Spousal Maintenance by Formula: The Canadian Experience

Introduction

The recent announcement by the Law Commission that it is conducting a review into the laws which determine how finances are divided on divorce has re-ignited the discussion as to whether the law on financial remedy provision in England and Wales should be reformed. One of the areas which is often discussed in this context is the issue of spousal maintenance. Owing to the discretionary and fact-specific nature of how spousal maintenance orders are approached at present, it is often one of the hardest areas for practitioners to advise on. It is also one of the areas where the provision in England and Wales is most at odds with many other developed countries.

One approach which is sometimes discussed is the possibility of formulae to give a range of likely outcomes depending on the circumstances of the case. Such an approach has been increasingly adopted in Canada since 2006 and was promoted by concerns in Canada over the lack of predictability of spousal support orders without any advisory guidelines. This article discusses the background to the Canadian *Spousal Support Advisory Guidelines*, reviews how they operate in practice and looks at a case study to analyse how they might compare with the current discretionary approach in England and Wales.

The Canadian system

In 1997, the Canadian federal government legislated the Federal *Child Support Guidelines*. Before this legislation, there was little consistency in child support orders, which required judges to consider not only the parties' incomes but also their budgets. The *Child Support Guidelines* are legally binding and courts are only permitted to deviate from set schedules in limited circumstances, such as when the payor earns more than C$150,000 per annum or when the parties

have shared or split parenting arrangements. Absent this, there are tables that vary slightly by province and territory (because of different tax rates) that set out exactly how much child support is payable. Additional expenses, such as for extracurricular activities or tuition, are shared between the parents, either equally or in proportion to their incomes. Child support has priority over spousal support.

There are, however, no mandatory guidelines for spousal support. Traditionally, spousal support was also discretionary and based on the parties' incomes and budgets, to be determined after child support had been decided. In January 2005, the federal government funded the development by two law professors, Carol Rogerson and Rollie Thompson, of advisory guidelines for spousal support, called the *Spousal Support Advisory Guidelines* (the SSAG). The aim of the SSAG is to increase predictability of support agreements and orders. Although it is not mandatory, there has been wide adoption by the courts and family law practitioners in all provinces and territories such that it is routine to consider the SSAG and to draft spousal support that falls within those parameters.

There is variation across provinces and territories. The Canadian system is a federal one in which some matters are solely a federal concern (e.g., divorce) while others are within the jurisdiction of the provinces (e.g., property division). Other aspects, such as parenting issues, child support and spousal support are under both federal and provincial jurisdiction. There is a federal Divorce Act that applies across Canada, but each province also has legislation governing those matters that fall within its jurisdiction. As a result, there is some variation across Canada in how the SSAG have been adopted by the courts, with some, for example, defaulting to the mid-range and others taking a more nuanced approach.

The SSAG are a complex set of formulae requiring a computer program to calculate the outcome. In very general terms, duration of support is presumed to be between half the length of the relationship up to the full length of the relationship (including any period of marriage-like relationship before marriage), unless the relationship is more than 20 years in which case it is of indefinite duration. So, for example, a 10-year marriage-like relationship would generate a spousal support duration range of between 5 and 10 years. The formulae do, however, take into account situations where this might not be appropriate, for example, short relationships with young children where the range could be higher, or situations where the parties are near retirement.

The quantum of support is also a range from low, medium to high. It is based on the payor's income, the recipient's income, as well as any child support that is payable. As child support has

priority over spousal support, it is not included in the recipient's income, but it will affect the quantum of their spousal support payments.

There are two main formulae: the *'Without Child Support Formula'* and the *'With Child Support Formula'*. The computer program used to calculate spousal support automatically uses the correct formula so long as the user correctly inputs the children's information.

Child support is neither taxable nor tax deductible. Periodic spousal support, though, is taxable to the recipient and tax-deductible to the payor. Spousal support can also be paid entirely or partly as a lump sum, in which case it is not taxable. For this reason, the SSAG can also calculate lump sum payments that take into account actuarial considerations as well as the tax consequences. As such, it is always less than simply adding together the monthly amounts that would otherwise be payable.

Professors Rogerson and Thompson developed and then revised the *Spousal Support Advisory Guidelines: The Revised User's Guide*, published in April 2016. It is a 110-page document that details how to use the SSAG, common pitfalls, as well as its application to various situations.

It is important to note that the SSAG do not deal with entitlement. Before using the SSAG, it is necessary to either have a finding or an agreement on entitlement, either on a compensatory or a non-compensatory or contractual basis. Once entitlement has been determined, it will be possible to use the SSAG formulas to determine quantum and duration.

Case study

The parties are both 40. They cohabited for 5 years followed by a 7-year marriage giving a total marital period of 12 years. They have three children aged 11, 9 and 7. They have assets of approximately £1.8m plus £1.5m in pensions. The husband earns approximately £300,000 (C$520,000) gross per annum plus bonus. The wife has always cared for the children and has not worked outside the home since the parties married. The parties have agreed to divide the non-pension assets two-thirds/one-third in the wife's favour to meet the housing needs of the wife and the children. The pension assets are to be divided equally. The parties cannot agree the quantum and duration of the maintenance payments.

English law

Under English law the court would be required to take all the circumstances of the case into account. The welfare of any minor children of the family would be the court's first consideration and the court would have particular regard to the list of factors contained in s 25(2) MCA 1973. The English court would also be required to achieve a clean break as soon as just and reasonable: s 25A MCA 1973. Subject to these considerations the court would have broad discretion to achieve an outcome it considers as fair as possible in the circumstances of the case.

Subject to this broad discretion, a typical outcome under English law may be that the husband pays the children's school fees, child maintenance at a rate of £7,500 per child per annum (apportioned 50% to the child direct when at university), £30,000 per annum by way of spousal maintenance for 11 years until the youngest child of the family turns 18 and 20% of the husband's net bonus for 7 years until the eldest children turns 18 capped at £25,000 per annum.

Canadian law

Under Canadian law, the first step would be to determine whether or not the wife is entitled to support. Based on the facts presented in this case, she would be entitled to both a compensatory (based on giving up economic opportunities for the sake of the family) and a non-compensatory (based on need) basis.

Child support would be calculated first, based solely on the parenting responsibilities (assumed to be primarily with the wife) and on the parties' incomes. Based on that, the husband would owe C$8,574 (£4,950) per month in child maintenance. As the husband earns over C$150,000, there would be some discretion available to the judge to order more or less than these amounts, although in practice judges do tend to default to the guidelines. Regarding extra expenses such as the children's school fees, the presumption is that the husband would pay 100%, although the parties can also agree to share.

Spousal support calculations are related to the division of assets. As the wife is receiving two-thirds of the parties' assets, it might be assumed that she is receiving all or part of her support as a lump sum. The presumption under Canadian law is to equally divide the increase in the value of assets since the beginning of the marriage-like relationship and then to pay monthly support. Therefore, given the division of assets in this case, there is a chance that the presumption would be that the wife has already received a lump sum payment in lieu of any spousal maintenance.

If, however, the wife is to receive monthly spousal support, the duration would be between 6 and

12 years. The duration is discretionary within this range, although the wife would likely receive towards the longer end of the range because of a number of factors, including that she has a strong compensatory claim (since she gave up a career to raise the family), the husband is unlikely to retire during the next 12 years, and the youngest child will not finish high school for 11 years. That said, the wife will be expected to try to become economically self-sufficient and it is not unlikely that regular reviews as to quantum and duration are included in any order or agreement.

The quantum would be between C$8,138 (£4,700) and C$10,432 (£6,020) per month. It is quite common to simply default to the mid-range, although that is not what was intended by the SSAG. In this case, an argument could be made to pay either on the low end of the range (because the wife has received two-thirds of the assets) or, conversely, on the high end (because of her strong compensatory claim, the fact that she remains the primary caregiver for the children, and the husband's income earning capacity). Again, regular reviews are likely.

Lastly, it is also possible to agree to have part of the support paid as a lump sum and part on a monthly basis. In this case, it is likely that a portion of the lump sum will be paid as part of the asset division and any monthly amount will then be on or below the low end of duration and/or quantum.

A print-out of the calculations is set out as an appendix at the end of this article.

Conclusion

The particularly eagle-eyed reader may have spotted that the facts of the case study are very similar to those in the case of *SS v NS [2014] EWHC 4183 (Fam),* where Mostyn J gave his famous exposition of the law on spousal maintenance in England. Since that decision in 2014, Mostyn J has suggested an adjusted formula for child maintenance where the paying parent earns between £156,000 and £650,000 gross per annum, but it is suggested that the global outcome in *SS v NS* still falls very much within the ballpark of likely outcomes.

In *SS v NS* the wife received £22,500 per annum in child support for three children, £30,000 per annum in spousal maintenance for 11 years and up to a further £25,000 per annum from the husband's bonus for 7 years, giving a total of £77,500 per annum. Under the Canadian guidelines the wife would have received £59,600 in child support plus between £56,400 and £72,240 per annum in spousal maintenance for between 6 and 12 years giving a total of between £116,000 and £131,840 per annum.

It may come as a surprise to some readers that the outcome in England and Wales – which is often perceived to be one of the most generous around the world in terms of maintenance orders – appears, on the surface, to be significantly less than the outcome using the Canadian guidelines. It does however need to be remembered that in Canada a spousal maintenance order would be taxable. This means that the wife would have to pay tax of between C$6,636 (£3,830) and C$8,104 (£4,675) per month, which equates to between £45,960 and £56,100 per annum.[1] This would in turn reduce the total amount the wife would receive from all sources from between £116,000 and £131,840 per annum to between £70,040 and £75,740, which is remarkably close to the outcome in *SS v NS*.

There are of course limits as to what can be drawn from the comparison of one middle money case. Time and word limits have not permitted a greater analysis in this article. Attempts were made to compare lower and bigger money cases, but the former are rarely reported in England and the latter tend to be resolved on the basis of a clean break. But when the Law Commission is reviewing how spousal maintenance could be reformed in England and Wales, it should certainly consider the Canadian experience. If it is possible to create a formula which gives a range of fair outcomes based on the particular circumstances of a case, it could have a huge positive impact on the way in which spousal maintenance orders are negotiated and determined in England.

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Notes

[1] The husband would also receive a reduction to his taxable income of between C$3,784 and C$4,851 per month.

Spousal Maintenance by Formula – Appendix.pdf

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