

*Indexed as:*  
**Moge v. Moge**

**Andrzej Moge, appellant;**  
**v.**  
**Zofia Moge, respondent, and**  
**Women's Legal Education and Action Fund, intervener.**

[1992] 3 S.C.R. 813

[1992] S.C.J. No. 107

File No.: 21979.

Supreme Court of Canada

1992: April 1 / 1992: December 17.

**Present: La Forest, L'Heureux-Dubé, Gonthier, Cory,**  
**McLachlin, Stevenson\* and Iacobucci JJ.**

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA (117 paras.)

\* Stevenson J. took no part in the judgment.

*Divorce -- Support -- Variation -- Wife not economically self-sufficient 16 years after separation -- Court of Appeal setting aside order terminating wife's support -- Whether support should be continued or terminated pursuant to s. 17 of Divorce Act -- Whether objective of self-sufficiency should be given priority -- Whether Pelech rule applicable to non-consensual situations -- Divorce Act, R.S.C., 1985, c. 3 (2nd Supp.), ss. 15, 17.*

*Courts -- Jurisdiction -- Powers of reviewing court -- Divorce -- Court of Appeal setting aside order terminating wife's support -- Whether Court of Appeal should have interfered with trial judge's discretion -- Divorce Act, R.S.C., 1985, c. 3 (2nd Supp.), s. 21(5).*

The parties were married in the mid-50's in Poland and moved to Canada in 1960. They separated in 1973 and divorced in 1980. The wife has a grade seven education and no special skills or training. During the marriage, she cared for the house and their three children and, except for a brief period, also worked six hours per day in the evenings cleaning offices. After the separation, she was awarded custody of the children and received \$150 per month spousal and child support and

[page814] continued to work cleaning offices. The husband remarried in 1984 and continued to pay support to his former wife. She was laid off in 1987 and, as a result of an application to vary, her spousal and child support was increased to \$400. She was later able to secure part-time and intermittent cleaning work. In 1989, the husband was granted an order terminating support. The trial judge found that the former wife had had time to become financially independent and that her husband had supported her as long as he could be required to do. The Court of Appeal set aside the judgment and ordered spousal support in the amount of \$150 per month for an indefinite period. This appeal is to determine whether the wife is entitled to ongoing support for an indefinite period of time or whether spousal support should be terminated.

Held: The appeal should be dismissed.

Per La Forest, L'Heureux-Dubé, Gonthier, Cory and Iacobucci JJ.: The husband's support obligation to his wife should be determined not on the basis of the reasoning in *Pelech*, *Caron* and *Richardson*, but on the principles embodied in the 1985 Divorce Act. The principles articulated in the trilogy should not be applied to non-consensual situations. In the trilogy, this Court did not espouse a new model of support but rather showed respect for the wishes of persons who, in the presence of the statutory safeguards, decided to forego litigation and settled their affairs by agreement under the 1970 Divorce Act. In paying deference to the freedom of individuals to contract, the Court did not intend to extend the principles articulated in the trilogy to all applications for relief between spouses. Such an extension would virtually eliminate the significance of the statutory criteria and, at the same time, close the door to the wise exercise of judicial discretion that can accommodate a diverse range of economic variables on marriage breakdown.

Under the 1985 Divorce Act, the "means and needs" test is no longer the exclusive criterion for support. All four of the objectives defined in ss. 15(7) and 17(7) of the Act must be taken into account when spousal support is claimed or an order for spousal support is sought to be varied. No single objective is paramount. With these objectives, Parliament intended that support reflect the diverse dynamics of many unique marital relationships. The objective of self-sufficiency is only one of [page815] the objectives enumerated in the sections and there is no indication that it should be given priority in determining the right to, quantum and duration of spousal support. The Act clearly indicates that this objective is to be made a goal only "in so far as is practicable". To elevate economic self-sufficiency to the pre-eminent objective would be inconsistent not only with the proper principles of statutory interpretation, but also with the social context in which support orders are made. There is no doubt that divorce and its economic effects are playing a role in the feminization of poverty in Canada. In most marriages, the wife still remains the economically disadvantaged partner. It would thus be perverse in the extreme to assume that Parliament's intention in enacting the Act was to penalize women in this country financially.

The support provisions of the 1985 Divorce Act are intended to deal with the economic consequences, for both parties, of the marriage or its breakdown. What the Act requires is a fair and equitable distribution of resources to alleviate these consequences regardless of gender. Under this approach, the distinction between traditional and modern marriages may not be as useful as courts have indicated so far. The doctrine of equitable sharing of the economic consequences of the marriage or its breakdown, which the Act promotes, recognizes and accounts for the economic disadvantages or advantages flowing from the role adopted by the spouses in the marriage. Studies indicate that women have tended to suffer economic disadvantages and hardships from marriage or its

breakdown because of the traditional division of labour within that institution. The Act now 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. It seeks to put the remainder of the family in as close a position as possible to the household before the marriage breakdown. Legislative support for the principles of compensation is to be found in s. 15(7)(a-c) and 17(7)(a-c) which are extremely broad in scope. The promotion of self-sufficiency remains relevant, but it does not deserve unwarranted pre-eminence. While spouses would still have an obligation after the marriage breakdown to contribute to their own support in a manner commensurate with their abilities, the ultimate goal is to alleviate the disadvantaged spouse's economic losses as completely as possible, taking into account all the circumstances of the parties, including the advantages conferred on the other spouse during the [page816] marriage. Marriage per se does not, however, automatically entitle a spouse to support. In rare cases, the spouses are able to make a clean break. But in most marriages in which both partners make economic sacrifices and share domestic responsibilities, or where one spouse has suffered economic losses in order to enable the other spouse to further a career, their roles should be considered in the spousal support order. As the Act is not exclusively compensatory in nature, an equitable sharing of the economic consequences of marriage does not exclude other considerations, particularly when dealing with sick or disabled spouses. In the final analysis, courts have an overriding discretion and the exercise of such discretion will depend on the particular facts of each case, having regard to the factors and objectives designated in the Act.

The exercise of judicial discretion in ordering support requires an examination of all four objectives set out in s. 17(7) of the Act in order to achieve equitable sharing of the economic consequences of marriage or its breakdown. In the proper exercise of their discretion, courts must be alert to a wide variety of factors and decisions made in the family interest during the marriage which have the effect of disadvantaging one spouse or benefiting the other upon its dissolution. While the most significant economic consequence of marriage or marriage breakdown usually arises from the birth of children, exacerbated by the need to accommodate and integrate those demands with the requirements of paid employment, the financial consequences of the end of a marriage extend well beyond the simple loss of future earning power or losses directly related to the care of children. Further, families need not fall strictly within a particular marriage model in order for one spouse to suffer disadvantages. Although spousal support orders still remain essentially a function of the evidence led in each particular case, to require expert evidence to present an accurate picture of the economic consequences of the marriage breakdown would not be practical or possible for many parties. The general economic impact of divorce on women, however, is a phenomenon the existence of which cannot reasonably be questioned and should be amenable to judicial notice. In any event, 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 [page817] when engaging in the examination of the objectives of the Act.

Under s. 21(5) of the 1985 Divorce Act, a court of appeal should only interfere with the trial judge's decision where it is persuaded that his reasons disclosed material error. This section does not give a court of appeal an independent discretion to decide a case afresh. Here, the trial judge committed an error in principle in engaging in an analysis premised upon a model of spousal support which is not sustainable on the wording of the Act. The trial judge focused on "financial independence" and

failed to consider the disparity between the earning ability of each former spouse and to have regard to the fact that the wife was disadvantaged by the marriage. Correcting such an error fell within the scope of review of the Court of Appeal. Continuing support is in order in this case since the four objectives set out in s. 17(7) are met: (1) the wife has sustained a substantial economic disadvantage "from the marriage or its breakdown" (s. 17(7)(a)); (2) the wife's long-term responsibility for the upbringing of the children of the marriage after the spousal separation in 1973 has had an impact on her ability to earn an income (s. 17(7)(b)); (3) the wife continues to suffer economic hardship as a result of the "breakdown of her marriage" (s. 17(7)(c)); and (4) the wife has failed to become economically self-sufficient notwithstanding her conscientious efforts (s. 17(7)(d)). These findings are irrefutable even in the absence of expert evidence relating to the appropriate quantification of spousal support.

Per Gonthier and McLachlin JJ.: In the 1985 Divorce Act, Parliament has enacted that judges considering applications for variation of support must consider the four factors set out in s. 17(7). The judge's task under that section is to make an order which provides compensation for marital contributions and sacrifices (s. 17(7)(a)), which takes into account financial consequences of looking after the children either before or after the separation (s. 17(7)(b)), which relieves against need induced by the separation (s. 17(7)(c)), and, to the extent it may be "practicable", promotes the economic self-sufficiency of each spouse (s. 17(7)(d)). The need to consider all four factors set out in s. 17(7) rules out the strict self-sufficiency model. The trial judge thus erred in giving no weight to the first three factors of s. 17(7) and in imposing a categorical requirement of self-sufficiency. The majority of the Court of Appeal was correct [page818] in rejecting the view that there is an absolute obligation for a spouse to become self-sufficient and that there is a time after which one spouse should no longer have to support another. They placed considerable emphasis on the need to compensate the wife for her contributions to the marriage and on the permanent economic disadvantage she suffered as a consequence. They then concluded that she was entitled to an order of maintenance to supplement her own income because her earning potential had been diminished. This conclusion represented a proper application of s. 17(7) of the Act.

Sections 17(7)(a) and 17(7)(c) raise the requirement of causation by the marriage or its breakdown. The question under s. 17(7)(a) is whether a party was disadvantaged or gained advantages from the marriage, as a matter of fact; under s. 17(7)(c) whether the marriage breakdown in fact led to economic hardship for one of the spouses. Hypothetical arguments after the fact about different choices people could have made which might have produced different results are irrelevant, unless the parties acted unreasonably or unfairly. In the context of s. 17(7), what is required is a common-sense, non-technical view of causation. The legal or ultimate burden remains with the plaintiff, but in the absence of evidence to the contrary adduced by the defendant, an inference of causation may be drawn although positive or scientific proof of causation has not been adduced.

Although evidence of the spouses' respective contributions and gains from the marriage is necessary under s. 17(7)(a) of the Act, the evidence need not be detailed, in the sense of a year-by-year chronology of sacrifices and gains. In most cases it will suffice if the parties tell the judge in a general way what each did. That will allow the judge to get very quickly an accurate picture of the sacrifices, contributions and advantages relevant to determining compensation under s. 17(7)(a), making detailed quantification and expert evidence unnecessary.

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By L'Heureux-Dubé J.

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By McLachlin J.

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APPEAL from a judgment of the Manitoba Court of Appeal (1990), 64 Man. R. (2d) 172, 70 D.L.R. (4th) 236, 25 R.F.L. (3d) 396, setting aside an order of Mullally J. (1989), 60 Man. R. (2d) 281, terminating spousal support. Appeal dismissed.

Douglas E. Johnston, for the appellant.

Peter J. Bruckshaw, for the respondent.

Helena Orton and Alison Diduck, for the intervener.

Solicitors for the appellant: Myers Weinberg Kussin Weinstein Bryk, Winnipeg.

Solicitors for the respondent: Teskey and Company, Winnipeg.

Solicitors for the intervener: Helena Orton, Toronto; Wilder, Wilder & Langtry, Winnipeg.

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The judgment of La Forest, L'Heureux-Dubé, Gonthier, Cory and Iacobucci JJ. was delivered by

**1 L'HEUREUX-DUBÉ J.:**-- At the heart of this appeal lies the question of spousal support. Specifically, the Court is asked to determine the circumstances under which spousal support ought to be varied or terminated pursuant to s. 17 of the Divorce Act, R.S.C., 1985, c. 3 (2nd Supp.) (the "Act"). In a broader sense however, this case turns upon the basic philosophy of support within the Act as a whole.

### I. Facts

**2** Mrs. Moge was born in 1937. The parties were married in Poland in the mid-50's. It is unclear from the evidence or the recollection of the parties whether the marriage took place in 1955 or 1957 but the discrepancy is immaterial for the purposes of this appeal. They decided to emigrate and moved to Manitoba in 1960. Three children were born of the marriage. The two elder children, Elizabeth and Victor, were born in Poland prior to the family's coming to Canada. The youngest, Edward, was born in 1966 and at the time of the application at issue was studying at the University of Manitoba.

**3** Mrs. Moge has a grade seven education. Prior to coming to this country she worked briefly as a sales clerk. During the marriage she was responsible for the day-to-day care of the children and did the laundry, housework, shopping, cooking and so on. She was also employed in the evenings working from 5:00 p.m. until 11:00 p.m. cleaning offices except for a brief period in 1963-64 when she worked as a seamstress. In his pleading, Mr. Moge attempted to persuade the Court that this was a marriage in which both contributed to the domestic chores, she during the day while he worked as a welder with Motor Coach Industries, and he in the evening while she worked. However, Twaddle J.A., whose reasons in the Court of Appeal I will examine in more detail later, found based on the evidence that:

There is no suggestion that the wife's outside employment was undertaken for any reason other than the need [page825] to supplement her husband's income. Nor is there any suggestion that the husband undertook additional responsibilities at home to counterbalance the wife's efforts in the external work force. In all respects, this was a traditional relationship of the kind which was common then and which was in conformity with the social conventions of the time.

((1990), 64 Man. R. (2d) 172, at p. 174.)

**4** In 1973, the parties separated and on November 22, 1974, Nitikman J. of the Manitoba Court of Queen's Bench granted the separation and made an order awarding custody of the children to Mrs. Moge. Mr. Moge was ordered to pay \$150 per month spousal and child support. After the separation Mrs. Moge continued to work outside the home. From 5:00 p.m. until 11:00 p.m. she cleaned at the Fort Garry Hotel in Winnipeg. During this time she remained responsible for the care of the children, and while she was out of the home in the evenings, the older children apparently helped out with Edward.

**5** A divorce petition was filed by Mr. Moge in 1980. It was not opposed by Mrs. Moge and she did not appear on the hearing of the petition to oppose her husband's proposal that he continue to pay \$150 per month towards her maintenance and that of the remaining dependant child. Mr. Moge remarried in 1984 but continued to pay support to his former wife.

**6** Mrs. Moge was employed at the Fort Garry Hotel from 1975 until January of 1987 when it closed down, and did not return when she was called back for reasons discussed in the judgment of Mullally J. to which I will refer. The evidence discloses that, at the time she was laid off in 1987, she was earning approximately \$795 net per month. Her net monthly income (excluding support) was reduced to \$593 in unemployment insurance benefits. The evidence further discloses that during the period she was out of work she unsuccessfully sought employment with 38 prospective employers. Mr. Moge was then earning approximately \$2,000 in gross monthly income and also [page826] derived a small amount from investments. He and his second wife had purchased a home.

**7** Mrs. Moge applied to vary the spousal and child support order pursuant to which she was continuing to receive \$150 per month. She was successful and a variation order was made by Mullally J. of the Manitoba Court of Queen's Bench on October 14, 1987. The order provided for spousal support of \$200 per month and child support of \$200 per month thereby increasing her total monthly support from \$150 to \$400.

**8** Between December 14, 1987 and June 30, 1989, Mrs. Moge was able to secure part-time and intermittent cleaning work with the province of Manitoba. The longest period of work began on November 14, 1988 and ended on June 30, 1989. During this period she worked from early to mid-morning for a total of 20 hours per week and received \$9.28 per hour or approximately \$800 gross per month. By way of comparison, though by no means independently wealthy, Mr. Moge was earning approximately \$2,200 gross per month. His second wife was also employed.

**9** In May of 1989, Mr. Moge applied to vary both the child and spousal support orders of October 14, 1987. This second application also came before Mullally J. By an order pronounced September 29, 1989, and signed on December 7, 1989, child support was terminated and spousal support was to cease on December 1, 1989. The wife appealed on the issue of spousal support only. On April 5, 1990, the Court of Appeal allowed Mrs. Moge's appeal in part and ordered spousal support in the amount of \$150 per month for an indefinite period beginning January 1, 1990. Mr. Moge now appeals that decision to this Court. Mrs. Moge has not [page827] appealed the quantum of support awarded by the Court of Appeal.

## II. Judgments

Manitoba Court of Queen's Bench (1989), 60 Man. R. (2d) 281

**10** Relying on Tutiah v. Tutiah (1988), 14 R.F.L. (3d) 37 (Man. Q.B.), Mullally J. ruled that Edward was no longer a child of the marriage for the purposes of the Act and thus his father's obligation was a moral one only and not enforceable. As for Mrs. Moge's entitlement, he said, and I quote in full (at pp. 282-83):

Turning now to Mrs. Moge and the spousal support provision of the order, Mr. Moge seeks to have the \$200.00 per month support to Mrs. Moge terminated as well. The first question which must be asked is whether or not there has been a change in circumstances as required by the Act. The order which is sought to be

varied was granted in October 1987, about two years ago. I see no evidence of substantial or any change in Mr. Moge's situation except he says his bank account is being depleted by the support payments he is making. As to Mrs. Moge, in 1987 she was receiving unemployment insurance payments with a gross monthly income of \$570.00. At present she is working for the Provincial Government as a permanent part-time worker earning \$804.00 gross per month. Mrs. Moge has been separated from her husband since 1973. Mr. Moge paid some small amount of support (\$150.00 per month child and spousal support) for her from 1980 to 1987. In 1987 the support for Mrs. Moge was set at \$200.00 per month. Mrs. Moge has little education (grade 7). She does not have good command of the English language. She has worked at cleaning jobs during the marriage and since separation. She has never had any other kind of employment and has had no training of any kind. She is presently working four hours a day, five days a week earning \$9.28 per hour. She says there is no chance of getting full or more time in the present job. She works from 6:30 a.m. until 10:30 a.m. Monday to Friday. After the separation Mrs. Moge worked for 12 years at the Fort Garry Hotel earning about \$1,000.00 per month when the hotel closed. In 1987, she was called back when the hotel reopened but she had the part-time work where she presently is and preferred to stay. She did not reply to the call from the Fort Garry.

[page828]

In the result, I believe there is a change of circumstances sufficient to warrant a variation in the support provision. Mrs. Moge is earning more now than two years ago. Two more years have gone by since the last order. She was called back to Fort Garry and would have predictably had full time employment but she chose not to reply. In her present occupation she works only four hours per day and should be able to find other part-time cleaning work during some of the other hours of the day. There is no indication she has tried to do so. She cannot expect that Mr. Moge will support her forever. He has contributed to her support since 1973. Mrs. Moge has had time to become financially independent. I think she could and should be. I am satisfied Mr. Moge has supported her as long as he can be required to do. In the result, I would terminate the support as of December 1, 1989. That is, the last payment required will be the December payment. [Emphasis added.]

Manitoba Court of Appeal (1990), 64 Man. R. (2d) 172

Twaddle J.A. (O'Sullivan J.A. concurring)

**11** After observing that Mr. Moge's case for terminating his obligation was Mrs. Moge's failure to reach self-sufficiency, Twaddle J.A. made some initial observations pertaining to the changing perceptions of marriage and the role of women in our society. Marriage, he stated, has been transformed from a lifetime union, dissoluble only upon the commission of a matrimonial offence, into a

union that lasts only as long as the spouses wish. The status of women has changed in that employment opportunities have opened up and, upon marriage dissolution, women now receive a fairer distribution of property. He continued at p. 175:

Women's gains have not been won without a price, a price most women gladly pay. A woman cannot be the equal of a man and expect maintenance from him if her marriage ends. Subject to transitional adjustments, particularly where children are involved, economic self-sufficiency has become the rule.

[page829]

**12** Twaddle J.A. was quick to point out, however, that the rule does not necessarily merit universal application; each case will have to be judged according to the particular circumstances of the parties. At page 175 he noted:

The change in women's status is one that many think is overdue. And so it is. Intrinsicly, a woman is the equal of a man. She should be recognized as such, with all the privileges that brings and all the consequences. But the consequences should not be suffered by those who have not enjoyed the privileges. We should not ignore the social forces which, though disappearing fast, have worked against the concept of equality for centuries.

Economic self-sufficiency may be appropriate for a wife who has had the same opportunities as her husband, but it surely leads to inequality for one who lacked them. Most women who married thirty years ago were encouraged to think of marriage as a way of life in which the husband provided for the family. A woman might be expected to help out in the early years, or even longer, but she was conditioned to think of her earning role as secondary. Although it may seem wrong to those who have been taught to think of woman as man's equal, it is a fact that, for many women who were married in the past, a woman's own economic independence was neither a consideration about which she gave much thought nor a goal for which she planned.

This conclusion is strengthened, in the view of Twaddle J.A., by ss. 17(7)(a), 17(7)(b) and 17(7)(c) of the Act which direct the court to have regard to the particular circumstances of the marriage and which temper the goal of self-sufficiency outlined in s. 17(7)(d) both temporally and practically. He added at pp. 176-77:

A wife who has spent her entire married life in a traditional relationship with her husband is likely, from that fact alone, to be economically disadvantaged when divorced. Depending on the duration of the marriage, and the wife's education and work experience, economic self-sufficiency may mean a permanent disadvantage from which the wife cannot recover. Having concentrated her

efforts for many years on looking after the home, the husband and the children, the wife may have [page830] lost opportunities to learn, to train, to grow. Those lost opportunities may not be regainable.

The husband, in the meantime, may not only have earned a living for the family, or part of one, but also have expanded his knowledge and experience in work-related areas. He may have a higher earning potential than his wife because of their domestic arrangements.

**13** As a result, in the view of Twaddle J.A. the level of self-sufficiency which a wife in a traditional marriage is able to obtain may not be that which could reasonably be expected of the husband, and the court will best meet the objectives set out by Parliament by supplementing the wife's ability with some support. Consequently, he found that the trial judge had erred in proceeding on the premise that the wife ought to have achieved total financial independence, an error in principle considering the earning potential of each spouse. He concluded with respect to the issue of entitlement (at p. 177):

The circumstances are such as entitle the wife to an order of maintenance which will supplement her own income. I do not think a variation should be made each time she finds more paying work, or less. It is her earning potential which has been diminished by the marriage and which entitles her, in the interest of true equality, to a subsidy.

**14** On the issue of quantum, Twaddle J.A. looked to the fact that the parties are essentially in the same position in which they found themselves in 1980, that Mr. Moge had remarried, that maintenance was at that point for Mrs. Moge alone, and that inflation had diminished the real value of the original support order. He accordingly fixed the figure at \$150 per month.

Helper J.A. (dissenting)

**15** Helper J.A. disagreed with the initial characterization of the marriage as "traditional". In her view, such a finding was not consonant with the fact that Mrs. Moge had worked six hours per day outside [page831] the home during the course of the marriage. She then addressed what she regarded as the two questions to be answered on this appeal, namely: (1) whether there was sufficient evidence on which the court could find that there had been a change in the condition, means, needs or other circumstances of either of the parties since the making of the support order or the last variation and, if so, (2) whether Mullally J. exercised his discretion judicially in making the variation order he did.

**16** Helper J.A. took the position that both of these questions ought to be answered in the affirmative. At pages 179-80 she made the following determination:

In reviewing both the decree nisi and the variation orders, I do not accept the argument that those orders were framed other than to promote the self-sufficiency of the respondent. The variation order of October 1987 recognized Mrs. Moge's difficult financial situation at the time of her unemployment but it certainly did not place her in a position of false financial security. The or-

der provided to her only a small measure of assistance. Mrs. Moge had made a concerted effort after her layoff in January 1987, to secure other employment and had been unsuccessful. She had never been totally dependent upon her husband, before or after separation. Her employment during the marriage was six hours per day, in the evenings. After the separation in 1973 she was employed full time until January of 1987. Two years after the variation order she had still not secured full-time employment. There was no evidence to show any efforts to secure other part-time employment and there was no evidence to explain the absence of such efforts to supplement her work with the provincial government. Given her work record and the evidence presented, the court concluded sixteen years after separation and two years after the last variation order that Mr. Moge's obligation was at an end. Mrs. Moge's economic disadvantage was not related to the marital breakdown.

The learned trial judge applied the proper test to be considered on a variation application under s. 17 of the Divorce Act, 1985. The evidence is consistent with his conclusions. This court ought not to substitute its discretion for that of the trial judge who has made no error in [page832] principle and who has not in any way misdirected himself on the evidence.

Consequently, Helper J.A. would have dismissed the appeal.

### III. Issues

**17** The appellant frames the issues in the following manner:

1. Did the Manitoba Court of Appeal wrongfully interfere with the trial judge's exercise of discretion and thereby substitute its own discretion for that of the trial judge?
2. Is the wife entitled to ongoing support from the husband for an indefinite period of time or should spousal support be terminated?

### IV. Appellate Review

**18** The first issue involves the scope of an appellate court's powers under the Act when intervening in the decision of a trial judge. That issue was canvassed by Wilson J. in *Pelech v. Pelech*, [1987] 1 S.C.R. 801. *Pelech* was decided under the Divorce Act, R.S.C. 1970, c. D-8, the predecessor to the Act. Section 17(2) of the 1970 Divorce Act provided as follows:

17. ...

- (2) The court of appeal may
  - (a) dismiss the appeal; or
  - (b) allow the appeal and
    - (i) pronounce the judgment that ought to have been pronounced including such order or such further or other order as it deems just, or

- (ii) order a new trial where it deems it necessary to do so to correct a substantial wrong or miscarriage of justice.

In construing the amount of latitude this section conferred upon an appellate court, Wilson J. accepted at p. 824 the view set out by Morden J.A. of the Ontario Court of Appeal in *Harrington v. Harrington* (1981), 33 O.R. (2d) 150, at p. 154:

[page833]

As far as the applicable standard of appellate review is concerned I am of the view that we should not interfere with the trial Judge's decision unless we are persuaded that his reasons disclose material error and this would include a significant misapprehension of the evidence, of course, and, to use familiar language, the trial Judge's having "gone wrong in principle or (his) final award (being) otherwise clearly wrong": *Attwood v. Attwood*, [1968] P. 591 at p. 596. In other words, in the absence of material error, I do not think that this Court has an "independent discretion" to decide afresh the question of maintenance and I say this with due respect for decisions to the contrary ....

**19** That legislation has been repealed and superseded by the Act and the salient section for the purposes of appellate review is now s. 21, the relevant portions of which state:

21. (1) Subject to subsections (2) and (3), an appeal lies to the appellate court from any judgment or order, whether final or interim, rendered or made by a court under this Act.

...

(5) The appellate court may

- (a) dismiss the appeal; or
- (b) allow the appeal and
  - (i) render the judgment or make the order that ought to have been rendered or made, including such order or such further or other order as it deems just, or
  - (ii) order a new hearing where it deems it necessary to do so to correct a substantial wrong or miscarriage of justice.

The difference between the old and the new wording being minimal, it is my opinion that the statements of Wilson J. are equally applicable under the Act.

**20** As will be seen, I am respectfully of the view that Mullally J. committed an error in principle. He engaged in an analysis premised upon a model of spousal support which is not sustainable on the wording of the Act. Correcting such an error fell [page834] within the scope of review of the Manitoba Court of Appeal and, accordingly, the appellant's argument on the first issue must fail.

## V. The Trilogy and its Jurisprudence

**21** The position of Mr. Moge before this Court is that his support obligation to his ex-wife should be terminated on the basis of the reasoning in *Pelech*, *supra*, *Richardson v. Richardson*, [1987] 1 S.C.R. 857, and *Caron v. Caron*, [1987] 1 S.C.R. 892, the so-called "trilogy". He submits that though those cases specifically concerned situations in which the parties had set out their respective rights and obligations following the dissolution of the marriage by agreement, the Court was advocating a model of support to be relied upon even in the absence of a final settlement.

**22** That model, he says, is characterized by such notions as self-sufficiency and causal connection. Effectively, his position is that his ex-wife should have been self-sufficient by now and, if she is not, no link may be drawn between that lack of self-sufficiency and the marriage. In other words, her current financial position is no concern of his.

**23** Various views have been expressed as to the state of the law in the wake of the trilogy. It would be impossible to cite all of them, but a fair cross-section would include: N. Bala and M. Bailey, "Canada: Controversy Continues Over Spousal Abortion and Support" (1990-91), 29 J. Fam. L. 303; M. J. Bailey, "Pelech, Caron, and Richardson" (1989-90), 3 C.J.W.L. 615; D. G. Duff, "The Supreme Court and the New Family Law: Working through the Pelech Trilogy" (1988), 46 U.T. Fac. L. Rev. 542; K. R. Halvorson, "Causal Connection and Spousal Support" (1989), 5 C.F.L.Q. 195; R. E. Salhany, "Causal Connection -- Is There a New Test for Spousal Support?" (1989), 5 C.F.L.Q. 151; M. J. Trebilcock and R. Keshvani, "The Role of Private Ordering in Family Law: A Law and Economics Perspective" (1991), 41 U.T.L.J. 533, at pp. 540-42 and 554-55; and C. J. Rogerson, "Judicial Interpretation of the [page835] Spousal and Child Support Provisions of the Divorce Act, 1985 (Part I)" (1990-91), 7 C.F.L.Q. 155.

**24** The question that arises is the extent to which the causal connection test articulated in *Pelech*, *supra*, decided under the 1970 Divorce Act, applies to non-consensual dispositions under the Act, as is the case here. The question has sparked considerable debate: G. Artinian, "The Application of *Pelech* to Variation of Maintenance in Quebec" (1989), 5 C.F.L.Q. 265; C. Davies, "Judicial Interpretation of the Support Provisions of the Divorce Act, 1985" (1992), 8 C.F.L.Q. 265, at pp. 266-67; K. Higginson, "Causal Connection: The Development of a Threshold Test for Entitlement to Spousal Support: A Commentary on *Willms v. Willms*, *Payne v. Payne*, *Weppler v. Weppler* and *Brace v. Brace*" (1989), 4 C.F.L.Q. 107; C. Wexler, "Causal Connection in British Columbia: A Critique" (1989), 5 C.F.L.Q. 257; and L. H. Wolfson, "The Legacy of *Pelech v. Pelech*" (1989), 4 C.F.L.Q. 115.

**25** Early on, Professor J. G. McLeod expressed the view that the trilogy cases apply beyond their facts and espoused the model Mr. Moge asks this Court to apply. In his annotation to the trilogy, reported at (1987), 7 R.F.L. (3d) 225, he wrote (at p. 232):

The reasons are also likely to affect the granting of support in the absence of a settlement agreement. The reasons of Wilson J. in *Pelech*, *Richardson* and *Caron* confirm a basic support model. In order to obtain support, a claimant must prove:

- (1) need;

- (2) that the need arises for a legally acceptable reason; and
- (3) that the need/inability is causally connected to the marriage.

This view was shared by, among others, D. R. McDermid in "The Causal Connection Conundrum" (1989), 5 C.F.L.Q. 107, at p. 119.

[page836]

**26** With respect, I cannot agree. A careful reading of the trilogy in general and Pelech in particular indicates that the Court has not espoused a new model of support under the Act. Rather, the Court has shown respect for the wishes of persons who, in the presence of the statutory safeguards, decided to forego litigation and settled their affairs by agreement under the 1970 Divorce Act. In other words, the Court is paying deference to the freedom of individuals to contract. I quote from the reasons of Wilson J. at pp. 849-53 those portions which make the point clearly:

... I believe that every encouragement should be given to ex-spouses to settle their financial affairs in a final way so that they can put their mistakes behind them and get on with their lives. I would, with all due respect, reject the Manitoba Court of Appeal's broad and unrestricted interpretation of the court's jurisdiction in maintenance matters. It seems to me that it goes against the main stream of recent authority, both legislative and judicial, which emphasizes mediation, conciliation and negotiation as the appropriate means of settling the affairs of the spouses when the marriage relationship dissolves.

However, as I stated at the outset, the Hyman principle that parties cannot by contract oust the jurisdiction of the court in matters of spousal maintenance is an established tenet of Canadian law. The question thus becomes the nature and extent of the constraint imposed on the courts by the presence of an agreement which was intended by the parties to settle their affairs in a final and conclusive manner.

...

It seems to me that where the parties have negotiated their own agreement, freely and on the advice of independent legal counsel, as to how their financial affairs should be settled on the breakdown of their marriage, and the agreement is not unconscionable in the substantive law sense, it should be respected. People should be encouraged to take responsibility for their own lives and their own decisions. This should be the overriding policy consideration.

...

[page837]

Absent some causal connection between the changed circumstances and the marriage, it seems to me that parties who have declared their relationship at an end should be taken at their word. They made the decision to marry and they made the decision to terminate their marriage. Their decisions should be respected. They should thereafter be free to make new lives for themselves without an ongoing contingent liability for future misfortunes which may befall the other. It is only, in my view, where the future misfortune has its genesis in the fact of the marriage that the court should be able to override the settlement of their affairs made by the parties themselves.

...

Where parties, instead of resorting to litigation, have acted in a mature and responsible fashion to settle their financial affairs in a final way and their settlement is not vulnerable to attack on any other basis, it should not, in my view, be undermined by courts concluding with the benefit of hindsight that they should have done it differently. [Emphasis added.]

**27** I find doctrinal support for this view of the holding in *Pelech, Richardson and Caron* in commentaries such as G. M. Quijano and N. A. Trott, "How Broadly Is the Causal Connection Test to Be Applied?" (1989), 5 C.F.L.Q. 247, at p. 248, where the authors note:

The Supreme Court of Canada in the trilogy cases seemed clearly to state that contracts between spouses should not be lightly disturbed and then, in considering the question of variation of the spousal maintenance provisions of an agreement between spouses, articulated the test to be applied to applications to vary spousal maintenance provisions which have been arrived at by the parties by agreement of one form or another.

and at p. 255:

Had the Supreme Court of Canada intended the causal connection test to be applicable to all applications for relief between spouses, it could easily have said so, but in each of the three decisions the Court was concerned only with determining the test to be applied to define the circumstances under which a court may interfere in the arrangements between parties arrived at by agreement in relation to questions of spousal maintenance.

A similar point is made in T. A. Heeney, "The Application of *Pelech* to the Variation of an Ongoing [page838] Support Order: Respecting the Intention of the Parties" (1989), 5 C.F.L.Q. 217, at p. 218.

**28** Professor J. D. Payne in my view best identifies the flaws of the early interpretation of the trilogy in "Further Reflections on Spousal and Child Support After *Pelech, Caron and Richardson*" (1989), 20 R.G.D. 477 when he states at p. 487:

... Professor McLeod's proposed extension of *Pelech*, *Caron* and *Richardson* to non-consensual situations and to provincial statutes as well as the new *Divorce Act*, 1985, virtually eliminates the significance of statutory criteria, whatever their form and substance, and at the same time closes the door to the wise exercise of judicial discretion that can accommodate a diverse range of economic variables on marriage breakdown or divorce.

Notwithstanding the common law's recognition of a spousal agency of necessity, it must not be forgotten that current spousal support laws are of statutory origin. Furthermore, subject to overriding constitutional doctrines, the sovereignty of Parliament ... remains paramount. Judge-made law may explain, but cannot override, statute law.

In addition, there are diverse appellate rulings in Canada that endorse the view that the principles articulated in the trilogy should not be applied to non-consensual situations. See, for example, *Lynk v. Lynk* (1989), 21 R.F.L. (3d) 337 (N.S.S.C., App. Div.); *Story v. Story* (1989), 23 R.F.L. (3d) 225 (B.C.C.A.); *Doncaster v. Doncaster* (1989), 21 R.F.L. (3d) 357 (Sask. C.A.); *Trainor v. Trainor* (1989), 23 R.F.L. (3d) 39 (Sask. C.A.); *Droit de la famille -- 598*, [1989] R.D.F. 15 (Que. C.A.).

**29** In light of my reading of *Pelech*, I decline to accede to Mr. Moge's argument that this Court has already determined the basis on which entitlement, or continuing entitlement, to spousal support rests in the absence of a settlement agreement intended by the parties to be final under the Act.

[page839]

**30** Since this case is not one which involves a final agreement entered into between the parties in order to settle the economic consequences of their divorce, I leave for another day the question of causal connection under the Act which was discussed in the trilogy in the particular context of a final settlement under the 1970 *Divorce Act*.

**31** The present appeal not only does not involve a final settlement agreement but deals specifically with a variation application following a support order at the time of divorce, a question to which I will now turn.

## VI. Spousal Support

### (1) The Act

**32** Although subss. (4) and (7) of s. 17 of the Act are the two subsections directly applicable to this appeal, s. 15(2), (4), (5), (6) and (7) and s. 17(1), (3), (6), (8) and (10) of the Act are also relevant to the analysis:

15. ...

(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.

...

(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

[page840]

- (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.

...

17. (1) A court of competent jurisdiction may make an order varying, rescinding or suspending, prospectively or retroactively,

- (a) a support order or any provision thereof on application by either or both former spouses;

...

(3) The court may include in a variation order any provision that under this Act could have been included in the order in respect of which the variation order is sought.

(4) Before the court makes a variation order in respect of a support order, the court shall satisfy itself that there has been a change in the condition, means, needs or other circumstances of either former spouse or of any child of the marriage for whom support is or was sought occurring since the making of the support order or the last variation order made in respect of that order, as the case may be, and, in making the variation order, the court shall take into consideration that change.

...

[page841]

(6) In making a variation order, the court shall not take into consideration any conduct that under this Act could not have been considered in making the order in respect of which the variation order is sought.

(7) A variation order varying a support order that provides for the support of a former spouse should

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

(8) A variation order varying a support order that provides for the support of a child of the marriage should

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

...

(10) Notwithstanding subsection (1), where a support order provides for support for a definite period or until the happening of a specified event, a court may not, on an application instituted after the expiration of that period or the happening of that event, make a variation order for the purpose of resuming that support unless the court is satisfied that

- (a) a variation order is necessary to relieve economic hardship arising from a change described in subsection (4) that is related to the marriage; and
- (b) the changed circumstances, had they existed at the time of the making of the support order or the last variation order made in respect of that order, as the case may be, would likely have resulted in a different order. [Emphasis added.]

[page842]

## (2) Introduction

**33** Before dealing squarely with the main issue raised by this appeal, there are a number of preliminary observations that I wish to make.

**34** The first has to do with the argument raised by Mr. Moge that, quite apart from the trilogy, the Act espouses a self-sufficiency model as the only basis of spousal support. He relies for this proposition on the reasoning in *Derkach v. Derkach* (1989), 22 R.F.L. (3d) 423 (Man. Q.B.), and on the reasons given by Mullally J. at trial (see also *Klaudi v. Klaudi* (1990), 25 R.F.L. (3d) 134 (Ont. H.C.)). Mrs. Moge disagrees. She points out that self-sufficiency is only one of many objectives which the Act directs a court of competent jurisdiction to consider in exercising its discretion under ss. 17(4) and 17(7) and that even then, the objective of self-sufficiency in s. 17(7) is modified by such terminology as "in so far as practicable". She further submits that there is now appellate court jurisprudence which recognizes that in cases such as her own, self-sufficiency will not be practicable, largely due to the residual effects of being outside the labour market for a protracted period of time.

**35** The self-sufficiency model advanced by Mr. Moge has generally been predicated on the dichotomy between "traditional" and "modern" marriage. Often, in order to draw the line after which no more support will be ordered, courts have distinguished between "traditional" marriages in which

the wife remains at home and takes responsibility for the domestic aspects of marital life, and "modern" ones where employment outside the home is pursued. Perhaps in recognition that, as Judge Rosalie S. Abella (now J.A.) wrote in "Economic Adjustment On Marriage Breakdown: Support" (1981), 4 Fam. L. Rev. 1, at p. 4, "[i]t is hard to be an independent equal when one is not equally able to become independent", courts have frequently been more amenable to finding that "traditional" marriages survive the so-called [page843] "causal connection" test than "modern" ones.

**36** The "traditional" vs. "modern" dichotomy is apparent upon an examination of the current spate of decisions in the area and is perhaps best reflected in *Heinemann v. Heinemann* (1989), 20 R.F.L. (3d) 236 (N.S.S.C., App. Div.). Speaking for the court, Hart J.A. states at pp. 272 and 274:

It would appear that the courts have recognized a substantial change in the nature of marriages and the roles played by the parties. At one end of the scale we have the traditional marriage where one spouse is the breadwinner and the other the child-rearer, often entitled to be supported for life. At the other end we have the type of marriage where both spouses participate in the economic advancement of the family unit and although one may be disadvantaged for a period of time during the marriage by deserting career opportunities, this can be balanced upon dissolution by provisions promoting the self-sufficiency of that spouse and thereafter both parties go their own ways. In between these two extremes we still find a variety of marital arrangements that must be fairly dealt with upon dissolution.

...

In my opinion, a judge today in approaching a maintenance order should continue to recognize the distinction between the traditional and the modern marriage. Upon dissolution of a modern marriage the goal should be the placing of both parties in a position of economic self-sufficiency at the earliest possible time... . Temporal limits on maintenance should be utilized to accomplish this end, and illness or other factors not related to the marriage should not be used to justify the continuation of maintenance which otherwise should cease. [Emphasis added.]

The case of *Messier v. Delage*, [1983] 2 S.C.R. 401, is also apposite here, as it demonstrates this Court's recognition of the reasonable limitations in attaining self-sufficiency that may be encountered by a wife who has performed traditional roles in a marriage. Although the wife in that case had a [page844] Master's degree, she was experiencing serious difficulties in rejoining the work force. The majority of the Court decided that, in the circumstances, she was entitled to continuing support. In the words of Chouinard J. at pp. 416-17:

The mechanism provided by the Divorce Act to take into account the conduct of the parties and changes in the condition, means or other circumstances of either of them is their right to apply to the Court each time a change which is regarded as fundamental occurs. This is not to assume, as in the case at bar, that in

eight months respondent will no longer need support or be entitled to it: it means that if the situation arises it can be dealt with.

...

After their marriage the parties lived together for twelve years. They had two children, whose education was respondent's constant concern. She never worked outside the home. Immediately after the divorce, she began studies in translation and took her Master's degree. She has since then been able to obtain part-time employment, which in the year preceding the trial judgment brought her some \$5,000. Appellant's means enable him to pay the pension awarded, which in fact was reduced by the Court of Appeal in the same proportion as it was by the Superior Court to take into account respondent's earnings and the fact that one of the children is no longer dependent on her. If other changes occur, it will be for appellant to apply to the Court again.

In my opinion the Superior Court erred in disregarding the present factors submitted for its consideration, and hypothesizing as to the unknown and then unforeseeable future; and the Court of Appeal properly intervened.

As Proudfoot J.A. held in *Story v. Story*, supra, at p. 245:

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 that a 45- or 50-year-old spouse who has not been in the job market for many, many years to be retrained and to compete for employment in a job market where younger women have difficulty becoming employed. Employment and self-sufficiency are simply not achievable. In those cases, the obligation to support [page845] must surely be considered to be permanent. That obligation must flow from the marriage relationship and the expectations the parties had when they married.

See also *White v. White* (1988), 13 R.F.L. (3d) 458 (N.B.C.A.); *Lynk v. Lynk*, supra; *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.).

**37** The same philosophy, grounded on this dichotomy and causal connection, also inspires decisions to deny support. In *Oswell v. Oswell* (1990), 28 R.F.L. (3d) 10 (Ont. H.C.), Weiler J. (now J.A.) decided that, as the wife had already pursued academic opportunities and had attained economic self-sufficiency as a result, it could not be said that she was in a worse position because of the marriage. See also *Grohmann v. Grohmann* (1991), 37 R.F.L. (3d) 73 (B.C.C.A.).

**38** 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. *Newbury J. of the British Columbia Su-*

preme Court makes this point particularly well in *Patrick v. Patrick* (1991), 35 R.F.L. (3d) 382 at pp. 398-99:

One might conclude that the marriage in the case at bar is not a traditional one in that it lasted only 10 years, the parties are comparatively young and healthy, and both are trained professionals. In applying the factors mandated by subs. 15(7) of the Divorce Act, however, it is clear that Mrs. Patrick will suffer an ongoing economic disadvantage as a result of the breakdown of the marriage, within the meaning of subpara. (a), and that the care of Vincent will entail financial consequences over and above those normally compensated by means [page846] of child support, within the meaning of subpara. (b). It is true that Mrs. Patrick has not, like the wives in *Brockie and Swift v. Swift*, supra, taken herself out of the job market for many years to devote herself to the marriage, or suffered some mental or physical illness that will seriously impede her independence. However, the evidence is clear that, as a result of the breakdown of her marriage and her continuing child-rearing role, she will be disadvantaged financially and professionally, both in comparison to her situation had the marriage continued and in comparison to her situation had no marriage occurred at all. In my view, it is a legitimate function of spousal support under subs. 15(7), and, indeed, it is expressly mandated by that provision, to compensate to some extent for that disadvantage and to require the non-custodial spouse to pay his fair share thereof.

**39** In *Mullin v. Mullin* (1989), 24 R.F.L. (3d) 1 (P.E.I.S.C., App. Div.), despite the fact that the wife had prospects of resuming full-time employment, Carruthers C.J.P.E.I. also held at p. 16 that a support order was in order, finding that:

There is no question but that the marriage here should be classified as a traditional marriage and based on the facts found by the trial judge the appellant has a need for support in order that she may have a reasonable standard of living. This need has been occasioned by the fact that she put the good of the family ahead of her own career. She deserted career opportunities for the good of the family and in doing so she has lost advancement in her career as well as seniority and pension benefits.

An appeal by the wife of a subsequent variation order lowering the amount payable was allowed by the Court of Appeal, which found that the variation judge had erred in failing to take into consideration any economic disadvantage resulting from the marriage suffered by the wife (*Mullin v. Mullin* (1991), 37 R.F.L. (3d) 142). See also *Heinemann v. Heinemann*, supra; *Story v. Story*, supra, per Proudfoot J.A.; and P. Proudfoot and K. Jewell, "Restricting Application of the Causal Connection Test: *Story v. Story*" (1990), 9 Can. J. Fam. L. 143.

**40** However, in other cases, support is denied or terminated because the dependent spouse is deemed to have an adequate income, despite substantial disparity in the standard of living enjoyed by the former spouses, or because the court is of the view that any financial problems suffered by a former spouse must be dealt with in the same manner as would a single person. (See *Seward v. Seward* (1988), 12 R.F.L. (3d) 54 (N.S. Fam. Ct.) which was decided prior to *Heinemann*, *supra*, but leaves little doubt as to the result even if it had been heard subsequently and, *Regan v. Regan*, Ont. Ct. (Gen. Div.), Kitchener Doc. 118/90, July 25, 1991, per Salhany J., [1991] O.J. No. 1350 (QL Systems).) And, even in the event that the hurdle of entitlement, or continuing entitlement, is overcome, the level at which self-sufficiency is set often demonstrates unmitigated parsimony. In *Cymbalisty v. Cymbalisty* (1989), 56 Man. R. (2d) 28 (Q.B.), at p. 32, the court held as follows:

The evidence indicates that the likelihood exists that Mrs. Cymbalisty will become employed with Statistics Canada on a full time basis at some point in the future. Full-time employment would provide the additional security of pension and other benefits. Although I do not restrict any period of spousal support to the eventuality of full-time employment, or obtaining of a job which would yield roughly \$20,000.00 per year gross income, however, achieving that level of self-sufficiency would seem to meet the requisite of the Divorce Act, 1985. [Emphasis added.]

See also Rogerson, *supra*, at p. 164.

**41** Given the concerns I harbour about making a spouse's entitlement to support contingent upon the degree to which he or she is able to fit within a mythological stereotype (in this context, see F. M. Steel, "Alimony and Maintenance Orders", in S. L. Martin and K. E. Mahoney, eds., *Equality and Judicial Neutrality* (1987), 155, at pp. 158-60), the distinction between "traditional" and "modern" marriages does not seem to me to be as useful as perhaps courts have indicated so far. While it may reflect flexibility on the part of courts and constitute an attempt to achieve fairness, I am of the view that there are much more sophisticated [page848] means which may be resorted to in order to achieve the objectives set out in the Act, a matter which I will deal with later in these reasons.

**42** The second observation I wish to make is that, in determining spousal support it is important not to lose sight of the fact that the support provisions of the Act are intended to deal with the economic consequences, for both parties, of the marriage or its breakdown. Marriage may unquestionably be a source of benefit to both parties that is not easily quantified in economic terms. Many believe that marriage and the family provide for the emotional, economic, and social well-being of its members. It may be the location of safety and comfort, and may be the place where its members have their most intimate human contact. Marriage and the family act as an emotional and economic support system as well as a forum for intimacy. In this regard, it serves vital personal interests, and may be linked to building a "comprehensive sense of personhood". Marriage and the family are a superb environment for raising and nurturing the young of our society by providing the initial environment for the development of social skills. These institutions also provide a means to pass on the values that we deem to be central to our sense of community.

**43** Conversely, marriage and the family often require the sacrifice of personal priorities by both parties in the interests of shared goals. All of these elements are of undeniable importance in shaping the overall character of a marriage. Spousal support in the context of divorce, however, is not about the emotional and social benefits of marriage. Rather, the purpose of spousal support is to re-

lieve economic hardship that results from "marriage or its breakdown". Whatever the respective advantages to the parties of a marriage in other areas, the focus of the inquiry when assessing spousal support after the marriage has ended must [page849] be the effect of the marriage in either impairing or improving each party's economic prospects.

**44** This approach is consistent with both modern and traditional conceptions of marriage in as much as marriage is, among other things, an economic unit which generates financial benefits (see M. A. Glendon, *The New Family and The New Property* (1981)). The Act reflects the fact that in today's marital relationships, partners should expect and are entitled to share those financial benefits.

**45** Equitable distribution can be achieved in many ways: by spousal and child support, by the division of property and assets or by a combination of property and support entitlements. But in many if not most cases, the absence of accumulated assets may require that one spouse pay support to the other in order to effect an equitable distribution of resources. This is precisely the case here, as the parties are not wealthy; for the most part, all they appear to possess are their respective incomes.

**46** 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.

**47** A third point worthy of emphasis is that this analysis applies equally to both spouses, depending on how the division of labour 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 [page850] disadvantaged partner. There may be times where the reverse is true and the Act is equally able to accommodate this eventuality.

**48** These caveats having been made, the question of spousal support which lies at the heart of this appeal must be dealt with first by examining the objectives of the Act.

### (3) The Objectives of the Act

**49** Parliament, subject always to over-arching constitutional norms, may set down any principles it wishes to govern spousal support. The task then is to determine the principles embodied in s. 15 and s. 17 of the Act, bearing in mind that those principles may in fact engage the courts in a different type of analysis than that required under the 1970 Divorce Act when considering the question of support.

**50** The most significant change in the new Act when compared to the 1970 Divorce Act may be the shift away from the "means and needs" test as the exclusive criterion for support to a more encompassing set of factors and objectives which requires courts to accommodate a much wider spectrum of considerations. This change, of course, does not signify that "means and needs" are to be ignored. Section 15(5) of the Act specifically states that "the court shall take into consideration the condition, means, needs and other circumstances of each spouse".

**51** I fully agree with Professor Payne who has commented on these objectives in Payne on Divorce (2nd ed. 1988), at p. 101, that:

Judicial implementation of the newly defined policy objectives should, to some degree, result in a shift from the narrow perspective of a "needs" and "capacity to pay" approach, particularly in cases where one of the spouses has substantial means: see *Linton v. Linton* (1988), 11 R.F.L. (3d) 444 (Ont. S.C.) (Killeen L.J.S.C.) [now aff'd (1990), 1 O.R. (3d) 1 (Ont. C.A.)]. It may also have an impact on the types of order that will be used to effectuate one or more of the applicable policy [page851] objectives. In this context, it should be observed that the four policy objectives defined in the Divorce Act, 1985 are not necessarily independent of each other. They may overlap or they may operate independently, depending upon the circumstances of the particular case. Legislative endorsement of four policy objectives manifests the realization that the economic variables of marriage breakdown and divorce do not lend themselves to the application of any single objective. Long-term marriages that ultimately break down often leave in their wake a condition of financial dependence, because the wives have assumed the role of full-time homemakers. The legitimate objective(s) of spousal support in such a case will rarely coincide with the objective(s) that should be pursued with respect to short-term marriages. Childless marriages cannot be treated in the same way as marriages with dependent children. The two-income family cannot be equated with the one-income family. A "clean break" accommodated by an order for a lump sum in lieu of periodic spousal support can often provide a workable and desirable solution for the wealthy, for the two-income family and for childless marriages of short duration. Rehabilitative support orders by way of periodic spousal support for a fixed term may be appropriate where there is a present incapacity to pay a lump sum and the dependent spouse can reasonably be expected to enter or re-enter the labour force within the foreseeable future. Continuing periodic spousal support orders may provide the only practical solution for dependent spouses who cannot be reasonably expected to achieve economic self-sufficiency. There can be no fixed rules, however, whereby particular types of orders are tied to the specific objective(s) sought to be achieved. In the final analysis, the court must determine the most appropriate kind(s) of order, having regard to the attendant circumstances of the case, including the present and prospective financial well-being of both the spouses and their dependent children .... [Emphasis added.]

See also: J. D. Payne, "Permanent Spousal Support in Divorce Proceedings: Why? How Much? How Long?" (1987), 6 Can. J. Fam. L. 384; "Further Reflections on Spousal and Child Support After Pelech, Caron and Richardson", *supra*, at p. 487, and "Management of a Family Law File with Particular [page852] Regard to Spousal Support on Divorce" (1988-89), 10 Adv. Q. 424, at pp. 438-39.

**52** All four of the objectives defined in the Act must be taken into account when spousal support is claimed or an order for spousal support is sought to be varied. No single objective is paramount. The fact that one of the objectives, such as economic self-sufficiency, has been attained does

not necessarily dispose of the matter. Carruthers C.J.P.E.I observed in *Mullin v. Mullin* (1991), *supra*, at p. 148:

All of these objectives must be considered. There is nothing in the legislation to suggest that any one or two of these objectives should be given greater weight or importance than any other objective. Section 17(7) of the Act recognizes that each former spouse shall attain economic self-sufficiency, insofar as practicable, within a reasonable period of time, but it does not say that such economic self-sufficiency is the dominant consideration.

As Perras J. has put it in *Crowfoot v. Crowfoot* (1992), 38 R.F.L. (3d) 354 (Alta. Q.B.), at pp. 356-57:

Each model has certain assumptions but is basically grounded in the Divorce Act, 1985, S.C. 1986, c. 4. The problem with selecting one model over others is that one then approaches the case from a preconceived point of view: the point of view being dictated by the assumptions associated with the model. The difficulty arises, then, in trying to either fit the model to the facts or fit the facts to the model, and in so doing, causing an injustice to the parties.

...

It is against the legislative backdrop or scheme as set out in the Divorce Act, 1985 that one must measure and arrive at a reasonable figure for support. It may be that, having done so, a final quantum can be quickly translated into an easy rule of thumb, like one third or two fifths or parity. But such translations are coincidental and ought not to be turned into unfailing universal formulas; nor should a support order necessarily be thought of as having been achieved as if one applied a particular model.

Both counsel have in their submissions urged upon the court a particular approach. I decline to follow either [page853] submission in this respect but, rather, prefer to adhere to the scheme proposed by the legislation, namely, to be mindful of the factors and objectives as set out in s. 15 of the Divorce Act, 1985 and of the principles as enunciated in the case law.

**53** Many proponents of the deemed self-sufficiency model effectively elevate it to the pre-eminent objective in determining the right to, quantum and duration of spousal support. In my opinion, this approach is not consonant with proper principles of statutory interpretation. The objective of self-sufficiency is only one of several objectives enumerated in the section and, given the manner in which Parliament has set out those objectives, I see no indication that any one is to be given priority. Parliament, in my opinion, intended that support reflect the diverse dynamics of many unique marital relationships. Osborne J.A. of the Ontario Court of Appeal made this point in *Linton v. Linton* (1990), 1 O.R. (3d) 1, at p. 27:

In not attaching any particular priority to the factors to be considered and the objectives sought to be achieved in making a spousal support order, it seems to me that Parliament recognized the great diversity of marriages and the need for judges to deal with support entitlement and quantum on a case by case basis.

**54** It is also imperative to realize that the objective of self-sufficiency is tempered by the caveat that it is to be made a goal only "in so far as practicable". This qualification militates against the kind of "sink or swim" stance upon which the deemed self-sufficiency model is premised. (See Bailey, *supra*, at p. 633, and *Droit de la famille* -- 623, [1989] R.D.F. 196 (Que. C.A.), at pp. 201-2.)

**55** That Parliament could not have meant to institutionalize the ethos of deemed self-sufficiency is also apparent from an examination of the social context in which support orders are made. In Canada, the feminization of poverty is an entrenched social phenomenon. Between 1971 and 1986 the percentage of poor women found among all women in this country more than doubled. During the same period the percentage of poor among [page854] all men climbed by 24 percent. The results were such that by 1986, 16 percent of all women in this country were considered poor: M. Gunderson, L. Muszynski and J. Keck, *Women and Labour Market Poverty* (1990), at p. 8.

**56** Given the multiplicity of economic barriers women face in society, decline into poverty cannot be attributed entirely to the financial burdens arising from the dissolution of marriage: J. D. Payne, "The Dichotomy between Family Law and Family Crises on Marriage Breakdown" (1989), 20 R.G.D. 109, at pp. 116-17. However, there is no doubt that divorce and its economic effects are playing a role. Several years ago, L. J. Weitzman released her landmark study on divorce, *The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America* (1985), and concluded at p. 323:

For most women and children, divorce means precipitous downward mobility -- both economically and socially. The reduction in income brings residential moves and inferior housing, drastically diminished or nonexistent funds for recreation and leisure, and intense pressures due to inadequate time and money. Financial hardships in turn cause social dislocation and a loss of familiar networks for emotional support and social services, and intensify the psychological stress for women and children alike. On a societal level, divorce increases female and child poverty and creates an ever-widening gap between the economic well-being of divorced men, on the one hand, and their children and former wives on the other.

(See also J. B. McLindon, "Separate But Unequal: The Economic Disaster of Divorce for Women and Children" (1987), 21 Fam. L.Q. 351.)

**57** The picture in Canada seems to follow a similar pattern. In the federal Department of Justice (Bureau of Review), *Evaluation of the Divorce Act -- Phase II: Monitoring and Evaluation* (1990), it was found, based on client interviews that, following divorce, 59 percent of women and children surveyed fell below the poverty line, a figure that dropped to 46 percent when support was included [page855] in the calculation of their incomes (see pp. 92-93). However, a more realistic picture, as it is not restricted to the more affluent segment of the divorcing public, is probably revealed by an analysis of court files, which determined that in 1988, overall two-thirds of divorced women had total incomes which placed them below the poverty line. When support was excluded, 74 percent of

divorced women fell below the poverty line (see pp. 94-95). It is apparent that support payments, even assuming they are paid, are making only a marginal contribution to reducing economic hardship among women following divorce. In contrast, a previous study released in 1986, *Evaluation of the Divorce Act -- Phase I: Monitoring and Evaluation*, found that only 10 percent of men were below the poverty line after paying support, and the average income was \$13,500 above the poverty line in such one-person households after the payment of support.

**58** Other studies confirm the trend. According to Statistics Canada, "Alimony and child support", in *Perspectives on Labour and Income* (Summer 1992), 8, at p. 18, the per capita income of those paying support in 1988 was \$25,800 while the per capita income of those receiving it in the same year was \$10,500.

**59** An examination of the economic position of single mothers is also useful in assessing the effects of dissolution of marriage since about 30 percent of single mothers are divorced: Statistics Canada, *Women in Canada: A Statistical Report* (2nd ed. 1990), at p. 16. In 1987, 57 percent of single mothers lived below the poverty line: National Council of Welfare, *Women and Poverty Revisited* (1990), at p. 58. Gunderson, Muszynski and Keck, *supra*, report a figure of 44.1 percent in 1986 (p. 18). (See also Statistics Canada, "Work and relative [page856] poverty", in *Perspectives on Labour and Income* (Summer 1990), 32.)

**60** Reports such as these have led many Canadian commentators to draw direct links between female poverty and the financial consequences of the dissolution of marriage. While M. Eichler emphasizes the limits of family law in addressing poverty in "The Limits of Family Law Reform or, The Privatization of Female and Child Poverty" (1990-91), 7 C.F.L.Q. 59, she recognizes that family law nevertheless has a role to play in alleviating poverty for single mothers when she writes at p. 60:

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.

(See also E. D. Pask and M. L. McCall, "How Much and Why? An Overview" (1989), 5 C.F.L.Q. 129, at pp. 139-40.)

**61** Findings in the Report of the Social Assistance Review Committee, *Transitions* (1988), show that support can be a significant factor in alleviating some of these negative economic effects. The report notes that recipients of social assistance who receive support payments are more likely to leave the programme than those who do not and that the length of time a recipient receives social assistance is inversely proportional to the total amount of support received. At page 44, the report states:

The nearly 50% of single parents receiving [family benefit allowance] who receive no support payments at all averaged between 3.5 and 4 years in the program. The 11% receiving between \$10 and \$100 per month averaged 2.5 to 3 years, while those receiving between \$100 and \$200 per month averaged 2 to 2.5 years. Finally, the mere 6% receiving in excess of \$200 per month averaged less than 2 years in the program.

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These socio-economic observations in my view support the objectives set out in the Act in as much as they provide background information useful in determining the intent of the legislators should that intent ever be in doubt.

**62** As Lamer C.J. stated in *R. v. Multiform Manufacturing Co.*, [1990] 2 S.C.R. 624, at p. 630, "[w]hen the courts are called upon to interpret a statute, their task is to discover the intention of Parliament". It is also axiomatic of statutory interpretation that Parliament must be taken as being aware of the social and historical context in which it makes its intention known: P.-A. Côté, *The Interpretation of Legislation in Canada* (2nd ed. 1992), at p. 346.

**63** 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, based on the review of the jurisprudence and statistical data set out in these reasons, 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... . [Emphasis added.]

**64** In the result, I am respectfully of the view that the support model of self-sufficiency which Mr. Moge urges the Court to apply, cannot be supported as a matter of statutory interpretation, considering [page858] in particular the diversity of objectives set out in the Act.

#### (4) Doctrine and Jurisprudence

**65** A burgeoning body of doctrine and, to some extent, jurisprudence is developing both abroad as well as in Canada which expresses dissatisfaction with the current norms along which entitlement to spousal support is assessed. This body of doctrine in particular proposes instead a scheme based on principles of compensation. Internationally, I would refer *inter alia* to such works as K. K. Baker, "Contracting for Security: Paying Married Women What They've Earned" (1988), 55 U. Chi. L. Rev. 1193; M. F. Brinig and J. Carbone, "The Reliance Interest in Marriage and Divorce" (1988), 62 Tul. L. Rev. 855; J. Carbone and M. F. Brinig, "Rethinking Marriage: Feminist Ideology, Economic Change, and Divorce Reform" (1991), 65 Tul. L. Rev. 953; J. Carbone, "Economics, Feminism, and the Reinvention of Alimony: A Reply to Ira Ellman" (1990), 43 Vand. L. Rev. 1463; I. M. Ellman, "The Theory of Alimony" (1989), 5 C.F.L.Q. 1; Report of the Florida Supreme Court Gender Bias Study Commission (March 1990), at p. 58; S. F. Goldfarb, "Marital Partnership and the Case for Permanent Alimony" (1988-89), 27 J. Fam. L. 351; J. M. Krauskopf, "Theories of Property Division/Spousal Support: Searching for Solutions to the Mystery" (1989), 23 Fam. L.Q. 253; H. Land, "Changing Women's Claim to Maintenance", in M. D. A. Freeman, ed., *The State, the Law,*

and the Family: Critical Perspectives (1984), 25, at pp. 28ff.; M. E. O'Connell, "Alimony After No-Fault: A Practice in Search of a Theory" (1988-89), 23 New Eng. L. Rev. 437; T. L. Perry, "No-Fault Divorce and Liability Without Fault: Can Family Law Learn from Torts?" (1991), 52 Ohio St. L.J. 55; J. A. Scutt, *Women and the Law: Commentary and Materials* (1990), at pp. 247ff.; and D. G. Stewart and L. E. McFadyen, "Women and the Economic Consequences of Divorce in Manitoba: An Empirical Study" (1992), 21 Man. L.J. 80.

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**66** In Canada, a major proponent of compensatory spousal support has been Professor Rogerson (see "The Causal Connection Test in Spousal Support Law" (1989), 8 Can. J. Fam. L. 95, and "Judicial Interpretation of the Spousal and Child Support Provisions of the Divorce Act, 1985 (Part I)", *supra*), but the principles of compensatory support and their underpinnings have found favour among such other scholars and practitioners as Davies, *supra*, at pp. 270ff.; M. Grassby ("Women in Their Forties: The Extent of Their Rights to Alimentary Support" (1991), 30 R.F.L. (3d) 369); Pask and McCall, *supra*; Payne ("Further Reflections on Spousal and Child Support After Pelech, Caron and Richardson", *supra*, at pp. 493ff.); and, Proudfoot and Jewell, *supra*, at p. 151.

**67** The theory, however, is not new, as is evident from the Law Reform Commission Working Papers and Report, 1972-1976. Antecedents of the compensatory spousal support model may be found in portions of the Law Reform Commission of Canada's Working Paper 12, *Maintenance on Divorce* (1975). The Commission recommended *inter alia* that the mere fact of marriage not create a right of maintenance and that the economic disabilities incurred due to marriage and the eventuality of children be compensated. The Commission also paid heed to the same principles of equality discussed by Judge Abella in "Economic Adjustment On Marriage Breakdown: Support", *supra*, at p. 3, when it concluded:

The law should have two primary objects. First, it should adopt a philosophy of interspousal maintenance that does not tend to compel a sexually-determined mode in which marriage functions are divided, leaving it to the market place of social custom as to how individuals will arrange their marriages in future. Second, it should ensure, as far as it is able, that the economic disadvantages of caring for children rather than working for wages are removed.

...

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A division of functions between marriage partners, where one is a wage-earner and the other remains at home will almost invariably create an economic need in one spouse during marriage. The spouse who stops working in order to care for children and manage a household usually requires financial provi-

sion from the other. On divorce, the law should ascertain the extent to which the withdrawal from the labour force by the dependant spouse during the marriage (including loss of skills, seniority, work experience, continuity and so on) has adversely affected that spouse's ability to maintain himself or herself. The need upon which the right to maintenance is based therefore follows from the loss incurred by the maintained spouse in contributing to the marriage partnership.

...

If the functions of financial provision, household management and child care are divided in any particular way between a husband and wife, the law should characterize this as an arrangement between the spouses for accomplishing shared requirements of the marriage partnership according to their preferences, cultural beliefs, religious imperatives, or similar motivating factors. A spouse who does one of these things should be seen as freeing the other spouse to perform the remaining functions. [Emphasis added.]

(Law Reform Commission of Canada, *supra*, at pp. 22-25.)

**68** Legislative support for the principles of compensation may be found in ss. 15(7)(a-c) and 17(7)(a-c) which are extremely broad in scope and which direct the court, in making or varying a support order, to recognize any economic advantages or disadvantages arising from the marriage or its breakdown, to apportion between the spouses any financial consequences arising from the care of children over and above those consequences which have already been made the subject of child support and to relieve economic hardships arising from the marriage. As a matter of statutory interpretation, it is precisely the manner in which compensatory spousal support is able to respond to the diversity of objectives the Act contains that makes it superior to the strict self-sufficiency model.

**69** Although the promotion of self-sufficiency remains relevant under this view of spousal support, [page861] it does not deserve unwarranted pre-eminence. After divorce, spouses would still have an obligation to contribute to their own support in a manner commensurate with their abilities. (Rogerson, "Judicial Interpretation of the Spousal and Child Support Provisions of the Divorce Act, 1985 (Part I)", *supra*, at p. 171). In cases where relatively few advantages have been conferred or disadvantages incurred, transitional support allowing for full and unimpaired reintegration back into the labour force might be all that is required to afford sufficient compensation. However, in many cases a former spouse will continue to suffer the economic disadvantages of the marriage and its dissolution while the other spouse reaps its economic advantages. In such cases, compensatory spousal support would require long-term support or an alternative settlement which provides an equivalent degree of assistance in light of all of the objectives of the Act. ("Judicial Interpretation of the Spousal and Child Support Provisions of the Divorce Act, 1985 (Part I)", *supra*, at pp. 171-72.)

**70** Women have tended to suffer economic disadvantages and hardships from marriage or its breakdown because of the traditional division of labour within that institution. Historically, or at least in recent history, the contributions made by women to the marital partnership were non-monetary and came in the form of work at home, such as taking care of the household, raising children, and so on. Today, though more and more women are working outside the home, such employment continues to play a secondary role and sacrifices continue to be made for the sake of domestic considerations. These sacrifices often impair the ability of the partner who makes them (usu-

ally the wife) to maximize her earning potential because she may tend to forego educational and career advancement opportunities. These same sacrifices may also enhance the earning potential of the other spouse (usually the husband) who, because his wife is tending to such matters, is free to pursue economic goals. This eventually may result in inequities. As stated by G. C. A. Cook, in "Economic Issues in Marriage Breakdown" in R. S. Abella and [page862] C. L'Heureux-Dubé, eds., *Family Law: Dimensions of Justice* (1983), 19, at p. 22:

Men as well as women make non-monetary contributions to the family unit but in general, the non-monetary contributions of women have formed a greater share of their total economic contributions. There was no reason for concern over this discrepancy when marriage breakdown was rare and there was no requirement to place monetary values on the economic shares of a complicated relationship. When dissolution of marriages became more common however, the tendency to treat the monetary contributions to the family as the major ones when distributing assets gave rise to familiar inequities... . [Emphasis added.]

Hence, while the union survives, such division of labour, at least from an economic perspective, may be unobjectionable if such an arrangement reflects the wishes of the parties. However, once the marriage dissolves, the kinds of non-monetary contributions made by the wife may result in significant market disabilities. The sacrifices she has made at home catch up with her and the balance shifts in favour of the husband who has remained in the work force and focused his attention outside the home. In effect, she is left with a diminished earning capacity and may have conferred upon her husband an embellished one.

**71** The curtailment of outside employment obviously has a significant impact on future earning capacity. According to some studies, the earning capacity of a woman who stays at home atrophies by 1.5 percent for each year she is out of the labour force. For example, the Report of the Florida Supreme Court Gender Bias Study Commission, *supra*, concluded (at p. 58):

These data reveal that women who forego a career outside the home suffer a permanent economic loss justifying compensation in the form of alimony upon dissolution.

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Richard Kerr's *Economic Model to Assist in the Determination of Spousal Support* (1992) came to a similar conclusion. He posits that "[f]or women whose labour force interruptions have lasted for 10 years or longer, the cumulative present value of post re-entry earnings losses will typically exceed \$80,000", over and above any loss incurred during the interruption itself. The figure is relative to women who have not interrupted their careers in such a fashion. He adds that "[e]ven labour force interruptions lasting as little as two years can have significant long-term costs in terms of lost earnings (\$30,000 or more)" (p. 1). Labour force interruptions are common and this accentuates the need for compensation. One Statistics Canada report, *Family History Survey: Preliminary Findings* (1985), notes that 64 percent of Canadian women report suffering work interruptions because of

parenting or domestic responsibilities. The figure for men was less than 1 percent (p. 26). The studies, while remaining untested, do illustrate the problems faced by women who reenter the labour force after a period during which they stay at home to care for the family.

**72** Often difficulties are exacerbated by the enduring responsibility for children of the marriage. The spouse who has made economic sacrifices in the marriage also generally becomes the custodial parent, as custody is awarded to the wife 75 percent of the time, to both parents jointly in 13 percent of cases, and to the husband alone in less than 8 percent of divorces (see *Evaluation of the Divorce Act -- Phase II: Monitoring and Evaluation*, supra, at p. 101). The diminished earning capacity with which an ex-wife enters the labour force after years of reduced or non-participation will be even more difficult to overcome when economic choice is reduced, unlike that of her ex-husband, due to the necessity of remaining within proximity to schools, not working late, remaining at home when the child is ill, etc. The other spouse encounters none of these impediments and is generally free to [page864] live virtually wherever he wants and work whenever he wants.

**73** 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. As Judge Abella wrote in "*Economic Adjustment On Marriage Breakdown: Support*", supra, at p. 3:

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.

**74** The equitable sharing of the economic consequences of marriage or marriage breakdown, however, is not a general tool of redistribution which is activated by the mere fact of marriage. Nor ought it to be. It is now uncontroversial in our law and accepted by both the majority and the minority in *Messier v. Delage*, supra, at pp. 416-17, that marriage per se does not automatically entitle a spouse to support. Presumably, there will be the occasional marriage where both spouses maximize their earning potential by working outside the home, pursuing economic and educational opportunities in a similar manner, dividing up the domestic labour identically, and either making no economic sacrifices for the other or, more likely, making them equally. In such a utopian scenario there [page865] might be no apparent call for compensation. The spouses are able to make a clean break and continue on with their respective lives. Such cases would appear to be rare. In most marriages in which both partners make economic sacrifices and share domestic responsibilities, or where one spouse has suffered economic losses in order to enable the other spouse to further a career, their roles should be considered in the spousal support order.

**75** The Act refers to economic advantages and disadvantages flowing from marriage or its breakdown (see Payne, "*Further Reflections on Spousal and Child Support After Pelech, Caron and*

Richardson", *supra*, and *Linton v. Linton*, *supra*). Sections 15(7)(a) and 17(7)(a) of the Act are expressly compensatory in character while ss. 15(7)(c) and 17(7)(c) may not be characterized as exclusively compensatory. These latter paragraphs may embrace the notion that the primary burden of spousal support should fall on family members not the state. In my view, an equitable sharing of the economic consequences of divorce does not exclude other considerations, particularly when dealing with sick or disabled spouses. While the losses or disadvantages flowing from the marriage in such cases may seem minimal in the view of some, the effect of its breakdown will not, and support will still be in order in most cases. We must recognize, however, as do Payne and Eichler, that family law can play only a limited role in alleviating the economic consequences of marriage breakdown. M. T. Meulders-Klein has eloquently stressed the necessity to understand the complex relationships between the family, work and the state which result in poverty and dependence in some of its members. She recognizes that the ultimate solutions will require adjustments in all of these areas (Meulders-Klein, "Famille, état et sécurité économique d'existence dans la tourmente", in M. T. Meulders-Klein and J. Eekelaar, [page866] eds., *Family, State and Individual Economic Security* (1988), vol. II, at p. 1077).

**76** As economic consequences have to be shared in an equitable manner by both partners, it is my view that the Act, while envisaging compensation for the economic advantages and disadvantages of marriage or marriage breakdown, does not necessarily put the entire burden of such compensation on the shoulders of only one party. I stress here that in the discussion of spousal support one must not lose sight of the fact that the real dilemma in most cases relates to the ability to pay of the debtor spouse and the limits of support orders in achieving fair compensation and alleviating the economic burdens of the disadvantaged spouse. While the disadvantages of the kind I mention hereunder are compensable, though not necessarily automatically or fully compensated in every case, the ultimate goal is to alleviate the disadvantaged spouse's economic losses as completely as possible, taking into account all the circumstances of the parties, including the advantages conferred on the other spouse during the marriage.

**77** The four objectives set out in the Act can be viewed as an attempt to achieve an equitable sharing of the economic consequences of marriage or marriage breakdown. At the end of the day however, courts have an overriding discretion and the exercise of such discretion will depend on the particular facts of each case, having regard to the factors and objectives designated in the Act.

#### (5) The Exercise of Judicial Discretion

**78** 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 [page867] its termination which adversely affect the economic prospects of the disadvantaged spouse. Not all such elements will be equally important, even if present, to the awarding of support in each case. However, it may be useful to canvass some of the most common compensable advantages and recognized disadvantages which the Act envisages. They are not to be taken as exhaustive but only as examples of some of the losses and gains one spouse, usually the wife, incurs and confers which may be useful for the courts to consider in the exercise of their discretion.

**79** The financial consequences of the end of a marriage extend beyond the simple loss of future earning power or losses directly related to the care of children. They will often encompass loss of

seniority, missed promotions and lack of access to fringe benefits such as pension plans, life, disability, dental and health insurance (see H. Joshi and H. Davies, "Pensions, Divorce and Wives' Double Burden" (1992), 6 Int'l J. L. & Fam. 289). As persons outside of the work force cannot take advantage of job-retraining and the upgrading of skills provided by employers, one serious economic consequence of remaining out of the work force is that the value of education and job training often decreases with each year in comparison to those who remain active in the work force and may even become redundant after several years of non-use. All of these factors contribute to the inability of a person not in the labour force to develop economic security for retirement in his or her later years.

**80** The most significant economic consequence of marriage or marriage breakdown, however, usually arises from the birth of children. This generally requires that the wife cut back on her paid labour force participation in order to care for the children, an arrangement which jeopardizes her ability to ensure her own income security and independent economic well-being. In such situations, spousal [page868] support may be a way to compensate such economic disadvantage.

**81** If childcare responsibilities continue past the dissolution of the marriage, the existing disadvantages continue, only to be exacerbated by the need to accommodate and integrate those demands with the requirements of paid employment. In that regard, I adopt without reservation the words of Bowman J. in *Brockie v. Brockie* (1987), 5 R.F.L. (3d) 440 (Man. Q.B.), *aff'd* (1987), 8 R.F.L. (3d) 302 (Man. C.A.), at pp. 447-48:

It must be recognized that 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 adoption of a lifestyle which, in ensuring the welfare and development of the child, places many limitations and burdens upon that parent. A single person can live in any part of the city, can frequently share accommodation with relatives or friends, can live in a high-rise downtown or a house in the suburbs, can do shift work, can devote spare time as well as normal work days to the development of a career, can attend night school, and in general can live as and where he or she finds convenient. A custodial parent, on the other hand, seldom finds friends or relatives who are anxious to share accommodation, must search long and carefully for accommodation suited to the needs of the young child, including play space, closeness to daycare, schools and recreational facilities, if finances do not permit ownership of a motor vehicle, then closeness to public transportation and shopping facilities is important. A custodial parent is seldom free to accept shift work, is restricted in any overtime work by the daycare 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 himself for the parent's attention. 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. The financial consequences of all of these limitations and demands arising from the custody of the child are in addition to the direct costs of raising [page869] the

child, and are, I believe, the factors to which the court is to give consideration under subs. (7)(b).

**82** It is important to note that families need not fall strictly within a particular marriage model in order for one spouse to suffer disadvantages. For example, even in childless marriages, couples may also decide that one spouse will remain at home. Any economic disadvantage to that spouse flowing from that shared decision in the interest of the family should be regarded as compensable. Conversely, the parties may decide or circumstances may require that both spouses work full-time. This in and of itself may not necessarily preclude compensation if, in the interest of the family or due to childcare responsibilities, one spouse declines a promotion, refuses a transfer, leaves a position to allow the other spouse to take advantage of an opportunity for advancement or otherwise curtails employment opportunities and thereby incurs economic loss. Such a situation occurred in *Heinemann v. Heinemann*, supra, where the court recognized that, despite the fact that the wife had worked full-time for nearly the entire duration of the marriage, she had foregone her own career aspirations in the interest of the family. The family had made three major moves occasioned by advancements in the husband's career. This caused a lack of continuity to the wife's career and in the result, the wife had no seniority, had obtained no promotions in her original career and would have returned to it "at the bottom of the pile", thus obviously disadvantaged in comparison to her husband.

**83** A spouse may contribute to the operation of a business, typically through the provision of secretarial, entertainment or bookkeeping services, or may take on increased domestic and financial responsibilities that enable the other to pursue licenses, degrees or other training and education. (See N. Bala, "Recognizing Spousal Contributions to the Acquisition of Degrees, Licences and Other Career Assets: Towards Compensatory Support" [page870] (1989), 8 Can. J. Fam. L. 23; J. M. Krauskopf, "Recompense for Financing Spouse's Education: Legal Protection for the Marital Investor in Human Capital" (1980), 28 Kan. L. Rev. 379, and Payne, "Management of a Family Law File with Particular Regard to Spousal Support on Divorce", supra, at pp. 441-42.) To the extent that these activities have not already been compensated for pursuant to the division of assets, they are factors that should be considered in granting spousal support.

**84** Although the doctrine of spousal support which focuses on equitable sharing does not guarantee to either party the standard of living enjoyed during the marriage, this standard is far from irrelevant to support entitlement (see *Mullin v. Mullin* (1991), supra, and *Linton v. Linton*, supra). Furthermore, great disparities in the standard of living that would be experienced by spouses in the absence of support are often a revealing indication of the economic disadvantages inherent in the role assumed by one party. As marriage should be regarded as a joint endeavour, the longer the relationship endures, the closer the economic union, the greater will be the presumptive claim to equal standards of living upon its dissolution (see Rogerson, "Judicial Interpretation of the Spousal and Child Support Provisions of the Divorce Act, 1985 (Part I)", supra, at pp. 174-75).

**85** In short, in the proper exercise of their discretion, courts must be alert to a wide variety of factors and decisions made in the family interest during the marriage which have the effect of disadvantaging one spouse or benefitting the other upon its dissolution. In my view, this is what the Act mandates, no more, no less.

**86** Such determination demands a complex and, in many cases, a difficult analysis. The same, of course, might be said of the evaluation of damages in contract or in tort. However, this complexity does not excuse judges from hearing relevant evidence nor from fully applying the law. There

are [page871] no easy recipes nor are there neat compartments on which to rely, as families and family relationships are not simple. But there are few matters more important before the courts, given the repercussions on the future of the parties themselves and in particular, their children. As Grassby has said, in "Women in Their Forties: The Extent of Their Rights to Alimentary Support", *supra*, at p. 396:

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.

**87** Given the principles outlined above, spousal support orders remain essentially a function of the evidence led in each particular case. In some cases, such evidence might come in the form of highly specific expert evidence which enables parties to present an accurate picture of the economic consequences of marriage breakdown in their particular circumstances. (See *Ormerod v. Ormerod* (1990), 27 R.F.L. (3d) 225 (Ont. U.F. Ct.), and *Elliot v. Elliot* (1992), 42 R.F.L. (3d) 7 (Ont. U.F. Ct.)) Although of great assistance in assessing the economic consequences of marriage breakdown in a particular marriage, such evidence will not be required nor will it be possible in most cases. For most divorcing couples, both the cost of obtaining such evidence and the amount of assets involved [page872] are practical considerations which would prohibit or at least discourage its use. Therefore, to require expert evidence as a sine qua non to the recovery of compensation would not be practical for many parties, not to mention the use of court time which might be involved. It would be my hope, therefore, that different alternatives be examined.

**88** One proposal put forth by Professor Rogerson would be for Parliament to consider enacting a set of legislative guidelines. In "Evidentiary Issues in Spousal Support Cases" (paper presented to the Law Society of Upper Canada 1991 Special Lectures, *Applying the Law of Evidence: Tactics and Techniques For the Nineties*, 219, at pp. 271-73), concerns about the cost and complexity of litigation were said to be a force to be reckoned with in matrimonial property cases when they were based upon doctrines of resulting and constructive trust. The legislature responded with schemes of matrimonial property legislation which replaced the discretion of individual judges with formulae for the division of property. Professor Rogerson suggests in her paper (at pp. 271-72) that:

... in the long run a similar solution should be contemplated for spousal support. Legislative guidelines could be enacted that allow for the sharing of gains and losses in spousal income-earning capacity due to the marriage. Precise calculations of gains and losses should be avoided, and instead the presumptions for sharing of such gains and losses should be rooted in a normative view of marriage as a sharing relationship. Such schemes would obviously sacrifice precision

of calculation, but they would offer ease of administration and result generally in conformity with notions of fair treatment of spouses. [Emphasis added.]

**89** One possible disadvantage of such a solution lies in the risk that it may impose a strait-jacket which precludes the accommodation of the many economic variables susceptible to be encountered in spousal support litigation.

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**90** Another alternative might lie in the doctrine of judicial notice. The doctrine itself grew from a need to promote efficiency in the litigation process and may very well be applicable to spousal support. One classic statement of the content and purpose of the doctrine is outlined in *Varcoe v. Lee*, 181 P. 223 (Cal. 1919), at p. 226:

The three requirements ... -- that the matter be one of common and general knowledge, that it be well established and authoritatively settled, be practically indisputable, and that this common, general, and certain knowledge exist in the particular jurisdiction -- all are requirements dictated by the reason and purpose of the rule, which is to obviate the formal necessity for proof when the matter does not require proof.

As E. M. Morgan noted in "Judicial Notice" (1944), 57 *Harv. L. Rev.* 269, at p. 272:

... the judge ... must be assumed to have a fund of general information, consisting of both generalized knowledge and knowledge of specific facts, and the capacity to relate it to what he has perceived during the proceeding, as well as the ability to draw reasonable deductions from the combination by using the ordinary processes of thought. That fund of general information must be at least as great as that of all reasonably well-informed persons in the community. He cannot be assumed to be ignorant of what is so generally accepted as to be incapable of dispute among reasonable men.

(See also *R. v. Zundel* (1987), 58 O.R. (2d) 129; *R. v. Sioui*, [1990] 1 S.C.R. 1025, at p. 1050; *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, at pp. 802-3 (per La Forest J.); and J. Sopinka, S. N. Lederman and A. W. Bryant, *The Law of Evidence in Canada* (1992), at p. 976.)

**91** 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. Such studies are beginning to provide reasonable assessments of some of the disadvantages incurred and advantages conferred post-divorce (see, for [page874] example, the study by Kerr, *supra*). 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 information at the very least. In the face of these complex evidentiary problems, I take comfort from Professor Ellman who argues, *supra*, at pp. 99-100 that:

Even crude approximations of theoretically defensible criteria are probably better than intuitive estimates of what is "fair" under a system lacking established principles of "fairness" in the first place. Moreover, the establishment of rules clearly specifying the facts that are relevant in judging alimony claims, and the precise impact of these facts on the amount of the claim, may itself motivate studies that increase the amount of relevant data. In the end, precision is not obtainable. The determination of alimony claims, even more than most legal questions, will necessarily depend, at least in part, upon the rough justice of trial judge discretion. That is, in fact, one of the lessons of this inquiry. But we are still better off knowing what we should be doing, even if we cannot do it perfectly, than not knowing at all. [Emphasis added.]

**92** 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.

**93** This being said, even if a major portion of the time of the civil courts in this country is taken by family law matters, and the efficient and speedy disposition of affairs before the court is a valuable goal, the paramount goal is to render justice to the parties in accordance with the Act. In this regard, I [page875] can only restate what I said some time ago in *Droit de la famille* -- 182, [1985] C.A. 92, at p. 95:

[TRANSLATION] Before considering this evidence -- the trial judge having provided no reasons for his finding -- I feel that a judge should not close his (or her) eyes to the daily realities of present-day life.

...

These general considerations that must be borne in mind are subject to the evidence and the circumstances of a particular case, I agree, but so often the evidence is incomplete owing to the ignorance or incompetence of counsel or the inexperience or unreasonable expectations of the client! Or the evidence is cut short so as not to prolong the discussion (or make the judge impatient) when there is already an overloaded list of such cases to be heard! Or the evidence is truncated owing to a lack of interest or a failure to understand its full meaning!

It is significant that this type of carelessness occurs much less often in the fields of contract, insurance or tort, which are classified as "civil law" as distinct from "family law"; yet the law should not be prepared to accept half-measures in either case. The outcome of a family law proceeding is certainly more dramatic. Lack of income is felt daily, and may affect the children's entire lives, aside from often working to the detriment of the person who, though with adequate resources, deprives his family of what they need.

This, in my view, had to be said since such deficiencies are so often encountered in the entering of evidence in family law cases.

## VII. Application to the Case at Bar

**94** Since this appeal involves an application for a variation order, here an order for the termination of support by Mr. Moge to Mrs. Moge, s. 17(4) of the Act applies.

**95** As a necessary preliminary condition to making such an order, s. 17(4) of the Act requires that the court be satisfied that "there has been a change in the condition, means, needs or other circumstances of either former spouse ... for whom support is or was sought occurring since the making of the support [page876] order or the last variation order made in respect of that order".

**96** That there has been a change in the circumstances of the parties since the last support order was not seriously contested and I agree with both the trial judge and the Court of Appeal that the threshold requirements of s. 17(4) of the Act are satisfied.

**97** The sole remaining consideration is whether the application of Mr. Moge to terminate support ought to have been granted in this case. In my view, it should not have, and the majority of the Court of Appeal was right in finding an error of principle on the part of the trial judge. I agree with Twaddle J.A., *supra*, at p. 177:

... even if some degree of economic self-sufficiency is practicable, the level at which the wife can become self-sufficient may be lower than the husband's level of self-sufficiency. This disadvantage will often be attributable to the marriage. In such a case, the court will best meet the objectives prescribed by Parliament by supplementing the wife's earning ability with some maintenance. It would be contrary to those objectives to foreclose a traditional wife from all maintenance.

In the case at bar, the learned judge in Motions Court did just that. In the passage from his reasons which I have quoted, he makes it clear that, in his view, this wife should have achieved total financial independence. With the greatest respect to him, I think that is an error in principle. He failed to consider the disparity between the earning ability of each former spouse: he failed to have regard to the fact that the wife, having married in a traditional arrangement, was disadvantaged by it.

**98** The four objectives of spousal support orders under s. 17(7) of the Act, as explicated above and applied by the Court of Appeal, are met in this case. For this reason, the following specific findings are in order based on the evidence in the record:

1. Mrs. Moge has sustained a substantial economic disadvantage "from the marriage or its breakdown" within the meaning of s. 17(7)(a) of the Act.

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2. Mrs. Moge's long-term responsibility for the upbringing of the children of the marriage after the spousal separation in 1973 has had an impact on her ability to earn an income so as to trigger the application of s. 17(7)(b) of the Act.
3. Mrs. Moge continues to suffer economic hardship as a result of the "breakdown of the marriage" within the meaning of s. 17(7)(c) of the Act.
4. Mrs. Moge has failed to become economically self-sufficient notwithstanding her conscientious efforts.

**99** These findings are irrefutable even in the absence of expert evidence relating to the appropriate quantification of spousal support. It follows that in view of all of the objectives of spousal support orders set out in s. 17(7) of the Act, continuing support is in order in this case. Accordingly, there was no error in the Court of Appeal.

### VIII. Conclusion

**100** In the result, I would dismiss the appeal and affirm the order of the Manitoba Court of Appeal. I see no reason to deviate from regular practice in the matter of costs and consequently the appellant will bear the costs throughout including the factum fee awarded by the Court of Appeal.

The reasons of Gonthier and McLachlin JJ. were delivered by

**101** McLACHLIN J.:-- I have read the reasons of L'Heureux-Dubé J. and would dispose of the appeal as she proposes. I wish to add, however, the following comments.

**102** It seems to me important to emphasize that this is, first and last, a case of statutory interpretation. It is interesting and useful to consider how different theories of support yield different answers to the question of how support should be determined. However, in the end the judge must return to what Parliament has said on the subject. Parliament has [page878] enacted that judges considering applications for variation of support consider four different factors.

17. ...

(7) A variation order varying a support order that provides for the support of a former spouse should

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

(Divorce Act, R.S.C., 1985, c. 3 (2nd Supp.), s. 17(7).)

**103** The first thing the judge must consider is "economic advantages or disadvantages ... arising from the marriage or its breakdown". This heading brings in many of the considerations which my colleague discusses. It clearly permits the judge to compensate one spouse for sacrifices and contributions made during the marriage and benefits which the other spouse has received.

**104** The second factor which the judge must consider is the "apportionment" of the "financial consequences" of the care of children. This heading also raises compensatory considerations. If a spouse, either before or after separation, has or continues to incur financial disadvantage as a result of caring for a child of the marriage, he or she should be compensated.

**105** The third thing which the judge's order should do is grant relief from any economic hardship arising from the breakdown of the marriage. The focus here, it seems to me, is not on compensation for what the spouses have contributed to or gained from the marriage. The focus is rather post-marital [page879] need; if the breakdown of the marriage has created economic hardship for one or the other, the judge must attempt to grant relief from that hardship.

**106** Finally, the judge's order must "in so far as practicable" promote the economic self-sufficiency of each former spouse within a reasonable period of time. This subhead raises the question of the degree to which ex-spouses should be expected to become self-sufficient, a contested point on this appeal. Several things about this subhead should be noted. First, unlike the first three factors, this one is stated in qualified language, beginning with the conditional phrase, "in so far as practicable". Second, economic self-sufficiency is not to be required or assumed; the verb used is "promote". By this language Parliament recognizes that actual self-sufficiency, while desirable, may not be possible or "practicable".

**107** Considering the factors together, the judge's task under s. 17(7) of the statute is to make an order which provides compensation for marital contributions and sacrifices, which takes into account financial consequences of looking after children of the marriage, which relieves against need induced by the separation, and, to the extent it may be "practicable", promotes the economic self-sufficiency of each spouse. Neither a "compensation model" nor a "self-sufficiency model" captures the full content of the section, though both may be relevant to the judge's decision. The judge must base her decision on a number of factors: compensation; child-care; post-separation need; and the goal, in so far as practicable, of promoting self-sufficiency.

**108** The need to consider all four factors set out in s. 17(7) rules out the strict self-sufficiency model which Mr. Moge urged upon this Court. The trial judge erred, in my respectful opinion, in giving no weight to the first three factors of s. 17(7) and in imposing a categorical requirement of self-sufficiency.

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**109** The majority of the Court of Appeal correctly rejected the view that there is an absolute obligation for a spouse to become self-sufficient and that there is a time after which one spouse should no longer have to support another. They placed considerable emphasis on the need to compensate Mrs. Moge for her contributions as homemaker and mother during the course of the marriage and the permanent economic disadvantage she suffered as a consequence. As Twaddle J.A. put it:

Depending on the duration of the marriage, and the wife's education and work experience, economic self-sufficiency may mean a permanent disadvantage from which the wife cannot recover. Having concentrated her efforts for many years on looking after the home, the husband and the children, the wife may have lost opportunities to learn, to train, to grow. Those lost opportunities may not be regainable.

The husband, in the meantime, may not only have earned a living for the family, or part of one, but also have expanded his knowledge and experience in work-related areas. He may have a higher earning potential than his wife because of their domestic arrangements.

((1990), 64 Man. R. (2d) 172, at pp. 176-77.)

Having concluded that Mrs. Moge's earning potential had been diminished in this way by her contribution to the marriage, the Court of Appeal found she was entitled to an order of maintenance to supplement her own income. This conclusion represented a proper application of s. 17(7) of the Divorce Act, and I would dismiss the appeal from its decision.

**110** This is sufficient to dispose of the appeal. However, I would like to add certain comments on the subjects of causation and evidence in connection with s. 17(7) of the Divorce Act.

**111** I turn first to causation. Two of the subheads of s. 17(7) raise the requirement of causation by the marriage or its breakdown. Section 17(7)(a) speaks of advantages and disadvantages "arising" from the marriage or its breakdown. Section 17(7)(c) speaks of economic hardship "arising" from the breakdown of the marriage.

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**112** Parties sometimes argue that the economic disadvantage of their spouse was not caused by the marriage or its breakdown, or that her economic hardship was not caused by the termination of the marriage. Shades of these arguments surfaced in this case. It was said that Mrs. Moge voluntarily elected to be the primary homemaker and caregiver; that it was her choice and not the marriage that caused the resultant economic disadvantage. Similarly, it was suggested that her present need and lack of self-sufficiency was not the product of the marriage but of her failure to choose to upgrade her education so she could earn more money.

**113** A formalistic view of causation can work injustice in the context of s. 17(7), as elsewhere. The question under s. 17(7)(a) is whether a party was disadvantaged or gained advantages from the marriage, as a matter of fact; under s. 17(7)(c) whether the marriage breakdown in fact led to economic hardship for one of the spouses. Hypothetical arguments after the fact about different choices people could have made which might have produced different results are irrelevant, unless the parties acted unreasonably or unfairly. In this case, for example, Mrs. Moge in keeping with the prevailing social expectation of the times, accepted primary responsibility for the home and the children and confined her extra activities to supplementing the family income rather than to getting a

better education or to furthering her career. That was the actual domestic arrangement which prevailed. What Mrs. Moge might have done in a different arrangement with different social and domestic expectations is irrelevant.

**114** Similarly, in determining whether economic hardship of a spouse arises from the breakdown of the marriage, the starting point should be a comparison of the spouse's actual situation before and after the breakdown. If the economic hardship arose shortly after the marriage breakdown, that may be a strong indication that it is caused by the family breakdown. Arguments that an ex-spouse [page882] should be doing more for herself must be considered in light of her background and abilities, physical and psychological. It may be unreasonable to expect a middle-aged person who has devoted most of her life to domestic concerns within the marriage to compete for scarce jobs with youthful college graduates, for example. Even women who have worked outside the home during the marriage may find that their career advancement has been permanently reduced by the effort which they devoted to home and family instead of their jobs, whether the woman be a janitor like Mrs. Moge or a well-trained professional. Sometimes the breakdown of the marriage may have left the woman with feelings of inadequacy or depression which make it difficult for her to do more. In short, the whole context of her conduct must be considered. It is not enough to say in the abstract that the ex-spouse should have done more or be doing more, and argue from this that it is her inaction rather than the breakup of the marriage which is the cause of her economic hardship. One must look at the actual social and personal reality of the situation in which she finds herself and judge the matter fairly from that perspective.

**115** What is required under s. 17(7) of the Divorce Act is a common-sense, non-technical view of causation, such as this Court proposed for personal injury cases in *Snell v. Farrell*, [1990] 2 S.C.R. 311, per Sopinka J., at p. 330:

The legal or ultimate burden remains with the plaintiff, but in the absence of evidence to the contrary adduced by the defendant, an inference of causation may be drawn although positive or scientific proof of causation has not been adduced.

**116** This leaves the question of evidence. I agree with my colleague that evidence of the spouses' respective contributions and gains from the marriage is necessary under s. 17(7)(a). I do not think the evidence need be detailed, in the sense of a year-by-year chronology of sacrifices and gains. This is not an exercise in accounting, requiring an [page883] exact tally of debits and credits for each day of the marriage. It is beyond the means of most parties and our overburdened justice system to devote weeks of lawyers' and experts' time to providing such a tally. Nor do I think it necessary. It is clear that certain things must be done to maintain a family. Income must be earned. Food must be bought and prepared. Children must be cared for. And so on. In most cases it will suffice if the parties tell the judge in a general way what each did. That will allow the judge very quickly to get an accurate picture of the sacrifices, contributions and advantages relevant to determining compensation under s. 17(7)(a), making detailed quantification and expert evidence unnecessary. Poverty is one of the main problems arising from marital breakdown; it should not be made worse by long and expensive legal proceedings.

**117** I would dismiss the appeal and dispose of costs in the manner which my colleague has ordered.

