DATE: ##########

TO: ##########

**RE: Independent Legal Advice**

Thank you for asking me to review the Minutes of Settlement drafted by ########## (the “Agreement”). I confirm that I have had an opportunity to review the Agreement, and have outlined some of my preliminary comments and concerns herein, based on the information that you have provided so far. When we meet on ################, we will discuss these concerns further, and after acquiring more information from you I may have further concerns.

General Information

Please **confirm** that your names are spent correctly, that your income and employment information on the first page is correct, and that the cohabitation, marriage, and separation dates on the front page are correct.

My understanding is that the **opposing counsel referred** you to me. It is very important that you select the lawyer of your choosing, without any influence from the opposing side. As the opposing side recommended me, you do not know if they recommended me because one of my traits was beneficial to their client. If you would rather retain a different lawyer, I will not be offended, and I will not charge you for my time spent reviewing the Agreement.

The **parties’ names** do not appear to be correct. Your names as listed on your driver’s license should be used. If you wish to change your name or revert to a former name, you can apply to do so through any motor vehicle Registry office.

The **child(ren)’s names or birthdays** appear to be incorrect. These should be fixed to avoid

Relevant **dates** are missing or appear to be incorrect. At a minimum, an agreement should list the dates of marriage and separation. The date that you started living together is also useful, so that if the Agreement is challenged we can confirm that a claim for the period prior to the marriage was considered.

There is no reference to the **court action number**. Although this isn’t necessary, it is useful to list this number so that in the future it will be easy to discover this information, rather than potentially having to perform a courthouse search.

It appears that the other party may have already initiated the **divorce action**. If you were served, have you filed a Statement of Defence or Demand for Notice? It can be useful to at least file a Demand for Notice, so that you can receive an advance copy of the Divorce Judgment, to ensure that nothing unusual is being requested of the Court.

The **effective date** has already been written in, even though the Agreement states that it will only be in effect once both parties have signed. The last party to sign should always be the one to write in the effective date. If you sign and have not strictly complied with the terms of the Agreement since it was signed by the other party, you could be found to have been breached the Agreement. Multiple effective dates are also confusing to anyone who has to look at the Agreement at a later date.

Disclosure

There has not been a formal **disclosure** of financial information. You have a right to obtain various financial documentation from the other party, and there is a simplified procedure available to compel each side to provide such information. The Court frequently refuses to enforce agreements which financial disclosure has not been exchanged. At the very least, proof of income and a list of assets and debts should be exchanged or included within the Agreement, and further formal disclosure waived if it is not desired. Either way, the Agreement should refer to what has been exchanged and any waiver of disclosure.

Each party’s **income** is not listed. Listing income proves that your income was disclosed, and may be useful at a later date to be able to understand whether there has been a departure from any Support Guidelines, and to decide whether or not support should be recalculated.

Each party’s **employer** is not listed. If you have transferred to a new employer or position since the separation, it is also important to prove that you disclosed all relevant information pertaining to your income earning capability.

Child support

The base (s3) amount of child support **does not appear to reflect the Guideline amount**. The Courts generally will not allow an agreement to waive or reduce child support. This means that either spouse, or even a child, may apply to the Court to vary child support. The Guideline amount must also generally be used before a Court will grant a Divorce. However, there are rare exceptions where a reduction in child support is permitted by the Court, which we can discuss further.

The **proportion** **of** **extraordinary (s7)** **expenses** is not listed. Expenses such as child care, healthcare, extra-curricular activities, education, and other similar expenses are shared based on the proportion of your incomes. It is useful to explicitly state what the proportion is, so that there is not a dispute about the amount of arrears owed in the future.

The **categories** **of** **extraordinary (s7)** **expenses** are not listed. We recommend listing these so that you can efficiently resolve disputes yourselves without having to retain lawyers or research the law.

There is no **recalculation** clause. As a Divorce Judgment must contain a clause that requires a yearly exchange of financial disclosure and recalculation of child support, forgetting to recalculate could result in significant arrears awarded against you.

Some parents will choose to include a clause relating to **health insurance** for the children. For example, it can be agreed that one parent will continue to pay for Blue Cross coverage (which would be a section 7 extraordinary expense), or will keep the children on an employment benefits plan.

Some spouses will choose to include a clause requiring the person who is paying support to maintain a **life insurance** policy up to a certain amount of coverage. This means that if they were to pass away, the support would be paid out of the life insurance coverage. Without life insurance in place, a potentially-complex claim would need to be made against the deceased’s Estate, and this type of clause would be particularly useful if the person paying child support passes away with little equity. However, this type of clause is voluntary and may require negotiation to obtain.

Parenting

There is no clause that deals with **relocation** of either party. If either spouse moves to a different city, province, or country, there could be substantial conflict, and a lack of adequate notice of the move can exacerbate this problem.

There is no clause that allocates **holidays**. Even if you are able to allocate holidays now, a new partner for either spouse, extended family, or special plans can all create future disputes over holiday access time. Given the short notice, disputes over upcoming holidays are rarely satisfactorily resolved through the legal process, and can significantly deteriorate your parenting relationship with the other spouse.

There is no clause permitting **vacations**. Vacations can often result in conflict when they interfere with the other parent’s access time. We recommend setting out each parent’s allowable additional vacation time each year, specifying that each parent will attempt to minimally interfere with the other’s access, specifying that each parent will not unreasonable withhold consent to travel abroad, and specifying that they shall provide a flight itinerary and contact information for their accommodations.

There is no **right of first refusal (ROFR) clause**. An ROFR clause states that if one parent is unable to care for the children for a certain length of time, then the other parent will be permitted to care for the children before alternate childcare is arranged. Although many agreements do not include an ROFR clause, and there is generally no legal right to such a clause, they can be a useful contractual term to allow you additional time with the children when it does not affect the other parent. Some ROFR clauses also accommodate grandparents.

There is no clause that explicitly allows you to **temporarily** **change** the schedule in writing. We recommend such a clause, so that the other parent can’t allege that access was withheld.

Spousal/Partner Support

These provisions **waive** future spousal support, even if you become ill, disabled, unemployed, and so on. This language is relatively common, but you should be aware that you may be giving up a valuable claim if your circumstances take a turn for the worst.

All **further** spousal/partner support is not waived. Although waiving further spousal/partner support would mean that you cannot claim spousal/partner support if your financial circumstances deteriorate, it would also mean that your spouse cannot claim spousal/partner support from you, and would prevent from this matter ending up with lawyers or the Court again.

The Agreement does not prohibit a **variation** of spousal/partner support. This means that either side can apply to increase or reduce spousal support, which could mean that spousal support could be renegotiated or brought to the Court in the future.

Each **circumstance** in which support shall not change is not listed. To effectively waive further spousal support and prevent variation, it should be explicitly stated that the agreement shall not change, even if there is a temporary or permanent disability (mental or physical), temporary or permanent loss of employment, change in financial obligations, inflation, economic depression, change in income of either spouse, an assignment, bankruptcy, or insolvency, a windfall, an inheritance, or the retirement of either spouse.

The Agreement does not state that certain **goals** are met, which must be considered when waiving further spousal support, such as an apportionment of economic disadvantages, the financial consequences, relief of hardship, and self-sufficiency.

The Agreement does not make note of the **tax implications** of spousal support. Although an Agreement does not necessarily need to explicitly state the tax consequences, please be aware that the payor can deduct spousal support payments in their taxes, and the recipient must claim spousal support as part of their taxable income, which could lead to taxes payable. This means that there could be significant financial consequences at the end of the year. The Agreement should be filed with the CRA through your accountant.

The Agreement states that you will be **paying bills directly**. Generally, if you were to pay spousal support, you would be entitled to deduct your spousal support payments. If you are instead paying your former spouse’s bills, a claim for a spousal support deduction may not necessarily be allowed by the CRA. This also puts the burden of any increased usage or costs on you.

Are you paying any **bills** or expenses on behalf of your former partner?

Some spouses will choose to include a clause requiring the person who is paying support to maintain a **life insurance** policy up to a certain amount of coverage. This means that if they were to pass away, the support would be paid out of the life insurance coverage. Without life insurance in place, a potentially-complex claim would need to be made against the deceased’s Estate, and this type of clause would be particularly useful if the person paying child support passes away with little equity. However, this type of clause is voluntary and may require negotiation to obtain.

Property

**Valuation dates** are not listed. Valuation dates tend to reduce the risk of a later challenge against the Agreement. Valuation dates can prove that property values were adequately disclosed, especially where an asset increases in value following when its value is first written into the Agreement.

1. Land

A **dower release** has not been drafted. A dower release is necessary to be able to sell, mortgage, or refinance land, and may even be required to obtain a line-of-credit. A dower release also confirms that the spouse which is not retaining the home will not be able to claim a life estate after the death of the other spouse.

A **Transfer of Land** has not been provided. A Transfer of Land is necessary to be able to remove the other spouse from the Title to land.

1. Vehicles

The Agreement states that vehicles are being transferred. Has this already been completed? If not, **bills of sale** should be prepared.

1. Corporation

[no transfer, no kids/support] There is no waiver of her claim in your business. Appropriate corporate clauses should also include a general release against the business, related parties, and the business’s property, a prohibition against registering any claim or lien against the business or any of its property, and a clause against disclosing confidential business information.

Director and officer **resignations** have not been provided. Until resignations are provided, a director or officer could claim that they were not properly included in corporate decision-making, and a director can be liable if the corporation fails to remit employee source deductions to the CRA, if there is any environmental contamination, and in several other circumstances.

A **Share Transfer Agreement** has not been provided. This document formalizes the transfer of shares, and may be required by the corporation or future shareholders. It can also be useful to state whether the transfer is occurring using the *Income Tax Act*’s spousal rollover provisions or whether the shares are being purchased or redeemed, which could have significant tax consequences.

1. Pensions & Investments

The pension is not properly **valued**. At a minimum, pension statements should be obtained. For defined benefit pensions, a formal valuation by an actuary should be performed, as the value can be much higher than what is listed on the pension statement.

**Joint accrual periods** are not listed. These are the dates during which the pension is split. Failing to agree upon these dates can result in a further dispute in the future.

An interest in the pension is not expressly **waived**. An agreement to waive an interest can be used to prevent a spouse from making a claim against a pension, and can clarify to the pension administrator or any financial institutions that only one spouse will keep an interest in the pension.

There is no waiver of life insurance or RRSP **beneficiary designations**. If this is not waived explicitly and your spouse is still listed as a beneficiary under any instrument, then upon your death, your spouse could attempt to claim that you intended to benefit them, and your new spouse or children would have difficulty claiming such funds if they are automatically paid to your former spouse by the administrator. We also strongly recommend filing new beneficiary designations for each life insurance, RRSP, and similar products, and noting in your Will that any beneficiary designations to your former spouse are revoked.

1. Debts

The Agreement does not state how spouses will be **released** from joint debts. If an obligation to refinance, pay out, or obtain a release from the creditor is not set out explicitly, it will be more difficult for the party not responsible for the debt to qualify for their own financing in the future. It also means that if the party responsible for the debt files for bankruptcy, the creditor can pursue the party that thought they would not be responsible. If you are not released from a joint debt, then it is also possible for your former spouse to incur even further debt and increase your exposure.

The Agreement does not state which party will be responsible for the **cost of refinancing and/or Land Titles registration fees**. Often, if this is not specified, it is assumed that the party responsible for the debt will be responsible for these costs, even though at law these costs are generally shared equally. This could result in a further dispute after the Agreement has been signed, especially if these costs are very high, such as in the case of a refinancing where there are several years left remaining on the mortgage term.

There is no clause stating that unless stated otherwise, the spouse retaining the asset will be responsible for any **associated debts**. Vehicle financing is sometimes forgotten about, and there are often other debts that may not have been disclosed, such as debts for mechanics, tax consequences associated with certain assets, debts to contractors who have serviced assets, and so forth. Unless such a clause is included, such a debt would technically be required to be divided equally, and there would be no obligation to remove the other spouse’s liability for such a debt.

There is no **indemnity** clause specifying that if a creditor pursues the spouse who is not retaining a debt, then the other spouse will reimburse them for any costs, including full legal fees.

There is no allocation for **income tax liability**, which is especially important to allocate if there was a joint business which will be retained by one spouse.

1. Farming

There appears to be a **surface lease**, however an Assignment of Surface Leases has not been included. Such an Assignment tells the resource company that only one party should be paid any monies arising from the surface lease. It is easier to deal with this now than several years in the future, when you may no longer have contact information for your former spouse.

There are **leased** quarters for **grazing**, however an Assignment of Grazing Leases has not been included. Such an Assignment allows the spouse retaining the lease to deal with the landowner directly. It is easier to deal with this now than several years in the future, when you may no longer have contact information for your former spouse.

**Livestock** is being retained by a spouse, but a Transfer of Brand has not been provided. A Transfer of Brand is required when both spouses owned the brand, so that the party retaining the brand can deal with it freely. It is easier to deal with this now than several years in the future, when you may no longer have contact information for your former spouse.

Livestock is being divided, but a **Brand Release** has not been provided. A Brand Release is required to be able to deal with that livestock in the future.

Equalization payment

There is no collateral or other mechanism to ensure payment of the equalization payment, it is **unsecured**. This means that if the equalization payment was not paid, you would still have to initiate a court action to sue your former spouse, and then have to seize assets, have land sold, or garnish their wages, which can be costly, could take years to complete, and could result in you obtaining an unfair amount. If you have waived your rights to property and removed your name from Title, your former spouse could also dispose of property in the meantime. There are many strategies that can be used to secure an equalization payment, such as registering a security agreement or mortgage against assets, keeping assets in your possession, remaining on the registration or Title until the equalization payment is paid, requiring funds be paid into trust before the agreement is signed, and so on.

The Property Statement (Schedule “A”) calculates property division as if you had been married, for which there would be much clearer rules. In **common law** scenarios, all assets and debts are not necessarily divided equally, or divided at all. Often times, courts will look at each partner’s contribution to the maintenance or improvement of specific assets, which affects the proportion of the division. Courts will usually only consider all assets and debts where there is a “joint family venture”, which requires a consideration of various factors such as the raising of children, the length of the relationship, the pooling of accounts, assets, and debts, the sharing of expenses, intent of each partner, and priority of the family over personal interests.

No **exemptions** are listed. Did you own any property prior to the marriage/relationship, receive any property as a gift or inheritance, as insurance proceeds, as a result of a personal injury, or through the proceeds of or an exchange of any of the aforementioned property? If so, you are legally entitled to a credit in the amount of the fair market value of the asset at the date of marriage or commencement of the relationship, or the date that you received the property, minus any debt on that date. This could significantly affect the equalization payment. Items that fall into this category are also not necessarily divided equally.

The **present value** **of the debt** seems to be included in the calculation of the equalization payment. Courts generally exclude debt that was incurred after the parties became financially separate. If either party is claiming debt incurred after the separation, as well as spousal/partner support, then they are also double-dipping. Payments towards debts incurred prior to the relationship are also generally excluded.

The equalization payment does not take into account **tax rates on investments**. Investments such as RRSPs are often discounted when taxes would be payable upon their withdrawal.

The equalization payment does not appear to take into account **capital gains tax**. When shares, land that is not designated the principal residence, and other capital assets are sold, then unless an exemption applies (such as the lifetime capital gains exemption or succession in relation to farmland), there will be capital gains tax payable. This amount could be significant, especially if the property has substantially increased in value since it was acquired.

General drafting

The Agreement does not contain **page numbers**. As a result, pages could be inserted or removed afterwards without your consent.

There is a **waiver of CPP credit division**. By law, either party can apply to reapportion CPP credits earned during the marriage/relationship, particularly where you each contributed a different amount, keeping in mind that CPP contributions are capped after a relatively-modest amount of income. By agreeing to waive this right, you should be aware that you may be giving your former spouse an additional benefit to which they are not necessarily entitled to. That said, many people prefer to waive a CPP credit division, so that they remain completely financially separated in the future.

The Agreement does not contain a **general release**. A general release ensures that no claim can be made for any events that occurred prior to the signing of the Agreement. That way you cannot be sued for promises made, contractual agreements, new claims as the Judge-made law changes, and so forth.

The Agreement does not contain a specific release of all **unjust enrichment claims** arising from pre-marital cohabitation.

The Agreement does not state that it is **binding on your estates and that claims against each other’s estates are prohibited**. This ensures that the Agreement can be used by your surviving family to prevent additional claims against your property upon your death.

There is no **general dower release**. Without such a release, it could be argued that either party intended to retain the right to object to the sale of land, and to reside upon the land after the passing of the other spouse.

The Agreement does not address **reconciliation**. This means that any future reconciliation, even for a very short period, could give rise to an argument about whether the Agreement is valid or invalid. Furthermore, a relatively long reconciliation could give rise to unpredictable results as assets and debts change, disappear, or accumulate, or parental/financial circumstances change. We recommend a clause that states that after a certain number of days of cohabitation (such as 60 or 90), the Agreement is rendered invalid.

The Agreement does not contain a **severability clause** which states that if any portion of the Agreement is found to be invalid by the Court, the rest of the Agreement continues in effect. This means that if a portion of the Agreement is struck, or if the law changes, then the entire arrangement could be ordered to be renegotiated.

The Agreement does not contain a **choice of law** clause which confirms that the law of Alberta shall be applied to the Agreement. This type of clause is important when parties reside in different provinces or countries.

The Agreement does not state that it **replaces all other agreements**. Without such a clause, it can be argued that there are further terms to the Agreement, from sources such as emails or text messages.

The Agreement does not refer to section 37 of the *Matrimonial Property Act* and state that you intend to **contract out of the *MPA***. Failing to do so could open the door to further claims.

The Agreement does not oblige you to **sign further documents** required to make the Agreement effective. Further documents are often required, especially when third parties want their own forms to be signed to confirm waivers and transfers. Such a clause obliges your former spouse to sign such documents, as required.

There is no clause stating that if you have to take legal action to enforce the Agreement, your **full** **costs to enforce** the Agreement will be recoverable. Otherwise, you may have to expend significant amounts of money on legal fees to enforce the Agreement if your former spouse is breaching the Agreement or attempts to challenge the Agreement, with little to no recourse against your former spouse. Such a clause is also often the largest or only incentive for each side to abide by the Agreement.

The Agreement does not state whether or not you can leave each other **gifts in your** **Wills**. Ordinarily, upon a formal divorce, all gifts in a Will are revoked. If this is issue is not dealt with in the Agreement, there could be unintended consequences, such as intentional gifts being revoked, or a dispute about whether or not you intended to leave a gift to your former spouse. In addition to such a clause, we strongly recommend that you revise your Will, or draft a new Will if you do not already have one. Otherwise, your former spouse could still make a claim against your property.

The Agreement does not state that **independent legal advice** and a supplemental agreement in **writing** is required for changes. This means that your former spouse could argue that by your words or actions, you intended to later vary the Agreement, even if they are misinterpreting what you stated to them. Given the amount of time and money invested into this Agreement, such a clause may be wise to ensure that issues are not renegotiated.

The Agreement states that you will each be responsible for half of the total **legal fees**, including your former partner’s cost to draft the Agreement, and the legal cost of the divorce. Unless parties agreed to share costs at the outset, an agreement to share legal fees is rare. At the least, I strongly recommend obtaining an estimate or quote of these fees before agreeing to such a term.

There is **no Acknowledgement**. This is a form attached to the back of agreements and signed by each party to assist with the waiving of partner support, as set out in the *Family Law Act* and *Adult Interdependent Relationships Act*. Without this Acknowledgement, the spousal support waiver is not complete.

There is **no Certificate**. This is a form attached to the back of agreements and signed by each party to assist with the waiving of partner support, as set out in the *Family Law Act* and *Adult Interdependent Relationships Act*. Without this Certificate, the spousal support waiver is not complete.

Schedule of Assets

There is no **schedule of assets**. An initialed schedule of assets and debts should be attached to the Agreement, so that if the Agreement is ever challenged, it will be easier to prove that disclosure of assets was exchanged, that the property was divided fairly, and to determine what property was retained by each side. Otherwise, either party can claim that they weren’t aware of the value of an asset, and seek to challenge the Agreement.

The schedule of assets is **not** **initialed**. All schedules should be initialed. An initialed schedule of assets and debts should be attached to the Agreement, so that if the Agreement is ever challenged, it will be easier to prove that disclosure of assets was exchanged, that the property was divided fairly, and what property was retained by each side.

The schedule of assets lists a **different equalization payment** than what is contained in the Agreement. Although it can be easier to attach a matrimonial property statement without deleting the calculations, this can lead to confusion in interpretation.

**Vehicles** are not listed in the schedule of assets. It is important to list which vehicles are being retained, so that it is clear which party is assuming the respective debts, and to be able to force a party to sign the registration card or a bill of sale transferring the registered owner.

Other

Your former partner had told my receptionist that she wanted the documents forwarded to their, and that they no longer wanted to involve their lawyer. As I am prohibited by the Law Society from contacting persons who have lawyers, I would need to contact their lawyer for permission to do so. However, even if permission were granted, I would recommend against doing so. To ensure that the terms of agreements take place, we ordinarily send them on “**trust conditions**”, which are special obligations placed on lawyers. For example, the obligation to send you the equalization payment and remove you from the mortgage prior to the agreement being release or Title being transferred into your name. If the documents are sent straight to your former partner, we could not use trust conditions to effect the transactions contained in the agreement.

The Agreement states that you are paying your former partner’s **legal fees** to draft and sign the Agreement, the **costs** of releasing you from the mortgage, and the **cost** of the Land Titles transfer. Customarily, each side would pay their own legal fees. It is very risky to agree to pay the other side’s legal fees, especially without having seen a bill. Even if you agree to paying this cost, it is much safer to list a fixed cost, for example $1500 towards her legal fees. Customarily, a person keeping an asset would be responsible for the Title transfer and debt removal costs. It is also very risky to agree to pay the costs of releasing you from the mortgage unless you have obtained a payout statement from the bank and confirmation of what is required to release you, because the bank could require a full refinancing with significant legal fees, penalties, and pre-payment penalties. I have seen pre-payment penalties exceeding $20,000.00.

Opinion

**I am unable to provide you a proper opinion as to the fairness of this settlement without a complete list of assets, debts, exemptions, equalization payment, and the income of each party. Ideally, there should also be a formal exchange of financial disclosure, an appraisal or valuation of all significant assets, and an accountant’s opinion as to taxes and corporate income, so that amounts can be verified.**

Based on the information that you have provided me so far, and subject to our further discussions, I can tentatively offer the following preliminary opinion in relation to the property listed and support:

* I require **further information** in order to provide you with a preliminary opinion.
* The settlement appears to be very **rushed**. We strongly caution against proceeding on a rushed basis, as items that need to be taken care of are often forgotten, bad decisions are often made when you are caught up in the moment, either side may try to back out of a deal either midway or may refuse to follow the agreement afterwards, and further conflict can come out of having to address new issues.
* We will have to meet to discuss **eligibility** **for** **spousal/partner support** in Order for me to advise as to the fairness of any support provisions.
* The settlement appears to be relatively **fair** on its face, taking into account several appropriate legal principles. Although a Court would likely decide several aspects differently, there is likely not enough benefit to warrant protracted litigation.
* The settlement does **not** appear to fully reflect your legal rights and what a Court would likely decide. However, that said, the discrepancy may not be large enough to cost-effectively warrant protracted litigation. We should discuss this further.
* The settlement appears to be **very unfair**. It does NOT appear to fully reflect your legal rights and what a Court would likely decide. We should discuss this further.

My advice may change after we meet to discuss this further. Please advise me of any circumstances which may be relevant that are not listed in the Agreement. I strongly recommend that you read the Agreement carefully before signing it.

Prior to you executing the Agreement, we will review the Agreement clause-by-clause, to ensure that you understand the nature and effect of the Agreement, and to determine if alternate arrangements would be more appropriate. I look forward to meeting with you.

I trust my efforts have been entirely satisfactory, and remain

Yours truly,