RECENT DEVELOPMENTS IN CANADIAN LAW: MARRIAGE & DIVORCE

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This Survey reviews the leading developments in the law concerning marriage and divorce, drawing on caselaw, reform initiatives, statutory developments, recently released census data and scholarly works from Canada and elsewhere. The discussion of marriage touches on the law of nullity, non-marital cohabitation and homosexual couples. The jurisprudence arising under the Divorce Act, 1985 *(which had come into force at the publication of the last survey) is reviewed and analyzed. Dominating this discussion is a treatment of the issues which have emerged following the Supreme Court trilogy of* Pelech, Richardson *and* Caron. *The final section reviews major developments in matrimonial property law in the common law provinces. Overall, the picture painted is of a branch of the law in a state of doctrinal turmoil.*

Cette étude examine les développements importants dans le domaine du droit matrimonial et du droit du divorce, en se fondant sur la jurisprudence, les projets de réforme, les développements législatifs, les récentes données du recensement et sur des études universitaires du Canada et de l'étranger. Dans la discusion du droit matrimonial, on traite de l'annulation de mariage, du concubinage et des couples homosexuels. De plus, on analyse la jurisprudence qui s'est développée après l'adoption de la Loi sur le divorce de 1985 *qui était entrée en vigueur lors de la publication de la dernière étude. Sur cet aspect, on traite surtout des questions soulevées après les trois décisions de la Cour suprême dans les affaires* Pelech, Richardson *et* Caron. *Dans la dernière partie, on étudie les principaux développements du droit sur les biens matrimoniaux dans les provinces de common law. Somme toute, le tableau que l'on brosse est celui d'une branche du droit en plein bouleversement doctrinal.*

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I. INTRODUCTION

Four years or so have passed since the publication of the last survey of marriage and divorce in this Review.[1] Although the changes which have occurred during this period have hardly been cyclonic, and even though the limelight of attention has remained on public law issues generally, and more specifically on the *Canadian Charter of Rights and Freedoms*,[2] it is nevertheless timely to take stock of the developments in several major areas of family law since 1986. A moment's reflection reminds us of how much has transpired. In September, 1986, the Supreme Court of Canada had not yet pronounced on the constitutionality of abortion law; Chantal Daigle and Barbara Dodd were unknowns; the "causal connection test" had not overwhelmed spousal support law; Baby M. was less than a year old; and the case of *Sorochan* v. *Sorochan*[3] had just been decided. These people and events will stand as permanent markers for this period in the evolution of family law. This survey endeavours to consider selected developments touching directly on aspects of the family, marriage and divorce. The presentation is based on material available to me as of August 1, 1990.

II. MARRIAGE

A. *The Nature of the Family: The Legacy of the 1980s*

In recent years the myth of the monolithic family construct has been irretrievably undermined.[4] The family, self-evidently the central focus of inquiry in family law, has always defied coherent definition, but perhaps never more so than in the modern era where our understanding of family patterns has been sharpened by empirical data. Since the publication of the last survey, results of the 1986 Canadian census have been released. This provides a snapshot of family patterns that is illuminating. Consider, first, the breakdown of marital status as it existed in 1986:[5]

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[1] B. Ziff, *Recent Developments in Canadian Law: Marriage and Divorce* (1986) 18 OTTAWA L. REV. 121.

[2] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982* (U.K.), 1982, c.11 [hereinafter *Charter*].

[3] [1986] 2 S.C.R. 38, 2 R.F.L (3d) 225 [hereinafter *Sorochan* cited to R.F.L.].

[4] *See generally* M. Eichler, FAMILIES IN CANADA TODAY (2d ed.) (Toronto: Gage, 1988); M.A. Burke, *Families: Diversity the New Norm* (1986 Summer) CANADIAN SOCIAL TRENDS 7; S.Y. Nickols, *Families: Diverse But Enduring* (1988 Fall) 80 J. OF HOME ECON. 49.

[5] M.S. Devereaux, *1986 Census Highlights: Marital Status* (1988 Spring) CANADIAN SOCIAL TRENDS 24 at 25.

Population Aged 15 and Over, by Marital Status, 1981 and 1986

Marital Status	1981	1986	% change 1981-1986
Total population aged 15 and over	18,862,085	19,917,365	5.6
Single	5,255,110	5,425,290	3.2
Married	11,478,715	12,033,670	4.8
Separated	470,455	517,530	10.0
Divorced	500,135	690,490	38.1
Widowed	1,157,670	1,250,395	8.0

Of all the groups, the smallest increase occurred within the married category. A staggering rise in the rate of divorce since 1971 would, of course, be a factor here, but it must be remembered that the number of divorced people who choose to re-marry has more than doubled during this period.[6] An overall drop in nuptiality may be the predominant consideration in the slow growth within the married group. That rate has continued to slide; since 1972[7] the trend has been consistently downward. Moreover, the age of first marriages has gently risen during the same time.[8] Predictably, there has been a countervailing increase in the rate of non-marital heterosexual cohabitation. Of all couples in 1986, 8% were living "common law". The figure in 1981 was 6%, the differential being 37%.[9] Cohabitation patterns vary markedly across the country:[10]

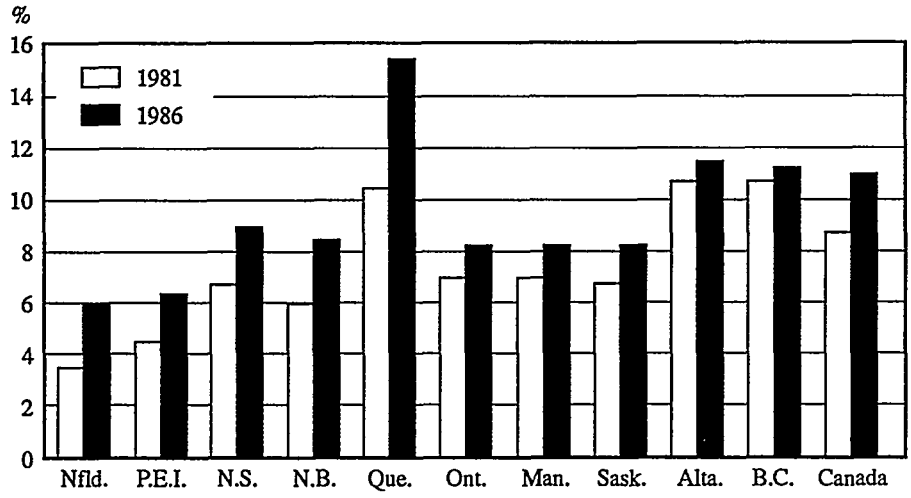
[6] Statistics Canada, THE FAMILY IN CANADA: SELECTED HIGHLIGHTS (Cat. No. 89-509) (Ottawa: Ministry of Supply and Services Canada, 1989) at 39 [hereinafter THE FAMILY IN CANADA].

[7] Statistics Canada, MARRIAGES AND DIVORCES: VITAL STATISTICS VOLUME II (Cat. No. 84-205) (Ottawa: Ministry of Supply and Services Canada, 1985). *See further* Statistics Canada, CURRENT DEMOGRAPHIC ANALYSIS: REPORT ON THE DEMOGRAPHIC SITUATION IN CANADA 1986 (Ottawa: Ministry of Supply and Services Canada, 1987) at 18-21 [hereinafter CURRENT DEMOGRAPHIC ANALYSIS].

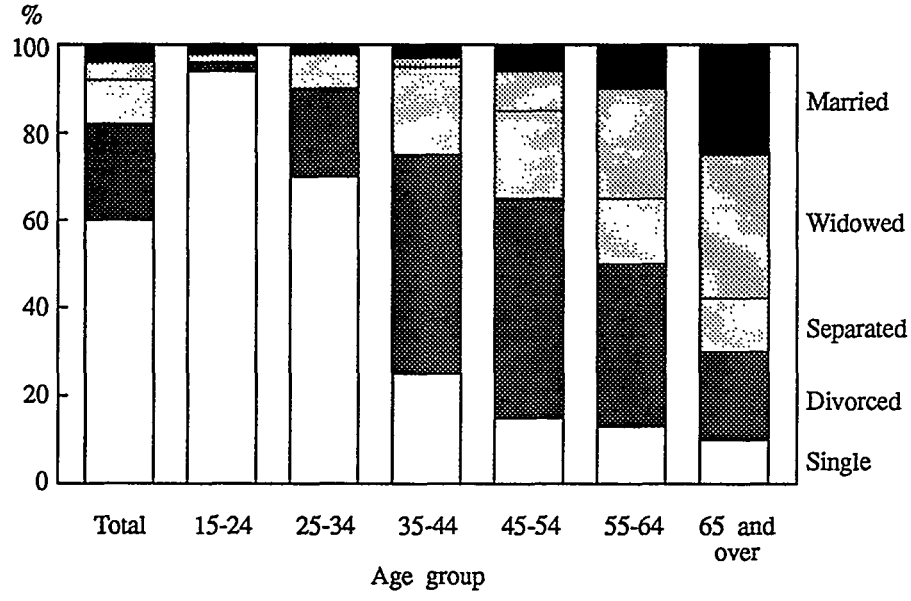
[8] The average age at first marriage for women was 22.6 in 1971 and 24.8 in 1986; for men, it was 24.9 in 1971 and 27 in 1986: THE FAMILY IN CANADA, *supra*, note 6 at 18-21.

[9] *See* P. Turcotte, *Common Law Unions: Nearly Half a Million in 1986* (1988 Autumn) CANADIAN SOCIAL TRENDS 35.

[10] *Ibid.* at 37 (Cohabitation Rates, Canada and Provinces, 1981 and 1986).



Marital status of the cohabitants, as a factor of age, also varies considerably:[11]



However, examining heterosexual dyads tells only part of the story. Ignored, for example, are the 1.9 million Canadians who live alone.[12] Also overlooked is the phenomenon of single parenthood. The census

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[11] *Ibid.* at 39 (Percentage of common-law partners by reported marital status and age group, 1986).

[12] *1986 Census Highlights: Changes in Living Arrangements* (1989 Spring) CANADIAN SOCIAL TRENDS 27 at 29. In 1986, 25% of people aged 65 or over were living alone; of these, 77% were women: *supra.*

indicates that there are 853,000 single parents in Canada; of these, 83% are women. Additionally, 1.16 million children, or 14% of the relevant population, were living in one-parent families.[13] This would not be a matter for concern if one were not compelled to read in the obvious — single parenting is a challenging task, aggravated in the extreme by an inadequate economic base. In Alberta, for example, about 43.2% of the female single parent families, and 28.6% of the male single parent families, are said to live in poverty.[14] Although the rate of single parenthood is actually lower than it was in the 1940s,[15] this is cold comfort for those who must cope today. And, even recognizing that for many single parenting is episodic, the average periods in this status are not short. For young women whose lone parenthood is the result of out-of-wedlock birth, the average time span is 4.4 years; among separated and divorced women, it is 5.6 years.[16]

Formal Marriage: Legal Developments

1. *Caselaw Developments*

The legal conceptualization of marriage has changed little in recent times, as is confirmed by the caselaw reported during the past several years. So, it has been held that a marriage entered into under a mistake as to the motivations of the bride is valid nonetheless,[17] and that damages in tort are unavailable against a defendant who deceives his betrothed in the same way.[18] These rulings break no new ground.

In *A.S.* v. *A.S.*[19] three issues concerning nullity of marriage were broached: (i) the validity of limited purpose marriages; (ii) the requisite parental consents required in the case of a minor; and (iii) duress as a basis of annulment. The wife, who was sixteen at the time of the ceremony, had married the husband to aid his efforts in seeking immigration. The couple did not live together and never engaged in sexual intercourse. The *quid pro quo* for the arrangement was a cash

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[13] M. Moore, *Female Lone Parenthood: The Duration of Episodes* (1988 Autumn) CANADIAN SOCIAL TRENDS 40.

[14] Even though these groups comprise only 12.8% and 1.4% (respectively) of the provincial population: *see* D. Ross & R. Shillington, THE CANADIAN FACT BOOK ON POVERTY 1989 (Ottawa: Canadian Council on Social Development, 1989) at 105.

[15] S.A. McDaniel, FAMILIES TODAY: CHANGE DIVERSITY AND CHALLENGE (Edmonton: Government of Alberta, 1990).

[16] Moore, *supra*, note 13 at 41.

[17] *Laroia* v. *Laroia* (1986), 54 O.R. (2d) 224 (C.A.), *rev'g* (1984), 47 O.R. (2d) 762 (H.C.). For a brief discussion of the trial decision *see* Ziff, *supra*, note 1 at 131-32.

[18] *Said* v. *Said* (1986), 8 B.C.L.R. (2d) 323, 38 C.C.L.T. 260 (C.A.).

[19] (1988), 15 R.F.L. (3d) 443, 65 O.R. (2d) 720 (U.F.C.) [hereinafter *A.S.* cited to R.F.L.].

payment, which was made to the wife's mother and stepfather, and the applicant alleged that it was the parents who had pressured her into the marriage so that they could reap this financial benefit.

The question as to the validity of so-called sham marriages has been a well rehearsed one, and the trial judge adopted the majority approach; such marriages are valid notwithstanding the motivations or mental reservations of the parties.[20] The second question was, by contrast, somewhat unique.[21] The applicant maintained that the consent to the marriage, which had been given by the mother in due form, was invalid because it was improperly motivated. After having undertaken a historical review of the relevant legislation in Ontario, this claim was rejected. While the *Marriage Act* permits a court to dispense with consent which has been unreasonably or arbitrarily withheld,[22] the legislation does not likewise make "the quality of consent a justiciable issue".[23] So, the fact that the parents were actuated by greed was irrelevant. Moreover, given that presently in Ontario the absence of parental consent does not render a marriage invalid, then *a fortiori* the flawed consent that existed here could not lead to a finding of invalidity. Presumably the same would be true where parental consent is obtained coercively.

In the end, however, the applicant was able to escape the marriage by convincing the court that she had acted under duress, emanating not from the groom, but from her parents. Here the decision contains a pithy articulation of basic principles, which is sensitive to the rationale of duress, and the need to take account of the subjective condition of the party seeking relief.[24] A valid marriage is grounded on the existence, at the time of the ceremony, of "a real, understanding and voluntary consent".[25] This may be vitiated by oppression, which may arise through fear, persuasion or pressure, and in the resolution of an individual case, account must be taken of all of the surrounding circumstances, including the make-up of the applicant:

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[20] For a consideration of the accordant Australian position, *see In the Marriage of Otway* (1987), F.L.C. 91-807 (W. Aus.Fam.Ct) (citing with approval *Iantis* v. *Papatheodorou* (1971), 15 D.L.R. (3d) 53, 3 R.F.L. 158 (Ont.C.A.)). In a recent development (of sorts), a long-lost short story by Robert Louis Stevenson, thought to have been written in about 1889, has been found. The story, entitled *The Enchantress*, involves a twenty-one year old woman who arranges her own marriage, so that she can become fully entitled to an inheritance. After the ceremony, she leaves her hapless husband forever.

[21] Mendes da Costa U.C.F.J. treated the question as one of first impression: *A.S.*, *supra*, note 19 at 452.

[22] R.S.O. 1980, c. 256, s. 6. *See Fox* v. *Fox* (21 April 1987), Brampton 200/87 (Ont. Prov. Ct) (digested in [1987] W.D.F.L. para. 948).

[23] *A.S.*, *supra*, note 19 at 453.

[24] *Ibid.* at 456.

[25] *Ibid.*

> Different people may respond to oppression in different ways, and conduct that may overmaster the mind of one person may not have this impact upon the mind of another. It matters not, therefore, whether the will of a person of reasonable fortitude would - or would not - have been overborne; the issue is, rather, the state of mind of the applicant.... Essentially, the matter is one of degree, and this raises a question of fact for the court. The determination involves a consideration of all relevant circumstances, including the age of the applicant, the maturity of the applicant, the applicant's emotional state and vulnerability, the lapse of time between the conduct alleged as duress and the marriage ceremony, whether the marriage was consummated, whether the parties resided together as man and wife and the lapse of time between the marriage ceremony and the institution of the annulment proceeding. As long as the oppression affects the mind of the applicant in the fashion stated, physical force is not required and, no more so, is the threat of such force a necessary ingredient. Nor is the source of the conduct material. Where duress is alleged, the onus of proof is upon the party seeking annulment, and it is an onus that is not lightly discharged.[26]

Finally, the Court addressed briefly the question as to whether duress rendered the marriage void but capable of ratification by the injured party, or voidable. This may seem little more than semantics, but the distinction is not trivial.[27] Without providing reasons, the Court opted for the latter characterization.

Just as the case of *A.S.* provided a useful vehicle to re-visit principles governing duress, the judgment in *W.* v. *W.*[28] contains a compendious treatment of the rudiments of annulment based on non-consummation. In that case, the parties separated a little more than a year after they had been married. While they had engaged in intercourse prior to the marriage (in fact, the applicant had become pregnant), there had been no sexual relations during the marriage, the wife claiming that she was unable, for psychological reasons, to do so. Several years after the couple had parted, they entered into a separation agreement.

The court dismissed the wife's (unopposed) application. In the course of so holding, a chronological review of Canadian and English cases was undertaken, and the following propositions were advanced: (i) all presumptions favour the validity of a subsisting marriage; (ii) convincing evidence is required to be adduced by the petitioner to

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[26] *Ibid.*

[27] It may now be that annulment of a voidable marriage is barred by a divorce: *see Hillcox* v. *Morrow* (1986), 3 R.F.L. (3d) 45 (B.C.C.A.) leave to appeal to S.C.C. refused (1987), 6 R.F.L. (3d) xxviii; *see also* B. Ziff, *Annot.: Hillcox v. Morrow* (1986), 3 R.F.L. (3d) 46.

[28] (1987), 5 R.F.L. (3d) 323 (P.E.I.S.C.). *See also Trenholm* v. *Trenholm* (1989), 21 R.F.L. (3d) 223 (N.S.C.A.); *Khan* v. *Mansour* (1989), 22 R.F.L. (3d) 370 (Ont. U.F.C.). *Compare Sallam* v. *Sallam* (1988), 73 NFLD. & P.E.I.R. 136 (Nfld S.C.). Contrast the English approach as considered in *A.* v. *J.* (1989), 1 F.L.R. 110 (Fam.Div.).

remove all reasonable doubt; (iii) the ground of impotency must be found in physical or psychological disability; (iv) in the case of psychological disability, such must constitute an invincible repugnance or aversion to the sexual act; (v) the disability must be irremediable, vis-a-vis the marriage partner; (vi) the partner suffering the disability, whether physical or psychological, must have exhibited a willingness to undergo remedial treatment; (vii) there must have existed, prior to the marriage ceremony, no previous knowledge of the disability; (vii) laches may constitute a bar to relief unless a reasonable explanation is provided; (viii) a separation agreement, depending on its content and the circumstances under which it was entered into, might constitute a bar; and (ix) the existence of a child, conceived prior to the marriage ceremony, does not, in itself, constitute a bar.[29]

For what it is worth, this is not the most successful summary of the conventional understanding of this area of law. While there is indeed authority that in annulment proceedings the applicant must remove all doubt, it is likely that today the courts should apply the normal civil standard of proof. Moreover, to say that the person suffering from the disability must express a desire to undergo treatment is a sensible rule, but does not conform to conventional doctrine. On the contrary, it has been held that where a party refuses to undergo treatment, this may lead to a finding that the disability is incurable.[30] A separation agreement, or a delay in taking legal action, may serve to underlie a claim of "insincerity", but it must be recalled that this is (probably) only a discretionary bar.[31]

2. *Reform Initiatives: Marriage Within the Prohibited Degrees*

In 1984, a Senate Bill was introduced which was designed to reduce dramatically the prohibitions on marriages between people who fell within prohibited degrees of consanguinity and affinity.[32] Several versions and six years later, that reform is still not law. In 1987, the whole initiative was left rotting on the vine in the House of Commons. Under Bill S-5,[33] the penultimate version, a marriage would be void only if entered into by individuals related lineally by consanguinity or adoption, or as brother and sister by consanguinity (whether by the whole or half blood). That Bill passed through the Senate, and received first reading in the Commons. However, before second reading a

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[29] *W.* v. *W.*, *ibid.* at 332-33, McQuaid J.

[30] *See* J.D. Payne, *The A's, B's and C's of Nullity of Marriage in the Common Law Provinces of Canada* (1986), PAYNE'S DIVORCE AND FAMILY LAW DIGEST (current binder - 1990) E-11.

[31] *Ibid.* at E-24.

[32] Bill S-13, *An Act to Consolidate and Amend the Laws Prohibiting Marriage Between Related Persons*, 2d Sess., 32d Parl., 1983-84 (1st reading 3 April 1984).

[33] Bill S-5, *An Act to Consolidate and Amend the Laws Prohibiting Marriage Between Related Persons*, 2d Sess., 33d Parl., 1986-87.

motion to withdraw the Bill and refer it to the Standing Committee on Justice and Solicitor General was passed.[34] That Committee received evidence, but the matter proceeded no further until February, 1990, when Bill S-14 was given first reading in the Senate.[35]

The legislators involved seem to have readily accepted that the fundamental aims of these proposed changes were sound. However, the sticking point has been the place of relationships based on adoption within the prohibitions. As the matter has proceeded through Parliament, five approaches have been considered: (i) silence on the issue; (ii) excluding adoption from the range of prohibitions; (iii) treating relationships based on adoption in the same way as consanguineous ones; (iv) precluding only *lineal* relationships arising from adoption; and (v) precluding marriage between both lineal relations and brother-sister relationships arising from adoption. The fourth solution could be found in Bill S-5 and the current bill in its initial form. Hubbard, while recognizing that this limited adoption prohibition is largely innocuous, nevertheless has criticized it as being retrograde and anomalous.[36] In a reform designed to reduce prohibitions on marriage, it serves to add a bar which was unknown to the common law. Moreover, it would lead to the curious situation that one could marry a step-child, but not an adopted child. This is true, but it also underscores the unique place which adopted children hold within a family. This is why the matter should perhaps be resolved by provincial law (leaving aside the constitutional wrangles this raises) where the functions of adoption can be given pride of place in the debate.

It is in response to concerns over provincial adoption law that Bill S-14 was amended before receiving third reading in the Senate to include a prohibition against marriage by adoptive siblings.[37] During committee hearings, provincial adoption agencies made the case that allowing siblings by adoption to marry was "potentially destructive to the integrity of the adoptive family unit".[38]

In sum then, the Bill as passed by the Senate, with the incorporation of the fifth option, contains the following marriage prohibitions:

> No person shall marry another person if they are related
> (a) lineally by consanguinity or adoption,
> (b) as brother and sister by consanguinity, whether by the whole or by the half-blood, or
> (c) as brother and sister by adoption.[39]

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[34] Canada, *H.C. Debates* at 8927 (14 September 1987).

[35] Bill S-14, *An Act Respecting the Law Prohibiting Marriage Between Related Persons*, 2d Sess., 34th Parl., 1989-90 [hereinafter Bill S-14].

[36] H.A. Hubbard, *Comments on Bill S-5* appearing as *Appendix Just-4* in MINUTES OF PROCEEDINGS AND EVIDENCE OF THE STANDING COMMITTEE ON JUSTICE AND SOLICITOR GENERAL (Issue No. 22) (15 October 1987).

[37] Canada, *Senate Debates* at 1872 (7 June 1990).

[38] *Ibid.* at 1871 (Hon. Nathan Nurgitz).

[39] Bill S-14, s. 2(2) (as passed by Senate).

C. Same Sex and Transsexual Marriage

The law's preoccupation with formal marriage is matched by its disregard or rejection of homosexual unions. Nothing in the census data reveals the nature and extent of this phenomenon, although there is anecdotal evidence that same sex couples regard some form of recognized status as a matter of value. It is not unheard of for gay couples to engage in "marriage ceremonies" designed as a demonstration of love, respect and commitment. Of course, these marriage vows are purely symbolic — formal marriage has remained an exclusively heterosexual preserve. Whatever legal protections are afforded against discrimination on the basis of sexual discrimination, and no matter to what degree gay relationships have come to be regarded in the community as an acceptable social phenomenon, the essence of marriage as the union of one man and one woman has endured. With this in mind, *Mossop* v. *Dept of Secretary of State*,[40] a decision of a tribunal established under the authority of the *Canadian Human Rights Act*,[41] deserves attention. There, it was decided that a male couple in a homosexual relationship enjoyed a "family status" within the meaning of the Act, so that conferring employee rights on heterosexual couples only constituted a form of discrimination prohibited by the Act.

The facts giving rise to the dispute in *Mossop* were banal in the extreme, leaving little doubt that the grievance was pursued wholly as a matter of principle. The complainant, an employee of a federal government department, had been cohabiting with a male companion since 1976. Throughout this period they had maintained a sexual relationship and had held themselves out, among family and friends, as lovers. When his companion's father died, the complainant, an employee of the federal government, applied (retroactively) for a one day bereavement leave from work. The application was denied and the complainant refused to accept an alternative form of relief offered by his employer. Under the terms of the relevant collective agreement, bereavement leave would have been available in circumstances such as occurred here, had the supplicant employee been married, or living in a common law heterosexual relationship of some permanence. Apart from the question of gender, it was clear that the complainant and his companion satisfied the definition of living common law contained in the agreement. Following the denial a complaint was filed under the *Canadian Human Rights Act*, alleging that the collective agreement and the actions of the employer contravened the *Act*'s prohibition against discrimination in the work place on the basis of "family status".

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[40] (13 April 1989), No. 6/89, 10 C.H.R.R. D/6064 [hereinafter cited to C.H.R.R.].

[41] R.S.C. 1985, c. H-6 as am.

The Tribunal, in searching for an interpretation for the term "family status" which was compatible with the function and framework of the human rights legislation, adopted an embracing definition of the family:

> Although dictionary definitions of "family" are reasonably consistent in that they are broad in scope, all of them contemplate relationships which are defined in several ways which may include: blood (or consanguinity), kinship (which may or may not be as narrowly defined as consanguinity), marriage or adoption; and finally through ties forged on some other basis such as natural liking, common interests or goals, or household arrangements. The Tribunal does not wish to detract from the undeniably common features, allowing for differences in expression, of these definitions...but stresses the variety of relationships which generally fall within the term which is reflected in dictionary definitions.[42]

Having accepted this expansive notion, together with the idea that the concept of the family should not be confined to its "historical roots, but must be tested...against an understanding of how people are living and how language reflects reality",[43] the Tribunal held that it was reasonable to regard homosexual couples as constituting a family. It was then a short step to the conclusion that the denial of bereavement leave amounted to discrimination under the *Act*.

The decision at first instance captured national attention in Canada. Svend Robinson, the federal member of Parliament who publicly declared his homosexuality, described *Mossop* as a significant victory for the gay and lesbian community, and the Globe & Mail hailed it as a "landmark decision".[44] For a moment, the case stood in marked contrast to the unsuccessful challenges which have been brought under the *Charter* to invalidate legislation on the basis of a similar type of discrimination.[45]

In the end, this development may turn out to be short-lived, for on June 29th, 1990, the Federal Court of Appeal set aside the decision of the Tribunal.[46] Marceau J.A. rejected use of a functional approach to the definition of family, eschewing also the suggestion that the concept of a family was so uncertain and unclear as to require a special interpretation in every instance in which it is invoked in a legal

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[42] *Supra*, note 40 at para. 43649 (M.E. Atcheson acting as the Human Rights Tribunal).

[43] *Ibid.* at para. 43656.

[44] (13 April 1990) *Globe & Mail* A1.

[45] *See, e.g., Andrews* v. *Ontario (Minister of Health)* (1988), 64 O.R. (2d) 258, 49 D.L.R. (4th) 584 (H.C.) discussed in M. Eaton & C. Peterson, *Comments: Andrews v. Ontario (Minister of Health)* (1987-88) 2 C.J.W.L. 416. For an analysis of the constitutionality of same-sex marriage restrictions, *see* M. Otvos, *Same Sex Marriage* (1987) 21 ADVOCATE (TOR.) 7.

[46] *Canada (Attorney General)* v. *Mossop* (29 June 1990), A-199-89 (Fed. C.A.). As of 10 August 1990, leave to appeal to the Supreme Court of Canada had not been sought.

setting. At its core, the meaning to be attributed to the term "family" was thought to be clear enough:

> Is it not to be acknowledged that the basic concept signified by the word has always been a group of individuals with common genes, common blood, common ancestors. This basic concept lends itself to various degrees of extension since the common ancestor may be chosen more or less remotely along the line of generations and the group referred to today is generally seen as including individuals connected by affinity or adoption, an inclusion rendered normal by the fact that marriage was made the only socially accepted way of extending and continuing the group, and adoption a legally established imitation of natural filiation. But that does not affect the core meaning conveyed by the word. It is true that the term is also the subject of analogical uses which may still be debatable and will remain susceptible to changes (hence the lack of complete uniformity in the dictionaries). But so long as these analogous uses are clearly seen as being what they are semantically, i.e. uses by analogy, the peripheral area of uncertainty they bring in is quite residual and should not be misleading.[47]

Among the errors said to have been made by the Tribunal was to take some attributes usually ascribed to family relationships (mutual love between family members, mutual assistance and so forth) and to treat these as the essence of the concept itself. Moreover, it could not be said that the gay couple in this case had a "family status", which is the phrase used in the legislation. Status was regarded as a legal construct, which homosexual couples do not enjoy, even if they can, "sociologically speaking",[48] constitute some sort of family. It was added that the gist of the complaint was one of discrimination based on sexual orientation, a ground not covered by the Federal human rights regime.[49]

A broader issue, the right of gay and lesbian couples to assume marital rights and obligations, may eventually force its way onto the political agenda in the aftermath of the *Mossop* rulings, and it may well be a propitious time to reassess the rule in *Hyde* v. *Hyde*[50] as it relates to gender, or to consider whether same-sex partners should be accorded a status akin to heterosexual cohabitants.[51] Doubtless, a

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[47] *Ibid.* at 15-16.

[48] *Ibid.* at 17.

[49] Heald J.A. concurred. Stone J.A. wrote a short judgment concurring in the result.

[50] (1866), L.R. 1 P. & D. 130.

[51] *See further* C.A. Lewis, *From This Day Forward: A Feminine Moral Discourse on Homosexual Marriage* (1988) 97 YALE L.J. 1783; R.D. Mohr, GAYS/JUSTICE: A STUDY OF ETHICS, SOCIETY AND LAW (New York: Columbus University Press, 1988); D. Gray, *Marriage: Homosexual Couples Need Not Apply* (1988) 23 NEW ENGLAND L. REV. 515. *Compare* REPORT ON LAWS GOVERNING HOMOSEXUAL CONDUCT (Topic No. 2) (Hong Kong: Law Reform Commission of Hong Kong, 1983) at 121.

segment of the gay community regards formal marriage as having many of the same virtues which have allowed orthodox marriage to endure. If one can move beyond religious-based perceptions of morality and irrational homophobic reactions, it is apparent that some of the stated objectives furthered by heterosexual marriage,[52] would also be served by homosexual marriage. In addition, the special reasons why the state might now wish to promote homosexual monogamy through the law are too obvious for words. Apparently, the boldest step in this direction so far has occurred in Denmark, where homosexual couples are entitled to enter into registered partnerships, in which various marriage-like rights are enjoyed.[53]

A subset of this debate concerns the question of the validity of transsexual marriage. The leading English case of *Corbett* v. *Corbett*[54] has been referred to approvingly in Canada,[55] but has equally received a fair measure of reproach.[56] In Australia, the *Corbett* ruling has recently been rejected, at least in the context of the criminal law.[57] The essence of the assault on the English position is that it undervalues the psychological dimensions of gender, and reflects a profoundly insensitive attitude about transsexualism. Gender dysphoria syndrome involves, among other things, an acute feeling of sexual ambiguity which the English position may well exacerbate.[58] The marriage regime should not contribute to the trauma sometimes accompanying transsexualism in the absence of a cogent justification. Moreover, tolerance

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[52] *See* E.D. Shapiro & L. Schultz, *Single Sex Families: The Impact of Birth Innovations upon Traditional Family Notions* (1985-86) 24 J. FAM. L. 271. *See also* Editors of the Harvard Law Review, SEXUAL ORIENTATION AND THE LAW (Cambridge, Mass: Harvard University Press, 1990) at 95 ff.

[53] P.S. Gutis, "Small Steps Toward Acceptance Renew Debate on Gay Marriage", *New York Times* (5 November 1989) 24 E.

[54] [1971] P. 83, [1970] 2 W.L.R. 1306 [hereinafter *Corbett*].

[55] *See M.* v. *M.* (1984), 42 R.F.L. (2d) 55 (P.E.I.S.C.).

[56] *See, e.g.*, J. Dewar, *Transsexualism and Marriage* (1985) 15 KINGSTON L. REV. 58. *See also* the poignant commentary on the unsuccessful litigant in *Corbett*: D. Fallowell & A. Ashley, APRIL ASHLEY'S ODYSSEY (London: J. Cape, 1982) at 229.

[57] *R.* v. *Cogley*, [1989] V.R. 799 (Vic. Sup. Ct); *R.* v. *Harris* (1988), 35 *A. Crim. R.* 146, 17 N.S.W.L.R. 158 (N.S.W. Ct of Cr. App.). *See* H.A. Finlay, *Transsexuals, Sex Change and the Chromosonal Test: Corbett v. Corbett Not Followed* (1989) 19 W. AUST. L. REV. 152; M. Otlowski, *The Legal Status of a Sexually Reassigned Transsexual: R. v. Harris and McGuiness and Beyond* (1990) 64 AUST. L.J. 67. *See also* H.A. Finlay & W.A.W. Walters, SEX CHANGE, MEDICAL AND LEGAL ASPECTS OF SEX REASSIGNMENT (Victoria, Australia: H.A. Finlay, 1988); *Van Oosterwijck* v. *Belgium* (1980), Eur. Court H.R. Ser. A., No. 4, 3 E.H.R.R. 557; *Rees* v. *United Kingdom* (No. 9532/81) (1984) 7 E.H.R.R. 409.

[58] *See further* J. Taitz, *The Law Relating to the Consummation of Marriage Where One of the Spouses is a Post-Operative Transsexual* (1986) 15 ANGLO-AMER. L. REV. 141; J. Taitz, *A Transsexual's Nightmare: The Determination of Sexual Identity in English Law* (1988) 2 INT. J. OF LAW AND THE FAMILY 139.

of alternative lifestyles ought to be an objective of modern family law; in this way the law's attitude in this sphere has implications for far more than a small sector of the population.[59]

D. Non-Marital Cohabitation[60]

1. *Caselaw Developments*

The increase in the frequency of cohabitation outside of marriage has already been noted.[61] In the face of this social development, the law has responded incrementally. On matters of property division, the concepts of unjust enrichment and the constructive trust have continued to play a major role across Canada.[62] But it is here that national uniformity ends. Bala and Canos' review[63] of provincial legislation governing support rights, cohabitation contracts, and possessory rights in the family home demonstrates the diversity.

The fact that some provinces have not recognized through statute the validity of agreements between cohabitants does not preclude recognition under the common law, as the decision in *Crispen* v. *Topham*[64] illustrates. There, the couple had entered into a written contract under which it was agreed *inter alia* that the rent and various current expenses would be shared and that neither would assert a claim to the property of the other. There was an addendum under which the man agreed that the woman could have a cat on the condition "that she will be responsible for cleaning up (litter box) & feeding a cat when she gets one, and further agrees to repay any damage the cat may cause".[65] When the relationship broke down (about one year later), the man tried to enforce the undertaking to share expenses in accordance with the contract. The defendant signed a promissory note for the amount then owing, and made some payments, but then she resisted claims for the balance. With little ado, the Court upheld the validity of the contract and the obligations accruing under it, concluding that nowadays, given the societal acceptance of cohabitation, such an agreement cannot be described as being illegal or unenforceable

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[59] For a review of American developments, which have generally demonstrated a humanistic attitude, *see* C. Kunkel Watson, *Transsexual Marriages: Are They Valid Under California Law?* (1986) 16 SW. U. L. REV. 505.

[60] *See generally* E. Kandoian, *Cohabitation, Common Law Marriage, and the Possibility of the Shared Moral Life* (1986-87) 75 GEORGETOWN L. J. 1829.

[61] *See* text accompanying note 9, *supra*.

[62] This is discussed in Part IV, *infra*.

[63] N. Bala & M. Cano, *Unmarried Cohabitation in Canada: Common Law and Civilian Approaches to Living Together* (1989) 4 C.F.L.Q. 147.

[64] (1986), 3 R.F.L. (3d) 149 (Sask. Q.B.), *aff'd* (1987), 9 R.F.L. (3d) 131 (C.A.).

[65] *Ibid.* at 152.

by reason of having been made for an immoral purpose.[66] To say that position is unassailable is to state the obvious. How ludicrous it would be if there was any impediment to such a benign sort of cost-sharing arrangement.

Interstitially provincial and federal statutes have introduced definitions of the term "spouse" designed to encompass companionate relationships. Typically, these attempt to delineate the prerequisites for the relationship by referring to a minimum period of time, or by requiring a finding that the relationship is of some permanence. The presence of children of the union is also commonly relevant to the definition. In *Alberta* v. *Appeal Panel Under the Widows' Pension Act*,[67] a definition of this sort was read into a specialized pension statute. In this case, one Jean Jackson applied for a pension under a statutory scheme available to widows. She had lived in a common law relationship for 31 years with the decedent, and they had parented six children. Under the legislation, a widow is defined simply as "a person whose spouse is deceased and includes a widower";[68] the term "spouse" is not defined. A decision to deny a pension to the woman was reversed by the pension appeal panel and an application to quash that ruling was rejected by the Alberta Court of Queen's Bench. The appeal panel's decision to treat the woman as a spouse in this instance was based on a number of considerations, including the length of the relationship and the fact that the couple had for years held themselves out as married to the community at large and to their children (only one of which was aware that the parents were not married). The Court being of the view that this interpretation of the legislation was not patently unreasonable, an application for *certiorari* was refused. This decision is extraordinary because it accords cohabitees rights in the absence of express statutory language to that effect. Left unresolved is the delineation of the minimum requirements which must be met before entitlement under the statute arises.

2. *Reform Initiatives*

The *Widows' Pension Act* case is perhaps symptomatic of the dearth of legislative action in Alberta concerning the legal implications of living together outside of marriage, but that may change if the

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[66] *Ibid.* at 154. The plaintiff was also, however, liable for a monetary claim. It was held that the written agreement did not contain all the terms of the agreement, and that there was a collateral contract providing that various domestic responsibilities would be shared equally. This sharing had not occurred; the woman had undertaken most of these duties. Although this would appear to give rise to a claim under that collateral accord, the claim was analyzed based on principles of unjust enrichment. In the end, this restitutionary claim succeeded and, taking the value of the services provided, minus the debt due under the written contract, the woman was left with a net award of $312.60.

[67] (1986), 76 A.R. 101 (Q.B.) [hereinafter *Widow's Pension Act* case].

[68] *Widow's Pension Act*, S.A. 1983, c.W-7.5, s.1(c).

recommendations of the Alberta Law Reform Institute are adopted.[69] The proposals are by no means revolutionary. While recognizing the growing social acceptance of non-marital cohabitation, and the degree to which this type of relationship mirrors traditional marriage relationships, particularly where allocational problems surface on breakdown, the report rejected the idea of a close assimilation of cohabitation with marriage. Instead, it was suggested that the province introduce a series of reforms designed to deal with special areas of inequity. Three main reasons were said to underscore this response. First, full assimilation might serve to undermine the institution of marriage, by creating a disincentive to marry. This could lead to relationships which are more transient, since "divorce acts as a break on hasty breakups in the context of marriage but could not be applied to cohabitants".[70] Secondly, it was felt that individuals who cohabit have chosen not to marry, so that imposing marriage obligations on such people would be wrong in principle. Thirdly, even partial assimilation, using a blanket definition of cohabitation which would be applicable generally, would not be as subtle as developing an appropriate definition to suit each discrete area of law to be regulated.

Operating on these premises, the report recommends that claims for support be available to a cohabitant who is undertaking the care of a child (up to 12 years of age, or up to 16 if the child is handicapped), or where rehabilitative maintenance is required for a person whose earning capacity has been adversely affected by reason of the relationship. At all events, such maintenance should only be awarded where it would be reasonable to do so, and guidance in awarding support would be garnered from principles established under the *Divorce Act, 1985*.[71] This is the fundamental proposal, but there are others of some significance: cohabitation contracts (as well as other forms of domestic contract) would be permitted and regulated; and common law widows would be entitled to share in estates (of their partners) which devolve on intestacy. No special rules would be enacted to allow for the division of property on breakdown, although an order for possession of the matrimonial home could be made in favour of a cohabitant who has responsibility for the care of a child.[72]

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[69] TOWARDS REFORM OF THE LAW RELATING TO COHABITATION OUTSIDE MARRIAGE (Report No. 53) (Edmonton: Alberta Law Reform Institute, 1989) [hereinafter Report No. 53]. *See also* TOWARDS REFORM OF THE LAW RELATING TO COHABITATION OUTSIDE MARRIAGE (Issues Paper No. 2) (Edmonton: Institute of Law Research and Reform, 1986) [hereinafter Issues Paper No. 2]; SURVEY OF ADULT LIVING ARRANGEMENTS (Research Paper No. 15) (Edmonton: Institute of Law Research and Reform, 1984).

[70] Report No. 53, *ibid.* at 12-13.

[71] R.S.C. 1985 (2d Supp.), c.3.

[72] Specifically, these orders would be available where the applicant has custody of a child who is twelve years old or less, and who is a child of the relationship (whether natural born or adopted), a child of the respondent, or to whom the respondent stands *in loco parentis*: Report No. 53, *supra*, note 69 at 23.

These proposals appear quite cautious, although in truth they are not significantly different from some of the provincial regimes which appear to confer more plenary rights. The premise that couples cohabit with a view to avoiding the obligations associated with marriage may be questionable, but in any event, the proposals do not slavishly follow the logic of that premise. Under the report, support obligations are imposed by the state, and can only be removed if the parties take initiative by specifically opting out of these by contract.[73] Moreover, the type of support orders contemplated by the report, while ostensibly more narrow than those which obtain in other provinces (say, Ontario), probably earmark the grounds under which most awards are now made. Additionally, other provinces (including Ontario) have resisted application of the property division rules to cohabitants. Of course, even with these qualifications, it is clear that the proposals might have gone further. For example, the appropriateness of a support claim during the joint lives of the parties should not evanesce on death, and therefore some accommodation under the dependent's relief legislation would seem sensible. Likewise, if one recognizes that orders for possession of the home can and should serve a support function, the availability of those orders should perhaps also comport better with the support principles.[74]

III. DIVORCE

A. *Introduction*

After a short period of decline in the first half of the 1980s, the divorce rate rose sharply in 1986, no doubt in response to the introduction of the new divorce legislation in that year. Roughly 30% of all marriages in Canada now end in divorce.[75] Also, the median length of marriage is now shorter than ever before. Whereas it was 11.2 years under the old law, it is now 9.1 years. In 1969, the average was about 15 years.[76]

The variation in patterns of divorce among provinces is staggering:[77]

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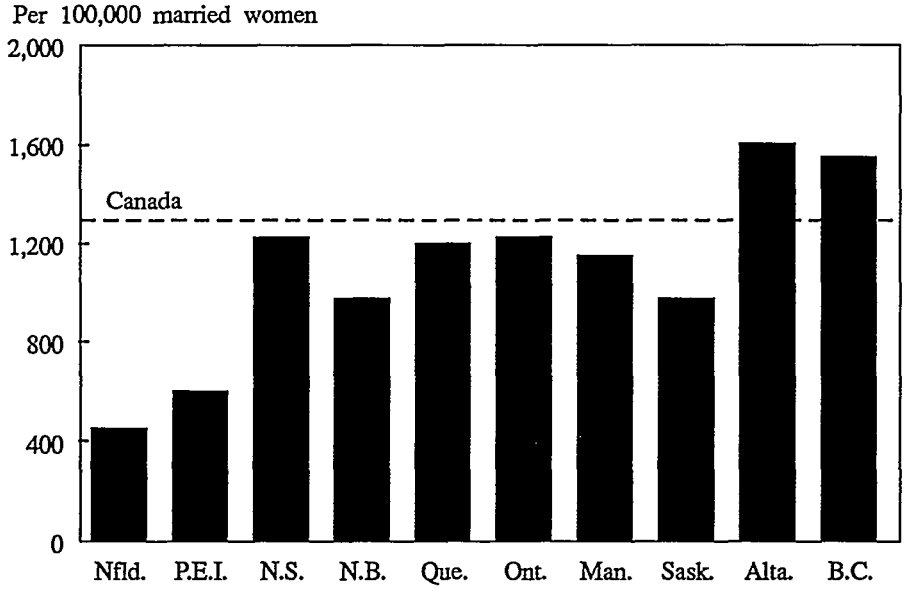
[73] *Compare* Issues Paper No. 2, *supra*, note 69 at 67-68.

[74] *See further* A. Orlando, *Exclusive Possession of the Family Home: The Plight of Battered Cohabitees* (1987) 6 R.F.L. (3d) 82.

[75] O. Adams & D. Nagnur, *Marrying and Divorcing: A Status Report for Canada* (1989 Summer) CANADIAN SOCIAL TRENDS 24.

[76] O. Adams, *Divorce Rates in Canada* (1988 Winter) CANADIAN SOCIAL TRENDS 18.

[77] *Ibid.* at 19 (Divorce rate by province, 1986).



The last survey was published on the eve of the implementation of the *Divorce Act, 1985*. The government promised that the *Act* would prompt an amelioration of the divorcing process, one that would represent a kinder and gentler administration of justice. While there is some evidence that this is so, the path of change has not been smooth. Legislation of this importance is likely to experience some teething problems, and the 1985 *Act* has been no exception. A host of controversies have emerged, and these are addressed below.

B. Grounds and Bars

The *Divorce Act, 1985*, putatively establishing a no-fault regime, nevertheless retains the archetypal matrimonial offences of cruelty and adultery, recasting these as factors denoting breakdown. These were retained as a safety valve, remaining available for those few cases where one-year separation was, for one reason or another, unendurable.[78] On the basis of the evidence available to date, it appears that adultery and cruelty have indeed been relegated to this subordinate role. In 1985, the last full year under the old law, the ratio of fault-based grounds alleged (under section 3) and breakdown grounds (section 4) was 2:1. Currently, over 90% of divorces are granted on the basis of one year of separation.[79]

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[78] *See Divi* v. *Divi* (23 September 1988) Regina 010591 at 8 (Sask.Q.B.) (digested in [1988] W.D.F.L. para. 2263) where, curiously, Grotsky J. suggested that it might be possible to grant "a petition for divorce upon the grounds of public policy".

[79] Adams, *supra*, note 76 at 19.

By obviating the need for a trial and allowing for the introduction of "desk top" divorce procedures, the wasteful, empty process of perfunctory divorce court hearings has been eliminated. Contested divorces have continued to be as rare as hen's teeth; rarer still are reported cases, though a few have emerged. So, under the separation ground it has been confirmed that while the parties may be living separate and apart while under the same roof, the facts must demonstrate a true separation, not merely disharmony.[80] Even though cruelty notionally has a new function, soon after the 1985 *Act* came into force it was decided that the old learning remained fully relevant.[81] Despite this, it has held that mental cruelty contains an element of wilfulness.[82] Not only is this inconsistent with entrenched authority, it is antithetical to the characterization of cruelty as an *indicia* of breakdown. If this new role is to have any meaning, then more than ever the relevant question is not "who was aimed at?", but rather "who was hit?".[83]

The 1985 *Act* retains the "three Cs" of divorce law — condonation, connivance and collusion — although, as before the reforms, these bars appear to be of little practical concern.[84] The one true impediment to divorce is to be found in paragraph 11(1)(b), which provides that in divorce proceedings it is the duty of the court "to satisfy itself that reasonable arrangements have been made for the support of any children of the marriage, and if such arrangements have not been made, to stay the granting of the divorce until such arrangements are made." This innocuous little provision has had an impact. When it was first introduced, a caution was raised that the paragraph might work to preclude lower income spouses from obtaining a divorce in those instances in which an adequate level of child support could not be provided.[85] That was based on an uncompromising reading of the statute. For a time a comparable issue surfaced in British Columbia, where divorces were being stayed under this provision with alarming frequency. In some instances, modest child support payments were being proposed by the parents as a means of insuring that those payments would not reduce social assistance benefits being received by the payee. The staying of divorces in these situations suggested

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[80] *Thorogood* v. *Thorogood* (1987), 11 R.F.L. (3d) 82 (Ont. U.F.C.). *See also Ginter* v. *Ginter* (1988), 15 R.F.L. (3d) 203 (Sask. Q.B.). *Compare McDonald* v. *McDonald* (1988), 15 R.F.L. (3d) 268 (N.S.S.C.); *Levene* v. *Levene* (17 November 1987) 85-01-01679 (Man. Q.B.) (digested in [1987] W.D.F.L. para. 2333).

[81] *Barron* v. *Bull* (1987), 76 A.R. 120, 5 R.F.L. (3d) 427 (Q.B.).

[82] *Y.B.* v. *J.B.* (1989), 66 ALTA L.R. (2d) 193 (Q.B.).

[83] *See further* B. Ziff, *Cruel and Unusual Divorce Law* (1989) 66 ALTA L.R. (2d) 196.

[84] It has been held that, despite the absence of express provision, a court may rescind or stay a judgment for divorce where the parties have reconciled: *Fraser* v. *Fraser* (1989), 23 R.F.L. (3d) 30 (Ont.H.C.). *Compare McDermid* v. *McDermid* (1989), 21 R.F.L. (3d) 47 (Sask.C.A.).

[85] Ziff, *supra*, note 1 at 147.

that an underclass of undivorceables might emerge, and (perhaps even worse), raised the "chilling prospect of complex Charter arguments in uncontested divorces".[86]

Not very long after these fears first emerged, the tempest subsided. In *R.D.F.* v. *S.L.F.*[87] the British Columbia Supreme Court adopted a reading of paragraph 11(1)(b) which should avoid the spectre of economic discrimination on divorce. In that case, the husband had agreed to pay $100.00 for the support of his son. Any award above this amount would have reduced the mother's social assistance allowance on a dollar-for-dollar basis. The Court observed that after adding in the welfare cheque, the actual support for the child might be in excess of $500.00 per month. As to the effect of paragraph 11(1)(b) in such an instance, McEachern C.J.S.C. said:

> A literal reading of s.11(1)(b) suggests that any arrangement that does not ensure sufficient funds for the proper support of a child (food, clothing, shelter, education, etc.) cannot be a reasonable arrangement. In many cases, including this one, there is not enough money, however it may be divided, to ensure proper support for the children of the marriage. A literal construction of this section, therefore, would result in the remedy of divorce being denied to many spouses who otherwise qualify for the dissolution of their marriage. Divorce would be available only to the rich and seldom, if ever, to the poor. As such would be patently unfair, it cannot have been the intention of Parliament. Some other rational construction consistent with the intention of Parliament to facilitate the dissolution of broken marriage must be given to s.11(1)(b)....
>
> I am persuaded, with much hesitation, that the reasonableness of the arrangements made by spouses for the support of their children must be determined in the context not just of the spouses but in all the circumstances which could include such items as assistance from other members of the family or friends, social assistance and any other relevant circumstances.[88]

In consequence, it was held that an arrangement will not always be unreasonable merely because it would artificially minimize the contribution of a non-custodial spouse. It was recognized that sometimes it would be imprudent to second-guess an applicant who prefers the security of the steady and reliable welfare payment to the private law obligation cast onto the other parent. At the same time, a non-custodial spouse with a regular income could not throw the support obligation on the welfare system.[89]

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[86] L.N. MacLean, "Uncontested Divorce at Crisis Point in B.C." *The Lawyers Weekly* (3 April 1987) 4.

[87] (1987), 6 R.F.L. (3d) 413, 12 B.C.L.R. (2d) 1 (S.C.).

[88] *Ibid.* at 419.

[89] *Ibid.* at 421-22.

R.D.F. should be contrasted with *Simpson* v. *Simpson*,[90] decided several months afterwards. There, the husband agreed to pay $600.00 for child and spousal support; to this was added $365.00 in extra outlays related to the three children. The wife was receiving $1,000.00 in welfare. Given that increased support to the wife would lead to a concomitant reduction in welfare receipts, it was calculated that the children and wife would receive no net gain from increased support payments unless those were raised to $1,300.00; the husband claimed that he could not provide that amount. On these facts, the divorce was stayed, the Court indicating that a proper level of support for the children would minimally be $225.00 per child:

> [In] this case it is apparent that the petitioning father can afford additional payments for the benefit of the children over and above those which he is presently bound to make. That being the case I know of no reason why, to the extent he is able to afford maintenance, that burden should not be transferred to him rather than imposed upon the welfare system. If fathers who are able to pay do not pay a proper amount, then the amount of money available in the welfare system for people who truly cannot pay is diminished.[91]

This result is hard to square with *R.D.F.*, though the trial judge in *Simpson* purported to accept that earlier decision. If the husband's calculations are correct (and these were not doubted), then an order of $225.00 per child (all else remaining the same) would not enhance the children's standard of living one iota. Granted, the public purse would be enriched, but that is not the intended function of paragraph 11(1)(b). If concerns for protecting the welfare system are legitimately a matter for the divorce court, then the vigilance demonstrated in *Simpson* is correct, and *R.D.F.* is misguided and should be abandoned. Instead of condoning an arrangement for lower payments, the highest reasonable order should be required. This can then be assigned to the provincial authorities by the payee,[92] in return for the guarantee of a regular and dependable welfare cheque. By contrast, if concerns over protecting the public purse are now to be subordinated to other policies on divorce — and the Supreme Court has sent some very strong signals that this is now so[93] — then *R.D.F.* is sound and reasonable and it is *Simpson* which is out of step. But the two decisions cannot stand comfortably together.[94]

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[90] (1987), 8 R.F.L. (3d) 216 (B.C.S.C.) [hereinafter *Simpson*].

[91] *Ibid.* at 220, Spencer J.

[92] *Divorce Act, 1985*, R.S.C. 1985 (2d Supp.) c.3, s. 15(9). *See further*, J.D. Payne, PAYNE ON DIVORCE, 2d ed. (Toronto: Butterworths, 1988).

[93] *See* text accompanying note 119, *infra*.

[94] *Compare* J.G. McLeod, *Annot.: Simpson v. Simpson* (1987) 8 R.F.L. (3d) 216, where it is suggested that *Simpson* is a refinement of *R.D.F.*, and that in the later case the husband, who had a secure income, was able to pay for more than he had agreed to provide. Indeed, the insecurity of payment was referred to in *R.D.F.*, but was not directly addressed in *Simpson*.

A recurring theme running through the cases is the requirement that satisfactory information be presented to the court. In *R.D.F.*, the divorce was not granted owing to this deficiency.[95] A similar posture was taken by the Manitoba Court of Appeal in *Money* v. *Money*[96] where the trial judge decided that she was not satisfied that reasonable arrangements for the support of the children had been made. A detailed agreement had been worked out by the parents, but there was no information relating to the income of the wife (who had not defended the petition). The Court of Appeal considered that the trial judge had acted properly in requesting additional material. At the same time, however, the Court suggested that an extensive review of each file is not contemplated by the Act:

> The court must be satisfied that reasonable support arrangements have been made, and, notwithstanding the private arrangements of the parties, may proceed on its own motion to satisfy itself. However, I do not view s.11(1)(b) as requiring the court, in every case, to embark upon a searching inquiry as to "the condition, means, needs and other circumstances of each spouse and of any child of the marriage for whom support is sought". I would think that in most cases where matters of corollary relief have been agreed upon by parties who have benefitted from independent legal advice, and where the divorce proceeds on an unopposed basis, it will not require extensive evidence to satisfy the court that reasonable arrangements have been made for the support of the children of the marriage. The evidence, when required, should be primary evidence establishing the factual circumstances, and not just testimony reflecting subjective opinions.[97]

Similar sentiments have been expressed in Nova Scotia. In *MacKinnon* v. *MacKinnon*[98] it was recognized that the court's ability to assess the position of children is rendered difficult where the proceedings are undefended and the evidence is presented entirely by affidavit. The Court was unimpressed by a sworn statement by the spouses that reasonable arrangements had been made, nor was it prepared to assume that suitable child support was to be paid merely because the custodial spouse had received independent legal advice before accepting the support arrangements. The divorce decree was

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[95] *See also L.A.K.* v. *G.N.K.* (1987), 12 B.C.L.R. (2d) 9 (S.C.); *B.J.M.* v. *J.H.M.* (1987), 12 B.C.L.R. (2d) 16 (S.C.); *D.M.W.* v. *H.W.W.* (1987), 12 B.C.L.R. (2d) 19 (S.C.); *Webb* v. *Webb* (1987), 11 B.C.L.R. (2d) 357 (S.C.); *Skewes* v. *Wilson* (22 November 1988), No. 68/88 (Ont.H.C.) (digested in [1989] W.D.F.L. para. 413); *Wonderham* v. *Wonderham* (26 October 1988) Saskatoon No. 458 (Sask.Q.B.) (digested in [1988] W.D.F.L. para. 2524).

[96] (1987), 5 R.F.L. (3d) 375, 45 MAN. R. (2d) 308 (C.A.) [hereinafter *Money*]. *See also Schultz* v. *Schultz* (1987), 8 R.F.L. (3d) 22, 48 MAN. R. (2d) 251 (Q.B.).

[97] *Ibid.* at 379.

[98] (1986), 78 N.S.R. (2d) 361, 193 A.P.R. 361. *See also Bergman* v. *Bergman* (1987), 8 R.F.L. (3d) 94 (N.S.S.C.); *Anderson* v. *Anderson* (1987), 11 R.F.L. (3d) 260 (N.B.C.A.).

not issued and the parties were granted leave to file additional material detailing the nature of the parties' employment and other pertinent matters.

C. Corollary Relief on Divorce: The Imposing Presence of the Trilogy

The 1985 *Act* provided an opportunity for the federal government to inject into the law of support strictures that were conspicuously absent from the predecessor legislation, with its "intentional flexibility".[99] Instead, what was provided were only broad guidelines, though these were an improvement on the completely open-ended principles which had existed since 1968. The courts were then left with the responsibility of drawing their own image of modern support law, and they have not shirked that duty. Yet the picture which has emerged possesses little of the serenity of the Mona Lisa; rather it resembles more the freneticism of a Jackson Pollack. This area will now be canvassed.

One development stands out as so profoundly important to the current state of support law that it demands to be considered straightaway. I refer to the trilogy of Supreme Court of Canada decisions: *Pelech* v. *Pelech*[100], *Richardson* v. *Richardson*[101] and *Caron* v. *Caron*.[102] All three cases concern the principles governing negotiated settlements on divorce, and given the importance of extra-curial resolution in family law, the value of review by the Supreme Court should be self-evident. However, the judgments have implications which extend far beyond the realm of spousal agreements. These signals were picked up with alacrity and zeal by the lower courts after the trilogy was decided, and in consequence the issues raised continue to be the focus of scholarly and judicial debate. Hence, to declare that these decisions "may mark the most significant advancement in matrimonial case law of the 20th century"[103] may be a little melodramatic, but only a little.

1. *Pelech* v. *Pelech*

The Pelechs were married in 1954; they divorced in 1969. At the divorce hearing the trial judge determined that the wife was entitled to support and ordered a reference to the Registrar to make recommendations as to quantum. The parties, both having received indepen-

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[99] *Messier* v. *Delage*, [1983] 2 S.C.R. 401 at 408, 2 D.L.R. (4th) 1 at 7, Chouinard J.

[100] [1987] 1 S.C.R. 801, 7 R.F.L. (3d) 225 [hereinafter *Pelech* cited to R.F.L.].

[101] [1987] 1 S.C.R. 857, 7 R.F.L. (3d) 304 [hereinafter *Richardson* cited to R.F.L.].

[102] [1987] 1 S.C.R. 892, 7 R.F.L. (3d) 274, [hereinafter *Caron* cited to R.F.L.].

[103] J.G. McLeod, *Annot.: Pelech v. Pelech* (1987) 7 R.F.L. (3d) 226.

dent legal advice, entered into an agreement under which the wife was to receive a lump sum, to be paid in instalments. This arrangement was approved by the Registrar, and was later incorporated into a consent order. The payments were duly made by the husband.

As the years passed, the fortunes of the parties took drastically different turns. The husband flourished, his net worth increasing more than tenfold, while the wife suffered setbacks and illness, so that by 1982 the settlement was depleted, and she was receiving welfare and "living at a poverty existence level".[104] Moreover, given her ongoing psychological problems and work history, it was unlikely that she would find gainful employment. Under these circumstances, Mrs Pelech applied to vary the original support order under subsection 11(2) of the 1968 *Divorce Act*.[105] She succeeded at trial, but that decision was reversed by the British Columbia Court of Appeal.[106] A further appeal by Mrs Pelech was dismissed by the Supreme Court of Canada.[107]

The majority judgment of Wilson J. contains a far-ranging analysis.[108] The starting point, and the common ground shared by all Canadian courts, was the House of Lords decision in *Hyman* v. *Hyman*,[109] where it was held that divorcing spouses could not by private agreement oust the jurisdiction of the court to award support. Even so, in fixing the quantum of the award an agreement is not irrelevant. The central question is the respect to be accorded the spousal settlement, and this is manifestly a question of policy, the resolution of which entails the balancing of a plethora of competing interests. These include the promotion of private ordering (with all its attendant virtues), the importance of finality, the value of individual responsibility, the need to protect the spouses and their children, and the public interest.

That Canadian courts have differed in their efforts to strike the correct balance among these countervailing concerns is reflected in Mme Justice Wilson's review of the authorities, where she identifies four patterns. Under the first, which was labelled the "private choice" approach, utmost respect is accorded to the parties' own determination of support entitlements. Here agreements are to be upheld unless they are invalid under the general law, or unless they otherwise fall within a "narrow range of cases" in which intervention is warranted. A second posture, said to be characteristic of the manner in which

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[104] *Pelech* v. *Pelech* (1984), 41 R.F.L. (2d) 274 at 279 (B.C.S.C.), Wong L.J.S.C. [hereinafter *Pelech (B.C.S.C.)*].

[105] R.S.C. 1970, c.D-8.

[106] *Pelech (B.C.S.C.)*, *supra*, note 104.

[107] *Pelech*, *supra*, note 100.

[108] Wilson J. wrote for Dickson C.J., McIntyre, Lamer, and LeDain J.J. in all three judgements.

[109] [1929] A.C. 601 (H.L.) [hereinafter *Hyman*].

Manitoba courts have operated, has been far more interventionist: spousal contracts are regarded as no more than a very relevant consideration in fixing entitlements. A third approach, described as a compromise position between the first two, would allow an agreement to be outflanked where a change of circumstances of considerable magnitude had occurred. A fourth mode of scrutiny homes in on a list of accepted bases for overriding a settlement. These have included contractual terms which affect the public purse, or adversely affect children, or are unconscionable.

The formulation crafted by Wilson J. in *Pelech* creates a fifth approach, and one that is pointedly non-intrusive, in fact more so than any previous ruling. Where the parties negotiate freely, with the aid of counsel, and enter into an agreement which is not "unconscionable in the substantive law sense",[110] they should normally be held to their bargain. As a result, a court should only exercise its power where the applicant has "suffered a radical change in circumstances flowing from an economic pattern of dependency engendered by the marriage".[111] Absent this, a spouse in need becomes the communal responsibility of the state. This promotes gender equality, and encourages former spouses to settle their financial affairs in a final way. Moreover, the overriding policy consideration is that "[p]eople should be encouraged to take responsibility for their own lives and their own decisions."[112]

One might expect that such a restrictive rule might buckle in the face of a hard case, but it is difficult to conjure up a more sympathetic scenario than that in *Pelech* itself; and here the Supreme Court refused to re-open the question of maintenance.

While there was a gross change of circumstances, there was no causal connection between the post-divorce events and the marital relationship. The psychological problems experienced by the former wife pre-dated the marriage, and no aspect of her current predicament could be said to have stemmed from the marriage or the conduct of Mr Pelech. In conclusion, Mme Justice Wilson said that:

> I believe that the courts must recognize the right of the individual to end a relationship as well as to begin one and should not, when all other aspects of the relationship have long since ceased, treat the financial responsibility as continuing indefinitely into the future. Where parties, instead of resorting to litigation, have acted in a mature and responsible fashion to settle their financial affairs in a final way and their settlement is not vulnerable to attack on any other basis, it should not, in my view, be undermined by courts concluding with the benefit of hindsight that they should have done it differently.[113]

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[110] *Supra*, note 100 at 269, Wilson J.
[111] *Ibid.* at 270.
[112] *Ibid.* at 269.
[113] *Ibid.* at 271.

La Forest J. wrote a short opinion in which he associated himself with much of what was said on behalf of the rest of the Court. He agreed with the disposition of the case and with the requirement, in the case of an antecedent consent order, that there be a causal connection between the marriage and the changes of circumstance being relied upon as a basis for seeking to alter that order. As a general rule, he also accepted that the change alleged must be of a highly significant character, adding however that he could conceive of exceptional cases, beyond those of strict unconscionability, where it is not necessarily the *dimensions* of the change as the circumstances that would warrant the making of a variation.[114] These instances were not elaborated upon.

2. *Richardson* v. *Richardson*

Although *Pelech* was clearly the lead decision of the trilogy, the matter directly at issue there was second in the natural order. It had dealt with the question of the courts' power of variation in the face of a settlement which had been incorporated into a consent order. The approach to be taken when the parties seek an *original* order to alter a support agreement that had not been before the court was not addressed in *Pelech*. That was to be considered in *Richardson*[115] where (not surprisingly) an accordant rule was adopted.

After twelve years of marriage, the Richardsons separated in 1979. In 1980, proceedings were commenced under the Ontario *Family Law Reform Act*,[116] and prior to the hearing, handwritten minutes of settlement were agreed to under which the husband promised to make periodic child and spousal support payments. The payments to the wife, who was then unemployed, were to last only one year. In the final version of the minutes, counsel for the husband inserted a clause which provided that this was to be a final and conclusive settlement of all claims between the parties. The wife later filed for divorce, seeking maintenance for herself as well as increased child support. The trial judge held that change in the wife's position since 1980 justified a departure from the minutes and he therefore allowed her claim. The level of child support was not disturbed. Additionally, both orders were "indexed", so that they would vary annually in accordance with fluctuations in the husband's income. The Ontario Court of Appeal struck the wife's award and the escalator clause but did raise the level of child support. A final appeal by the wife failed.

Wilson J. unequivocally asserted that the principles articulated in *Pelech* applied with equal force where an original order under the *Divorce Act* is sought. The underlying rationales, the promotion of

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[114] *Ibid.* at 273.
[115] *Supra*, note 101.
[116] R.S.O. 1980, c.152.

finality and the assumption of individual responsibility, were the same. The only difference was a temporal one: in the *Pelech* situation, the relevant time during which a relevant radical change must occur is the period following the consent order. In the *Richardson* situation, it is the time span between the contract and the first court application. Applying *Pelech*, the wife's appeal was dismissed. There was no change of circumstance during the relevant period, nor was her current state tied to a pattern of dependency engendered by the marriage. In fact, she had been employed during most of the marriage, and the period between her last employment and the ultimate separation was not great. As a result, it could not be found that the marriage had "atrophied her skills or impaired their marketability".[117]

The majority judgment raised three additional points. First, Wilson J. reiterated the rejection of preservation of the public purse as a policy objective of the rules governing interspousal contracts. The primacy of the private obligation of support can be found at the heart of the rule in *Hyman*,[118] but it is no longer so: "the fact that a former spouse has become or may become a public charge does not by itself justify the variation of a spousal maintenance order."[119] Secondly, the position of children, a matter left somewhat dangling in *Pelech*, is more fully developed in *Richardson*. Undoubtedly, an inadequate support stipend to a caregiver is likely to operate to the detriment of the children, and accordingly it has sometimes been observed that it is artificial to treat the two matters separately. While that may be so, Wilson J. decided that any adverse affect on children should be dealt with directly, by increasing child support if necessary, since this assures that the rights of the children will be the clear focus of the inquiry and that the payments ordered would be based on principles of child support.

Finally, the majority dealt with the issue of the foreseeability of a change of circumstance, perhaps one of the most difficult facets of the entire trilogy to understand fully. It was argued that the spousal support payments were set to expire in one year because it was the parties' common intention that the wife would be employed within that period of time. Re-worded to fit the *Pelech* standard, the fact that this did not occur was presented by the wife as constituting a change in circumstance justifying judicial override of the agreement. However, Wilson J. held that there was no clear indication as to the common intention of the parties in this regard, and that "[i]n the absence of a common expectation of the parties it seems to me that the minutes of settlement...should be respected subject to the principle enunciated in *Pelech*."[120] Moreover, it was added that bearing in mind the wife's

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[117] *Supra*, note 101 at 311.

[118] *Supra*, note 109 at 629, Lord Atkin.

[119] *Supra*, note 101 at 311. *See also Pearson* v. *Pearson* (1990), 25 R.F.L. (3d) 79 (N.B.Q.B.).

[120] *Ibid.* at 314.

circumstances at the time of the agreement, her employment record, and the fact that she had no certain employment prospects, her future unemployment was not outside of the reasonable contemplation of the parties.[121]

In *Richardson*, La Forest J. was in dissent and his critique of the majority opinion was spirited and staunch. To His Lordship, the fact that an *original* order was being sought made a crucial difference. In such an instance, the agreement has not yet been subject to scrutiny by the divorce court, and to defer to an agreement at this stage would be to re-write the legislation, for under the *Act* the judge has a responsibility to make an order which is fit and just. The proper standard of review, he suggested, is that which was ascribed in *Pelech* to the Manitoba courts. By contrast, on a variation, the court is dealing with an arrangement which has already been judicially vetted. Only changes of circumstance are relevant at this stage, and a more rigorous standard, the one deployed in *Pelech*, is therefore justified.

On the facts, La Forest J. would have overridden the minutes of settlement. In his view, over the course of the marriage, the wife's acquired skills did atrophy. She was not able to improve those skills owing to her caregiving responsibilities. On top of this, her age and continuing responsibilities had to be considered when assessing her competitive position in the market place. Under the minority analysis, these factors were sufficient to warrant judicial action. It mattered not whether the changes which occurred were radical or catastrophic, and the agreement was only to be given "appropriate weight".[122]

3. *Caron* v. *Caron*

In this final instalment of the trilogy, the parties entered into a separation agreement which was incorporated into a divorce decree. Under the terms of the accord, the husband was to provide *inter alia* a lump sum (which he paid) and periodical spousal support, which was to continue until the wife remarried or cohabited with another man for more than ninety days. The wife did enter into a cohabitation relationship, triggering the termination provision of the consent order, and in due course her former husband stopped the support payments. This new relationship ended and the wife fell back on social assistance. After a brief spate of employment, she started receiving unemployment insurance. Subsequently, she applied to vary the divorce decree, seeking a reinstatement of spousal support. Mr Caron was in a financial position to pay, but the issue was whether he was obliged to do so. All three levels of court hearing this case said "no".

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[121] *Ibid.* at 315.

[122] *Ibid.* at 325. La Forest J. also thought that the public purse rationale was important in this instance: *supra* at 326.

The terms of the agreement allowed for variation of the support obligation, so to the Supreme Court the question was bifurcated into a determination of (i) whether as a matter of construction this variation clause applied, and failing that (ii) whether the general variation jurisdiction under the *Divorce Act* could be invoked. The essence of the wife's claim was that the cohabitation which led to a termination of support could count as a change of circumstance as contemplated by the agreement. This was rejected. Since the agreement expressly contemplated such an eventuality as a reason for terminating support, it could hardly be used also as a justification for re-establishing the obligation. Neither could it be said that the termination provision contravened public policy, as a means of promoting chastity, restraining marriage, or whatever.[123] Wilson J. did allude to one possible argument, which if successful would have served to circumvent the operation of the termination clause. The wife might have asserted that cohabitation had not in fact taken place, at least if that term were construed to include the notion that the new partner was providing support (which on the facts did not happen). This matter was not pursued further since the parties seemed content that the requisite degree of cohabitation had been present.

The variation provision in the contract spoke only of a change of circumstance *simpliciter*, and did not require that there be a "radical" or "gross" change. But it did suggest that the change could only be made to the quantum of support, a qualification which the Supreme Court found controlling. Here entitlement had been terminated fully, and it was held that the reinstatement of the obligation in these circumstances was not contemplated by the agreement as drafted. The contractual arguments having failed, it was short work to dispose of the request for a variation under the *Divorce Act*, for here *Pelech* applied in full force. The absence of a radical change of circumstance was enough to defeat this claim. Therefore, it was essentially unimportant that the Court had before it little information about the wife's work pattern during the marriage, and whether this might expose a pattern of dependency connected to that marriage.[124]

D. The Aftermath of the Trilogy

The trilogy dealt with matters so vital to the practice of family law that their impact was sure to be great. Moreover, the breadth of the analysis, only barely visible in the nutshell summaries above, offered a rich source for extrapolation by commentators and the courts. Even at an early stage, however, it was patent that there was sure to

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[123] *See supra*, note 102 at 279.

[124] La Forest J., in a one paragraph judgment, expressly concurred with Wilson J.

be an ironic twist in the next stage of development. These judgments, which sought to promote settlement and court-avoidance, were destined to generate by their own force a monsoon of litigation, as the full implications of the judgments were mooted, assessed, attacked, extended, or confined. The results of this process will now be explored.[125] Yet this is not a happy or easy project. As has been cautioned, in this area "[a]ny attempt to rationalize current judicial decisions would be a futile task."[126]

1. *Does the Trilogy Apply to Applications Under the Divorce Act, 1985?*

The trilogy cases all concerned applications under the 1968 *Act*, and so it is necessary to consider whether the legal context had been altered in some material way through the enactment of the *Divorce Act, 1985*. Most courts have assumed that the trilogy applies under the new statute, but there are holdings to the contrary.[127] Three arguments, all of which are based on an interpretation of the 1985 *Act*, are said to support this minority position. The first is that the new *Act* states that an agreement is one factor of which account should be taken in assessing support.[128] Secondly, there is no reference whatsoever to agreements in the list of factors to be taken account of on a variation.[129] Thirdly, if the specific list of factors entitling a spouse to apply for an order or a variation under the 1985 *Act* is to have the full meaning which Parliament intended, the limitations imposed by the trilogy cannot apply.

This is not an irrational position, if the analysis is confined only to the language of the statute. But surely there is more to be considered. At the time the new Act was drafted, the promotion of private ordering

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[125] In the words of one commentator close to the action: "[t]he effect of the trilogy cases varies from province to province. Indeed, case law in most provinces shows that it varies in individual provinces on a judge by judge basis": J.G. McLeod, *Annot.: Fleming v. Fleming* (1989) 20 R.F.L. (3d) 416. *See also* J.G. McLeod, *Annot.: Fenwick v. Fenwick* (1988) 15 R.F.L. (3d) 18 at 19; J.D. Payne, *Further Reflections on Spousal and Child Support After Pelech, Caron and Richardson* (1990) PAYNE'S DIVORCE AND FAMILY DIGEST (current binder - 1990) E-163.

[126] Payne, *ibid.* at E-165.

[127] *Northcut* v. *Ruppel* (1989), 21 R.F.L. (3d) 193 (Man. Q.B.); *Geiler* v. *Geiler* (1987), 51 MAN. R. 107 (Q.B.); *Fenwick* v. *Fenwick* (1988), 15 R.F.L. (3d) 18 (Alta Q.B.); 15 R.F.L. (3d) 18 *Hunkin* v. *Hunkin* (1988), 14 R.F.L. (3d) 157 (Man. Q.B.). *But see Savoy* v. *Savoy* (1989), 23 R.F.L. (3d) 32 (N.B.Q.B.); *Lerette* v. *Wheaton* (16 December 1988), Moncton 1301-23782 & FDM 804-87 (N.B.Q.B.) (digested in [1989] W.D.F.L. para. 355); *Tomlin* v. *Christie* (1987), 10 R.F.L. (3d) 292 (Sask. Q.B.); *Fanning* v. *Fanning* (1989), 94 N.S.R. (2d) 327, 24 R.F.L. (3d) 135 (S.C.). *See also* N. Bala, *Domestic Contracts in Ontario and the Supreme Court Trilogy: A Deal is a Deal* (1988) 13 QUEEN'S L.J. 1 at 24.

[128] *Divorce Act, 1985*, R.S.C. 1985 (2d Supp.), c. 3, s. 15(5)(c).

[129] *Fenwick* v. *Fenwick*, *supra*, note 127.

on divorce had been well-entrenched as a goal of modern divorce law, and the impressive body of jurisprudence representing that posture under the 1968 *Act* had developed in the complete absence of a statutory reference. Bearing this in mind, it is hard to accept that this was to be undone by the insertion into the *Act* of an explicit reference to agreements as relevant considerations in assessing support entitlements. Additionally, the trilogy was handed down almost a year to the day after the *Divorce Act, 1985* came into force. Given that the Supreme Court has only rarely pronounced in such a fulsome way on "mega-issues" in family law in recent years, it is difficult to believe that this was only intended to apply to a repealed statute. Of course, that might well have been clearly indicated in the judgments; the court did not advert at all to the new law, and this is surely the source of some of the confusion.[130] In due course, the trilogy must be carefully integrated with the 1985 *Act*,[131] and some of the specifics of that statute may well serve to re-define the Supreme Court rulings.[132]

2. *Does the Trilogy Apply if the Agreement was not Intended to be Final?*

The trilogy celebrates the autonomy of the individual,[133] rolling back the protections against foolish bargaining inherent in the *Hyman* rule. The driving force of the trilogy is not the promotion of a "clean break" on divorce, nor a desire simply to limit variation applications, but rather to accord as much respect as prudence will allow to that resolution of contentious issues which the parties have chosen for themselves. If they bargain for finality, that will affect the court's attitude about overriding their contract; by the same token, nothing precludes the parties from engaging the supervisory jurisdiction of the court on a continuing basis, if they so choose. It has been lamented, with some justification, that a number of courts have failed to take

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[130] *See further* J.G. McLeod, *Annot.: Northcut v. Ruppel* (1989) 21 R.F.L. (3d) 196.

[131] *See also Linton* v. *Linton* (1988), 11 R.F.L. (3d) 444, 49 D.L.R. (4th) 278 (Ont. H.C.).

[132] *See, e.g.*, Payne, *supra*, note 125 at E-167: "A potential stumbling block to the continued application of *Pelech*, *Caron* and *Richardson* may arise, however, pursuant to s. 15(7)(c) of the *Divorce Act, 1985*. This subsection appears to imply that the right to State support is subordinate to the individual responsibilities of the spouses. And if that is the case, the contractual right of people to shift the burden of spousal support from the individual to the State may be open to challenge."

[133] "The trilogy's atomistic view of the family is consistent with dominant liberal discourse, which represents the oppressive relationship between husband and wife as a freely chosen contract between rational, unencumbered, autonomous individuals.": M.J. Bailey, *Pelech, Caron and Richardson* (1989-90) 3 C.J.W.L. 615 at 616.

account of this, and so have applied *Pelech* to contracts which were never intended to be so immune to judicial intervention.[134] Others have shown an acute sensitivity to this consideration.[135]

Even if it is accepted that the trilogy applies to agreements intended to be the final word on support obligations, it still must be recognized that troublesome cases will arise in which the parties' intentions on this score are not clear. When the contract specifically provides that an agreement is to operate in full satisfaction of all claims, this is straightforward enough. Likewise, when the terms allow explicitly for judicial variation under the *Divorce Act*, *Pelech* does not preclude a judicial application of that nature. But when the agreement is silent the matter must be resolved by the presumed intentions of the parties. What should be the default position? What is to be presumed? The safest course is to assume against finality, so that an agreement as to support presumptively means no more than the amount agreed upon is viewed as acceptable for the time being. The merit of this approach is that it requires the parties to direct their attention to the issue in some measure before the full brunt of *Pelech* is visited upon them. This is not to say that only the clearest of terms will serve to override the presumed intentions of the parties; a necessary implication should suffice. So should a tacit agreement that the spouses will go their separate ways and make no claims against each other.[136] Where a property division and support obligations are closely intertwined, this too may suggest a final settlement was intended.[137] However, an agreement which does not establish a "clean break" (say, by providing for a lump sum, or time-limited support payments) is no less final, simply because the payments may endure indefinitely. "Final" here means carved in stone as far as the parties have agreed, and the law will allow.

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[134] J.D. Snipper, *Pelech Applied to Applications to Vary Agreements for Ongoing Spousal Support: A Practitioner's Viewpoint* (1989) 20 R.F.L. (3d) 15. *See also* T.A. Heeney, *The Application of Pelech to the Variation of an Ongoing Support Order: Respecting the Intention of the Parties* (1989) 5 C.F.L.Q. 217. No better example can be found than *Young* v. *Young* (1989), 19 R.F.L. (3d) 45 (N.B.Q.B.).

[135] *Ronson* v. *Ronson* (1989), 21 R.F.L. (3d) 132 (Ont. H.C.); *Ellis* v. *Ellis* (1988), 15 R.F.L. (3d) 252 (Sask. Q.B.); *Garner* v. *Garner* (1988), 16 R.F.L. (3d) 242 (Ont. U.F.C.); *Craig* v. *Craig* (1989), 20 R.F.L. (3d) 66 (N.S.S.C.); *Weir* v. *Weir* (1987), 12 R.F.L. (3d) 160, 50 MAN. R. (2d) 41 (C.A.); *Hunkin* v. *Hunkin*, *supra*, note 127 (*sed quaere* the reasoning for the finding that the agreement was not final; *see also* J.G. McLeod, *Annot.: Hunkin v. Hunkin* (1988) 14 R.F.L. (3d) 157); *Droit de la famille - 598*, [1989] R.D.F. 15 (Que. C.A.), discussed in G. Artinian, *The Application of Pelech to Variation of Maintenance in Quebec* (1989) 5 C.F.L.Q. 265 at 272-73.

[136] *Bush* v. *Bush* (1989), 21 R.F.L. (3d) 298 (Ont. U.F.C.).

[137] J.D. Payne, *Management of a Family Law File with Particular Regard to Spousal Support on Divorce* (1989) PAYNE'S DIVORCE AND FAMILY LAW DIGEST (current binder - 1990) E-137 at E-151.

In a number of cases the parties' intentions have been inelegantly set out. For example, in *Swiderski* v. *Swiderski*,[138] a consent order stated that the support terms were intended to be in full satisfaction of all claims, but added that the amounts provided were to endure until further order of the court. *Pelech* was applied and the husband's attempt to vary failed.[139] Jon Snipper has attacked this type of result on the basis that finality cannot have been intended by such a consent order, especially in those cases in which it had been entered into in the pre-trilogy era.[140] However, there is another reasonable viewpoint. Even under *Pelech*, an arrangement intended to be final will not always be left alone and may indeed be judicially varied at some future time. In view of this, therefore, the order in *Swiderski* was in fact little more than declaratory of law as it obtains generally.

Snipper's observation that there are still many agreements extant which were drafted by lawyers before *Pelech* raises intriguing questions. His concern is that prior to June 1987, the basis for judicial review of support terms was broader and that divorcing couples (and their advising lawyers) could never have intended the type of finality now possible by virtue of the trilogy. In response it may be said that the chasm between *Pelech* and its Ontario antecedents may not be as wide as intimated by Snipper's remarks. Furthermore, he may be conceding that lawyers were foolhardy or careless in inserting final settlement clauses in the expectation that these would not be read according to their tenor. Still, the problems raised highlight the axiom that the only constant in modern family law is change. Since the second world war, the regimes governing the rights of married couples have changed dramatically. That the rules of the game alter over time, and often apply retrospectively, is also a regrettable consequence of a common law system.[141] As has been observed before, this harsh reality was visited on the unsuccessful litigants in *Richardson*, *Pelech* and *Caron*.[142] Ironically, the three cases which raise contractual freedom to a pre-eminent status might have done so at the cost of disappointing the probable actual intentions of the parties involved, and perhaps copious other pre-trilogy contractors.

As an additional and related matter, it is patent that *Pelech* does not preclude the spouses from establishing their own regime for

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[138] (1988), 15 R.F.L. (3d) 295 (Sask. Q.B.).

[139] *But see Publicover* v. *Publicover* (1987), 9 R.F.L. (3d) 308, 81 N.S.R. (2d) 91 (N.S. Fam. Ct); *Greenberg* v. *Greenberg* (1990), 25 R.F.L. (3d) 446 (Alta Q.B.).

[140] *See* Snipper, *supra*, note 134. *See also Horn* v. *Horn* (1987), 11 R.F.L. (3d) 23, 49 MAN. R. (2d) 301 (C.A.).

[141] As a result it cannot be argued that *Pelech* itself constitutes a change of circumstance warranting a re-opening of the question of support: *Enns* v. *Enns* (9 March 1989), Hamilton-Wentworth D/1044/87 (Ont. U.F.C.) (digested in [1989] W.D.F.L. para. 663).

[142] J.G. McLeod, *Annot.: Marshall v. Marshall* (1988) 13 R.F.L. 337 at 338.

variation, which might be wider than *Pelech*, but more narrow than that otherwise available under section 17 of the *Divorce Act, 1985*.[143] The *Caron* case,[144] which appears to sometimes have been neglected, lying in the shadows of *Pelech* and *Richardson*, illustrates the point. There, the parties had included within the agreement an internal variation provision. Although in the end *Pelech* was applied, the Supreme Court of Canada first considered whether the internal variation, which could be triggered by a mere "change of circumstances", could be invoked. They assumed that in principle it could, and the only reason that the Court did not apply the clause was that, on their construction of the contract, the predicate facts for its operation did not exist.

Moreover, there appears to be no policy reason precluding the spouses from dispensing with the "causal connection" requirement; nor should the court demand at all events that need is an essential condition to receive support. If, at its core, the trilogy promotes contractual freedom, there should be no impediment to the parties establishing their own rules as to maintenance. This is especially true now that the preservation of public funds no longer serves as a limiting consideration. There can be little doubt that Canadians hold a range of opinions about the principles of maintenance; this is surely a natural outgrowth of the diversity identified at the outset of this article. The Supreme Court has now effectively allowed couples to fashion their own support model and courts should respect the decisions they have made as to the relevant criteria.[145] Only in the absence of a clear vision as to what the parties intended should the courts invoke a general model, by default.[146] Indeed, the causal connection test can only be justified in this way. After all, if the spouses think that a causal connection is irrelevant to them, why should the courts impose this pre-condition? The only logical answer is that, in the absence of evidence to the contrary, it may be assumed that the need for a causal connection was intended. A separate issue is whether a default model based solely on a causal connection is sagacious, especially in light of the broader approach contemplated by the *Divorce Act, 1985*.

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[143] *See, e.g., Sheahan* v. *Sheahan* (1989), 21 R.F.L. (3d) 206 (Ont. H.C.); *Shepard* v. *Shepard* (1989), 19 R.F.L. (3d) 40 (Man. Q.B.); *Brasier* v. *Brasier* (1989), 19 R.F.L. (3d) 423 (Ont. Prov. Ct); *Cattani* v. *Mihalich* (1989), 22 R.F.L. (3d) 84 (Ont. Dist Ct). *See also Remillard* v. *Remillard* (1990), 103 A.R. 110, 24 R.F.L. (3d) 156 (Q.B.).

[144] *Supra*, note 102.

[145] *See, e.g., Guignard* v. *Guignard* (1987), 9 R.F.L. (3d) 328 (N.B.Q.B.) where the Court refused to alter an agreement which provided support to a former wife suffering a disability. The wife's problems existed at the date the agreement was negotiated and executed.

[146] *See also Rohrich* v. *Smith* (1989), 22 R.F.L. (3d) 410 at 412 (Ont. Prov. Ct).

3. *Does the Trilogy Apply if the Change was Reasonably Foreseeable?*

The relevance of foreseeability was not treated in *Pelech*, but emerged as a consideration in *Richardson*. There, it was argued that the time-limited support order was based on the common expectation that the wife would find employment during that time, and that since that failed to materialize, a variation was proper. However, the Supreme Court thought that the evidence in support of this common expectation was unclear and decided that *Pelech* should govern.[147] Additionally, it was found that the possibility that Mrs Richardson would not find employment was not unforeseeable and could not be said to be "completely outside the reasonable contemplation of the parties".[148] Following up on this *dicta*, a requirement of unforeseeability has apparently now been enshrined as a constituent element of the trilogy,[149] although on one reading, it may simply be an aspect of the idea that a change must be "radical".

There is something ominous and troubling about the introduction of this factor, especially if it is to be regarded as a separate requirement. Shrewdly used, it can serve to eliminate the supervisory jurisdiction of the court almost to the point of extinction. Imagine, for example, a contract which specifically lists all of those possible changes which the parties recognize and acknowledge will not justify a variation. Perhaps such a contract should be read literally, and if the parties assume these risks, then so be it. If one adopts the ethos of autonomy which permeates the trilogy, this may indeed follow. Under the new doctrine, great faith is placed in the parties being able to bargain assiduously in their own self-interest. The parties are left to their own devices to deal with the possibility that variation may be precluded.

A measure of semantic confusion attends the precise nature of this requirement. Some courts have spoken of an objective *unforeseeability*, while others have suggested that the change must be *unforeseen*,[150] which can be taken to mean subjective foresight. To the extent that these two notions are different, the subjective requirement seems most sound. The premise for introducing this element must be that if the spouses are aware of some possible future change, and contract in the face of it nevertheless, they cannot fairly point to this as a ground for intervention. It has been factored into the initial bargaining process and dealt with accordingly. The retention of the residual supervisory power in *Pelech* is designed to cover those unexpected eventualities

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[147] *Supra*, note 101 at 314.

[148] *Ibid.* at 315.

[149] *Crowe* v. *Crowe* (1988), 16 R.F.L. (3d) 420, 66 O.R. (2d) 157 (H.C.); *Fyffe* v. *Fyffe* (1988), 12 R.F.L. (3d) 196, 63 O.R. (2d) 783 (C.A.). *Compare Marshall* v. *Marshall* (1988) 13 R.F.L. (3d) 337 (Ont. C.A.).

[150] *See Cook* v. *Cook* (1988), 17 R.F.L. (3d) 35 (N.S. Fam. Ct).

which arise subsequently and which subvert or undermine the logic of the original accord.[151] The fact that the parties *should* have directed their minds to a problem, but did not, does not mean that the foundation of the settlement is any less undermined.

4. *Does the Trilogy Apply in an Application to Reduce the Liability of the Payor?*

The question of whether the trilogy is a two-edged sword, applying equally to both sides of a settlement, is among the most emotive and important yet raised in the jurisprudence. More than other issues, it reveals that although the trilogy is presented in gender-neutral terms, the relationship of the spouses under an agreement are frequently going to divide along gender lines: typically husbands will be the payors, and wives the recipients. Therefore, to ask in the context of *Pelech*, whether "sauce for the goose is sauce for the gander",[152] is to invoke a fitting adage. Judicial opinion on this vexing issue is divided, and the numbers in each camp are swollen.[153]

A perfectly symmetric application of the *Pelech* test would have the veneer of fairness, but would in fact be illogical.[154] Recall that the rationale of *Pelech* was, principally, to hold spouses accountable for their own decisions; and secondarily, to promote finality through settlement. The requirement that intervention can only occur where there is a radical change of circumstances recognizes that settlements in which future liability is at issue involve a prognostication that is sometimes impossible, so that correction is sometimes required. Responding only in the face of a radical change of circumstances shows that the courts will not readily meddle but may do so in extreme cases, and the theory is that this may actually encourage parties to agree. That aspect applies to both contracting parties.

However, the requisite change must relate to a relevant factor. In the case of the payor, any change affecting the ability to pay will normally count; for the payee, the change must be tied to some aspect

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[151] *See Isaacson* v. *Isaacson* (1987), 10 R.F.L. (3d) 121 (B.C.S.C.). *See also Neufeld* v. *Neufeld* (1987), 9 R.F.L. (3d) 163 (Man. Q.B.).

[152] J.G. McLeod, *Annot.: Fetterly v. Fetterly* (1989) 14 R.F.L. (3d) 47 at 48.

[153] *Pelech* applies equally: *Fleming* v. *Fleming* (1989), 20 R.F.L. (3d) 416 (N.S.C.A.); *Fenwick* v. *Fenwick*, *supra*, note 127; *Tomlin* v. *Christie*, *supra*, note 127; *Swiderski* v. *Swiderski*, *supra*, note 138; *Cook* v. *Cook*, *supra*, note 150; *Peterson* v. *Peterson* (1988), 13 R.F.L. (3d) 85 (Man. Q.B.); *Pigeon* v. *Pigeon* (1988), 15 R.F.L. (3d) 373 (B.C.S.C.); *Leman* v. *Leman* (1988), 14 R.F.L. (3d) 122 (Ont. H.C.); *Fetterley* v. *Fetterley* (1988), 14 R.F.L. (3d) 47, 89 A.R. 350 (Q.B.). *But see Ritchie* v. *Ritchie* (1988), 16 R.F.L. (3d) 163 (B.C.S.C.); *Swan* v. *Swan* (1988), 14 R.F.L. (3d) 385, 89 N.B.R. (2d) 111 (Q.B.); *Savoy* v. *Savoy*, *supra*, note 127; *Osterkampf* v. *Osterkampf* (1989), 22 R.F.L. (3d) 153 (Alta Q.B.).

[154] *See further* B. Helper, *Does the Causal Connection Principle Enunciated in the Supreme Court Trilogy Apply to Payors Under the Divorce Act, 1985?* (1989) 5 C.F.L.Q. 179.

of entitlement. In *Pelech*, the Supreme Court decided that (absent some contractual term to the contrary) the only valid entitlements would be those with a nexus to the marriage. Clearly, this part of the ruling concerns the purposes of support, and not the value of private ordering. Based on this analysis, the most general formulation of *Pelech* would be this: before a court will override a valid contract or consent order, there must be shown to exist a radical (and perhaps unforeseeable or unforeseen) change of circumstance of a factor which would have affected a judicial award in the absence of agreement.[155] This formulation still leads to differential treatment. As an example, illness unconnected with the marriage can justify a reduction if suffered by the payor, but not an increase for the payee.[156] Occasionally it might work the other way, as where the original arrangement was set quite low because of the payors' limited means, a condition which might ultimately improve.

5. *The Importance of "Need"*

In the same fashion that a valid agreement is regarded an undergirding of the *Pelech* test for review, several courts have come to regard *need* as integral. For example, in *Goddard* v. *Goddard (Public Trustee)*,[157] the husband succeeded in his application to terminate support payments originally contained in the minutes of settlement. Were the payments to continue, his new family would run into a significant monthly deficit. His former wife was in a nursing home and had sufficient resources to cover expenses. The trial judge suggested that "at least implicit in the reasons of Wilson J. is the threshold requirement that the applicant must establish need".[158] This reasoning would appear to create a departure from the radical change requirement in *Pelech*. In addition, treating the continued presence of need (however defined) as a prerequisite to continued support ignores the rationale of permitting a variation only where a radical change has occurred. This restriction on review shows respect for the parties and is designed to inject a measure of finality. The fact that a court might make a different order in the face of the parties' positions should not matter. The thrust of the trilogy is to defer to the parties unless major changes have caused the original arrangement to go awry.

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[155] *See also* J.G. McLeod, *Annot.: Ritchie v. Ritchie* (1988) 16 R.F.L. (3d) 163; J.G. McLeod, *Annot.: Kalavrouziotis v. Kalavrouziotis* (1988) 14 R.F.L. (3d) 376.

[156] *See, e.g., Francis* v. *Francis* (1988), 16 R.F.L. (3d) 149 (Ont. H.C.).

[157] (1988), 16 R.F.L. (3d) 453 (Ont. H.C.).

[158] *Ibid.* at 455, McCart J. *See also Savoy* v. *Savoy, supra*, note 127 at 36, Larlee J.: "[i]t is illogical to require an ex-spouse to continue paying support where there is no longer any need."

6. *Other Bases for Challenging Agreements on Divorce*

To an outsider, the rhetoric of *Pelech* may seem a curious throwback to an erstwhile era — namely, the latter stages of the nineteenth century — when the notion of freedom of contract was at its zenith. It has such an unsavoury libertarian feel, and it seems so out of step with transitions occurring in other spheres of contract law, where an ever-widening list of excuses for contractual non-performance has emerged. But this paradox is more apparent than real. A spousal agreement is not somehow clothed with an immunity from the general law of contract. Indeed, *Pelech* merely *supplements* that law, conferring an additional supervisory power. This is alluded to in *Pelech*, where it is intimated that an agreement will not be upheld if it is unconscionable, in the substantive law sense. More generally, the Supreme Court stated that if a contract is invalid then the question of whether the court should defer to its terms disappears.[159] An agreement which is infected with elements of undue influence, fraud, mistake, *et cetera*, can be undermined on those grounds. The interrelationship between *Pelech* and general contractual principles has been considered in these terms:

> The trial judge found the separation agreement was "not enforceable". Separation agreements that are negotiated by the parties are to be respected and, generally speaking, the parties are to be held to the terms of their contract. That proposition has been stated by the Supreme Court of Canada in *Pelech* v. *Pelech*... and several judgments of this court of which *Cox* v. *Cox*... is an example. However, that proposition is premised on the basis that there has been independent legal advice, that there is valid and informed consent, that no material information has been withheld by one party from the other and that the parties have freely and without duress negotiated the terms by which they have severed their marital relationship.[160]

Given the strictures inherent in the trilogy test, it has been predicted that we might now see more agreements challenged under the general law.[161] So far that has yet to materialize in the reported caselaw, although several decisions have considered the validity of a settlement where the process of bargaining is suspect. For example, in *Crouse* v. *Crouse*[162] the wife successfully claimed that she signed minutes of settlement under pressure from her husband and that,

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[159] *Pelech*, *supra*, note 100 at 268.

[160] Graham v. *Graham* (1988), 83 N.S.R. (2d) 164 at 166 (C.A.), Clarke J. The case dealt with a contract covering matrimonial property. *See also Lindsay* v. *Lindsay* (1989), 21 R.F.L. (3d) 34 (Man. Q.B.) (unconscionability not found).

[161] A. Bissett-Johnson, *Family Law - Judicial Variation of Final Global Settlements* (1988) 67 CAN. BAR REV. 153 at 167.

[162] (1988), 88 N.S.R. (2d) 199, 25 A.P.R. 199 (S.C.). *See also Kristoff* v. *Kristoff* (1987), 7 R.F.L. (3d) 284 (Ont. Dist Ct).

accordingly, the agreement was unconscionable and invalid by reason of the undue influence. A similar result was reached in *Zimmer* v. *Zimmer*[163] through different means. There, the agreement was weighted heavily in the wife's favour. In addition to acquiring almost all of the matrimonial property, she was also to receive $5,000 per month in support for herself and one child. The husband, described by the Nova Scotia Supreme Court as immature and unworldly, had agreed to these terms on the understanding that it was only a temporary measure; he was hoping for a reconciliation. The wife had her solicitor formalize the deal on the premise that this would save the expense of two lawyers. In view of all of this, the agreement was set aside, the court exercising its jurisdiction under section 29 of the Nova Scotia *Matrimonial Property Act*.[164] That section permits a court to vary a spousal contract where it is found to unconscionable, fraudulent or unduly harsh. This latter ground, purely a creature of the statute, was relied upon, and a substantially different resolution of maintenance and property claims was ordered. A question not raised was whether an agreement rendered invalid or variable under provincial law can nevertheless inhibit a divorce court in assessing support under *Pelech*.

The decision of *Brosseau* v. *Brosseau*[165] also concerns fair process in bargaining, but the ruling does not rely on conventional contract doctrine, and may introduce a further accepted excuse for the non-performance of a divorce settlement. In this case, in the course of arranging a settlement, the parties imprudently relied on two lawyers who were related to the husband and who were associated with each other in the practice of law. A settlement was hammered out in which the wife waived all claims to maintenance. Before this was finalized, an attendance with a third lawyer was arranged for the wife, so that she could receive independent legal advice. The wife did attend, but the meeting was short and the wife later asserted that she regarded this step as largely a rubber stamping exercise. On divorce the wife successfully claimed that she should not be bound by the accord.

The judgment in *Brosseau* builds on the substratum of the trilogy. In *Pelech*, Wilson J. spoke of respecting agreements reached on the advice of independent legal counsel.[166] Latching onto this, the Alberta court held that the "unimpeachability"[167] of a settlement is predicated on informed and legitimate bargaining, which should occur without either party labouring under a legally recognized disadvantage. They found that the conflict of interest that existed here constituted such a

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[163] (1989), 90 N.S.R. (2d) 243 (S.C.).

[164] S.N.S. 1980, c. 9.

[165] (1989), 23 R.F.L. (3d) 42 (Alta C.A.) (leave to appeal to S.C.C. refused) [hereinafter *Brosseau*].

[166] *Supra*, note 100 at 269.

[167] *Supra*, note 165 at 47 (*per curiam*).

disadvantage, which the minimalist nature of the second legal opinion had not cured. In sum there was, on the facts, an absence of the "independent *advice* which is fundamental to the successful introduction of the bar sanctioned by the court in *Pelech*".[168] The Court was not prepared to allow the husband to "set up inadequate advice arising out of the errors of his solicitors"[169] as a defence to his wife's attack on the settlement. Although the facts of the case were somewhat peculiar, the decision nevertheless opens a door for challenges which are not necessarily focused on the quality of legal advice, but on the knowledge and consent of one of the spouses. Prior to the trilogy this sometimes justified ignoring settlements, even though the grounds for attack did not fit into any cognate legal or equitable doctrine.

In *Pelech*, Wilson J. appeared to accept that on a challenge to a prior consent order mounted on the basis of procedural unfairness, the order would stand, though a court would justifiably feel more willing to allow a variation. This position may understate the vulnerability of tainted judicial orders. English courts, when confronted with this problem, have been ready to set aside consent orders under some circumstances, such as where it can be demonstrated that there has been material non-disclosure,[170] fraud or mistake.[171] In time, this may become a growth area for Canadian law.

7. *Does the Trilogy Apply to Contractual Terms Concerning Child Support?*

The inapplicability of the *Pelech* rule to child support was discussed in *Richardson*, where it was recognized that child maintenance is the right of the child which the parents could not barter away, and that therefore a court "is always free to intervene and determine the appropriate level of support of the child".[172] Building on this, the British Columbia Court of Appeal in *Dickson* v. *Dickson*,[173] set out the following synopsis of principles:

> (1) The court may override the provisions of an agreement dealing with child support where deemed appropriate having regard to the needs of the children.

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[168] *Ibid.* at 48. *See also Stark* v. *Stark* (1988), 16 R.F.L. (3d) 257 (B.C.S.C.). *Compare Remillard* v. *Remillard*, *supra*, note 143.

[169] *Brosseau*, *ibid.*

[170] *See generally Livesley* v. *Jenkins*, [1985] A.C. 424, [1985] 2 W.L.R. 47 (H.L.).

[171] *See generally* S.M. Cretney, PRINCIPLES OF FAMILY LAW (4th ed.) (London: Sweet & Maxwell, 1984) at 909-11.

[172] *Supra*, note 94 at 312. *See also Kelley* v. *Kelley* (1988), 16 R.F.L. (3d) 238 (B.C.S.C.); *Carruthers* v. *Carruthers* (1988), 15 R.F.L. (3d) 321 (P.E.I.S.C.); *Currie* v. *Currie* (1987), 10 R.F.L. (3d) 207, 49 MAN. R. (2d) 129 (C.A.).

[173] (1987), 11 R.F.L. (3d) 337, 21 B.C.L.R. (2d) 69 (C.A.) [hereinafter *Dickson* cited to R.F.L.].

(2) The nurture of children is inextricably intertwined with the well-being of the nurturing parent.
(3) The children have a right to an increased standard of living in accordance with the combined increase in the earnings of their parents.
(4) Since child support is the right of the child, the fact that an increase in that support will indirectly benefit the custodial spouse cannot make any difference.
(5) The duty to support children is a duty owed to the children and not to the custodial parent.
(6) The court should not award spousal support under the guise of child support.[174]

By contrast, some courts have been influenced by the spirit of the trilogy. As a result, it has been said that the onus of showing that an agreement is not in the best interests of the child is on the party seeking to avoid the agreement;[175] that a court should be reluctant to interfere; and that the policy of protecting the children against the effects of poor bargaining by a parent must not lead courts to be too paternalistic concerning the parents' own arrangements of their affairs.[176]

One of the virtues of extra-curial settlement is that the parties' own estimation on matters such as child care may be better than the courts', and so an agreement is not an irrelevant indicator of proper support levels.[177] As long as the court operates on the assumption that the agreement must be shown to be in the best interests of the child, it seems sensible to require that the party attempting to undermine a settlement should have to show that his or her initial agreement as to support is not what is best for the child.[178]

Of course, not all applications to tinker with child support involve requests to upgrade the level of support. In *Pidgeon* v. *Pidgeon*,[179] a father successfully obtained a reduction when one of the children for whom he was providing support decided to move in with him. The Court held that it could not have been intended that the full measure of child support was to continue under these circumstances. This case, as simple as it appears to be, identifies a *lacuna* in the current doctrine.

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[174] *Ibid.* at 357, Anderson J.A.

[175] *Silverman* v. *Silverman* (1987), 7 R.F.L. (3d) 292, 38 D.L.R. (4th) 40 (*sub nom S.* v. *S.*) (N.S.C.A.). *See also* J.G. McLeod, *Annot.: Silverman v. Silverman* (1987) 7 R.F.L. (3d) 293; *Day* v. *Day* (1989), 20 R.F.L. (3d) 113 (B.C.C.A.); J.G. McLeod, *Annot.: Day v. Day* (1989) 20 R.F.L. (3d) 113; *Desmarais* v. *Desmarais* (1988), 13 R.F.L. (3d) 64, 84 A.R. 353 (Q.B.).

[176] *Boca* v. *Mendel* (1989), 20 R.F.L. (3d) 421 (Ont. Prov. Ct). *See also Droit de la famille - 646* (1989), 20 R.F.L. (3d) 432 (Que. C.A.); D.M. Hendy, *Annot.: Droit de la famille - 646* (1989) 20 R.F.L. (3d) 432.

[177] This was recognized in *Dickson*, *supra*, note 173 at 358.

[178] *See also Conley* v. *Conley* (1988), 12 R.F.L. 202 (N.S.S.C.).

[179] *Supra*, note 153.

The best interests of the child cannot be the sole governing criterion here; a radical change of circumstances would also seem relevant. Such a test would fit with the result in *Pidgeon*.

8. *Does the Trilogy Apply to Original and Variation Applications Where There is no Spousal Agreement of Any Kind?*

None of the controversies generated by the rich exposition of the trilogy have been as tempestuous as the question of whether the doctrine laid down there can be extended to apply to applications for support where no prior agreement exists. On such an expansive reading, the holdings would permeate virtually all facets of spousal support. Many courts have "crossed the Rubicon" and so held;[180] others have steadfastly resisted this incursion.[181] The result has been a pitched battle of considerable intensity, which has included several border wars over such matters as whether or not the trilogy applies to interim proceedings[182] and to claims made under provincial support law. Here, again, there is a severe difference of judicial opinion.[183] The perceived

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[180] *See, e.g., Snyder* v. *Snyder* (1987), 80 N.S.R. (2d) 257, 10 R.F.L. (3d) 144 (C.A.); *Payne* v. *Payne* (1988), 16 R.F.L. (3d) 8 (Ont. H.C.); *Droit de la famille - 382*, [1988] R.J.Q. 2408, 16 R.F.L. (3d) 379 (C.A.); *Williams* v. *Williams* (1988), 13 R.F.L. (3d) 321 (Nfld S.C.); *Brookes* v. *Strohschein* (1987), 84 A.R. 321, 11 R.F.L. (3d) 163 (Q.B.). *See also* D.R. McDermid, *The Causal Connection Conundrum* (1989) 5 C.F.L.Q. 107 at 117-20; K.R. Halvorson, *Causal Connection and Support* (1989) 5 C.F.L.Q. 195 at 197.

[181] *See, e.g., Scobie* v. *Scobie* (1989), 21 R.F.L. (3d) 447 (Sask. Q.B.); *Trainor* v. *Trainor* (1989), 23 R.F.L. (3d) 39 (Sask. C.A.); *Finch* v. *Finch* (9 February 1990) Edmonton Nos. 8603-08896, 4803-,1059 (Alta Q.B.) (digested in [1990] A.W.L.D. para. 191); *Story* v. *Story* (1989), 23 R.F.L. (3d) 225 (B.C.C.A.); *Phibbs* v. *Phibbs* (1 December 1988) No. 088/347/081 (Ont. H.C.) (summarized in 12 A.C.W.S. (2d) 431).

[182] The trilogy applies to interim applications: *see Weppler* v. *Weppler* (1988), 15 R.F.L. (3d) 279 at 282 (Ont. H.C.), Clark L.J.S.C.: "The thrust of the new policy is doggedly pragmatic." *See Miller* v. *Miller* (1988), 15 R.F.L. (3d) 366 (Ont. H.C.); *Iwan* v. *Iwan* (1989), 22 R.F.L. (3d) 306 (Ont. H.C.) (but the onus of proving a causal connection is not as strong as at trial). *See also* L. Wolfson, *The Legacy of Pelech* 10 ADV. Q. 205 at 217-18. *But see Doncaster* v. *Doncaster* (1989), 21 R.F.L. (3d) 357 (Sask. C.A.) [hereinafter *Doncaster*]; *Nadeau* v. *Nadeau* (1987), 10 R.F.L. (3d) 117 (Ont. Dist Ct); *Feehan* v. *Feehan* (1989), 79 NFLD & P.E.I.R. 54, 24 R.F.L. (3d) 185 (P.E.I.S.C.). For a recent review of principles of interim support generally, *see* N.M. Mossip, *Interim Spousal Support — To Pay or Not to Pay?* (1989) 5 C.F.L.Q. 157.

[183] The reasoning under the trilogy informs the application of the *Family Law Act*, S.O. 1986, c. 4: *Stojanowski* v. *Stojanowski* (1987), 10 R.F.L. (3d) 290 (Ont. Prov. Ct); *Currie* v. *Currie* (1988), 13 R.F.L. (3d) 414 (Ont. Dist Ct). *But see Andreeff* v. *Andreeff* (1989), 20 R.F.L. (3d) 277 (Ont. U.F.C.); *Madill* v. *Madill* (1988), 15 R.F.L. (3d) 181 (Ont. Prov. Ct); *Fisher* v. *Fisher* (1989), 22 R.F.L. (3d) 225 (Ont. Div. Ct.) (followed in *McMahon* v. *McMahon* (1990), 720 O.R. (2d) 725, 25 R.F.L. (3d) 357 (H.C.)).

result of this extension is that, as a result of a narrow conception of causal connection and increased resort to rehabilitative maintenance orders, the frequency and quantum of support orders have both been reduced.[184]

Not long after the Supreme Court judgments were handed down, the process of extrapolation began in earnest. The reasoning process is easy to follow. The causal connection requirement makes sense in the context of the *Pelech* rule only if it is meant to define what constitutes an acceptable maintenance entitlement. If this is a critical condition when a judicial order for support is sought in the face of a prior agreement, it should also be controlling in any case in which principles of maintenance are relevant. Moreover, demanding some form of causal connection is a defensible position to stake out in the debate about the proper ambit of the private law of support. As suggested by Wilson J. in *Pelech*, in the absence of old, fault-based notions of support, and at a time in which the status of marriage, without more, is no longer seen as giving rise to a maintenance claim as against a former partner, some other justification is required. The causal connection test provides that rationale. Where marriage has had a debilitating effect on the capacity of a spouse to achieve the appropriate level of self-sufficiency, the effects of this should be borne by both spouses. Additionally, it has been opined that the legislative competence of the federal government over support on divorce can only be justified if there is a nexus between the two.[185]

Strong statements of resistance to the application of the trilogy have emanated from several courts. For example, in *Doncaster*, the Saskatchewan Court of Appeal held that *Pelech* could not be applied "without modification"[186] to applications for interim and permanent maintenance. *Pelech*, it was underlined, was not concerned with initial applications for support. Moreover, the Supreme Court had placed emphasis on the need to avoid ongoing contingent liability for the future misfortunes of former spouses. Indeed, the Court in *Doncaster* took the position that "*Pelech* clearly does not go beyond eliminating liability for future misfortunes occurring long after the separation and unrelated to the marriage."[187] More importantly, it was noted that the requirement of a causal connection appears just once in the 1985 *Act*, in subsection 17(10). Under that provision, a court cannot vary a support order which has expired unless there has occurred a change of

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[184] *See generally* C. Schmitz, "Courts' emphasis on 'self-sufficiency' for *Divorce Act* support awards causing hardships for ex-spouses, kids?" *Lawyers Weekly* (1 September 1989) 1.

[185] *See Goering* v. *Goering* (1988), 13 R.F.L. (3d) 383 (Ont. H.C.). *See also Wark* v. *Wark* (1986), 2 R.F.L. (3d) 337, 30 D.L.R. (4th) 90 (Man. C.A.).

[186] *Supra*, note 182 at 361, Sherstobitoff J.A. *See also Story* v. *Story*, *supra*, note 181; *Finch* v. *Finch* (1990), 103 A.R. 228, 24 R.F.L. (3d) 355 (Q.B.).

[187] *Doncaster*, *ibid.*

circumstance related to the marriage. The implication is that this is the only instance in which a causal connection serves as a condition precedent to an order. Section 15, which governs initial applications, makes no such reference to this requirement. At best, in considering maintenance, the presence or absence of a causal connection may be a factor affecting the exercise of discretion.

Apart from those arguments based on *stare decisis* and statutory interpretation, there is the more general complaint that the causal connection test, as the sole basis for support, is far too impoverished. Unless liberally interpreted, it excludes the recognition of claims which a spouse may have to the fruits of an enhanced standard of living, a standard to which a dependent spouse may have contributed indirectly. Arguably, support law should be concerned not only with repairing the damage of dependency, but also with recognizing the contributions leading to the income earning power of the major breadwinner. If these contributions can be adequately recognized through property reallocation, then fine; but where this is not possible, where the real asset is the human capital of one spouse, then a support order seems just.[188] And on a more general plane, to allow the trilogy to steam-roll provincial and federal support regimes which contain a restitutionary or compensatory support model, or other principles of support, seems a simplistic solution. On divorce, absent a spousal contract, there is little justification for ignoring the "signposts"[189] which a court should take into account by virtue of subsection 15(7) of the *Divorce Act, 1985*.

9. *What is a Relevant Causal Connection?*

Assuming that some consensus can eventually emerge around the essential elements of the doctrines let loose in the trilogy, problems in application are nevertheless bound to persist. Included is the proper application of the causal connection test, in both contractual and non-contractual settings. Indeed, in this vein, *Richardson* may be apocryphal. Recall that in that case, the majority and minority judgments in the Supreme Court differed sharply on whether there existed a nexus between Mrs Richardson's current plight and the responsibilities she assumed during marriage.

In the trilogy, the archetypal instance of an economic pattern of dependency engendered by marriage was identified. This would occur where one spouse, almost invariably the wife, assumes domestic responsibilities, thereby foregoing opportunities in the labour market. A woman who has done so for many years is ill-equipped to seek

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[188] *See also* B.T. Granger & J. Small, *Compensatory Support* (1987) 2 C.F.L.Q. 1. *But see Johnson* v. *Johnson* (1988), 16 R.F.L. (3d) 113 (B.C.C.A.).

[189] Payne, *supra*, note 137 at E-145.

employment on marriage breakdown, especially given the pay inequity which she may encounter in the workplace. But that is the simple case, and there are already a legion of reported decisions which confront the causal connection requirement at its fuzzy edges. For example, in *McAfee* v. *McAfee*,[190] it was found that the former wife's employment capacity and her inability to support herself were "causally and inextricably related to the marriage."[191] This economic disability arose because of her fragile health, which itself could be traced to the marriage and the birth of her son. In *Lessany* v. *Lessany*[192] it was held that the wife's difficulty with the English language, which affected her employment prospects, was caused by the roles assumed during marriage, and hence a causal connection was made out. And in *Alexander* v. *Alexander*[193] the wife's poor skills in money management were ascribed to the role she played during marriage, thereby giving rise to a finding that her current financial plight, after having squandered a prior award, was due in part to a pattern of dependency occasioned by the marital relationship.

The inherent difficulty in applying the causal connection test in a thoroughly rational fashion is that it invokes the concept of causation, a legal construct of bedeviling complexity. The parameters of this tack in the context of spousal support have not yet been explored rigorously. What is the true nature of the causal link that is required? Is it enough to show that the marriage is a cause *sine qua non* to the current plight of the claimant? Even if so, how can one demonstrate that but for the marriage the claimant would or could have developed the capacity for self-sufficiency? In the application of a "but for" or *sine qua non* test of causation it is necessary to consider the possible outcomes which could have arisen absent the marriage; one must ask what might have occurred in a world in which this marriage had not taken place. The number of counterfactuals which could be deployed in this analysis are boundless. As an example, in some cases one might surmise that had the claimant not married this respondent, he or she might have married someone else and a comparable dependency might have developed.

On the other hand, one might presume that it will be the rare case in which marriage does *not* significantly alter the way the lives of married people unfold.[194] Rarely will the economic fortunes of spouses be unaffected, both *inter se* and at large, by the marriage.

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[190] (1989), 21 R.F.L. (3d) 75 (B.C.S.C.). *See also Fairall* v. *Fairall* (1989), 20 R.F.L. (3d) 107 (Alta Q.B.).

[191] *Ibid.* at 82, Allan L.J.S.C.

[192] (1988), 17 R.F.L. (3d) 433 (Ont. Dist. Ct.).

[193] (1988), 15 R.F.L. (3d) 422 (N.S.S.C.).

[194] *See* R.E. Salhany, *Causal Connection - Is There a New Test for Spousal Support?* (1989) 5 C.F.L.Q. 151 at 153.

There is no principled reason why a lost opportunity for employment or advancement should be ruled out as a consideration, except that these will always involve prognostication and speculation. Given that marriages often prompt changes in lifestyle, should not the courts presume, or readily find, some level of causal connection when a partner assumes domestic responsibilities? Only the ultimate holdings on the facts, made in *Pelech* and *Richardson*, preclude this more generous reading of the causal connection test.

Whatever might be said to be embraced as a sufficient causal connection, there has emerged a category of case which has been found to fall outside the definition of that concept — those in which a spouse is unable to achieve self-sufficiency due to a serious illness, which might have arisen during the marriage, but is otherwise unconnected to it. A rigorous application of the causal connection requirement means that such people will not generally be able to look to their former spouses on divorce for financial aid when the malady inhibits or precludes employment. In *Willms* v. *Willms*,[195] the Ontario Court of Appeal adopted this view, contrary to the holdings in other courts in that province and elsewhere.[196] Among this latter group is the Saskatchewan decision in *Hammermeister* v. *Hammermeister*,[197] where continuing support was ordered in favour of a chronically ill woman. That court nevertheless effectively articulated some of the undesirable implications of its own approach:

> If one spouse must be responsible indefinitely for the care of the other spouse because of an incurable illness arising during the course of the marriage, although the marriage is subsequently terminated, we would have in our society an anomalous standard. A spouse who is fortunate enough to completely terminate the marital relationship, for example,

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[195] (1988), 14 R.F.L. (3d) 162, 27 O.A.C. 316 (C.A.) [hereinafter *Willms*]. *See also Miller* v. *Miller*, *supra*, note 182; *Francis* v. *Francis* (1988), 16 R.F.L. (3d) 149 (Ont. H.C.); *Perrin* v. *Perrin* (1988), 17 R.F.L. (3d) 87 (Ont. Dist. Ct.); *Pilon* v. *Pilon* (1988), 66 O.R. (2d) 1, 16 R.F.L. (3d) 225 (C.A.) (leave to appeal to S.C.C. refused: (1989) 66 O.R. (2d) xi); *Winterle* v. *Winterle* (1987), 10 R.F.L. (3d) 129 (Ont. H.C.); *Williams* v. *Williams*, *supra*, note 180; *Droit de la famille - 608*, [1989] R.J.Q. 522 (Que. C.A.). *See also Schroeder* v. *Schroeder* (1987), 11 R.F.L. (3d) 413 (Man. Q.B.) and *Duff* v. *Duff* (1988), 12 R.F.L. (3d) 435 (Ont. H.C.) where transitional support was ordered.

[196] *See Smith* v. *Smith* (1987), 63 O.R. (2d) 146, 11 R.F.L. (3d) 214 (H.C.); *Wettlaufer* v. *Wettlaufer* (1988), 12 R.F.L. (3d) 379 (Ont. Dist Ct); *Evans* v. *Evans* (1988), 16 R.F.L. (3d) 437 (Ont. H.C.); *Madill* v. *Madill*, *supra*, note 183; *Dumais* v. *Dumais* (1988), 14 R.F.L. (3d) 337, 54 MAN. R. (2d) 13 (C.A.). *See also Smithson* v. *Smithson* (1988), 15 R.F.L. (3d) 393 (B.C.S.C.), where in *obiter* the trilogy was taken to apply to support applications generally. Nevertheless, the Court was prepared to order continuing support in the special circumstances (the wife's chronic illness) had it been necessary to do so. Instead, the Court was satisfied that the property order would provide the wife with adequate protection. *See further Grader* v. *Grader* (1989), 22 R.F.L. (3d) 130 (Ont. H.C.).

[197] (1988), 14 R.F.L. (3d) 27 (Sask. Q.B.).

> several weeks before the onset of the debilitating disease of the other spouse would be forever freed of the responsibility for caring for that person — the obligation to support the afflicted individual would be the communal responsibility of the state. But if the debilitating illness occurred immediately prior to the complete settlement of all of the affairs of the spouses, as a prelude to termination of the marriage, the healthy spouse would presumably be indefinitely responsible for the care of the spouse who suffered the misfortune, even though the misfortune had no causal connection to the marriage. Even if the illness occurred immediately after a complete settlement of all marital affairs, perhaps the determination of responsibility for continuing care would depend upon whether the illness arose during the continuance of the marriage, even though not diagnosed until after termination thereof.
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> If the determining factor is, in fact, whether the illness, necessitating the need for maintenance, arose during the course of the marriage, other scenarios can be envisioned which would emphasize the inequity between the status of spouses and former spouses. One such scenario might entail, as in this instance, one spouse being afflicted with a degenerative and incurable illness; the marriage is ultimately at an end in all but name; the marriage is legally terminated; the healthy spouse must bear the responsibility for continuing care; but the healthy spouse remarries and his new spouse is similarly afflicted. Even if the healthy spouse's ability to pay is not in serious question, the healthy spouse would unquestionably be entitled to bewail his misfortune in not having terminated his marriage before the onset of the misfortunes, and thereby shifting the burden of perpetual care to the state.[198]

The ostensibly calloused stance taken in *Willms* can be tempered in several respects. The premise of the case is that the affliction was not rooted in any way in the marriage. In the case of mental (and some physical) illness, discerning the underlying cause from a purely medical perspective may be impossible. In *Story* v. *Story*, the British Columbia Court of Appeal doubted that marriages, especially of long duration, could not somehow be linked to a mental disability which manifests itself during marriage, or after breakdown.[199]

Additionally, as Carol Rogerson has observed, it would be wrong in some cases to treat an illness occurring during marriage (though not strictly caused thereby) as an intervening event which invariably is regarded as breaking the causal chain of dependency.[200] A spouse suffering, for example, from a chronic disease, may be unable to obtain self-sufficiency as a result. But that illness may have had a different

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[198] *Ibid.* at 34.

[199] *Supra*, note 181. *See also Bodzian* v. *Bodzian* (9 April 1990) Vancouver No. D070964 (B.C.S.C.) (digested in [1990] W.D.F.L. para. 605). *Compare Weisman* v. *Weisman* (15 November 1988) No. 088/337/020 (Ont. Dist Ct) (summarized in 12 A.C.W.S. (3d) 326).

[200] *See also Klassen* v. *Klassen* (1990), 25 R.F.L. (3d) 277, 63 MAN. R. (2d) 201 (Q.B.).

impact on some other vocation which the spouse could have pursued but for the marriage. Moreover, a spouse who drops out of the labour force to take up domestic duties, may also have given up employment benefits which would cushion the hardship occasioned by incapacity. In Professor Rogerson's words: "[t]he marriage may not have caused the illness, but it may have affected a spouse's ability to economically cope with an illness."[201]

Finally, the *Willms* decision, even absent these tempering considerations, may be terribly out of step with what the average Canadian would regard as right. In this vein, consider the results of Lenore Weitzman's California study as it relates to attitudes about the proper role of "alimony" on divorce. She asked respondents to identify which among twelve grounds for alimony they felt could be justified. The highest measure of approval was given to the notion that a woman would deserve alimony if she was disabled and could not support herself. Of the women questioned, over 94% expressed approval; 87% of the men adopted the same position.[202] Would Canadians feel differently?

10. *Questions of Quantum and Duration*

The causal connection test sets only a threshold to entitlement and once met forces the next issues to be addressed, namely the appropriate level and duration of maintenance. The trilogy is essentially silent on this point and, remarkably, there has been little debate on the appropriate principles to be applied.[203]

Starting from a position of abject triteness, one may say that support should be based on need, but that need is an ambiguous and relative term. Under conventional support models, need was pitched at the standard of living enjoyed during marriage. The analogue was the type of compensation applicable for a breach of contract — the court endeavoured to place the dependent spouse in the position that person would have been in had the marriage continued. The issue of policy is whether the contract analogy remains viable under a dependency-caused-by-marriage rationale of support. Perhaps the standard should, instead, draw on a tort analogue, so that the amount ordered should ideally attempt to place the dependent in the position he or she would have been in had the marriage, and the resultant dependency, not intervened. Assuming this could be calculated, the figure might

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[201] C. Rogerson, *The Causal Connection Test in Spousal Support Law* (1989) 8 CAN. J. FAM. L. 95 at 128.

[202] L. Weitzman, THE DIVORCE REVOLUTION (New York: Free Press, 1985) at 152.

[203] *See* T. Hainsworth, *The Interrelation of Support and Property Rights* (1989), 5 C.F.L.Q. 103 at 105: "[t]he 'causal connection' test is designed to prevent...injustice. It now defines when support should be granted, how much should be paid, and how long support should continue."

sometimes be higher than the standard of living enjoyed during the marriage. In *Heinemann* v. *Heinemann*,[204] the Nova Scotia Court of Appeal broached this question, inclining to some extent to the tort damages idea:

> In my opinion, the tendency will be to return the spouses to the position in life they would have attained had they not diverted their talents to the development of a family. The standard of living to which they will be entitled will be that of a reasonable standard under all of the circumstances and not tied to that of the spouse from whom they have been separated. An equalization of wealth must be left to property settlements under provincial statutes. Maintenance payments should not, in my opinion, be utilized to equalize the standard of living of the former spouses at the termination of a modern marriage but should be directed towards the re-establishment of both parties to positions of reasonable economic self-sufficiency and then be allowed to cease.[205]

Closely allied to this facet of support is the matter of the appropriate duration of support. If the purpose of support is to accommodate a dependency, payments should only continue, at the latest, until the effects of dependency are overcome and the once-dependent spouse is self-sufficient.[206] In pursuit of this, many courts have granted time-limited orders, which create a transition period during which a spouse is expected to overcome the marriage-based financial dependency. By the same token, it has been recognized that self-sufficiency will sometimes be an unrealistic goal, particularly in what is occasionally termed a "traditional" (as opposed to a "modern") marriage.[207] The introduc-

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[204] (1989), 20 R.F.L. (3d) 236, 60 D.L.R. (4th) 648 (N.S.C.A.). It is by no means clear that the Court of Appeal endorsed the applicability of the trilogy in a non-contractual setting. Allister Bissett-Johnson thinks not: *see* A. Bissett-Johnson, *Support Based on Lifestyle: A Commentary on Heinemann v. Heinemann and Lynk v. Lynk* (1989) 22 R.F.L. 251 at 256-57:

> [T]he Court of Appeal took the opportunity, after an extensive review of the case law, to confine the comments of the Supreme Court of Canada to cases where there were final settlement agreements. The need to show a 'marriage based dependency' did not apply in the absence of such agreements.

Compare J.G. McLeod, *Annot.: Heinemann v. Heinemann* (1989) 20 R.F.L. (3d) 237:

> The reasons [in *Heinemann*] confirm the new support philosophy: the purpose of support is to redress economic disadvantage resulting from the roles adopted in marriage....The Court of Appeal appears to adopt a theory of support based on compensating a spouse for economic loss attributable to the roles adopted in marriage.

See also J.G. McLeod, *Annot.: Lynk v. Lynk* (1989) 21 R.F.L. (3d) 338.

[205] *Ibid.* at 272-73, Hart J.A. *See also Sabharwal* v. *Sabharwal* (1990), 95 N.S.R. (2d) 216, 25 R.F.L. (3d) 72, (Fam. Ct) (applying *Heinemann* in proceedings under the *Family Maintenance Act*, S.N.S. 1980, c. 6).

[206] *See further* C. Rogerson, *supra*, note 201.

[207] *See Heinemann* v. *Heinemann*, *supra*, note 204; *Lynk* v. *Lynk* (1989), 21 R.F.L. (3d) 337 (N.S.C.A.); *Van Dyke* v. *Van Dyke* (1987) 8 R.F.L. (3d) 303 (Ont. Dist Ct).

tion of language of this nature adds only unhelpful stereotypes. The important point is merely that complete financial independence is not always going to be possible;[208] enough said.

E. Spousal Support: Other Developments

1. Appeals

In the previous survey it was observed that the 1985 *Act* did not attempt to reformulate the basis for appellate court intervention.[209] Two different approaches could be discerned under the 1968 *Act*. In matters of spousal support, at least, the British Columbia Court of Appeal had attributed to itself an "independent discretion"[210] and in consequence it had displayed a willingness to indulge in reviews of a *de novo* nature.[211] The prevailing rule in Ontario was that only errors in principle, such as the failure to consider relevant factors, should prompt appellate intervention.[212] Where such an error had occurred the reviewing court could then grant such orders as were available at trial. This was among the issues addressed by the majority in *Pelech*, where the Ontario view was endorsed.[213] The Court had clearly established this position in relation to custody appeals, which are governed by the same statutory wording. So now there can be little doubt that the basis of appeal in corollary relief matters is congruent with the general rules governing appellate review. A number of provincial courts of appeal, including British Columbia's, have towed the line and explicitly followed *Pelech* on this point.[214]

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[208] *See, e.g., Brace* v. *Brace* (1988), 16 R.F.L. (3d) 287 (Ont. H.C.); *Moge* v. *Moge* (1990), 25 R.F.L. (3d) 396, 64 MAN. R. (2d) 172 (C.A.). *See also Porter* v. *Porter* (1987), 12 R.F.L. (3d) 19 (Sask. Q.B.).

[209] *Supra*, note 1 at 177-78.

[210] *Carmichael* v. *Carmichael* (1976), 27 R.F.L. 325 at 329, 69 D.L.R. (3d) 297 (B.C.C.A.), Farris, C.J.B.C.

[211] *See, e.g., Piller* v. *Piller* (1975) 17 R.F.L. 252, 54 D.L.R. (3d) 150 (B.C.C.A.). *But compare Phillips* v. *Phillips* (1984) 43 R.F.L. (2d) 462 (B.C.C.A.) (in relation to appeals from interim maintenance awards). *See further* McLeod, *Annot.: Pelech v. Pelech*, *supra*, note 103 at 226-27.

[212] *Harrington* v. *Harrington* (1981), 33 O.R. (2d) 150, 22 R.F.L. (2d) 40 (Ont. C.A.).

[213] *Supra*, note 100 at 245. The same conclusion was reached concerning the proper approach to appeals before the Supreme Court of Canada: *supra* at 251. Patently, the correct articulation of the manner in which a court should review a prior consent order raised issues of law, and were, therefore, properly the subject of appeal.

[214] *See, e.g., Kurcz* v. *Kurcz* (1989), 20 R.F.L. (3d) 206 (B.C.C.A.); *Harrower* v. *Harrower* (1989), 21 R.F.L. (3d) 361 (Alta C.A.); *Heinemann* v. *Heinemann*, *supra*, note 195; *Harris* v. *Harris* (1988), 19 R.F.L. (3d) 27 (Ont. C.A.); *Reid* v. *Reid* (1989), 19 R.F.L. (3d) 461 (Sask. C.A.); *Saunders* v. *Saunders* (1988), 14 R.F.L. (3d) 225 (Sask. C.A.). The same rule applies in marital property cases: *Elsom* v. *Elsom*, [1989] 1 S.C.R. 1367, 20 R.F.L. (3d) 225; *Green* v. *Green* (1989), 23 R.F.L. (3d) 398 (N.S.C.A.).

2. *Types of Orders*

An issue which has been mooted for some time has been the acceptability of cost of living adjustment (C.O.L.A.) clauses in divorce court orders. These are not uncommonly found, but it has never been resolved as to whether they owe their vitality to the order or the underlying agreement. *Richardson* provided the Supreme Court with a perfect opportunity to settle the uncertainty, since in that case the trial court had inserted such a provision. The majority of the Supreme Court, having disposed of the case on other grounds, chose not to consider the C.O.L.A. clause. However, La Forest J. did speak to this matter, endorsing the validity and desirability of such clauses.[215] They can provide a useful vehicle to reduce variation applications prompted, for example, by inflation. While it is true that automatic adjustment provisions can, at times, be crude tools, appropriate adjustments by court order remain possible. Nothing in law or policy spoke against validity. While these views are the *obiter* statements of a single puisne judge in dissent on the main issue, they represent an important statement nonetheless, so it is scarcely surprising that these comments have been relied upon by lower courts.[216]

3. *Variations and Provisional Orders*

The *Divorce Act, 1985* introduced a provisional order mechanism which is available in variation proceedings under the *Divorce Act*.[217] This device, borrowed from provincial maintenance (and maintenance enforcement) legislation, allows for a provisional order for variation to be made in one province, which can then be confirmed in another.[218] This was a monumental improvement over the old law, under which variations could only be entertained by the court which had granted the original order.[219]

Several decisions have attempted to confine the ambit of this new procedure. In *Maxmitch* v. *Maxmitch*,[220] the Court refused to grant a

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[215] *Richardson, supra*, note 101 at 327.

[216] *See, e.g., Kerr* v. *Kerr* (1989), 22 R.F.L. (3d) 221 (Sask. C.A.). *See also Vogel* v. *Vogel* (1988), 18 R.F.L. (3d) 445 (Ont. H.C.), where an order under the *Divorce Act, 1985* was tied to the Consumer Price Index. There was no explicit reference to the dissent in *Richardson*. *See further Baker* v. *Baker* (1989), 22 R.F.L. (3d) 346 (Ont. U.F.C.).

[217] *Divorce Act, 1985*, R.S.C. 1985 (2d Supp.), c.3, s.18(2).

[218] *See Smith* v. *Rubin* (1988), 15 R.F.L. (3d) 177 (Ont. H.C.) (confirmation was refused).

[219] *Divorce Act*, R.S.C. 1970, c.D-8, s.11(2). *See also Divorce Act, 1985*, R.S.C. 1985 (2d Supp.), c.3, s.5.

[220] (1987), 8 R.F.L. (3d) 54, 48 MAN. R. (2d) 302 (Q.B.). *See also Mahar* v. *Mahar* (1987), 10 R.F.L. (3d) 276, (N.B.Q.B.).

provisional order, granting instead a final order of variation. The husband applied in Manitoba for a reduction in his support obligations and served his former wife (who was living in Alberta at the time) with notice of these proceedings. She filed a response in the Manitoba court and asked that court to dismiss the application and, in the alternative, requested (to no avail) that a provisional order be made. The *Act* allows such orders to be made "without notice and in the absence of the respondent",[221] if it is satisfied that the issues can be adequately determined through this procedure. This, it was held, permitted the court to proceed only where the respondent had not received notice. Where notice is given, the applicant has the right to ask a court to vary a support order, made in another province, on a final basis.

Section 18 was explored further in *Adams* v. *Adams*,[222] where the submission that a provisional order could only be granted in applications made without notice to, and in the absence of, the respondent was also accepted. But, unlike *Maxmitch*, this was not taken to mean that the court was then required to entertain the motion to vary. A court, it was said, should be "alive to considerations of procedural fairness".[223] So, where practical problems affect the ability of the respondent to make representations, or where there is inadequate information, the court may decline to hear the application. It was suggested that principles analogous to the doctrine of *forum non conveniens* might well develop to provide guidance where problems of this nature arose.

Not all courts have taken such a restrictive reading of the availability of provisional orders. In *Walker* v. *Walker*,[224] with little stated analysis, it was assumed that the *Act* gave the court a discretion to proceed provisionally, even where notice had been given. That approach appears to best reflect both the policy of the reform, while remaining faithful to a reasonable interpretation of the statute. Provisional orders were designed to provide a convenient procedure for both former spouses. To allow one party to, in effect, subvert or control this by the simple expedient of serving notice, cannot have been what was contemplated by the framers of the legislation. Ultimate control over the decision to proceed provisionally should rest with the court in which the variation is sought, and that is why a discretion is

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[221] *Divorce Act, 1985*, R.S.C. 1985 (2d Supp.), c.3, s.18(2).

[222] (1986), 3 R.F.L. (3d) 157, 4 B.C.L.R. (2d) 330 (S.C.) [hereinafter cited to R.F.L.].

[223] *Ibid.* at 162, Paris J.

[224] (1987), 8 R.F.L. (3d) 270 (N.S.S.C.). *See also Whalley* v. *Barsalou* (1988), 86 N.B.R. (2d) 296 and *Foley* v. *Foley* (1987), 8 R.F.L. (3d) 98, 66 NFLD & P.E.I.R. 81 (Nfld U.F.C.) where it was said that the person seeking a provisional order bears the burden of persuading the court that the application ought to be heard in that manner. Obviously, this can only be effective as against a respondent without notice.

conferred in section 18.[225] Subsection 18(2) of the *Act* appears to create only two pre-conditions to the making of a provisional order, once a variation is sought: (i) the respondent must be ordinarily resident in another province; and (ii) the court must be satisfied that a provisional order is appropriate.[226] If these exist, a provisional order may be made without notice to the respondent. This describes only the possible effect of such an order, making it patent that proceedings can be started though one party may be totally unaware that this is so. The ability to grant an order with notice is not mentioned since it should be regarded as implicit.

The provisional order mechanism obviously cannot replicate fully a conventional hearing and some of the logistics are not spelled out in the legislation, leaving open the matter of how best to proceed. In *Watters* v. *Watters*,[227] the original Court (in Nova Scotia) was unable to fix the quantum of support on the basis of the material before it, and so remitted this determination to the confirming Court (in Prince Edward Island). That Court refused to confirm, or to take up the assigned task of fixing the award. It was held that the initial Court should determine quantum on the basis of the applicant's need, leaving it to the confirming Court to assess whether the respondent has the ability to make the payments which have been provisionally ordered. Although not directly considered in *Watters*, one must assume that the respondent could also challenge the initial finding of entitlement.

4. *Empirical Data*

The Department of Justice's EVALUATION OF THE DIVORCE ACT[228] provides — at long last — a review of empirical data touching on the financial implications of divorce. Among its many findings, the study confirmed that the financial position of women (and children) following divorce in Canada is dismal. Lamentably, a standard of living below the poverty line for almost half of women on divorce:[229]

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[225] *See also* J.G. McLeod, *Annot.: Mahar v. Mahar* (1987) 10 R.F.L. (3d) 276.

[226] *See, e.g., Reid* v. *Reid* (7 October 1988) Saskatoon No. 887 (Sask. Q.B.) (digested in [1988] W.D.F.L. para. 2280), *aff'd* (1989), 19 R.F.L. (3d) 461 (Sask. C.A.).

[227] (2 May 1989) No. F.S.C. 2104 (P.E.I.S.C.) (digested in [1989] W.D.F.L. paras 975, 1419).

[228] Department of Justice, EVALUATION OF THE DIVORCE ACT — PHASE II: MONITORING AND EVALUATION (May 1990) [hereinafter the EVALUATION].

[229] *Ibid.* at 94.

Comparison of Economic Aspects of Divorce
Before and After the Divorce Act, 1985
(Client Interview Data)
(Percentages)

		1986	1988
1)	Women's earnings as percentage of men's earnings	64	68
2)	Proporation of women and their children below the poverty line	58	46
3)	Proportion of women and children below the poverty line if support were sole source of income	97	97
4)	Proportion of men below the poverty line after paying support	11	13
5)	Average percent of gross income paid by men in support	18	16
6)	Average percent of women's income derived from support	35	24
7)	Average gross monthly income		
	a) men	2343	2803
	b) women	1506	1920

The study found that spousal support was rarely requested and granted. Only in 16% of the files reviewed was an order sought[230] and in 14% of these cases was some form of monetary order given.[231] The average award was $553.00 per month.[232] Given this, one of the most remarkable features of this facet of the EVALUATION relates to the perceived satisfaction levels of recipient ex-spouses concerning support awards. When asked whether they were satisfied with the level of support awarded, 76% answered yes, 7% were unsure, and 17% were dissatisfied. Of the men, only 37% were satisfied, 12% were unsure and 50% were dissatisfied.[233]

Carol Rogerson has also completed a rather monumental analysis of spousal and child support issues, drawing on the reported decisions under the *Divorce Act, 1985*.[234] While her conclusions are far from

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[230] *Ibid.* at 75. Various reasons for the failure to apply were advanced by the women in the interview sample: perceived self-sufficiency (54%); knew ex-husband could not pay (4%); no need (9%); seeking child support (2%); felt no order would be made (7%); does not believe in it (10%); wanted a clean break (14%): *supra* at 77.

[231] *Ibid.* at 76. In another 14% of the cases, the files contained the notation "leave to apply", and therefore did not contain an indication of the final outcome.

[232] *Ibid.* at v.

[233] *Ibid.* at 79.

[234] C. Rogerson, JUDICIAL INTERPRETATION OF THE SPOUSAL AND CHILD SUPPORT PROVISIONS OF THE DIVORCE ACT, 1985 (Faculty of Law, University of Toronto, 1990) [unpublished] (summary of paper prepared for the Department of Justice).

heartening, she provides some indication that the new legislation has not worked as harshly as some have feared. So, it was found that the goal of self-sufficiency was, generally speaking, not being pursued relentlessly in traditional marriages of long duration, and that here the causal connection test tended not to be applied strictly to deny entitlement.[235] As a corollary, time-limited orders were less common in such instances, a finding which is consistent with that contained in the EVALUATION.[236] Looking globally at this aspect, it was said that in many cases the courts were operating in a way that could be "deemed reasonable".[237] However, the quantum of support in these cases was seen to be low, leaving divorced women with a standard of living below that enjoyed by their former husbands.

Rogerson's study reveals much more. She found that in assessing the prospects for self-sufficiency, some courts "completely disregarded women's on-going child-care responsibilities".[238] Moreover, while many courts appear willing to suspend the impact of the obligation to pursue self-sufficiency while children remain at home, the support entitlement may be ended soon afterwards. Such women, it was reasoned, may be viewed as on the threshold of self-sufficiency, having been moving towards that goal for several years. In general, it was found that the group suffering most from the impact of the new law were women in their thirties or forties, who had reduced or ceased remunerative employment, and who often assumed the custodial responsibilities after divorce. Here principles of self-sufficiency were more often invoked.[239] Again, this comports with the results contained in the EVALUATION.[240]

F. Custody, Access and Support

For reasons which are not self-evident, the number of divorces involving children dipped drastically in the first year of the implementation of the *Divorce Act, 1985*. Children were implicated in 34% of the divorce petitions in 1986, compared with 52% under the old law.[241] Perhaps this is a manifestation of the "baby bust": the birth rate is

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[235] *Ibid.* at 30. "Generally, traditional homemakers aged 50 years and older are not being completely abandoned and left to their own resources because of a dogmatic adherence to the philosophy of spousal self-sufficiency": *supra* at 33 ff.

[236] *Supra*, note 228 at v. *See also* Rogerson, *ibid.* at 26.

[237] Rogerson, *supra*, note 234 at 93.

[238] *Ibid.* at 67. This, of course, is not always so: *see supra* at 70 ff.

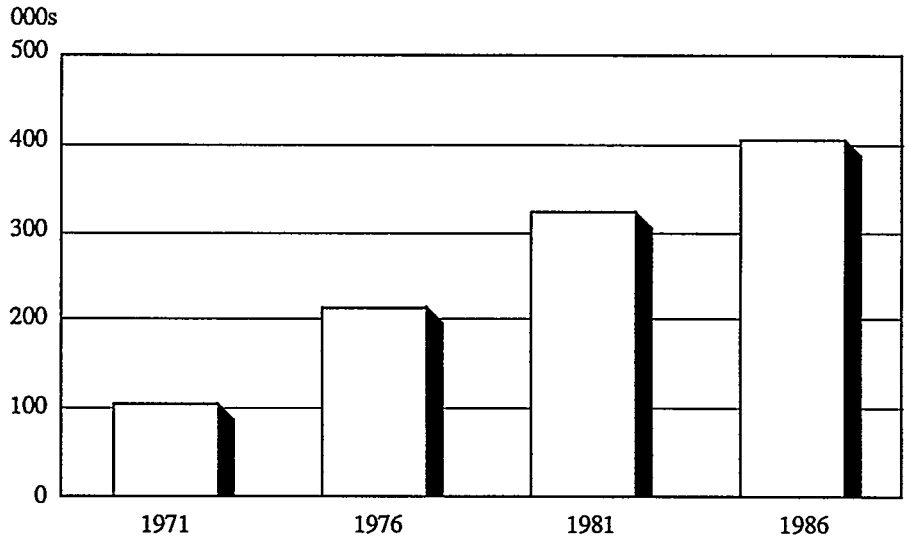
[239] *Ibid.* at 8. Additionally, the signposts contained in the new legislation have done little to promote judicial uniformity. A wide diversity of judicial approaches to resolving support claims was found: *supra* at 8. This, too, was concluded in the EVALUATION: *supra*, note 228 at v.

[240] *Supra*, note 228 at v.

[241] Adams, *supra*, note 76 at 19.

sinking,[242] while infertility has risen markedly.[243] Concomitantly, the number of childless couples has increased, nearly doubling since 1961,[244] and the age of mothers at the time of the first birth has also climbed.[245] Despite these trends, it remains true that thousands of children experience directly the divorcing process each year, swelling the ranks of those that had gone before them. In 1985, over 50,000 dependent children were members of divorcing families,[246] and since 1971 the number of children living with divorced lone parents has grown:[247]

Number of children living with divorced parents, 1971-1986



When one considers the amount of litigation commenced under provincial law, concerning married and unmarried parents, the real dimensions of the phenomenon become clearer still.

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[242] McDaniel, *supra*, note 15 at 11.

[243] Statistics Canada, CURRENT DEMOGRAPHIC ANALYSIS, FERTILITY IN CANADA: FROM BABY-BOOM TO BABY-BUST (Ottawa: Minister of Supply and Services Canada, 1984) at 11.

[244] M. Boyd, *Changing Family Forms: Issues for Women* in N. Mandell & A. Duffy, eds, RECONSTRUCTING THE CANADIAN FAMILY: FEMINIST PERSPECTIVES (Toronto: Butterworths, 1988) 85 at 90.

[245] Statistics Canada, CURRENT DEMOGRAPHIC ANALYSIS, *supra*, note 7 at 29. *See also* THE FAMILY IN CANADA, *supra*, note 6 at 20.

[246] THE FAMILY IN CANADA, *ibid.* at 38.

[247] *Ibid.* at 39.

1. *Children of the Marriage*

The child support, custody and access provisions of the *Divorce Act, 1985* apply only to children of the marriage, by which is meant natural children, those with whom both parents stand *in loco parentis*, or those natural children of one spouse, with whom the other spouse stands *in loco parentis*.[248] Excluded is a child who is 16 years of age or more, unless that person is unable, owing to illness, disability or other cause, to withdraw from the care of his or her parents.[249] There are two soft spots in this formulation — the constituent elements of standing *in loco parentis*, and the acceptable causes which would justify a finding that a child was unable to leave the nest. Both of these questions have continued to prompt judicial treatment.

Since *Jackson* v. *Jackson*[250] it has been understood that the phrase "or other cause" should not be confined by a *ejusdem generis* interpretation, but should be read expansively.[251] This has meant that an "adult" child who is in attendance in school, including university, may be entitled to support.[252] First degrees tend to be looked on sympathetically.[253] Moreover, even where the child must live away from home to attend school, he or she may still be regarded as under the charge of his parents,[254] for to hold otherwise would of course place the child whose family did not live near a suitable university in a disadvantageous position. Causes other than school attendance have justified a finding that a child falls within the ambit of the statutory definition. In one instance, unemployment qualified as a sufficient cause.[255] In another, a British Columbia court held that an 18 year old

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[248] R.S.C. 1985 (2d Supp.), c.3, s.2(2).

[249] R.S.C. 1985 (2d Supp.), c.3, s.2(1).

[250] [1973] S.C.R. 205, 29 D.L.R. (3d) 641.

[251] *But see Matthews* v. *Matthews* (1988), 11 R.F.L. (3d) 431, 68 NFLD & P.E.I.R. 91 (Nfld S.C.).

[252] *See, e.g., Thompson* v. *Thompson* (1987), 6 R.F.L. (3d) 161 (Ont. H.C.).

[253] *See, e.g., Smith* v. *Smith* (1989), 23 R.F.L. (3d) 89 (Man. Q.B.); *Tutiah* v. *Tutiah* (1988), 14 R.F.L. (3d) 37, 36 MAN. R. (2d) 76 (Q.B.); *Saunders* v. *Saunders* (1987), 10 R.F.L. (3d) 437, 60 SASK. R. 92 (Q.B.), *aff'd* 14 R.F.L. (3d) 225 (C.A.); *Chalifour* v. *Chalifour* (1990), 82 NFLD & P.E.I.R. 345, 25 R.F.L. (3d) 455 (Nfld U.F.C.); *Ramsay* v. *Ramsay* (1989), 73 NFLD. & P.E.I.R. 66, 229 A.P.R. 66 (P.E.I.T.D.); *Bird* v. *Bird* (1988), 53 MAN. R. (2d) 13 (Q.B.); *Cook* v. *Cook* (21 February 1990) No. 0779A (Nfld S.C.) (digested in [1990] W.D.F.L. para. 467); *Sosulski* v. *Sosulski* (1987), 63 SASK. R. 153 (Q.B.). *See also Strachan* v. *Strachan* (1986), 2 R.F.L. (3d) 316 (Ont. H.C.). *Compare Berry* v. *Berry* (1986), 1 R.F.L. (3d) 444 (Man. Q.B.); *Harris* v. *Harris* (1989), 19 R.F.L. (3d) 102 (Man. C.A.); *Koulson* v. *Koulson* (1989), 19 R.F.L. (3d) 306 (Man. Q.B.); *Stites* v. *Stites* (8 February 1990) Saint John No. F.O.S.J.-9523-89 (N.B.Q.B.) (digested in [1990] W.D.F.L. para. 475), discussed in text accompanying note 260, *infra*.

[254] *See, e.g., Thomas* v. *Thomas* (1986), 5 R.F.L. (3d) 406 (B.C.S.C.); *Bird* v. *Bird, ibid.*

[255] *Smith* v. *Smith* (1987), 12 R.F.L. (3d) 50 (B.C.S.C.). *Compare Linton* v. *Linton* (1988), 11 R.F.L. (3d) 444, 64 O.R. (2d) 18 (H.C.).

who planned to return home after he was released from jail still counted as a child of the marriage.[256]

Merchant has trenchantly criticized the liberal trend under which orders for support are commonly obtained for children engaged in some form of post-secondary education.[257] Awards for children above sixteen years of age, he argues, were meant to be exceptional and that this is signalled by the other specific pre-conditions of "illness" and "disability". There must be an inability to withdraw,[258] or to obtain the necessities of life. The courts, in bending these strictures, "have created a definition quite different from that which was apparently intended by Parliament....This development of the law has become an assumption — if a child is going to go to university, support should be paid."[259] Merchant is not alone in this view. In *Stites* v. *Stites*,[260] it was held that, despite the perceptions of some, higher education was not one of the necessaries, although, exceptionally, an order might be made where the child was at university prior to the breakdown, where the child was attending with the encouragement and support of both parents, or where an obligation has been assumed in a separation agreement.

While it may be true that the first mistake in the process of interpretation was to eschew a *ejusdem generis* reading of the statute, the retention of the formulation of the definition in the 1985 *Act* might be seen as an endorsement of the prior caselaw. The real difficulty may well lie in the failure of the law to articulate a rationale which explains the basis of child support and which can perhaps be used to define its duration.[261] The duties of nurture to a child are based on natural dependency, and on one view, parents are charged with the responsibility of providing offspring with the social goods which are needed to overcome that dependency and cope as an adult.[262] Generally, this includes a proper education and nowadays this must in the normal case include some form of post-secondary schooling.[263] After that, the parents can be viewed as having acquitted themselves of this duty, and

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[256] *Weir* v. *Weir* (1986), 1 R.F.L. (3d) 438 (B.C.S.C.).

[257] E.F.A. Merchant, *Annot.: Saunders v. Saunders* (1988) 14 R.F.L. (3d) 225.

[258] *See also Greyeyes* v. *Greyeyes* (1990), 24 R.F.L. (3d) 457, 82 SASK. R. 79 (Q.B.).

[259] *Supra*, note 256 at 226.

[260] *Supra*, note 253.

[261] On the early history of the obligation to provide child support, *see* D. Schuele, *Origins and Development of the Law of Parental Child Support* (1988-89) 27 J. FAM. LAW 807.

[262] *See further* M.D.A. Freeman, THE RIGHTS AND WRONGS OF CHILDREN (London: F. Pinter, 1983) at 56.

[263] As well, the average age at which children in Canada tend to leave home is twenty: THE FAMILY IN CANADA, *supra*, note 6. If the aim of child support law is to put the child in the position he or she would have been in, had the family remained together, this general pattern may be a factor.

they should not, for example, be required to underwrite the effects that unemployment may have on a child. In the case of a child who is ill or disabled, where the social goods are not realistically attainable, liability may be continuing.[264] However, even here, the trilogy may have implications, for in time it might be thought that such children become a matter of communal responsibility.[265] Likewise, the income received by a child from social assistance or student loans[266] should be taken into account in determining whether a child is unable to provide the necessities of life.

In the last survey[267] it was observed that the new *Act* did not address the troublesome question as to the relevant time frame to be considered in determining whether a spouse stands in the place of a parent.[268] Predictably, the divergence of opinions found under the old law have spilled over into the cases decided under the *Divorce Act, 1985*. The Manitoba Court of Appeal decision in *Carnigan* v. *Carnigan*[269] contains an extensive review of the leading authorities which have confronted this question. There, the husband had not supported the wife's son from a previous relationship from the time the parties had separated. In view of this, it was held that this unilateral withdrawal by the husband effectively avoided liability for child support. This was shown to be consistent with early English authorities[270] (from which the concept of *in loco parentis* first emerged) and with a number of recent American decisions.[271] Contrary to a raft of Canadian cases in

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[264] *See, e.g., Kelley* v. *Kelley* (1988), 16 R.F.L. (3d) 238 (B.C.S.C.). *Compare Baker* v. *Baker* (1988), 16 R.F.L. (3d) 121 (B.C.S.C.); *Currie* v. *Currie* (1989), 18 R.F.L. (3d) 20 (Sask. C.A.).

[265] For a provocative argument on the respective roles of the family and the state in furnishing child support, *see* H.O. Krause, *Child Support Reassessed: Limits of Private Responsibility and the Public Interest* (1990) 24 FAM. L.Q. 1.

[266] *See Matthews* v. *Matthews*, *supra*, note 251. *But see Thompson* v. *Thompson* (1988), 13 R.F.L. (3d) 372, 28 O.A.C. 383 (Div. Ct).

[267] *Supra*, note 1.

[268] As to the determination of whether a spouse has *ever* stood *in loco parentis*, *see Sloat* v. *Sloat* (26 January 1990) Fredericton No. 103-89 (N.B.Q.B.) (digested in [1990] W.D.F.L. para. 425); *Weichholz* v. *Weichholz* (1987), 81 A.R. 326 (Q.B.); *Munro* v. *Munro* (11 January 1990) London No. D185/88 (Ont. Prov. Ct) (digested in [1990] W.D.F.L. para. 390). Knowledge that the child is not one's own is a pre-requisite to a finding that the person stands in the place of a parent: *Ketchum* v. *Ketchum* (1988), 13 R.F.L. (3d) 221, 88 N.B.R. (2d) 123 (Q.B.).

[269] (1989), 22 R.F.L. (3d) 376, 55 MAN. R. (2d) 118 (C.A.) [hereinafter *Carnigan* cited to R.F.L.]. *But see Cox* v. *Cox* (29 August 1988), (Nfld S.C.) [unreported].

[270] *See, e.g., Ex Parte Pye* (1811), 11 VES. 140, 34 E.R. 271; *Powys* v. *Mansfield* (1837), 3 MY. & CR. 359, 40 E.R. 946; *Re Ashton*, [1897] 2 CH. 574 (C.A.).

[271] *See Iowa* v. *Bacon*, 91 N.W. 2d 395 (Iowa S.C., 1958); *D.* v. *D.*, 153 A. 2d 332 (N.J.C.A., 1959); *Fuller* v. *Fuller*, 247 A. 2d 767 (D.C.C.A., 1968); *D.L.G.* v. *M.G.*, 580 P. 2d 836 (Colo C.A., 1978).

which the status was held to crystallise on separation or on the initiation of divorce proceedings,[272] a spouse could withdraw at least until the order of support was made.[273] The question of whether unilateral termination was possible afterwards was not answered, as it did not call for resolution here. In cryptic tones, it was intimated that this may be too late: "there is an argument to be made that, once an order is given, liability for maintenance is based on the order rather than on the relationship of *in loco parentis*".[274]

However faithful this interpretation may be to the juridical etymology of the *in loco parentis* status, it is more important that it conform to the function which this concept is supposed to play under divorce law. The rationale must be that children should not be cut adrift as a consequence of marriage breakdown; parents divorce, children do not. If a dependency relationship was in place at breakdown, then an entitlement should exist. At that point it is too late for a payor to shirk his or her obligations towards that innocent casualty.[275] Moreover, the standard of support should not depend on whether the claim is made on behalf of a step-child or a natural child of the payor.[276]

2. *Jurisdiction*

By virtue of section 6 of the *Divorce Act, 1985*, divorce and corollary relief (including variation) proceedings may be transferred from one province to another, on application by one of the parties, or the court of its own motion. This can occur where there is a custody or access dispute, and where the child is most substantially connected with another province. Just as the first cases concerning provisional orders gave a restrictive interpretation to the newly-bestowed power, some artificial limits have been placed on this transfer provision. In *Naylen* v. *Naylen*,[277] it was held that while custody and access could be transferred, child support could not, a conclusion that seems at odds with a plain reading of the *Act*. If custody is sought, the *corollary relief proceedings* may be transferred. Given the interrelationship which

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[272] *See, e.g., Hock* v. *Hock* (1971), 3 R.F.L. 353, [1971] 4 W.W.R. 262 (B.C.C.A.). *But see Lewis* v. *Lewis* (1987), 11 R.F.L. (3d) 402 (Alta Q.B.); *Primeau* v. *Primeau* (1986), 2 R.F.L. (3d) 113 (Ont. H.C.).

[273] *Carnigan, supra*, note 269 at 391. The Court also noted that the phrase "at the material time" (*Divorce Act, 1985*, R.S.C. 1985 (2d Supp.), c.3, s.2(1)), which has figured prominently in the caselaw governing the *in loco parentis* status, appears under the new Act to refer only to the determination of the age of the child: *Carnigan, supra*, at 385. *See also Miller* v. *Miller* (1988), 13 R.F.L. (3d) 80 (Ont. H.C.).

[274] *Carnigan, ibid.* at 390, Huband J.A. *Compare* J.G. McLeod, *Annot.: Pender v. Pender* (1989) 23 R.F.L. (3d) 435.

[275] *But compare Miller* v. *Miller, supra*, note 273 at 83.

[276] *See Leveque* v. *Leveque* (1990), 25 R.F.L. (3d) 1 (B.C.C.A.) (under the *Family Relations Act*, R.S.B.C. 1979, c.121).

[277] (1987), 6 R.F.L. (3d) 350 (B.C.S.C.).

often exists between aspects of ancillary issues on divorce, Parliament would have been foolish to have hived off one component and allowed only this to be shuttled over to another venue. This is why a court should either transfer all (or none) of the proceedings before it,[278] and why the recipient court acquires exclusive jurisdiction.[279]

Chenkie v. *Chenkie*,[280] the first reported judgment on section 6, remains the leading decision on the factors to be considered in determining whether to invoke the transfer provision. A mother applied to transfer a divorce action from the Northwest Territories to Alberta. In refusing this request, Veit J. adopted the premise that under the *Act* primary consideration should be given to the various "connections" which the child had with the two jurisdictions;[281] she avoided resort to existing jurisprudence dealing with analogous matters, in favour of a fresh approach.

The child in *Chenkie* was less than two years old. Shortly after her birth the family had moved to Alberta and a year later the mother returned with the child to the Territories. The husband remained in Alberta but was able to visit his daughter frequently. He then petitioned for divorce in Alberta; the mother sought and received interim custody under Northwest Territories' law, and thereafter had actively impeded the father's attempts to see the child.

The trial judge initially identified matters which should *not* be taken into account in considering whether to transfer proceedings. It did not matter that the mother had not filed for divorce in the Territories. Neither was it relevant that parallel custody proceedings had been commenced in that jurisdiction, at least where no final order had been made. The place of marriage and the residence of the spouses prior to the birth of the child were also of no import. In refusing to transfer the proceedings north, seven considerations were advanced:

1. The daughter had spent two-thirds of her young life in Alberta and therefore had a real and substantial connection with that province.
2. Her recent and relatively strong links with the Territories were weakened by her mother's one month sojourn to British Columbia.
3. While the daughter was in the Territories, the father maintained access until this was prevented by the mother.
4. The mother had obtained an *ex parte* custody order and had threatened to cut off access permanently.

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[278] *Tibbs* v. *Tibbs* (1988), 12 R.F.L. (3d) 169, 54 MAN. R. (2d) 33 (Q.B.).

[279] *Divorce Act, 1985*, R.S.C. 1985 (2d Supp.), c.3, s.6(4).

[280] (1987), 6 R.F.L. (3d) 371, 50 ALTA L.R. (2d) 41 (Q.B.) [hereinafter *Chenkie* cited to R.F.L.]. *See also Nagy* v. *Nagy* (16 January 1990) Victoria No. V00917 (B.C.C.A.) (digested in [1990] W.D.F.L. para. 282); *Lucatuorto* v. *Lucatuorto* (10 July 1987) Vancouver No. D60765 (B.C.S.C.) (digested in [1987] W.D.F.L. para. 676).

[281] *Chenkie*, *ibid.* at 372.

5. The "unexplained or wrongful interference"[282] with access is not in the child's best interests.
6. There was no evidence that the ultimate decision might lead to the child remaining in the north.
7. There was no evidence that the father consented to the child establishing a permanent residence in the Territories.[283]

Significantly, this list includes considerations that do not directly relate to the "most substantial connection test" set out in section 6. Factors 4, 5 and 7 focus on the circumspect conduct of the mother. The Court acknowledged that a wrongful resettlement of a child in another jurisdiction might create real connections justifying a transfer. By the same token, the *mala fides* of the wife could also be germane; this facet was certainly not overlooked here. The *ex parte* order, far from assisting the mother, seemed to work against her in this case. Item 6 relates to the merits of the ultimate hearing; the Court took the potential for an unnecessary resettlement of the child's life into account. A further factor, the balance of convenience to the parties (and witnesses), was considered by the Court, though it was not regarded as applicable to the instant application.

Veit J. was surely correct in going beyond a concern for ascertaining the most substantial connection, since the court is given a discretion under section 6: it *may* order a transfer if the child is most substantially connected with another province. In effect, this means that the section creates a two-part test. Not only must it be established that connections are strongest in another province, but also that it is fair and reasonable in the circumstances to order a transfer.[284] To be sure, the reasons for judgment collapse these two tests into one, but it is patent that the Court assumed a discretion to refuse the order even had strong ties to the Territories been established.

Before leaving *Chenkie*, a final point should be addressed. In assessing the balance of convenience, it was intimated that a court might, in an appropriate case, make an order conditional on the payment of one spouse of the travel expenses of the other.[285] Here, the matter had not been raised by counsel, so the Court declined to pursue the point further. The *Act* expressly permits the creation of conditions in relation to custody orders, but not for orders under section 6. What is the source of this power?

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[282] *Ibid.* at 377.

[283] *Ibid.* at 376-77.

[284] *See also T.W.D.* v. *Y.M.D.* (1989), 20 R.F.L. (3d) 183 at 187, (*sub nom DeWolfe* v. *DeWolfe*) 230 A.P.R. 399 N.S.S.C.: Any analysis of the facts must be based on the best interests of the child as the primary factor. The secondary factor is the proper administration of justice.

[285] Chenkie, *supra*, note 280 at 375.

3. *General Principles of Custody and Access*

In resolving custody and access disputes on divorce, the sole consideration is supposed to be the best interests of the child.[286] This at once says everything and nothing at all. There are few legal principles which are so magnificently polysemous, and this obviously invites a wide discrepancy in judicial attitudes to be impressed upon litigating parents. During the survey period, one finds decisions placing emphasis on "tender years"[287] and fault,[288] and these are clear manifestations of the scope for discretion which is conferred on judges in the area.

Perhaps one concrete feature of a pure best interests test is that it diminishes parental rights in the face of a custody claim by a non-parent. This was illustrated in the Quebec case of *G.C.* v. *T. V.-F.*,[289] where the Supreme Court of Canada again[290] confronted the rights of parents in a custody contest with non-parents. The Court held that in such a determination the best interests of the child are controlling. At the same time, it was recognized that this may still mean that access may be awarded to a natural father, thus keeping alive the possibility that he may be able to assume custody at some time in the future.

As a reaction to the open-ended nature of current custody adjudication criteria, some have sought a more certain and fair regime. Among the American states which have taken the lead in this regard is West Virginia, where there now exists a presumption in favour of the primary caretaker parent in custody disputes.[291] This primary parent is to be determined by reference to a non-exhaustive list of caregiving activities, but the presumption can be displaced by showing that the primary parent is unfit. Where the parents have contributed in an equal way to the upbringing of their children the presumption would not arise, and neither would it necessarily govern where children are old enough to express a preference. The leading West Virginian decision, *Garska* v. *McCoy*,[292] has attracted attention in Canada, and several Canadian commentators have advocated implementation of a similar

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[286] *Divorce Act, 1985*, R.S.C. 1985 (2d Supp.), c.3, s.16(8).

[287] *See, e.g., Harris* v. *Lyons* (1987), 8 R.F.L. (3d) 59 (N.B.Q.B.) (application under the *Family Services Act*, S.N.B. 1980, c. C-2.1). *Compare Williams* v. *Williams* (1989), 24 R.F.L. (3d) 86 (B.C.C.A.).

[288] *See, e.g., Dawe* v. *Dawe* (1987), 11 R.F.L. (3d) 265 (Nfld S.C.).

[289] [1987] 2 S.C.R. 244, 9 R.F.L. (3d) 263.

[290] *See King* v. *Low*, [1985] 1 S.C.R. 87, 44 R.F.L. (2d) 113 (*sub nom. K.K.* v. *G.L.*). *See also Minister of Health and Community Services (N.B.)* v. *G.C.C.*, [1988] 1 S.C.R. 1073, 14 R.F.L. (3d) 1.

[291] *See Garska* v. *McCoy*, 278 S.E. 2d 357 (W.Va C.A., 1981). *See also Pikula* v. *Pikula*, 374 N.W. 2d 705 (Minn. S.C., 1985).

[292] *Ibid.*

reform.[293] The *Garska* decision has also been placed in argument in custody disputes in Alberta, though these submissions have yet to surface in a reported judgment.[294]

There is a certain allure to this idea, for by homing in on select nurturing activities, the presumption can help to ascertain efficiently the most competent parent, or the one with whom the children have developed the strongest bonds; it limits the unwieldy discretion which now obtains in custody determinations, and so creates more certain and acceptable judicial outcomes; as such, it minimizes bias and may promote out of court settlement. Some have suggested that a primary caretaker rule might promote co-parenting during marriage, since parents should know that participation in childcare during marriage is important if they wish to carry on in that capacity after breakdown.[295] As the rule is gender neutral, it is fair to both children and their parents; and it rewards good parenting.[296]

Despite these attributes, the presumption is not free from difficulty. Even if one could agree as to what counts as good parenting, nevertheless, the formulation is focused on the parents, not *per se* on the needs of the children. Also, reliance on the primacy of caretaking runs the risk of mistaking quantity with quality. If one parent is reckoned to be the primary parent, the nurturing attributes of the other are a closed book to the court. The test is largely backward-looking, and unless the claim of unfitness is raised, the future plans for the child are irrelevant. Likewise, the test assumes that a child will bond most strongly with the primary parent, but does not accommodate the introduction of evidence to the contrary. Granted, the primary caretaker rule is more structured than the current law, but a review of the American caselaw reveals that there are acute problems in calculating who has actually been the primary caretaker (and demarcating the relevant time period), the type of unfitness which can be used to rebut

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[293] *See* S. Boyd, *From Gender Specificity to Gender Neutrality? Ideologies in Canadian Child Custody Law* in S. Sevenhurgen & C. Smart, eds, CHILD CUSTODY AND THE POLITICS OF GENDER (London: Routledge, 1989) 126; S.M. Holmes, *Imposed Joint Legal Custody: Children's Interests or Parental Rights?* (1987) 45 U.T. FAC. L. REV. 300; J. McBean, *The Myth of Maternal Preference in Child Custody Cases* in S.L. Martin & K.E. Mahoney, eds, EQUALITY AND JUDICIAL NEUTRALITY (Toronto: Carswell, 1987) 184; M. Landsberg, "Only in male justice system does primary care count so little" *Globe and Mail* (15 March 1986) A2; S. Boyd *Potentialities and Perils of the Primary Care-giver Presumption* (1990) 7 C.F.L.Q. 1. *See also* E.D. Pask & M.L. McCall, *Klachefsky v. Brown: A Case of Competing Values* (1989) 4 C.F.L.Q. 73.

[294] R.R. Couchard, *Child Custody* in FAMILY LAW: PREPARING FOR THE NINETIES (Banff, Alberta: Legal Education Society of Alberta, 1989) 483 at 504.

[295] *See, e.g.*, J.B. Singer & W.L. Reynolds, *A Dissent on Joint Custody* (1988) 47 MARYLAND L. REV. 497 at 522-23; Couchard, *ibid.* at 505.

[296] M.L. Fineman, *Dominant Discourse, Professional Language, and Legal Change in Joint Custody Decisionmaking* (1987-88) 101 HARV. L. REV. 727 at 771.

the presumption, and whether a given child should be considered as competent to express an opinion.[297] Additionally, one may question whether this (or any) custody rule can have the socializing effect which some would ascribe to it.[298]

A preference for joint custody arrangements[299] has also been advanced in recent times as being superior to the simple "at large" approach,[300] and in the past few years joint custody orders have increased in frequency.[301] Many courts have adhered to the common sense notion that joint custody is inappropriate if the parents are unable to co-operate.[302] However, this has not meant that such orders will only be made on consent, and some judges have shown a willingness to impose such arrangements, even if not requested. Hence, joint custody has been awarded where it was thought to be the best means of ensuring the child's continued contact with both parents,[303] or where the ability of the parents to set aside their differences, and to com-

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[297] In relation to *Pikula* v. *Pikula*, *supra*, note 291, which introduced the primary parent rule into Minnesota, it has been said the this decision "has spawned an incredible amount of litigation concerning who changed more diapers, the unfitness of the parents and the threshold age at which a child is old enough to express a preference": D.J. Freed & T.B. Walker, *Family Law in the Fifty States: An Overview* (1989) 22 FAM. L.Q. 367 at 460.

[298] For a more detailed critique, *see* B. Ziff, *The Primary Caretaker Presumption: Canadian Perspectives* (1990) 4 INT. J. OF LAW AND THE FAMILY 186.

[299] Confusion continues to attend the terminology in this area. In this discussion, joint custody is used to mean a division of the decision making powers that are at the core of legal custody. Joint custody orders (so defined) commonly bestow physical custody on one parent with liberal access to the other. Sometimes physical custody is also shared or split.

[300] *See, e.g.*, H.H. Irving & M. Benjamin, *Shared Parenting in Canada: Questions, Answers and Implications* (1986-87) 1 C.F.L.Q. 79. *See also* V.J. Mackinnon & J.R. Groves, *Some Proposals to Reform Custody Litigation* (1988) 3 C.F.L.Q. 287 at 308-10.

[301] Richardson reports that in his sample, joint legal custody was awarded in 8.8% of the cases, and split custody was awarded in 4.4%: *infra*, note 323 at 154. By contrast, such awards were much rarer in the 1970's (3%): D.C. McKie, B. Prentice & P. Reid, DIVORCE: LAW AND THE FAMILY IN CANADA (Ottawa: Minister of Supply and Services Canada, 1983) at 205.

[302] *See, e.g.*, *Adams* v. *Adams* (1987) 6 R.F.L. (3d) 299 (N.S.S.C.); *Menage* v. *Hedges* (1987), 8 R.F.L. (3d) 225 (Ont. U.F.C.); *Dawe* v. *Dawe*, *supra*, note 288; *Dussault* v. *Ladouceur* (1987), 14 R.F.L. (3d) 185 (Que. C.A.); *Reid* v. *Reid* (21 December 1989) Walkerown No. 26/88 (Ont. Dist Ct) (digested in [1990]W.D.F.L. para. 419).

[303] *Droit de la famille — 361*, [1987] R.J.Q. 1094, 8 R.F.L. (3d) 272 (Que. Sup. Ct); *Thornhill* v. *Thornhill* (21 December 1989) No. 1543 (Nfld Prov. Ct) (digested in [1990] W.D.F.L. para. 420); *Normore* v. *Normore* (3 April 1990) No. 88/3950 (Nfld U.F.C.) (digested in [1990] W.D.F.L. para. 590).

municate and work effectively together suggests that a joint arrangement would be in the best interests of the child.[304]

Against the growing judicial acceptance of joint custody can be contraposed the critical stance now found in the literature. Joint custody, it has been maintained, empowers men, who are then in a position to wield this as a bargaining chip in the negotiation of support and property entitlements, and as a means of interfering with the primary caregiving of the mother. Diane Pask has stressed the adverse financial implications of such arrangements, for mothers and children, particularly in those instances where physical custody is divided.[305] Additionally, a judicial preference for joint awards, absent a pattern of co-parenting during marriage, works to discourage co-operation during marriage because non-participating parents incur no penalties for their failure to become actively involved during marriage.[306] If the aim of joint custody is to promote greater parental contact after breakdown, this is by no means assured by such an order. It may serve only to replicate roles within intact families, whereunder the father remains largely uninvolved, delegating day-to-day tasks to the mother, but retaining a notional veto power over decisions with which he disagrees.[307] The assumption of power is thus targeted as one explanation for the increased interest in joint custody arrangements by fathers:

> As men *slowly* lose power in the public sphere, they have begun to look to the private sphere to regain some of their control. The status of child caregiver has arguably become more "public" and therefore somewhat more esteemed in recent years. As custody becomes "trendy", fathers are "status-seeking as legal custodians."[308] [Emphasis in original.]

Singer and Reynolds have summarised the case against joint custody in this way:

> No doubt joint custody can work well. Motivated, caring, and wealthy parents can manage a true sharing of the children. That sharing, unac-

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[304] *Nurmi* v. *Nurmi* (1988), 16 R.F.L. (3d) 201 (Ont. U.F.C.). *See also Faunt* v. *Faunt* (1988), 12 R.F.L. (3d) 331 (Alta C.A.); *Derosier* v. *Derosier* (1987), 12 R.F.L. (3d) 235, 63 O.R. (3d) 307 (Dist Ct); *Banks* v. *Banks* (19 December 1986) Hamilton-Wentworth No. V/648/86 (Ont. U.F.C.) (digested in [1987] W.D.F.L. para. 147); *Kamimura* v. *Squibb* (1988), 13 R.F.L. (3d) 31 (B.C.S.C.); *Sichmann* v. *Sichmann* (1988), 15 R.F.L. (3d) 307, 88 A.R. 270 (Q.B.); *Demchuk* v. *Demchuk* (1988), 13 R.F.L. (3d) 348 (Alta Q.B.); *Lewis* v. *Lewis* (1988), 18 R.F.L. (3d) 97 (Ont. Dist Ct). *See further* G.C. Coleman, *Joint Custody: Recent Developments* (1989) 4 C.F.L.Q. 1; G.C. Coleman, *Joint Custody: An Update* (1989) 19 R.F.L. (3d) 246.

[305] D. Pask, *The Effect on Maintenance of Cost Sharing* (1989) 3 C.J.W.L. 155.

[306] A.M. Delorey, *Joint Legal Custody: A Reversion to Patriarchal Power* (1989) 3 C.J.W.L. 33 at 42.

[307] L.K. Girdner, *Custody Mediation in the United States: Empowerment or Social Control?* (1989) 3 C.J.W.L. 134 at 138. *See also* Holmes, *supra*, note 293.

[308] Delorey, *supra*, note 306 at 43-44.

> companied by strife, may even benefit the children. But those parents do not need a judicial order to achieve joint custody; such arrangements can be accommodated easily under the existing umbrella of sole custody *cum* liberal visitation rights.
>
> But joint custody, for the overwhelming majority of families, is a snare and a delusion. It is wrong to think that joint custody can work without committed parents, that it is likely to be in the best interests of the child, or that it will likely result in true sharing of parenting. Rather, joint custody is all too likely to be another millstone around the neck of the real custodial parent, who will find she has to share rights (but not responsibilities) with a recalcitrant former spouse, yet who is likely to find lessened support payments the real payoff to her of the arrangement. The sincerity of many joint custody advocates cannot conceal the reality that joint custody creates many harmful effects, and that a court order cannot overcome the difficult problems presented by a disintegrating family. Presumptive joint custody is an idea whose time has come and gone.[309]

Among the myriad of contested custody decisions, few teach us much, read individually, about Canadian law. The Manitoba decision of *Klachefsky* v. *Brown*[310] stands out, however, perhaps because it touches on some contemporary themes. For five years following marriage breakdown, the parents and their two children lived under a joint and shared custody regime. In early 1987, the mother moved to Vancouver to take up a job opportunity and so left the children, during the period of transition, in the care of their father in Winnipeg. He then sought sole custody, and at trial was granted custody during the school year. This was reversed on appeal.

The mother had intended to use in-home paid care in Vancouver to cover the periods of time when, due to work, she could not be at home. The children, who were aged five and eight at the time of the hearing, had been sent to daycare in Winnipeg. Under the father's plan, the children would be cared for by his new wife, with whom the children presumably got along well. Extended family support was also available. These factors were seen as having particular importance to the trial judge, although his judgment also appeared at times inconsistent with the ultimate ruling. He found, for example, that the move to Vancouver was in the best interests of the mother and the children, and that "[o]n balance, if this were a contest between Mr. Klachefsky [the father] and Ms. Brown [the mother], I would choose

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[309] Singer & Reynolds, *supra*, note 295 at 518. These authors also suggest that court imposed joint custody allows judges to avoid resolving difficult disputes, and that custody disputes *are* difficult, requiring real decisions: *supra*, at 515. This sits uneasily with their advocation of a primary caretaker presumption.

[310] (1988), 12 R.F.L. (3d) 280, 51 MAN. R. (2d) 33 (C.A.) [hereinafter *Klachefsky* cited to R.F.L.] (leave to appeal to S.C.C. refused [1988] 1 S.C.R. x).

Ms. Brown".[311] Given this language, it is not surprising that this decision appeared to send out mixed signals, inviting appellate review.

The Court of Appeal found that there was ample evidence to support the conclusion that the wife was the better parent, and that the trial judge had placed undue emphasis on the fact that the mother would be required to rely on paid assistance in caregiving, especially since this involved in-home care for only a few hours each day. Daycare and homecare arrangements were regarded as a "fact of life which many children and parents face",[312] and in the instant case there was no evidence that the children would be adversely affected by the mother's scheme. Moreover, the home life offered to the children with the mother promised more stability, at least if the past track records of the parents were examined. Since the separation the mother had lived in a stable household with the children. The father had apparently gone out with several women and entered into two relationships before remarrying. While the new wife got along well with the children, the relationship had not been trouble-free, and the Court of Appeal thought that the trial judge may have over-stated the amount of time she had actually spent with the children.

Mr Justice Philp, in dissent, would have dismissed the appeal, on the view that the trial judge did not commit the palpable errors identified by the majority.[313] For him, the oral trial judgment may have lacked clarity and felicity, but otherwise appeared rooted in a determination that remaining in Winnipeg was in the best interests of the children. What had been weighed at trial was the comparative advantage of the children being cared for by the new wife, with whom the children had developed an attachment, as opposed to the Vancouver plan which involved paid caregivers. But Philp J.A. was unprepared to conclude that the decisive factor at first instance was whether the alternative caregiver was paid or not.

This decision illustrates how little is known about what is good for children generally, or in a given case. The "at large" test for determining custody allocation admits as much. Pask and McCall suggest that *Klachefsky* "reinforces the principle that custody decisions must be based on a true assessment of which is the 'better' parent; i.e., the parent who provides continuity of attention, nurturing and care".[314] This is a curious analysis from commentators who have maintained that "[t]here is no agreement among judges, as there is no consensus in society, about the weight to be given to the various factors seen as relevant to the needs of the child".[315] Even if some

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[311] *Klachefsky* v. *Brown* (1987), 9 R.F.L. (3d) 428 at 431, 51 MAN. R. (2d) 40 (Q.B.), Goodman J.

[312] *Klachefsky*, *supra*, note 310 at 283, O'Sullivan J.A.

[313] *Ibid.* at 286.

[314] *Supra*, note 293 at 91-92.

[315] *Ibid.* at 73.

notion of continuity of care and nurture is inherently important and should be treated as a principle of custody law, its application in *Klachefsky*-like situations is still problematic. Care came from a variety of sources in this case, and at the time that the last application arose, there were several people involved in the children's lives. Continuity may also involve allowing children to remain within an environment in which they may have thrived.[316] When this is important, the decision of a parent to leave that community with the children, however necessary or laudatory, cannot be ignored as a factor and, unhappily, sometimes what is best for a parent and the children will not converge. But neither should a decision to move be fatal to that parent's claim, as was recognized in *Klachefsky*.

Klachefsky can also be seen as supporting the notion that daycare arrangements can be part of a perfectly satisfactory custodial plan, all else being equal.[317] Reliance on daycare is an important option for women, particularly for those who must strive for self-sufficiency after divorce, and who seek to assume custody while doing so. This facet of the case, and its potential impact on the many mothers who find themselves in this situation, prompted the application by the Women's Legal Education and Action Fund (LEAF) to seek intervenor status; that endeavour did not succeed.[318]

The case further reminds us that members of a re-constituted family may have a vital role to perform in a child's future well-being, an especially significant factor in view of the increasing frequency of both remarriage, and cohabitation among previously married people.[319]

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[316] *See also Happy* v. *Happy* (16 February 1990) Regina No. 010751 (Sask. Q.B.) (digested in [1990] W.D.F.L. para. 351); *Lambright* v. *Lambright* (2 February 1990) Grande Prairie No. 4804-2989 (Alta Q.B.) (digested in [1990] W.D.F.L. para. 612). It has been suggested that (in Manitoba) it will be likely that after *Klachefsky* a judge will have to hear expert evidence with regard to the parents' proposed plans, since it cannot be assumed that the plan most closely resembling the traditional home situation will be the best for the children: S. Devine & E. Murray, *Some Implications of Equal Time-Sharing Arrangements: New Directions in Parenting* (1989) 4 C.F.L.Q. 47 at 53. *Sed quaere*.

[317] *See also* Devine & Murray, *ibid.* at 55. *But see* E.S. Gozer, *The Variation of a Joint Custody Order under Section 17 of the Divorce Act, 1985* (1989) 4 C.F.L.Q. 39.

[318] *Klachefsky* v. *Brown* (1987), 11 R.F.L. (3d) 249, [1988] 1 W.W.R. 755 (Man. C.A.). *See further* F.M. Steel & M.J. Smith, *A Comment on the Application by LEAF for Intervenor Status in Klachefsky v. Brown* (1989) 4 C.F.L.Q. 57.

[319] In 1985, of all marriages that took place, at least one of the parties had been previously married in 29% of the cases: CURRENT DEMOGRAPHIC ANALYSIS, *supra*, note 7 at 19. About 76% of men and 64% of women remarry: Statistics Canada, MARRIAGE, DIVORCE AND MORTALITY: A LIFE TABLE ANALYSIS FOR CANADA AND REGIONS by O.B. Adams & D.N. Nagnur (Ottawa: Minister of Supply and Services Canada, 1988) at 18. As to cohabitations, *see* table accompanying note 11, *supra*. There it is shown that less than 30% of the cohabitants between the ages of 33 and 44 were single.

Many courts, including the trial court in the instant case, have factored in this reality, and it was relevant in *Klachefsky* because bonds had developed between the children and the husband's new wife. Criticizing cases in which other women who remain in the home have assisted men in receiving custody, Pask and McCall have offered that "[t]hese decisions suggest that any woman in the father's home on a full-time basis is preferable to the children's mother who is not".[320] They add that "the logical extension of such an assumption would be to award custody of children whose parents are both employed to live in housekeepers or nannies".[321] Such views or assumptions, if held by judges, would be so simplistic as to be utterly absurd. Yet by the same token, to fail to take account of the ability of individuals to assume the role of psychological parent is to adopt a fiction of family life in Canada today, and to undervalue, or render legally invisible, the nurturing activities of women who are interested in assuming the care of children.[322]

4. *Recent Empirical Findings on Custody and Access*

Professor James Richardson, in a valuable study of family law in action in several urban centres in Canada, examined, among other things, the types of judicial awards made in custody cases in Canada.[323] Whereas about ten years ago women received custody in about 85% of the divorce cases involving dependent children, in the localities covered by his research, sole custody was granted to mothers 76.6% of the time. The remaining orders were for sole custody to the father (9.5%), joint custody (8.8%), split custody (4.4%) and other orders (0.4%).[324] These figures include all cases, whether contested or otherwise. Perhaps most surprising of all were the observations that there was little evidence in the data that "custody was a particularly vexing or contentious issue"[325] and that the researchers were "unable to find many cases where custody was actually seriously contested".[326] This is all the more remarkable given the current thinking that allegations of sexual abuse are an increasingly common feature of private

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[320] *Supra*, note 293 at 82.

[321] *Ibid.*

[322] If it is true that second marriages are less stable than first ones (*see* Pask & McCall, *ibid.* and the authorities they cite), this has implications for both mothers and fathers who remarry, although overall there may be a differential impact.

[323] C.J. Richardson, DIVORCE AND FAMILY MEDIATION RESEARCH STUDY IN THREE CANADIAN CITIES (A Report Prepared for the Dept of Justice Canada) (Ottawa: Minister of Supply and Services Canada, 1988). *See also* Sloan and Greenaway Consultants, DIVORCE AND FAMILY MEDIATION RESEARCH STUDY WINNIPEG (A Report Prepared for the Dept of Justice Canada) (Ottawa: Minister of Supply and Services Canada, 1988).

[324] Richardson, *ibid.* at 154.

[325] *Ibid.* at 161.

[326] *Ibid.* at 162.

custody litigation.[327] Where a dispute proceeded to trial (14.9% of the cases),[328] the following results occurred: sole custody to mother (68.9%); to the father (26.2%); and joint custody (4.9%).[329] Overall, patterns of custody varied in relation to the mode of dispute resolution ultimately used:

Custody Outcomes by Method of Resolving the Dispute[330]

Method of Resolution	Type of Custody Award				
	Wife (%)	Husband (%)	Joint (%)	Split (%)	Number
Negotiation between Parties	59.5	8.5	21.6	10.5	(153)
Negotiation between Lawyers	67.9	7.6	13.2	11.3	(53)
Mediation	32.6	2.3	65.1	—	(43)
Custody Investigation	68.4	10.5	10.5	10.5	(19)
Court Hearing	68.9	26.2	4.9	—	(61)
Not Disputed	79.2	4.2	14.4	2.2	(361)

Richardson's study also revealed that access orders are rarely denied (only 1.1% of the time) where sought.[331] However, it was also suggested that, in practice, access was not in fact enjoyed in about 11% of the cases in which the mother was awarded sole custody.[332] This was so for a variety of reasons: the father had failed to pay maintenance (22%); he had moved (30%); he was not interested in maintaining contact (55%); or the children did not want to see him (20%).[333] About one-third of fathers who are non-custodians appear to have little or no contact with their children. One quarter of non-custodial mothers have almost no contact.[334]

The Department of Justice EVALUATION provides more current data. Overall, it was reported that women receive sole custody 72%

[327] *See* M.L. Fassel, *Some Considerations on the Issue of Child Abuse Allegations in Custody Disputes* in Law Society of Upper Canada, SELECTED PAPERS FROM THE 1988 NATIONAL FAMILY LAW PROGRAM (Montreal: Law Society of Upper Canada, 1988) U-1; D. Lipovenko, "Child Abuse Used to Win Custody Disputes" *The Globe and Mail* (8 January 1987) A1. *See also* J.E.B. Myers, *Allegations of Child Sexual Abuse in Custody and Visitation Litigation: Recommendations for Improved Fact Finding and Child Protection* (1989-90) 28 FAM. L.J. 1.

[328] Richardson, *supra*, note 323 at 156.

[329] *Ibid.* at 158.

[330] *Ibid.*

[331] *Ibid.* at 164.

[332] *Ibid.* at 166.

[333] *Ibid.*

[334] *Ibid.* at 167.

of the time; for men the figure is 16%. From this it was concluded that there has been "no appreciable or consistent change in the basic patterns of awarding sole custody since at least the early 1970's".[335]

The frequency of joint custody orders under the new law has now risen to 12.6%,[336] and the study endeavours to respond to the concerns of some as to the harms associated with such orders. It was found, for example, that men pay *more* in child support when there is a joint custody order[337] and that "there is no evidence that women felt coerced into this arrangement or that their rights had been undermined".[338] The view of the EVALUATION was that joint custody was often agreed to primarily because the parents respected each others' parenting skills and thought the arrangement best for the children.[339] There were also high levels of satisfaction among parents with joint custody (86% for men and 79% for women). However, it was also recognized that joint custody was the first choice of about 83% of men, but only 54% of women; and that only 65% of women in joint custody arrangements would choose joint custody again.[340] A concern raised among the women questioned was the failure of the father to fulfil his share of the parenting obligations.[341]

The EVALUATION found that courts were denying access at an increased rate of 2.4%.[342] Where orders were granted, there was an overall satisfaction rate of approximately 80%, and 87% of men and 92% of women claimed that they exercised their visitation rights.[343] Importantly, while some non-custodial fathers expressed a desire for more contact with their children, the EVALUATION nevertheless concluded that lack of contact is "rarely, contrary to what fathers' rights groups have claimed, due to denial of access".[344]

5. *Child Support*

In *Paras* v. *Paras*,[345] the Ontario Court of Appeal outlined a formula designed to be a straightforward and fair means to fix the

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[335] EVALUATION, *supra*, note 228 at 133. *See also supra* at 106.

[336] *Ibid.* at 99. This was viewed as a conservative estimate.

[337] *Ibid.* at 82.

[338] *Ibid.* at 108.

[339] *Ibid.* at vii.

[340] *Ibid.* at 109 (89% of men stated they would choose joint custody again: *supra*).

[341] *Ibid.* at 107. Women with sole custody showed higher levels of satisfaction with their arrangements (94%), while 75% of men (whose ex-wives had custody) said they were satisfied with this state of affairs: *supra*.

[342] *Ibid.* at 111.

[343] *Ibid.* at 114, 115.

[344] *Ibid.* at 135.

[345] (1970), [1971] 1 O.R. 130, 2 R.F.L. 328 (C.A.)[hereinafter *Paras* cited to R.F.L.].

quantum of child support: one should first determine the sum needed for adequate support, apportion that amount between the parties in accordance with their means, and order the non-custodial spouse to pay his or her contribution over to the other parent. Although this was decided in the context of an interim application, *Paras* soon came to be applied to permanent orders. The *Divorce Act, 1985*, fits quite comfortably with the formula[346] and moreover, in *Richardson* v. *Richardson*[347] the Supreme Court of Canada expressly endorsed it. In *Menage* v. *Hedges*, accordant principles were set out:

> (a) The responsibility for providing child support is shared by both parents in accordance with their ability to pay;
> (b) Any amount ordered to be paid by way of support will be tax deductible in the hands of the payor and taxable in the hands of the spouse having custody of the child;
> (c) In assessing the capacity of both parents to provide financial assistance, all of their income producing assets should be considered including those assets acquired as a result of an equalization order;
> (d) It is frequently difficult to assess each and every expense generated by a child and an assessment of the need must take into account certain generalities;
> (e) The spouse who has custody of the children provides non-financial assistance to the children which can be considered when assessing the mutuality of the obligation of support;
> (f) The amount of support should be fixed having regard to present circumstances and may be varied subsequently in the event of a change in the financial circumstances of either parent.[348]

A method for determining the costs of child rearing was outlined in the Saskatchewan case of *Nielson* v. *Geransky*:[349]

> First of all, the total cost of maintaining the child must be determined. That cost cannot be calculated precisely. It will no doubt vary from month to month; some expenditures will not occur each month, some expenditures benefit other persons in the household as well as the children and cannot readily be apportioned between them. At best, determining the cost of maintaining a child involves considerable estimating and

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[346] But *Paras* will not be applied where there is a sizable disparity between the parents' incomes: *see, e.g.*, *Burke* v. *Burke* (1987), 8 R.F.L. (3d) 393, 47 MAN. R. (2d) 216 (Q.B.). *See generally* R.J. Williams, *Quantification of Child Support* (1989) 18 R.F.L. (3d) 234 at 266:

> *Paras* does not in my view adequately deal with lifestyle (high income non-custodial parent) situations. It does not address the role of third parties, inflation, or how you define needs and income. It is, however, a start.

Additionally, child support remains one of the last areas where fault remains as relevant. When the child bites the hand that feeds, this conduct may not escape consideration: *see, e.g.*, *Dalep* v. *Dalep* (1987), 11 R.F.L. (3d) 359 (B.C.S.C.).

[347] *Supra*, note 101.

[348] *Supra*, note 302 at 269, Fleury U.F.C.J.

[349] (1987), 63 SASK. R. 77 (Q.B.), Dickson J.

> guesswork. On the other hand, the cost of maintaining the entire household in which the child lives can be calculated quite precisely if a record of actual expenses are kept. It would therefore be simpler and more accurate to start from this point and subtract from the total household expenses the estimated (or calculated, if possible) amount those expenses would go down if a child was not there. Perhaps the custodial parent would be living in a house or apartment if the child was not there. Consequently, the cost of accommodation would drop. If the same living accommodation is required by the remaining members of the household, the cost would not drop. It depends entirely upon the circumstances of each household.[350]

This is all fine in principle,[351] but the paradigm situation in which the child's standard of living approximates that enjoyed within the intact nuclear family is, one may safely assume, infrequently achieved.[352] Often when a family breaks up, "the tablecloths...will not cover both tables".[353] In fact, some of the data available reveal a bleak picture. A study conducted in Calgary found that the average child support payment was $212.24 per month (per child).[354] Intuitively, this seems low, even accepting that it is a global figure, encompassing all income levels. The important determination is whether court orders can be seen as representing a fair share of the cost of childrearing (as contemplated by the *Paras* formula). The computation of that cost is complex, but some attempts have been made. These suggest that expenditures on first children may range from 15% of family income to 25%. The payments ordered in the Calgary study do not reveal a comparable level of contribution. At the bottom end of the payment scale, the orders constituted only 4% of the payor's gross income, and at the upper end, the proportion did not rise above 12%. Even if these figures are not based on after-tax resources, there is still scope for the position that the awards are not high enough. By the same token, Richardson found that men paid on average about 18% of their gross incomes on maintenance, and that this figure did not fluctuate greatly among income levels.[355] This is a significantly different finding.

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[350] *Ibid.* at 79.

[351] However, it has been suggested that the formula is inadequate since it fails to take into account the unpaid caregiving work of the custodial parent, which, even if compensated at a minimum wage, would be considerable: A. Bissett-Johnson, *Child Support — Objectives and Factors Under the Divorce Act, 1985* in Law Society of Upper Canada, *supra*, note 327, B-1 at B-9.

[352] *See further* C. Rogerson, *Winning the Battle, Losing the War: The Plight of the Custodial Mother After Judgment* in M.E. Hughes & E.D. Pask, eds, NATIONAL THEMES IN FAMILY LAW (Toronto: Carswell, 1988) 21 [hereinafter *Winning the Battle, Losing the War*].

[353] *Woodworth* v. *Woodworth*, 337 N.W. 2d 332 at 337 (Mich. App., 1983) (quoting the trial judgment).

[354] C.L. Brown, *The Economics of Compensation at Divorce* (University of Calgary, 1988) [unpublished].

[355] *Richardson, supra*, note 323 at viii.

One means of injecting greater uniformity, and possibly rationality, into the area of child support is to develop some sort of sanctioned provincial or national guidelines.[356] Under American federal law, it is necessary for each state to develop guidelines of this nature.[357] Of course, these can only be helpful if they are realistic.[358] However, if properly contoured, they can produce a fair allocation, at least when the real reason for the inadequacy of child support is not simply that both parents are broke. On this front, modest improvements in the levels of support for children after divorce have been detected in the United States. The analysis of Pearson, Theonnes and Tjaden revealed:

> that while guidelines have increased awards, in particular bringing them closer to expenditure levels in intact families, the resources available for child-rearing remain seriously deficient....In our post-guideline sample of cases with a single child and net income of $16,000 or less, the average order level was only 22 percent of net income. This represented an improvement over the pre-guideline sample, where the average order level was 19 percent of net income, but it still fell short of the expenditure level observed in intact families....More to the point, at this income level the actual dollars expended on the child in both intact and divorced households was probably well below true need. As one Illinois judge put it, "In low-income cases, I might order a non-custodial father to pay 50 percent of his salary and it still wouldn't be enough." The solution for these families lies beyond the manipulation of a child support guideline and requires a more fundamental economic intervention.[359]

G. *Mediation*

Mediation has become an entrenched element of family conflict resolution procedures in the 1990s. Across Canada there are apparently a considerable number of agencies, both private and publicly-funded,

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[356] *See generally* A. Giampetro, *Mathematical Approaches to Calculating Child Support Payments: Stated Objectives, Practical Results and Hidden Policies* (1986-87) 20 FAM. L.Q. 373; L.H. Elrod, *Kansas Child Support Guidelines: An Elusive Search for Fairness in Support Orders* (1987) 27 WASHBURN L.J. 104; R.G. Williams, *Guidelines for Setting Levels of Child Support Orders* (1987-88) 21 FAM. L.Q. 281; J.B. Donovan, *The Seventeen Percent Solution: Formula Guidelines for Determining Child Support Awards Arrive in North Carolina* (1989) N.C. CENTRAL L.J. 209; J.M. Billings, *From Guesswork to Guidelines — The Adoption of Uniform Child Support Guidelines in Utah* [1989] UTAH L. REV. 859.

[357] *See Child Support Enforcement Amendments of 1984*, Pub. L.No. 98-378.

[358] *See* J. Douthitt & J. Fedyk, THE COST OF RAISING CHILDREN IN CANADA (Toronto: Butterworths, 1990).

[359] J. Pearson, N. Theonnes & P. Tjaden, *Legislating Adequacy: The Impact of Child Support Guidelines* (1989) 23 LAW & SOC. REV. 569 at 583. These authors suggest (*supra*, at 588) that the augmenting of child support awards, while not as great as proponents had hoped for, nevertheless was promising and that this could, perhaps, be explained by four factors: (i) the high level of support for the idea of guidelines among judges and lawyers; (ii) the manner in which the guidelines expedite and otherwise enhance the process of conflict resolution; (iii) the ease of application; and (iv) the consonance of guidelines with public and legal culture.

which provide such services.[360] Along with the growth of mediation, the quality of scholarship on this topic has also improved, and in recent times attention has turned to exploring the implications of resort to mediative processes. There remains no dearth of writing advancing the virtues of this mode of conflict resolution.[361] However, the honeymoon period is surely over, and it is no longer true to say that the dark side of the concept has not yet been explored.[362]

Carrie Menkel-Meadow,[363] drawing on the influential work of Carol Gilligan,[364] has suggested that mediation might well form an integral part of a resolution process fashioned by women. Yet, just as Gilligan's work has suffered criticism from feminist scholars, so too has the claim that mediation can function as an effective process for enhancing or protecting the needs of women been doubted.[365] The mainstream family mediation movement, it has been alleged, "is largely male-dominated and anti-feminist".[366] At the risk of being overly reductionist,[367] one may identify five complaints. First, media-

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[360] *See* Dept of Justice Canada, A PROFILE OF DIVORCE MEDIATION AND RECONCILIATION SERVICES IN CANADA (Ottawa: Minister of Supply and Services Canada, 1985).

[361] *See, e.g.*, H.H. Irving & M. Benjamin, *Family Mediation: Theory and Practice of Dispute Resolution* (Toronto: Carswell, 1987)(caustically reviewed by M. Bailey, *infra*, note 366); Trans-Atlantic Divorce Mediation Conference, THE ROLE OF MEDIATION IN DIVORCE PROCEEDINGS: A COMPARATIVE PERSPECTIVE (UNITED STATES, CANADA AND GREAT BRITAIN) (South Royalton, Vermont: Vermont Law School, 1987); B. Landau, M. Bartoletti & R. Mesbur, FAMILY MEDIATION HANDBOOK (Toronto: Butterworths, 1987); J.D. Payne & E. Overend, *Divorce Mediation: An Overview of Process and Strategies* in Hughes & Pask, eds, *supra*, note 352, 3; C.W. Moore, THE MEDIATION PROCESS (San Francisco: Jossey-Bass, 1986); J.P. Ryan, *The Lawyer as Mediator: A New Role for Lawyers in the Practice of Nonadversarial Divorce* (1986-87) 1 C.F.L.Q. 105 (*see also* the selected bibliography); D.R. Chalke, *Mediation of Family Disputes: B.C. Practice in 1988* (1988) 46 ADVOCATE 579; B. Landau, *Mediation: An Option for Divorcing Families* (1988) 9 ADVOCATES' Q. 1; D. Neumann, DIVORCE MEDIATION: HOW TO CUT THE COST AND STRESS OF DIVORCE (New York: H. Holt, 1989); L. Parkinson, CONCILIATION IN SEPARATION AND DIVORCE: FINDING COMMON GROUND (London: Croom Helm, 1986); and *see* any and all issues of MEDIATION QUARTERLY. *See also* J.G. McLeod, ed., FAMILY DISPUTE RESOLUTION: LITIGATION AND ITS ALTERNATIVES (Toronto: Carswell, 1987); R. Dingwall & J.M. Eekelaar, DIVORCE MEDIATION AND THE LEGAL PROCESS (Oxford: Clarendon Press, 1988).

[362] R. Crouch, *Mediation and Divorce: The Dark Side is Still Unexplored* (1982) 4:3 FAM. ADVOCATE 27.

[363] C. Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process* (1985) 1 BERKELEY WOMEN'S L.J. 39 at 52-53.

[364] C. Gilligan, IN A DIFFERENT VOICE (Cambridge, Mass.: Harvard University Press, 1982).

[365] "In the family context, questioning of informal dispute mechanisms comes almost exclusively from feminist quarters": M. Shaffer, *Divorce Mediation: A Feminist Perspective* (1988) U.T. FAC. L. REV. 162 at 166.

[366] M.J. Bailey, *Book Review of Family Mediation: Theory and Practice of Dispute Resolution* by H.H. Irving & M. Benjamin (1989) 3 C.J.W.L. 303 at 304.

[367] A risk run at every step in a "survey".

tion as currently practised is unregulated and potentially quite uneven. Absent some sort of professional standards, the potential for individuals to perform a difficult job poorly is always present. Secondly, the inability of mediators to compel disclosure can hamper the effectiveness of the process. Thirdly, the child-centred orientation of some mediators results in a narrow perception of the other roles of women and their separate needs.[368] Fourthly, the mediation process bestows power on a class of mediating professionals, who are perched to impose their own values on the families they are called upon to assist. Hence, mediation is unmasked as another form of state control.[369] Fifthly — and this appears to be the most prominent and important critique — the privatization of dispute resolution through mediation may fail to account adequately for severe power imbalances which exist among many spouses. In this vein, it has been suggested that "[t]he difficulty (perhaps impossibility) of social unequals making fair deals in an informal setting is a basic problem of mediation".[370]

Linda Girdner's analysis[371] explores these latter two concerns. She identified several models of mediation, including those which emphasize "control" and those predicated primarily on "empowerment". Characteristic of the first model is the use of mediation to move the parties to the mediator's perception of what would be best for the children; typically the solution sought is joint custody. As Girdner demonstrates, some of the mediation literature explicitly reflects this strategy of control.[372] Others have demonstrated just how mediators exercise a form of selective facilitation, and that mediators "frequently conduct themselves in ways that show that they are working with notions of favoured and disfavoured outcomes".[373] Empowerment models are said to be, in theory, substantively neutral. The objective of a mediator here is to rectify power imbalances between spouses. This is rather a challenging task, and where it is not possible, it may be that mediation is inappropriate. It is this form of mediation

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[368] A. Bottomley, *What is Happening to Family Law? A Feminist Critique of Conciliation* in J. Brophy & C. Smart, eds, WOMEN IN LAW: EXPLORATIONS IN LAW, FAMILY AND SEXUALITY (London: Routledge & Kegan Paul, 1985) 162 at 185.

[369] Bottomley, *ibid.* at 175; Fineman, *supra*, note 296.

[370] Bailey, *supra*, note 366 at 305; Shaffer, *supra*, note 365 at 197; Bottomley, *supra*, note 368 at 179.

[371] L.K. Girdner, *Custody and Mediation in the United States: Empowerment or Social Control?* (1989) 3 C.J.W.L. 134.

[372] *Ibid.* at 145, quoting D. Saposnek, *Aikido: A Systems Model for Maneuvering in Mediation* (1986 Winter/1987 Spring) 14/15 MEDIATION Q. 119.

[373] D. Greatbatch & R. Dingwall, *Selective Facilitation: Some Preliminary Observations on a Strategy Used by Divorce Mediators* (1989) 23 LAW & SOC. REV. 613 at 636.

which, as Girdner argues, is practised by some mediators,[374] that she endorses.

Again, Richardson's work provides an insight; indeed the primary focus of his research concerned the effectiveness of family mediation. In brief, his findings tended to demonstrate that there are virtues associated with the use of mediation, though its advantages over the more conventional forms of family dispute resolution were not profound. He offered that "[i]f...the critics of this approach have vastly overstated their case, so have its proponents; the claims of both are more polemical than empirical".[375] He found that women fared marginally better through mediation than through other processes. In one of the cities covered in his study (but not the others), compliance with support awards was higher where the award had been arrived at through mediation.[376] While the data did not suggest that mediation is less costly, to the litigants or the state, than non-mediative approaches,[377] there was some indication of time-saving. There was also evidence that re-litigation was reduced. Furthermore, the study concluded that the concern that parties' rights may not be adequately protected was described as being "without foundation".[378] As was seen above, there is an inordinately high correlation between joint custody and mediation,[379] and this can be seen as supportive of the contention that mediators are not neutral catalysts. Still, Richardson regarded this as neither a forced resolution, nor one which has proven to be detrimental to women:

> While mediators evidently encourage couples to work out a joint custody arrangement, there is no evidence to suggest that women were "forced" into this because of fears that they would lose in a contested custody dispute. For most women with a joint custody order this had been their first choice. At the time of the interview, they were less satisfied with joint custody than were the men but this would seem to be because their former husbands, though sharing in the parenting, were doing so less than equally. Nor was joint custody a trade off for a lower maintenance payment: women involved in joint legal custody arrangements but with *de facto* sole physical custody were receiving considerably higher levels of maintenance than the general sample of separated and divorced women in the sample.[380]

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[374] *Supra*, note 371 at 151, citing J. Kelly & L. Gigy, *Divorce Mediation: Characteristics of Clients and Outcomes* in K. Kressel & D. Pruitt, eds, THE MEDIATION OF DISPUTES: EMPIRICAL STUDIES IN THE RESOLUTION OF CONFLICT (San Francisco: Jossey-Bass).

[375] *Supra*, note 323 at xi.

[376] *Ibid.* at viii.

[377] *See also* A. Ogus *et. al.*, *Evaluating Alternative Dispute Resolution: Measuring the Impact of Family Conciliation on Costs* (1990) 53 MOD. L. REV. 57.

[378] Richardson, *supra*, note 323 at xi.

[379] *See* chart accompanying note 330, *supra*.

[380] *Supra*, note 323 at xi.

H. *Enforcement of Custody, Access and Support Orders*

Maintenance enforcement has experienced a "revolution"[381] in recent years, and this has been characterized by a transformation of the issue from a matter of private law and civil remedies, to a public law concern in which the state has taken an unprecedented pro-active interest in the collection of outstanding support monies. As Professor Steel has explained succinctly, generally the common features of the provincial reforms are: (i) the computerized monitoring of payments; (ii) automatic state-initiated enforcement; (iii) the enlistment of provincial Crown counsel; and (iv) the introduction of measures to help locate absent debtors.[382] On top of this, the federal *Family Orders and Agreements Enforcement Assistance Act*[383] is now fully in force.[384] That *Act*, which was introduced contemporaneously with the *Divorce Act, 1985*, allows for the tapping into of federal information banks[385] and

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[381] F.M. Steel, *An Overview of Provincial and Federal Maintenance Enforcement Legislation* (1989) 4 C.F.L.Q. 261.

[382] *Ibid.* at 270. *See also* B.A. Pottruff, *The Enforcement of Maintenance Orders Act* (1986-87) 51 SASK. L. REV. 173.

[383] R.S.C. 1985 (2d Supp.), c.4.

[384] The *Act* other than Part II was proclaimed in force 30 November 1987 (SI/87-260); Part II was proclaimed in force 2 May 1988 (SI/88-88).

[385] The data banks available for the purposes of s.15 of the *Act* are designated by SOR/87-315, s.3:

(a) information banks controlled by the Department of National Health and Welfare, namely,
  (i) Canada Pension Plan Record of Earnings...,
  (ii) Canada Pension Plan Retirement and Survivors Benefits (Individual)...,
  (iii) Canada Pension Plan Social Insurance Number Validator...,
  (iv) Canada Pension Plan Computer Master Data...,
  (v) Canada Pension Plan Disability...,
  (vi) International Social Security — Domestic and Foreign Benefits — Computer Master Benefit Data...,
  (vii) Canada Pension Plan — Records of Earnings Enquiries (new)...,

(b) information banks controlled by the Canada Employment and Immigration Commission, namely,
  (i) Record of Employment (Third Copy)...,
  (ii) Benefit and Overpayment Master File...,
  (iii) Social Insurance Number Registration...,

the garnishment of money payable to support debtors under designated federal schemes.[386]

The enforcement of custody and access arrangements[387] poses different problems, making the adoption of comparable solutions unrealistic. In this realm, one is not concerned with the collection of liquidated sums, which can be processed through the interposition of some government agency. Yet, of course, the difficulties are also acute here, and the feelings of frustration and cynicism which the lack of enforcement generates can be deeply felt.

The violation of access orders was addressed by the Supreme Court of Canada in *Frame* v. *Smith*.[388] The case involved a battle royale over access which involved a host of events and court applications over a sixteen year period. In 1971, the mother was granted custody of the three children of the marriage by a Manitoba court; the father received liberal access. But from that moment on the mother thwarted the father's attempts to exercise that visitation at every turn. Several times she relocated in other jurisdictions without informing the father. In addition to this, the mother (and her new partner) frustrated the father's attempts to maintain contact with his children. They limited or prevented telephone contact; diverted letters and gifts; instructed the children not to contact the father; and told the children that he was not their father, *et cetera*. Throughout all of this, the father had spent

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[386] Garnishable moneys are defined (in SOR/88-181, s.3, *as am.* SOR/89-278, s.1 and SOR/89-417, s.1) as follows:

> The following Acts, provisions thereof and programs thereunder are designated for the purposes of the definition of "garnishable moneys" in section 23 of the Act:
>
> (a) sections 164 and 216 of the *Income Tax Act* as they relate to the personal return of income of the taxpayer for a particular taxation year;
>
> (a.1) section 54 and paragraph 55(c) of the *Financial Administration Act* as they relate to moneys payable November 1 by the Bank of Canada on account of regular interest savings bonds;
>
> (b) sections 12 to 13.6 of the *Agriculture Stabilization Act*;
>
> (c) the following provisions of the *Western Grain Stabilization Act*, namely,
>
> (i) subsection 10.1(i),
>
> (ii) subsection 11(7), as enacted by S.C. 1988, c.45, s.15,
>
> (iii) section 23, as amended by S.C. 1988, c.45, s.15, and
>
> (iv) paragraph 29(1)(f);
>
> (d) section 9 of the *Canadian Dairy Commission Act*;
>
> (e) section 5 of the *National Training Act*;
>
> (f) the *Unemployment Insurance Act*, excluding the provisions relating to benefits paid on behalf of a beneficiary to a province or municipality; and
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> (g) sections 3, 11, 19 and 21 of the *Old Age Security Act*.

[387] As to which, *see generally* R.M. Diamond, *Enforcement of Custody and Access Orders* (1989) 4 C.F.L.Q. 303.

[388] [1987] 2 S.C.R. 99, 9 R.F.L. (3d) 225 [hereinafter *Frame* cited to R.F.L.].

considerable time and energy trying to maintain a relationship with his children, and since 1977 he had been treated for severe depression which he claimed had resulted from the mother's conduct. In 1982, he commenced an action against the mother for $1,525,000, including a claim of $500,000 in punitive damages. By this time, his children were all over the age of fifteen, and the father's relationship with them had been destroyed, so no claim for access was pursued. Despite seven years of litigation, his damages action never fully got out of the starting blocks.

All three courts that heard the case held that the father's statement of claim disclosed no cause of action.[389] In brief, it was held that there was no cognisable tort of interference with access in Canada, and no enforceable fiduciary duty arising out of the earlier orders of custody and access. Neither could it be said that there should exist a right to sue on the basis of intentional infliction of mental suffering, or civil conspiracy.

Mr Justice La Forest, for a majority of the Supreme Court, found that policy pointed clearly to the conclusion that civil liability of the type contemplated by the father's lawsuit ought not to be recognized. To allow the father's claim to proceed could produce the undesirable result of "provoking suits within the family circle",[390] and could lead to the disruption of the child's familial and social environment. Compounding this were problems in defining sufficiently the wrongful conduct. "Is the advice or encouragement to a child sufficient?" the Court asked rhetorically.[391] Moreover, to allow a damages action to proceed could deplete the resources of the custodial parent, and in this direct way enure to the detriment of children. To limit recovery to expenses incurred would, in the normal case, confer little more than a Pyrrhic victory, given the transactional costs typically associated with litigation. In addition to this, the statutory scheme for enforcement of access was regarded as comprehensive, thereby precluding common law supplements. The conclusion that there was no intention to allow this scheme to be complemented by recourse to an action for damages seemed supported by the abolition (in Ontario) of the common law actions pertaining to loss of a child's consortium (and related claims).[392] In conclusion, it was said that:

> [I]t is by no means certain that permitting civil actions against the custodial parents can be said to be in the best interests of the child, whether this be by creating a tort or recognizing a fiduciary relationship arising out of a court order. Resort even to fines and imprisonment,

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[389] *Ibid.* at 230-33, 263.

[390] *Ibid.* at 258.

[391] *Ibid.*

[392] As to the general nature of which, *see* P.B. Kutner, *Law Reform in Tort: Abolition of Liability for "Intentional" Interference with Family Relationships* (1987) 6 CAN. J. FAM. L. 287.

> which is permitted by the *Act*, has been described as not "entirely appropriate". ...That is because these may encroach on the resources of the custodial parent and because the child may suffer from the knowledge that one parent has taken such drastic action against the other. This applies, and in some respects with greater force to a legal action. Damages can impose a far greater financial burden than the fine of up to $1,000 which may be imposed under the [*Children's Law Reform*] *Act*. ...Furthermore, though the imprisonment of one parent at the behest of the other may be damaging to the child, litigation by one against the other over a protracted period may well be even more damaging.[393]

Wilson J. agreed in large measure with the analysis of the majority. For her, the need to promote the best interests of children was relevant in precluding a common law right of action under the heads advanced. She would, nevertheless, have allowed the claim to proceed in equity, as a breach of the fiduciary duty, which she considered to have arisen out of the relationship created by the custody and access orders. However, such a course would only be available if there was no risk that the support of the children would be impaired or that the suit would cause a conflict of loyalties in the children. The majority saw no virtue in this alternative,[394] and indeed Wilson J. is somewhat unconvincing in her efforts to demonstrate that this type of recourse does not suffer from the same disadvantages as those which led her to deny relief at common law.[395]

As the judgments in *Frame* v. *Smith* recognize, non-custodial parents do possess an arsenal of enforcement weapons.[396] These include the granting of compensatory access to make up for time lost,[397] the imposition of fines or imprisonment, *via* contempt proceedings,[398] and the suspension of the obligation to pay child maintenance.[399] Apart

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[393] *Frame*, *supra*, note 388 at 262.

[394] *Compare* J.S. Leon, *The Wisdom of Solomon: A Comment on Frame v. Smith* (1988) 3 C.F.L.Q. 397.

[395] *Quaere* whether parents can agree to fashion contractual remedies? As Julien Payne has observed in Payne, *supra*, note 92 at 172:

> [i]t remains to be seen whether lawyers can or will circumvent [*Frame* v. *Smith*] by incorporating innovative covenants in domestic contracts that provide a contractual remedy for the parents or child in the event of a fundamental breach of defined parenting rights or responsibilities.

[396] *See generally*, Diamond, *supra*, note 387.

[397] *See, e.g.*, *Yunyk* v. *Judd* (1986), 5 R.F.L. (3d) 206, 47 MAN. R. (2d) 75 (Q.B.).

[398] *See, e.g.*, *O'Byrne* v. *Koresec* (1986), 2 R.F.L. (3d) 104 (B.C.S.C.); *Rawlinson* v. *Rawlinson* (1986), 5 R.F.L. (3d) 166, 52 SASK. R. 191 (Q.B.); *Holker* v. *Holker* (1986), 2 R.F.L. (3d) 293, 3 B.C.L.R. (2d) 359 (C.A.). Note, however, that the *Criminal Code* provisions relating to child abduction do not cover the denial of court-ordered access: *R.* v. *Powless* (1988), 18 R.F.L. (3d) 433 (Ont. Prov. Ct) (in respect of *Criminal Code*, R.S.C. 1985, c.C-46, s.282).

[399] *Brownell* v. *Brownell* (1987), 9 R.F.L. (3d) 31, 82 N.B.R. (2d) 91 (Q.B.); *Harrison* v. *Harrison* (1987), 10 R.F.L. (3d) 1 (Man. Q.B.); *Casement* v. *Casement* (1987), 9 R.F.L. (3d) 169, 81 A.R. 76 (Q.B.).

from the compensatory order, these appear as rather harsh alternatives. While this is no doubt true, the most severe response must be to transfer custody in the face of a persistent refusal of the custodial parent to allow access to occur. That step, which had occasionally been resorted to prior to the reforms of the mid-80s,[400] is consistent with subsection 16(10) of the *Divorce Act, 1985*, which directs the court, in awarding custody, to consider the willingness of the parents to permit continued contact with the non-custodial spouse.[401]

The need to augment and improve the enforcement of visitation rights has prompted some recent action. Following an empirical study in Manitoba, a pilot access assistance program has been initiated.[402] Ontario has now enacted legislation to deal directly with this problem.[403] The statute codifies the jurisdiction to order compensatory access, and supervised visits. It also allows for the recovery of expenses and empowers the court to order mediation as a means of resolving access violations. Remedial orders are available where the parent granted access is not properly undertaking the visits. In some ways, this seems largely cosmetic, given the array of pre-existing remedies.[404] However, the motivation to act may have been designed as an important symbolic statement. As has been observed, there is a highly-charged political element to this reform: "[m]en's groups may see the Bill as vindicating their claims that access rights are regularly abused by women".[405] A critic of this reform described its introduction as "the first major political *coup* for men's rights"[406] who would thereby be accorded "another weapon for intimidation and control".[407]

I. *Divorce Reform*

On December 20, 1989, a Government bill was introduced into the House of Commons which, if passed, would introduce a minor

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[400] *See, e.g., Fast* v. *Fast* (1983), 33 R.F.L. (2d) 337, 23 SASK. R. 96 (C.A.).

[401] *See Tremblay* v. *Tremblay* (1987), 10 R.F.L. (3d) 166, [1987] 6 W.W.R. 742 (Alta Q.B.).

[402] *See further* Diamond, *supra*, note 387 at 329-32.

[403] *An Act to Amend the Children's Law Reform Act*, S.O. 1989, c.22. *See also* the *Children's Law Act*, S. Nfld 1988, c.61, ss 41-43.

[404] That the refusal to exercise access produces additional burdens on the custodial spouse has already been recognized. *See Wagener* v. *Wagener* (1988), 17 R.F.L. (3d) 308, 55 MAN. R. (2d) 91 (Q.B.); *Russo* v. *Russo* (1988), 15 R.F.L. (3d) 243 (Ont. H.C.); *Mackinnon* v. *Mackinnon* (1988), 84 N.S.R. (3d) 363 (Fam. Ct).

[405] J.G. McLeod, *Enforcement of Access and Ontario Bill 124* (1989) 4 C.F.L.Q. 335 at 341.

[406] S. Crean, IN THE NAME OF THE FATHERS: THE STORY BEHIND CHILD CUSTODY (Toronto: Amanita Enterprises, 1988) at 117.

[407] *Ibid.*

amendment to the *Divorce Act, 1985*.[408] The purpose of Bill C-61 is to prevent a spouse from taking advantage of religious divorce dogma as a means of exerting pressure on the other spouse in the negotiation of (secular) matters on divorce. This apparently has been a problem among adherents of the Jewish faith, where the parties can control the availability of the "Get", the Jewish bill of divorcement; usually it is the husband who impedes the process.[409] According to a study conducted by the B'nai B'rith organization, between 1982 and 1985, 27 lawyers, from a sample of 1,000, reported the withholding of a Get in 111 cases. Out of a pool of 1,500 rabbis, 200 reported 122 such cases.[410] Men were twice as likely to refuse than women. Drawing on the New York state progenitor,[411] Ontario had earlier endeavoured to neutralize this tactic through provisions in the *Family Law Act*.[412]

The bill applies to those spouses who are in a position to remove religious barriers to divorce, but who refuse to do so. The key is that the recalcitrant spouse must have effective control over the religious process, for the provision will not apply "where the power to remove the barrier to religious marriage lies with a religious body or official".[413] Where there has been a wrongful refusal, the Court *may*, subject to any terms that it considers appropriate, dismiss any application filed by the delinquent spouse, or strike out any other pleadings or affidavits filed by that spouse under the *Divorce Act, 1985*.[414] In addition to this general discretionary power, the divorce court may refuse to exercise its powers where the spouse files an affidavit setting out any religious or conscientious grounds for the refusal to remove the barriers, and satisfies the court that these grounds are genuine.[415] This latter proviso, absent from the Ontario law, is fair and, no doubt, drafted with the *Charter* in mind.[416]

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[408] Bill C-61, *An Act to Amend the Divorce Act (Barriers to Religious Remarriage)*, 2d Sess., 34th Parl., 1989-90 (Royal Assent 12 June 1990) [hereinafter Bill C-61].

[409] Syrtash explains that the Ontario provision can apply to Islamic divorcing procedures: J. Syrtash, *Removing Barriers to Religious Remarriage in Ontario* (1986-87) 1 C.F.L.Q. 309 at 333-35. This would be equally true of the federal provision.

[410] *See* Justice Information, BACKGROUNDER: AMENDMENTS TO THE DIVORCE ACT, 1985 (Ottawa: Dept of Justice Canada, December 1989) at 2.

[411] *See* N.Y. Dom. Rel. Law s.253 (McKinney 1983 Supp.). *See further* L.M. Warmflash, *The New York Approach to Enforcing Religious Marriage Contracts: From Avitzur to Get Statute* (1983-84) 50 BROOKLYN L. REV. 229; M. Feldman, *Jewish Divorce and Secular Courts: Helping a Jewish Woman Obtain a Get* (1989-90) 5 BERKELEY WOMEN'S L.J. 139.

[412] S.O. 1986, c.4, ss 2(4)–(7) and 56(5)–(7).

[413] Bill C-61, s.2(6).

[414] Bill C-61, ss 2(3)(c) and (d).

[415] Bill C-61, ss 2(4)(a) and (b).

[416] Professor Whyte has maintained that the Ontario provisions would withstand a *Charter* challenge: J. Whyte, *Memorandum of Law* as appendix to Syrtash, *supra*, note 409 at 337ff.

IV. MATRIMONIAL PROPERTY

A. Introduction

While our understanding of the actual workings of support and custody rules is more sophisticated than it was a decade ago (thanks to the work of Richardson, Weitzman and others),[417] there remains a paucity of empirical information as to how the marital property statutes operate in practice.[418] We do know, nevertheless, that there appears to be a popular consensus that the ideas underlying Canada's marital property laws are sound. In a gallup poll released in 1986,[419] it was reported that 75% of the Canadians surveyed felt that assets accumulated during marriage should be equally divided. Only 6% disagreed, and another 18% answered that it would depend on the circumstances. Overall, there was not a large discrepancy between men (73%) and women (76%). Although there has been little social scientific research, there has been a continuous stream of reported jurisprudence. Inevitably, some new wrinkles on the issues of classification[420] and division have been added during the survey period, and some of the most significant of these are explored below.

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[417] Richardson, *supra*, note 323; Weitzman, *supra*, note 202. *See also* J.B. McLindon, *Separate But Unequal: The Economic Disaster of Divorce for Women and Children* (1987-88) 21 FAM. L.Q. 351; J.M. Eekelaar & M. Maclean, MAINTENANCE AFTER DIVORCE (New York: Oxford University Press, 1986).

[418] For a shining exception, *see* Australian Law Reform Commission, MATRIMONIAL PROPERTY (Report No.39) (Canberra: Australian Government Publication Service, 1987) [hereinafter MATRIMONIAL PROPERTY (Report No. 39)].

[419] Reproduced in B. Ziff, ed., CASES AND MATERIALS ON FAMILY LAW AND POLICY (Edmonton: Faculty of Law, University of Alberta, 1987) at 3.

[420] A contentious and abstruse issue, of particular relevance in Alberta and Ontario, concerns tracing the value of exempt or excluded property into other assets. One Alberta practitioner has described tracing as "probably the 'hottest' topic in current matrimonial litigation in Alberta": J. McBean, *Book Review of National Themes in Family Law*, ed. by M.E. Hughes & E.D. Pask (1989) 27 ALTA L. REV. 504. There is a rapidly growing list of authorities from Alberta and Ontario: *see, e.g., Harrower* v. *Harrower* (1989), 21 R.F.L. (3d) 369, 68 ALTA L.R. (2d) 97 (C.A.); *Yukes* v. *Yukes* (1988), 13 R.F.L. (3d) 196, 85 A.R. 223 (Q.B.); *Roenisch* v. *Roenisch* (25 January 1990) Calgary Nos 4801-62784, 8801-05966 (Alta Q.B.) (digested in [1990] W.D.F.L. para. 299); *Humphreys* v. *Humphreys* (1987), 7 R.F.L. (3d) 113 (Ont. H.C.); *Michalofsky* v. *Michalofsky* (1987), 9 R.F.L. (3d) 113 (Ont. H.C.). *See also Sweetland* v. *Sweetland* (1987), 67 NFLD & P.E.I.R. 289 (Nfld U.F.C.). *Compare Lucas* v. *Lucas* (8 January 1990) Halifax No. 1201-41893 (N.S.S.C.) (digested in [1990] W.D.F.L. para. 295). *See further* W.H. Holland, *Ontario* in A. Bissett-Johnson & W.H. Holland, eds, MATRIMONIAL PROPERTY LAW IN CANADA (Toronto: Carswell, 1980) O-30 - O-35; J.G. McLeod, *Annot.: Harrower v. Harrower* (1989) 21 R.F.L. (3d) 370; B. Ziff, *Tracing of Matrimonial Property: A Preliminary Analysis* in Pask & Hughes, *supra*, note 352, 55; B. Ziff, *Family Property and Distributive Justice: Some Features of Section 7(3) of the Matrimonial Property Act* (1989) 68 ALTA L.R. (2d) 110.

B. Caselaw Developments

One recurring issue of pan-Canadian importance concerns the periphery of the "property" concept, for it is here that the borderland of marital property law can be seen. Whereas once the divisibility of unmatured pensions raised conceptual questions of this nature, that concern has now largely been dealt with, although difficulties in the quantification and division persist.[421] Given that the juridical definition of property is multi-textured; there will always be new regions for debate, and throughout the process of evolution the accepted property interests form only the starting point for the extrapolation into new areas. So, for example, it has been held that rights under a profit sharing plan on termination of employment can count as property,[422] as can severance pay,[423] the right to receive war reparations,[424] a cause of action in tort,[425] the right to designate a beneficiary under a life

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[421] On this difficult practical issue, *see* E.D. Pask, *Pension Division Across Canada: New Developments* in Law Society of Upper Canada, *supra*, note 327, J-1; B.B. Dibben, *Breaking Up is Hard To Do: Pension Credit Splitting in Ontario* (1990) 6 C.F.L.Q. 49; D.A. Short, *Pension and Family Law* (1986-87) 1 C.F.L.Q. 73; E.M. Roche, *Treatment of Pensions upon Marriage Breakdown in Canada: A Comparative Study* (1986-87) 1 C.F.L.Q. 189; J.B. Patterson, *Determining a Realistically High Value of the Spouse's Interest in the Employee Pension* (1986-87) 1 C.F.L.Q. 345; J.B. Patterson, *Determining a Realistically Low Value for Employee's Pension (In Spite of Unrealistically Large Claims Being Made by the Spouse)* (1986-87) 1 C.F.L.Q. 365; K.J. MacLise, *The "Rutherford Formula" — What's Left of It?* (1989) 4 C.F.L.Q. 373; J.M. McBean, *The Treatment of Pensions Under the Alberta Matrimonial Act: Some Unresolved Issues* in J.D. Payne, PAYNE'S DIVORCE AND FAMILY LAW DIGEST (1989) (current binder — 1990) E-25; F.J. Lynch, *Domestic Contracts: Pensions, Tax and Trusts Considerations and Clauses* (1988) 15 R.F.L. (3d) 28; P.M. Winokur & S.A. Eadie, *Current Pension Valuation Issues from an Ontario Perspective* (1988) 3 C.F.L.Q. 197; M.J. Pollock, *Division of Pension Rights on Marriage Breakdown in Alberta: A Review of Some Proposed Amendments to the Alberta Matrimonial Property Act* (1987) 2 C.F.L.Q. 83.

[422] *Ellis* v. *Ellis* (1986), 7 R.F.L. (3d) 214, 63 NFLD & P.E.I.R. 136 (P.E.I. C.A.).

[423] *Marsham* v. *Marsham* (1987), 7 R.F.L. (3d) 1, 59 O.R. (2d) 609 (H.C.). *See also Emond* v. *Emond* (1987), 10 R.F.L. (3d) 107 (Ont. C.A.); *Berghofer* v. *Berghofer* (1988), 15 R.F.L. (3d) 199, 61 ALTA L.R. (2d) 186 (Q.B.); *Jering* v. *Jering* (1987), 7 R.F.L. (3d) 42, 45 MAN. R. (2d) 296 (Q.B.); *Muir* v. *Muir* (1988), 16 R.F.L. (3d) 90 (Sask. Q.B.). *See* J.G. McLeod, *Annot.: Jering v. Jering* (1987) 7 R.F.L. (3d) 43. *See also Hayden* v. *Hayden* (3 January 1990) No. 533 (Nfld U.F.C.) (digested in [1990] W.D.F.L. para. 371).

[424] *Mittler* v. *Mittler* (1988), 17 R.F.L. (3d) 113 (Ont. H.C.).

[425] *Kivisto* v. *Kivisto* (1988), 17 R.F.L. (3d) 75 (Ont. Dist Ct). However, it has been asserted that payments under worker's compensation legislation are not property: *Burke* v. *Burke* (1988), 12 R.F.L. (3d) 388, 63 O.R. (2d) 749 (Dist Ct). *Compare Kelly* v. *Kelly* (1987), 8 R.F.L. (3d) 212 (Ont. H.C.).

insurance policy,[426] probably even frequent flyer points.[427] A mere expectancy under a will is not property,[428] but in some provinces contingent interests, including those received under a will or trust, have been so regarded.[429]

The question as to whether university degrees or professional licences count as property[430] has remained a vexing one and, as with other cutting-edge issues in family law today, judicial views are divided sharply on the correct approach.[431] There is much at stake, since in modern Canadian society, licences, degrees, certificates and the like are widely held. There is a tension added by the fact that this superficially neutral issue possesses underlying gender and class dimensions. The failure to reward one spouse adequately for the contributions made to the educational training of the other will adversely affect the entitlements of women more than men.[432] Likewise,

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[426] *Hurzin* v. *Great West Life Assurance Co.* (1988), 13 R.F.L. (3d) 172, 23 B.C.L.R. (2d) 252 (S.C.). However, life insurance proceeds payable to a non-spouse are not property under New Brunswick's statute: *Jennings* v. *Jennings* (1988), 14 R.F.L. (3d) 423, 50 D.L.R. (4th) 740 (N.B.C.A.) (with regard to *Marital Property Act*, R.S.N.B. 1980, c.M-1.1).

[427] *See Berghofer* v. *Berghofer*, *supra*, note 423 at 202.

[428] *Dunning* v. *Dunning* (1987), 8 R.F.L. (3d) 289, 66 O.R. (2d) 643 (H.C.). *See* J.G. McLeod, *Annot.: Dunning v. Dunning* (1987) 8 R.F.L. (3d) 290.

[429] *See Black* v. *Black* (1988), 8 R.F.L. (3d) 303 (Ont. H.C.). *See also Flynn* v. *Flynn* (1989), 20 R.F.L. (3d) 173 (Ont. Dist Ct); *Nichol* v. *Nichol* (1989), 21 R.F.L. (3d) 236 (Ont. H.C.); *Brinkos* v. *Brinkos* (1989), 20 R.F.L. (3d) 445, 60 D.L.R. (4th) 556 (Ont. C.A.) (the right to receive income from a trust was held to be property). *Compare Robinson* v. *Robinson* (1989), 22 R.F.L. (3d) 10, 70 O.R. (2d) 249 (H.C.) [hereinafter *Robinson*] and *Weicker* v. *Weicker* (1986), 4 R.F.L. (3d) 1, 72 A.R. 264 (Q.B.) [hereinafter *Weicker*] (contingent interest not property under Alberta's *Matrimonial Property Act*, R.S.A. 1980, c.M-9). For a critique of *Robinson*, *see* J.G. McLeod, *Annot.: Robinson v. Robinson* (1989) 22 R.F.L. (3d) 11, and for further analysis of *Weicker*, *see* P.J. Lown & B. Ziff, *Alberta* in Bissett-Johnson & Holland, eds, *supra*, note 420, A-16 at A-17. *Compare also Gasparetto* v. *Gasparetto* (1988), 15 R.F.L. (3d) 401 (Ont. H.C.) (where it was held that a retirement "gratuity" was property, but that an early retirement plan was not. Much turned on the contingent nature of these entitlements); *Kremp* v. *Kremp* (1989), 23 R.F.L. (3d) 164 (Alta C.A.).

[430] For a detailed discussion of this question as it pertains to the Canadian jurisprudence, *see* C. Davies, *Degrees and Licenses to Practice: Problems of Characterization, Compensation and Valuation* (1990) 6 C.F.L.Q. 1; N. Bala, *Recognizing Spousal Contributions to the Acquisitions of Degrees, Licences and Other Assets: Towards Compensatory Support* (1989) 8 CAN. J. FAM. L. 23.

[431] Professional degrees are property: *Caratun* v. *Caratun* (1987), 9 R.F.L. (3d) 337, 61 O.R. (2d) 359 (Ont. H.C.); *Berghofer* v. *Berghofer*, *supra*, note 423; *Corless* v. *Corless* (1987), 5 R.F.L. (3d) 256, 58 O.R. (2d) 19 (Ont. U.F.C.). *But see Menage* v. *Hedges*, *supra*, note 302; *Linton* v. *Linton* (1988), 11 R.F.L. (3d) 444, 64 O.R. (2d) 18 (Ont. H.C.); *Drummond* v. *Smith* (1988), 18 R.F.L. (3d) 120, 64 ALTA L.R. (2d) 425 (Q.B.); *Leippy* v. *Leippy* (1987), 62 SASK. R. 171 (Q.B.). *See also Brinkos* v. *Brinkos*, *supra*, note 429 at 451; *Nicholson* v. *Nicholson* (1988), 87 A.R. 293, 58 ALTA L.R. (2d) 423n (Q.B.).

[432] *See* Bala, *supra*, note 430 at 23-24, n.1.

conferring an interest for assistance in career advancement leading to a degree does not necessarily allow recovery where there has been an investment in human capital which does not happen to result in a spouse receiving formal accreditation.

The decisions favouring recognition of degrees have pursued the policy of conferring a fair share to both spouses of the fruits of the partnership. In so doing, they have accepted the idea that there are forms of so-called "new property", which are not well captured by conventional notions of proprietary interests.[433] The Doubting Thomases in the jurisprudence have focused on the conceptual and practical difficulties attending the treatment of career assets as property. In *Menage* v. *Hedges*, this attitude is evident:

> Degrees are simply the official recognition by a body of more or less authority that a certain individual has completed a certain course of instruction in a given field. It is in the nature of a testimonial only. It constitutes a convenient way of establishing the extent of a person's academic pursuits. Although in some circles a degree may have become an essential condition of admission to membership, the degree remains primarily the proof of the individual's academic abilities. ...Similarly, membership in a law society is the recognition by an official body that a certain individual has conformed with the requirements imposed by law for holding himself out as a lawyer. The requirement to belong to such society is primarily aimed at protecting the general public from unscrupulous improperly qualified individuals.[434]

Along similar lines, in *Linton* v. *Linton*,[435] the idea that so-called traditional forms of property could be "jettisoned out of hand",[436] to be replaced by notions of "new property", was rejected. There was no indication, it was reasoned, that the law had been designed to expand the concept of property in this way. On the contrary, provincial legislation distinguishes between property and income, which the recognition of degrees as property would blur. Likewise, In *Brinkos* v. *Brinkos*,[437] it was stated in *obiter* that the right to income from employment cannot be regarded as property, an observation which may portend that Court's position on the correct treatment of degrees.

Despite the wide range of opinions, there is one common denominator found throughout the authorities: whatever opinion is held about the correct legal characterization of diplomas and degrees, *et cetera*, there has not been the slightest susurration that compensation in some form is unwarranted. That there exists in these cases a form of unjust

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[433] *See, e.g., Caratun* v. *Caratun*, *supra*, note 431 at 346ff, drawing on the work of C.A. Reich, *The New Property* (1963-64) 73 YALE L.J. 733. *See also* M.A. Glendon, THE NEW FAMILY AND THE NEW PROPERTY (Toronto: Butterworths, 1981).

[434] *Supra*, note 302 at 261, Fleury U.F.C.J.

[435] *Supra*, note 431. The Court's comments were part of a direct frontal assault on *Caratun* v. *Caratun*, *supra*, note 431.

[436] *Linton*, *ibid.* at 454, Killeen J.

[437] *Supra*, note 429 at 450.

enrichment seems accepted by all hands.[438] The real questions relate to the level of compensation and the mode of implementation, and these pose problems which are acute.[439] Is it the value of the degree or the contributions of the spouse which should govern compensation? In either event, how should the quantum be determined? As with pensions, should awards involve an immediate capitalization, or periodic and future payments? Are all forms of human capital to be treated the same?

Matrimonial property legislation may be an imperfect implement for solving this type of enrichment, however, none of the reasonable alternative solutions are fully satisfactory either. A court might make an uneven division of other assets, as a means of recognizing contributions to career enhancement. This would only be possible where the requisite threshold for departing from the norm of equality is met, and provided also that there is enough "other" property to make this alternative meaningful. Since these claims may arise in short marriages which undergo breakdown just after the period of training (and are sometimes a fallout from that process), there may be few assets. In *Caratun* v. *Caratun*,[440] it was found that the right to practice dentistry was property, but rather than apply the property provisions of the Ontario *Family Law Act*,[441] a constructive trust was imposed. It is doubtful whether a court may simply sidestep the application of the *Act* in this way. A *quantum meruit* claim might be launched, based on reimbursement for services rendered, although this will only provide a restricted level of recovery.[442] Along similar lines, several courts have inclined towards the awarding of compensatory support. Such an order can endeavour to provide restitution for the various contributions provided by a spouse, whether tangible or otherwise, as well as for lost opportunities suffered by that person. It has also been suggested that other factors, such as the value of the career asset to the holder, and the extent to which the contributing spouse has benefitted from that during marriage, can be taken into account.[443]

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[438] *See* R. Redosh Eisner & R. Zimmerman, *Individual Entitlement to the Financial Benefits of a Professional Degree: An Empirical Study of the Attitudes and Expectations of Married Professional Students and their Spouses* (1989) 22 U. OF MICH. J. OF L. REF. 333 at 363 (the authors found that: when a spouse "1) provides monetary support, 2) makes a personal sacrifice, 3) divorces shortly after the spouse attains a degree, leaving few assets to divide, and 4) possesses a lower earning capacity than the professional spouse, participants feel that the supporting spouse deserves recompense").

[439] *See generally* Bala, *supra*, note 430 and Davies, *supra*, note 430 for a fuller examination of the complexities involved.

[440] *Supra*, note 431.

[441] S.O. 1986, c.4, Part I.

[442] This idea was raised, but rejected, in *Caratun*, *supra*, note 431 at 353.

[443] Bala, *supra*, note 430 at 56-58.

The virtue of a compensatory support approach is, at root, its flexibility. Support orders are variable, which is an extremely important quality in this setting, given the wide array of factors which can affect the ultimate "value" of the degree. Additionally, one can limit or refuse an order to avoid the prospect of double compensation. Some provincial regimes allow for claims of this nature,[444] however, the British Columbia Court of Appeal[445] has cast doubt on whether a claim for compensatory support can be properly maintained under the *Divorce Act, 1985*. The manner in which such support would sit with the trilogy (assuming that it applies to original orders)[446] is also yet to be worked out. An order premised on lost opportunities seems to be covered, arguably at least, by the causal connection test. Other types of claims under the rubric of compensatory support, seem to be ruled out by the trilogy.

The property-like quality of human capital is hard to deny. A woman who assists her husband in launching a small business has an easily understood claim to a concrete asset; the spousal contributions to the career of a budding professional is functionally very comparable. In both instances, the contributions are normally mixed into the wash of normal married life. That being so, a property-like entitlement seems fair, and compensatory support might yield less than this; at the very least, it must be conceded that different considerations seem to apply.[447] The resistance to this reasoning is that human capital is unacceptably abstract, and moreover, that matrimonial property statutes are too rigid to accommodate the subtleties at play in giving effect to an entitlement of this nature.

In the end, one is drawn to the conclusion that human capital is *sui generis*, requiring special treatment.[448] A purpose-built regime should embrace the partnership ethos of property law, but accord some

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[444] *See Keast* v. *Keast* (1986), 1 R.F.L. (3d) 401 (Ont. Dist Ct); *Magee* v. *Magee* (1987), 6 R.F.L. (3d) 453 (Ont. U.F.C.) (applying *Family Law Act*, S.O. 1986, c.4, s.33(9)(j)). *Compare Corless* v. *Corless*, *supra*, note 431. *See also* J.G. McLeod, *Annot.: Keast v. Keast* (1986) 1 R.F.L. (3d) 401.

[445] *Johnson* v. *Johnson* (1988), 16 R.F.L. (3d) 113, 29 B.C.L.R. (2d) 359 (C.A.) [hereinafter *Johnson*]. *But see Pena* v. *Pena* (2 March 1989), (Alta Q.B.) [unreported]. Bala has suggested that the decision in *Johnson* need not be read as precluding compensatory support under the *Divorce Act, 1985*: Bala, *supra*, note 430 at 52. *See also* J.G. McLeod, *Annot.: Johnson v. Johnson* (1988) 16 R.F.L. (3d) 113.

[446] *See* text accompanying notes 183 to 189, *supra*.

[447] Why should it matter, for example, whether a spouse has lost opportunities in assisting the other spouse in acquiring a degree? This is not relevant in other property claims. Neither is there a concern for double benefits. A spouse who enjoys fully the profits of the other spouse's business venture during marriage is not precluded from a share of that enterprise.

[448] *See* C. Welsh, *Apportioning Degrees Earned During Marriage: An Equitable Justification* (1987) 45 U. T. FAC. L. REV. 272 at 298.

of the flexibility enjoyed by the support systems. Problems of valuation will persist, to be sure.[449] The quantification of human capital might focus on the enhancement of a spouse's *current* earning power which is attributable to the period of the marriage.

In *Rawluk* v. *Rawluk*,[450] the Supreme Court of Canada was forced to confront the thorny problem of the interrelationship between the doctrine of constructive trust and marital property legislation, in this instance, Ontario's *Family Law Act*.[451] In short, a majority of the Court held that the remedial constructive trust could be applied to married couples to determine their respective property holdings prior to the invocation of the statutory rules under which those holdings are valued and reallocated. Although this ruling is fundamentally sound, it is not free from conceptual and practical difficulty.[452]

During twenty-nine years of marriage, the Rawluks worked together in several business enterprises, and acquired numerous properties in various parts of Ontario. All but one of the properties were registered in the name of the husband. The contribution of both spouses to the assets was considerable, and it was conceded that, all else being equal, Mrs Rawluk's monumental efforts throughout the marriage would have given rise to some form of equitable relief. The only question was whether in view of the distributional rules contained in the *Family Law Act*, the constructive trust remained available to spouses. The *Act* creates a presumption of equal sharing for assets acquired by onerous title during marriage, and the relevant properties here would have fallen within that presumption. That being so, whether a division occurred under trust principles or by virtue of the *Act* might seem moot, or an exercise in "judicial formalism".[453] There is, however, a crucial difference between these two routes: under the *Act* the value of the net family property to be divided is determined as at a set valuation date, which here was the date of separation (in 1984). Real estate prices in Ontario having, until recently, steadily increased since that time, the property was now worth far more and for this reason Mrs Rawluk argued that she was the beneficial owner of those properties. If this claim succeeded, she would be entitled to share in the increased land values *qua* owner; she would not have to settle for the smaller value (as fixed on the 1984 valuation date), available to her as a non-owning spouse applying under the *Act*. The husband's view

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[449] *See generally* J.L. Horvath, *Valuing Professional Degrees and Licences* (1988) 3 C.F.L.Q. 1; H.N. Cohen & P. Hennessey, *Valuation of Property in Marital Dissolutions* (1989) 23 FAM. L.Q. 339 at 373-80.

[450] [1990] 1 S.C.R. 70, 23 R.F.L. (3d) 337 [hereinafter *Rawluk* (S.C.C.) cited to R.F.L.], *aff'g* (1987), 61 O.R. (2d) 637, 10 R.F.L. (3d) 113 (C.A.), *aff'g* (1986), 55 O.R. (2d) 704, 3 R.F.L. (3d) 113 (H.C.).

[451] S.O. 1986, c.4.

[452] *Compare* J.G. McLeod, *Annot.: Rawluk v. Rawluk* (1990), 23 R.F.L. (3d) 338.

[453] *Rawluk* (S.C.C.), *supra*, note 450 at 365, Cory J.

was that the *Act* itself is designed to rectify unjust enrichment, and its terms left no room (or need) for the continued operation of the equitable principles as between married partners once the *Act* has been brought into play.

Mr Justice Cory, writing for a majority of the Supreme Court of Canada,[454] affirmed the decision at trial, and that of the Ontario Court of Appeal, holding that the *Family Law Act* did not abolish the constructive trust remedy. Conversely, the fabric of the statute was said to incorporate that remedy,[455] and its retention enabled courts "to bring that treasured and essential measure of individualized justice and fairness to the more generalized process of equalization provided by the Act".[456] It was observed that by 1986 the constructive trust was well entrenched as a device to cure unjust enrichment in family property disputes and that there was nothing in the *Act* to suggest that that state of affairs was to be changed.[457] The preamble of the *Act*, which recognizes the need for the equitable and orderly settlements of the fruits of the marital partnership, could be furthered by use of the constructive trust: "[t]hus, the preamble itself is sufficient to warrant the retention and application of this remedy".[458]

Although this litany of reasons seem more like general principles or platitudes, there was more to underscore the ultimate ruling. The *Family Law Act*, as with its counterparts across Canada, retains the idea of title as the starting point in the reallocation process. The first step is to determine "who owns what?" in accordance with fundamental property doctrine, and once this is done the appropriate adjustments may be made to rearrange the interests, or order compensatory (or transfer) payments. Since property includes equitable interests, beneficial ownership, such as that arising under a constructive trust, should normally be considered in determining who owns the property subject to division. That title arises from the time the unjust enrichment arose, even if this is only judicially declared at some later point. Several other signals in the *Act* were identified as confirming this conclusion. The most important among these was to be found in section 10, which allows a spouse to apply prior to breakdown for an order declaring an interest in property.[459] Since this provision allowed a spouse to seek a

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[454] Dickson C.J., Wilson and L'Heureux-Dubé JJ. concurred.

[455] *Rawluk* (S.C.C.), *supra*, note 450 at 363.

[456] *Ibid.* at 369.

[457] It was said that a legislature was presumed not to have departed from existing law unless it does so with "irresistible clearness": *ibid.* at 363, quoting *Goodyear Tire & Rubber Co.* v. *T. Eaton Co.*, [1956] S.C.R. 610 at 614, 4 D.L.R. (2d) 1.

[458] *Rawluk* (S.C.C.), *ibid.*

[459] *See further ibid.* at 366-68, citing *Family Law Act*, R.S.O. 1986, c.4, ss 5(6), 14, 64(2).

declaration of constructive trust prior to breakdown, it was thought to be inconsistent to deny the right to make such a claim once the equalization provisions of the *Act* had been invoked.

The gist of Mme Justice McLachlin's dissenting opinion[460] centred on the remedial nature of the constructive trust. She concluded that the constructive trust, as developed in Canada, was not a property right *per se*, but rather one of several possible remedies which can be deployed in response to a finding of unjust enrichment. Moreover, the doctrine of constructive trust should not be applied here because the *Family Law Act* itself provides a remedy for unjust enrichment in the context of marital property disputes.

The characterization of the constructive trust as "remedial" was taken to mean, in essence, that the beneficiary only obtains an equitable interest when the court so declares. Before doing so, it must first be determined if a constructive trust is the most appropriate remedy in response to the unjust enrichment which has occurred. This, it was noted, is consistent with the earlier Supreme Court decisions which had forged the current Canadian principles. Put another way, a constructive trust cannot be regarded as arising in all cases where the preconditions for unjust enrichment (set out in *Pettkus* v. *Becker*[461]) have been made out. Moreover, given the potential impact which a declaration of trust can have on other doctrines and on third parties, it was suggested that prudence might dictate that a claimant first exhaust personal remedies before seeking to have property impressed with a trust. To the minority, it was the failure of both courts below and the majority to conceptualize the constructive trust as only one of several restitutionary remedies which marked a basic flaw in their lines of reasoning. Given the remedial nature of the trust, it was an inappropriate device to apply in view of the *Act*, which was itself designed to deal with unjust enrichment. While it might be that equity could provide a better remedy than the *Act* in some cases (including the present one), this provided no basis for supplementing the statutory regime. This did not mean that the doctrine of constructive trust could never apply between spouses, for an application for a declaration could be brought before breakdown (under section 10). However, after an application under the *Act* has been launched, the remedial constructive trust gives way to the statutory mechanisms for curing unjust enrichment.

The profundity of this issue is matched only by the compelling nature of the arguments marshalled on both sides of the debate. On balance, it would appear that the majority got it right. Even if one accepts that the constructive trust should be described as remedial, it does not follow that this remedy cannot live with the *Family Law Act*. There is little in the minority judgment which clearly demonstrates that

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[460] With which La Forest and Sopinka JJ. concurred.

[461] [1980] 2 S.C.R. 834, 19 R.F.L. (2d) 165.

it is at odds with the *Act*. In fact, the majority judgments shows how the two dovetail together: first apply general legal and equitable principles to determine title and then apply the allocational rules under the *Act*. In a given case it may be that at the first step a constructive trust is denied for any number of reasons, including the possibility that a money judgment is more suitable; if that's the case, so be it. Additionally, it should be said that *Rawluk* demonstrates that the overlap of equitable doctrine and statute is not perfect; there is no reason to pretend otherwise.[462] As here, increases in the value of property after valuation date would also be dealt with differently.[463]

Treating the trust as having retroactive effect is really the main conceptual problem for the minority. After all, it is recognized that the deprived spouse could succeed in pursuing a constructive trust before the *Act* is triggered. However, that result at least makes sense given the way in which the Ontario *Act* works. Had the majority held that the trust comes into existence only when declared, this might have served to affect the husband quite adversely. The wife's interest would have been acquired *after* the valuation date and so would not be considered in computing her net family property. Conversely his interest, which pre-dated the separation, would have been included in the computation of his net worth.

Mme Justice McLachlin's judgment does not directly deal with whether a spouse could attempt to claim a constructive trust in property which is excluded from the sharing regime under the *Family Law Act*. Unlike post-separation gains, which she finds can be dealt with under the *Act* (by way of an unequal division of assets) there is no way to "get at" exempt property; this may be a key distinction. Additionally, while Mme Justice McLachlin confidently asserts that the constructive trust remedy is lost after separation, she does not consider the status of the underlying cause of action for unjust enrichment. This is a chose in action — a property interest — which presumably can be found to exist on the valuation date and therefore must be given a value. At least, she does not suggest otherwise.[464]

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[462] McLachlin J. endeavors to make the argument that "the elements necessary to establish a constructive trust are not present where enrichment occurs as a result of appreciation of the market value of land after separation": *Rawluk* (S.C.C.), *supra*, note 450 at 379. However, in *Sorochan*, *supra*, note 3 at 240 it was held that increases due to inflation can sometimes be enjoyed by a spouse claiming by way of constructive trust.

[463] Note, however, that the minority assumed that this could be taken into account by an unequal division of other property, if the result would be unconscionable: *Rawluk* (S.C.C.), *ibid.* at 378. The majority expressly declined to state its views on the issue: *supra* at 366. If the minority is correct, there is a closer overlap between what the *Act* can provide and the restitution that equity might confer.

[464] Perhaps the argument here would be that the *Family Law Act* provides a "juristic reason" not to compensate for unjust enrichment, thereby undercutting the cause of action. *Quaere* whether this is true as at the valuation date, or at least before an action under the *Family Law Act* is commenced.

Once the full effect of the majority decision is played out, it might be seen that the cases like *Rawluk* are not the exception, but the rule. Two factors may come together to produce that result. First, pressures of inflation or economic growth, such as those which gave rise to *Rawluk* are as normal in Canada as political patronage. Secondly, the strictures of the equitable doctrines of unjust enrichment appear to be quite sensitive to many forms of domestic contribution. The requirement of direct contributions to assets is softening. This topic is addressed immediately below.

The primary importance of the highly potent doctrine of unjust enrichment in the realm of family law is to be seen in contests between unmarried cohabitants, where the constructive trust has been doing yeoman's service for over a decade.[465] In *Sorochan* v. *Sorochan*,[466] the Supreme Court of Canada developed further the nature of the relevant equitable doctrines.[467]

The Sorochans lived together for 42 years, separating in 1982. During the period of cohabitation, Mrs Sorochan collaborated with her common law husband on the farming operation, and assumed virtually all the responsibilities for the caregiving of their six children. Although they never married, the prospect of marriage was held out to Mrs Sorochan by Mr Sorochan. All of the land was registered solely in his name and in 1971, he refused a request that part of the land be transferred into hers. Following separation, Mrs Sorochan sought a remedy in equity in relation to the farm property. The trial judge granted her a one-third interest in the farm (on condition it was conveyed to the children) and also awarded a cash payment. The Alberta Court of Appeal reversed this holding.[468] In short, that Court found that there was no link between the acquisition of the property in question and Mrs Sorochan's labour. A final appeal to the Supreme Court of Canada was allowed, unanimously.

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[465] *See, e.g., Crisp* v. *Banton* (1988), 18 R.F.L. (3d) 24 (Ont. H.C.); *Garvey* v. *Garvey Estate* (1987), 12 R.F.L. (3d) 122, 62 SASK. R. 198 (Q.B.); *Boucher* v. *Koch* (1988), 14 R.F.L. (3d) 443, 87 A.R. 78, 59 ALTA L.R. (2d) 428n. (C.A.); *Milne* v. *McDonald Estate* (1986), 3 R.F.L. (3d) 206, 5 B.C.L.R. (2d) 46 (C.A.); *Anderson* v. *Wilson* (1986), 1 R.F.L. (3d) 281, 73 N.S.R. (2d) 1 (S.C.); *Davidson* v. *Worthing* (1986), 6 R.F.L. (3d) 113, 9 B.C.L.R. (2d) 202 (S.C.). *Compare Reeves* v. *LaRose* (1987), 8 R.F.L. (3d) 87 (B.C.S.C.); *Heppner* v. *Heppner* (1986), 1 R.F.L. (3d) 77 (Ont. Div. Ct); *Connors* v. *Connors* (1986), 1 R.F.L. (3d) 94, 58 NFLD & P.E.I.R. 148 (Nfld S.C.); *Joudrey* v. *Gavel Estate* (1988), 15 R.F.L. (3d) 90, 86 N.S.R. (2d) 159 (Co. Ct).

[466] *Supra*, note 3.

[467] *See generally* C. Davies, *Unjust Enrichment and the Remedies of Constructive Trust and Quantum Meruit* (1986-87) 25 ALTA L. REV. 286.

[468] (1984), 44 R.F.L. (2d) 144, 36 ALTA L.R. (2d) 119 (C.A.).

Chief Justice Dickson, for the Court, found the prerequisites for the establishment of unjust enrichment to be met. The husband had been enriched: the benefit he received "included valuable savings from having essential farm services and domestic work performed by [Mrs Sorochan] without having to provide remuneration".[469] The corresponding deprivation was to be found in the fact that these contributions, which were significant, were made without compensation; there was no juristic reason to deny relief. Mrs Sorochan was under no obligation to perform the services which she did. Moreover, she had prejudiced her position on the reasonable expectation of receiving something in return; Mr Sorochan accepted these benefits in circumstances in which, minimally, he ought to have appreciated that expectation.

A finding of unjust enrichment having been made, the next step was to determine the best method of providing restitution. The suitability of the constructive trust was at issue, since the farm property was already owned by the husband at the beginning of the common law relationship and so its acquisition could not be connected to Mrs Sorochan's labours.[470] The Court held that this was not controlling. While it is important to require some nexus, or proprietary relationship, a contribution relating to the preservation, maintenance or improvement of property would suffice. That type of connection was present in the instant case. Mrs Sorochan had a reasonable expectation of obtaining a proprietary interest. The length of the relationship was also regarded as a compelling factor in the granting of an *in rem* order. In the end, the essence of the trial judge's award was confirmed.[471]

The *Sorochan* case consolidates general principles. Among other things, it brings us closer to a recognition that domestic services can found, at least in part, a claim of unjust enrichment. In *Sorochan* the domestic contributions were coupled with the extensive labour committed to the farming enterprise. However, there is no reason in principle why this combination of effort should be seen as necessary. Various lower courts have recognized all sorts of claims based on domestic-type contributions,[472] and there is little reason to suggest that

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[469] *Supra*, note 3 at 234, Dickson C.J.C.

[470] For cases in which a monetary award has been made, *see Everson* v. *Rich* (1988), 16 R.F.L. (3d) 337, (Sask. C.A.); *Saifer* v. *Koulack* (1987), 10 R.F.L. (3d) 307, 47 MAN. R. (2d) 52 (Q.B.); *Jolicoeur* v. *Levasseur* (1987), 10 R.F.L. (3d) 136 (Sask. Q.B.).

[471] But it was not endorsed *in toto*. The trial judge had granted a one-third interest in the property, on condition that this be conveyed to the children. This condition was struck off: *Sorochan*, *supra*, note 3 at 242. It was, after all, Mrs Sorochan who was entitled to restitution. The monetary payment was to be made in stages, and the relevant periods were fixed to start from the rendering of the Supreme Court judgment.

[472] *See* Bala & Cano, *supra*, note 63 at 157-60 and the authorities cited therein.

such developments will not continue, or are not warranted.[473] At the same time, care should be taken in determining the magnitude of the enrichment, and in particular, attention should be paid to whether any return benefit has been provided. This aspect of the equation may have been generally overlooked in the caselaw to date.[474] In some cases, the contribution of a non-titled spouse may be offset by the maintenance, support and lodging provided by the other. If it is unrealistic to suppose that a cohabitee (such as Mrs Sorochan) is intending to make a gift of domestic services, then so too of the tangible benefits provided by the other party. That being so, there is something to commend the view that "only when the contribution of domestic services is substantially out of proportion to the benefits acquired from the other party, should there be restitution for such services".[475]

C. Reform Initiatives

The trick to the implementation of a successful matrimonial property regime is to provide the "fairest" means of dividing property at the lowest transaction costs. It was the failure of Ontario's *Family Law Reform Act* to accomplish these two objectives that, in part, prompted the movement to reform. Now, similar sentiments are being expressed about the failings of the property provisions of British Columbia's *Family Relations Act*.[476] A recent working paper released by the Law Reform Commission of British Columbia concluded, *inter alia*, that no opinion on the probable outcomes of family property disputes in the province could be advanced with any degree of certainty,[477] since the language of the *Act* is porous and confers too wide a berth for judicial discretion.[478] The *Act* was also found to be flawed in other respects. For example, there was a gap in the range of assets which should be subject to division.[479]

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[473] *See* J.G. McLeod, *Annot.: Herman v. Smith* (1984), 42 R.F.L. (2d) 154, criticized in M.M. Litman, *The Emergence of Unjust Enrichment as a Cause of Action and the Remedy of Constructive Trust* (1987-88) 26 ALTA L. REV. 407 at 438-39.

[474] *See further* M.M. Litman, *Recent Developments in the Law of Unjust Enrichment: Survival of Actions, Accounting and Beyond* (1988-89) 9 ESTATES & TRUSTS J. 287. *But see O'Brien* v. *O'Brien* (1989), 23 R.F.L. (3d) 424 (B.C.S.C.); *Prentice* v. *Lang* (1987), 10 R.F.L. (3d) (B.C.S.C.). *Compare Fougere* v. *Petipas* (4 January 1990) Moncton No. M/C/1046/87 (N.B.Q.B.) (digested in [1990] W.D.F.L. para. 303).

[475] Litman, *supra*, note 438 at 441-42. *See also* K.B. Farquhar, *Causal Connection in Constructive Trusts* (1986-88) 8 ESTATES & TRUSTS Q. 161 at 188.

[476] R.S.B.C. 1979, c.121.

[477] Law Reform Commission of British Columbia, WORKING PAPER ON PROPERTY RIGHTS ON MARRIAGE BREAKDOWN (Working Paper No. 63) (Vancouver: The Commission, July 1989) at 71 [hereinafter WORKING PAPER].

[478] *See further* K.B. Farquhar, *Matrimonial Property and the British Columbia Court of Appeal* (1988) 23 U.B.C.L. REV. 31.

[479] WORKING PAPER, *supra*, note 477 at 31.

In response to these shortcomings, the working paper calls for a substantial revision of the law, and advocates changes roughly along the lines of the current Ontario *Act*. Included would be a statement of principle which would set out the operating presumption that inherent in the marital relationship is the idea that spouses make equal contributions, whether financial or otherwise, to the financial well-being of that relationship, thereby giving rise to a general right of equal sharing.[480] The current law would be abandoned in favour of an accumulations system, which does not distinguish between business and family assets (as the current B.C. law now does), and does not treat the family home in any special way. Property acquired before marriage, or through gift and inheritance, would be exempt but, as in Alberta, increases in the value of such items would be sharable.[481] Normally an equalization payment would be made, although in appropriate circumstances a property transfer could be ordered. The norm of equality, which now can be departed from in situations of unfairness[482] would apply unless it would be "unconscionable"[483] to do so, having regard to several financial considerations.[484] If implemented, the law in British Columbia would be simplified considerably, and this alone would serve the goals of the reformers to reduce the complexity of marital property litigation and the attendant costs.

More recently, the British Law Reform Commission has published a report on this issue.[485] Operating on the assumption that the "time for more comprehensive reform must await more study and more

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[480] Law Reform Commission of British Columbia, *Draft Family Relations Act Amendment Act*, s. 45(1) [hereinafter *Draft Act*].

[481] *Draft Act*, s. 44(1)(c)(ii). But under Alberta law, the increases in the value of the exempt property is not subject to a statutory presumption of equal sharing: *Matrimonial Property Act*, R.S.A. 1980, c.M-9, s.7(3). *Compare Mazurenko* v. *Mazurenko* (1981), 23 R.F.L. (2d) 113, 15 ALTA L.R. (2d) 357 (C.A.) (leave to appeal to S.C.C. refused 30 R.F.L. (2d) xxxiv, 22 ALTA L.R. (2d) xxxvi).

[482] *Family Relations Act*, R.S.B.C. 1979, c.121, s.51, discussed at length in WORKING PAPER, *supra*, note 477 at 33-57. *See further Elsom* v. *Elsom*, [1989] 1 S.C.R. 1367, 20 R.F.L. (3d) 225; K.J. MacLise, *Elsom v. Elsom: Its Implications for Section 51 of the Family Relations Act (B.C.)* (1989) 5 C.F.L.Q. 335.

[483] *Draft Act*, s. 45(5).

[484] *See LeBlanc* v. *LeBlanc*, [1988] 1 S.C.R. 217, 12 R.F.L. (3d) 225, where the Supreme Court of Canada upheld a finding that an equal division of property was "inequitable" under the New Brunswick statute (*Marital Property Act*, S.N.B. 1980, c.M-1.1) because the husband had made no real contribution to the family. *See also* J.G. McLeod, *Annot.: LeBlanc v. LeBlanc* (1988) 12 R.F.L. (3d) 225; J.G. McLeod, *Unequal Distribution of Matrimonial Property* in Law Society of Upper Canada, *supra*, note 327, ch. H-1. *Compare* Saskatchewan Law Reform Commission, *Proposals Relating to Matrimonial Property Legislation* (Saskatoon: The Commission, 1985).

[485] Law Reform Commission of British Columbia, REPORT ON THE PROPERTY RIGHTS ON MARRIAGE BREAKDOWN (Vancouver: Province of British Columbia Press, 1990).

consultation",[486] several general recommendations were outlined. These do not depart significantly from the proposals set out in greater detail in the *Working Paper*: a statement of principle is adopted and an accumulations system based on increases in value during marriage is proposed. Some assets, such as gifts and pre-marital acquisitions, would normally be excluded from division; but (unlike the *Working Paper*) subsequent increases in value of those assets would also be excluded.[487] These items would be subject to division where it would be *unfair* (not necessarily *unconscionable*) to fail to take these into account.[488] No recommendation is made in the *Report* about the grounds and standards to apply where an unequal division of presumptively sharable property is sought.

The Australians have also recently reviewed their matrimonial property rules, which at present provide for a discretionary system of property division on breakdown.[489] In the exercise of this discretion, the court weighs the contributions of the spouses. Significantly, the post-divorce conditions and means of the parties are taken into account. The Australian Law Reform Commission has concluded *inter alia* that, as in British Columbia, the rules are too fluid. This would seem to be self-evident in a pure discretionary system. The astounding fact is, however, that the results of their empirical work do not provide the sort of cogent proof on this point that one would expect. Less than 4% of divorcing spouses go to trial on property issues, and from the perspective of the judges and registrars, these cases resulted more from the personal attitudes and unrealistic expectations of the parties, than from complex legal or factual issues.[490]

The scheme proposed for Australia would introduce a presumption of equal sharing for all property of the spouses which could only be departed from in defined circumstances. These are briefly summarized as follows:

> From a starting point of equal sharing in the value of the property of the marriage, the Court should be able to vary the shares of the parties in order to take account of certain special circumstances:
>
> *a substantially greater contribution to the marriage by one party than by the other
>
> *actions of the parties in relation to property or child care after separation
>
> *that one party has the benefit of financial resources built up during the marriage

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[486] *Ibid.* at 21.
[487] *Ibid.* at 27 ff.
[488] *Ibid.*
[489] MATRIMONIAL PROPERTY (Report No. 39), *supra*, note 418.
[490] *Ibid.* at xxvii.

> *that one party brought property into the marriage or acquired it by way of gift or inheritance or as compensation or damages.
> ...
> After applying the rule of equal sharing and any variation required on account of matters related to the financial history of the marriage, the Court should be able, if it considers it just, to further adjust the parties' shares. It should do so only if there is a disparity between the standards of living reasonably attainable by the parties, and the disparity is wholly or partly attributable to
>
> *a party's responsibility for the future care of the children of the marriage
>
> *a party's income earning capacity having been affected by the marriage....[491]

A significant feature of the proposal is that it accommodates the use of property division as a tool for support. This has been the case in Australia, and the virtues of retaining it were appreciated by the law reformers:

> As to the children, the parties continue after separation to share responsibility for their welfare. If the arrangements for the children place one party at a financial disadvantage relative to the other, it is appropriate to make up for this by an adjustment of shares of property. If the allocation during the marriage of the spouses' shared responsibility for child care, household management and financial matters affects the earning capacity of either of them so as to cause a disparity in their living standards after separation, it is appropriate to make up for this in the property adjustment. Such adjustments are not and should not be seen as some form of spousal or child maintenance. They are, rather, an essential part of the property adjustment in that they recognize disparities flowing directly and solely from the marriage relationship.[492]

Apart from the ability to allocate the matrimonial home, and other more incidental matters, Canadian marital property law has not been used in this way. In fact, statutes such as that in place in Ontario are somewhat resistant to such considerations, prompting a call for reform.[493] Australia has now provided a model.

V. CONCLUSION

There is something quite distressing about the subject-matter of this survey. I am not referring to the way in which the statistical picture reminds us of the frequency of family dysfunction. Taken

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[491] *Ibid.* at xxxi.
[492] *Ibid.* at 163.
[493] *See* C. Rogerson, *Winning the Battle, Losing the War*, *supra*, note 352.

alone, increases in the resort to divorce are as much a testimonial to liberation and regeneration as anything. No, the despair relates to the ancillary aspects of family crisis; the allocational disputes which form the true *casus belli* when families break up. Here we see that the perennial questions still remain unanswered. The law of support and custody remains a cauldron of confusion and controversy. Perhaps to a lesser extent, the same is true of the law of property distribution. More unsettling still is the fact that these areas have not suffered from legislative neglect; issues in family law remain as agenda items for reform, but still the promise of improvement has been left largely unfulfilled.

There are a few bright spots. For example, the determination at both levels of government to take enforcement seriously is an important development. However, the news elsewhere is not so promising. The law of private ordering on divorce is in a shambles, as is the law of spousal maintenance. Despite the well meaning efforts of the Supreme Court, the trilogy has demonstrated the dangers of large scale judicial law-making. We are no further ahead in understanding how to do best for our children.

Perhaps the next survey can report on the way Canadian law recognizes the value of tolerance to homosexual lifestyles, how children's true needs are better understood and accommodated, how division on breakdown can, with precision, better redress the unfairness of the separate property rules, and how the financial implications of divorce can be more fairly distributed. Over the past four years some of the goals have been pursued, but the progress has been slow, and not without costs, be they social, emotional or monetary.

CHARTER PRINCIPLES AND PROOF IN CRIMINAL CASES. By David M. Paciocco. Carswell, 1987. Pp. 616. ($68.00)

This ambitious work tackles the *Canadian Charter of Rights and Freedoms*[1] impact on the rules of admissibility in criminal cases. It is mainly prospective in outlook and comparative in method. The approach is to use the constitutionalized law of evidence in the United States as a guidepost for future development of Canadian criminal evidence under the *Charter*.

The book is in four parts dealing respectively with general *Charter* analysis, the defence right to obtain and present evidence, limits on the presentation of Crown evidence (hearsay, unreliable and unduly prejudicial evidence) and, fourthly, the *Charter*'s provisions respecting self-incrimination. Each of the ten chapters begins with a detailed table of contents and, somewhat unusually, a fairly lengthy summary of the chapter. A table of cases and a good index are included.

This work is a significant contribution to Canadian evidence scholarship. It identifies and tries to come to grips with some of the central problems of how our law of evidence will or should be reshaped by the *Charter*. It provides an excellent source for what has become mandatory immersion in the constitutional doctrine of the United States and thoughtful comments on its strengths and weaknesses from a Canadian perspective. However, the ambitious scope of the book required the author to confront some large and difficult issues and his attempts to do so are not invariably successful.

A central problem for this study is how American constitutional jurisprudence ought to be used to guide *Charter* development. Professor Paciocco recognizes and addresses the issue in appropriate places in the text.[2] He rightly argues that concepts and principles, not verbal formulae, should be the guide and that differences in political systems and values must be borne in mind. But the fundamental dilemma of how to take account of differing social conditions and pressures is not adequately addressed. How can the wisdom of an interpretive approach be assessed without regard to the society which has helped to shape it and which, in turn, has been shaped by the interpretive approach itself?[3] These are deep waters, but ones that must be crossed by a book which spends so much of its time discussing and assessing American constitutional jurisprudence.

Another conundrum, although of a lower order, concerns whether the constitutionality of evidence rules should be assessed by considering

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[1] Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

[2] *See, e.g.*, pp. 81-85; 181-85.

[3] *See* J. Cameron, *The Motor Vehicle Reference and the Relevance of American Doctrine in Charter Adjudication* in R.J. Sharpe, ed., CHARTER LITIGATION (Toronto: Butterworths, 1986) 69.

the rule apart from the facts of the case or, alternatively, on a case by case basis in which the rule's operation is judged in a particular situation. The Supreme Court in *R.* v. *Oakes*[4] opted for the former, choosing to consider the constitutionality of section 8 of the *Narcotic Control Act*[5] on its face rather than in light of the legitimacy of its presumption on the evidence against Oakes. However, more recently, some courts have assessed constitutionality on particular facts and have saved rules from being struck down by creating a discretion to suspend their operation.[6] The reconciliation of these approaches is a matter requiring detailed attention in this book. Although Professor Paciocco recognizes this problem and addresses it with some useful comments, he does not provide many guideposts for finding ways out of the dilemma.

The two examples I have given of tough theoretical questions are also symptoms of a deeper tension in this and other efforts to tackle "The *Charter* and ...". In any work that tries to assess the impact of the Constitution on a particular doctrinal area, it is difficult to decide how much emphasis to give issues of general constitutional theory. Professor Paciocco is certainly alive to the problem. He has included two chapters that offer an overview of the general principles of the *Charter* and he touches on fundamental *Charter* issues throughout the book. It is unrealistic to think that this book should be a treatise on constitutional theory. But there are a few thorny theoretical issues that are central to how the *Charter* affects the law of evidence, such as the two I have touched on above. They cannot be left to the constitutional theory texts because they drive any serious reflection on the constitutionalization of evidence law. To confront them effectively is an enormous challenge, but one I think that is unavoidable in the enterprise Professor Paciocco has undertaken. I think that his attempts to do so are not fully successful and constitute the least satisfactory aspect of the book.

All that aside, I end as I began. This book is a substantial contribution to Canadian evidence scholarship from an articulate and insightful author. I am looking forward to the second edition.

*T. A. Cromwell**

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[4] [1986] 1 S.C.R. 103, 24 C.C.C. (3d) 321.

[5] R.S.C. 1985, c. N-1.

[6] *Re Seaboyer and the Queen, Re Gayme and the Queen* (1987), 61 O.R. (2d) 290, 58 C.R. (3d) 289 (C.A.), leave to appeal to S.C.C. granted 16 May 1988.

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