial discretion, rules are

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[191] See Rogerson, "Access to Justice", *supra* note 75 at 57 (referring specifically to the *Child Support Guidelines*, but also applicable to the *Advisory Guidelines*).
[192] See *Moge*, *supra* note 61 at 871-872.
[193] See Schauer, *supra* note 26 at 2.
[194] Sunstein, "Expressive Function", *supra* note 36 at 2023.
[195] *Ibid*.
[196] *Ibid* at 2024-2025.
[197] Dewar, "Chaos", *supra* note 36 at 483. See also Leckey, "Judicial Guidance", *supra* note 14.
[198] Schneider, "A Lawyer's View", *supra* note 16 at 77.

also open to significant criticism. Chief among those criticisms is the fact that they are built on crude and probabilistic generalizations.[199] Indeed, as exceptions to the rule are always imaginable, rules necessarily capture situations not indicated by their justifications.[200] Accordingly, "the most precise of rules is potentially imprecise."[201] Moreover, in the case of exceptions — that is, where a rule's underlying generalizations do not apply — rules may give rise to injustice. Bright-line rules, in other words, will necessarily lead to "some number of wrong results" — that is, results other than those dictated by the rationale supporting the rule.[202] If the goal of rules in spousal support is to decrease both real and perceived injustices, bright-line rules might not be the best approach.

The static nature of rules also makes them particularly ill-suited to family law. Because they are unchanging, rules that may have once applied to situations indicated by their justifications often become unsuited to changing contexts. They may "offer predictability," but they do so "by diminishing their capacity to adapt to a changing future."[203] This is the flip side of the argument from reliance, outlined above; the rigidity of rules inhibits the doctrinal flexibility typically demonstrated by judges exercising discretion.[204] The ill-suited nature of established rules to novel situations is particularly problematic in family law, often characterized as an area of law in constant evolution, dealing as it does with evolving demographics and changing family forms.[205] Indeed, the

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[199] See Schauer, *supra* note 26 at ch 2.
[200] *Ibid* at 34-35.
[201] *Ibid* at 35.
[202] *Ibid* at 135.
[203] *Ibid* at 140.
[204] See Schneider, "A Lawyer's View", *supra* note 16 at 56.
[205] See Baker, *supra* note 148.

complexity of contemporary society is one of the key reasons that legal systems rely heavily on discretionary grants.[206] It is also the reason that creating rules in family law is especially difficult.

Promoting bright-line rules as a cure to the arbitrary nature of the exercise of discretion in individual family law cases ignores that the power to make rules involves the same kind of personalized choices, as does the nature of the rules itself. Rules, then, do not necessarily lead to greater substantive justice.[207] Indeed, Carl Schneider makes this point especially clear when he writes that a bad rule, applied uniformly, "can do more harm than a single bad judge."[208] As bright-line rules share discretion's potential to produce injustice, they do not provide an easy fix to the problems of the discretionary awarding of spousal support and, accordingly, would not restore the credibility of the support obligation. Rather than restoring legitimacy, the defects of both rules and discretion "dilute [their] advantages and … drive us toward some mix of rules and discretion."[209] The *Advisory Guidelines* constitute that kind of mix. What remains is the question of how and why the *Advisory Guidelines*, by combining the two approaches, might help to restore some legitimacy to the law of spousal support — the absence of which provoked their creation. It is to that matter that the following part now turns.

4. The Legitimizing Function of the Space Between Discretion and Rules

This part draws on instrument choice and regulatory theory to argue that the *Advisory Guidelines* are an appropriate choice of instrument for determining spousal support awards. A blend of rules and discretion, the *Advisory Guidelines* represent a

[206] Hawkins, "Perspectives", *supra* note 22 at 12.
[207] Baldwin & Hawkins, *supra* note 34 at 586.
[208] Schneider, "Tension", *supra* note 133 at 241.
[209] Schneider, "A Lawyer's View", *supra* note 16 at 79.

compromise between the two regulatory approaches. While they may not be a perfect solution to the difficult exercise of determining spousal support in a context of doctrinal uncertainty and contradiction, they may nevertheless mitigate some of the demonstrated challenges with the broad statutory grant of discretion while avoiding some of the problems associated with the inflexibility of bright-line rules. By drawing on the merits of both discretion and rules, the *Advisory Guidelines* have the potential to restore some legitimacy to the law of spousal support, evidenced by their acceptance among legal actors. Their legitimizing function alone makes the *Advisory Guidelines* a worthwhile object of study. But that success does not end the inquiry into the choice of family law instrument. The *Advisory Guidelines* are one example of a regulatory approach, in an area where "the question of which technique is best is yet to be settled."[210] Understanding how they function as a valuable tool is thus just one step in "the continuing search for the third way between discretion and rules, [which is] a key feature of modern family law."[211]

As explained, the *Advisory Guidelines* are not rules in the traditional sense. They are neither legislated nor binding, they are not applicable in every case and judges may, in principle, choose whether or not to rely on their contents.[212] But insofar as they contain established formulas for reaching a range of appropriate results, the *Advisory Guidelines* can be likened to the concept of instructive rules, as distinguished from their regulative

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[210] Dewar, "Families", *supra* note 163 at 418.
[211] *Ibid* [references omitted].
[212] This is less true in jurisdictions where the contents of the *Advisory Guidelines* inform the standard of appellate review. See *Redpath*, *supra* note 114; *Fisher*, *supra* note 117; *Carrier*, *supra* note 119. As this part argues, however, even in jurisdictions where appellate courts have not endorsed the *Advisory Guidelines*, their existence alone exerts legitimizing force, as judges in all jurisdictions should justify both their application of the formulas and their decisions to depart from them.

counterparts.[213] Both prescriptive in nature, in that they "contain normative content … used to guide the behaviour of decision-makers,"[214] instructions differ from mandatory rules because they are optional.[215] Their force is thus "congruent with [the decision-maker's] assessment of the likelihood they will produce the desired result."[216] Where application of the *Advisory Guidelines* does not give rise to what the judge perceives as a just result in the circumstances, she is free to depart from them. The *Advisory Guidelines*, by "providing useful guides for the routine case, but not taken by even those … who accept them to exert any normative pressure,"[217] are thus best understood as rules of thumb for determining spousal support, the normative force of which, depends on their value in a particular case.

Understanding the *Advisory Guidelines* as an instructive rule helps explain their regular use by judges, as does the difficult nature of the questions they are used to determine. In economically and legally complex areas of life, such as the financial consequences of marriage breakdown, non-binding rules backed by binding principles are said to provide greater certainty than inflexible rules, which, as seen, are still shaped by judicial discretion.[218] Prior to the creation of the *Advisory Guidelines*, the crux of the problem facing litigants, lawyers, and judges dealing with spousal support claims was the Court's failure to guide the concrete application of the competing theories of support, leading to fundamental disagreement about which principles should prevail in which

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[213] See Schauer, *supra* note 26 at 3.
[214] *Ibid* at 2.
[215] *Ibid* at 3-4.
[216] *Ibid* at 4.
[217] *Ibid*.
[218] See John Braithwaite, "Rues and Principles: A Theory of Legal Certainty" (2002) 27 Austl J Leg Philosophy 47.

kinds of cases. For these kinds of complicated matters, where neither rules nor discretion are suitable, a "judicious combination of rules and principles" might deliver optimal results.[219] A blend of discretion and rules, the *Advisory Guidelines* offer this precise combination.

The *Advisory Guidelines* are not of mandatory application. They do not, therefore, eliminate the need for judges to exercise discretion in awarding support. Rather, they function to structure judges' discretionary power — "to regularize it, organize it, produce order in it, so that … decisions affecting individual parties will achieve a higher quality of justice."[220] The *Advisory Guidelines* thus "control the manner of the exercise of discretionary power."[221] Whereas bright-line rules confine and limit — potentially eliminating germane considerations and focusing on the irrelevant — the *Advisory Guidelines*, by structuring discretion, specify what should be done within established limits,[222] as these limits have been set out by both Parliament and the Supreme Court.

As seen, the choice of instrument will never be a perfect one. But literature on rules and discretion suggests that while guidelines may not always achieve their desired substantive effects, there is nevertheless value in this kind of non-binding rule, or rule of thumb, the very existence of which may increase legitimacy and public trust in the justice system. It is in this sense that the *Advisory Guidelines* may be viewed as a regulatory success. Indeed, in identifying some of the changes to the practices around spousal support since their development, the authors of the *Advisory Guidelines* suggest that one observable effect has been "to provide a structure for the exercise of discretion in the

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[219] *Ibid* at 65.
[220] Davis, *Discretionary Justice*, *supra* note 164 at 97.
[221] *Ibid*.
[222] *Ibid*.

resolution of a support case, making decisions more logical and more transparent."[223] Scholarship on regulatory theory supports that contention.

In provinces where they have been endorsed by appellate courts, the *Advisory Guidelines* "[establish] a confidence level necessary for taking actions inconsistent with" their contents.[224] As a result, litigants are assured that where they are not awarded an amount within the established range, that decision is not the result of an arbitrary value judgment, but that it can be justified on the facts of the case. Likewise, because decisions premised on their contents — within or outside the ranges — are no longer perceived as arbitrary, the *Advisory Guidelines* should contribute to a greater acceptance of awards and an increased likelihood that payor spouses will respect support orders.[225] That ability to attract the support of the general population is a significant factor in designing regulatory tools,[226] and may help explain the enthusiasm with which a number of courts have embraced the *Advisory Guidelines*.

The success of the *Advisory Guidelines* thus lies, at least in some part, in their non-binding nature. That they draw on the benefits of both bright-line rules and judicial

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[223] Rogerson & Thompson, "Canadian Experiment", *supra* note 59 at 263.
[224] Schauer, *supra* note 26 at 108.
[225] See Cecile Bourreau-Dubois & Bruno Jeandidier, "Équité et barème de pension alimentaire pour enfants : une approche économique" in Sayn, ed, *supra* note 186, 26 at 28. Note that, to date, there is no empirical evidence on compliance with awards determined according to the *Advisory Guidelines* and that this is an area in need of further study. However, in the years following their increased use, the authors of the *Advisory Guidelines* have observed that reported decisions in jurisdictions where they are regularly used tend to deal with more "complex" questions — for example, where the payor spouse has custody of children. "Basic" cases, then, where "a higher-income payor pays child and spousal support to a lower-income parent with custody or primary care of the children" now occupy less of the courts' time, despite that "this is by far the most common custodial arrangement." In other words, there is some indication that straightforward determinations, which used to be frequently litigated, are no longer the principal focus of the courts. This might be viewed as a result of the legitimizing effect of the *Advisory Guidelines* and as a general indication that awards decided according to them are typically seen as acceptable by litigants. See *SSAG Revised User's Guide*, 2016, *supra* note 131 at 33; Rogerson, "Turn to Guidelines", *supra* note 75 at 162.
[226] Howlett, "What is a Policy Instrument?", *supra* note 56 at 41.

discretion, while avoiding some of the drawbacks of both, helps to confer legitimacy on decisions on that consider them. But there are further reasons that the *Advisory Guidelines* should remain a non-legislated instrument, along the continuum between rules and discretion. Spousal support is simply not conducive to rigid rules. Family law contains too many unique circumstances; it begs for individualized justice. Indeed, "[t]he law of support must address an almost infinite number of situations and life experiences."[227] The *Advisory Guidelines*, by leaving space for the exercise of discretion, accommodate family law's need for flexibility.

While this thesis is not a detailed exposition of the *Advisory Guidelines*, it is important, in order to come to a full understanding of their effectiveness, to note that their content is not limited to the two formulas described. In addition to structuring discretion through the creation of ranges for amount and duration of support, the *Advisory Guidelines* list a number of exceptions, lest the formulas result in unsuitably high or low awards. For example, the formulas should not apply in the presence of a payor income above $350,000 per year, where their application would create unreasonably high awards.[228] Likewise, because a shorter marriage without children would not typically give rise to a compensatory award, the formulas should be departed from where a disadvantaged spouse nevertheless has a claim to compensation following a short marriage. Examples include situations where a claimant spouse moved — and in doing so sacrificed her own career — to accommodate that of her spouse, or where she supported her spouse's education, only to have the relationship dissolve before enjoying the benefit

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[227] *Boston v Boston*, 2001 SCC 43, [2001] 2 SCR 413 at para 94.
[228] See *Advisory Guidelines*, *supra* note 1 at ch 11 "Ceilings and Floors".

of her contribution.[229] In situations such as these, while the formulas may be consulted, the *Advisory Guidelines* invite users to depart from them.

The presence of exceptions should function to further the legitimizing effects of the *Advisory Guidelines*. By structuring discretion as to whether or not the formulas should apply, the *Advisory Guidelines* give judges reasons to depart from their formulas. In doing so, they oblige judges to motivate such departures. Likewise, because they structure discretion when the formulas do apply — by creating ranges for awards instead of exact figures — the *Advisory Guidelines* require judges to provide reasons for selecting the amounts that they do. In this respect, the *Advisory Guidelines* maintain a valuable feature of discretion: the balancing and deliberation inherent in its exercise, as contrasted with the rote application of a mandated rule, mean that judicial discretion requires judges to "face up to [their] choices."[230] A judge, forced to rationally account for her decision, cannot point to a rule to absolve herself of responsibility for the outcome, making her more accountable, and responsible, for her decision.[231] The *Advisory Guidelines* then, by requiring judges to explain their choice of a particular point on the range of acceptable outcomes, as well the choice to depart from them completely, increase transparency and legitimacy, while leaving room for individualized decision-making in the uncertain and diverse world of the family.

The spousal support obligation is anchored in notions of rights and fairness between spouses following family breakdown. It is, in other words, a question of economic justice — a small part of the broader pursuit of substantive gender equality.

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[229] See *ibid* ch 12.5.
[230] See Sullivan, *supra* note 17 at 67.
[231] *Ibid*.

Without proper instruments to achieve them, however, theories of justice are little more than collections of "loosely defined elements and complicated standards."[232] Rather, it is the institutions and instruments they apply in pursuing these goals that become central in "the realization of a just society."[233] When conceptions of "the good" — of justice — are complex and vague, as they are with respect to spousal support and its competing justifications, instrument choice theory maintains that the means of deciding becomes paramount.[234] Indeed, "just societies are based not on the announcement of broad principles but on the design of real world institutional decision-making processes and the designation of which process will decide which issues."[235]

Prior to the creation of the *Advisory Guidelines*, spousal support law, and its application by the courts, did not appear conducive to promoting justice. The *Advisory Guidelines* may not be the best solution; as seen, they are one choice among alternatives. Their significance, however, lies in the fact that in the face of demonstrated injustice resulting from the combination of conceptual confusion and the broad exercise of judicial discretion, a viable solution appeared to lie in the choice of governing instrument, and not in substantive reforms to the law. By combining diverging regulatory approaches, they can be understood, in the context in which they were created, as restoring some legitimacy, in the form of public confidence and acceptance by relevant actors, to the spousal support regime. In this sense, it is not an exaggeration to characterize the *Advisory Guidelines* as an instrument choice success.

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[232] Komesar, *supra* note 7 at 41.
[233] *Ibid*.
[234] *Ibid*.
[235] *Ibid* at 48-49.

Conclusion

A unique approach to determining spousal support, the *Advisory Guidelines* enable the extension of instrument choice analysis to the regulation of the family. Thus, this chapter has adopted the lens of instrument choice, and drawn on regulatory theory, in order to uncover lessons underlying the success of non-binding rules in remedying some of the difficulties with the traditional discretionary approach to spousal support. For the instrument choice theorist, the *Advisory Guidelines* are one example of "experimentation with non-traditional means of policy implementation."[236] Moreover, whereas scholars regularly address the changing character of economic regulation, family law has taken a backseat in discussions of regulatory approaches. This chapter's analysis attempts to fill that gap by viewing the *Advisory Guidelines* as part of a governance trend characterized by the "weakening of the centrality of the state as an author of policy," where "top-down formulation and implementation processes [are] dominated by government," and being replaced by "more 'bottom-up'" regulatory approaches.[237] It thus expands the reach of instrument choice as a means of illustrating the importance of the choice of tool employed to achieve particular substantive goals.

The *Advisory Guidelines* were created as a response to a legal landscape where a failure of process often inhibited substantively just results. The broad statutory grant of judicial discretion for determining spousal support meant that awards were inconsistent and unpredictable, often discouraging support claimants from pursuing a claim. Indeed, the need to limit judicial discretion in this area and curb its negative impacts — impacts felt predominantly by women — has been well documented. Moreover, as a general

[236] Howlett, "Good and Evil", *supra* note 37 at 11.
[237] Howlett, "Old to New", *supra* note 15 at 189.

matter, Western conceptions of justice typically conceive of the absence of rules as embarrassing; judges should be able, in settling disputes, to "look to the law for norms" and not rely "on personal preferences or political allegiances."[238]

By providing formulas designed to compensate for lost earning potential and to recognize the financial interdependence that results from marriage, at the same time preserving judges' discretion to depart from the formulas, the *Advisory Guidelines* meet an enduring demand in family law. They are an example of an effective regulatory instrument that sits at the midpoint on the spectrum between rules and discretion. By drawing on both approaches, the *Advisory Guidelines* should confer upon spousal support determinations a newfound sense of legitimacy, enabling judges to rise above competing theories of support and ensuring respect for parties' rights.

[238] Schneider, "A Lawyer's View", *supra* note 16 at 63.

III. Spousal Support in Quebec: An Internal Critique of Substantive and Formal Resistance to the *Spousal Support Advisory Guidelines*

Introduction

The preceding chapters have set the stage for inquiring into one of the central questions raised by this thesis: What is the basis for the differential reception of the *Spousal Support Advisory Guidelines* across provincial lines, specifically, certain Quebec judges' exceptionalism in refusing to adhere to their formulas? This chapter contends that the strong resistance to the application of the *Advisory Guidelines* demonstrated by Quebec judges is based on misconceptions about both the substance and form of spousal support law in Quebec. With respect to substance, resistance to the *Advisory Guidelines* may be connected with one of the principal features of Quebec family law, the privileged notions of autonomy and individualism, rooted in a formal conception of equality. This outlook is based on former legislative policies and judicial beliefs, which have since, to a large degree, become obsolete. Judicial scepticism toward the *Advisory Guidelines* also does not correspond with the applicable federal law on spousal support and thus fails to account for the economic interdependence that typically results from marriage. With respect to form, the chapter challenges the idea, expressed by some trial judges, that the unofficial and non-binding nature of the *Advisory Guidelines* should prevent judges from relying on them. It suggests that rather, as they are analogous to scholarship — or, to *la doctrine* in Quebec — there is an important place for the *Advisory Guidelines* within the province's hierarchy of legal sources and that, given the mixed nature of Quebec's legal

system, judicial reliance on the *Advisory Guidelines* would not be inconsistent with the province's history of governing the family.[1]

Part 1 of this chapter provides background to the critique that follows by setting out the Quebec courts' responses to the *Advisory Guidelines*. A close reading of the relevant decisions shows that judicial resistance to the *Advisory Guidelines* is indeed rooted in difficulties with both their substance and their form. Following this, Part 2 suggests that the substantive opposition to the *Advisory Guidelines* stems from the legal and social weight of the concepts of choice and individual autonomy in Quebec family law, particularly in the context of marriage and matrimonial relations. More specifically, Part 2 argues that the refusal of many Quebec trial judges to apply the *Advisory Guidelines* stems from the rejection of the substantive theory of equality espoused by the Supreme Court in favour of a formal conception of liberal equality characterized by individualism, autonomy, choice, and contractual freedom.

With that background in place, Part 3 sets out to demonstrate that the emphasis on individualism and free choice accords with neither the provincial nor the federal legislative context of divorce. While the rhetoric of individualism and choice is forceful in Quebec, it does not reflect the province's matrimonial law, wherein legislative reforms have resulted in the almost complete removal of economic freedom for most married couples. Likewise, while some Quebec judges pay lip service to the binding case law on spousal support, resistance to the *Advisory Guidelines* is out of step with the federal law of divorce. This part also engages with the relevant literature by Quebec scholars.

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[1] All mentions of the *Advisory Guidelines* refer to: Family, Children and Youth Section, Department of Justice, *Spousal Support Advisory Guidelines* by Carol Rogerson & Rollie Thompson (Ottawa: Department of Justice, Canada, 2008) [*Advisory Guidelines*].

Finally, Part 4 explores the second stated reason for the demonstrated hostility toward the *Advisory Guidelines* — the idea that their application would undermine the paramountcy of legislation that characterizes the civilian legal system. First, it argues that use of the *Advisory Guidelines* fits well within the civilian paradigm that privileges scholarship over prior judicial decisions. Second, it suggests that in the context of a mixed legal system, shaped in large part by common law influences, resistance to the *Advisory Guidelines* misleads with respect to the nature of Quebec's legal system.

With its focus on Quebec family law, this chapter necessarily draws on literature related to the lively debate around the legal status of unmarried cohabitants in that province. The focus, however, is on married spouses, as the question of spousal support — and the related issue of reliance on the *Advisory Guidelines* — does not, at present, apply to individuals in a *de facto* union in Quebec. Further, while the *Advisory Guidelines* question applies equally to heterosexual and same-sex married couples, the majority of the case law and literature on spousal support is rooted in the traditional gender division that has historically informed debates around the economic consequences of divorce — that is, a gendered division of domestic labour wherein women shoulder a disproportionate share of the burden of social reproduction and domestic responsibility. Thus, without expressly relying on feminist scholarship, the chapter aligns with the feminist legal objectives of this thesis. It is premised on the idea, developed in the previous chapters, that the *Advisory Guidelines* are a valuable tool in the promotion of gender equality, based, as they are, on the recognition of the economic value of domestic work and the need to redress the historically unequal effects of marriage breakdown on women. With respect to the question of judicial reliance on non-legislated instruments,

the chapter draws on the wealth of literature on legal systems, specifically civilian and mixed systems, the hierarchy of sources across different systems, and the legal pluralism that forms the basis of Quebec's mixed system of private law.

1. Judicial Resistance to the *Advisory Guidelines* in Substance and in Form

Judicial resistance to the *Advisory Guidelines* in Quebec is based on two distinct objections: their substance and their form. Since their first appearance in a Quebec courtroom, both of these features have led Quebec judges to approach them with ambivalence, at best, and hostility, at worst. With time, judges appeared to warm to them. Eventually, the Quebec Court of Appeal expressly endorsed the *Advisory Guidelines* and directed Quebec judges to model their reasoning on spousal support on the behaviour of their counterparts in the common law provinces. In spite of that endorsement, however, Quebec trial judges continue to refuse to meaningfully consider the *Advisory Guidelines*. This part explains the two bases for opposition to them, a crucial first step in the demonstration that resistance to the *Advisory Guidelines* rests on shaky ground.

As seen in the preceding chapter, common law judges have displayed openness to the *Advisory Guidelines*. Some appellate courts — notably, in British Columbia, Ontario and New Brunswick — have been nothing less than enthusiastic about the potential of the *Advisory Guidelines* to remedy many of the demonstrated difficulties associated with the discretionary granting of spousal support.[2] Others, such as Alberta and Nova Scotia, have been less keen to see their discretion limited to matters of entitlement and, as a general

[2] See *Yemchuk v Yemchuk*, 2005 BCCA 406; *Fisher v Fisher*, 2008 ONCA 11; *SC v JC*, 2006 NBCA 46; Carol Rogerson & Rollie Thompson, "The Canadian Experiment with Spousal Support Guidelines" (2011) 45:2 Fam L Q 241.

matter, have not embraced the *Advisory Guidelines* with the same eagerness as others.[3] As this part sets out, however, none of the common law courts have expressed the same attitude toward the *Advisory Guidelines* as the Quebec courts, where they have been met with hostility on the part of both trial judges and the Quebec Court of Appeal. Moreover, while, the Quebec Court of Appeal eventually reversed its approach, its initial reaction nevertheless resonated with Quebec trial judges. As a result, the *Advisory Guidelines* have not had the same dramatic impact in Quebec as in the rest of Canada. In consequence, awards are less reflective of the judicially entrenched principle of substantive equality in spousal support.[4] Nor have the *Advisory Guidelines* had the opportunity to improve access to family justice in Quebec, as they may have done in the common law provinces.

1.1. Quebec Judges United in Opposition

The appearance of the *Advisory Guidelines* in Quebec was accompanied by their immediate rejection. They were first mentioned in a Quebec judgment in 2005, when they were still in draft form. In that decision, their unfinished, or experimental, quality spurred Justice Corriveau's cautious refusal to apply them: "In their present form, they are commentary intended to be reviewed. It would certainly be premature to apply them as they are."[5] Thus, early opposition to the *Advisory Guidelines* was clearly grounded in their non-legislated and non-binding character — in other words, their form.

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[3] See *Neighbour v Neighbour*, 2014 ABCA 62; *Strecko v Strecko*, 2014 NSCA 66; *MacDonald v MacDonald*, 2017 NSCA 18; *ibid*. For further discussion of the responses of the common law provinces to the *Advisory Guidelines* see Chapter 2 of this thesis.

[4] For further discussion of the judicial entrenchment of substantive equality in spousal support, see Chapter 1 of this thesis.

[5] *MF v NC*, 2005 CanLII 13719 (QC CS) at para 200 [translated by author].

More revealing illustrations of Quebec judges' attitude toward them came the following year, when the *Advisory Guidelines* were rejected not only for their unofficial character, but also for their content. The idea that "the court is not a testing ground or a research laboratory" made it clear that Quebec judges were not interested in these non-binding rules,[6] as did the inference that they do not properly reflect the law or the case law on spousal support.[7] Specifically, given their emphasis on the length of the marriage,[8] Justice Julien suggested that the *Advisory Guidelines* distort the requirement, in the *Divorce Act* and the relevant case law, that equal weight should be granted to each of the enumerated objectives and factors that go into a support award. Later parts of this chapter will elaborate on the disconnect between this approach and that espoused by the Supreme Court of Canada in interpreting the *Divorce Act*. But read on their own, it is clear from Quebec judges' earliest interactions with the *Advisory Guidelines*, that opposition was based not only on their form, but also on their substance. Despite that divorce is a matter of federal jurisdiction, interpretations of the law on spousal support differ between Quebec and the rest of Canada.

Quebec judges did not appear to immediately grasp the potential of the *Advisory Guidelines* to benefit divorcing spouses. As discussed in Chapter 2, both negotiation theory and experience with their use suggest that reliance on guidelines to direct an

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[6] *BD v SDu*, 2006 QCCS 1033, [2006] JQ no 1670 at para 20.
[7] *DS v MSc*, 2006 QCCS 334, [2006] RDF 399 [*DS v MSc*] at paras 40, 41.
[8] See *Advisory Guidelines*, supra note 1 ("Under the Advisory Guidelines length of marriage is a primary determinant of support outcomes in cases without dependent children. … Length of marriage is much less relevant under the with child support formula, although it still plays a significant role in determining duration under that formula" at 33). For further detail on the functioning of the *Advisory Guidelines* see Chapter 2 of this thesis.

otherwise discretionary determination advantages parties in at least two important ways.[9] First, by creating a reference point for potential awards, guidelines inform negotiations and even the playing field for claimant spouses. Second, the existence of a set range of support outcomes means that spouses who may otherwise be deterred by the uncertainty of results are more likely to claim the support owed to them. Both these factors, by limiting room for disagreement to the established range, have been demonstrated to reduce litigation among divorcing spouses, thus increasing access to justice. In writing that the judicial application of the *Advisory Guidelines* would introduce a context of uncertainty for litigants,[10] Justice Julien appeared to have been referring to an uncertainty relative to their use. She suggested that parties wanting to invoke the *Advisory Guidelines* might be tempted to push for litigation where the opposing party disagrees, thus engendering the perverse effect of encouraging litigation over resolution by mutual agreement.[11] As the *Advisory Guidelines* were still in their infancy in 2006, uncertainty as to the consequences of their use was understandable; Quebec courts could not have predicted the significant ways that the *Advisory Guidelines* would impact the determination of spousal support or the speed with which they would come to form an essential part of the practice of divorce law throughout the rest of Canada.

The Quebec Court of Appeal quickly approved of trial judges' initial approach. In 2006, citing the Supreme Court's earlier statement that there is no magic recipe for

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[9] See Robert H Mnookin & Lewis Kornhauser, "Bargaining in the shadow of the law: The case of divorce" (1979) 88:5 Yale LJ 950; Craig Martin, "Negotiation Theory and Spousal Support Under Canadian Divorce Law" (1998) 56:1 UT Fac L Rev 135; Carol Rogerson, "Shaping Substantive Law to promote Access to Justice: Canada's Use of Child and Spousal Support Guidelines" in John Eekelaar, Mavis Maclean & Benoit Bastard, eds, *Delivering Family Justice in the 21st Century* (Portland, OR: Hart Publishing, 2015) 51.

[10] *DS v MSc*, *supra* note 7 at para 38.

[11] *Ibid*.

carrying out the difficult analysis required by the law of spousal support, the Court of Appeal endorsed Justice Julien's cautious approach, both with respect to the content of the *Advisory Guidelines* and to their form.[12] Referring to the decision under appeal, in which the claimant invoked the *Advisory Guidelines* and the trial judge's support order fell within their range, Justice Forget, on behalf of a unanimous Court of Appeal, wrote that the trial judge erred in dispensing with the individualized analysis required by law.[13] The Court of Appeal reduced the award by nearly 40 per cent of the original order,[14] thus confirming the idea that the *Advisory Guidelines* reflect neither the substance nor the form of Quebec matrimonial law.

1.2. A Judiciary Divided

Novel approaches to decision-making should be considered with caution, and Quebec judges may have been justifiably prudent. By 2010, however, despite the Court of Appeal's clear opposition to the *Advisory Guidelines*, trial judges eventually looked to them again. Four years after the Court of Appeal rejected them, Justice Masse, a trial judge, wrote that even if they are not binding, the *Advisory Guidelines* may be an element to consider in the determination of spousal support.[15] One year later, a unanimous Court of Appeal re-evaluated its earlier approach and issued an unambiguous endorsement of the *Advisory Guidelines*.[16] In reversing its earlier position, the Quebec Court of Appeal responded to the many critiques expressed in various decisions, ultimately concluding that, as they are analogous to scholarship, Quebec judges should, as a general matter, be

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[12] *GV v CG*, 2006 QCCA 763, [2006] RDF 444.
[13] *Ibid* at para 120.
[14] *Ibid* at para 147.
[15] *Droit de la famille — 101242*, 2010 QCCS 3334, [2010] JQ no 7213, varied on other grounds *Droit de la famille — 103253*, 2010 QCCA 2172, [2010] JQ No 12470.
[16] *Droit de la famille — 112606*, 2011 QCCA 1554, 8 RFL (7th) 1 [*DF — 112606*].

encouraged to apply them.[17] Justice Bich wrote of their many virtues and their general usefulness in "that they foster a less arbitrary determination of the amount of spousal support."[18] She lauded the excellence of arguments in favour of their use and encouraged Parliament to adopt them and "impose their use."[19] But Justice Bich stopped short of requiring trial judges to justify their departure from the *Advisory Guidelines* and mandating their use, because they are not mandatory in law and "the courts cannot, in law, be bound by the guidelines or … compelled to use them."[20] Thus, in addition to inviting Parliament to act, the Quebec Court of Appeal instructed trial judges to consider it "good practice" to refer to the *Advisory Guidelines* and to draw inspiration from the practice of the other provinces where they are "customarily used or more widely used than in Quebec."[21] In short, the Court of Appeal called for a new approach to spousal support determinations, in line with that of the common law provinces.

Not even this resounding expression of support for the *Advisory Guidelines* was enough to change judicial attitudes in Quebec. In the year following the Court of Appeal's endorsement, the early hostility expressed toward the *Advisory Guidelines* once again took hold. In 2012, the Superior Court re-characterized the Court of Appeal's statements, minimizing the virtues of the *Advisory Guidelines* as described by Justice Bich and emphasizing the error inherent in exclusive reliance on them.[22] What is more, the Superior Court issued a forceful criticism of the *Advisory Guidelines*, reiterating that they do not reflect the law in Quebec, questioning their basic premises and calling them

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[17] *Ibid* at para 110.
[18] *Ibid* at para 125.
[19] *Ibid*.
[20] *Ibid*.
[21] *Ibid* at para 126.
[22] *Droit de la famille — 123274*, 2012 QCCS 5873, [2012] JQ no 13971 at paras 37-38.

conceptually defective in their application to the facts before the court, all in the name of Quebec specificity.[23]

As recently as 2014, trial judges in Quebec continued to minimize the impact of the Court of Appeal's approval of the *Advisory Guidelines*. Decisions persist in citing the concern, first expressed in 2006, that reliance on them would constitute an unacceptable shortcut and an illegitimate circumvention of the statutory analysis dictated by the *Divorce Act*.[24] This attitude endures despite the Court of Appeal's recent reference to the instructive and useful nature of the *Advisory Guidelines* in fixing support.[25] While some more recent trial decisions indicate a slight trend toward increasing acceptance of the *Advisory Guidelines*,[26] the initial resistance to them, and the fact that Quebec lags a decade behind the rest of Canada with respect to their application, are revealing of Quebec judges' understandings of the role and function of spousal support and the stated importance of formal instruments in Quebec law. As a means of gaining insight into fundamental conceptions about both the substance and form of Quebec matrimonial law — and of using that insight to dispel common misconceptions — this thesis maintains that the situation merits study. Before exploring these issues further, it is useful to set out the legislative and social context in which Quebec spousal support determinations are made.

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[23] *Ibid* at paras 40, 42, 46, 51.
[24] *DS v MSc*, *supra* note 7, cited in *Droit de la famille — 14165*, 2014 QCCS 402, [2014] JQ no 847.
[25] *Droit de la famille — 14175*, 2014 QCCA 216, [2014] JQ no 708 at para 95, n 23 [*DF — 14175*].
[26] See e.g. *Droit de la famille — 151740*, 2015 QCCS 3284; *Droit de la famille — 152586*, 2015 QCCS 4781 (finding the *Advisory Guidelines* admissible as evidence, but failing to engage with them in awarding $500 per month less than the amount claimed under them); *Droit de la famille — 162754*, 2016 QCCS 5504 (acknowledging their admissibility, but refusing to defer to their formulas).

2. Spousal Support in Quebec: Solidarity and Autonomy in a Federal State

This part provides the background necessary to understand and critique Quebec's approach to spousal support. The discussion is premised on the idea that the judicial approach in Quebec informs the common rejection of the *Advisory Guidelines*. Because Quebec enjoys a distinct system of private law, drawing lines between federal and provincial competence is not a simple exercise. This part therefore begins by clarifying the "imprecise boundaries" of legislative jurisdiction over the family in the Canadian federation,[27] as power to regulate the family is shared between the federal government and the provinces. Following this, this part sets out two distinct understandings of spousal support in Quebec, evidenced by the relevant judgments: the "needs and means" model of support — grounded in the relevant provisions of the *Civil Code* — and support based on the values of free choice and economic independence — central themes of Quebec private law. These conceptions will inform the subsequent demonstration of the judicial misconceptions about Quebec matrimonial law on which judicial resistance to the *Advisory Guidelines* appears based.

2.1. Shared Jurisdiction Over the Family

In abstract terms, Quebec has a strong claim to jurisdiction over family matters. The province has enjoyed its own system of private law since the proclamation of the *Act of Quebec* of 1774,[28] long before Confederation, and nearly a century before the Constitutional drafters turned their minds to the regulation of marriage and divorce.[29] Indeed, it is fair to say that historically, as an integral part of "private law," Quebec

[27] See John Dewar, "Families" in Peter Cane & Mark Tushnet, eds, *The Oxford Handbook of Legal Studies* (Oxford: Oxford University Press, 2003) at 413.
[28] *The Quebec Act*, 14 Geo III, c 83, (1774).
[29] See FJE Jordan, "The Federal Divorce Act (1968) and the Constitution" (1968) 14:2 McGill LJ 209.

enjoyed exclusive jurisdiction over the regulation of matrimonial law. Since Confederation, however, jurisdictional lines have become blurred, as constitutional authority over the regulation of "marriage and divorce" now rests with Parliament.[30] Further, the adoption of the federal *Divorce Act* as a uniform law applicable across provincial lines means that the federal law on divorce applies in Quebec.[31] While, at Confederation, the inclusion of marriage and divorce among federal powers may have been contentious,[32] there is little debate today that the *Divorce Act*, insofar as it establishes the grounds for divorce, is valid federal legislation.[33]

Where corollary relief in the form of support is concerned, it was not always clear that legislating spousal and child support was a valid exercise of the federal power. Indeed, these questions arguably lie at the heart of the provincial power over "matters of a merely local or private nature in the province," as well the provincial power over

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[30] *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, ss 91(26), reprinted in RSC 1985, Appendix II, No 5 ["*Constitution Act, 1867*"].
[31] *Divorce Act*, RSC, 1985, c 3 (2nd Supp) [*Divorce Act*].
[32] See Jordan, *supra* note 29.
[33] For some, the legitimacy of the federal power over marriage, divorce, and corollary relief in the context of a divorce remains a source of contention. A textual reading of the relevant section of the *Constitution Act, 1867*, *supra* note 30, confirms that jurisdiction over marriage and divorce lies with the federal government and, as discussed in the text, judicial interpretations of the federal statutory provisions dealing with support have confirmed their constitutional validity. Nevertheless, the 2015 government-commissioned report on the future of Quebec family law illustrates the continued resistance, on the part of its authors — members of the "*Comité consultatif sur le droit de la famille*" — to Parliament's jurisdiction over the family. In dealing with the alimentary obligation between spouses, the committee members write that the original justifications for the federal power over marriage and divorce — national uniformity and respect for the freedom of religion of members of Quebec's religious minorities — are no longer relevant today. Accordingly, the authors invite the Quebec government to undertake negotiations with the federal government with the aim of recovering provincial jurisdiction over marriage and divorce. At the time of writing, none of the recommendations contained in the report have been put into effect. See Comité consultatif sur le droit de la famille, Alain Roy (chair), *Pour un droit de la famille adapté aux nouvelles réalités conjugales et familiales* (Montreal: Thémis, 2015) at 179 [Comité consultatif]. Contra Suzanne Pilon, "La pension alimentaire comme facteur d'appauvrissement des femmes et des enfants en droit québécois" (1996) 6:2 CJWL 349 (recommending the harmonization of the *Civil Code* with the relevant federal legislation at 367).

property and civil rights in the province.[34] Further, it was because of this constitutional overlap that Parliament chose to leave the division of matrimonial property following a divorce to the provinces.[35] To do otherwise would have created difficulties given the prior existence of matrimonial property legislation in all of the provinces.[36] Thus, jurisdiction over divorce and its effects being shared by the federal and provincial governments, Parliament's compromise lay in legislating support, but not property division.

The Supreme Court has since upheld this decision as constitutionally valid: while support is, in itself, a matter of provincial interest, as a necessary incident of divorce, the support provisions of the *Divorce Act* are rationally and functionally connected to the federal power and therefore valid.[37] This does not mean, however, that the provinces no longer legislate in connection with support. As the application of the federal law is limited to divorcing couples, the provinces still legislate support obligations during marriage and upon legal separation (separation from bed and board in Quebec),[38] as well as, except in the case of Quebec, support obligations for unmarried spouses.[39] Thus, constitutional jurisdiction over family breakdown is shared between the different levels of government and support lies at the intersection of federal and provincial powers.

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[34] *Constitution Act, 1867*, *supra* note 30, s 92(16), 92(13). See also Robert Leckey, *Contextual Subjects: Family, State and Relational Theory* (Toronto: University of Toronto Press, 2008) at 33 [Leckey, *Contextual Subjects*].
[35] See Jordan, *supra* note 29 at 249.
[36] *Ibid* at 262.
[37] *Zacks v Zacks*, [1973] SCR 891, 35 DLR (3d) 420. See also *Jackson v Jackson* [1973] SCR 205, 29 DLR (3d) 641; *Papp v Papp et al*, [1970] 1 OR 331.
[38] See art 511 CCQ.
[39] See e.g. *Family Law Act*, RSO 1990 c F3, s 29 [Ontario *Family Law Act*]; *Family Law Act*, SBC 2011 ch 25, s 3(1)(b).

Quebec's matrimonial law dates back much further than the federal *Divorce Act*. The province has legislated familial obligations as it has seen fit since the adoption of the province's first *Civil Code* in 1866. As the *Advisory Guidelines* are based on judicial interpretations of the *Divorce Act*, Quebec jurists may feel justified in approaching the *Advisory Guidelines* with caution. Indeed, in Canada's federal system, federal laws are "frequently grounded in a policy that is incompatible with underlying civilian institutions."[40] Thus, resistance might be based on a desire to preserve provincial jurisdiction over a matter of historically private law. Where Quebec judges err, however, is in seeming to base their resistance to the *Advisory Guidelines* on conceptions of spousal support unique to Quebec and rooted in the *Civil Code*. As the following paragraphs suggest, these distinctive understandings of spousal support have little foundation in the current legislative landscape in Quebec. It follows that reliance on misconceived civilian notions of support inhibit the success of the *Advisory Guidelines* in Quebec. The following sections will set out these distinct conceptions of support.

2.2. The *Civil Code*'s "Needs and Means" Model of Spousal Support

As a general matter, in Quebec, spousal support is understood neither as compensatory in nature nor as responding to any sort of freestanding obligation, resulting from the fact of marriage. In other words, and as discussed below, the understanding of the alimentary obligation in Quebec does not correspond with the theoretical underpinnings of spousal support under the *Divorce Act*, on which the *Advisory Guidelines* are based.[41] This attitude may flow from the fact that prior to the adoption of

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[40] John EC Brierley & Roderick A Macdonald, *Quebec Civil Law: An Introduction to Quebec Private Law* (Toronto: Emond Montgomery, 1993) at 47.

[41] See the discussion of the theoretical bases for the *Advisory Guidelines* in Chapter 2 of this thesis.

the *Divorce Act* by the federal government, economic relief in the form of support for divorcing spouses was simply not available in Quebec; with the severance of matrimonial ties, came the end of any obligation of support flowing from the marriage.[42] In the case of separation from bed and board, however, while the marriage bond subsists, so does the alimentary obligation, as spouses are solidary in marriage.[43] In light of the relationship of solidarity that is marriage — and the end of solidarity upon divorce — some Quebec scholars describe the difficulty of reconciling the continuing obligation of support with the end of the legal relationship.[44]

As divorce has the effect of severing the bond of solidarity, a literal reading of the *Civil Code* would mean that the support obligation ceases upon the pronouncement of divorce. Civilian judges, then, have traditionally conceived of support as limited to addressing a current need and promoting the eventual self-sufficiency of the dependent spouse,[45] and not as the natural continuation of the economic partnership that is marriage. "Need" in this context is understood as "the basic necessities of life" such as food, clothing, lodging, heat, and medical care.[46] Thus, while some authors make explicit the distinction between the support obligation contained in the *Civil Code* and that which

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[42] Jean Pineau & Marie Pratte, La famille (Montreal: Les Éditions Thémis, 2006) at 318. See also Jean Carbonnier, *Droit Civil – Tome 2 : La famille, l'enfant, le couple*, 21st ed (Paris: Presses Universitaires de France, 2002) (on the dissolution of matrimonial ties upon divorce at 601).
[43] See e.g. arts 392, 396, 397 CCQ.
[44] See Pineau & Pratte, *supra* note 42 at 318.
[45] See e.g. *JD v SA*, [2003] JQ no 637, [2003] RDF 181 (CS) [*JD v SA*]; *GL v NF*, [2004] JQ no 6566, [2004] RDF 489 (CA) at para 73; *SS v PC*, [2005] JQ no 7121, JE 2005-1163 (CS); *Droit de la famille — 1221*, 2012 QCCA 19, [2012] JQ no 53 [*DF — 1221*]. See also Robert Leckey, "Developments in Family Law: The 2012-2013 Term" (2014) 64 SCLR (2d) 241 at 264 [Leckey, "Developments"].
[46] See Carbonnier, *supra* note 42 at 53 [translated by author from "*les besoins de vie*"]. Carbonnier defines the alimentary obligation as the obligation to "*faire vivre*" the creditor of support, to the extent of the debtor's means.

arises upon divorce,[47] it is commonplace that in Quebec, even in the case of divorce, spousal support is often primarily granted on the basis of the "needs and means" of the parties and the promotion of economic independence, often with little regard for compensatory principles. [48] Indeed, Quebec courts show clear resistance to the characterization of support in compensatory terms, often preferring to limit support to situations of clear need and financial dependence.[49]

This distinctive understanding of spousal support was made clear in the Supreme Court's most recent statements on spousal support in Quebec. In the context of a constitutional challenge to Quebec's exclusion of unmarried spouses from the province's support regime, a number of justices weighed in on the functions and objectives of spousal support, as they are understood in Quebec.[50] Justice Deschamps' reasoning, on behalf of one third of the Court, was particularly revealing, as her understanding of the Quebec support obligation reads as a significant departure from the compensatory model of spousal support established by the Supreme Court decades earlier and never overruled: "[the] *Civil Code of Québec* … establishes that the right to support granted to persons in need who are part of the family unit is distinct in that it does not have a compensatory function…."[51] For some members of the Court, then, it is the provisions concerning property division that address the need to protect vulnerable spouses as well as the need

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[47] See e.g. Mireille Castelli & Dominique Goubau, *Le droit de la famille au Québec*, 5th ed (Quebec: Les Presses de l'Université Laval, 2005) at 365.
[48] See especially *JD v SA*, *supra* note 45 at para 9; *DF — 1221*, *supra* note 45. See also art 587 CCQ ("In awarding support, account is taken of the needs and means of the parties, their circumstances and, as the case may be, the time needed by the creditor of support to acquire sufficient autonomy").
[49] See e.g. *DF — 1221*, *supra* note 45; *Droit de la famille – 113904*, 2011 QCCA 2269, aff'g *Droit de la famille —111449*, 2011 QCCS 2518 [*DF – 113904*].
[50] *Quebec (Attorney General) v A*, 2013 SCC 5, [2013] 1 SCR 61 [*Quebec v A*].
[51] *Ibid* at para 383, Deschamps J, dissenting in part.

"to compensate for contributions made by the parties while living together and to recognize the economic union formed by married and civil union spouses."[52] At the federal level, these purposes are typically understood as the objectives of spousal support.[53] As seen elsewhere in this thesis, they also form the basis for the formulas contained in the *Advisory Guidelines*. For Deschamps J. and concurring justices, however, spousal support in Quebec is, as a matter of statutory interpretation, non-compensatory in nature.[54]

Justice Deschamps' statements reflect the deep theoretical disparity between understandings of the function of spousal support in Quebec's civil law tradition and the approach adopted in the rest of Canada. Spousal support in Quebec is "focused on the basic needs of the vulnerable spouse" and is based, among other things, on "the satisfaction of needs resulting from the breakdown of a relationship of interdependence."[55] Likewise, the Quebec Court of Appeal has continued to hold that compensatory principles do not factor into a spousal support determination where a claimant spouse fails to demonstrate that she has made efforts to attain self-sufficiency, typically by re-entering the workforce, even where she spent the bulk of her employable years as a full-time homemaker.[56] Further, in *Droit de la famille — 1221*, Justice Rochon reiterated the "civilian notion of support" as "always dependent on the debtor's resources

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[52] *Ibid*.
[53] See *Moge v Moge*, [1992] 3 SCR 813 at 853, 99 DLR (4th) 456 [*Moge*]; *Bracklow v Bracklow*, [1999] 1 SCR 420, 169 DLR (4th) 577 [*Bracklow*].
[54] *Quebec v A*, *supra* note 50 at para 390.
[55] *Ibid* at para. 392, 396.
[56] See *DF — 1221*, *supra* note 45. More recently, in *DF – 14175*, *supra* note 25, the Quebec Court of Appeal, relying on compensatory principles, overturned a trial decision denying spousal support following a two-year marriage where the wife worked within the home and raised five children. Even here, however, the decision appears based on the premise that compensatory principles should only be considered once a claimant spouse's efforts to achieve financial autonomy have been sufficiently demonstrated.

and the creditor's needs."[57] In Quebec, then, the granting of spousal support is generally premised on the demonstrated failure to achieve self-sufficiency, either in actual fact or based on the claimant's remote prospects for employment, as evaluated by the judge.

2.3. Privileging Autonomy and Imputing Individual Choice

A number of family law scholars in Quebec suggest that with regard to matrimonial property and support obligations upon marital breakdown, the law privileges personal autonomy and individual choice. In the discourse surrounding Quebec matrimonial law, much ink has been spilled around the concepts of "freedom of choice," contractual freedom, and individual autonomy.[58] In their decision confirming the constitutionality of precluding unmarried spouses from claiming spousal support in Quebec, several justices of the Supreme Court of Canada emphasized the value of choice, both at the legislative and cultural levels.[59] The privileging of choice is understood as promoting the family law principle of gender equality between husbands and wives, which is deeply engrained in Quebec's social fabric.[60] In its 2015 report on the future of Quebec family law, the consultative committee commissioned by the provincial government to make recommendations for reform relied on the "couple as a space for

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[57] *DF — 1221*, *supra* note 45 at para 69.

[58] See e.g. Danielle Burman, "Politiques législatives québécoises dans l'aménagement des rapports pécuniaires entre époux : d'une justice bien pensée à un semblant de justice — un juste sujet de s'alarmer" (1988) 22:2 RJT 149; Alain Roy, "Le contrat de mariage en droit québécois : un destin marqué du sceau du paradoxe" (2006) 51:4 McGill LJ 665 Roy, "Paradoxe"]; Louise Langevin, "Liberté de choix et protection juridique des conjoints de faits en cas de rupture : difficile exercise de jonglerie" (2009) 54:4 McGill LJ 697 [Langevin, "Liberté de choix"]; Benoît Moore, "Culture et droit de la famille : de l'institution à l'autonomie individuelle" (2009) 54:2 McGill LJ 257 [Moore, "Culture"]; Louise Langevin, "Liberté contractuelle et relations conjugales : font-elles bon ménage?" (2009) 28:2 Nouvelles Questions Féministes 24.

[59] See *Quebec v A*, *supra* note 50.

[60] See e.g. Hélène Belleau & Pascale Cornut St-Pierre, "Conjugal Interdependence in Quebec: From Legal Rules to Social Representations About Spousal Support and Property Division on Conjugal Breakdown" (2013) 29:1 CJLS 43.

free will and contractual freedom" as one of its guiding principles.[61] Its recommendations were geared toward promoting the cultural and legislative values of autonomy and freedom in conjugal and family matters.[62]

The vision of spousal support set out above — that is, as a measure to respond to demonstrated need and promote economic independence — aligns with the privileging of individual autonomy and choice. For some judges, the absence of proven efforts to achieve financial autonomy is interpreted as the absence of demonstrated need. Moreover, in situations that would give rise to a compensatory claim outside of Quebec — after a long marriage during which the wife sacrificed income generating opportunities in favour of domestic responsibilities, for example — demonstrated financial independence may bar the granting of support.[63]

In placing significant weight on the pursuit of financial independence, Quebec judges seem to suggest that as autonomous individuals, spouses should take responsibility for their decisions during and after the marriage and accordingly bear the consequences. The choice, for example, to sacrifice professional opportunities in order to devote time to domestic endeavours may give rise to a compensatory claim, but it will be viewed as a deliberate decision made by an autonomous and independent actor, who must make subsequent efforts to mitigate the consequences of her choice. The evaluation of that claim will be coloured by that choice and by the reasonableness of efforts aimed at achieving self-sufficiency. Demonstrated need is viewed as a result of the spouses'

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[61] Comité consultatif, *supra* note 33 at 78 [translated by author].
[62] *Ibid* at 79.
[63] See e.g. *KFS v JC*, [2002] JQ no 6234, JE 2003-227, [2003] RDF 59; *JD v SA*, *supra* note 45; *ST v RC*, [2003] JQ no 838, [2003] RJQ 905; *DF — 113904*, *supra* note 49. See also Brierley & Macdonald, *supra* note 40 ("[i]f the achievement of autonomy is one important goal for support awards, alimentary support may be expected to terminate as soon as a former spouses has achieved that autonomy" at 264).

express choices about the division of domestic labour. Some Quebec judges, in other words, seem to envision a form of implied contract between the spouses and a consequent assumption of the associated costs.[64]

Such an understanding of spousal support is not completely at odds with the idea that Quebec law privileges gender equality and autonomy. Formal equality and individualism, as foundational principles of law, are indeed reflected throughout the *Civil Code*. For example, that spouses keep their legal surnames upon marriage promotes the ideals of individualism and personal autonomy.[65] Further, the centrality of choice is what recently drove a majority of the Supreme Court to uphold Quebec's legislative exclusion of cohabiting spouses from the *Civil Code*'s protective matrimonial law regime.[66] But Quebec's distinctive understandings of support, as premised on the cessation of the solidarity of marriage and the associated end of the matrimonial bond, the needs and means of the spouses upon divorce, and the primacy of individual choice, are at odds with the conception of marriage as an ongoing partnership and relationship of economic interdependence, which does not immediately end upon a judgment in divorce — the conception on which the *Advisory Guidelines* are based, in line with the Supreme Court's authoritative interpretations of the *Divorce Act*. Moreover, the following part will suggest that judicial ambivalence toward the *Advisory Guidelines* based on the idea that they do not reflect Quebec's approach to spousal support does not withstand close scrutiny. This is because the approach itself does not correspond to the legislative context, at either the provincial or federal levels.

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[64] See Dewar, *supra* note 27 (on the relationship between the contract model and individualism at 428).
[65] See Moore, "Culture", *supra* note 58 at 265; art 393 CCQ.
[66] *Quebec v A*, *supra* note 50.

3. Critiquing the Substantive Resistance to the *Advisory Guidelines*

By and large, Quebec judges approach spousal support determinations from two different perspectives. The "needs and means" model of support, where the debtor spouse is responsible for ensuring that the claimant is able meet her basic needs, is rooted in the idea that with the termination of the matrimonial bond, the economic solidarity of the spouses also ceases. The imputed contract model of support is premised on the idea that as independent and autonomous individuals, released from matrimonial solidarity, spouses should take responsibility for their individual choices during the marriage and bear the economic costs of those choices upon marriage breakdown. Together, these approaches both function in opposition to the compensatory principle of spousal support and the theory of support as a means of recognizing and redressing the economic impacts of the interdependence that develops as the spouses' economic lives merge over time. As discussed in Chapter 1, these latter principles have been endorsed by the Supreme Court in its leading decisions interpreting the *Divorce Act* provisions governing spousal support and, as discussed in Chapter 2, it is on these same principles that the *Advisory Guidelines* are based. Thus, even though Quebec is bound by the federal *Divorce Act*, the province's approach to spousal support is disconnected from the statutory and judicial interpretations applied in the rest of the country.

This part suggests that Quebec's refusal to apply the *Advisory Guidelines* is based on two distinct errors in the judicial understanding of spousal support in Quebec. First, judicial interpretations of the support obligation are inconsistent with Quebec's legislative reality with respect to matrimonial relations; in Quebec, despite popular discourse, freedom of choice and individualism play a limited role in governing the

family. The judicial approach, with its emphasis on individualism and the promotion of self-sufficiency, fails to recognize that the statutory framework for support aims to remedy the documented economic disadvantages to women that result from privileging free choice. Second, perhaps in an effort to preserve provincial jurisdiction over private family matters, some Quebec judges have failed to adapt their reasoning to correspond with judicial interpretations of the *Divorce Act*. In doing so, the Quebec approach fails to grasp the reality of most marriage relationships, where spouses are typically bound by a degree of economic interdependence so that their financial lives cannot be easily or neatly severed upon marriage breakdown. The *Advisory Guidelines*, rooted as they are in the Supreme Court's interpretations of the binding provisions of the *Divorce Act*, aim to accommodate and reflect that reality.

3.1. Autonomy, Protection, and the Role of Choice in Quebec Family Law

The concepts of freedom of choice, contractual freedom, and individual autonomy loom large in the cultural discourse around Quebec matrimonial law. This thesis maintains, however, that the invocation of choice as the theoretical foundation for spousal support is, at the level of positive law, flawed. Quebec matrimonial law does not, in fact, privilege free choice. Rather, married spouses in Quebec have little choice with respect to the organization of their economic lives, and no choice with respect to the property that composes the family patrimony, explained below. The limited period of freedom of choice between spouses ended when it became clear that freedom of choice was harmful to women. Moreover, under early Quebec law, marriage could not be characterized by the concept of pure freedom of contract. To rely on contractual principles to describe the matrimonial relationship is not only misleading, but also inaccurate. Insofar as resistance

to the *Advisory Guidelines* is anchored in these principles, the judicial approach is out of step with provincial law.

3.1.1. The Community Regime and the Immutability of the Marriage Contract

The significance of choice in matrimonial relations dates back to the *Civil Code of Lower Canada*. Heavily influenced by the matrimonial law of France, Quebec law gave spouses a choice, upon marriage, between two matrimonial regimes: community of property and separation as to property.[67] Under the former, all of the spouses' property was held communally between the spouses and administered by the husband. In the case of marital breakdown or dissolution, the community was shared equally between them. Spouses married under the separation as to property regime did not share in a community of property. Each spouse was responsible for his or her own assets; upon dissolution, property remained in the hands of its original owner or of the spouse that had accumulated it during the marriage.[68] Thus, by enabling spouses to select their regime, the first laws of Quebec accommodated choice and individual freedom in matrimonial law.

It would be a mistake, however, to exaggerate the role of free choice in 1866. While spouses were free to select their regime, the majority of couples did not contract out of the default regime, either because they were unaware of the alternatives, or

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[67] See Pineau & Pratte, *supra* note 42 (defining a matrimonial regime as a complete set of rules governing the exclusively pecuniary relations of the spouses and bestowing a particular status on their property, in their mutual relations as well as their relations with third parties at 205). Note that in theory, Quebec spouses were free to choose any regime or means of organizing their economic lives, beyond the two listed here. As the default, however, the community regime was most common, with separation as to property the most likely alternative.

[68] See Jean Pineau & Danielle Burman, *Effets du mariage et régimes matrimoniaux* (Montreal: Thémis, 1984) at 12.

because, immediately prior to the marriage, they were simply not concerned with arrangements concerning property and finances.[69] Moreover, it is important to note that the default regime was not considered a contract. Rather, it was a unique product of Quebec's civil law, in the *absence* of a marriage contract.[70] Founded on a presumption, and not on the spouses' intentions, the community of property was "not precisely equatable to common law contract, partnership, or tenancy in common."[71] It is thus inaccurate to describe Quebec marriage, in 1866, as primarily characterized by choice or contractual freedom.

Further to the fact that most couples did not, by contract, select an alternative matrimonial regime, Quebec marriage under the *Civil Code of Lower Canada*, like the French model of marriage from which it evolved, was affected by the principle of immutability of matrimonial regimes. Spouses, despite mutual agreement, were prohibited from changing matrimonial regimes.[72] Envisioned as a "family pact," immutability protected spouses from being dispossessed of personal wealth once the marriage was celebrated.[73] Thus, the little choice that existed — to opt for a matrimonial contract or an alternate regime such as separation as to property — was removed once the marriage was celebrated. Further, the default community of property regime saw the husband as administrator of the community, with the responsibility of diligent

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[69] Commission on the Status of Women, *Legal Status of Married Women: Reports Submitted by the Secretary-General*, 1958, ST/SOA/35 at 48 [Status of Women]. See also *ibid* (in 1958, approximately 75 percent of married couples remained in the default community at 122).
[70] H Margles, "The New Canadian Couple: Civil Law Matrimonial Property and its Effects in Ontario" (1958) 16 UT Fac L Rev 53 at 53 [emphasis added].
[71] *Ibid*.
[72] Status of Women, *supra* note 69 at 49.
[73] Pineau & Pratte, *supra* note 42 at 187.

administration, so as to protect his wife's economic interests.[74] Rather than uphold principles of free choice and individualism, Quebec matrimonial law of 1866, much as it is today, was characterized by paternalism and the protection of women's economic fates.[75]

3.1.2. Freedom of Choice and its Consequences for Women

The second half of the twentieth century saw the original paternalism and protectionism of Quebec family law diminished, as the years between the 1960's and 1970's were marked by the emancipation of Quebec's married women. Formal equality was enshrined; the community regime was modified to enable the joint administration of communal property,[76] and a new default regime enabled spouses to alter their regime during the marriage and limited the default community of property to property accumulated during the marriage.[77] Spouses were now able to choose how to organize their financial affairs, through the vehicle of the matrimonial regime.[78]

Despite the increased economic powers of women within the family, many Quebec families opted out of the default regime, choosing instead to remain separate as to property.[79] Women, despite typically not working outside the home or accumulating

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[74] *Ibid* at 189.

[75] See J-M Brisson & N Kasirer, "The Married Woman in Ascendance, the Mother Country in Retreat: from Legal Colonialism to Legal Nationalism in Quebec Matrimonial Law Reform, 1866-1991" (1995) 23 Man LJ 406 ("The law consolidated in the *Civil Code of Lower Canada* in 1866 had spousal inequality as a defining feature — *les pouvoirs au mari*, said a maxim inherited from old French law, *la protection à la femme*" at 406). See also Leckey, *Contextual Subjects*, *supra* note 34 ch 2.

[76] *Act respecting the legal capacity of married women*, SQ 1964, c 66 (under which administration of communal property no longer fell exclusively to the husband).

[77] *Act respecting matrimonial regimes*, SQ 1969, c 77.

[78] See Pineau & Pratte, *supra* note 42 at 11. For another thorough review of the legal emancipation of married women, see Brisson & Kasirer, *supra* note 75.

[79] In 1969, in response to the frequency with which spouses opted out of the default community of property regime, the Quebec legislature changed the default matrimonial regime to the "partnership of acquests." The partnership enables each spouse to maintain control over his or her personal assets during the marriage,

personal wealth, often agreed to contract out of the community of property (or partnership of acquests).[80] By 1967, upwards of 70 per cent of couples were using marriage contracts to choose to be separate as to property.[81] Spouses were attracted to the simplicity of the regime and, in many cases, were simply ignorant of the consequences of their choice.[82] More significantly, however, among women's motives for choosing separation, was the fact that the community of property, despite women's emancipation, did not give wives the autonomy, capacity, and powers they wished to exercise over their property, and that the community of property necessarily entailed a community of debts.[83] The preference for separation was thus understood as a reaction, on the part of married women, to the historically patriarchal nature of the community of property regime, which was seen as incompatible with the legal emancipation of women, and as a means of protecting themselves from the risks associated with a declaration of bankruptcy by their husbands.[84] In other words, separation was perceived as a long awaited guarantee of married women's personal autonomy, in line with the cultural primacy of freedom of choice and individualism.[85] Moreover, the ability to choose one's

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regardless of whether the assets were acquired before or during the marriage. Upon the breakdown of the marriage, however, certain types of property accumulated during the marriage — specifically, income and fruits of other property — are deemed assets, and are consequently shared equally between the spouses. See arts 448-484 CCQ; Pineau & Pratte, *supra* note 42 at 192-195; Roger Comtois, "Pourquoi la société d'acquêts?" (1967) 27 R du B 602.

[80] *Ibid* at 604.

[81] *Ibid*.

[82] *Ibid* at 611.

[83] *Ibid*.

[84] See Burman, *supra* note 58 at 151.

[85] *Ibid*.

matrimonial regime — before and during the marriage — meant that the principles of freedom of choice and contract were now central to Quebec matrimonial law.[86]

As rates of separation, and eventually divorce, increased, it became apparent that privileging choice would have serious, and negative, economic impacts on women. Upon divorce, women who did not accumulate personal wealth were left with nothing. Indeed, the separate as to property regime was "fatal" to these women;[87] at marriage end, a woman who had no property upon marriage and who, in devoting her time to unpaid domestic work during the marriage, had no claim to a share of her husband's wealth, to which she contributed by alleviating him of domestic responsibilities.[88] For the Civil Code Revision Office, charged with reforming the province's matrimonial law at the time, these situations had the potential to result in "real injustice" to Quebec women.[89] Indeed, easier access to divorce under the federal *Divorce Act* meant that the potential for "devastating consequences" for non-working wives resulting from the choice of matrimonial regime was realized.[90] For many women, then, freedom of contract, in addition to establishing their autonomy, contributed to their poverty.[91] Freedom of choice, as animating theme of Quebec matrimonial law, was problematic for a large proportion of the province's population and was therefore short lived.

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[86] See Pineau & Pratte, *supra* note 42 at 186. See also Brisson & Kasirer, *supra* note 75 (on the connection between the removal of the principle of immutability of the matrimonial regime and the extension of freedom of contract at 429).
[87] See Burman, *supra* note 58 at 152.
[88] *Ibid*.
[89] Quebec, Department of Justice, Civil Code Revision Office, *Report on Matrimonial Regimes*, vol 5 (Montreal: Civil Code Revision Office, 1968) at 9.
[90] *Quebec v A*, *supra* note 50 at para 61, Le Bel J.
[91] Brisson & Kasirer, *supra* note 75 at 436.

3.1.3. Scaling Back Choice: The Compensatory Allowance

In the 1980's, legislative reform in response to its harmful financial effects on women began to chip away at the central value of freedom of choice. By adopting the compensatory allowance, the legislature sought to remedy a spouse's — typically a wife's — inability to share in the enrichment that she contributed to her husband's patrimony.[92] The remedy provides for the possibility of compensation for a spouse who has enriched her husband's patrimony, or pecuniary interests, by her contribution in the form of unpaid goods or services.[93] Inspired by the common law constructive trust and rooted in the civilian concept of unjust enrichment,[94] the compensatory allowance was created in the context of the "great many flagrant injustices" that resulted from a regime characterized by freedom of matrimonial agreements.[95] It was "clearly intended to mitigate the injustices produced by the implementation of a freely adopted matrimonial regime…."[96]

The adoption of the compensatory allowance was one of the first steps in the erosion of the freedom of choice that characterized Quebec matrimonial law during the preceding decade. Anchored in the objective of genuine economic equality between the spouses, the mechanism threatened to undermine the freedom of choice inherent in the marriage contract.[97] Faced with the impoverishment of many women married under the regime of separation, the compensatory allowance saw the legislature subordinate choice

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[92] Pineau & Burman, *supra* note 68 at 89.
[93] Art 427 CCQ.
[94] See Ernest Caparros, "Le régime primaire dans le nouveau Code civil du Québec : quelques remarques critiques" (1981) 22:3 C de D 325 at 334.
[95] *Lacroix v Valois*, [1990] 2 SCR 1259, 74 DLR (4th) 61 at 1275, 1276 [*Lacroix*].
[96] *Ibid*. See also Ernest Caparros, "Les régimes matrimoniaux secondaires à la lumière du nouveau Code civil du Québec" (1982) 13:1 RGD 27.
[97] Brisson & Kasirer, *supra* note 75 at 435.

"to the agenda of protection."[98] The compensatory allowance meant that spouses could no longer absolutely preclude any intermingling of their respective property, thus paving the way for the progressive disappearance of freedom of choice, once the stated centrepiece of Quebec matrimonial law.

In the contest between choice and protectionism, the compensatory allowance became a casualty of narrow judicial interpretations in favour of free choice. Courts, citing the cultural values of contractual autonomy and financial independence, interpreted the relevant provisions restrictively, requiring women to demonstrate a contribution over and above the typical marital division of labour, such as unpaid work for her husband's business, as well as a causal relationship between the contribution and the enrichment.[99] Further, the compensatory allowance was to be interpreted in the context of codified matrimonial law, in which the legislator had made an express policy choice to allow spouses to select their regime.[100] To award a compensatory allowance for domestic work, freely consented to by the parties, would have constituted a disguised sharing of property and a disregard for contractual freedom.[101]

The judicial unwillingness to "run roughshod over the marriage contract and the chosen matrimonial régime" meant that the compensatory allowance would not be sufficient to alleviate the economic injustices that resulted from the legislative and social

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[98] *Quebec v A*, *supra* note 50 at para 307, Abella J.
[99] See *Droit de la famille — 67*, [1985] CA 135, [1984] JQ no 888 [*DF — 67*]. See also *Droit de la famille — 391*, [1987] RDF 523, [1987] JQ no 1629, cited in Roy, "Paradoxe", *supra* note 58.
[100] *DF — 67*, *supra* note 99.
[101] *Ibid*. See also *Lacroix*, *supra* note 95 at 1279 discussing the close relationship between the compensatory allowance the action in unjust enrichment, and the consequent applicability of similar narrow rules.

entrenchment of freedom of choice.[102] Thus, formal equality between spouses, manifested in the privileging of free choice, prevailed, while the principle of substantive equality, expressed through protectionist measures aimed at ensuring that the economic consequences of divorce were shared equally between the spouses, "suffered at the hands of contractual freedom."[103] The Quebec legislator went back to the drawing board.

3.1.4. The Final Erosion of Choice: The Family Patrimony

The ultimate demise of freedom of matrimonial choice came in the form of the 1989 enactment of the family patrimony. Adopted in response to the demonstrated judicial restraint in interpreting the compensatory allowance,[104] the family patrimony is a mandatory primary regime — that is, the provisions governing the family patrimony apply obligatorily to all marriages, regardless of whether the spouses opt for a regime of separation or the default matrimonial regime of the partnership of acquests.[105] The family patrimony provisions dictate that, upon dissolution of a marriage, both spouses share equally in the value of certain property, regardless of ownership and matrimonial regime.[106] Of public order,[107] spouses may not contract out of the family patrimony, which includes "the residences of the family … the movable property with which they are furnished or decorated and which serves for the use of the household, the motor vehicles used for family travel and the benefits accrued during the marriage under a retirement plan."[108] The regime does not encompass all of a couple's property; spouses may still

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[102] Brisson & Kasirer, *supra* note 75 at 435.
[103] *Ibid*.
[104] Langevin, "Liberté de choix", *supra* note 58 at 714.
[105] See Pineau & Pratte, *supra* note 42 at 199.
[106] See *MT v J-YT*, 2008 SCC 50, [2008] 2 SCR 781.
[107] Art 391 CCQ.
[108] Art 414, 415 CCQ.

choose to be separate as to property with respect to their remaining assets. But the adoption of the family patrimony nevertheless had a serious impact on the law of marriage. As a practical matter, most of a family's wealth will lie in the matrimonial home and any secondary residences, their furnishings, vehicles, and the spouses' retirement savings. Save for its impact on the very wealthy, then, the obligatory family patrimony regime effectively overrides the chosen matrimonial regime.[109]

The measure's primary objective — the reduction of economic inequalities between spouses married under the separation of property regime (but nevertheless applicable to all married spouses) — was clear from the name of the amending bill. But in addition to promoting fair outcomes, the *Act to amend the Civil Code of Québec and other legislation in order to favour economic equality between spouses* effectively deprived Quebec couples of the hard won freedom of choice that had come to characterize the law.[110] Thus, the adoption of the family patrimony symbolized the end of an era in Quebec matrimonial law.[111] In a few short decades, the law went from robustly protecting spouses' contractual freedom and economic independence, to creating a "legal straightjacket"[112] based primarily on principles of protectionism.[113]

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[109] Pineau & Pratte, *supra* note 42 at 199, 206. See also *GB v CC*, [2001] JQ no 2270, [2001] RDF 435.
[110] SQ 1989, c 55, art 8.
[111] But see Nicholas Kasirer, "Testing the Origins of the Family Patrimony in Everyday Law" (1995) 36:4 C de D 195 (for the suggestion that rather than a new legislative creation, the family patrimony can be understood as rooted in existing "customary norms already present in the Quebec legal order at the time of its enactment" at 5).
[112] Burman, *supra* note 58 at 154.
[113] Dominique Goubau, "La conjugalité en droit privé: comment concilier 'autonomie' et 'protection'?" in Pierre-Claude Lafond & Brigitte Lefebvre, eds, *L'union civile: Nouveaux modèles de conjugalité et de parentalité au 21e siècle* (Cowansville: Éditions Yvon Blais, 2003) 153 at 157. See also *Quebec v A*, *supra* note 50 at para 307, Abella J.

For most married couples in Quebec, freedom of choice is a now relic of earlier times. As suggested above, however, where spousal support is concerned, the legislative removal of choice does not seem to have diminished the importance of the concept in the judicial mindset. Rather, while matrimonial laws were adapted in response to social facts about the economic consequences of divorce on women, judicial attitudes about support, as reflected in the discretionary awarding of support, still appear to focus on principles of choice and autonomy and are therefore out of step with the legislative context within which spousal support determinations are made. Insofar as it informs some Quebec judges' rejection of the *Advisory Guidelines*, the ethic of choice and individualism does not correspond with either the positive law of the province, or the policy choices enshrined therein. Rather, the decision to subject all spouses to a mandatory primary regime, aimed at securing substantive equality for spouses, recognized that formal equality, in the form of economic freedom for spouses, "represented a potentially de-stabilising force in married life" and "held no guarantee for the economically vulnerable partner…."[114] Thus, spousal autonomy had to give way to the promotion of substantive equality.[115]

The progressive development of a paternalistic matrimonial law geared primarily toward economic protectionism suggests that Quebec judges' appeal to principles of contract and individualism involves an exaggeration of the importance of choice in Quebec law, both today and historically. While more room for choice existed under the *Civil Code of Lower Canada*, the immutability of matrimonial regimes nevertheless

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[114] Brisson & Kasirer, *supra* note 75 at 432 (referring to the protections of the family residence, not canvassed here, but also applicable to other mechanisms aimed at protecting the economic well-being of vulnerable spouses).
[115] *Ibid*.

limited spouses' economic freedom once married. Later legislative amendments, including the adoption of the compensatory allowance and the family patrimony, limited choice even further. It is therefore a mistake to overemphasize the role of choice as central organizing principle when, in truth, the importance and desirability of freedom of contract in marriage was a perpetual subject of debate and disagreement.[116] Examining the legislative developments in hindsight, it becomes clear that choice has taken a back seat: "Quebec explicitly subordinated a contractual theory of support to a protective one based on mutual obligation, since its law does not allow a couple in a formally recognized union to contract out of the *Civil Code*'s mandatory support provision."[117] Moreover, while some degree of choice subsisted until the adoption of the family patrimony in 1989, today's matrimonial law is better characterized as concerned with conjugality, family solidarity, and protecting family members from economic vulnerability, and not with the fiction of free will.[118]

Quebec judges' distinct approach to the economics of marital breakdown does not correspond with the province's legislative reality. Judicial reasoning rooted in freedom of choice and individualism may have some cultural resonance,[119] but its connection with the legislative landscape of Quebec matrimonial law — historically and today — is more tenuous. Accordingly, the idea that the principles enshrined in the *Advisory Guidelines* — principles of economic partnership and compensation for lost earning capacity — should be rejected in favour of an approach to spousal support grounded in choice and imputed

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[116] *Ibid* at 429.
[117] *Quebec v A*, *supra* note 50 at para 295, Abella J. See also Leckey, "Developments", *supra* note 45 at 254-256.
[118] Benoît Moore, "La consecration de l'autonomie individuelle", *Bulletin de Liaison*, *Fédération des Associations de Familles Monoparentales et Recomposées du Québec* 40:1 (September 2015) 6.
[119] See e.g. Comité consultatif, *supra* note 33.

contract is not only paradoxical, but is harmful to women, whom the law otherwise seeks to protect. Arguments that the rejection of the *Advisory Guidelines* is rooted in Quebec's distinct approach to marriage economics are thus misconceived. Further, as the following section suggests, the idea that some Quebec judges' reasoning might instead be anchored in the relevant federal law are equally unpersuasive, as Supreme Court judges interpreting the *Divorce Act* have explicitly distanced themselves from the individualism that once characterized the prevailing approach to spousal support. Rather than viewing spouses as economically independent individuals, the provisions of the *Divorce Act* are to be interpreted in a context that recognizes the economic interdependence that typically characterizes the marriage relationship.

3.2. Interpreting the *Divorce Act*

The rejection of the *Advisory Guidelines* by some Quebec trial judges appears to be grounded not only in erroneous beliefs about the role of free choice in Quebec matrimonial law, but also in the privileging of self-sufficiency inherent in the "needs and means" model of support. Further, rejection of the *Advisory Guidelines* has been attributed to their emphasis on the length of the marriage in calculating support. Neither of these critiques withstands meaningful scrutiny when read in light of the applicable federal law on spousal support. Moreover, examined in the same light, Quebec scholarship that similarly rejects the applicability of the *Advisory Guidelines* may not withstand meaningful scrutiny.

3.2.1. Departing from the Case Law

While Quebec judges emphasize the pursuit of self-sufficiency on the part of former spouses, judicial interpretations of the *Divorce Act* have been unequivocal that the goal of spousal support is to recognize and to provide redress for the economic harms that

can result from the marriage relationship — a relationship typically characterized by the merger of the spouses' economic lives and the resulting financial interdependence. As discussed in the preceding chapters, the Supreme Court of Canada has set out two competing models of spousal support.[120] First, according to the compensatory model, spousal support functions to financially compensate dependent spouses for their unremunerated contributions to the family.[121] Thus, spousal support seeks to remedy the professional and economic disadvantages associated with the prioritization of domestic tasks and to recognize the economic benefits to the spouse whose earning potential and long term economic prospects have flourished, in part due to the claimant spouse's contributions. Second, spousal support, in its non-compensatory form, is grounded in the "basic social obligation" that characterizes marriage, "in which primary responsibility falls on the former spouse to provide for his or her ex-partner, rather than on the government."[122] Spousal support, in other words, functions to replace lost income that the claimant spouse enjoyed as an economic partner in marriage.[123]

One of the principal critiques of the *Advisory Guidelines* on the part of Quebec judges is that they do not give equal weight to all of the statutory objectives of spousal support, including the pursuit of self-sufficiency.[124] But privileging the pursuit of economic independence as the principal objective of spousal support, ignores both the text and the Supreme Court's interpretations of the *Divorce Act*, which lists four distinct

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[120] For a fuller discussion of the theoretical grounds of spousal support under the *Divorce Act*, see Chapter 1 of this thesis.
[121] See *Moge*, *supra* note 53.
[122] *Bracklow*, *supra* note 53 at para 23.
[123] *Ibid*.
[124] See *DS v MSc*, *supra* note 7.

objectives of spousal support.[125] Only one of these objectives — the promotion of "economic self-sufficiency of each spouse within a reasonable period of time" — includes qualifying language; a support order should promote self-sufficiency only "in so far as practicable."[126] Interpreting these objectives, the Supreme Court has confirmed that no individual objective is to be given priority. Rather, spousal support should "reflect the diverse dynamics of many unique marital relationships."[127] At the same time, however, Justice L'Heureux-Dubé, in the Supreme Court's leading decision on compensatory spousal support, emphasized that the objective of self-sufficiency is, unlike the other objectives of support, "tempered by the caveat that it is to be made a goal only 'in so far as practicable.'"[128] Thus, the Supreme Court rejected the "ethos of deemed self-sufficiency" that some Quebec judges privilege.[129]

Moreover, the Court was express in its finding, based on the evidence before it, that the self-sufficiency model of support has clearly disenfranchised women, both in the courtroom and beyond.[130] Accordingly, a theory that has contributed to "the female decline into poverty" could not have been Parliament's intention in setting out the objectives of spousal support.[131] By incorporating the principles of compensation set out by the Court in *Moge*, the *Advisory Guidelines* reflect the Court's rebuff of self-sufficiency as a principal objective of support. The rejection of the *Advisory Guidelines*

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[125] *Divorce Act*, *supra* note 31, s 15.2(6).
[126] *Ibid*.
[127] *Moge*, *supra* note 53.
[128] *Ibid*.
[129] *Ibid*.
[130] *Ibid* at 857.
[131] *Ibid*.

based on the claim that they underemphasise the goal of self-sufficiency is simply not a tenable interpretation of the federal law on divorce.

In addition to their purported underemphasis of the objective of financial independence, Quebec judges have criticized the *Advisory Guidelines* for their overemphasis on the length of the marriage in calculating support.[132] This critique, however, involves an oversimplification of the *Advisory Guidelines* and ignores the dictates of the Supreme Court. Indeed, in endorsing the *Advisory Guidelines* as a "well-done, convenient, and practical work tool," the Quebec Court of Appeal observed that the length of the marriage reflects the principle of the "merger over time" of spouses' economic lives — a concept endorsed by the Supreme Court both in *Moge*, dealing with compensatory support, and later in *Bracklow*, referring to non-compensatory support.[133] Drawing on these decisions, Justice Bich wrote that "[m]arriage represented as a 'socio-economic partnership' … derives quite clearly from [the relevant provisions] of the *Divorce Act*. It may reasonably be thought that the longer a marriage lasts, the closer the partnership and the more problematic it is to dissolve that marriage."[134] As the length of a marriage increases, so too does the spouses' economic interdependence, thus making the length of the marriage a significant factor in determining support.[135]

The rejection of the *Advisory Guidelines* by some Quebec trial judges appears to be grounded not only in erroneous beliefs about the pursuit of self-sufficiency and the significance of the length of the marriage, but moreover, in Quebec's general approach to spousal support, where awards are granted based on the needs and means of the spouses.

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[132] See *DS v MSc*, *supra* note 7 at para 40.
[133] *DF — 112606*, *supra* note 16 at para 99.
[134] *Ibid* at para 100. See also *Bracklow*, *supra* note 53 at para 49.
[135] *DF — 112606*, *supra* note 16 at para 101.

This is evident not only in the decisions of the Quebec Superior Court and Court of Appeal, but also, as highlighted above, in the concurring reasons of one Quebec judge in *Quebec v. A*.[136] The understanding of spousal support based on meeting the basic needs of the claimant spouse, however, ignores the economic merger that characterizes the marriage relationship. Instead, the needs and means model of support, as understood by some Quebec judges, echoes the cultural tenet of individualism and economic self-sufficiency that, while once an important feature of Quebec matrimonial law, eventually became subordinate to the "agenda of protectionism," described in the preceding section.[137] Justice Deschamps' reasoning has thus been criticized not only by concurring justices on the Court,[138] but also by scholars in family law. Notably, one of the authors of the *Advisory Guidelines* issued a strong rebuke of Justice Deschamps' reasoning, calling her unexplained exclusion of compensatory support "baffling," and criticizing the decision as a whole as an abandonment of the Court's earlier functional approach to the family.[139]

The conceptual gaps between the prevailing approach to spousal support in Quebec and that espoused by the Supreme Court and entrenched in the *Advisory Guidelines* suggests that the Quebec approach cannot be reconciled with either its own matrimonial law, or the federal law governing divorce. Quebec's conception of spousal support as a measure to respond to demonstrated need and to promote economic independence aligns with the historic, but now outdated, privileging of individual autonomy and free choice. While rooted in notions of equality, principles of autonomy

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[136] *Supra* note 50 at para 383, Deschamps J.
[137] *Ibid* at para 307.
[138] *Ibid*.
[139] Rollie Thompson, "*Droit de la famille – 091768*", Case Comment, (2013) RFL 325 at 326.

and freedom of contract reflect a formal conception of equality,[140] wherein the emphasis lies on equal treatment under the law, regardless of its differential impacts on different members of society.[141] As the Supreme Court has reiterated on numerous occasions, however, the formal approach to equality — that is, treating like alike — "is seriously deficient in that it excludes any consideration of the nature of the law."[142] Rather, equality is to be understood as remedial in nature;[143] "[c]onsideration must be given to the content of the law, to its purpose, and its impact upon those to whom it applies…"[144]

Moreover, many read *Moge* as incorporating the principle of substantive equality into the law of spousal support and setting out the idea that both spouses should experience the impacts of divorce in equal ways.[145] The same might be said of *Bracklow*, in its continued recognition of the differential impacts of divorce on dependent spouses. Thus, the compensatory and the basic social obligation models of spousal support, by recognizing the potential for uneven economic consequences of divorce on the spouses, ensure not merely that spouses are *treated* equally, but that they *experience* the impacts of divorce in substantively equal ways, accounting for context and situational differences. These models — grounded in principles of substantive equality and fairness — are the models of spousal support reflected in the *Advisory Guidelines*. Accordingly, the

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[140] Alain Roy, "Pour un droit de la famille adapté aux nouvelles réalités conugales et familiales : Le rapport du Comité consultatif sur le droit de la famille" in Service de la formation continue, Barreau du Québec, vol 403, *Développements récents en droit familial* (Montreal: Yvon Blais, 2015) 1 at 5. Also see Susan Engel, "Compensatory Support in *Moge v Moge* and the Individual Model of Responsibility: Are We Headed in the Right Direction?" (1993) 57:2 Sask L Rev 397.
[141] See *Andrews v. Law Society of British Columbia*, [1989] 1 SCR 143, 56 DLR (4th) 1.
[142] *Ibid* at 166.
[143] *Ibid* at 171.
[144] *Ibid* at 168.
[145] See Engel, *supra* note 140.

rejection of the *Advisory Guidelines* in Quebec is misguided in its departure from the positive law of divorce, both provincially and federally.[146]

3.2.2. A Note on the Literature

As mentioned above, Quebec resistance to the *Advisory Guidelines*, while originating in the courts, is not limited to members of the province's judiciary; a number of family law scholars also support the rejection of the *Advisory Guidelines*. In 2016, four authors examined the relevance of their application in Quebec.[147] Commissioned by the Quebec Ministry of Justice, the authors analyzed 565 divorce files spanning from 2008-2012, including cases settled by agreement and by judicial order.[148] The authors compared both the settlements and the judicial awards with the awards that might have been obtained pursuant to the *Advisory Guidelines* and concluded that, "clearly, the application of the *Advisory Guidelines* leads to a non-negligible increase in the amount of spousal support."[149] In other words, the formulas contained in the *Advisory Guidelines* cannot be said to reflect Quebec practice with respect to spousal support, despite the claim, by the authors of the *Advisory Guidelines*, that they build on actual practice and aim to reflect current practice across the country.[150] The authors write: "Quebec courts do

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[146] It may be possible to connect resistance to the *Advisory Guidelines* in Quebec with the fact that the leading cases interpreting the relevant provisions of the *Divorce Act* originated outside of Quebec. As Section 3.2.2 of this chapter suggests, however, the fact that the interpretation of the corollary relief provisions of the *Divorce Act* stems from outside of Quebec, should not be a bar to their application in that province, given their unique nature and contained as they are in a federal statute designed for uniform application across the provinces.

[147] Jocelyn Jarry et al, "Lignes directrices facultatives en matiere de pensions alimentaires pour epoux — Pertinence de leur application au Quebec?" (2016) 31:2 CJLS 243.

[148] *Ibid* at 251.

[149] *Ibid* at 264 [translated by author].

[150] *Ibid*. It bears mentioning that the study only examined cases applying the "without child support" formula from the *Advisory Guidelines* — that is, the formula that applies in the absence of a concurrent child support obligation. In failing to examine awards rendered using the "with child support" formula, the study ignores the fact that the vast majority of decisions applying the *Advisory Guidelines* employ the "with

not share the same reading of the authors of the *Advisory Guidelines*, when they view "income sharing" as an accurate reflection of their mutual obligation of support."[151] Ultimately, the authors suggest that the *Advisory Guidelines* should not apply in Quebec.

While the study was descriptive, canvassing Quebec divorce cases and comparing their outcomes with the ranges provided by the *Advisory Guidelines*, the authors are clear in their view that it is the *Advisory Guidelines* that get things wrong, and not Quebec judges. As with judicial views, however, that conclusion is unpersuasive for a number of reasons. The authors maintain that a weakness of the *Advisory Guidelines*, insofar as they might apply in Quebec, is their failure to contemplate or account for the mandatory division of family patrimony, described above.[152] What the authors seem to overlook, however, is that while the rules are not as rigid outside of Quebec — spouses may renounce family property in advance — all Canadian provinces mandate the equal sharing of property upon divorce.[153] While the details of the different legislative schemes vary across the country, in terms of what constitutes family or matrimonial property for the purposes of sharing following a divorce, all spouses in Canada mandatorily share equally in that property by default. Moreover, while spouses outside of Quebec may renounce their claim to property sharing prior to the end of the relationship — by

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child support" formula. Specifically, twice as many cases are dealt with using that formula. See Carol Rogerson & Rollie Thompson, "Ten Years of the SSAG" (Presentation delivered at the Federation of Law Societies of Canada National Family Law Program, Whistler, 15 July 2014), online: <http://library.law.utoronto.ca/spousal-support-advisory-guidelines> [Rogerson & Thompson, "Ten Years"]. This is unsurprising given the strong connection between parenting and spousal support discussed in *Moge*, *supra* note 53.

[151] Jarry et al, *supra* note 147 at 264 [translated by author].

[152] *Ibid*.

[153] See e.g. Ontario *Family Law Act*, *supra* note 39, Part II.

concluding a domestic contract,[154] also known as a cohabitation agreement or prenuptial agreement — most spouses do not;[155] only eight per cent of Canadian couples have a domestic contract in place.[156] What is more, there will be many cases where insignificant amounts of property mean that a family's most valuable asset will be a spouse's income.[157] In such cases, where families do not own property, or where the value of any property would not suffice to compensate for losses incurred during the marriage, division of family patrimony will offer little relief to a financially vulnerable spouse.

Ultimately, the issue for both courts and scholars appears to be less about the *Advisory Guidelines*, than about the substance of the federal law on divorce, as interpreted by the Supreme Court. The authors of the 2016 study write: "If the provisions relative to spousal support contained in the *Divorce Act* seem to be interpreted differently in Quebec, this is undoubtedly because the scope of their foundational principles remains debatable."[158] Moreover, guidelines endorsing only one possible interpretation of a 30-year-old law will necessarily lead to disagreement.[159] Indeed, the authors suggest that the concept of "merger over time," which underlies the without child support formula — that

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[154] See e.g. *Ibid*, Part IV.

[155] While it is tempting to ground the infrequency of cohabitation agreements in the spouses' exercise of autonomy and choice, it is worth noting that the emotional nature of family law is regularly understood as "[engaging] the passions as no other part of our legal system does," with passion "[exceeding] rationality." See John Dewar, "The Normal Chaos of Family Law" (1998) 61:4 Mod L Rev 467 at 484. See also: Margaret F Brinig, "Comment on Jana Singer's *Alimony and Efficiency*" (1994) 82:7 Geo LJ 2461 (for the idea that couples headed to the altar engage in a "willing suspension of disbelief" about the likely outcome of their union at 2462), citing Jeffrey E Stake, "Mandatory Planning for Divorce" (1992) 45:2 Vand L Rev 397; Jana B Singer, "Alimony and Efficiency: The Gendered Costs and Benefits of the Economic Justification for Alimony" (1994) 82:7 Geo LJ 2423.

[156] See Dani-Elle Dubé, "Should you get a prenup or cohabitation agreement before settling down?", *Global News* (16 June 2017), online: <globalnews.ca> (citing an interview with John-Paul Boyd, executive director of the Canadian Research Institute for Law and the Family with the University of Calgary).

[157] Carol Rogerson, "Spousal Support After Moge" (1996) 14 Can Fam L Q 281 at 299, citing *Moge*, *supra* note 53 at 849.

[158] Jarry et al, *supra* note 147 at 264 [translated by author].

[159] *Ibid*.

is, the formula that applies in the absence of a concurrent child support obligation — may not correspond with social conceptions of the role of spousal support in Quebec.[160]

Such a reading of federal divorce law as not directly applicable to Quebec is not unique. Whether interpretations of family law emanating from the common law provinces should apply in Quebec has been the subject of judicial disagreement.[161] In rejecting the application of federal divorce law in Quebec, Justice Dalphond, then on the Quebec Superior Court, relied on scholarship for the proposition that "[the] complementarity of federal law and civil law, however natural it may be (...) must be constantly maintained and reaffirmed…."[162] Indeed, Professors Brisson and Morel have maintained that federal and provincial law can work together, when they promote the same objectives.[163] As seen, however, spousal support upon divorce is an area where the federal and provincial laws part ways; whereas Quebec family law is regularly understood to promote individual autonomy, seeing the end of the marriage as the end of the obligations of solidarity and support between the spouses,[164] authoritative interpretations of the federal law have rejected such an understanding. Instead, the corollary relief provisions of the *Divorce Act* have been understood as recognizing the existence of an economic partnership, and as

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[160] *Ibid*, citing Comité consultatif, *supra* note 33. (Recall that the 2015 report commissioned by the Quebec government placed the concepts of free will and contractual freedom at the centre of the family.)
[161] For arguments that federal law is not directly applicable, see *Droit de la famille — 562*, [2000] QJ No 1397 [*DF — 562*]; *Droit de la famille — 608*, [1989] JQ no 74; *Droit de la famille — 427*, [1987] JQ no 2210. For the opposing view, see *Droit de la famille — 1532*, [1993] JQ no 2001; *Droit de la famille — 3462*, JE 99-2340 ("*Pour les mesures accessoires prévues aux articles 15 et 17 de la Loi sur le divorce, ce ne sont donc pas les principes du droit civil québécois qu'il nous faut appliquer, mais ceux de la Common Law*"). Note that these decisions deal with variations of prior awards based on agreements and not initial spousal support awards; as mentioned earlier in the text, Quebec judgments on the latter question typically refer to the applicable Supreme Court case law.
[162] *DF — 562*, *supra* note 161 at 65, citing Jean-Maurice Brisson & André Morel, "Droit fédéral et droit civil : Complémentarité, Dissociation" (1996) 75:2 Can Bar Rev 297 at 334.
[163] *Ibid* at 326.
[164] See Pineau & Pratte, *supra* note 42 at 318.

aiming to remedy financial vulnerabilities that persist beyond a judgment in divorce.[165] To this end, Brisson and Morel suggest that while it will often be appropriate to supplement federal law with provincial interpretations, section 15 of the *Divorce Act* requires the federal law to function autonomously.[166] This is because it is an example of a federal law that transcends Canadian legal traditions, given its "*sui generis*" nature, distinct from both Quebec's civil law and the common law of the other provinces.[167] The application of federal law in Quebec in not a simple matter; more about the boundaries between Canada's legal systems will be said in the following part. But the idea that provincial interpretations should prevail with respect to spousal support as an incident of divorce is not uncontroversial, suggesting that the rejection of the *Advisory Guidelines* based on that belief might not be taken as the conclusive word on their application in Quebec.

This part has sought to demonstrate that substantive critiques to the *Advisory Guidelines* — that is, critiques based on their content and foundational principles — may not stand up to meaningful scrutiny, as they reflect neither provincial nor federal divorce law. Instead, they lend credence to the observation by the authors of the *Advisory Guidelines* that some of the criticisms of the *Advisory Guidelines* in Quebec are "really criticisms of the current law" and, in some cases, reflect a judicial preference for a non-compensatory approach to support.[168] In an area of shared federal and provincial jurisdiction such as spousal support, resistance might then be anchored in an unstated rebuff of federal legislation dealing with a matter traditionally at the heart of provincial

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[165] See *Bracklow*, *supra* note 53.
[166] Brisson & Morel, *supra* note 162 at 314, n 63.
[167] *Ibid* at 314.
[168] *Advisory Guidelines*, *supra* note 1 at 22.

private law.[169] As the preceding pages have suggested, however, the non-compensatory approach adopted by some Quebec judges, insofar as it is ostensibly rooted in Quebec law, has no real foundation in the current legislative context. Moreover, while in the absence of federal law on the subject, Quebec would be within its jurisdiction in regulating family matters, the Quebec approach fails to give sufficient weight to the existing provisions of the applicable federal law. Insofar as it is grounded in their substance, then, judicial resistance to the *Advisory Guidelines* is unpersuasive. The following part turns to the second stated reason for the rejection of the *Advisory Guidelines* — their informal, non-legislated character — and suggests that this reasoning involves a mischaracterization of both the *Advisory Guidelines* and of some of the essential features of Quebec's civil law system.

4. Critiquing the Formal Resistance to the *Advisory Guidelines*

The preceding part examined some Quebec judges' approach to the substance of the *Advisory Guidelines* and challenged the idea that they do not represent the law of spousal support in Quebec. This part now examines the second stated justification for the refusal to apply the *Advisory Guidelines*, their form. Upon a quick reading, the idea that the informal, unlegislated character of the *Advisory Guidelines* should prevent their use in Quebec might seem attractive, given the civilian nature of the province's private law system and the paramount place of legislation within that system. In a system that seeks to give effect primarily to legislative intent, the judicial hesitancy to rely on the purely advisory and non-binding *Advisory Guidelines* — an instrument foreign to Quebec's system — has some appeal. But as the following paragraphs suggest, rather than an

[169] For further discussion of the interaction between provincial and federal law regulating the same matter, see Part 4.2 below, on the mixed nature of Quebec's legal system.

amorphous tool — neither law nor jurisprudence — the *Advisory Guidelines* might be better viewed as playing an integral and accepted role in the civil law system, that of scholarship, or "*la doctrine*." This part thus furthers the internal critique of Quebec's approach to spousal support by first suggesting that the form-based resistance to the *Advisory Guidelines* is inconsistent with the primacy that the province's legal system places on other non-legislated sources. Second, it attempts to demonstrate that due to its nature as a pluralistic and mixed legal system, especially when dealing with subjects of shared constitutional jurisdiction, resistance to the *Advisory Guidelines* misleads with respect to the question of legal systems in Quebec.

4.1. The *Advisory Guidelines* within Quebec's Hierarchy of Legal Sources

As any Canadian jurist will know, the differences between Quebec and the rest of Canada go further than language and culture; the province stands apart with respect to its legal system as well.[170] Unlike the other provinces, where the common law governs all areas of life, Quebec's private law — that is, areas of law dealing with relations between individuals, family law included — is governed by civil law.[171] A retelling of the history of Quebec's French-inspired system would go beyond the scope of this thesis. But one feature of that history merits mention here, as it relates to the classification of legal sources in Quebec's private law system. Unlike the common law, which is developed primarily by judges, modern civil law, with its roots in the Napoleonic Code of 1804, was primarily concerned with limiting the scope of judicial power — an aristocratic power at

[170] See Catherine Valcke, "Quebec Civil Law and Canadian Federalism" (1996) 21:1 Yale J Intl L 67 at 69 [Valcke, "Quebec Civil Law"].
[171] *Ibid* at 70.

odds with France's post-revolutionary anti-feudalist agenda.[172] To the lawmakers of the time, the most effective way to limit judicial discretion was to codify the law, in the form of general principles, "and to commit judges to rational deduction from these principles."[173] Thus, legislation, representing the will of the lawmaker, in the form of the *Civil Code*, became paramount in France, and consequently in Quebec. In the hierarchy of legal sources, the legislated text sits at the apex.[174]

Given that legislative paramountcy is rooted in a desire to stem judicial activism,[175] it is not surprising that in Quebec, judicial decisions do not rank next in the hierarchy. Rather, in terms of sources of law, *la doctrine*, or scholarly writing, is the second place Quebec judges should look in interpreting the law and determining legislative intent. Even prior to Napoleonic codification, doctrinal commentary helped to shape French legal rules.[176] Described as a "law of professors," wherein the "teacher-scholar is the real protagonist,"[177] and previously decided cases are secondary to civilian legal scholarship, the civil law tradition places "paramount importance on the doctrinal

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[172] *Ibid* at 73.
[173] *Ibid* [references omitted].
[174] See Adrian Popovici, "Le droit civil, avant tout un style…" in Nicholas Kasirer, ed, *Le droit civil, avant tout un style?* (Montreal: Éditions Thémis, 2004) [Kasirer, *Le droit civil*] 207 at 211. See also John EC Brierley, "The Civil Law in Canada" (1992) 84:1 Law Libr J 159 [Brierley, "Civil Law"]; Pierre Legrand, "*Antiqui Juris Civilis Fabulas*" (1995) 45:3 UTLJ 311 (on the *Civil Code* as a Constitution and a "secular Bible" at 327); Nathalie Des Rosiers, Book Review of *Quebec Civil Law: And Introduction to Quebec Private Law* by John EC Brierley & Roderick A Macdonald (1995) 33:1 Osgoode Hall LJ 203 (on the "pre-eminence of written law" in the civilian regime at 204, n 2); Robert Leckey, "The Practices of Lesbian Mothers and Quebec's Reforms" (2011) 23:2 CJWL 579 (on the positivistic character of Quebec family law and the "sacred" nature of the codified civil law at 581) [Leckey, "Lesbian Mothers"].
[175] See Valcke, "Quebec Civil Law, *supra* note 170 at 73.
[176] Brierley & Macdonald, *supra* note 40 at 125.
[177] Popovici, *supra* note 174 at 213, citing John Henry Merryman, *The Civil Law Tradition* (Stanford: Stanford University Press, 1969) at 27.

writings of legal scholars." [178] The *Advisory Guidelines* were written by experienced family law scholars. On its own, then, the paramount place of scholarship in Quebec's civilian system undermines the judicial argument that the advisory and unofficial character of the *Advisory Guidelines* precludes judicial reliance on them. But a fuller understanding of the form and function of doctrinal commentary in Quebec further belies the stated reasons for judicial resistance to the *Advisory Guidelines*.

The contrast between common law and civilian scholarship suggests that the *Advisory Guidelines* may be characterized as scholarship, as that term is understood in Quebec's civil law. Whereas scholarship originating in common law jurisdictions is traditionally descriptive in nature — with the explanation or rationalization of judicial decisions as its primary focus — civil law scholarship is comparably prescriptive.[179] Rather than elaborate on the case law, civilian doctrinal writing will flesh out the implications of legal texts and judicial reasoning.[180] *La doctrine* performs a "puzzle-solving" function: it "examines the evolution of both legal norms and their social functions, suggesting new formulations and unprecedented applications of existing rules. … [I]t integrates various sources of legal justification into their political and social context."[181] Because the common law is an uncodified system, judgments provide both decisions and reasons for their decisions; they do not, however, provide more general legal norms.[182] Conversely, the primary source of law in Quebec — the text of the *Civil*

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[178] The Honourable Madame Justice Claire L'Heureux-Dubé, "By Reason of Authority or By Authority of Reason" (1993) 27:1 UBC L Rev 1 at 8.
[179] Roderick A Macdonald, "Understanding Civil Law Scholarship in Quebec" (1985) 23:2 Osgoode Hall LJ 575 at 578.
[180] *Ibid*.
[181] *Ibid* at 589 [emphasis added].
[182] *Ibid* at 579.

Code — establishes norms, but "does not decide cases or give justifications."[183] As a result, the justification for legal texts, and the "extensions to which they may be taken," falls to academic scholarship, as the "culture of codification requires (and authorizes) fundamental conceptual analysis."[184] In Quebec, then, scholarship not only complements the legislative text by writing about law, but, in some cases, may be viewed as constitutive of law.[185]

Although authored by professors trained in the Canadian common law tradition,[186] the *Advisory Guidelines* perform precisely the same function as civilian scholarship. In much the same way that the *Civil Code* establishes norms, but does not decide cases, the judgments setting out the principles underlying the *Advisory Guidelines* provide the current conceptual and theoretical bases for spousal support, but have been criticized for their failure to provide concrete direction to lawyers and trial judges with respect to calculating support.[187] Likewise, the statutory provisions governing the determination of spousal support upon divorce describe the general objectives of a spousal support award, as well as some factors for judicial consideration, but they offer little in the way of concrete guidance.[188]

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[183] *Ibid*.
[184] *Ibid* at 580-581.
[185] See L'Heureux-Dubé, *supra* note 178 at 9, citing *ibid* at 577.
[186] Carol Rogerson studied and teaches at the University of Toronto. See "Carol Rogerson" University of Toronto Faculty of Law, online:
<http://www.law.utoronto.ca/faculty-staff/full-time-faculty/carol-rogerson>.
Rollie Thompson studied and teaches at the Schulich School of Law at Dalhousie University. See "Rollie Thompson" Schulich School of Law, online: <http://www.dal.ca/faculty/law/faculty-staff/our-faculty/rollie-thompson.html>.
[187] See e.g. *Advisory Guidelines*, *supra* note 1; Carol Rogerson, "Spousal Support Post-Bracklow: The Pendulum Swings Again?" (2001) 19 Can Fam LQ 185. For further background on the rationale for the development of the *Advisory Guidelines* see Chapter 2 of this thesis.
[188] See *Divorce Act*, *supra* note 31, ss 15.2(4), 15.2(6).

In drawing on the models of marriage described by the Supreme Court and canvassing the decisions of lower courts so as to distil formulas for applying the Supreme Court's directives, the *Advisory Guidelines* contribute to the law on spousal support by "synthesiz[ing] material otherwise not available to or digestible by judges."[189] By establishing formulas for applying the dictates of the Court, they formulate new applications of existing rules.[190] By drawing on the combination of decisions underpinning and applying the law of spousal support, as well as the relevant statutory provisions, and by creating a means to respond to the demonstrated problems with discretionary support awards, they "[integrate] various sources of legal justification into their political and social context."[191] "[A]n authoritative interpretation of a legislative text,"[192] the *Advisory Guidelines* serve the same purposes as traditional civil law scholarship.

The parallel between the *Advisory Guidelines* and traditional civilian scholarship may be taken further. In determining how much weight to ascribe to academic commentary, civilian jurists will consider the reputation of its author.[193] As discussed elsewhere in this thesis, the *Advisory Guidelines* were written by two of the leading authorities in Canadian family law, in consultation with interested stakeholders throughout the country. Moreover, since the 2008 release of the final draft of the *Advisory Guidelines*, the authors continue to monitor their use, as well as the development of spousal support law more generally. To ensure that they are applied in

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[189] Brierley & Macdonald, *supra* note 40 at 128.
[190] See Macdonald, *supra* note 179 at 589.
[191] *Ibid*.
[192] *Ibid*.
[193] Brierley & Macdonald, *supra* note 40 at 126.

keeping with jurisprudential developments, the authors have created "User Guides" to inform their use by lawyers and judges,[194] and they regularly write and present on the use of the *Advisory Guidelines*.[195] Insofar as the reputation of the author of doctrine goes, it is difficult to criticize the authors' expertise in the subject.

Where the authors of the *Advisory Guidelines* might raise concerns among civilian jurists is not with their knowledge, but with their status as "common lawyers," neither of them being trained in Quebec's civil law tradition. The concern for maintaining the integrity of the civil law system is unsurprising, given the relationship between the province's *Civil Code*, its distinct system of private law and its legal — and national — identity.[196] That concern might induce scepticism on the part of Quebec jurists with respect to the doctrinal writings of scholars trained outside that system.[197] Indeed, the "community of authorized interpreters" of civilian private law "brings together individuals who share a common educational background, who communicate in the same technical language, who expound the same values…."[198] Thus, the protection of these values, as well as linguistic differences, has resulted in a "cleavage" between civil law and non-civil law scholarship in Quebec; "[t]he authors of the former conceive of

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[194] See Family, Children and Youth Section, Department of Justice, *The Spousal Support Advisory Guidelines: A New and Improved User's Guide to the Final Version* by Carol Rogerson & Rollie Thompson (Ottawa: Department of Justice, Canada, 2010); Family, Children and Youth Section, Department of Justice, *Spousal Support Advisory Guidelines: The Revised User's Guide* by Carol Rogerson & Rollie Thompson (Ottawa: Department of Justice, Canada, 2016).

[195] See e.g. Rollie Thompson, "6 Errors That You Could Make Using the SSAG (But Shouldn't, and Now Won't)" (Paper delivered at LSUC, The Six-Minute Family Lawyer 2014, 4 December 2014), online: <http://library.law.utoronto.ca/utfl_file/count/media/6%20errors%206-minute%20lawyer%20nov2014.pdf>; Rogerson & Thompson, "Ten Years", *supra* note 150.

[196] Legrand, *supra* note 174 at 341. See also Macdonald, *supra* note 179; David Howes, "From Polyjurality to Monojurality: The Transformation of Quebec Law, 1875-1929" (2011) 32:3 McGill LJ 523.

[197] See Macdonald, *supra* note 179 at 576, 586.

[198] Legrand, *supra* note 174 at 338

themselves as guardians of their civilization through their insistence on a particular theory of law, legal science and legal scholarship."[199] Suspicion of scholarship emanating from outside Quebec is understandable. But at the same time, "the pursuit of purity for its own sake is a dangerous preoccupation which, when carried to extremes, can lead to paradoxical results."[200] Where the rejection of scholarship originating outside of Quebec undermines the pursuit of substantive equality — an objective of the applicable federal law of spousal support — the desire to protect the distinctive character of Quebec's legal system should give way to solutions outside of the province's private law, especially where the matter in question is one of shared legislative jurisdiction.

Reliance on the *Advisory Guidelines* would not undermine the legislative supremacy that characterizes Quebec civil law. While the legislative text may be the first place to look in matters of private law, unyielding devotion to the text becomes problematic when the law does not reflect the facts or social practice,[201] or, as in the case of the wide discretionary grant contained in the *Divorce Act*, where the law demands interpretation and adaptation in light of the circumstances. While a discussion of Quebec family demographics is beyond the scope of this thesis, relevant data suggest that the social context of Quebec families is not reflected by the province's legal model,[202]

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[199] Macdonald, *supra* note 179 at 586.
[200] *Ibid* at 587.
[201] See Leckey, "Lesbian Mothers", *supra* note 174.
[202] See e.g. "Tâches domestiques : encore loin d'un partage équitable", *Institut de recherche et d'informations socio-économiques* (October 2014) (Data from Quebec indicates that in 2013, the salary gap between men and women reached its peak, with men earning an average of almost $3.00 more per hour than women. With respect to household work, women, in Quebec and throughout Canada, consistently perform approximately 30 per cent more unpaid domestic work than men. Likewise, care for children continues to be assumed by women the majority of the time, and women are 30 per cent more likely to miss work to assume familial obligations) [IRIS, "Tâches domestiques"]; Canada, Status of Women Canada,

premised, as it is on formal gender equality. Moreover, while the *Civil Code* is the primary source of Quebec private law, it is not the only one.[203] Scholarship, as a source of law, ranks higher in Quebec than in the common law provinces and the *Advisory Guidelines* share the qualities of traditional academic commentary. Accordingly, the paramountcy of legislation need not function as an impediment to the pursuit of substantive equality, as mandated by the relevant case law, and as entrenched in the *Advisory Guidelines*. If, however, their characterization as *la doctrine* does not persuade Quebec jurists that they are worthy of meaningful consideration, the following section suggests that the mixed nature of Quebec's legal system and its associated plurality of legislative sources further undermine judicial scepticism of the *Advisory Guidelines*.

4.2. The Mixed Nature of Quebec's Legal System

The judicial resistance to the *Advisory Guidelines* based on adherence to civilian principles misleads with respect to the nature of Quebec's legal system. The mixed nature of Quebec law, shaped in substantial part by common law influences and, historically, by a plurality of sources, suggests that the refusal of some judges to apply the *Advisory Guidelines* may be unjustified. More specifically, the discussion below maintains that the public dimensions of family law, the history of drawing on foreign sources, and certain institutional structures of Quebec's legal system militate in favour of a greater openness on the part of Quebec jurists toward instruments originating outside of Quebec.

Women and Girls in Canada: Presentation to the Social Trends, Policies and Institutions Deputy Ministers' Policy Committee (Ottawa, Status of Women Canada, 2015) [SWC, "*Women and Girls*"].

[203] See Robert Leckey, "Family Law Outside the Book on the Family" (2008) 88:3 Can Bar Rev 541 at 547.

There is a lively debate around whether Canadian family law is better classified as "private" or "public" law.[204] Indeed, much academic ink has been devoted to the idea that private relationships between spouses are necessarily shaped by public forces.[205] Given the state interest in the family and the important public law dimensions of family law (such as the Supreme Court's reliance on substantive equality principles developed under the *Charter*), it is no longer fitting to conceive of family law as exclusively private law.[206] The result of the shift toward public law is that "traditional resources of private law are inadequate for addressing the (…) challenges" of family law.[207] In determining questions of family law, Quebec jurists must look beyond the rules contained in the *Civil Code*. Turning to the *Advisory Guidelines*, which incorporate the Court's use of public law principles and synthesize judicial decisions across jurisdictions is not only helpful, but is more appropriate than limiting spousal support determinations to historical practices within Quebec.

Reliance on common law sources in areas of mixed private and public law would not be a first for Quebec. The "ideological shift" of the 1980's away from freedom of

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[204] See especially Alison Harvison Young, "The Changing Family, Rights Discourse and the Supreme Court of Canada" (2001) 80:2 Can Bar Rev 749 (on the "public" nature of family law); Robert Leckey, "Family Law as Fundamental Private Law" (2007) 86:1 Can Bar Rev 70 [Leckey, "Private Law"].
[205] See e.g. Susan B Boyd, "Child Custody, Ideologies, and Employment" (1989) 3:1 CJWL 111; Marlène Cano, "La réforme Québécoise sur les rapports pécuniaires entre conjoints (Loi 146): Le concept de 'liberté de choix'" (1990) 4:1 CJWL 190; Brenda Cossman, "A Matter of Difference: Domestic Contracts and Gender Equality" (1990) 28:2 Osgoode Hall LJ 303; Brenda Cossman, "Family Feuds: Neo-Liberal and Neo-Conservative Visions of the Reprivatization Project" in Brenda Cossman and Judy Fudge, eds, *Privatization, Law, and the Challenge to Feminism* (Toronto: University of Toronto Press, 2002) 169; Rebecca Johnson, *Taxing Choices: The Intersection of Class, Gender, Parenthood, and the Law* (Vancouver: UBC Press, 2002); Hester Lessard, "Charter Gridlock: Equality Formalism and Marriage Fundamentalism" (2006) 33 SCLR (2d) 291; Diana Majury, "Women are Themselves to Blame: Choice as Justification for Unequal Treatment" in Fay Faraday, Margaret Denike & M Kate Stephenson, eds, *Making Equality Rights Real: Seeking Substantive Equality Under the Charter* (Toronto: Irwin Law, 2009) 209.
[206] See Leckey, "Private Law", *supra* note 204.
[207] *Ibid* at 74.

choice and toward protectionism "required a move away from the usual sources of matrimonial law. It was through an openness to what was happening elsewhere in the world that Quebec jurists acted to make obligatory certain effects of marriage."[208] The adoption of the compensatory allowance, for example, drew on the work of the Ontario legislature and borrowed from the common law doctrine of constructive trust, just as the obligatory provisions protecting the family residence (not canvassed above but adopted around the same time as the compensatory allowance) relied on schemes in "Ontario, Saskatchewan, British Columbia and England, as well as more familiar civilian ports of call."[209] Thus, "an official policy of legal pluralism was adopted in law reform circles, elevating 'comparative law' to the status of a first-order source for ideas."[210] Quebec's earlier experiences amending the family law indicate that provincial boundaries are "no longer a meaningful constraint when women's economic lives [seem] unaffected by the niceties of legal traditions and technicalities known to lawyers and law books."[211] Moreover, as the relevant data on gender roles suggest,[212] economic data about marriage breakdown, and the methodology for gathering it, transcend jurisdictional boundaries.[213] Just as openness to comparative ideas did not spell the end of Quebec's distinct system in the late 20th century, judicial reliance on external instruments like the *Advisory Guidelines* will not lead to the demise of Quebec's civilian character today, especially considering the mixed nature of the private law system itself.

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[208] Brisson & Kasirer, *supra* note 75 at 438.
[209] *Ibid* at 439.
[210] *Ibid*.
[211] *Ibid* at 444.
[212] See IRIS, "Tâches domestiques", *supra* note 202; SWC, "*Women and Girls*" *supra* note 202.
[213] Macdonald, *supra* note 179 at 588.

The concern for the integrity of the civil law system is further undermined by the popular understanding of Quebec not as a purely civilian jurisdiction, but rather, as a "mixed" legal system.[214] In its institutional structures, Quebec looks much more like a common law jurisdiction, in fact, than its French predecessor. Unlike in the continental system, for example, judges in Quebec are appointed from the bar, and not educated in the classroom.[215] Further, the form of judicial output in Quebec follows the English tradition; Quebec judges, like common law judges, write in their own name and often include lengthy motivations for their reasons.[216] Appellate reasons often include a dissent.[217] And, unlike the deductive logic and "succinct reasoning" of French jurists, Quebec judgments employ syllogistic reasoning, and "discursive logic."[218] As a result, save for their language — Quebec judges typically write in French — judgments in "Quebec read much like judgments from anywhere else in common law Canada," leading some to question whether the Quebec judge can still be characterized as a civilian judge at all.[219]

The common law features of Quebec judgments do not end with the question of form. Referring to the plurality of sources that together make up the legal system, Quebec

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[214] See e.g. Joseph Dainow, "The Civil Law and the Common Law: Some Points of Comparison" (1967) 15:3 Am J Comp L 419; Macdonald, *supra* note 179; Brierley, "Civil Law", *supra* note 174; Denis Lemay, "The Québec Legal System: An Overview" (1992) 84:1 Law Libr J 189; Catherine Valcke, "Legal Education in a 'Mixed Jurisdiction': The Quebec Experience" (1995) 10 Tul Eur & Civ LF 61; Jean-Louis Baudouin, "Mixed Jurisdictions: A Model for the XXIst Century?" (2003) 63:4 La L Rev 983; Popovici, *supra* note 174; Vernon Valentine Palmer, "Quebec and Her Sisters in the Third Legal Family" (2009) 54:2 McGill LJ 321; Rosalie Jukier, "Inside the Judicial Mind: Exploring Judicial Methodology in the Mixed Legal System of Quebec" (2011) 6:1 J Comp L 54.

[215] *Ibid*. See also Pierre J Dalphond, "Le style civiliste et le juge : le juge québecois ne serait-il pas le prototype du juge civiliste de l'avenir?" in Kasirer, *Le droit civil*, *supra* note 174, 81.

[216] Jukier, *supra* note 214 at 65. See also Baudouin, *supra* note 214 at 990.

[217] Jukier, *supra* note 214 at 65.

[218] *Ibid* at 66. See also Dalphond, *supra* note 215 at 90; Dainow, *supra* note 214 at 432-433.

[219] Jukier, *supra* note 214 at 65, referring to Dalphond, *supra* note 215.

has been described as a "library of acculturation."[220] In addition to the more recent borrowing from the common law already described, it is well documented that in earlier times, Quebec's private law did not stem exclusively from its French predecessor, but rather, drew on a plurality of sources.[221] Quebec's legal landscape prior to codification has been described as a "legal Babel," wherein "turn-of-the-century civilians" did not hold the same exclusive conception of sources of Quebec law as some do today.[222] Nor was the *Civil Code* understood as the controlling source of Quebec law; Quebec jurists regularly drew, among other sources, on American and English jurisprudence and scholarship.[223] Likewise, in addition to the civil law of France, the *Civil Code of Lower Canada* was informed by "adaptations of that tradition within the new world," as well as "a number of principles of English law."[224]

When the application of federal law in Quebec is considered, it becomes clear that Quebec law is more than a purely civilian system. Rather, the mixing of federal and provincial law has created a "living laboratory of comparative law,"[225] as the spousal support example illustrates. While spousal support upon divorce is federal law, Quebec has a long history of regulating matrimonial law. Thus, the federal law is completed by the application of provincial law;[226] neither can function without the other. Moreover, in areas of federal jurisdiction, to the extent that federal and provincial laws are

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[220] Nicholas Kasirer, "Dire ou définir le droit?" (1994) 28:1 RJT 141 at 144 [translated by author].
[221] See Howes, *supra* note 196.
[222] *Ibid* at 527. See also Lemay, *supra* note 214.
[223] Howes, *supra* note 196 at 531.
[224] Brierley, "Civil Law", *supra* note 174 at 165-166.
[225] Lemay, *supra* note 214 at 189.
[226] Brisson & Morel, *supra* note 162 at 300.

incompatible, the federal law must prevail, as alluded to earlier.[227] As suggested above, this incompatibility is precisely the case with respect to spousal support, where the civil law approach simply does not correspond with the Supreme Court's interpretations of the governing statute. Finally, where Parliament creates an autonomous regime, or complete code, as it has in the relevant provisions of the *Divorce Act*, the federal law is paramount; the provincial law must give way to Parliament's intent.[228] The provincial and federal law on spousal support do not stand in isolation. Rather, they are emblematic of the mixed nature of Quebec's system. Viewed from this perspective, judicial resistance to the *Advisory Guidelines* — the entrenchment of binding federal law — makes little sense.

Throughout its history, Quebec law has been influenced by a plurality of sources and, as a result, is as much a "mixed" legal system as a civilian one. It is with this fact in mind that this part suggests that judicial resistance to the *Advisory Guidelines* based on their informal nature is inconsistent with Quebec's legal tradition. Indeed, resistance to common law influences based on "political reasons linked to cultural survival" is no longer appropriate, as it might have been in earlier times.[229] Resistance to the *Advisory Guidelines* thus fails to acknowledge their fit within Quebec's hierarchy of legal sources and the legal system as a whole.

Conclusion

This chapter has set out a two-pronged critique of the continued resistance of some Quebec judges to the *Advisory Guidelines* in awarding spousal support under the federal *Divorce Act*. While the Quebec Court of Appeal has been unequivocal in its

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[227] *Ibid* at 303.
[228] *Ibid* at 314, 315, n 63.
[229] Baudouin, *supra* note 214 at 991.

endorsement of the *Advisory Guidelines* and its directive that trial judges look to them for guidance, subsequent decisions have been resolute in their opposition to their content and to their informal nature. An internal critique, this chapter has focused on the inconsistencies between the stated reasons for judicial resistance to the *Advisory Guidelines* and the actual substance and form of Quebec family law.

In terms of substance — specifically, of the idea that the *Advisory Guidelines* do not reflect the law of spousal support in Quebec — judicial and scholarly emphasis on principles of individualism, self-sufficiency, and free choice has little grounding in the positive law of Quebec, or in the applicable federal law on divorce. The resistance to federal law may be attributable to a sense of protectionism on the part of Quebec judges with respect to the integrity of the province's private law. But the suggestion that Quebec judges are upholding provincial legal doctrines at the expense of binding federal law does not withstand close scrutiny in light of the history of Quebec matrimonial law and the progressive erosion of the limited contractual freedom that once existed. On the question of form, resistance to an instrument analogous to academic scholarship is incompatible with the place of *la doctrine* in the civilian hierarchy of legal sources. Further, judicial adoption of the *Advisory Guidelines* would fit neatly with the plurality of legal sources that characterizes Quebec's mixed legal system, where civil and common law traditions have historically come together.

This chapter has examined the form of the *Advisory Guidelines* in the context of the legislative paramountcy inherent in civilian legal systems. It has been silent with respect to the question of the constitutional legitimacy of judicial reliance on non-legislated instruments. While the use of soft law is increasingly common among

administrative actors, the *Advisory Guidelines* are unique in that they are regularly relied on by judges; as discussed in Chapter 2 of this thesis, they now inform the standard of appellate intervention in an area well known for deference to a trial judge's discretionary determination. That the *Advisory Guidelines* are regularly applied as if they were law, despite not having gone through the legislative process, leads to the question of whether uncritical judicial reliance on them threatens to undermine the unwritten constitutional principle of the rule of law. It is to this question that the following chapter now turns.

IV. The *Spousal Support Advisory Guidelines* and the Rule of Law

Introduction

Picking up where Chapter 3 left off, this final chapter attempts to respond to a lingering issue related to judicial reliance on the *Advisory Guidelines*: their informal, non-legislated nature and whether their use by judges offends the constitutional principle of the rule of law. As non-legislated guidelines, the *Advisory Guidelines* have no official character and judges may, in the exercise of their discretion, depart from them. As explained in Chapters 2 and 3, however, where a refusal to rely on the *Advisory Guidelines* is not based on the facts of the case — where judges instead cite their non-legislated nature as the basis for the refusal to apply them, as in Quebec and some other provinces — the problems that they were meant to remedy may persist. Thus, litigants may continue to endure disparate treatment in the face of similar facts and the unpredictability and sense of injustice described elsewhere may continue to undermine the family law system. As mentioned earlier in this thesis, despite some lingering objections, use of the *Advisory Guidelines* continues to grow throughout the country, including in those provinces that are comparatively slow to adopt them. In this thesis's final examination of the *Advisory Guidelines*, this chapter responds to those judges who continue to ground their resistance to them in their unofficial character, and attempts to lay these objections to rest.

Part 1 sets out the objection, by some trial judges and appellate courts, to treating the *Advisory Guidelines* as anything more than an informal guide. It also characterizes the *Advisory Guidelines* as an instrument of soft law. It thus provides the backdrop for the discussion of whether their application by judges undermines the constitutional

separation of powers and the principle of parliamentary supremacy — in other words, fundamental elements of the rule of law. In doing so, it responds to the call to "[bring] soft law out of the constitutional shadows."[1] Part 2 begins to challenge the objection, by demonstrating that judicial resistance to soft law instruments is grounded in a thin conception of the rule of law. It contrasts thin and thick understandings of the constitutional principle and suggests that the conception espoused by judges resisting the application of the *Advisory Guidelines* is rooted in a rigid commitment to the constitutional separation of powers that ignores the idea that the rule of law might encompass more than formal considerations. Even according to this impoverished conception of the rule of law, however, Part 2 suggests that judicial reliance on the *Advisory Guidelines* may still be understood as furthering the basic constitutional principle.

Part 3 engages with an alternative, thicker, understanding of the rule of law. It suggests that judicial reliance on the *Advisory Guidelines* might be seen to correspond with the procedural conception of the rule of law. Drawing on political science literature on deliberative democracy and public choice, this part challenges the idea that constitutionally legitimate regulatory tools can only stem from elected government. It suggests that appeals to legislative supremacy anchored in the deliberative work of representative government are not grounded in reality and opposes the idea that the legislature is always the ideal place for the creation of normative policy. Instead, it posits that the *Advisory Guidelines*, and soft law tools like them, might better promote participation and democracy than traditional legislation. Part 4 sets out one final

[1] Lorne Sossin, "Discretion Unbound: Reconciling the Charter and Soft Law" (2002) 45:4 Can Public Administration 465 at 465 [Sossin, "Discretion Unbound"].

conception of the rule of the law — that which sees constitutional conformity as a requirement of substantive justice and the protection of rights and freedoms. It argues for an understanding of the rule of law grounded in reason, justification, and fair outcomes, and suggests that the *Advisory Guidelines* further this conception as well. In sum, this chapter aims to show that however we conceive of the rule of law, contrary to judicial objections, judicial reliance on the *Advisory Guidelines* can be understood as promoting respect for the foundational constitutional principle.

Literature on the rule of law is vast; this chapter does not attempt to engage with it exhaustively. The scholarship relied on represents a sample of ideas related to the three conceptions of the rule of law that judicial reliance on the *Advisory Guidelines* might be understood as promoting. This chapter accordingly does not purport to have the final word on how this complex concept should be understood or applied, in this context or others. Rather, its more limited aim is to offer a number of suggestions, grounded in a specific set of authorities, as to why the non-legislated status of the *Advisory Guidelines* need not be understood as a threat to Canada's constitutional order.

1. Judicial Scepticism and Soft Law

This part sets out the principal objection to reliance to the *Advisory Guidelines*, so as to ground judicial resistance in their non-legislated character and the idea that they do not represent the will of our democratically elected and politically accountable representatives. It does so by reproducing some of the statements opposing their application, in order to connect them with a particular understanding of the rule of law. Following that, this part draws on both Canadian and international scholarship to classify the *Advisory Guidelines* as an instrument of soft law, unique in Canada in both its origins

and its form. In doing so, it identifies some of the difficulties associated with the use of soft law in Canada, which also raise concerns about the rule of law. That discussion underlies subsequent arguments that judicial reliance on the *Advisory Guidelines* — a unique form of soft law in Canada — can be understood as promoting Canadian constitutional values. Last, this part looks at whether the *Advisory Guidelines* are correctly understood by some judges as changing the law of spousal support — and thus circumventing the natural development of the law — or whether their function is limited to assisting with complex discretionary determinations.

1.1. Revisiting Judicial Objections to the *Advisory Guidelines*

The most vocal objections to the *Advisory Guidelines* have come from Quebec, where trial judges' approaches to them have ranged from doubt to hostility. In 2005, they were described as "mere commentary,"[2] a clear indication of judicial attitudes to come. One year later, they were rejected on the basis that the court is not a "research laboratory" or "testing ground," again an allusion to their unofficial character.[3] Despite a strong endorsement of the *Advisory Guidelines* by the Quebec Court of Appeal in 2011,[4] attitudes among trial judges remained unchanged. In 2012 and 2014, Quebec trial judges consistently reminded us that the *Advisory Guidelines* are not law and that reliance on them would constitute an unacceptable shortcut, akin to illegitimately circumventing the statutory analysis set out in the *Divorce Act*.[5]

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[2] *MF v NC*, 2005 CanLII 13719 (QC CS).
[3] *BD v SDu*, 2006 QCCS 1033, [2006] JQ no 1670 at para 20.
[4] *Droit de la famille — 112606*, 2011 QCCA 1554, 8 RFL (7th) 1.
[5] See e.g. *Droit de la famille — 14165*, 2014 QCCS 402, [2014] JQ no 847, citing *DS v MSc*, 2006 QCCS 334, [2006] RDF 399.

Alberta's courts, while not as biting in their critique as some Quebec judges, have expressed similar reservations about the unofficial character of the *Advisory Guidelines*. Unlike neighbouring British Columbia, the Alberta Court of Appeal appears firmly of the view that judges are under no obligation to justify a decision to depart from the *Advisory Guidelines*, because they are not law. Indeed, it is no secret among Alberta judges that the *Advisory Guidelines* are understood to "carry more weight in British Columbia than … in Alberta,"[6] and that a litigant's claim "based on the [*Advisory Guidelines*] would likely be stronger" in the former province.[7] While the Alberta objection is not entirely the same as in Quebec, where judges also take issue with the substantive contents of the *Advisory Guidelines*,[8] the Alberta Court of Appeal has continued to emphasize that they "cannot be used as a formula or software tool."[9] In 2014, a unanimous Alberta Court of Appeal repeated that the *Advisory Guidelines* "are not mandatory and do not have the force of law. They are a useful tool … [but] do not and should not truly fetter a trial judge's discretion."[10]

The same is true in Nova Scotia, where, despite their slow integration by trial judges, the message from the Court of the Appeal is that "[since] the law does not oblige the judge to apply the [*Advisory Guidelines*]," there is no error in law in a trial judge choosing not to use them.[11] That statement is in stark contrast with the British Columbia Court of Appeal's reasoning that failure to consider the *Advisory Guidelines* or justify

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[6] *RMQ v JAQ*, 2014 ABQB 620.
[7] *RMQ v JAQ*, 2015 ABQB 392.
[8] See Chapter 3.
[9] *Sawatzky v Sawatzky*, 2008 ABCA 355, 302 DLR (4th) 516 at para 17.
[10] *Neighbour v Neighbour*, 2014 ABCA 62 at para 15, citing *ibid* at para 16.
[11] *Strecko v Strecko*, 2014 NSCA 66, [2014] NSJ No 313 at para 50. See also *MacDonald v MacDonald*, 2017 NSCA 18.

departing from them when they are argued may constitute an error in law.[12] More recent cases in Nova Scotia have emphasized the non-binding nature of the *Advisory Guidelines* and referred to them as a "reference" for courts.[13]

It seems clear from these examples that the judicial refusal to rely on the *Advisory Guidelines* in provinces where they have not been the subject of a wholesale endorsement is grounded not in their content or substance, but in their unofficial and non-binding status.[14] Given the unique nature of the *Advisory Guidelines* as an official tool meant to guide judicial determinations, the status-based objection is not unreasonable. The *Advisory Guidelines* constitute a novel approach to structuring or curtailing statutorily mandated judicial discretion in Canada and, as such, they should be approached with caution. But caution need not mean complete closed-mindedness to alternative views of legality that might support the legitimacy of judicial reliance on soft law. Moreover, the strength of the objection is weakened where it can be argued that judicial reliance on the *Advisory Guidelines* in fact aligns with different conceptions of the rule of law. Further, the *Advisory Guidelines* are meant to reflect the law of spousal support as it has developed pursuant to the relevant provisions *Divorce Act*.[15] It is thus worth exploring whether the objection stems from a concern that the *Advisory Guidelines* do more than simply reflect the Canadian law of spousal support. Before doing so, however, the

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[12] See *Redpath v Redpath*, 2006 BCCA 338, 33 RFL (6th) 91.
[13] *Darlington v Moore*, 2014 NSSC 358 at para 163. Note that the parties in this case were not married and therefore not subject to the *Divorce Act*. Nevertheless, the Court is firmly of the view that even were they married, "the Spousal Support Guidelines would not be binding" [emphasis in original]. See also *Breed v Breed*, 2016 NSSC 42, finding the *Advisory Guidelines* "neither instructive nor constructive" at para 78.
[14] Quebec, where resistance seems grounded on the content as well as form of the *Advisory Guidelines*, is an exception to this.
[15] RSC, 1985, c 3 (2nd Supp) [*Divorce Act*].

following section first describes their exact nature as a regulatory tool and the constitutional difficulties they may raise.

1.2. Objecting to Soft Law

The *Advisory Guidelines* are best characterized as an instrument of soft law. In the administrative context, the use of soft law is widespread, although to date, the practice has not been the subject of much scholarly attention.[16] Where it has been considered in the Canadian context, soft law, at its most general, is typically understood as a tool for "guidance as to how to exercise broad discretionary authority."[17] Lorne Sossin writes, "[soft] law encompasses non-legislative instruments such as policy guidelines, technical manuals, rules, codes, operational memoranda, training materials, [and] interpretive bulletins…."[18] Daniel Mockle adds strategic plans, user guides, standards, and code of conduct.[19] As with the *Advisory Guidelines*, administrative soft law "[typically … takes] a statutory power or powers as a point of departure and elaborate[s] how that discretion should be exercised in different factual settings."[20] Significantly, given its informal nature, administrative soft law, like the *Advisory Guidelines*, "cannot in theory bind decision-makers…."[21] As with the *Advisory Guidelines* in certain jurisdictions, however,

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[16] But see Sossin, "Discretion Unbound", *supra* note 1; Lorne Sossin, "Hard Choices and Soft Law: Ethical Codes, Policy Guidelines and the Role of the Courts in Regulating Government" (2003) 40:3 Alta L Rev 867 [Sossin, "Hard Choices"]; Angela Campbell & Kathleen Cranley Glass, "The Legal Status of Clinical and Ethics Policies, Codes, and Guidelines in Medical Practice and Research" (2001) 46:2 McGill LJ 473; France Houle, "La zone fictive de l'infra-droit : l'intégration des règles administratives dans la catégorie des textes réglementaires" (2001) 47:1 McGill LJ 161; Anna di Robilant, "Genealogies of Soft Law" (2006) 54:3 Am J of Comp L 499.
[17] Sossin, "Discretion Unbound", *supra* note 1 at 466.
[18] *Ibid* 466-67.
[19] Daniel Mockle, *La gouvernance, le droit et l'État : La question du droit dans la gouvernance publique* (Brussells: Bruylant, 2007) at 108.
[20] Sossin, "Hard Choices", *supra* note 16 at 868-69.
[21] *Ibid* at 869.

this fact has not inhibited the influence of non-binding guidelines: "… in practice [soft law] often has as much or more influence than legislative standards."[22]

The increasing influence of soft law, both in Canada and abroad might be attributed to the growth of the administrative state and the rise of administrative agencies — that is, the rise of ministerial decision-making, outside of the courts.[23] Whereas courts, as a general matter, rely on statutes — both primary legislation and regulations — the growth of administrative decision-making brought with it the "increasing practice of regulation by administrative rather than statutory rules."[24] Thus, many "regulatory regimes … rely heavily on codes of practice, guidance, and circulars, which are often of indeterminate legal status."[25] The unofficial nature of the *Advisory Guidelines* might be understood as placing them in the same "indeterminate" category.

The parallels between administrative soft law and the *Advisory Guidelines* are many. Importantly, both "may be seen as a bridge spanning the divide between statutory authority, on the one hand, and discretionary judgement, on the other."[26] Both "[implicate] some form of normative commitment, [but] do not rely on binding rules or on a regime of formal sanctions."[27]

Similar as they are, however, a crucial distinction — one that might form the basis of judicial resistance to the *Advisory Guidelines* — merits mention. While administrative guidelines and policies are "not laws passed by the legislature," they nevertheless

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[22] *Ibid*.
[23] See Christopher McCrudden, "Regulations and Thatcherism: Some British Observations on Instrument Choice and Administrative Law" (1990) 40:3 UTLJ 542.
[24] *Ibid* at 546.
[25] *Ibid*.
[26] Sossin, "Discretion Unbound", *supra* note 1 at 474.
[27] di Robilant, *supra* note 16 at 499.

typically have their source in government.[28] Unlike the *Advisory Guidelines*, administrative soft law is often issued by government departments, ministries, and "public-sector institutions" to guide decision-making in those places.[29] In other words, administrative soft law is "developed by and applicable to unelected officials exercising public authority."[30] As seen, the *Advisory Guidelines* do not stem from government. They were written by two family law professors, under the aegis of the federal Department of Justice, in consultation with a committee of family law practitioners and judges. Further, unlike administrative guidelines, which guide the decisions of bureaucrats acting on behalf of the executive branch, the *Advisory Guidelines* are designed to guide judges, as well as lawyers and litigants, in determining support pursuant to a broad statutory grant of discretion.

While the distinctions between administrative soft law and the *Advisory Guidelines* might appear significant, they should not be overstated. Their parallels are stronger than their differences. While Sossin's work focuses on the administrative state and the decision-making powers of the executive, there is no reason to limit the practice of administrative reliance on similar policies and internal guidelines to state actors. Non-legislated instruments aimed at guiding the exercise of discretion are created and used outside of government as well. In the Canadian healthcare context, for example, conduct is often guided by soft law.[31] Angela Campbell and Kathleen Cranley Glass define soft law in the medical context as, "[standards] that are not enacted in law or regulation," which lack a "definitive legal status," and which "affect the behaviour of health care

[28] Sossin, "Hard Choices", *supra* note 16 at 868.
[29] *Ibid*.
[30] *Ibid*.
[31] See Campbell & Cranley Glass, *supra* note 16.

professionals."[32] Given its non-legislated character, this form of soft law may likewise be disregarded by a court, although in practice judges lacking expertise in medical fields will often defer to its contents.[33]

Outside of Canada, examples and definitions of soft law are even broader. In the United States, judges regularly rely on the non-legislated American Law Institute Restatements.[34] Much like the *Advisory Guidelines*, ALI Restatements "are not law, but they are influential."[35] Created by a committee of "prominent judges, attorneys, and law professors," ALI Restatements have been produced since 1923, with the goal of responding to the perceived "uncertainty and complexity" of American law — defects understood to have "produced a general dissatisfaction with the administration of justice."[36] They cover an array of subjects, such as torts, contracts, and employment law.[37] The ALI Restatements are considered "persuasive authority by many courts,"[38] in spite of not being legislated.[39]

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[32] *Ibid* at 475.
[33] *Ibid* at 475-476.
[34] See e.g. American Law Institute, *Restatement of the Law, Second: Torts* (St Paul, Minn: American Law Institute Publishers, 1979); American Law Institute, *Restatement of the Law, Third: Agency* (St Paul, Minn: American Law Institute Publishers, 2006).
[35] Shawn G Nevers, "Restatements: An Influential Secondary Source" (2013) 42:2 Student Lawyer 19 at 19.
[36] Kristen David Adams, "The Folly of Uniformity?" Lessons from the Restatement Movement" (2004) 33:2 Hofstra L Rev 423 at 432-433.
[37] See "Restatements of the Law", *American Law Institute*: <https://www.ali.org/publications/#publication-type-restatements>.
[38] Meg Kribble, "Secondary Sources: ALRs, Encyclopedias, Law Reviews, Restatements, & Treatises", *Harvard Law School Library*: <https://guides.library.harvard.edu/c.php?g=309942&p=2070280>.
[39] But see: Kristen David Adams, "Blaming the Mirror: The Restatements and the Common Law" (2007) 40:2 Ind L Rev 205 (setting out some common critiques of the Restatements and suggesting that such "criticisms … should be more accurately presented as critiques of the common-law court system" at 207).

In the European Union context, Anna di Robilant describes academics taking the lead in the development of soft law.[40] She describes soft law initiatives as a "decentralized" process of governance, "yielding voluntary guidelines and standards rather than compulsory regulation."[41] In France, non-legislated guidelines structure discretion in areas as diverse as parental contributions to a child's education and maintenance upon divorce and the portion of the cost of public housing for the elderly to be paid by a resident's family.[42] Despite their creation outside of government, the *Advisory Guidelines* are accordingly best characterized as an instrument of soft law, albeit a unique one in Canada, where soft law tools are for the most part limited to the administrative context, whether emanating from the state or some other policy-making body.

Given the similarity between them and administrative soft law, it is not surprising that objections to deferential approaches to the latter tend to echo the judicial objections to the *Advisory Guidelines*. Sossin clearly captures the objection when he writes:

> Legislation and Regulations are subject to Parliamentary accountability and procedural formality…. Soft law is subject to no such criteria. Courts cannot treat guidelines as law because to do so would recognize that public administration is subject to laws of its own design, which would offend Canada's constitutional separation of powers.[43]

Granted, the objection, as Sossin describes it, applies to reliance on soft law by the executive branch of government, in administering government programs. But it is rooted

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[40] See di Robilant, *supra* note 16 at 500. See also Vanitha Sundra-Karean, "In Defense of Soft Law and Public-Private Initiatives: A Means to an End? — The Malaysian Case" (2011) 12:2 Theor Inq L 465.
[41] di Robilant, *supra* note 16 at 504.
[42] See Alice Gouttefangeas, "Des barèmes de calcul de la participation des familles au financement de l'hébergement des personnes âgées en institution" in Isabelle Sayn, ed, *Le droit mis en barèmes?* (Paris: Dalloz, 2014) [Sayn, *Barèmes*] 37.
[43] Sossin, "Hard Choices", *supra* note 16 at 887 [references omitted].

in the same concern as judicial objections to the non-legislated status of the *Advisory Guidelines* — they are not law and reliance on them defies the unwritten constitutional principle of the separation of powers.

The separation of powers is a "defining feature" of Canada's Constitution.[44] Whereas "the role of the judiciary is … to interpret and apply the law; the role of the legislature is to decide upon and enunciate policy."[45] Moreover, the separation of powers is inherent in the Canadian constitutional principle of parliamentary democracy — that is, the "ultimate truth … that fundamental matters of political choice are left to the legislature…."[46] Objections to the application of the *Advisory Guidelines* on the basis that they are not legislated are thus ostensibly rooted in the principle that legislative policy should emanate from democratically elected lawmakers.

Resistance to soft law seems to reflect two related concerns. First, as seen, a concern for respect for the foundational constitutional principle of the rule of law and the requirement "that the exercise of all public power must find its ultimate source in a legal rule."[47] At stake, then, for judges whose refusal to apply the *Advisory Guidelines* is based on their informal nature, is a potential affront to the rule of law, and the requirement that all government action comply with the law.[48] As the judiciary is a branch of Canadian government, the objection implies that it would be contrary to constitutional principles

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[44] *Cooper v Canada (Human Rights Commission)*, [1996] 3 SCR 854, 140 DLR (4th) 193 at para 10 [*Cooper*].
[45] *Fraser v Public Service Staff Relations Board*, [1985] 2 SCR 455, 23 DLR (4th) 122, at pp. 470, cited in *ibid* at para 10.
[46] *Cooper*, *supra* note 44 at para 23.
[47] *Reference re Remuneration of Judges of the Provincial Court (PEI)*, [1997] 3 SCR 3, 150 DLR (4th) 577 at para 10.
[48] See *Reference re Secession of Quebec*, [1998] 2 SCR 217, 161 DLR (4th) 385 at para 72 [*Secession Reference*].

for courts to rely on normative instruments that do not conform to the rule of law, "the root of our system of government."[49] Later parts of this chapter suggest that the rule of law may be understood as something broader than what is captured by these narrow judicial statements.

The second difficulty with judicial deference to soft law instruments has not been explicitly addressed by judges approaching the *Advisory Guidelines*, but it is grounded in similar rule of law concerns. Because administrative soft law is, as a general matter, both "developed and applied by the bureaucracy, it is not subject to the accountability measures applicable to legislation and regulations."[50] Legislation — both primary statutes and the regulations adopted under them — may be subjected to judicial review and evaluated for *Charter* compliance. Indeed, "they must be enacted or issued in a particular fashion, published in a particular form, vetted for compliance with constitutional strictures, and are subject to Parliamentary debate." [51] Soft law, however, which "[elaborates] the legal standards and political values underlying bureaucratic decision-making,"[52] with potentially serious impacts on the individuals subject to it, is not subject to the same constraints.[53] Indeed, the absence of "requirements governing [its] content and the process by which [it is] developed and disseminated" [54] might seriously undermine its legitimacy as the basis for determining outcomes.

As a tool for guiding discretionary determinations, the *Advisory Guidelines*, like administrative soft law, might be understood as "[enhancing] coherence and

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[49] *Ibid* at para 70.
[50] Sossin, "Hard Choices", *supra* note 16 at 870. See also Sossin, "Discretion Unbound", *supra* note 1.
[51] Sossin, "Hard Choices", *supra* note 16 at 887. See also McCrudden, *supra* note 23 at 547.
[52] Sossin, "Hard Choices", *supra* note 16 at 871.
[53] *Ibid* at 887.
[54] *Ibid* at 892.

accountability." [55] Indeed, by providing a clearer structure for spousal support determinations, the *Advisory Guidelines* "[make] the basis for discretionary determinations more transparent."[56] By requiring judges to justify departures from the formulas, they create a sense of accountability on the part of decision-makers.[57] But the same absence of procedural and constitutional constraints on administrative soft law might be seen as effectively allowing "public authority to be exercised according to internal and sometimes secret principles and policies, not subject to a fair and accountable process of development or meaningful forms of public review."[58] Indeed, where soft law materials are reviewed by courts — typically in the administrative context — they are normally not scrutinized for *Charter* compliance.[59] Accordingly, just as judicial reliance on a non-legislated regulatory instrument might be understood as threatening basic constitutional principles, the absence of procedural accountability might likewise "[undermine] both the integrity of public administration and the rule of law."[60]

The rule of law is a foundational element of Canada's political and legal system and regulatory tools must conform to it. As seen, however, alternatives to legislation are a reality — both within the regulatory state and in the context of dispute resolution.[61] As these new regulatory techniques are a reality of legal and political life, rather than resist them, energy might be better spent ensuring that they respect constitutional

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[55] *Ibid* at 888.
[56] Carol Rogerson, "Shaping Substantive Law to Promote Access to Justice: Canada's Use of Child and Spousal Support Guidelines" in John Eekelaar, Mavis Maclean & Benoit Bastard, eds, *Delivering Family Justice in the 21st Century* (Oxford: Hart Publishing, 2015) 51 at 66 [Rogerson, "Access to Justice"].
[57] See Frederick Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (Oxford: Clarendon Press, 1991) at 108 and text of Part 5, below.
[58] Sossin, "Hard Choices", *supra* note 16 at 887.
[59] See Sossin, "Discretion Unbound", *supra* note 1.
[60] Sossin, "Hard Choices", *supra* note 16 at 887.
[61] Mockle, *supra* note 19 at 37.

requirements.[62] In the case of spousal support, the question thus becomes whether there is merit to judicial objections to the *Advisory Guidelines* based on their unofficial status or whether, instead, it is possible to understand reliance on this kind of instrument as adhering to constitutional requirements — both with respect to the separation of powers and the procedural requirements of the rule of law. Before turning to that question, however, the following section looks at whether the *Advisory Guidelines* are simply a reflection of the state of the law when they were created, or whether, by changing the spousal support analysis, they in fact circumvent the natural development of the law and accordingly threaten constitutional principles.

1.3. The *Advisory Guidelines*: Reflecting or Changing the Law?

A close reading of the *Advisory Guidelines* and related materials suggests that while they may have impacted the practice of family law and the granting of spousal support, they have not changed the substance of the law. This chapter is not grounded in empirics or in a comprehensive review of spousal support awards applying the *Advisory Guidelines* across jurisdictions. Instead, much insight into their impact on the development of the law is gained from the *Advisory Guidelines* themselves, as well as the literature on their development and use. In the "Background Paper" published prior to their creation, Carol Rogerson, co-author of the *Advisory Guidelines*, acknowledges the fine line between reflecting and modifying the law of spousal support. "There is … admittedly, a tension built into the project between reflecting current practice and

[62] *Ibid* at 40.

changing the law."[63] While the *Advisory Guidelines* were intended to "build on" and reflect current practice, that practice, prior to their creation, was diverse.[64] That diversity of approaches, combined with the doctrinal confusion created by the Supreme Court, were precisely what spurred the project. Moreover, Rogerson does not deny that structuring diversity and bringing certainty to an unpredictable area of law means that "choices have to be made as to what are 'emerging trends' or 'best practices' and the law will thus be 're-structured' along those lines."[65]

Prior to the creation of the *Advisory Guidelines*, Rogerson made no secret of her dissatisfaction with the jurisprudential direction of spousal support law. In 2001, four years before the draft release of the *Advisory Guidelines*, she criticized the Supreme Court's move away from the centrality of compensation in spousal support, toward a more needs-based approach: "… implicit in *Bracklow*'s endorsement of the basic social obligation model of support is a subtle, conservative shift in the analytic framework, one which emphasizes needs and income security, more than compensation and entitlement…."[66] That move constituted a departure from the compensatory model of spousal support established earlier in *Moge*, which endorsed the feminist view of spousal support as an "entitlement earned by women because of their economic contributions to

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[63] Department of Justice Canada, *Developing Spousal Support Guidelines in Canada: Beginning the Discussion*, Background Paper by Professor Carol Rogerson (Ottawa: Department of Justice Canada, 2002) at 65 [Rogerson, "Background Paper"].
[64] *Ibid*.
[65] *Ibid*.
[66] Carol Rogerson, "Spousal Support Post-*Bracklow*: The Pendulum Swings Again?" (2001) 19 Can Fam LQ 185 at 280 [Rogerson, "Post-*Bracklow*"], referring to *Bracklow v Bracklow*, [1999] 1 SCR 420, 169 DLR (4th) 577 [*Bracklow*].

the family."[67] With respect to the creation of the *Advisory Guidelines*, the resulting doctrinal divergences "reflect deeply conflicting value choices that [needed] to be resolved if guidelines [were] to be developed."[68]

The *Advisory Guidelines* could not have been a mirror image of the law of spousal support; had it been possible to reflect the contents of the law precisely, there would have been no need for them. The question is whether, in selecting from competing value choices and best practices, the *Advisory Guidelines* are true to the applicable law, or whether they function to alter the doctrinal context of spousal support. For Rogerson, prior to their creation, the *Advisory Guidelines* would not aim to transform the objectives or effects of spousal support. While the project contemplated change, insofar as change is inherent in selecting from competing approaches, any change would be "consistent with the current legislative structure and basic framework that comes from decisions of the Supreme Court of Canada interpreting [the relevant] provisions." [69] The *Advisory Guidelines* would merely "[facilitate] or ['speed up'] the normal common law process for the development of the law whereby the best understandings or interpretations of the current law eventually rise to the surface."[70] As the natural development of the law had "fallen apart … because of an excessive emphasis on discretion and individualized decision-making," [71] the *Advisory Guidelines* would help remedy the situation, by encouraging the development of the law along consistent and predictable lines.

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[67] Rogerson, "Post-*Bracklow*", *supra* note 66 at 222, referring to *Moge v Moge*, [1992] 3 SCR 813, 99 DLR (4th) 456 [*Moge*].
[68] Rogerson, "Post-*Bracklow*", *supra* note 66 at 280.
[69] Rogerson, "Background Paper", *supra* note 63 at 65.
[70] *Ibid*.
[71] *Ibid*.

The text of the *Advisory Guidelines* suggests that while they may succeed at aligning judicial understandings of spousal support in places where they are regularly used, they should not be understood as changing the law. In describing the project of creating the *Advisory Guidelines*, the authors explain that theoretical disparity could not lead to structure.[72] That structure, then, had to be located somewhere other than the contradictory statements of the Supreme Court. To uncover it, the authors turned to the case law, where "patterns and structure were beginning to emerge … at least in a range of typical cases."[73] Those patterns were not, however, "discussed or articulated or openly acknowledged within the family law system."[74] The creation of the *Advisory Guidelines* thus aimed to "build upon and facilitate those developments"[75] — to make express, in other words, the trends already developing in trial courts.

The *Advisory Guidelines* were not based on hypotheticals or personal beliefs about the function of spousal support; the formulas contained in them were grounded in case law and based on discussions with, and consensus within, the working group. In this sense, their development is described as a process of "crystallizing the guidelines that were [already] emerging."[76] Rogerson recounts "a practical rather than a theoretical exercise"[77] and not a "bold process of law reform intended to depart dramatically from

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[72] Family, Children and Youth Section, Department of Justice, *Spousal Support Advisory Guidelines* by Carol Rogerson & Rollie Thompson (Ottawa: Department of Justice, Canada, 2008), online: <http://www.justice.gc.ca/eng/rp-pr/fl-lf/spousal-epoux/spag/index.html> at 15 [*Advisory Guidelines*].
[73] *Ibid*.
[74] *Ibid*.
[75] *Ibid*.
[76] *Ibid* at 18.
[77] Carol Rogerson, "Child Support, Spousal Support and the Turn to Guidelines" in John Eekelaar & Rob George, eds, *Routledge Handbook of Family Law and Policy* (Routledge, 2014) 153 at 159.

the past and set new norms."[78] Rather, the creation of the *Advisory Guidelines* "simply [involved] clarifying norms that [had] evolved from practice under an existing discretionary regime."[79] The law had already outlined competing approaches and the *Advisory Guidelines* represent the "limits of what is possible in terms of standardization and clarification."[80]

Thus, a close reading of the history, development, and application of the *Advisory Guidelines* suggests that while the creation of an instrument meant to reflect the law will inevitably include "debates about normative principles and what constitutes fair outcomes,"[81] that debate does not automatically usurp the legislative task of Parliament. This observation alone should suffice to quell judicial objections grounded in the separation of powers. But further examination of the *Advisory Guidelines* and their correspondence with other understandings of the rule of law suggests that they do not threaten foundational constitutional principles. Indeed, the idea that reliance on them is constitutionally problematic is based on a thin understanding of the rule of law that denies the potential strengths of similar soft law instruments. It is to that discussion that the following part now turns.

2. The Thin Conception of the Rule of Law

This part provides the background to the discussion of differing conceptions of the principle of the rule of law. It contrasts a narrow and formalistic, "thin" understanding of the constitutional principle, with a richer, "thick" conception, that looks beyond the question of form and opens new possibilities for conceiving of constitutionality. It then

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[78] Rogerson, "Access to Justice", *supra* note 56 at 55.
[79] *Ibid*.
[80] *Ibid* at 66.
[81] *Ibid* at 55.

suggests that judicial objections to the *Advisory Guidelines* are rooted in the former, based, as they are, exclusively on their authorship. It goes on to argue that even if we accept a simplified, or narrow, version of the rule of law, reliance on the *Advisory Guidelines* would not jeopardize the principle, but in fact might further it. This part thus sets the stage for subsequent arguments that the thin understanding of the rule of law might be supplanted by thicker conceptions — conceptions that might be furthered by judicial reliance on the *Advisory Guidelines*. Moreover, it aims to show that as a general matter soft law can correspond with constitutional principles.

2.1. Thin and Thick Constitutional Principles

Resistance to the *Advisory Guidelines* based on the idea that judicial reliance on them offends the rule of law is rooted in a thin understanding of the Constitution. It is grounded in the Supreme Court's narrow definition of the rule of law, which regards the Constitution as "rule-based" and "takes [the] principal site of operation [of constitutions] to be the constitutional or highest court."[82] It is a formal conception of the rule of law, because it depends exclusively on the non-legislated form of the *Advisory Guidelines*. The objection to the legitimacy of judicial reliance on the *Advisory Guidelines* aligns with the Supreme Court's articulation of the principle — that is, the idea that official decisions should be based only on democratically adopted laws and that all state action, including that of judges, must be "grounded in a legal rule."[83] Indeed, the "extravagant version" of the principle dictates that "decisions should be made by the application of

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[82] Robert Leckey, "Thick Instrumentalism and Comparative Constitutionalism: The Case of Gay Rights" (2009) 40 Colum HRLR 425 at 437 [Leckey, "Thick Instrumentalism"]. Note that Leckey's work calls for a thick approach to legal scholarship and does not espouse a political theory. This work draws merely on the notion that constitutional principles might be viewed from both thin and thick perspectives.

[83] See *Secession Reference*, *supra* note 48 at para 71.

known principles or laws."[84] Accordingly, where officials are free to base decisions on an authority other than democratically adopted laws, as judges do when relying on the *Advisory Guidelines*, the principle of the rule of law is "subverted."[85]

Along similar lines, the central question regarding the legitimacy of soft law has been described as "that of the independence of the judiciary faced with a powerful tool not subject to democratic debate."[86] With respect to determining spousal support, the argument would claim that limiting discretion in an area where the legislator has expressly chosen that approach undermines the legitimacy of the legislative process.[87] But the commitment to a fixed, and formal, conception of the rule of law ignores that the rule of law is "an essentially contested concept,"[88] and a "highly contestable idea."[89] Moreover, with its focus on form, the thin view of the constitutional principle is abstracted from the "social, political, historical, and discursive contexts" of the text.[90]

A thicker understanding of the Constitution enables a richer conception of the rule of law by looking beyond the formal features of a governing instrument. Instead of limiting understanding of a particular instrument to the narrow formalities associated with a thin conception of the rule of law, thick constitutionalism enables the

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[84] Kenneth Culp Davis, *Discretionary Justice: A Preliminary Inquiry* (Baton Rouge: Louisiana State University Press, 1969) at 29.
[85] Peter W Hogg, "Judicial Review in Canada: How Much Do We Need It?" (1974) 26:3 Admin L Rev 337 at 344.
[86] Isabelle Sayn, "Les barèmes dans le fonctionnement du droit et de la justice" in Sayn, *Barèmes*, *supra* note 42, 1 at 16 [translated by author] [Sayn, "Fonctionnement du droit"].
[87] See Robert Baldwin & Keith Hawkins, "Discretionary Justice: Davis Reconsidered" (1984) Winter, Public L 570 at 595.
[88] See Jeremy Waldron, "Is the Rule of Law an Essentially Contested Concept (In Florida)?" (2002) 12:2 Law & Phil 137.
[89] Jeremy Waldron, "The Concept and Rule of Law" (2008) 43:1 Ga L Rev 1 at 52 [Waldron, "Concept and Rule of Law"].
[90] Leckey, "Thick Instrumentalism" *supra* note 82 at 438.

incorporation of pluralistic understandings of law and legality. Whereas the thin conception of the principle insists on grounding legality in rules and precedent, and thus responds only slowly to changing social needs and circumstances,[91] thick constitutionalism is released form formal constraints and accepting of novel approaches to legal problems.

In the administrative law context, objections to soft law based on a thin conception of the rule of law weaken the potential for non-legislated tools like the *Advisory Guidelines* to help decision-makers reach fair outcomes. Indeed, seeing law as "exclusively the product of a hierarchical relationship between the legislative, executive, and judicial mechanisms of the state," represents a reductionist view of law.[92] Importantly, a thick understanding of the Constitution "may reject a strict division between legislation and interpretation…."[93] Such an understanding would have important implications on the normative force of a soft law instrument like the *Advisory Guidelines*, the purpose of which is to aid in interpreting the legislation on spousal support. Thus, thick constitutionalism "aims to attend to a legal system's 'hidden richness,'"[94] and opens new ways of understanding normativity, constitutionality, and adherence to the rule of law. It enables a move away from the distracting debate between forms of instruments — hard law versus soft law — and shifts inquiry toward the merits of particular instruments and approaches.[95]

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[91] See Baldwin & Hawkins, *supra* note 87 at 587.
[92] Houle, *supra* note 16 at 163 [translated by author].
[93] Leckey, "Thick Instrumentalism" *supra* note 82 at 437.
[94] *Ibid* at 439.
[95] See di Robilant, *supra* note 16 at 554.

The thick conception of the rule of law is controversial. Indeed, the narrower conception is regularly espoused by courts and constitutional scholars. Peter Hogg writes, "[the] most obvious feature of a democracy is that the laws are made by legislatures whose members are elected."[96] As "an ideal of constitutional legality," the rule of law requires "open, stable, clear, and general rules, even-handed enforcement of those laws [and] the independence of the judiciary."[97] Thus, the rule of law is a fundamental "constitutional value, an ideal that influences how our laws are made and administered…." [98] Instruments that flout these requirements cannot be seen as constitutionally legitimate. The narrow conception of the rule of law, however, has also been described as "an emotion, an aspiration, an ideal," lacking a foothold in reality, where it has been consistently rejected by "all governments of the world."[99] It is a version, in other words, abstracted from its social, political, and historical contexts. By creating space for inquiry beyond form, the thick understanding of the Constitution and of constitutional principles opens avenues to explore other, also meaningful, questions, such as the distributive or discriminatory effects of a particular regulatory scheme or instrument.[100]

For present purposes, adopting a thick view of the rule of law facilitates the inquiry into the merits of soft law instruments. With respect to the *Advisory Guidelines*, the thick conception of the rule of law enables their examination as a tool for advancing social and economic justice, without compromising Canada's constitutional structure.

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[96] Hogg, *supra* note 85 at 344.
[97] Peter W Hogg & Cara F Zwibel, "The Rule of Law in the Supreme Court of Canada" (2005) 55:3 UTLJ 715 at 717.
[98] *Ibid* 718.
[99] Davis, *supra* note 84 at 33.
[100] See di Robilant, *supra* note 16 at 554.

Before moving on to how the *Advisory Guidelines* might be understood as furthering thicker conceptions, however, the following section suggests that even according to the thin, or formal, conception of the principle, judicial reliance on the *Advisory Guidelines* need not undermine the rule of law.

2.2. Uncertainty in Spousal Support and the Thin Rule of Law

Even according to a thin understanding of the concept, the constitutional principle of the rule of law may not support judicial resistance toward the *Advisory Guidelines*. As the Supreme Court explains it, the rule of law "provides a shield for individuals from arbitrary state action."[101] Given the inconsistent and unpredictable nature of spousal support awards in the years leading up to their development and release, and the consequent uncertainty in the law, the *Advisory Guidelines* might better be seen as promoting, than undermining the rule of law. Indeed, for Jeremy Waldron, predictability is the essence of the rule of law, an "elementary [requirement] for a system of rule to qualify as a legal system."[102] Thus, where a decision is arbitrary, or unpredictable, it is "the antithesis of a decision taken in accordance with the rule of law."[103] Accordingly, the state of spousal support law prior to the release of the *Advisory Guidelines* can itself be described as offensive to the rule of law:

> The Rule of Law is violated … when the norms that are made public to the citizens do not tell them in advance precisely what to expect in their dealings with officialdom. It is violated when outcomes are determined thoughtfully by official discretion rather than by the literal application of rules with which we are already familiar. And it is violated when the

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[101] *Secession Reference*, *supra* note 48 at para 70.
[102] Waldron, "Concept and Rule of Law", *supra* note 89 at 20.
[103] Davis, *supra* note 84 at 29 [references omitted].

> sources of law leave us uncertain about what the rules are supposed to be."[104]

The situation prior to the *Advisory Guidelines* suffered from all of the difficulties Waldron identifies. Chief among those difficulties, insofar as impetus for the creation of the *Advisory Guidelines*, was the uncertainty surrounding the law of spousal support.[105] Because claims were determined by discretion rather than rules familiar to all, citizens could not know what to expect from litigating spousal support claims. Moreover, the *Divorce Act* and the relevant decisions of the Supreme Court left the legal community guessing about the rules of spousal support.

As an affront to the rule of law, similar inconsistencies in the criminal law context "jeopardise the ongoing legitimacy of the justice system."[106] Some believe that disparities in criminal law sentencing are "widely regarded as a disgrace to the legal system."[107] This is so even in jurisdictions with statutory sentencing guidelines, aimed at reducing disparity. In England, for example, judges are statutorily required to follow criminal sentencing guidelines, "unless the court is satisfied that it would be contrary to the interests of justice to do so."[108] Nevertheless, critics of the English Sentencing Guidelines argue that they are insufficient for reducing sentencing disparities,[109] as factors such as

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[104] Jeremy Waldron, "Thoughtfulness and the Rule of Law" (2011) 18 British Academy Rev 1 at 3 [Waldron, "Thoughtfulness"]. See also Jackson et al, "Financial Support on Divorce: The Right Mixture of Rules and Discretion?" (1993) 7 Intl JL & Family 230 ("The Rule of Law dictates that like cases should be treated alike and that the law should be predictable so that individuals are able to foresee the legal consequences of their actions and plan their conduct accordingly" at 233).

[105] See Carol Rogerson & Rollie Thompson. "The Canadian Experiment with Spousal Support Guidelines" (2011) 45:2 Fam LQ 241 [Rogerson & Thompson, "Canadian Experiment"].

[106] Sean J Mallett, "Judicial Discretion in Sentencing: A Justice System that is No Longer Just" (2015) 46 VUWLR 533 at 534.

[107] Davis, *supra* note 84 at 133.

[108] *Coroners and Justice Act 2009* (UK), ch 25, s 1245.

[109] See e.g. Mandeep K Dhami, "Sentencing Guidelines in England and Wales: Missed Opportunities?" (2013) 76:1 Law & Contemp Probs 289 at 290; Mallet, *supra* note 106.

offender age and race, geographic region, or judicial background may still lead to unexplained differences.[110] It stands to reason that while official sanction might mitigate some of the constitutional legitimacy concerns with respect to judicial reliance on the *Advisory Guidelines*, the uncertainty that results from discretionary decision-making in the absence of any structure, guidance, or consistency poses more of a threat to the rule of law.

This argument might be formulated as the idea that reliance on the *Advisory Guidelines* respects the "internal morality" of the law.[111] The formal conception of the rule of law is commonly associated with Lon Fuller's requirements of a legal system.[112] Scott J. Shapiro summarizes the requirements, which, "as a group … constitute the ideal known as the [rule of law]."[113] Accordingly, "a legal system cannot exist … if it (1) lacks rules; (2) does not make its rules public; (3) drafts its rules obscurely; (4) engages in retroactive legislation; (5) enacts contradictory rules; (6) enacts rules that are impossible to satisfy; (7) constantly changes its rules; or (8) does not apply the rules it adopts."[114] The law of spousal support, prior to the release of the *Advisory Guidelines*, may be understood to have flouted many of these requirements.

The *Divorce Act* contains principles aimed at structuring the discretionary granting of spousal support, but it is does not contain clear, public, and unambiguous rules. Further, the objectives it does contain — for example, recognizing the economic impacts of childcare and encouraging self-sufficiency among spouses — are often

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[110] See Dhami, *supra* note 109 at 290.
[111] See Lon L Fuller, *The Morality of Law* (New Haven, CT: Yale University Press, 1964).
[112] See Scott J Shapiro, *Legality* (Cambridge, Mass: Harvard University Press, 2011) at 392 ff.
[113] *Ibid* at 394.
[114] *Ibid* at 393-394.

contradictory, and the provision does not provide guidance as to how these objectives should be balanced.[115] While the drafters of the provision might have intended its breadth to cover a greater number of cases, the result was confusion among legal actors and litigants alike.[116] Moreover, the effect of litigating spousal support, prior to the release of the *Advisory Guidelines*, was to ask a judge to settle the financial consequences of prior conduct — conduct engaged in without a clear understanding of its future impacts, given the unpredictable nature of the law. Finally, when the Supreme Court set out competing theoretical bases for the ongoing support obligation, it unwittingly created a situation where the rules were constantly shifting, or simply not being applied at all.[117] This is not to say that all legislative grants of judicial discretion undermine the rule of law. But where the injustice that results from inconsistency seems unrelated to discretion's goal of tailoring outcomes to individual cases, the negative effects of discretion might outweigh the benefits of individualized decision-making.

The non-legislated nature of the *Advisory Guidelines* is an unconvincing basis for judicial resistance to their consideration, where the alternative results in the inconsistency and unpredictability that plagued spousal support determinations prior to their creation. Rather than undermine, the *Advisory Guidelines* might be seen as advancing the central tenets of the formal conception. They contain clear and public rules. While litigants may not know the exact figure a judge might select from within the ranges, the formulas

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[115] See *Divorce Act*, *supra* note 15, ss 15.2(6)(b)(d).
[116] See generally Carol Rogerson, "Spousal Support After *Moge*" (1996) 14 Can Fam LQ 281; Rogerson, "Post-*Bracklow*", *supra* note 66; Julien D Payne, "An Overview of Theory and Reality in the Judicial Disposition of Spousal Support Claims Under the Canadian Divorce Act" (2000) 63:2 Sask L Rev 403; Rollie Thompson, "Rules and Rulelessness in Family Law: Recent Developments, Judicial and Legislative" (2000) 18 Can Fam LQ 25.
[117] See Rogerson, "Post-*Bracklow*", *supra* note 66.

provide a degree of predictability that was previously absent. The formulas encompass both competing theories of support, rather than giving rise to contradictions, depending on the theory one chooses. In provinces where the *Advisory Guidelines* are regularly applied, the rules do not change.

The critique of the thin conception, and the suggestion that reliance on the *Advisory Guidelines* may not violate even the thin understanding of the rule of law, aims to demonstrate that the separation of powers is not the only relevant consideration when it comes to the legitimacy of recognizing the potential normative force of soft law. Indeed, the force of a rule will often come from its meaning, shared understandings of the rule, and internalizations of it, rather than its source.[118] It is that shared understanding and internalization, on the part of judges and family law practitioners, that imbues the *Advisory Guidelines* with normative force. Their value, or the legitimacy of judicial reliance on them, in other words, should depend on their content and effects. Frederick Schauer writes, "[where] the rule comes from and what it does are logically separate, and the origin of a rule, except as a contingent empirical observation, offers no assistance in identifying those rules that lack normative force."[119] It is the substance of a rule, then, and not its source, that determines its normative force. Moreover, as the rest of this chapter suggests, adopting thicker conceptions of the rule of law may help to understand that the legitimacy of judicial reliance on the *Advisory Guidelines* should depend not on their form, but on the circumstances of their creation and on their effects.

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[118] See Schauer, *supra* note 57 at 68-71.
[119] *Ibid* at 107.

3. Thickening the Rule of Law: Proceduralism, Democratic Legitimacy, and the *Advisory Guidelines*

Thicker conceptions of the principle of the rule of law may enhance, rather than undermine, the constitutional legitimacy of judicial reliance on the *Advisory Guidelines* and similar soft law instruments. This part first sets out the procedural conception of the rule of law, according to which validity depends not on a normative instrument's form, but on the procedure leading up to its creation. It then draws on literature on public choice to suggest that where formal legislation is concerned, the procedural vision of the rule of law is more an ideal than a reality. Finally, it applies these inquiries by asking whether the requirements of procedural rule of law might be fulfilled by soft law and suggests that, contrary to the concerns set out in Part 2, reliance on the *Advisory Guidelines* might be understood as upholding this thicker version of the constitutional principle. The analysis contained here is not limited to the *Advisory Guidelines*; importantly, the lessons about the democratic nature of recognizing the normative force of certain non-legislated instruments might be adapted to other novel forms of soft law, aimed at remedying interpretive difficulties and advancing rights, provided that those instruments meet the requirements of the procedural rule of law.

3.1. The Rule of Law as a Rule of Procedure

This section sets out the theory underlying a procedural conception of the rule of law — one that might be promoted by judicial reliance on the *Advisory Guidelines*. Looking beyond thin constitutionalism means conceiving of the principle of the rule of law as something more than a requirement of form and authorship. Even staunch defenders of parliamentary supremacy and the constitutional principle of the separation

of powers will admit that the rule of law is about more than predictability.[120] Waldron's conception of the rule of law is particularly relevant to the idea that reliance on the *Advisory Guidelines* might be seen as constitutionally legitimate. Accordingly, the rule of law encompasses procedural elements that might be in tension with "the ideal of formal predictability."[121] Pursuant to this broader conception of the rule of law, the principle implies a certain procedure — one that gives citizens a voice, with which to "[intervene] on their own behalf in confrontations with power."[122] For Waldron, then, adherence to the rule of law depends on the democratic procedures underlying legislative instruments; the rule of law is respected when policy making and public administration include "opportunities for active engagement."[123]

The procedural conception of the rule of law connects legitimacy with adherence to specific processes. Under this model, a regulatory tool will conform to the constitutional principle as long as a designated person, or group of people, participate in its creation, and provided they follow pre-established processes.[124] That group is typically understood as the elected legislature.[125] More specifically, it is the legislature, engaging in "principled dialogue," on behalf of the citizenry.[126] As with the formal conception, the procedural view of the rule of law does not depend on the substance, or content, of a normative instrument. Thus, provided it was arrived at through a specific process,

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[120] See Waldron, "Concept and Rule of Law", *supra* note 89 at 5.
[121] *Ibid* at 8.
[122] *Ibid*.
[123] *Ibid* at 9.
[124] See Jeremy Waldron, "The Core of the Case Against Judicial Review" (2006) 115:6 Yale LJ 1346 at 1372 [Waldron, "Against Judicial Review"].
[125] See *Ibid*; Jeremy Waldron, "A Rights-Based Critique of Constitutional Rights" (1993) 13:1 Oxford J Leg Stud 18 [Waldron, "Rights-Based Critique"]; Jeremy Waldron, "The Dignity of Legislation" (1995) 54:2 Md L Rev 633 [Waldron, "Dignity of Legislation"].
[126] Waldron, "Rights-Based Critique", *supra* note 125 at 38.

proponents of this view will accept the fairness of a decision, or policy choice, even where they disagree with its content or outcome. From a procedural rule of law perspective, that response based on process, which accepts decisions independent of their outcome, "is the theory of political legitimacy." [127] Legitimacy, then, depends on legislative procedures.

The legitimacy of legislation is rooted not only in its representative nature, but also in the deliberative and participatory processes associated with democratic debate. Thus arguments in favour of legislative supremacy are based the "quality of public deliberation." [128] Participation is seen as "valuable because of the importance of assembling diverse perspectives and experiences" in public decision-making, and because a plurality of voices and perspectives enables the development of "more interesting and probably more valid opinions than we could manufacture on our own." [129] Thus, underlying the authority of legislation is the idea that deliberation and endorsement by elected representatives are "indispensable to the recognition of a general measure of principle or policy as law."[130] As legislators participate in that discussion in place of their constituents, the procedural conception of the rule of law promotes "respect for the freedom and dignity" of every citizen.[131]

Otherwise conceived of, the procedural understanding of the rule of law grounds legitimacy in representative democracy and the collective deliberation of elected representatives. Similar to the Habermasian notion of deliberative democracy, legitimacy

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[127] Waldron, "Against Judicial Review", *supra* note 124 at 1387.
[128] Waldron, "Rights-Based Critique", *supra* note 125 at 37.
[129] *Ibid*.
[130] Waldron, "Dignity of Legislation", *supra* note 125 at 642.
[131] Waldron, "Thoughtfulness", *supra* note 104 at 8.

derives from the fact that those who exercise legislative power "do so on the presumption that their decisions represent an impartial standpoint that is equally in the interest of all."[132] That presumption rests on the idea that "decisions [are] the result of appropriate public processes of deliberation," wherein participants participate and question equally and may raise arguments about both the substance of a decision, as well as the procedures of decision-making.[133] Under this model, legitimacy, in the context of "collective decision making processes in a polity," is conditional on the fact that free and fair deliberation among equals results in policies that benefit all.[134] Procedural rule of law, then, sees the legitimacy of legislative instruments as resulting from the participation, in their creation, of representatives of the diverse citizenry. Moreover, legislatures debate questions from the broadest of perspectives. The diversity and representative nature of legislative assemblies means that lawmakers are able to take multiple and diverging views into account when interpreting rights and determining their content.[135] In consequence, regulatory tools that, like the *Advisory Guidelines*, do not result from the legislative process fail to promote the freedom and dignity of the people subject to them; judicial reliance on them constitutes an affront to the procedural rule of law.

The procedural rule of law represents a broader conception of the principle than that espoused by Canadian courts and seemingly at the root of the judicial objection to the *Advisory Guidelines*. But it is still grounded in a strict separation of powers, which

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[132] Chantal Mouffe, "Deliberative Democracy or Agonistic Pluralism?" (1999) 66:3 Soc Research 745 at 747.
[133] *Ibid*.
[134] *Ibid* at 746-747, citing Seyla Benhabib, "Toward a Deliberative Model of Democratic Legitimacy", in Seyla Benhabib, ed, *Democracy and Difference: Contesting Boundaries of the Political* (Princeton: Princeton University Press, 1996) 67 at 69.
[135] See Jeremy Waldron, "Judges as Moral Reasoners" (2009) 7:2 Intl J Constitutional L 2; Waldron, "Against Judicial Review", *supra* note 124.

understands constitutional legitimacy as connected with legislative supremacy. As seen, however, where spousal support is concerned, the legislative process has undermined rather than furthered the rule of law. The diversity of opinions among judges tasked with applying the law created confusion and uncertainty. Moreover, in failing to select a particular approach to spousal support, the legislative process that led to the adoption of the spousal support provisions of the *Divorce Act*, and their subsequent judicial interpretation, did not result in a clear endorsement of a particular conception of a right — here, the right to equality — as legislatures are said to do.[136]

In light of its contradictory and confusing nature prior to the release of the *Advisory Guidelines*, Canadian spousal support law might be described as self-defeating. Indeed, the legislation fulfills Cass Sunstein's description of a "regulatory paradox" — that is, a "self-defeating regulatory [strategy that achieves] an end precisely opposite to the one intended."[137] While the spousal support provisions adopted in 1985 might have been an improvement over their predecessors — providing, as they do, minimal guidance to judges determining support — it cannot be said that they were very successful at remedying the devastating economic consequences of marriage breakdown on many women. Prior to the release of the *Advisory Guidelines*, women continued to endure harsh and gendered financial effects upon divorce, many of which were attributable to the inconsistent, unpredictable, and seemingly arbitrary nature of spousal support law.[138]

That the spousal support provisions of the *Divorce Act* should constitute a regulatory paradox is unsurprising; similar broad and heavily fact-dependent

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[136] See, Waldron, "Rights-Based Critique", *supra* note 125; *Ibid*.
[137] Cass R Sunstein, "Paradoxes of the Regulatory State" (1990) 57:2 U Chicago L Rev 407 at 407.
[138] See Rogerson, "Post-*Bracklow*", *supra* note 66; Nicholas Bala, "Judicial Discretion and Family Law Reform in Canada" (1986) 5:1 Can J Fam L 15.

discretionary grants have likewise been known to undermine their objectives. Determining the "best interests of the child" in custody and access cases, for example, is understood by some as doing a disservice to children "because of the enormous time spent in resolving the complicated factual question."[139] Particularly significant for the present discussion is Sunstein's belief that legislation invoking principles of formal equality in family law matters might produce "less rather than more in the way of real equality between men and women."[140] The spousal support provisions of the *Divorce Act* direct judges to look at the details of a couple's relationship when determining support. But the legislation is gender neutral, and it was not until the Supreme Court set out the compensatory approach to spousal support in *Moge* that trial judges awarding support began to systemically consider the demonstrated socio-economic impacts of family breakdown on women.[141] The Court thus recognized that "[when] two groups are differently situated, a legal requirement that they be treated the same seems a perverse method of promoting equality between them."[142] Indeed, a formal legislative approach to gender equality will often have the effect of further disadvantaging women. The Canadian legislation on spousal support is thus characteristic of a regulatory paradox, where "legal controls have been self-defeating."[143]

Thickening the principle of the rule of law to take into account the procedures underlying legislation does not provide a satisfactory answer to the problem of legislative or regulatory paradoxes, which, while perhaps procedurally sound, defeat rather than

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[139] Sunstein, *supra* note 137 at 428 [references omitted].
[140] *Ibid* at 429 [references omitted].
[141] See *Moge*, *supra* note 67.
[142] Sunstein, *supra* note 137 at 429.
[143] *Ibid*.

promote their objectives. In the case of spousal support, the relevant provisions of the *Divorce Act* may have been properly adopted by the legislature, but their conflicting objectives and factors, prior to the advent of the *Advisory Guidelines*, did little to improve the fate of divorcing women. As the following paragraphs suggest, the failure of the spousal support provisions to adequately redress the harmful and gendered economic impacts of divorce is less surprising when read in light of the political science literature respecting the realities of the legislative process, compared with the ideal of procedural democracy.

3.2. Proceduralism and the Legislative Process

This section draws on public choice literature to suggest that, on its own, the existence of validly adopted legislation governing the granting of spousal support does little to alleviate the rule of law problems with spousal support described above. The existence of paradoxical legislation comes as little surprise when examined in light of the social science literature on deliberative democracy and public choice. Political scientists have long understood that the sort of representative and participatory deliberation envisioned by Waldron — the features of legislation that enable it to conform to the procedural vision of rule of law — is but a fiction.[144] Indeed, the Habermasian ideal of deliberative democracy ignores the power dynamics that characterize democratic government and the idea that legislation is rarely the product of any real consensus among the elected.[145] While legal scholarship on the legislative process is lacking, some authors have looked to the social sciences for insight into the actual functioning of

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[144] See Daniel A Farber & Philip P Frickey, *Law and Public Choice: A Critical Introduction* (Chicago: University of Chicago Press, 1991); Mouffe, *supra* note 132.
[145] See *ibid* at 753, 755.

legislatures.[146] Drawing on economics and premised on the idea that we cannot take for granted that the legislature represents the public interest, literature on public choice theory suggests that legislation, as a general matter, can often no longer be said to represent the public interest.[147] Rather, at their most basic, public choice theories "treat the legislative process as a microeconomic system in which 'actual political choices are determined by the efforts of individuals and groups to further their own interests.'"[148] Thus, legislation increases the welfare not of the general public, but of interest groups who are able to exert the most pressure and influence on legislators.

In Canada, members of Cabinet regularly understand that interest groups, and not the general public, are their primary constituencies.[149] Indeed, it is understandable that the Minister of Finance would conceive of her role as responding to the voices of the finance community, just as the Minister of Indigenous and Northern Affairs would interact primarily with Canada's indigenous communities.[150] But family matters are not so rigid in terms of ministerial departments; the boundaries of family law are imprecise and tend to vary across jurisdictional lines.[151] Those seeking legislative reform might target the Department of Justice, which supported the *Advisory Guidelines* project. But given its amorphous nature,[152] the family does not fit neatly into a single legislative category. Further, contrasted with matters affecting industry and natural resources, for

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[146] Farber & Frickey, *supra* note 144 at 1.
[147] *Ibid* at 3.
[148] *Ibid* at 14-15.
[149] See J Hugh Faulkner, "Pressuring the Executive" (1982) 25:2 Can Public Administration 240.
[150] See *ibid* at 240.
[151] See John Dewar, "Families" in Peter Cane & Mark Tushnet, eds, The Oxford Handbook of Legal Studies (Oxford: Oxford University Press, 2003) at 413.
[152] See e.g. John Dewar, "Family, Law and Theory" (1996) 16:4 Oxford J Leg Stud 725 at 733; Alison Harvison Young, "The Changing Family, Rights Discourse and the Supreme Court of Canada" (2001) 80:2 Can Bar Rev 749; Robert Leckey, "Family Law as Fundamental Private Law" (2007) 86:1 Can Bar Rev 69.

example, it is difficult to speak of powerful interest groups focusing on family law. The activities of the Women's Legal Education and Action Fund, one of the leading Canadian advocacy groups focused on the pursuit of gender equality, are not limited to government lobbying. While the organization is involved in law reform initiatives, it is better known for its successes in the courtroom than at the legislature.[153] Moreover, it is a charitable organization, with an annual operating budget of less than $1 million, much of which is devoted to litigation.[154] Where legislative reform is concerned, these features of family law help explain Patrick Parkinson's contention that family law tends to rank low on government priority lists.[155] And that observation might underlie the demonstrated legislative complacency in the face of the problems that plagued spousal support law prior to the creation of the *Advisory Guidelines*.

Public choice literature is illuminating not only as to the client of legislation, but also with respect to its creation. The empirical observation that many legislative votes are "cast after only the most modest reflection"[156] challenges the picture of thoughtful deliberation and debate prized by Waldron in his endorsement of the procedural rule of law. In the American context, even a lawmaker who is a "paragon of industry" will rarely have read enough on the subject of proposed legislation to engage in thoughtful debate.[157] In consequence, for legislators who do not sit on a legislative committee for a particular

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[153] See e.g. Christopher P Manfredi, *Feminist Activism in the Supreme Court: Legal Mobilization and the Women's Legal Education and Action Fund* (Vancouver: UBC Press, 2004); Anna S Pellatt, "Equality Rights Litigation and Social Transformation: A Consideration of the Women's Legal Education and Action Fund's Intervention in *Vriend v R*" (2000) 12:1 CJWL 117.
[154] See Women's Legal Education and Action Fund, Annual Report 2016-2017, online: <http://www.leaf.ca/wp-content/uploads/2012/12/LEAF_AnnualReport_WEB_102417.pdf>.
[155] See Patrick A Parkinson, "The Challenge of Affordable Family Law" (2014) Sydney Law School Legal Studies Research Paper No 14/78 at 19.
[156] Barber B Conable, Jr, "Our Limits Are Real" (1973) 11 Foreign Policy 73 at 75.
[157] *Ibid* at 73.

bill, most legislative debate will involve "simple yes or no answers to complex pieces of legislation."[158] In Canada, it is rare that proposed legislation, once introduced in Parliament, will undergo any serious modification through the sort of lively debate envisioned by the procedural conception of the rule of law.[159] Rather, public policy — that is, "the reconciliation of conflicting views through the political process" — is typically developed by Cabinet, working with the public service, and not in a public forum, where everyone affected by a proposed law has a voice in its creation.[160]

Canadians experienced with the legislative process do not disagree with Waldron's ideal of legislative legitimacy. Former Cabinet minister J. Hugh Faulkner writes that with respect to legitimacy, the concern is with process and not with the substance of a policy.[161] But he posits that in the current political context, legislation "does not proceed from sources that command political legitimacy" because decision-making is not made by Parliament.[162] Instead, policy making "puts a premium" on the interaction of well-organized interest groups with the Executive.[163] That dispersion of political power "[undermines] the legitimacy of the policy-making process,"[164] and suggests that validly adopted legislation will not automatically conform to the procedural conception of the rule of law. Parliament should exist to bridge the gap between the

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[158] *Ibid* at 73-74.
[159] See Ian Vallance, "Interest Groups and the Process of Legislative Reform Bill C-15 - A Case Study" (1998) 13:1 Queen's LJ 159 at 165.
[160] James Gillies & Jean Pigott, "Participation in the Legislative Process" (1982) 25:2 Can Public Administration 254 at 264.
[161] See Faulkner, *supra* note 149 at 253.
[162] *Ibid*.
[163] *Ibid* 253.
[164] *Ibid* at 253.

government and the governed.[165] But when "political and economic elites dominate" the making of new policy,[166] the idea that "the law is the expression of the will of the people may be a little starry-eyed."[167] In the administrative context, principles of deliberative democracy suggest that "the failure of legislators and the courts to ensure that … policy making follows from appropriate process renders the legitimacy of the resulting policies questionable, as well as making these policies less likely to be factually and normatively sound."[168] Given what we know about the legislative process more generally, combined with the normative difficulties surrounding spousal support law prior to the creation of the *Advisory Guidelines*, the same criticism might easily apply to the governing provisions of the *Divorce Act*.

This picture of the political and legislative process in Canada suggests procedural legitimacy does not necessarily stem from all legislated instruments. But might it derive from non-legislated sources? Can soft law, in other words, meet the requirements of the procedural rule of law? The *Advisory Guidelines* suggest that it can. Indeed, the creation of the *Advisory Guidelines*, relying on the input of various actors and stakeholders representing different interested factions of society, indicate that the pillars of deliberative democracy might still be upheld in the non-legislative context.

3.3. Advancing the Procedural Rule of Law through the *Advisory Guidelines*

While they do not derive from the legislature, the *Advisory Guidelines* — and, in consequence, judicial reliance on them — might nevertheless respect the procedural rule

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[165] Philip Laundry, *Parliaments in the Modern World* (Dartmouth: Aldershot UK, 1989) at 75.
[166] Donald Savoie, *What is Government Good At? A Canadian Answer* (Montreal & Kingston, McGill-Queen's University Press, 2015) at 11.
[167] Laundry, *supra* note 165 at 75.
[168] Alice Woolley, "Legitimating Public Policy" (2008) 58:2 UTLJ 153 at 155.

of law. One of the principal critiques of political decision-making and legislating is that favouring interest groups and concentrating power in the "hands of a few" effectively "[locks citizens] out of the key decision-making structures."[169] Democracy is said to suffer as a result.[170] Even Waldron admits that both elected governments and courts "exercise … political power at some remove from the participation of ordinary citizens."[171] Moreover, political decision-making, as described above, fails to adhere to the "four pillars of deliberation" — that is, to the "four consistently articulated criteria for a discussion to be considered fully deliberative,"[172] and therefore, legitimate from a procedural rule of law perspective.[173] Alice Woolley describes the four criteria as consensus; reason, or an "orientation to the public good … [taking] into account in a fundamental way the perspective of others;" rational discussion; and equality of participation, unconstrained by the existing distribution of social resources.[174] For Woolley, these are the markers according to which a decision-making process can be judged as legitimate.[175]

The 2008 release of the final version of the *Advisory Guidelines* was preceded by seven years of consultations with the family law bar and judiciary across Canada.[176]

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[169] Robert P Shepherd, Book Review of *Power: Where Is It?* by Donald J Savoie, (2011) 54:2 Can Public Administration 308 at 309.
[170] *Ibid*.
[171] Jeremy Waldron, "Representative Lawmaking" (2009) 89:2 BUL Rev 335 at 348.
[172] Woolley, *supra* note 168 at 180.
[173] See *ibid* at 169.
[174] *Ibid* at 170-171.
[175] See *ibid* at 172.
[176] See *Advisory Guidelines*, *supra* note 72 at 157 (There was no representation from New Brunswick or Prince Edward Island. While no Quebec judges participated, the province was represented by three Quebec jurists: two lawyers experienced in family law and one mediator). Note that the push for spousal support guidelines dates further back than 2001. As early as 1992, Carol Rogerson wrote about the evidentiary difficulties inherent in spousal support determinations and the need for guidelines to help mitigate those

Building "from the ground up," the authors worked with "an advisory group of family lawyers, judges, and mediators who drew upon their experience of spousal support outcomes in negotiations, mediation and settlement conferences."[177] The advisory group was composed of 15 individuals, from eight provinces, whose experiences ranged from private family law practice, the non-profit sector, professional leadership roles, and the bench.[178] The group met several times during the lead-up to the release of the *Advisory Guidelines* in draft form, with a view to securing consensus on all aspects of the project. Moreover, it was essential that the authors of the *Advisory Guidelines* hear the input and diverse voices of those with "on-the-ground experience" with spousal support.[179]

The release of the first draft of the *Advisory Guidelines* was followed by a second stage of "discussion, experimentation, feedback and revision."[180] This stage included cross-country tours, during which the authors spoke with groups of lawyers and judges, and sought feedback through focused discussions with small groups of stakeholders.[181] They also received written comments from the public, individual lawyers, and bar associations.[182] The advisory group also continued to meet and reflect on the project during this stage.[183]

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difficulties. See "Evidentiary Issues in Spousal Support Cases", in Special Lectures of Law Society of Upper Canada, 1991, *Applying the Law of Evidence: Tactics and Techniques for the Nineties* (Toronto: Carswell, 1992) 219.

[177] See Rogerson & Thompson, "Canadian Experiment", *supra* note 105 at 250.

[178] *Advisory Guidelines*, *supra* note 72 at 157.

[179] *Ibid* at 17.

[180] *Ibid* at 18.

[181] *Ibid* at 19-20.

[182] *Ibid* at 20.

[183] *Ibid*.

If reason and thoughtfulness are understood to be the hallmarks of the procedural rule of law,[184] it is difficult to impugn an instrument of soft law, the creation of which, appears to better fulfill the pillars of deliberative democracy than the Canadian legislative system. Indeed, the process of creating the *Advisory Guidelines* was characterized by the markers of procedural legitimacy. The authors sought consensus on the different aspects of the project; the process took fundamental account of the diverse perspectives involved; the authors engaged in rational discussions with the advisory group and other interested parties; and equality of participation, unconstrained by social resources, seems to have been inherent in the authors' travels throughout the country — instead of waiting for those with the resources to reach out to them, the authors actively sought out the views of different voices. Moreover, unlike the legislative process as set out above, their process of creation suggests openness to change and continuous revision, until all participants agreed that the *Advisory Guidelines* constituted a proper reflection of the law, taking into account regional and cultural differences across geographic lines. All of this supports the idea that procedural legitimacy — that is, respect for the procedural conception of the constitutional principle of the rule of law — might well lie outside of formal legislation.

The imperfect nature of the legislative system, together with the demonstrated difficulties with the judicial application of the statutory grant of judicial discretion in the spousal support context, illustrate that the relevant provisions of the *Divorce Act* may not advance the rule of law. Informed by the reasoning underlying the procedural conception, that failure might be described as a lack of democratic accountability with respect to the law of spousal support. The *Advisory Guidelines*, however, might represent a means of

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[184] See Waldron, "Thoughtfulness", *supra* note 104.

restoring that accountability. In the administrative context, Sossin writes, "better statutory guidance in crafting discretionary powers is desirable from the standpoint of democratic accountability."[185] While they may not be a legislative creation, or even statutorily mandated, the *Advisory Guidelines* relieve some of the demonstrated problems with the law of spousal support, while their creation adhered to democratic and deliberative principles. Moreover, given the "chaotic" nature of family law[186] — what Rogerson describes as "the fragmentation of the modern family law system" — it is easy to understand how this kind of soft law instrument might be "generated by various legal actors, not only by legislators…."[187] As seen, in the administrative context, decisions taken under a statutory grant of discretion are regularly based on soft law. Provided these tools correspond with constitutional values — for example, by incorporating an equality-based analysis grounded in the *Charter* and being the subject of meaningful deliberation about their content — reliance on them by judges should not be viewed as a threat to the rule of law.

Acknowledging the legitimacy, from a procedural rule of law perspective, of judicial reliance on soft law may thus serve to refute the rule of law objection to the *Advisory Guidelines*. While they do not constitute legislation, reliance on the *Advisory Guidelines* may still be seen as fulfilling the requirements of a thicker understanding of the rule of law — that is, procedural rule of law. Proceduralists concerned about the creation of normative instruments might look at the "input legitimacy" of the *Advisory*

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[185] Sossin, "Discretion Unbound", *supra* note 1 at 478.
[186] See John Dewar, "The Normal Chaos of Family Law" (1998) 61:4 Mod L Rev 467.
[187] Rogerson, "Access to Justice", *supra* note 56 at 56.

Guidelines,[188] as compared with the procedures behind the adoption of legislation. As seen, their creation used mechanisms normally associated with successful deliberation, such as leadership and stakes in the outcome.[189] Moreover, as in the administrative context, as an instrument "forged through a process of hearings or negotiation involving all relevant interests," the *Advisory Guidelines* have a "strong claim to legitimacy" from the procedural point of view.[190] Indeed, as predicted by Rogerson,[191] the type of participation by interested stakeholders in the creation of the *Advisory Guidelines* is understood to create a better framework for decision-making than what would emerge from the lengthy and "gradual accretion of practice or precedent."[192]

As far as the procedural conception of the rule of law is concerned, there may be little merit in impugning judicial reliance on the *Advisory Guidelines* because they are not legislated. Thus, a thicker conception of the constitutional principle — one grounded in procedure — makes space for informal normative instruments. As the following part briefly suggests, however, the constitutional legitimacy of judicial consideration of the *Advisory Guidelines* is not limited to the procedural view. Where their substance is concerned, the *Advisory Guidelines* can be understood to promote another thick conception of constitutionalism, that of the substantive rule of law.

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[188] di Robilant, *supra* note 16 at 506.
[189] See David M Ryfe, "Does Deliberative Democracy Work?" (2005) 8 Annual Rev Political Science 49.
[190] See David J Mullan, *Administrative Law* (Toronto: Irwin Law, 2001) at 378.
[191] See Rogerson, "Background Paper", *supra* note 63.
[192] See Mullan, *supra* note 190 at 375.

4. The Thickest Rule of Law: The *Advisory Guidelines*, Rights, Reason, and Justification

This part advances two related arguments in support of the legitimacy of judicial reliance on the *Advisory Guidelines*: First, as a set of rules anchored in the legislative and jurisprudential pursuit of substantive equality, the *Advisory Guidelines* should advance the right to equality. Second, by forcing judges to justify their reasoning under them, the *Advisory Guidelines* are more likely to produce fair and justifiable outcomes than the broad exercise of judicial discretion.

It should be evident from both the narrow, formal conception and from the thicker, procedural one, that objections to judicial reliance on the *Advisory Guidelines* based on the notion that the practice may offend the constitutional principle of the rule of law are misguided. But understanding the *Advisory Guidelines* as a legitimate normative source, suitable for grounding the exercise of judicial discretion, need not be limited to formal and procedural points of view. From a substantive perspective, reliance on them may also be viewed as promoting respect for the rule of law. The thickest conception of the rule of law — that which looks to the merits, or substance, of a normative tool and accepts novel approaches to legal problems[193] — supports the normative force of the *Advisory Guidelines* and further undermines the rule of law-based objection to their use by judges.

4.1. Spousal Support, Rights, and the Rule of Law

A conception of the rule of law based on the substance of a particular area of law is concerned not with form, or procedure, but with substantive outcomes and the ability to

[193] See Leckey, "Thick Instrumentalism" *supra* note 82; di Robilant, *supra* note 16.

promote fairness and respect for rights. Such an understanding might thus see judicial reliance on the *Advisory Guidelines* as upholding the rule of law. Eschewing the limited nature of the thinner conceptions of the principle, supporters of a substantive rule of law would recast Fuller's formal requirements of a legal system described above (publicity, clarity, consistency, etc.) as "rule by law" and not rule of law.[194] Without attention paid to the content of an instrument or policy choice, and to whether it gives rise to morally justifiable results, the rule of law becomes merely instrumental.[195] Moreover, the procedural conception is also lacking, as "even when political decisions are taken by representative, elected bodies, an injustice can also be done when the outcomes of those decisions are wrong, unfair or unjust."[196] Accordingly, a political decision should not be viewed "purely in terms of the participatory quality of its procedures."[197] Rather, the "fundamental criterion for judging political institutions" is the justice of its outcomes.[198] Substantive rule of law does not distinguish between the form and content of a rule or decision. "On the contrary, it requires, as part of the ideal of law, that the rules … capture and enforce moral rights."[199] Adherence to the rule of law, then, according to the substantive conception, will depend on whether a legal instrument gives rise to fair or just

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[194] Jeremy Waldron, "Legislation and the Rule of Law" (2007) 1:1 Legisprudence 91 at 122 [Waldron, "Legislation"].
[195] See Aileen Kavanagh, "Participation and Judicial Review: A Reply to Jeremy Waldron" (2003) 22:5 Law & Phil 451.
[196] *Ibid* at 462.
[197] *Ibid*.
[198] *Ibid*.
[199] Ronald Dworkin, *A Matter of Principle* (Cambridge: Harvard University Press, 1985) 11-12, cited in Paul P Craig, "Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework" (1997) 21 Public L 467 at 478.

results. Constitutional validity, in other words, is to be judged according to values and to "conceptions of the good life."[200]

It is true, of course, that justice might mean different things to different people. Waldron questions "how we are to decide which values should be incorporated into a substantive conception."[201] It is uncontroversial, however, in the Canadian context, that the law should further gender equality, one of the rights guaranteed by the *Charter*,[202] and one of objectives underlying the drive to bring consistency and predictability to spousal support law through the *Advisory Guidelines* project. Moreover, as seen elsewhere in this thesis, there is also little controversy around the idea that the Canadian law of spousal support is rooted in the right of both spouses to experience the economic impacts of family breakdown in substantively equal ways.[203] This is not unique to Canada: internationally, family law is increasingly viewed "as a means of giving effect to rights irrespective of consequences … rather than as being concerned to search for the most beneficial or welfare-maximising outcome."[204] That the shift toward thinking about spousal support as a rights-based entitlement has been accompanied by a move toward guidelines and rules is not surprising; rule-based instruments, such as the *Advisory Guidelines*, "[displace] discretion by adopting a starting point or presumption that gives expression to equality in a particular context."[205] If, as some scholars maintain, adherence

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[200] David Dyzenhaus, "Positivism and Validity" (1983) 100:3 SALJ 454 at 465.
[201] Waldron, "Legislation", *supra* note 194 at 118.
[202] *Canadian Charter of Rights and Freedoms*, s 15, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11. Also see Kerri A Froc, "Is Originalism Bad for Women — The Curious Case of Canada's Equal Rights Amendment" (2015) 19:2 Rev Const Stud 237 (for the idea that s 28 of the *Charter* ensures women's equal access to all constitutional protections).
[203] See *Moge*, *supra* note 67; *Bracklow*, *supra* note 66.
[204] John Dewar, "Reducing Discretion in Family Law" (1997) 11 Austl J Fam L 309 at 320.
[205] *Ibid* at 321.

to the substantive ideal of the rule of law depends on "conduciveness to good results,"[206] a soft law instrument like the *Advisory Guidelines*, the objective of which is to increase the fairness of results in furtherance of the right to equality, surely corresponds to the constitutional principle.

Moreover, soft law guidelines, as a general matter, function as a tool for redistribution and allocation from a perspective of equality and fairness.[207] When discretion reigns, equality of treatment cannot be ensured by similar facts; recourse to guidelines thus acknowledges and responds to the inherent uncertainty of judicial decisions.[208] Internationally, in the labour and employment context, there is support for the idea that as a matter of fairness and reasonableness, once it is accepted that employment rights have constitutional status, soft law initiatives that protect those rights should be "hardened," or incorporated into the law.[209] This is particularly the case where formal law reform does not show any sign of "real improvement" with respect to protecting rights.[210] As with the *Advisory Guidelines*, the soft law in question governing labour law was written by third parties and has no binding status.[211] Further, given its "deeply organic character," soft law is viewed as "a tool for empowerment and emancipation, reflecting [the] peculiar lived experience and special needs" of

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[206] Kavanagh, *supra* note 195 at 451.
[207] See Brigitte Munoz-Perez, "Introduction : Première partie" in Sayn, *Barèmes*, *supra* note 42, 21. See also Michael Howlett, "What is a Policy Instrument? Tools, Mixes, and Implementation Styles" in Pearl Eliadis, Margaret M Hill & Michael Howlett, eds, *Designing Governments: From Instruments to Governance* (Montreal & Kingston: McGill-Queen's University Press, 2005) 31 (on the distributional effect of instruments at 41).
[208] See Sayn, "Fonctionnement du droit", *supra* 86 at 14.
[209] Sundra-Karean, *supra* note 40 at 467.
[210] *Ibid*.
[211] See *ibid*.

"marginalized groups seeking social change."[212] Women in particular are understood to benefit from soft law measures, which "profit from women's lived knowledge by providing detailed descriptive accounts and finely tuned policy options."[213]

The *Advisory Guidelines*, constructed with the input of those experienced with and subject to spousal support law, aim in part to improve the fate of women involved in divorce proceedings, by facilitating the equality-based analysis mandated by the *Divorce Act*. The substantive conception of the rule of law evaluates decisions "on the basis of whether they [are] right/just/fair" — whether, in other words, they are in the "best interests" of the governed.[214] From a substantive rule of law perspective, it is difficult to impugn the legality of judicial reliance on an instrument geared toward precisely those ends.

4.2. The *Advisory Guidelines* as Promoting Fairness and Justification

Before concluding, it is worth examining one final conception of the rule of law, distinct from the formal and procedural views, and in line with the idea that the rule of law is integrally linked with the ideals of justice and fairness. As seen, much of the literature on guidelines and discretion stems from the field of administrative law. Moreover, Canadian scholarship on soft law, limited as it is, is focused on the administrative state. It is therefore unsurprising that there are further analogies to be made between administrative soft law and the question of the legality of judicial reliance on the *Advisory Guidelines*. Borrowing the administrative law concept of common law constitutionalism completes the argument that judicial reliance on the *Advisory*

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[212] di Robilant, *supra* note 16 at 533.
[213] *Ibid*.
[214] Kavanagh, *supra* note 195 at 463.

Guidelines may be understood as promoting the substantive understanding of the rule of law.[215]

The substantive conception of the rule of law is said to promote fairness. In this respect, the rule of law has been connected, by a number of scholars in Canadian administrative law, with the concept of common law constitutionalism.[216] A thick conception of the rule of law, "common law constitutionalism frees the rule of law from the confines of a strict separation of powers."[217] It recognizes, in other words, that the "separation of powers … is only useful to the extent that it enables the realization of foundational constitutional principles."[218] For common law constitutionalists, that foundational principle is the justification of the actions of public officials.[219]

While administrative law scholars refer to officials acting in an executive function, the state of disarray that characterized Canadian spousal support law prior to the introduction of the *Advisory Guidelines* suggests that the rule of law depends as much on justification by judges as by public officials. Moreover, common law constitutionalism, understands the common law as "a source of deep-seated principles," two of those principles being fairness and reasonableness, on the basis of which, "public officials

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[215] For a reference to common law constitutionalism outside of the administrative law context see Joanna Erdman, "A Constitutional Future for Abortion Rights in Canada" (2017) 54:3 Alb L Rev 727.
[216] See e.g. David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge: Cambridge University Press, 2006); Evan Fox-Decent, "Democratizing Common Law Constitutionalism" (2010) 55:3 McGill LJ 511; Jocelyn Stacey, "The Environmental, Democratic, and Rule-of-Law Implications of Harper's Environmental Assessment Legacy" (2016) 21:2 Rev Const Stud 165 [Stacey, "Legacy"].
[217] Jocelyn Stacey, "The Environmental Emergency and the Legality of Discretion in Environmental Law" (2016) 52:3 Osgoode Hall LJ 985 at 1023.
[218] *Ibid* at 1023 [references omitted].
[219] See David Dyzenhaus, "Law as Justification: Etienne Mureinik's Conception of Legal Culture," (1998) 14:1 SAJHR 11.

[must] publicly justify their decisions."[220] Stated otherwise, "public officials must demonstrate that their decisions are both fair and reasonable."[221] Importing common law constitutionalism and the requirements of reason and justification into the substantive conception of the rule of law thus helps to advance the argument that judicial consideration of the *Advisory Guidelines*, which require judges to justify their reasoning on spousal support, promotes, rather than undermines, the constitutional principle.

Literature on rules and discretion can be read as supporting the idea that consideration of the *Advisory Guidelines*, by placing an increased burden of justification on trial judges, furthers common law constitutionalism, and therefore promote the reason-based conception of the rule of law. As seen in Chapter 2, because they produce ranges for amount and duration, judges relying on the *Advisory Guidelines* must justify their choices and motivate their selection from within the ranges. Further, where a judge, in the exercise of her discretion, deems that application of the formulas contained in the *Advisory Guidelines* to a given set of facts will not promote the underlying rationale of spousal support, that determination must also be justified.[222] Where a guideline is not determinative — where there is no reason to prefer its non-application to its application — decision-makers will often still choose to apply it,[223] thus increasing the overall predictability, and therefore fairness, of judicial reasons. Moreover, where a guideline states that it should be followed unless the decision-maker is "convinced" that its application would not produce the desired justification — the effect of several appellate court endorsements of the *Advisory Guidelines* — decision-makers will only depart from

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[220] Stacey, "Legacy", *supra* note 216 at 179.
[221] *Ibid*.
[222] See Schauer, *supra* note 57 at 108.
[223] *Ibid* at 108.

it where they are confident the departure is justified.[224] The existence of the guideline thus "[increases] the burden of justification for acting inconsistently with the [guideline]…."[225] The *Advisory Guidelines*, in other words, exert normative force by increasing the burden of justification, both when applying the formulas and when departing from them. In an important sense, then, one of their primary goals is to make decision-makers aware of when to depart from them,[226] and thus, to require them to justify that departure. When the rule of law is understood as a requirement of justification on the part of public officials, an instrument that aids judges in justifying their decisions should be seen as contributing to, rather than detracting from, compliance with the constitutional principle.

Whether the substantive conception of the rule of law is informed by a desire to uphold the right to equality, or simply understood as a requirement of justice and fairness, evidenced through justification, both views suggest that judicial reliance on the *Advisory Guidelines* accords with the rule of law. Thus, thickening our understanding of the foundational constitutional principle to take into account the substantive effects of a particular instrument or practice functions to undermine the judicial objection grounded in the separation of powers and in a limited and narrow conception of the rule of law.

Conclusion

This chapter does not purport to settle the meaning of the rule of law. Its much more limited aim is to suggest that to reduce the constitutional principle to the formal understanding expressed by the Supreme Court and a small number of scholars is to

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[224] *Ibid*.
[225] *Ibid* at 109.
[226] See Virginie Gautron, "La 'barèmisation' et la standardisation des réponses pénales saisies au travers d'une etude empirique de l'administration de la justice pénale" in Sayn, *Barèmes*, *supra* note 42, 85 at 93.

ignore the richness of the concept, and its potential fruitfulness for examining the use of novel regulatory instruments such as soft law. It also does not endorse any particular conception of the rule of law; attempts to answer the question that has occupied scholars of jurisprudence for centuries would go far beyond its scope. Instead, this chapter has set out to suggest that whichever conception of the rule of law one adopts, judicial reliance on the *Advisory Guidelines*, as well as similar soft law tools, might be understood as upholding, rather than offending, the foundational constitutional principle, contrary to the judicial objection expressed in some provinces.

The thinnest conception of the rule of law, grounded strictly in judicial interpretations of the constitutional text, limits legality and constitutional validity to formal requirements and ignores the potential of broader understandings. This chapter accordingly suggests that in considering the *Advisory Guidelines*, the rule of law might be better served by setting aside the formal understanding. Even according to this narrow view, however, acknowledging the potential normative force of the *Advisory Guidelines* can be understood as conforming to the rule of law, as they increase consistency and predictability, and correspond with jurisprudential understandings of the law's internal morality. For its part, the thicker, procedural conception of the rule of law also supports judicial reliance on the *Advisory Guidelines*, given that the process of creating them was characterized by the same kind of thoughtfulness that scholars of jurisprudence attribute to the legislative process. Moreover, whereas the budding political science literature on public choice theory undermines the idealized procedural view of democratic lawmaking, it suggests that reliance on the *Advisory Guidelines*, given the process of their creation, might correspond with the constitutional ideals of popular representation and

deliberation. Finally, the thickest conception of the rule of law — the substantive understanding, which views legitimacy as dependent on respect for rights, justice, and fairness — further challenges judicial resistance to the *Advisory Guidelines* based on their unofficial status. In addition to their objective of advancing gender equality, the *Advisory Guidelines* help to ensure that the decisions of public officials — judges interpreting the spousal support provisions of the *Divorce Act* — act fairly and justifiably in exercising their discretion to grant an award.

A unique soft law tool in Canada, the *Advisory Guidelines* may do more than advance the objectives of the spousal support provisions of the *Divorce Act*. Like similar tools used in Europe, they force a re-questioning of traditional conceptions of law and justice.[227] In doing so, they open up new understandings of legitimacy and expand the existing pool of sources of normativity. With respect to spousal support, they may help facilitate the pursuit of substantive economic equality across gender lines. In times of rapid social and technological change, formal law will often be disconnected from social reality. As it does in the context of spousal support, soft law might bridge the gap between formal legislation and the lived reality of legal subjects, thus ensuring that the law remains fair and promotes the rights and principles that underlie the Canadian justice system. But spousal support is just one example of a place where soft law may help promote respect for the rule of law. Further research might reveal other areas where similar instruments might play an important role in the lives of both jurists and ordinary citizens. Once it is accepted, as this chapter has attempted to illustrate, that reliance on non-legislated guidelines, created by parties other than government, does not inevitably

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[227] Sayn, "Fonctionnement du droit", *supra* 86 at 10-11.

undermine foundational constitutional principles, the potential of soft law to contribute to the existing cache of normative instruments is limited only by our creativity.

Conclusion

This thesis has combined a number of questions and approaches to examining a novel family law instrument. Although the substantive law of spousal support has not changed in recent years, the creation and use of the *Advisory Guidelines* during the last decade have given rise to a need for new inquiry into the functioning of spousal support, across jurisdictions, particularly given their differential reception across provincial lines. The problem the *Advisory Guidelines* were meant to address is not a new one; experts in family law have been urging the creation of a tool to assist judges with the difficult task of dealing with the financial consequences of marriage breakdown for at least three decades — prior even to the Supreme Court's adoption of a compensatory approach to spousal support grounded in principles of substantive equality.[1] In 1979, the Canadian Advisory Council on the Status of Women envisioned an "objective mechanism … that would settle the financial affairs of ex-spouses objectively and clearly once and for all."[2] More than a decade after the creation of that mechanism, the situation merits scholarly attention.

Given the focus on an instrument geared toward facilitating the application of spousal support law, this thesis revisited the longstanding debate about the purposes of

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[1] See e.g. Carol Rogerson, "Evidentiary Issues in Spousal Support Cases" in Special Lectures of the Law Society of Upper Canada 1991: Applying the Law of Evidence, Tactics and Techniques for the Nineties (Scarborough: Carswell, 1992); See also Edward W Cooey, "The Exercise of Judicial Discretion in the Award of Alimony" (1939) 6:2 Law & Contemp Probs 213 ("Consideration might be given to the adoption of some standard in the form of a certain proportion of the estate or income of the husband to serve as a guide only and to be deviated from as the facts suggest" at 224).

[2] Canadian Advisory Council on the Status of Women, *Love, Marriage and Money… An Analysis of Financial Relations Between the Spouses*, (Ottawa: 1984) at 49, citing E Raedene Combs, "The Human Capital Concept as a Basis for Property Settlement at Divorce: Theory and Implementation" (1979) 2:4 J Divorce 329, cited in Nicholas Bala, "Judicial Discretion and Family Law Reform in Canada" (1986) 5:1 Can J Fam L 15 at 46-47.

the ongoing obligation of support, and attempted to reconcile the varied judicial pronouncements and scholarly approaches. Applying a relational feminist approach, premised on the inevitability of interdependence in marriage and the difficulty of unraveling the economic dynamics of long-term partnership, the thesis attempted to combine the Court's models into an overarching relational theory of support. That theory offers some response to feminist critiques of spousal support as perpetuating female dependence, and attempts to rationalize the private nature of the support obligation. In doing so, it establishes a fundamental premise of this thesis — that spousal support can be viewed as a tool for economic justice.

This thesis does not maintain that privatized post-marital obligations provide the best solution to women's economic vulnerability. Its approach is pragmatic and is rooted in the current social context of the move toward neo-liberal politics and the privileging of individual responsibility and self-sufficiency. In that context, the relative absence of progressive housing or childcare policies in Canada, coupled with the continued gender gap in the labour force, suggest that making women's economic dependence a public responsibility will perpetuate, if not worsen, their economic subordination. The deficiencies of these kinds of social programs, and their impacts, also illustrate the limited "power of family law to dramatically improve people's lives."[3] Thus, family law, and spousal support in particular, are one piece of a much broader puzzle aimed at ensuring economic gender equality, important parts of which have not yet been attained. Until they have been, feminist scholars, while urging improvements to the social safety

[3] Robert Leckey, "Relational Contract and Other Models of Marriage" (2002) 40:1 Osgoode Hall LJ 1 at 6.

net, might accept the necessity of a private obligation. Conceiving of spousal support as rooted in relational theory might also help to promote that acceptance.

Building on the idea that spousal support plays a vital role in the pursuit of genuine economic equality between divorcing spouses, the thesis looked to instrument choice theory as a means of evaluating whether the law, as interpreted and applied through reliance on the *Advisory Guidelines*, in fact promotes substantive gender equality. Instrument choice theory recognizes that principles of spousal support alone — broad pronouncements on the objectives of the law — will do little to enhance equality. While there is value in the law's expressive function,[4] the means of implementing the messages expressed might matter more than the principles espoused in the case law and legislation. As Neil Komesar writes, "[just] societies are based not on the announcement of broad principles but on the design of real world institutional decision-making processes and the designation of which process will decide which issues. Justice is forged in the crucible of institutional choice."[5] Thus, exploring the *Advisory Guidelines* as the chosen instrument for determining spousal support awards is essential to the inquiry as to whether the post-marital support obligation advances the pursuit of economic justice.

The instrument choice approach saw the discussion of the *Advisory Guidelines* as moving beyond the traditional boundaries of family law. At the same time, drawing on instrument choice theory meant expanding the reach of that discipline as well, outside of

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[4] See Cass R Sunstein, "On the Expressive Function of Law" (1996) 144:5 U Pa L Rev 2021. See also Michael J Prince, "From Welfare State to Social Union: Shifting Choices of Governing Instruments, Intervention Rationales, and Governance Rules in Canadian Social Policy" in Pearl Eliadis, Margaret M Hill & Michael Howlett, eds, *Designing Government: From Instruments to Governance* (Montreal & Kingston: McGill-Queen's University Press, 2005) [Eliadis, Hill & Howlett, *Designing Government*] 281 (on law's functions of "moral suasion and exhortation" at 285).

[5] Neil K Komesar, *Imperfect Alternatives* (Chicago: University of Chicago Press, 1994) at 49.

its traditional focus on economic regulation and the regulatory state. The thesis thus suggests that focusing exclusively on the substance of a particular law or public policy reveals only part of the picture and misses important considerations about the processes used to implement the law. Indeed, without valid procedures, assessed in terms of an instrument's acceptance among legal actors, even the best law will be limited in its ability to achieve its goals.

Significant space was devoted to the *Advisory Guidelines*, which was necessary in order to meaningfully appreciate them as the federal government's choice of instrument for structuring spousal support awards. The thesis's primary vocation however is not their exposition. Instead, it is an attempt to properly understand them as a regulatory tool in order to evaluate their effectiveness as such. Moreover, the arguments presented are not necessarily limited to the *Advisory Guidelines*, to spousal support, or even to the regulation of the family. Rather, this early scholarly attempt at a critical view of the *Advisory Guidelines*, from the lens of instrument choice and regulatory theory, as well as feminist legal theory and constitutional theory, might contain lessons for other areas of law, where policy makers struggle to devise appropriate decision-making mechanisms and structures. Thus, practitioners might gain a deeper understanding of the regulatory instruments they rely on as advocates, while judges might demonstrate a greater degree of openness to novel limits on their discretion. Further, scholars working in other areas of law might be moved to explore a similar approach, where the shortcomings of judicial discretion are seen as undermining the effectiveness or acceptability of the legal regime. Finally, legislators might consider this research in developing suitable tools for governing

other complex areas of social life, and particularly those with distinctive effects on vulnerable groups.

From a comparative perspective, the thesis attempted to bring out the constant contest in Quebec family law between the cultural ideals of formal equality and freedom of choice, on the one hand, and a paternalistic legislative landscape aimed at protecting the economically vulnerable, on the other. Indeed, Quebec family law has consistently sought to balance cultural mores with protective legislative priorities.[6] That tension, however, is not limited to Quebec; the conceptual challenges raised by continuing post-marital support obligations transcend provincial lines. This observation supports the idea that where families are concerned, the historical purity, difference, and impermeability of the civil law are things of the past,[7] as is the conception of a pure civil law that violates the principle of reciprocity, which characterizes the relationship between Canada's two legal systems.[8] These too are not novel issues. But at a time when Quebec family law may be on the potential brink of legislative reform, the *Advisory Guidelines* question provides a new and relevant lens with which to approach these complex questions. Accordingly, the failure of the *Advisory Guidelines* to conform to a particular civilian mould should not affect the legitimacy of judicial reliance on them, but rather, would promote a vision of Quebec civil law as a space for legal creativity and the intermingling of traditions.

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[6] See Benoît Moore, "Culture et droit de la famille : de l'institution à l'autonomie individuelle" (2009) 54:2 McGill LJ 257; Nicholas Kasirer, "The Dance is One" (2008) 21:1 L & Lit 69.
[7] See Jean-Louis Baudouin, "Mixed Jurisdictions: A Model for the XXIst Century?" (2003) 63:4 La L Rev 983.
[8] See David Howes, "From Polyjurality to Monojurality: The Transformation of Quebec Law, 1875-1929" (2011) 32:3 McGill LJ 523.

With respect to the constitutional legitimacy of judicial reliance on a non-legislated instrument, the thesis suggests that the *Advisory Guidelines* demonstrate the potential of soft law to fill gaps in the law where statutes complicate rather than clarify and the legislature is slow to respond. They provide a concrete example of the idea that legislative reform is not the only way that guidelines, meant to assist judges, lawyers, and laypeople alike, may be introduced.[9] Those working outside of family law have posited a similar need for bottom-up, or "organic," non-legislative development of the law, in order to avoid the instability of the legislative approach — the same instability that characterized spousal support determinations pursuant to the broad legislative grant of judicial discretion in the *Divorce Act*.[10] Moreover, viewing reliance on the *Advisory Guidelines* as a constitutionally legitimate judicial practice would align with broader constitutional perspectives, which accept guidelines and soft law not as contradictory to law as traditionally understood, but as promoting the underlying objectives and structures of our legal system.

This thesis has not gone into great depth with respect to the relationship between the *Advisory Guidelines* and the pursuit of access to justice. This is not to ignore or deny that where access to justice is concerned, the early part of the 21st century is characterized by an urgent need for changes to Canada's family justice system.[11] The *Advisory Guidelines*, by empowering litigants to bargain in light of the law and reducing recourse

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[9] See Carol Rogerson, "Shaping Substantive Law to Promote Access to Justice: Canada's Use of Child and Spousal Support Guidelines" in John Eekelaar, Mavis Maclean & Benoit Bastard, eds, *Delivering Family Justice in the 21st Century* (Oxford: Hart Publishing, 2015) 51 [Rogerson, "Access to Justice"].
[10] See Serge Gaudet, "Le rôle de l'État et les modifications apporteés aux principes généraux du droit" (1993) 34:3 C du D 817.
[11] See Canada, Action Committee on Access to Justice in Civil and Family Matters, *Access to Civil & Family Justice: A Roadmap for Change* (Ottawa: Canadian Forum on Civil Justice, 2013).

to litigation, should contribute to easing the burden on the justice system. No tool is, of course, perfect. Reliance on the *Advisory Guidelines* in many cases still requires legal advice and access to proprietary software. But as their use has become more frequent, it has also become more accessible; in what Carol Rogerson describes as "an extremely positive development,"[12] one software provider has made a simplified version of the formulas available for free online.[13] Thus the *Advisory Guidelines* heed John Dewar's call for a "move away from traditional modes of legislation," geared primarily toward legal professionals, toward "regulatory techniques that speak more directly to the parties themselves."[14] In doing so, they work to "mitigate the arbitrariness of the current system."[15] Discretion will never disappear from spousal support — that is simply the nature of family law.[16] In the *Advisory Guidelines*, judicial discretion lives on, but in a tool that combines rule-based solutions with the benefits of judicial discretion.

Further, this thesis is premised on a doctrinal analysis of the *Advisory Guidelines*. The brief survey of their reception across jurisdictions is based on reported cases, and not on empirical data. The doctrinal method is useful for uncovering judicial statements and jurisprudential trends, but it is limited in its ability to reveal deeper motivations for differing approaches to the *Advisory Guidelines*, and to anchor those approaches in deep-seated attitudes toward spousal support or marriage more broadly. Such insights might be discovered through quantitative interviews with relevant legal actors. Further research,

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[12] Rogerson, "Access to Justice", *supra* note 9 at 67.
[13] See "My Support Calculator", online: <http://www.mysupportcalculator.ca/Welcome.aspx>, cited in *ibid* at n 60. The free calculator is funded by lawyer advertising on the website.
[14] John Dewar, "Can the Centre hold? Reflections on Two Decades of Family Law Reform in Australia" (2010) 22:4 Child & Family LQ 377 at 385.
[15] *Ibid*.
[16] See e.g. Carl E Schneider, "The Tension Between Rules and Discretion in Family Law: A Report and Reflection" (1993) 27:2 Fam L Q 229.

both qualitative and quantitative, is also needed on the use of the *Advisory Guidelines* in private negotiations and settlements in order to determine whether they indeed promote the planning function of rules and, in consequence, access to justice. Thus, this thesis, insofar as it posits possible reasons for the success of the *Advisory Guidelines*, might serve as a starting point for the generation of empirical data on their effects on the family justice system.

The *Advisory Guidelines* are not a wholesale solution to the problem of economic inequality upon marriage breakdown. The law of spousal support is one small aspect of broader systemic policies aimed at remedying post-marital dependency and economic vulnerability.[17] As a regulatory instrument, the *Advisory Guidelines* are only useful in the context of the privatization of dependence. While it may be possible to rationalize the private nature of spousal support, the *Advisory Guidelines*, and the law they incorporate, do not respond to the "need for comprehensive social policies to address the serious disadvantage of many children from low-income families, in general, regardless of the marital status of their parents."[18] They are only helpful where resources are sufficient to meet spousal entitlements.[19] In tackling the problem of economic inequality upon marriage breakdown, then, it is not enough to look at the *Advisory Guidelines* in isolation. Indeed, policy problems are rarely confined to a "single policy domain"[20] and instruments must be evaluated not in isolation, but "in relation to other tools of

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[17] See E Diane Pask, "Canadian Family Law and Social Policy: A New Generation" (1994) 31:2 Hous L Rev 499.
[18] *Ibid* at 511.
[19] *Ibid*.
[20] B Guy Peters & John A Hoornbeek, "The Problem of Policy Problems" in Eliadis, Hill & Howlett, *Designing Government*, *supra* note 4, 77 at 98.

government."[21] In the spousal support context, this means keeping a critical eye on the *Divorce Act* itself and its privatization of support, as well social policies, such as those geared toward workplace gender equality, fiscal policy, and public support for childcare. In the current context of privatized support, however, the *Advisory Guidelines* are a significant part of the just solution to a complex problem — one that contains important lessons in Canadian family law and beyond.

[21] Margaret M Hill, "Tools as Art: Observations on the Choice of Governing Instrument" in Eliadis, Hill & Howlett, *Designing Government*, *supra* note 4, Eliadis, Hill & Howlett, *Designing Government*, *supra* note 4, 21 at 27.

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