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Equality and the Economic Consequences of Spousal Support: A Canadian Perspective

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EQUALITY AND THE ECONOMIC CONSEQUENCES OF SPOUSAL SUPPORT: A CANADIAN PERSPECTIVE

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I. INTRODUCTION

> More than any other area of law, family law has a pervasive influence on the way society functions. To dissect family law is to begin to understand the dynamics of law, tradition and culture. It is also to begin to appreciate the dynamics and components of social change. In short, family law is a study in law, politics, history, philosophy and sociology.[1]

In 1991, 83% of Canadians lived in a married, common-law or single-parent family setting.[2] Between 1981 and 1991, the percentage of families headed by married couples dropped from 83% to 77%, while for common-law couples it rose from 6% to 10%.[3] For single parents the increase was from 11% to 13%.[4] In fact, the number of common-law families has more than doubled in the last ten years, and the number of single-parent families has more than doubled in the last twenty years.[5] Furthermore, in 1990 alone, there were 78,152 divorces in Canada.[6]

These statistics herald social change that promises, over time, to recharacterize what constitutes a family and, as a corollary, what norms, principles and assumptions should animate our discussions of and developments in family law. Indeed, if family law is to stay with the times and address the issues of today, it must demonstrate a capacity for evolution and growth greater than that demanded of most areas of the law. Most importantly, it must demonstrate a capacity for development that is both sensitive and responsive to the realities of the individuals it professes to regulate.

The purpose of this article is to familiarize readers in the United States with judicial approaches to Canadian divorce legislation in the hope that an understanding of the Canadian approaches and philosophies may offer fruitful perspectives for the interpretation of similar legislation in the United States. This article focuses only on one aspect of the complex problem of inequalities that underlie traditional approaches to family law. Specifically, it examines the Canadian approach to spousal support and developments in Canada towards acknowledging and addressing the social dynamic of

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1. Rosalie S. Abella, *Family Law in Ontario: Changing Assumptions*, 13 (1) OTTAWA L. REV. 1 (1981).

2. STATISTICS CANADA, HOUSING, FAMILY AND SOCIAL STATISTICS, A PORTRAIT OF FAMILIES IN CANADA 9-10 (Nov. 1993).

3. *Id.* at 10.

4. *Id.*

5. *Id.*

6. *Id.* at 17.

inequality arising from marriage and its breakup.

This article focuses primarily upon the social context of spousal support. It does not offer a comprehensive discussion on interpretation of spousal-support provisions under Canadian divorce law. Rather, it focuses upon the Supreme Court of Canada's rejection of the "clean break" or "self-sufficiency" model as the dominant philosophy governing spousal-support awards in Canada. Further to this discussion, it examines the importance of acknowledging women's economic realities upon marital breakup in Canadian jurisprudence and argues that now judges must issue spousal-support orders that accurately reflect those realities. The article comes to four conclusions: (1) Until recently, in Canada the self-sufficiency model of spousal support has been used disproportionately as a basis for determining eligibility for and duration and quantum of spousal support; (2) The self-sufficiency model has now been recognized in Canadian jurisprudence as aggravating rather than palliating existing structural inequalities in society between men and women; (3) Values of substantive equality have been identified by the Supreme Court of Canada as an appropriate philosophy by which to address the inequities between spouses exposed under the self-sufficiency model; and (4) Judicial notice may play an important role in acknowledging these realities in the exercise of judicial discretion.

The subject of this paper has been canvassed to a great extent in the Supreme Court of Canada's 1992 decision, *Moge v. Moge*.[7] Therefore, I used that decision as a prism through which to question some of the traditional assumptions underlying the self-sufficiency model of spousal support. Furthermore, my analysis examines the role that a commitment to substantive equality has played in this process and comments upon judicial notice as a means, and judicial discretion as a necessity, in furthering this goal through equitable sharing between spouses of the economic consequences of marriage and its breakdown.

II. DIVORCE LEGISLATION IN CANADA

A. *The Ambit of the Divorce Act*

Sections 91 and 92 of Canada's Constitution Act, 1867[8] set out the division of powers between the federal government and the provinces of Canada. According to Section 91(26), divorce is an exclusively federal jurisdiction; a jurisdiction, however, which was not invoked except in limited circumstan-

7. [1992] 3 S.C.R. 813 (Can.).

8. British North America Act, 1867, 30 & 31 Vict., ch. 3, § 91(26) (U.K.) (renamed to Constitution Act, 1867, by the Canada Act 1982 (U.K.) ch.11).

ces for the first 100 years of Confederation.[9] At the time of their entry into Confederation, most provinces already had some form of legislation governing divorce.[10] Since these statutes were based on various English and Pre-Confederation colonial statutes, however, the approaches taken lacked significant uniformity. Because of this lack of uniformity and a genuinely perceived need for reform in the area,[11] in July of 1968 the federal government of Canada enacted the first comprehensive divorce legislation, the Divorce Act of 1968.[12] The modern descendent of that Act is the Divorce Act of 1985.[13]

The enactment of the Divorce Act of 1968 and the Divorce Act of 1985 only partly displaced the authority of provincial statutes from the family law sphere. The displacement is explained, in part, by Section 92(13) of the Constitution Act, which accords provinces the exclusive right to enact legislation dealing with property and civil rights. The Divorce Act of 1968 applies only to spouses who are formally married and does not affect the provinces' jurisdiction with respect to, for instance, the breakup of common-law relationships. The Act also does not touch upon the division of spousal property. It only governs the breakup of actual marriages, and in that context only, is paramount to provincial legislation in custody matters and awards of spousal and child support.[14] With this brief introduction by way of background, it is clear that Canadian family law is both a federal and provincial domain. However, because the most important asset held by a significant

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9. Parliament dealt with divorce on only five occasions and in a strictly minor way: Marriage and Divorce Act of 1925, 1925 (Can.), ch. 41; Divorce Act of 1930 (Ontario), 1930 (Can.), ch. 14; Divorce Jurisdiction Act, 1930 (Can.), ch. 15; British Columbia Divorce Appeals Act, 1937, ch. 4; Dissolution and Annulment of Marriage Act, 1963 (12 Eliz. II, ch. 10).

10. By virtue of the Constitution Act, provinces were prohibited from enacting divorce law or from interfering with the substantive provisions of a federal law in existence, subsequent to their entry into Confederation. Partly as a result of this arrangement, Quebec and Newfoundland had no divorce legislation whatsoever until the enactment of the Divorce Act of 1968. CHRISTINE DAVIES, FAMILY LAW IN CANADA 325-28 (4th ed. 1984).

11. In 1966, a special Joint Committee of the Senate and House of Commons was created in order to inquire into and report upon divorce in Canada and the social and legal problems relating thereto. Its "Report of the Joint Committee of the Senate and House of Commons on Divorce," issued in 1967, led the Federal Parliament to adopt the Divorce Act of 1968, R.S.C., ch. D-8 (1970) (Can.), which applied to all Canadian provinces. This uniform enactment dealing with divorce in Canada was received as a great improvement even by its critics. DAVIES, *supra* note 10, at 328-29.

12. Divorce Act of 1968, R.S.C., ch. D-8 (1970) (Can.).

13. R.S.C. (2d Supp.), ch. 3 (1985) (Can.).

14. Where a divorce order does not address child or spousal support, however, any existing provincial orders to such effect continue to be valid. Keller v. Keller (1987), 10 R.F.L. (3d) 268 (Alta. Q.B.). Moreover, a court making an order under the Divorce Act of 1985 should not make a support order whose effect is to vary a support order made under provincial legislation, since to do so would effectively frustrate the variation requirements set out in the provincial act. Rehn v. Rehn (1988), 13 R.F.L. (3d) 440 (Ont. U.F.C.).

percentage of married couples at the point of breakup is their future earnings, and since accounting for future earnings generally falls under the rubric of spousal support, this article restricts its analysis of the implications of divorce to the philosophy underlying support provisions in the federal Divorce Act. The principles and arguments raised in this narrower context are nonetheless illustrative of several points that have wider applicability and which are elaborated upon below.

B. *The Evolution of the Divorce Act*

Upon its introduction in 1968, Canada's Divorce Act did far more to consolidate and render uniform the laws governing marital breakup in Canada than it did to advance them to a higher theoretical plane. It was, in essence, largely based upon the English Matrimonial Causes Act of 1857.[15] Although the Act provided new grounds for divorce, they were based primarily on matrimonial fault. The sole exception to the purely fault-based criteria was a new criterion that permitted divorce after the spouses had lived separately for a period of 3 to 5 years.[16] On the whole, the Divorce Act of 1968 reflected primarily the social and behavioral assumptions, as well as the underlying philosophy, of its Victorian predecessor.[17]

Much had changed in Canadian society, however, to justify an evolution of divorce legislation that would reflect the fact that the assumptions which once firmly anchored the traditional model of spousal support were no longer representative of modern realities. Under the Victorian model, divorce had been rare, and innocent women could expect lifetime support.[18] This model was inextricably linked to the assumption that marriage was a lifetime commitment.[19] Without a doubt, this assumption no longer reflected social reality. Many living arrangements no longer could be characterized as traditional.[20] There has been a steady increase in the importance attributed to

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15. LAW REFORM COMMISSION OF CANADA, "REPORT ON FAMILY LAW": INFORMATION CANADA 13 (1976) [hereinafter LRCC Report].

16. The Divorce Act of 1968, R.S.C., ch. D-8 § 4(e) (1970) (Can.).

17. LRCC REPORT, *supra* note 15, at 13.

18. Carol S. Rogerson, *Judicial Interpretation of the Spousal and Child Support Provisions of the Divorce Act, 1985 (Part I)*, 7 C.F.L.Q. 155, 166 (1991).

19. The principle of indissolubility of marriage was at times recognized as a means to protect innocent women who were financially dependant on their husbands against repudiation. MIREILLE D.-CASTELLI & ÉRIC-OLIVIER DALLARD, LE NOUVEAU DROIT DE LA FAMILLE AU QUÉBEC — PROJET DE CODE CIVIL DU QUÉBEC ET LOI SUR LE DIVORCE 291-93 (Sainte-Foy, Les Presses de l'Université Laval, 1993). In other societies, indissolubility resulted from religious beliefs or developed as a means of ensuring an orderly society that reflected and protected the predominant moral views and social policies of its members, and also as a means of ascertaining the stability and permanency of the society itself. *Id.* at 289-90.

20. STATISTICS CANADA, HOUSING, FAMILY AND SOCIAL STATISTICS, WOMEN IN CANADA: A STATISTICAL REPORT 7 (2d ed., Ottawa, 1990) (cited in Canada (A.G.) v. Mossop,

individual values, interests, and expectations regarding the perception of marriage as a vehicle by which to advance those interests. This Act also witnessed an increase in the readiness of individuals to leave a marriage when the relationship demonstrated itself incapable of fulfilling those interests and expectations. Acceptance of divorce as a reasonable solution to marriage breakdown had risen dramatically in Canadian society. This significant shift from the "long duration traditional extended family" to the "shorter duration modern nuclear family" was based primarily on the free will of the partners and was increasingly oriented towards their equality.[21] Society's move beyond the principle of the indissolubility of marriage, however, consequently entailed a wholesale re-examination of all other principles and doctrines which may have depended upon it, in whole or in part.

In response to a number of criticisms of the Divorce Act of 1968, the Law Reform Commission of Canada was mandated by the legislature to review the Act and to formulate proposals for reform. The Commission released its report in 1976,[22] and this led to the adoption of the present Divorce Act of 1985. Central to the Divorce Act of 1985 was the fact that the sole ground for divorce was now the breakdown of the marriage. Specifically, the Act introduced a criterion which permitted no-fault divorce following a one-year period of separation.[23] Moreover, the spouses' conduct was expressly excluded from determinations regarding spousal- and child-support awards.[24] Whereas, under the previous Divorce Act of 1968 the grounds for divorce generated the most litigation, disputes under the new Act would focus primarily on spousal and child support, as well as on property division issues.[25]

The 1976 Report recognized the growing disjuncture between divorce laws and the realities of divorce. It alluded to the changing realities of Canadian society.

[1993] 1 S.C.R. 554, 628).

21. As shall be discussed below, however, the notion of equality engendered by this environment was strictly a notion of formal equality, which by its inappropriate assumption that it was giving equal rights to equally situated individuals, ultimately proved itself more economically destructive than constructive; it has been more of a barrier than a vehicle to women's substantively equal involvement in family and labor market spheres.

22. LRCC REPORT, *supra* note 15.

23. Divorce Act of 1985, R.S.C. (2d. Supp.), ch. 3 § 8(2)(b) (1985) (Can.).

24. *Id.* § 15(6).

25. Since 1986, most divorces have been based on the no-fault ground. In 1988, 83% of divorces were granted on that ground. *See* BUREAU OF REVIEW, CANADA DEPARTMENT OF JUSTICE, EVALUATION OF THE DIVORCE ACT, PHASE II: MONITORS AND EVALUATION 136 (1990) [hereinafter BUREAU OF REVIEW]. Even though the situation was not yet one of rubber-stamping divorces, 96% of divorces were not contested. *See* JULIEN D. PAYNE, PAYNE ON DIVORCE 4 (3d ed. 1993).

> Changes we have experienced socially, as well as changes in the composition, structure, expectations and thwarted hopes of families and their members have at best led to palliative accommodations by the law to social pressures, such as making divorce generally available, but hardly to a re-examination of the image of the family the law reflects. This image may be by now so far removed from reality that the law and its institutions may weaken rather than strengthen family life, especially in crisis situations.[26]

The 1976 Report purported, therefore, to set out a new approach, intended to alleviate the economic, social and emotional hardships so frequently endured in a marital breakdown. Essentially, while recognizing the need to preserve and strengthen family units in order to prevent marriage breakdown, the Report advocated the use of humane and constructive approaches when those families were beyond salvation. It found the adversarial nature of the judicial process to be inappropriate, in general, for the resolution of family conflicts and asserted that fault as a substantive ground for divorce fostered adversarial attitudes, as did accusatory pleadings.[27] Divorce on demand, on the other hand, raised concerns about hasty and unconsidered divorces. The Commission therefore settled upon a compromise whereby the sole ground for divorce became the failure of the personal relationship between the spouses, referred to as "marriage breakdown."[28] Under such an approach, settlement of property matters and financial provisions upon divorce would be achieved in the context of economic re-adjustment and would be kept separate from the issues surrounding the breakdown of the relationship itself.[29]

Several other observations and recommendations stemmed from the Commission's adoption of the no-fault standard. Most important was the Commission's recognition of the potential injustices that could follow if spousal support responded inadequately to the realities that spouses encounter both during and after the marital relationship.

> When a marriage has broken down, there is much that the law ought to do to assist the persons affected by the radical changes in circumstances to adjust to the new situation and to protect those who have

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26. LRCC REPORT, *supra* note 15, at 1.

27. *Id.* at 3.

28. *Id.* at 19. Other proposals made to render marital breakup a less confrontational process included arbitration, conciliation and other dispute-resolution mechanisms, all to be administered under a united, family court system. *Id.* at 2, 7, 11, 20.

29. *Id.* at 41.

> relied to their detriment on the expectation that marriage would be permanent. We suggest a shift in legal policy towards a process that focuses on the social and economic implications on marriage breakdown for the spouses and their children, premised on finding fair and constructive solutions to the problems resulting from the ending of this most important human relationship.[30]

The Commission's focus on the economic implications of marriage contemplated fair and equitable treatment of a generation of women who had married in earlier decades with the expectation that the marital relationship would be permanent, with a commensurate degree of income security. Furthermore, these women believed that their investment in the relationship would be justly rewarded in the event their marriage dissolved.

With respect to issues of property and maintenance, the Commission believed that the contemporaneous legal framework did not accord with social reality and recommended that the law leave room for creativity in these areas because the relative positions of men and women were evolving, if not experiencing a real revolution.[31] Most notably, the Commission explained that traditionally the law did not consider the work of a homemaker as contributing to the acquisition of property in a marriage and failed to foresee that women could eventually become totally financially independent.[32] Because of its failure to attribute value to work in the home, the law attached different economic consequences to the varied family roles of financial provider, household manager and child-care provider. Given that the first of these roles was almost always performed by the husband and the second by the wife, the law both perpetrated and perpetuated an unequal gender division in the economic consequences of marriage breakdown.[33]

In light of this conclusion, the Commission stressed that courts should apply a fair and rational set of objective criteria to deal with the economic consequences of marriage breakdown.[34] While acknowledging the complex moral and philosophical issues occasioned by marital breakup, the Commission, nonetheless, set out certain primary considerations to guide future analyses of support awards. First, it set forth the overarching principle that the judicial process consider children's interests as being of foremost importance.[35] Second, the Commission addressed the consideration that child care and household management not carry with them a one-sided risk of economic deprivation upon dissolution of marriage. It recommended that,

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30. *Id.* at 17-18.
31. *Id.* at 3.
32. *Id.*
33. *Id.* at 35-36.
34. *Id.* at 40.
35. *Id.* at 4.

as a primary factor, courts consider the economic disability of being the non-earning spouse.[36] Moreover, the Commission advocated that the law consider the economic advantages accruing to the spouse who performed the sole wage-earning role as a mutual asset.[37]

Both of these principles reflected the view that support is compensatory in nature. To this extent, the Commission's guidelines recognized the modern reality of women and required that support provisions be articulated in a way that would meet the reasonable needs of the spouse who performed family functions on behalf of both spouses. The Commission tempered this principle, however, with the following proviso:

> The right to continue to share in this asset after the partnership ends should last *as long as the economic needs following from dependency during marriage continue to exist in the face of reasonable efforts by the dependent person to become self-sufficient. The governing principle being that everyone is ultimately responsible to meet his or her needs.*[38]

These words hinted at a judicial approach to support that would ultimately worsen, rather than ameliorate, the economic situation of women emerging from marital breakup.

In advocating the use of firm objectives, the Commission implicitly recognized that the task of debunking traditional myths and assumptions also carried with it the responsibility of providing a new philosophical framework with which to replace them. This was an area in which the Divorce Act of 1968 had failed miserably. Although the 1968 Act had recognized the need to turn inside out many of the traditional assumptions of family law and had offered courts the judicial avenues to do so, it gave no guidance as to how this considerable discretion should be exercised.

According to the 1968 Act, support was to be awarded in a manner the courts thought "fit and just to do so having regard to the conduct of the parties and the condition, means and other circumstances of each of them."[39] No more precise objectives were cited; no philosophy was enunciated. By employing such vague and open-ended language, the 1968 Act conferred broad and *unstructured* discretion on the judiciary. The Act, in effect, created a social and normative vacuum on the subject of spousal support without offering a concrete alternative with which to fill it. Judge Rosalie S. Abella aptly described the ensuing muddle in the following terms:

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36. *Id.* at 40.
37. *Id.* at 40-41.
38. *Id.* at 41 (emphasis added).
39. Divorce Act of 1968, R.S.C., ch. D-8 § 11(1) (1970) (Can.).

> To try to find a comprehensive philosophy in the avalanche of jurisprudence which is triggered by the Divorce Act [R.S.C. 1970 c D-8] and the various provincial statutes is to recognize that the law in its present state is a Rubik's cube for which no one yet has written the Solution Book. The result is a patchwork of often conflicting theories and approaches.[40]

By offering basic principles upon which to premise support awards, the 1976 Commission sought to avoid this pitfall.

In 1984, when the Canadian Department of Justice released a series of recommendations based largely on the 1976 Report of the Law Reform Commission, it recognized the necessity of such an underlying philosophy.

> The objectives of maintenance should be clearly spelled out in the Divorce Act to ensure that, as far as possible, the economic consequences of divorce are settled fairly and consistently in divorce cases. These objectives should establish general guidelines to be used in determining the nature and value of maintenance awards, ruling out such consideration as the behavior of the spouses.[41]

The Divorce Act of 1985 was enacted shortly thereafter.

Section 15 of the 1985 Divorce Act sets forth the provisions governing the award of both spousal and child support. The relevant provisions provide:

> (2) A court of competent jurisdiction may, on application by either or both spouses, make an order requiring one spouse to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump sum and periodic sums, as the court thinks reasonable for the support of
>
> (a) the other spouse;
> (b) any or all children of the marriage; or
> (c) the other spouse and any or all children of the marriage.
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> . . .

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40. Rosalie S. Abella, *Economic Adjustment on Marriage Breakdown: Support,* 4 FAM. L. REV. 1 (1981).

41. DEPARTMENT OF JUSTICE CANADA, DIVORCE LAW IN CANADA: PROPOSALS FOR CHANGE 22 (1984).

(4) The court may make an order under this section for a definite or indefinite period or until the happening of a specified event and may impose such other terms, conditions or restrictions in connection therewith as it thinks fit and just.

(5) *In making an order under this section, the court shall take into consideration the condition, means, needs and other circumstances of each spouse and of any child of the marriage for whom support is sought, including*

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

(6) In making an order under this section, the court shall not take into consideration any misconduct of a spouse in relation to the marriage.

(7) *An order made under this section that provides for the support of a spouse should*

(a) *recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;*
(b) *apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above the obligation apportioned between the spouses pursuant to subsection (8);*
(c) *relieve any economic hardship of the spouses arising from the breakdown of the marriage; and*
(d) *in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.*

(8) An order made under this section that provides for the support of a child of the marriage should

(a) recognize that the spouses have a joint financial obligation to maintain the child; and
(b) apportion that obligation between the spouses according to their relative abilities to contribute to the performance of the obligation.[42]

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42. Divorce Act of 1985, R.S.C. (2d Supp.), ch.3 § 15 (1985) (Can.) (emphasis added). Section 17(7) of the Act sets out the identical four objectives in the context of variation of

The Canadian Department of Justice stressed that the four objectives governing spousal support, outlined in sections 15(7) and 17(7) of the 1985 Act, were not arranged in terms of priorities and should operate together to provide a fair system of maintenance awards.[43] As will be discussed below, however, courts generally did not adhere to this advice over the next few years.

III. THE EVOLVING JUDICIAL APPROACH TO SPOUSAL SUPPORT

A. *The Differing Models of Spousal Support*

Before contemplating the judicial trends evident both prior and subsequent to the Divorce Act of 1985, it is useful to set the parameters of this examination by outlining the three models of spousal support generally available to courts to fill the philosophical vacuum left under the 1968 Act: (1) the income-security model; (2) the compensatory model; and (3) the clean-break or self-sufficiency model.[44]

The obligation for support under the income-security model flows from the marriage per se. Its purpose is to provide for the economic support of the dependent spouse according to the needs and means of the parties, regardless of whether those needs arise from the marriage (*e.g.*, illness). In this respect, it is most closely related to the traditional model of support except that marital offenses no longer play a role in the court's determination. The model requires contemplation of the means and needs of both parties. However, it is unclear whether needs are defined according to a subsistence-level standard of living, whether they require a standard of living on a rough par with that of the other spouse, or whether their elucidation falls somewhere in between, depending on the length of the relationship.

On the other hand, the compensatory model bases spousal support on the advantages and disadvantages flowing from the actual relationship between the parties, rather than from the fact of marriage per se. It attributes financial value to the reasonably held expectations by the spouse who made the preponderance of non-monetary contributions or sacrifices that helped the couple achieve their marital lifestyle. The assumption of child-rearing responsibilities both during and after the marriage constitutes the most significant base for compensation under this model, both in terms of value of work contributed and of opportunity costs incurred.

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spousal-support awards. *Id.*

43. DEPARTMENT OF JUSTICE CANADA, *supra* note 41, at 23.

44. These three models are well canvassed in Rogerson, *supra* note 18, at 168. The following discussion is based largely upon her elucidation of these models.

The self-sufficiency model, in contrast, is premised upon the notion of personal responsibility. This model encourages the spouses to go their separate ways and is most consistent with the clean-break approach to marital relationships. While the model recognizes that, upon divorce, the wife is not wholly responsible for her situation of relative economic deprivation, and therefore, support should be paid to aid in her readjustment as an independent individual, it dictates that such support is only justifiable for a relatively short, transitional period. Support is provided only until such time as the wife reasonably can be expected to participate fully in the work force, in any type of viable employment. The self-sufficiency model avoids any significant discussion of the question of compensation for child care. It defines needs, moreover, in the narrow context of essential needs, regarding the standard of living achieved in the relationship itself as largely irrelevant.

B. *The Judiciary's Response to the Models of Spousal Support*

As noted earlier, one of the greatest lacunas of the Divorce Act of 1968 was its failure to articulate clear objectives with respect to the awarding of spousal support. Clearly, however, the social context in which the 1968 Act was enacted dictated an increasing recognition of women's equality, both in the family and in the workplace. The income-security model seemed unacceptable in this social context partially because it bore too much resemblance to the traditional model from which the Divorce Act supposedly departed.

At the opposite end of the spectrum, however, the compensatory model fared little better. The male-dominated legal profession may have feared that advocacy of the compensatory model would be perceived as calling into question the courts' commitment to equality and questioning the ability of women to "go it on their own." In other respects, a male backlash against the perceived injustices of the traditional support system also may have inhibited full consideration of the values of a compensatory-support model. The most salient factor underlying the failure of the compensatory model to take root, however, appears to have stemmed from misperceptions as to the full significance of true equality. Understandings of equality and its implications for justice were still at their nascent stages. Equality was perceived by many to require only equal treatment and not necessarily equal results. Accordingly, it was enough to treat women equally *before* the law without first ensuring that they were *equals* under the law.

Equality was a dangerously seductive term. Substantive equality, that is, equality of result only existed to the extent that women were the same as men, and no further. Though society was inviting women more openly into the workforce, it did not commensurately relieve them of their responsibilities within the family. Even worse, it continued to accord little recognition to the value of the work performed in the home or to the sacrifices undertaken by

women in order to fulfill the child-rearing and homemaking functions that society largely still assumed were theirs.

In 1981 Rosalie Silberman Abella, now a judge at the Ontario Court of Appeal, commented on the momentousness of the incorporation of notions of equality into divorce law.

> To recognize that each spouse is an equal economic and social partner in marriage, regardless of function, is a monumental revision of assumptions. It means, among other things, that caring for children is just as valuable as paying for their food and clothing. It means that organizing a household is just as important as the career that subsidizes this domestic enterprise. It means that the economics of marriage must be viewed qualitatively rather than quantitatively.[45]

This vision of equality, however, did not animate the majority of spousal awards emerging in the years following the passage of the 1968 Act. Rather, what did materialize was a slow but steady trend away from the simple model of "means and needs" to a greater emphasis on self-sufficiency.[46] Thus, although considerations of women's equality no doubt expedited passage of Canada's first Divorce Act, the victory was bittersweet. It will be argued later in this paper that the version of equality underlying self-sufficiency and animating interpretation of the 1968 Act constituted, in effect, "equality with a vengeance." By not acknowledging the magnitude of the economic disadvantage suffered by the primary caregiving spouse both during and after marriage, formal equal treatment of women only exacerbated their difficulties post-divorce. Put bluntly, the life preserver of equality that had been thrown to divorced women was lead-lined.

The advent of the 1985 Divorce Act brought a pronounced increase in judicial preference for the self-sufficiency model. At first blush, such an outcome appears somewhat paradoxical in light of the fact that section 15(7) of the 1985 Act enunciated a new set of four objectives for spousal support, supposedly all of equal significance. Nonetheless, the self-sufficiency model

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45. Moge v. Moge, [1992] 3 S.C.R. 813, 864 (Can.).

46. DAVIES, *supra* note 10, at 472. The following decisions lean toward a self-sufficiency model: Patton v. Patton (1983), 34 R.F.L. (2d) 318, 321 (B.C.S.C.); Barnard v. Barnard (1982), 30 R.F.L. (2d) 337 (Ont. C.A.); Purcell v. Purcell (1982), 29 R.F.L. (2d) 438 (N.S.T.D.); Hinds v. Hinds, [1983] W.D.F.L. 388 (B.C.S.C.); Scobell v. Scobell (1980), 21 R.F.L. (2d) 109 (B.C.C.A.); Humeniuk v. Humeniuk (1982), 27 R.F.L. (2d) 191 (Alta. Q.B.); Pearson v. Pearson (1982), 44 N.B.R. (2d) 444 (Q.B.); Dagenais v. Duceppe, [1982] C.S. 400; McMillan v. McMillan (1983), 36 R.F.L. (2d) 225 (Ont. C.A.); McManus v. McManus (1984), 37 R.F.L. (2d) 407 (Ont. H.C.). *But see* Berry v. Murray (1983), 30 R.F.L. (2d) 310, 312 (B.C.C.A.); Messier v. Delage, [1983] 2 S.C.R. 401; Nunan v. Nunan (1983), 37 R.F.L. (2d) 176 (Sask. U.F.C.); Magon v. Magon (1983), 36 R.F.L. (2d) 409 (Ont. H.C.).

appeared to gather steam, in part because of judicial extrapolation of two Supreme Court decisions on related subjects. The first decision, ironically, involved the carving out of an exception to the self-sufficiency model where it was clearly inappropriate.[47] The second decision, most commonly credited with encouraging the proliferation of the self-sufficiency model, was actually a series of three cases heard together. Often referred to as the "*Pelech* trilogy,"[48] these cases dealt with the variation of previously agreed-upon separation agreements. In all three *Pelech* cases, the payee sought to revive, extend or increase the support provisions of a previously concluded agreement on the basis that her circumstances had changed.[49] The Supreme Court of Canada, addressing this question in the context of the 1968 Act, concluded that a private agreement could not negate the court's discretion to review support orders.[50] Where the contract was freely negotiated with independent legal advice, however, it should be respected.[51] Thus, in order for an applicant to vary spousal support, the Court required the applicant to establish that the applicant had suffered a radical change in circumstances, and this change had resulted from an economic pattern of dependency engendered by the marriage.[52] In other words, the radical change in circumstances had to be causally connected to the marriage.

Commentators have attributed the escalating use of the self-sufficiency model in Canada to judges' adoption of the *Pelech* "causal connection" standard in "pure" support cases.[53] Accordingly, spousal-support awards continued to promote self-sufficiency, with any relaxation of this objective depending largely upon the ability of the woman to demonstrate a disadvantage that was causally connected to the marriage. As a corollary, the longer the

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47. Messier v. Delage, [1983] 2 S.C.R. 401. After a lengthy marriage, the ex-wife had obtained a Master's-level education and was having difficulties finding a job because of a particularly poor labor market. *Id.* The Court decided in her favor, holding the self-sufficiency model to be inappropriate in this case. It therefore found her to be entitled to an extension of her time-limited spousal support until she overcame her serious difficulties in rejoining the work force. The minority's view would have cut off all support. *Id.* at 412. Note, however, that the Court seemed to endorse, as a general rule, the goal of self-sufficiency, and furthermore, relied heavily on the fact that the labor market *generally* had suffered a considerable downturn which was not foreseeable to the parties. This factor is extrinsic to any recognition of economic disadvantage arising *from the marriage.*

48. Pelech v. Pelech, [1987] 1 S.C.R. 801; Richardson v. Richardson, [1987] 1 S.C.R. 857; Caron v. Caron, [1987] 1 S.C.R. 892 (approach taken in all three cases).

49. *Pelech,* [1987] 1 S.C.R. at 802; *Richardson,* [1987] 1 S.C.R. at 857; *Caron,* [1987] 1 S.C.R. at 892-93.

50. *Pelech,* [1987] 1 S.R.C. at 803; *Richardson,* [1987] 1 S.R.C. at 858; *Caron,* [1987] 1 S.R.C. at 893.

51. This principle was enumerated in *Pelech,* [1987] 1 S.R.C. at 803.

52. *Id.*

53. *See, e.g.,* Rogerson, *supra* note 18, at 183-84, 210. Pure support cases are those where no separation agreement existed between the parties.

period of time after divorce, the more difficult it became to prove the existence of a causal link between the marriage and the source of the woman's disadvantage. As noted above, however, this causal connection standard first appeared in the very different context of variation of separation agreements, rather than in the context of pure support orders. Extension to the domain of pure support awards, in the opinion of some commentators, caused courts to avoid discussing more explicitly the advantages and disadvantages flowing from the marriage by *obscuring* rather than *exposing* these aspects of the relationship.[54] Most particularly, although self-sufficiency permits some analysis of the disadvantages suffered by one spouse, it provides no latitude for a discussion of the advantages conferred by one spouse upon the other.

The inappropriateness of the self-sufficiency model was most evident in the context of lengthy marriages after which it was unreasonable to expect the dependent spouse ever to become wholly financially independent. In order to avoid injustices in such contexts, courts began to classify marriages as being either "traditional" or "modern."[55]

A traditional marriage is typically lengthy, with one spouse, the man, occupying the role of breadwinner, and the other spouse, the wife, remaining at home and attending to child care and other domestic aspects of marital life. In such circumstances, it is often highly unlikely that the wife would be capable of overcoming the disadvantages of her lengthy dependency and re-entering the workforce to the extent required for her to become self-sufficient. This reality was recognized by the Supreme Court of Canada in the narrow-split decision of *Messier v. Delage*[56] and has been generally accepted in subsequent case law.[57]

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54. *Id.* at 210-11. Rogerson cites the example of finding no causal connection between economic disadvantage and the relationship on the basis that the woman has the same job after marriage that she had had before. *Id.* This analysis is simplistic because it fails to account for promotions, salary increases and the value of keeping job skills up-to-date.

55. *See* Heinemann v. Heinemann (1989), 20 R.F.L. (3d) 236, 272, 274 (N.S.S.C. App. Div.); *see also* Story v. Story (1989), 23 R.F.L. (3d) 225, 244. There may be cases where self-sufficiency is never possible due to the age of the spouse at the marriage breakdown. It is often, in my opinion, totally unrealistic to expect a 45- or 50-year-old spouse who has not been in the job market for many, many years to be retrained and to compete for employment in a job market where younger women have difficulty becoming employed. Employment and self-sufficiency are simply not achievable. In those cases, the obligation to support must surely be considered to be permanent. That obligation must flow from the marriage relationship and the expectations the parties had when they married.

56. [1983] 2 S.C.R. 401.

57. *See, e.g.*, Story v. Story (1989), 23 R.F.L. (3d) 225; White v. White (1988), 13 R.F.L. (3d) 458 (N.B.C.A.); Droit de la famille — 614, [1989] R.J.Q. 535 (C.A.); Christian v. Christian (1991), 37 R.F.L. (3d) 26 (Ont. Ct. (Gen. Div.)); Touwslager v. Touwslager (1992), 63 B.C.L.R. (2d) 247 (C.A.); Vigneault v. Cloutier (1989), 65 D.L.R. (4th) 598 (Que. C.A.), [1989] R.D.F. 686 (sub nom. Droit de la famille — 716); Droit de la famille — 1567, [1992] R.J.Q. 931 (C.A.).

In contrast, a modern marriage is one in which both spouses are employed outside the home, and therefore, both participate in the economic advancement of the family. Although one spouse may be disadvantaged for a period of time during the marriage by deserting career opportunities, the theory holds that this could be balanced upon dissolution by provisions promoting the self-sufficiency of that spouse, after which each party could go their own way.[58]

In certain cases this dichotomy proved unhelpful because it was difficult to categorize the union as either traditional or modern since it possessed attributes common to both types of marriage.[59] Therefore, some courts, despite the fact that the wife had prospects of resuming full-time employment, classified the marriage as traditional in order to justify a support order.[60] In similar situations, other courts arrived at a contrary conclusion.[61] Almost across the board, court-awarded support was not generous.[62] Thus, even in traditional marriages where the self-sufficiency model and its progenitor, the causal connection test, did not affect the questions of entitlement to or duration of spousal support, these factors asserted themselves at the level of *quantum*.[63] Further, the additional danger existed that courts would view *any* involvement in the labor market as evidence that the marriage was modern, and the wife had only suffered minimal economic displacement.[64] There was little, if any, recognition that women often tailor their jobs to their

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58. Oswell v. Oswell (1990), 28 R.F.L. (3d) 10 (Ont. H.C.); Grohmann v. Grohmann (1991), 37 R.F.L. (3d) 73 (B.C.C.A.).

59. *See* Moge v. Moge [1992] 3 S.C.R. 813, 845 (Can.). "There are, however, many cases which do not fall easily into either category. These cases pose difficulties for courts which attempt to make assessments based on two clear stereotypes, especially when determining the question of self-sufficiency." *Id.* (referring to Patrick v. Patrick (1991), 35 R.F.L. (3d) 382 (B.C.S.C.)).

60. Mullin v. Mullin (1989), 24 R.F.L. (3d) 1 (P.E.I.S.C. App. Div.); Mullin v. Mullin (1991), 37 R.F.L. (3d) 142; Heinemann v. Heinemann (1989), 20 R.F.L. (3d) 236 (N.S.S.C. App. Div.); Story v. Story (1989), 23 R.F.L. (3d) 225.

61. *See* Seward v. Seward (1988), 12 R.F.L. (3d) 54 (N.S. Fam. Ct.), Regan v. Regan, Ont. Ct. (Gen. Div.), Kitchener Doc. 118/90, July 25, 1991, *per* Salhany J., [1991] O.J. No. 1350 (QL Systems).

62. In Cymbalisty v. Cymbalisty (1989), 56 Man R. (2d) 28, 32 (Q.B.), the court made explicit an assumption which seems to underlie many determinations of self-sufficiency, namely that a gross income of $20,000 per year would meet the level of self-sufficiency required by the Divorce Act.

63. Rogerson, *supra* note 18, at 180. According to a study by Professor Carol Rogerson of recently reported cases involving support awards, in only 3 of 19 cases characterized as traditional marriages did the woman receive an award permitting her a total annual income equal to 70% or more of her husband's income. *Id.* At the opposite extreme, in 5 of the 19 cases the woman received a total annual income equal to less than 30% of that received by her husband. *Id.* In all fairness, however, these figures do not take into account agreed-upon divisions of property. *Id.*

64. *Id.* at 197.

child-care responsibilities.[65]

In summation, notwithstanding the language of the 1985 Act, Canadian jurists continued to view support largely through the prism of self-sufficiency, to the exclusion of the other three objectives outlined in subsections 15(7) and 17(7) of the Divorce Act of 1985.

IV. THE SOCIAL CONTEXT: SELF-SUFFICIENCY THAT WASN'T

In spite of the judicial trend noted above, or perhaps because of it, many recognized that the self-sufficiency model was poorly equipped to respond to the realities of both marriage and divorce. The perceived unfairness of the existing spousal-support regime prompted academics[66] and some courts[67] to look for alternatives that would promote greater fairness and substantive equality. Some opted for a compensatory model.[68] Most underlined the un-

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65. *Id.* at 208.

66. Martha Bailey & Nicholas Bala, *Canada: Abortion, Divorce and Poverty, and Recognition of Nontraditional Families*, 30 J. FAM. L. 279, 283-84 (1991). These authors stressed that Canadian appellate courts had not fully explored the compensatory model of spousal support and expressed their hopes that the Supreme Court of Canada would take the opportunity offered by the *Moge* decision to articulate a clear and equitable philosophy of spousal support. *See* Moge v. Moge, [1992] 3 S.C.R. 813, 858-66 (Can.) for an analysis of this doctrine. *See generally Report of the Florida Supreme Court Gender Bias Study Commission* 58 (March 1990); Hilary Land, *Changing Women's Claim to Maintenance*, *in* THE STATE, THE LAW, AND THE FAMILY: CRITICAL PERSPECTIVES 25, 28 (Michael D.A. Freeman ed., 1984); J.A. SCUTT, WOMEN AND THE LAW: COMMENTARY AND MATERIALS 247ff. (1990); Katherine K. Baker, *Contracting for Security: Paying Married Women What They've Earned*, 55 U. CHI. L. REV. 1193 (1988); Margaret F. Brinig & June Carbone, *The Reliance Interest in Marriage and Divorce*, 62 TUL. L. REV. 855 (1988); June Carbone & Margaret F. Brinig, *Rethinking Marriage: Feminist Ideology, Economic Change, and Divorce Reform*, 65 TUL. L. REV. 953 (1991); June Carbone, *Economics, Feminism, and the Reinvention of Alimony: A Reply to Ira Ellman*, 43 VAND. L. REV. 1463 (1990); Ira. M. Ellman, *The Theory of Alimony*, 5 C.F.L.Q. 1 (1989); Sally F. Goldfarb, *Marital Partnership and the Case for Permanent Alimony*, 27 J. FAM. L. 351 (1988-89); Joan M. Krauskopf, *Theories of Property Division/Spousal Support: Searching for Solutions to the Mystery*, 23 FAM. L.Q. 253 (1989); Mary E. O'Connell, *Alimony After No-Fault: A Practice in Search of a Theory*, 23 NEW ENG. L. REV. 437 (1988); Twila L. Perry, *No-Fault Divorce and Liability Without Fault: Can Family Law Learn from Torts?*, 52 OHIO ST. L.J. 55 (1991); Dana G. Stewart & Linda E. McFadyen, *Women and the Economic Consequences of Divorce in Manitoba: An Empirical Study*, 21 MAN. L.J. 80 (1992).

67. Heinemann v. Heinemann (1989), 20 R.F.L. (3d) 236, (N.S.S.C. App. Div.); Story v. Story (1989), 23 R.F.L. (3d) 225; White v. White (1988), 13 R.F.L. (3d) 458 (N.B.C.A.); Lynk v. Lynk (1989), 21 R.F.L. (3d) 337; Droit de la famille — 614, [1989] R.J.Q. 535 (C.A.); Christian v. Christian (1991), 37 R.F.L. (3d) 26 (Ont. Ct. (Gen. Div.)); Touwslager v. Touwslager (1992), 63 B.C.L.R. (2d) 247 (C.A.); Vigneault v. Cloutier (1989), 65 D.L.R. (4th) 598 (Que. C.A.), [1989] R.D.F. 686 (*sub nom. Droit de la famille — 716*); Droit de la famille — 1567, [1992] R.J.Q. 931 (C.A.); Messier v. Delage, [1983] 2 S.C.R. 401; Oswell v. Oswell (1990), 28 R.F.L. (3d) 10 (Ont. H.C.); Grohmann v. Grohmann (1991), 37 R.F.L. (3d) 73 (B.C.C.A.); Patrick v. Patrick (1991), 35 R.F.L. (3d) 382, 398-99; Mullin v. Mullin (1989), 24 R.F.L. (3d) 1 (P.E.I.S.C. App. Div.); Mullin v. Mullin (1991), 37 R.F.L. (3d) 142.

68. A major proponent of compensatory spousal support has been Professor Carol J. Rogerson. *See* Rogerson, *supra* note 18; Carol J. Rogerson, *The Causal Connection Test in*

fair treatment by the court system of middle-aged women who were thrown into the work force without training or proper skills.[69] The magnitude of women's economic disadvantage after divorce was becoming ever more evident.

A. *The Economic Reality of Divorce for Women*

In Canada, the "feminization of poverty"[70] manifested itself dramatically in the years following the early 1970s. The number of poor women increased by 110% between 1971 and 1986, while the number of poor men increased by only 24% during the same period.[71] Also, women constituted 46% of all persons living under the poverty line in 1971; they accounted for 59% in 1986.[72] In effect, the relative number of women to men living below the poverty line rose by almost 1% per year during that fifteen-year period. This trend contrasted starkly with the fact that women were nonetheless entering the labor force in ever-increasing numbers.

An analysis of Canadian court files in 1988, moreover, demonstrated that two-thirds of divorced women lived in poverty and that, when support was excluded from their incomes, this rose to 74%.[73] In contrast, a contemporaneous study revealed that only 11% of men lived below the poverty line after paying support.[74] Moreover, many divorced men received salary increases while their support obligations remained fixed, diminished or even ended as their former wives became self-sufficient and their children reached

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Spousal Support Law, 8 CAN. J. FAM. L. 95 (1989). However, the principles of compensatory support and their underpinnings have also found favor among other scholars and practitioners. Christine Davies, *Judicial Interpretation of the Support Provisions of the* Divorce Act, 1985, 8 C.F.L.Q. 265, 270 (1992); Miriam Grassby, *Women in Their Forties: The Extent of Their Rights to Alimentary Support*, 30 R.F.L. (3d) 369 (1991); E. Diane Pask & Marnie L. McCall, *How Much and Why? An Overview*, 5 C.F.L.Q. 129 (1989); Julien D. Payne, *Further Reflections on Spousal and Child Support After* Pelech, Caron *and* Richardson, 20 R.G.D. 477, 493 (1989); Patricia Proudfoot & Karen Jewell, *Restricting Application of the Causal Connection Test:* Story v. Story, 9 CAN. J. FAM. L. 143, 151 (1990). The theory, moreover, is not new, as is evident from the LRCC REPORT discussed *supra* note 15. Antecedents of the compensatory spousal-support model may also be found in portions of the Law Reform Commission of Canada's Working Paper 12, *Maintenance on Divorce* (1975).

69. Professor Rogerson noted a disturbing trend that recently divorced women were taking low paying jobs with few opportunities for advancement rather than investing in re-training, which would ultimately improve their long-term chances of self-sufficiency. Rogerson, *supra* note 18, at 209. This finding seems to parallel that of Lenore J. Weitzman in *The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards*, 28 UCLA L. REV. 1181, 1230 (1981).

70. The term "feminization of poverty" was first coined by Diana Pearce in 1978. *See* MORLEY GUNDERSON ET AL., WOMEN AND LABOR MARKET POVERTY 8-9 (1990).

71. *Id.* at 7-8.

72. *Id.*

73. BUREAU OF REVIEW, *supra* note 25, at 94-95.

74. *Id.* at 75.

the age of majority.[75]

The self-sufficiency model's unresponsiveness disenfranchised many women of spousal support in the courtroom even after the enactment of the Divorce Act of 1985.[76] However, to say that this was the extent of its effect would be to understate the magnitude of the problem. Many women probably did not even ask for support given the poor chance of obtaining or actually receiving an award.[77] Indeed, recent statistics indicate that only 16% of divorcing women request support.[78] Where children are involved, it rises slightly to 19%.[79] Of the women who did not request support, 11% acknowledged that they needed support, but assumed that they would not likely be awarded any and that, even if they were, their ex-spouse would be unable or unwilling to pay.[80] Another 24% either did not believe in spousal support or wanted a clean break from their ex-husband.[81] The demeaning image of spousal support, perpetuated under the self-sufficiency model as a form of welfare for dependent women instead of as well-earned compensation for domestic and child-rearing work performed within the family, very well may have contributed to these statistics.

Even when spousal support is awarded, limited money and duration may inhibit, rather than encourage, women from becoming *meaningfully* self-sufficient. Specifically, the failure of the self-sufficiency model to contemplate the compensatory aspects of a woman's contributions to marriage systematically led to lower awards, since only half of the economic consequences of marriage and its breakup were contemplated. Moreover, awards were based on self-sufficiency defined according to subsistence standards rather than according to the lifestyle enjoyed during the marriage. Both American and Canadian research has indicated that women faced with limited-duration spousal support are all too likely to forego retraining for a job, which is not well paid and has no possibility of advancement, in order to assure themselves of a steady income.[82] This reaction arises from women's fear of not being able to make ends meet and of having only a few years to reach autonomy.[83] The courts, lured by considerations of formal equality, often

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75. Weitzman, *supra* note 69, at 1253.

76. R.S.C. (2d Supp.), ch. 3 (1985) (Can.). *See also* Moge v. Moge, [1992] 3 S.C.R. 813, 857.

77. BUREAU OF REVIEW, *supra* note 25, at 75.

78. *Id.*

79. *Id.*

80. *Id.* at 74-76.

81. *Id.*

82. Weitzman, *supra* note 69, at 1230; Rogerson, *supra* note 18, at 209.

83. Weitzman, *supra* note 69, at 1230. In contrast, it has been found that when a woman underwent training rather than taking a job in the first year following divorce, she was more successful in the long run, both in terms of job level and annual earnings. *Id.* at 1232 (referring to Frank L. Mott, *The Socioeconomic Status of Households Headed by Women: Results*

assume that women are as capable as men of obtaining employment that will provide them with a reasonable income.[84] Such assumptions are inconsistent with the reality that women are usually less well paid than men and that, considering the effects of childrearing on women, including lost employment skills and missed opportunities for advancement, women do not leave marriage on an equal footing with their husbands.

B. *The Inseverability of Spousal and Child Support*

> What are the consequences of divorce for women, men and children, besides emotional pain? They are very different. Men tend to maintain the standard of living they had before the divorce, while women and children sink into instant poverty.[85]

A 1991 census found over 80% of single parents were women.[86] Moreover, although 62% of single-parent families headed by women under sixty-five years of age had incomes below the Low Income Cut-offs, only one-third of single-parent families headed by women with children under the age of eighteen received spousal or child support.[87] In contrast, only 24% of male-headed, single-parent families were in the same position.[88] Moreover, although female-headed, single-parent families represented only 6% of all family units, they comprised 29% of all low-income families.[89] Fifty-four percent of all female single parents fell within the twenty-five to forty-four age category, the category most directly affected by the unrealistic expectations underlying the self-sufficiency model.[90] Given that 57% of female single parents were either divorced or separated,[91] one cannot avoid the conclusion that there is at least some significant connection between divorce, support law and the feminization of poverty.

Statistics also indicate an alarming level of child poverty in Canada. In 1991, Statistics Canada reported that 1.3 million children under the age of

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from the National Longitudinal Surveys, Employment & Training Admin., U.S. Dep't of Labor, R. & D. Monograph No. 72 (1979)).

84. Freda Steel & Kimberely Gilson, *Equality Issues in Family Law: A Discussion Paper, in* EQUALITY ISSUES IN FAMILY LAW: CONSIDERATION FOR TEST CASE LITIGATION 21, 31 (Karen Busby et al. eds., Legal Research Inst., 1990); *see also* Rogerson, *supra* note 18, at 197-244.

85. Margrit Eichler, *The Limits of Family Law Reform, or the Privatization of Female and Child Poverty*, 7 C.F.L.Q. 59, 60 (1990-91).

86. STATISTICS CANADA, *supra* note 2, at 5.

87. *Id.* at 38 (based on 1990 tax data).

88. *Id.*

89. *Id.* at 5, 34-35.

90. STATISTICS CANADA, LONE-PARENT FAMILIES IN CANADA 10 (Dec. 1992).

91. *Id.*

eighteen were living in a family with an income level below the Low Income Cut-offs.[92] Furthermore, a recent study indicates that the number of children living in poverty in Canada increased by 30% between 1989 and 1991.[93] Approximately 40% of divorces granted in 1989 involved one or more children, and in 83% of cases, the woman was awarded custody.[94] The responsibility of caring for children increases the mother's financial difficulties upon divorce, and the likelihood of poverty increases in relation to the number of dependent children involved. Even though child support is granted more frequently than spousal support, the amount awarded does not seem to reflect the cost of living.[95] In addition, as the number of dependent children increases, the average amount awarded per child decreases.[96]

Statistics aside, commentators have criticized the self-sufficiency model on the basis that it presumes the existence of so-called "Chinese walls" between the custodial spouse, who will be cut off from support when she is deemed to have sufficient income to meet her essential needs, and the children in her custody who are, nonetheless, still expected to enjoy a reasonable standard of living to which both spouses must contribute equally.[97] Custodial mothers bear the brunt of the economic dislocation inherent in separation and divorce. There is a direct link between inadequate child support and women's long-term economic circumstances that lasts long after the children have grown up and left the household. Most importantly, if child-rearing costs are not fully covered by the estimates or if the estimates do not take into account additional costs to custodial mothers and the value, in monetary terms, of their additional contributions to childrearing, the gender inequality will be perpetuated.[98]

The inseverability of the financial link between the custodial spouse, usually a woman, and the children factors importantly in an examination of why the notions of formal equality intrinsic to the self-sufficiency model are inconsistent with the greater goal of substantive equality. Miriam Grassby graphically describes the almost inevitable end outcome for custodial parents.

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92. STATISTICS CANADA, *supra* note 2, at 36.

93. Rosemary Speirs, *Child Poverty on Rise, Report Says*, OTTAWA CITIZEN, Nov. 24, 1993, at A1.

94. STATISTICS CANADA, CANADIAN CENTRE FOR HEALTH, INFORMATION HEALTH REPORTS 20, 23 (Vol. 2, No. 4, Supp. No. 17, 1991).

95. Willick v. Willick, [1994] 3 S.C.R. 670 (Can.).

96. BUREAU OF REVIEW, *supra* note 25, at 33. Two-thirds of women with custody have orders for child support. *See* GUNDERSON ET AL., *supra* note 70, at 20.

97. *See* Ellen B. Zweibel, *Child Support Guidelines: An Ineffective and Potentially Gender-Biased Response to Child Support Issues, in* FAMILY LAW VOODOO ECONOMICS FOR WOMEN FEMINIST ANALYSIS CONFERENCE (Canadian Bar Association-Ontario, Jan. 1993).

98. *Id.* at 1.

> How do you tell a child that he cannot go to a birthday party because you cannot afford a present for his friend? or that he has to quit hockey because you have to sell your car and will not be able to drive from arena to arena? or that, even though your child has been to the same summer camp for years, she cannot go with her best friend this year, even for 2 weeks? or she will have to sleep on the sofa in the living room when she is home from university because you cannot afford a bedroom for her? It is easy to deprive children if you appear to be paying a large amount for child support; it is very difficult to deprive children if you are living with them.
>
> *Many mothers, rather than deprive their children, deprive themselves.*[99]

When one spouse has a lower income, a greater percentage of that income goes to meet basic needs and, consequently, less of that income is disposable or discretionary. Given that men generally tend to have a higher salary than women, it follows that a custodial mother has to allocate a greater proportion of her disposable income towards the cost of child care than the father. This becomes more pronounced when a woman is faced with minimal or nonexistent child or spousal support. Indeed, in that case, she will have to spend most or all of her disposable resources on the cost of child care instead of saving for her own future.[100]

Much of this disparity stems from the tendency of both courts and custodial spouses to underestimate the real costs of rearing children. An important aspect of this underestimation stems from an improper or inadequate accounting of the hidden, or non-monetary, costs involved in child care. The nature of these costs is being increasingly recognized as essential to an understanding of the full picture of child-rearing costs. Justice Bowman made the following comments to this effect in *Brockie v. Brockie*:

> There are numerous financial consequences accruing to a custodial parent, arising from the care of a child, which are not reflected in the direct costs of support of that child. To be a custodial parent involves ensuring the welfare and development of the child which places many limitations and burdens upon that parent.
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> . . .
>
> A custodial parent seldom finds friends or relatives who are anxious

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99. Grassby, *supra* note 68, at 396 (emphasis added).

100. Carol Rogerson, *Winning the Battle, Losing the War, the Plight of the Custodial Mother After Judgement, in* NATIONAL THEMES IN FAMILY LAW 20, 22 (M.E. Hughes & E. Diane Pask eds., 1988).

> to share accommodation, must search long and carefully for accommodation suited to the needs of the young child, including play space, closeness to day care, schools and recreational facilities. If the custodial parent does not own a car then closeness to public transportation and stores is important. A custodial parent is seldom free to accept shift work, is restricted in any overtime work by the day care arrangements available, and must be prepared to give priority to the needs of a sick child over the demands of an employer. After a full day's work, the custodial parent faces a full range of homemaking responsibilities including cooking, cleaning and laundry, as well as the demands of the child. Few indeed are the custodial parents with strength and endurance to meet all of these demands and still find time for night courses, career improvement, or even a modest social life.[101]

Some Canadian courts have considered such hidden costs in their spousal-support calculations but, until recently, these cases constituted a trickle rather than a flow.[102]

Studies have shown, moreover, that the earning capacity of a woman who stays out of the labor market atrophies by 1.5% per year and that the loss can be as high as 4.3% per year for those with college education.[103] The longer the time spent out of the labor force, the lower the proportion of women who re-enter it.[104] Almost two-thirds of women interrupt their employment for a long period of time for family reasons: 16% for marriage; 42% for pregnancy or child care; and 6% to relocate for their husbands' employment.[105] In contrast, work interruptions for men are motivated by diametrically different considerations: layoff accounted for almost 40% of cases, returning to school accounted for another 25% and illness or disability led to a further 27%.[106]

These considerations and this social debate constituted much of the legal landscape and social context underlying the hearing of *Moge v. Moge*[107] in 1992 by the Supreme Court of Canada. The widespread adoption of the self-sufficiency model and its adverse consequences on women were at the forefront of the arguments presented before the Court on the proper interpretation

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101. 46 MAN.R. (2d) 33, 39 (1987).

102. *See* PAYNE, *supra* note 25, at 93 and accompanying cites.

103. Marnie McCall et al., THE PROCESS AND ECONOMIC CONSEQUENCES OF MARRIAGE BREAKDOWN 34 (Canadian Research Inst. for Law and the Family 1988).

104. *Id.*

105. *Id.* at 33.

106. CARA BROWN ET AL., HOW MUCH AND WHY? ECONOMIC IMPLICATIONS OF MARRIAGE BREAKDOWN: SPOUSAL AND CHILD SUPPORT, Figure 3.6 (E. Diane Pask & M.L. McCall eds., Canadian Research Inst. for Law and the Family 1988).

107. [1992] 3 S.C.R. 813 (Can.).

of the spousal-support provisions in Section 17 and, consequently, in Section 15 of the Divorce Act of 1985.[108]

V. THE RETRENCHMENT OF SPOUSAL SUPPORT OBJECTIVES UNDER *MOGE V. MOGE*

A. *The Facts in* Moge

In *Moge*, the parties married in the 1950s, separated in 1973 and divorced in 1980.[109] Mrs. Moge had a seventh-grade education and no special skills or training.[110] During the marriage, she took care of the house and the children and, in addition, worked six hours each evening cleaning offices.[111] Upon separation, she was awarded spousal and child support in the amount of $150 per month.[112] In 1987, she lost her job and applied for variation of support.[113] She was then awarded $400 per month.[114] Later, she resumed work on a part-time and intermittent basis.[115]

In 1989, Mr. Moge applied for, and was granted, an order terminating support on the grounds that his former wife, after sixteen years, had time to become, and was in fact, self-sufficient.[116] The Manitoba Court of Appeal reversed that order and reinstated the original order of $150 per month for an indefinite period.[117] Following Mr. Moge's appeal, the Supreme Court of Canada unanimously affirmed the Court of Appeal's decision.[118] It asserted in no uncertain terms that the promotion of self-sufficiency should not pre-empt full consideration of the three other statutory objectives elaborated in Section 17(7) of the 1985 Act, including the disadvantages sustained by Mrs. Moge as a result of her long-term child-care responsibilities, and the continuing economic hardship she experienced as a result of the marriage breakdown.[119]

The Court deemed the four statutory objectives of spousal-support orders in Sections 15(7) and 17(7) of the Act to have been met by the Court of Appeal's lifetime award of $150.[120] The following specific findings were

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108. *See* R.S.C. (2d Supp.), ch. 3 (1985) (Can.).
109. *Moge*, [1992] 3 S.C.R. at 824-25.
110. *Id.* at 824.
111. *Id.*
112. *Id.* at 825.
113. *Id.*
114. *Id.* at 826.
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.* at 852.
120. *Id.* at 876.

made based on the evidence in the record: Mrs. Moge sustained a substantial economic disadvantage from the marriage or its breakdown; her long-term responsibility for the upbringing of the children of the marriage after the spousal separation in 1973 had an impact on her ability to earn an income; she continued to suffer economic hardship as a result of the breakdown of the marriage; and she failed to become economically self-sufficient notwithstanding her conscientious efforts.[121] Continuing support was ordered and the appeal was dismissed accordingly.[122]

B. *The Reasons*

"*Moge* confirms what clients have been telling counsel for years: women remain the more economically disadvantaged partner after marriage breakdown."[123]

To this day, more than 200 cases have been decided in light of *Moge* throughout Canada. Commentators have observed that its greatest value stems not so much from any particular or finite framework of analysis as from its elucidation of a broad philosophy that should thereafter animate courts' approach to spousal support awards.[124] The following discussion examines *Moge* from the perspective of commentators' views to this effect.

The Court's substantive analysis of the Act's spousal support provisions began with the observation that though the terms of the Act were gender neutral, its effects were often gender-specific:

> [A] point worthy of emphasis is that this analysis applies equally to both spouses, depending on how the division of labor is exercised in a particular marriage. What the Act requires is a fair and equitable distribution of resources to alleviate the economic consequences of marriage or marriage breakdown for both spouses, regardless of gender. *The reality, however, is that in many if not most marriages, the wife still remains the economically disadvantaged partner.* There may be times where the reverse is true and the Act is equally able to accommodate this eventuality.[125]

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121. *Id.* at 876-77.

122. *Id.*

123. Ronald Foster, Moge v. Moge: *What It Means to Family Law Lawyers*, 43 R.F.L. (3d) 465, 465 (1993).

124. Lorne H. Wolfson et al., *The Use of the Judicial Notice in the Wake of* Moge v. Moge, 8 MONEY & FAMILY LAW 37 (1993). *See also* Foster, *supra* note 123. Note, moreover, that the Court in *Moge* emphasized the importance of spousal support on the basis that division of matrimonial assets is, more often than not, insufficient to fully compensate the economic losses of the dependent spouse and the economic advantages of the other. *Moge*, [1992] 3 S.C.R. at 849.

125. *Moge*, [1992] 3 S.C.R. at 849-50 (emphasis added).

This recognition set the tone for the judgment, and demonstrated an approach to equality based on result rather than treatment. The Court went on to recognize that much of the unequal effect of the Act stemmed from tendency of courts to undervalue non-monetary or non-property contributions to the marriage. The labor market and family dynamics, however, dictated that it was often economically rational that the division of labor within the family be gender-based, with men contributing more in financial terms and women contributing more in terms of homemaking and childrearing.

> The traditional allocation of responsibility in families between a homemaker wife and a bread winner husband has an economically rational basis (Block, 1982; Block & Walker, 1985). In general, women do not earn as much as men. . . . Therefore, in a division of functions within the family, it is less costly to have the wife undertake the functions of child rearing and homemaking than the husband, who can earn more money.[126]

The Court, therefore, recognized that the first step toward a more substantive equality required acknowledgment of the value of work performed in the home.

> The doctrine of equitable sharing of the economic consequences of marriage or marriage breakdown upon its dissolution which, in my view, the Act promotes, seeks to recognize and account for both the economic disadvantages incurred by the spouse who makes such sacrifices and the economic advantages conferred upon the other spouse. Significantly, *it recognizes that work within the home has undeniable value and transforms the notion of equality from the rhetorical status to which it was relegated under a deemed self-sufficiency model, to a substantive imperative.* In so far as economic circumstances permit, the Act seeks to put the remainder of the family in as close a position as possible to the household before the marriage breakdown.[127]

The self-sufficiency model embodies principles of formal equality; it only treats women and men equally to the extent that their ability to achieve self-sufficiency post-divorce is equal. In the *Moge* decision, however, the Court took judicial notice of the fact that most wives' earning potential is undermined by their diminished presence in the workforce, principally because of

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126. BROWN ET AL., *supra* note 106, at 56-57.
127. *Moge*, [1992] 3 S.C.R. at 864 (emphasis added).

their child-rearing responsibilities both during and after marriage.[128] The Court's analysis, therefore, constituted a clear rejection of the notion of formal equality, one of the central assumptions underlying the self-sufficiency model itself:

> It would be perverse in the extreme to assume that Parliament's intention in enacting the Act was to financially penalize women in this country. And, while it would undeniably be simplistic to identify the deemed self-sufficiency model of spousal support as the sole cause of the female decline into poverty . . . it is clear that the model has disenfranchised many women in the court room and countless others who may simply have decided not to request support in anticipation of their remote chances of success. The theory, therefore, at a minimum, is contributing to the problem. I am in agreement with Professor Bailey, *supra*, at p. 633 that:
>
> > The test is being applied to create a clean break between the spouses before the conditions of self-sufficiency for the dependent partner have been met, *and will undoubtedly cause an increase in the widespread poverty (at least relative poverty) of women and children of failed unions*. . . .
>
> In the result, I am respectfully of the view that the support model of self-sufficiency . . . cannot be supported as a matter of statutory interpretation, considering in particular the diversity of objectives set out in the Act.[129]

The Court went on to explain that three of the Act's four objectives lent support to a compensatory model of statutory support. It recognized that although self-sufficiency was a desirable end, according to sections 15(7)(d) and 17(7)(d) of the Act, compensatory support's explicit consideration of the economic disadvantages and hardships arising from marriage or its breakdown furthered an equally important aim of the Act.[130]

In the end, however, the Supreme Court of Canada in *Moge* recognized that no single model could by itself set a formula for equitably sharing resources upon marriage breakdown. The multiplicity of possible scenarios simply precludes rigid application of any one model to all situations. Instead, equitable sharing under the Act mandated that all of the circumstances of the parties be taken into account, that all four of the statutory objectives

128. *Id.* at 862-63, 877.
129. *Id.* at 857-58 (emphasis added).
130. *Id.* at 860.

of support set out in sections 15(7) and 17(7) of the 1985 Act be considered, and that no single objective be considered paramount.[131] Moreover, the Court concluded that the introduction of the four spousal support objectives in the 1985 Act called for an evaluation of the dependent spouses' "needs" which exceeded subsistence levels, which realistically reflected reasonable expectations, and which took into account the totality of the circumstances of the parties:

> *Fair distribution* does not, however, mandate a minute, detailed accounting of time, energy and dollars spent in the day to day life of the spouses, nor may it effect full compensation for the economic losses in every case. Rather, it *involves the development of parameters with which to assess the respective advantages and disadvantages of the spouses as a result of their roles in the marriage, as the starting point in determining the degree of support to be awarded.* This, in my view, is what the Act requires.[132]

Having revisited the philosophy of equitable distribution underlying the Act, the Court ultimately urged broad judicial discretion in carrying this philosophy forward to the arena of spousal support.[133]

VI. JUDICIAL DISCRETION, *MOGE* AND EQUALITY

> It is inevitable in all areas of law that judges exercise a certain amount of discretion, and this is especially so in those areas which concern human relations, such as family law. When considering an area of law, one must ask why the courts have been given a particular type and amount of discretion. Though there can be no magic formula for determining what is an appropriate level of judicial discretion, it is valuable to study discrete fields of law, and individual legal issues within that field, to assess whether the courts have been given too much discretion, or indeed too little.[134]

There are different views about judicial discretion in the field of family law. One school of thought holds that higher courts should develop legal rules instead of giving more discretion to lower courts.[135] This view is pre-

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131. *Id.* at 852.
132. *Id.* at 849 (emphasis added).
133. *Id.* at 866-75.
134. Nicholas Bala, *Judicial Discretion and Family Law Reform in Canada*, 5 CAN. J. FAM. L. 15, 16 (1986).
135. James G. McLeod, Case Comment, Moge v. Moge (1993), 43 R.F.L. (3d) 455, 463.

mised on the argument that the parties have a right to a consistent application of legal rules and should not depend on a particular judge's version of what is fair. For those who share this view, guidelines should be set by the legislature in order to assist the courts in family law decision-making since the discretion exercised under the Divorce Act has often led to arbitrary results.[136] Another school of thought, more at the other end of the spectrum, argues that wide judicial discretion in the field of family law is essential to do justice in particular cases.[137] For instance, the recent decision of the Canadian Supreme Court in *Young v. Young* stressed that "family law statutes, and child custody provisions in particular, probably best exemplify the type of legislation in which broad judicial discretion is necessary to fulfill the legislative purpose effectively."[138]

Whatever position one chooses to take, there are certain unique aspects of family law that militate against approaches that are overly inflexible.[139] To begin with, family law cases usually involve the assessment of entire persons, as well as periods of interaction that extend over years. In this respect, assessments are generally more complex and fact-sensitive than the assessment of a discrete act or transaction. Second, in ordinary litigation, decisions made by a judge are retrospective (whose fault was it) while in family cases the decisions are prospective (how much money will this spouse need). Inevitably those who make predictions about the future will sometimes be wrong; an acknowledgement of this dynamic implies, concomitantly, a greater measure of tolerance toward judicial decision-making and discretion. Third, family law involves a number of interrelated issues such as custody, possession of the matrimonial home and division of matrimonial assets, to name a few. These issues must be addressed by the judge as a matrix, rather than in isolation from one another, an exercise that once again is not highly amenable to predilection by rule-making. Finally, unlike most other areas of the law, family law cases often involve an ongoing interaction between the parties after judgment, thereby requiring a court to assess, at least implicitly, how the future relationship of the parties will be affected by the disposition of their matters by the court.

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136. Bala, *supra* note 134. *See* Krauskopf, *supra* note 66; Carol Rogerson, *Evidentiary Issues in Spousal Support Cases*, *in* APPLYING THE LAW OF EVIDENCE: TACTICS AND TECHNIQUES FOR THE NINETIES 219 (1992).

137. PAYNE, *supra* note 25, at 153, 167; Pelech v. Pelech, [1987] 1 S.C.R. 801; Messier v. Delage, [1983] 2 S.C.R. 401; Crowfoot v. Crowfoot (1992), 38 R.F.L. (3d) 354 (Alta. Q.B.); Berry v. Murray, [1983] 1 W.W.R. 561 (B.C.C.A.); Greenall v. Greenall (1984), 39 R.F.L. (2d) 225, 237 (Ont. H.C.); Howey v. Howey (1984), 42 R.F.L. (2d) 23, 34 (Ont. H.C.); Bowman v. Bowman (1984), 42 R.F.L. (2d) 86, 91 (Ont. H.C.); Linton v. Linton, 1 O.R. (3d) 1 (1990) (Ont. C.A.); Brockie v. Brockie (1987), 5 R.F.L. (3d) 440, 443, affirmed (1987) 8 R.F.L. (3d) 302 (Man. C.A.); Robichaud v. Robichaud (1992), 124 N.B.R. (2d) 332.

138. [1993] 4 R.C.S. 3, per L'Heureux-Dubé J., at 76.

139. Bala, *supra* note 134, at 28-29.

Notwithstanding these factors, however, it is equally evident that excessively broad judicial discretion which leads to results perceived as arbitrary does not engender confidence in the system or advance the purposes of the Divorce Act:

> Although decisional discretion is needed, judicial decisions may be so unpredictable and vary so greatly among judges that the result is too much discretion. This causes inefficiency in settlement and litigation as well as criticism of the legal system. Laundry lists of unweighted factors do not control discretion because different judges or the same judge on different days weigh the factors differently.[140]

Even worse, uncertainty spawned from perceptions of arbitrariness may itself have a gender-specific, discriminatory component. This danger stems from the self-evident observation that excessive unpredictability will, by definition, more seriously affect the more risk-averse of the two parties. Given that women suffer more severe economic consequences from marital breakup and often leave marriage in a position of dependency, it stands to reason that they will be the more risk-averse parties at the point of separation. In fact, where custody of the child may be at issue, this effect may be magnified.[141] While greater risk aversion often leads to preference for a settlement,[142] it also may have the insalubrious effect of tending to undermine both bargaining position and resolve. It does not stretch the imagination to deduce that the more risk-averse party may, notwithstanding the advice of independent counsel, opt for a less advantageous settlement than would otherwise be awarded, on average, by a court. In short, excessive uncertainty in the fixing of support awards may disadvantage women and cause them to suffer accordingly in their out-of-court settlements. Such an outcome surely does not advance the 1985 Act's goal of promoting the *equitable* distribution of the economic effects inherent in marriage and its breakup. At the same time, however, it is difficult to see how judicial discretion cannot play an important role in spousal support decisions, given many possible circumstances and arrangements that a court may encounter.

In a somewhat different context, Professor Carol Rogerson has shed light on this conundrum by identifying its underlying cause:

> At this point in time, there appears to be little or no legislative

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140. Krauskopf, *supra* note 66, at 276.

141. *See, e.g.*, Donald Poirier & Lynne Castonguay, *Formal vs. Real Equality in Property Division on Marriage Breakdown of Business Couples: An Empirical Study*, 11 C.F.L.Q. 71, 86 (1994).

142. Bala, *supra* note 134, at 34.

> enthusiasm for the development of spousal support guidelines. *This can be explained in part by continuing confusion and disagreement as to the very purpose of the spousal support obligation*, as well as by a widespread belief that the extent of spousal support varies significantly depending upon the kind of marriage in issue.[143]

As mentioned earlier in this article, much confusion about the proper normative framework for support awards followed the philosophical vacuum left in the wake of the 1968 Act. With the introduction of the first comprehensive Divorce Act in 1968, diverse forces of social change led to a questioning of previously unexamined notions of "wrong" and "right" in family law.[144] These forces also brought about a shift from relatively definite rules governing the formation and dissolution of family units to more flexible standards which reflected society's greater openness to different family lifestyles.[145] It appears that the ensuing vacuum made it necessary, commencing under the 1968 Act and continuing despite the 1985 amendments, for courts to exercise a far broader form of discretion than desirable under the Act. Namely, the perceived lack of philosophical direction in the Act necessitated that judges first choose, consciously or unconsciously, the normative model within which their discretion would be exercised. Only then could a judge move on to the second stage of her analysis, which was to actually exercise her discretion within the parameters of that normative framework. Consequently, judges may very well have had to make personal, moral choices about what normative framework was fair and just *even before turning to the particular facts of the case*. This process could quite possibly have led to perceptions of arbitrariness and uncertainty.

What was therefore needed was a new philosophical foundation, a unifying principle, which would collapse the two stages mentioned above back into one. The Supreme Court of Canada's judgment in *Moge* has the potential to fill this gap by providing this philosophy. It is a philosophy which explains both the Court's refusal to accept the primacy of the self-sufficiency model and its acknowledgement that the compensation model offers valuable insight into achieving the ultimate goal of the equitable sharing of the consequences of divorce between the spouses. Specifically, it is the philosophy of *equality*.

When Section 15 of the *Canadian Charter of Rights and Freedoms*[146]

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143. Rogerson, *supra* note 18, at 222-23 (emphasis added). These remarks are, albeit, made in the context of her criticism that §15(7) of the Divorce Act espouses objectives that are vague and potentially conflicting. *Id.* at 222-31.

144. Bala, *supra* note 134, at 28.

145. *Id.*

146. Constitution Act, 1982, pt. I (Sched. B of the Canada Act (U.K.), 1982, ch.11).

came into force in 1985, it elevated equality to the level of a constitutional imperative. Section 15 provides as follows:

> 15(1) Every individual is equal under and before the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.[147]

Not until 1988, however, did the Supreme Court make its first pronouncement on this section, in the case of *Andrews v. Law Society of British Columbia*.[148] In *Andrews*, the Court recognized that equality is a comparative concept, a condition which may only be attained or discerned by comparison with the condition of others *in the social and political setting in which the question arises*.[149] More importantly, the Court rejected as vague and overly diffuse the "similarly situated" test of equality that has evolved in American jurisprudence. Instead, it focused on the reality of the historically disadvantaged in society, building on the statement of the Federal Court of Appeal in *Smith, Kline & French Laboratories v. Attorney General of Canada* that

> the inquiry, in effect, concentrates on the personal characteristics of those who claim to have been unequally treated. Questions of stereotyping, of historical disadvantage, in a word, of prejudice, are the focus and there may even be a recognition that for some people equality has a different meaning than for others.[150]

This case set the ground rules in Canada for a commitment to *substantive* equality rather than *formal* equality, to equality of result rather than to equality of treatment.

In *Moge*, these considerations animated the Court's approach to competing interpretations of the spousal support provisions of the 1985 Divorce Act. The self-sufficiency model espoused formal equality but it demon-

147. *Id.*
148. [1989] 1 S.C.R. 143.
149. *Id.* at 164.
150. *Id.* at 180 (quoting (1987) 34 D.L.R. (4th) 584, 591).

strably disadvantaged women; whereas, the compensatory model recognized these inequalities and attempted some measure of substantive justice in its approach to spousal support awards. Faced with these two possible interpretations, the Court preferred the interpretation which better furthered the values of equality embodied in the *Charter*.[151] Namely, it adopted a framework for judicial discretion that was consistent with the overarching goal of substantive equality:

> The exercise of judicial discretion in ordering support requires an examination of all four objectives set out in the Act in order to achieve equitable sharing of the economic consequences of marriage or marriage breakdown. *This implies a broad approach with a view to recognizing and incorporating any significant features of the marriage or its termination which adversely affect the economic prospects of the disadvantaged spouse.*[152]

The Court noted that three of the four objectives set out in Sections 15(7) and 17(7) of the 1985 Act espouse measures of compensatory support.[153] The fourth, self-sufficiency *in so far as that objective is practicable*, was interpreted by the Court in *Moge* as being integrally linked to the other three.[154] By recognizing that the primary goal of the Act was to achieve a measure of substantive justice *between the parties*, the Court sought to guide the exercise of judicial discretion in a direction that was consistent with the full matrix of objectives and criteria set out by the Act. The Court noted that one equitably shares the economic consequences of marriage or its breakdown without having regard to the social reality experienced by women.[155] The views of Professor Payne are to the same effect:

> Section 15(5) of the Divorce Act, *1985* requires the court to have regard to the "condition, means, needs and other circumstances of each spouse" in determining the right to and quantum of spousal support. These criteria open up a virtually unlimited field of relevance and leave the court with a wide judicial discretion.
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> . . .
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> *[Sections 15(7) and 17(7)] objectives may be perceived as guidelines or signposts to the proper exercise of judicial discretion.* This interpretation does not relegate pursuit of the objectives to an

151. This approach is consistent with the Court's enunciation of that principle in Hills v. Canada (Attorney-General), [1988] 1 S.C.R. 513, 558.

152. Moge v. Moge, [1992] 3 S.C.R. 813, 866-67 (Can.) (emphasis added).

153. *Id.* at 860, 865.

154. *Id.* at 852-53, 860-61.

155. *Id.* at 848-75.

> insignificant role but *it does re-affirm the preservation of a broad judicial discretion to do justice according to the facts of the particular case.*
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> . . .
>
> *[These] objectives*, which operate in the context of a wide judicial discretion under sections 15(5) and 17(4) of the *Divorce Act, 1985*, *provide opportunities for a more equitable distribution of the economic consequence of divorce between the spouses.*[156]

In essence, family law by its very nature is not the kind of legislation that attracts precise rules. Judges must consider a wide range of possibilities and exercise flexibility in adapting an appropriate solution to the particular case. As long as the basic philosophy is articulated, "discretion makes it possible to devise judicial solutions better suited to new situations than rules enacted by the legislature."[157] To ensure that judicial discretion is exercised in a manner consistent with the above-noted philosophy, however, judges must also demonstrate a readiness to resort to judicial notice regarding aspects of the socio-economic context in which they issue their support order.

VII. JUDICIAL NOTICE

The doctrine of judicial notice, which dates back several centuries, was first developed to meet the need for a more efficient decision-making process that would nonetheless allow parties to maintain some control over the evidence presented in an adversarial system. The landmark American case of *Varcoe v. Lee*[158] posits the following two-step test which a court must apply in order to take judicial notice of a fact: (1) the fact has to be one of common and general knowledge in that particular jurisdiction; (2) the fact has to be virtually indisputable.[159]

The doctrine has been reiterated by Sopinka, Lederman, and Bryant in their recent treatise:

> Judicial notice is the acceptance by a court or judicial tribunal, in a civil or criminal proceeding, without the requirement of proof, of the truth of a particular fact or state of affairs. Facts which are (a) so notorious as not to be the subject of dispute among reasonable persons, or (b) capable of immediate and accurate demonstration by resorting to readily accessible sources of indisputable accuracy, may

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156. PAYNE, *supra* note 25, at 153, 167, 169 (emphasis added).

157. The Hon. Albert Mayrand, *La garde conjointe, rééquilibrage de l'autorité parentale*, 67 CAN. BAR REV. 193; P.(D.) v. S.(C.), [1993] 4 R.C.S. 141, 179 (Can.).

158. 181 P. 223 (1919).

159. *Id.* at 227.

> be noticed by the court without proof of them by any party. The practice of taking judicial notice of facts is justified. *It expedites the process of the courts, it creates uniformity in decision making and it keeps the court receptive to societal change.* Furthermore, the tacit judicial notice that surely occurs in every hearing is indispensable to the normal reasoning process.[160]

In family law, and more particularly in the law of spousal support, the need for a court to acknowledge and keep abreast of broad societal trends is particularly great. A decision of such human consequence must, in good conscience, contemplate the human picture.

The Court in *Moge* acknowledged the value of such a perspective and consequently took notice of reliable and uncontroversial statistics which demonstrated beyond dispute that the economic consequences of divorce disproportionately affect women and children in Canada. Referring to many of the studies and statistics discussed above, it endorsed judicial notice in the following terms:

> Based upon the studies which I have cited earlier in these reasons, the general economic impact of divorce on women is a phenomenon the existence of which cannot reasonably be questioned and should be amenable to judicial notice. More extensive social science data are also appearing.
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> . . .
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> In all events, whether judicial notice of the circumstances generally encountered by spouses at the dissolution of a marriage is to be a formal part of the trial process or whether such circumstances merely provide the necessary background information, it is important that judges be aware of the social reality in which support decisions are experienced when engaging in the examination of the objectives of the Act.[161]

Some commentators have argued that judicial notice is of no assistance in the quantification of actual losses.[162] Simply because judicial notice does not do all of a judge's work, however, does not mean that we cannot allow it to do some: "While quantification will remain difficult and fact-related in each particular case, judicial notice should be taken of such studies, subject to other expert evidence which may bear on them, as background

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160. JOHN SOPINKA ET AL., THE LAW OF EVIDENCE IN CANADA 976 (Butterworths, 1992) (emphasis added).

161. *Moge*, [1992] 3 S.C.R. at 873-74.

162. Wolfson et al., *supra* note 124, at 41.

information at the very least."[163]

Judicial notice regarding evidence of a general character has the potential to simplify a judge's task of assessing the true consequences flowing from the relationship and its breakup. It also can assist courts in formulating a more accurate picture of the realistic needs of the parties, particularly when self-sufficiency, market conditions and real estate situations are at issue. Judicial notice promotes judicial awareness of the context in which support awards are *experienced*, rather than merely contemplated.

Though judicial notice as a proper device in family law is not new, its use appears to have escalated since it received the Court's blessing in *Moge*. A recent article itemizes fifty-nine cases where judicial notice was taken in Canadian family law cases on subjects such as the following: the employment market for women; the impairment of the economic ability of a woman at the end of a relationship; the increase in the cost of raising children as they grow older; the effects of inflation on the parties; the tax implications to the parties; changes in the value of property, including changes in the real estate market; and the costs of disposition of property.[164] *Moge* has acknowledged that as much as laws are not enacted in a vacuum, judicial decisions should not be made in isolation, particularly of the socio-economic data of the time. Divorce and its economic consequences are the subject of a great deal of statistical data and consensus. They should not be ignored when assessing the adequacy of a support award.

Judicial notice of the general economic impact of divorce on women and of studies providing social science data also serves important ends of judicial efficiency. Specifically, the high cost of family law litigation is moderated by reducing the need for experts. Court time is freed for more important matters. Moreover, the financial burden on many spouses is reduced. This benefit is especially important for women who do not have the resources necessary to produce the studies and expert evidence which might provide such context. In other cases, the small sums involved simply would not justify the expenditure of such resources. Finally, requiring that such facts be proven in each individual support adjudication would undoubtedly spawn needless duplication. The value of judicial notice as a practical and economic measure to increase judicial consciousness on the social realities of support should therefore not be underestimated.

Thus, the Court's recognition in *Moge* that expert evidence on the economic consequences of divorce will not be required or possible in many circumstances bodes well for those seeking recognition of the realistic costs

163. *Moge*, [1992] 3 S.C.R. at 874.
164. Wolfson et al., *supra* note 124, at 42-44.

of support.[165] Notwithstanding these observations, however, it must be remembered that judicial notice has its limits and cannot replace expert evidence when it truly is required.

VIII. CONCLUSION

The problem of spousal support in the context of the current Canadian Divorce Act cannot be properly appreciated without an acknowledgement that our approach to the Act reflects our societal commitment to equality. Although the self-sufficiency model of spousal support is couched in gender-neutral terms, its neutrality is illusory. A credible approach to the Act requires a recognition that its effects are *not* gender neutral. Its emphasis on equality of treatment over equality of result obfuscates more thorough inquiries into the economic consequences of marriage and marriage breakdown for both spouses. In light of *Moge*, a fair and equitable distribution of resources consistent with this approach to equality requires that courts be cognizant of both social context and economic realities. Full recognition of the hidden costs of homemaking and childrearing, and recognition of the insights offered by the compensatory model of spousal support, are important steps in this direction.

Social forces have brought about significant change in family law in Canada since 1968. The law of support consequently faces two very challenging and potentially irreconcilable tasks. First and foremost, it must strive to do justice between individual parties before it in a way that is responsive to the dynamic underlying each unique relationship. To this end, it must demonstrate sensitivity to context. Second, it must prove itself capable of evolving with, yet imparting stability to, the very institution it professes to regulate. In this sense, it must be responsive to greater social change, while nonetheless adhering to a reasonably identifiable underlying philosophy. These two divergent mandates, sensitivity to context versus consistency of principle, pose a considerable challenge to lawmakers and judges. Experience has shown that attempts in the common law to do justice in every case have sometimes led to the creation of bad legal principle. The Court in *Moge* viewed judicial discretion, properly exercised, as a vehicle which may

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165. *Moge*, [1992] 3 S.C.R. at 871-72. In the words of one commentator:

> *Moge v. Moge* may prove to be extremely useful in reducing some of the financial burden of adducing evidence in family law cases. The statement in that case to the effect that expert evidence cannot reasonably be required of such parties, that the general economic impact of divorce on women should be amenable to judicial notice and can be ascertained in the ordinary way, together with the court's use of legal and socio-economic studies, are as applicable to child support as to spousal support.

E. Diane Pask, *Gender Bias and Child Support: Sharing the Poverty*, 10 C.F.L.Q. 33, 51 (1994).

help to reconcile these divergent paths.

The proper exercise of judicial discretion, in turn, must not seek to avoid these conflicts by preferring one objective over another, or one view of morality over another. Legislative recognition of the inherently conflicting nature of spousal support has led, in Canada, to the elaboration of a matrix of four objectives. These objectives should not, and cannot, be approached as airtight compartments. Above all, their interpretation is to be animated by an underlying philosophy of substantive equality, and with one eye to the socio-economic reality of those that must live with these decisions.

To this end, judicial notice offers courts a valuable means by which to demonstrate their appreciation of the socio-economic context of their support award determinations. "Judicial notice is a useful tool in the criminal and civil context because it expedites the judicial process, fosters consistent decisions and ensures that the courts are attuned to the reality of society and its changing situations."[166] Its greatest utility, however, is its usefulness as a leitmotif against which the actual facts of a given situation can be evaluated. It will not relieve judges, however, of the necessity for some additional inquiry into the economic consequences flowing from the particular relationship and its breakup.

Ultimately, though, the law of spousal support can only play a limited role in alleviating the overall economic consequences of divorce: "family law reform is an important aspect of achieving a more equitable society. Nevertheless, it is most important to recognize what it can and cannot do. For one, it *cannot* eradicate poverty among women and children."[167] Indeed, the ultimate solutions to gender-based poverty and dependence will require structural adjustments within family, work, and State spheres.[168] Here, too, there are no neat compartments and there are no easy solutions.

166. Wolfson et al., *supra* note 124, at 38.

167. Eichler, *supra* note 85, at 83. *See also* Payne, *supra* note 68, at 477.

168. *See, e.g.*, Marie-Thérèse Meulders-Klein, *Famille, état et sécurité économique d'existence dans la tourmente, in* FAMILY, STATE AND INDIVIDUAL ECONOMIC SECURITY 1077 (M.T. Meulders-Klein & John Eekelaar eds., 1988).