

IN THE SUPREME COURT OF CANADA
(Appeal from the Court of Appeal for the Province of Ontario)

BETWEEN:

WILLIS BARCLAY FREDERICK BOSTON

Appellant (Applicant)

- and -

10

SHIRLEY ISOBEL BOSTON

Respondent (Respondent)

- and -

WOMEN'S LEGAL EDUCATION AND ACTION FUND

Intervener

INTERVENER'S FACTUM

20

PART I: THE FACTS

1. The Intervener, Women's Legal Education and Action Fund (LEAF), is a national advocacy organization engaged in public education, research and test case litigation to secure women's equality rights as guaranteed by the *Canadian Charter of Rights and Freedoms*. LEAF has developed considerable expertise relating to women's social and economic circumstances in the family law context.

2. LEAF takes no position with respect to the facts as set out in the appellant's and respondent's
30 facts.

PART II: POINTS IN ISSUE

3. This appeal concerns an application to vary a spousal support order in the later stages of a former spouse's life cycle. Specifically, the court must reassess entitlement when a retired payor is seeking to reduce or terminate his obligation on the primary basis that his pension was previously considered in the distribution of property. Such a review requires an elaboration of the principles articulated in *Moge* and *Bracklow* at a time of women's heightened economic vulnerability.

Bracklow v. Bracklow, [1999] 1 S.C.R. 242

Moge v. Moge, [1992] 3 S.C.R. 813

10

PART III: ARGUMENT

A. Overview

4. In *Best*, this Court acknowledged that pension law reform is critically important. Unless and until a legislative solution is devised, LEAF submits that such variation applications should be guided by the following principles:

20

- (1) The entire pension income is to be included in assessing ability to pay;
- (2) Prior equalization of a pension is only one of several circumstances warranting consideration;
- (3) Where an award has a significant compensatory component, a court should be extremely reluctant to reduce the support, particularly where the payor's retirement income is sufficient to meet the existing obligation;
- (4) Self-sufficiency should not dominate the inquiry nor should its assessment be grounded upon unrealistic or false assumptions about a woman's capacity to generate income from her assets; and
- (5) The review process must be responsive to the social and economic realities of the recipient spouse since separation and at the time of the variation application.

30

Best v. Best, [1999] 2 S.C.R. 868 at 880, 943
Moge, supra at 857, 874
Willick v. Willick, [1994] 3 S.C.R. 670 at 699-700

B. Situating this Case within Larger Equality Goals

5. To situate this case in its larger social context, one must be mindful of the fact that many, if not most women, will receive no compensation for the economic cost of their household labour and childcare. Although true substantive equality requires that the state recognize the important economic value of women's unpaid work within the home, the legislature has instead placed the primary obligation of support on spouses and former spouses.

Hough, J. "Mistaking Liberalism for Feminism: Spousal Support in Canada" (1994) 29:2 *Journal of Canadian Studies* 147 at 161

6. This case is also limited in its scope because, in many jurisdictions in Canada, only married spouses have access to a statutory scheme for sharing a private pension. Unmarried opposite-sex and same-sex spouses are denied access to equalization of property and are forced to rely on difficult, uncertain equitable claims. This exclusion has been successfully challenged as contravening s. 15 of the *Charter*, but statutory property distribution is generally available only to married spouses. Although this factum uses terminology which invokes heterosexuality and married status, LEAF is not thereby drawing a conclusion regarding the capacity of same-sex spouses to marry; nor is it taking a position on the constitutional validity of excluding unmarried spouses from a statutory division of property on relationship breakdown.

Canadian Charter of Rights and Freedoms, s. 15, Part I of the *Constitution Act*, 1982, being Schedule B of the *Canada Act* 1982 (U.K.), 1982, c. 11
Walsh v. Bona (2000), 5 R.F.L. (5th) 188 (N.S.C.A.) (A.G. Nova Scotia leave to appeal pending)

7. This factum routinely employs gender specific language in describing support recipients as female and support payors as male. This choice reflects the fact that the economic consequences of

marriage and its breakdown are gendered. In most cases, women are disadvantaged as a result of the sex-based division of labour within their relationships and their inequality of earning power in the paid labour market. Spousal support statutes recognize, however, the “diverse dynamics of the many unique marital relationships”. Support may be payable by either female or male spouses.

Bracklow, supra at 440, McLachlin J. (as she then was)
M. v. H., [1999] 2 S.C.R. 3 at 48-49, 74

C. The Social and Material Conditions of Divorced Women

10

8. In *Moge*, this Court identified and sought to ameliorate the crisis of feminization of poverty following divorce. The decision emphasized the importance of considering all the factors and objectives of the *Divorce Act* to ensure an equitable sharing of the economic consequences of the marriage and its breakdown. Its compensatory approach extended the duration of women's entitlement to spousal support following a traditional marriage. It has also assisted in increasing the amount of support awards. Nonetheless, some eight years following *Moge*, relationship breakdown still causes poverty for an alarming number of women and children.

Rogerson, C. “Spousal Support After *Moge*” (1997) 14 C.F.L.Q. 281 at 283, 303-04
Moge, supra at 852, 854, 856, 866-67, 879
Willick, supra at 713-15

20

9. Post-*Moge*, most women continue to suffer a serious loss of opportunity and earning capacity as a result of marriage. Women with children are very likely to experience interruptions or reductions in their labour force participation. In general, married women who are employed devote significantly more hours to unpaid domestic labour than married men. In fact, the time women spend on housework relative to men is virtually unchanged in 40 years. Women often sacrifice their own career to advance their husband's ambitions. Not surprisingly, married women earn substantially less than single women of the same age, while married men earn substantially more than single men.

30

Canada. Statistics Canada. *As Time Goes By.....Time Use of Canadians*. By J.A. Frederick. Ottawa: Minister of Supply and Services Canada, 1995

GPI Atlantic. "Gender Equality in the Genuine Progress Index" (Synthesis Paper prepared for *Made to Measure Symposium*. Halifax, October 1999) [unpublished] at 5

Kerr, R. *An Economic Model to Assist in the Determination of Spousal Support*. (Paper prepared for the Department of Justice and Status of Women Canada. Ottawa, 1992) at 9-11

10. Following divorce, the overwhelming majority of women continue to devote long hours to parenting and other domestic responsibilities to the detriment of their own future economic well-being and security. A year following separation, 68 percent of women head single parent families with children. Sixty-one percent of female-headed lone parent families are poor.

Canada. Statistics Canada. *Family Income After Separation*. By D. Galarneau & J. Sturrock. Ottawa: Minister of Industry, 1997 [*"Family Income"*] at 9

Canada. Statistics Canada. *Low Income Persons, 1980 to 1997*. Ottawa: Minister of Industry, April 1999 [*"Low Income"*] at 8-9

Young v. Young, [1993] 4 S.C.R. 3 at 49-50

20

11. In the first year after divorce, Canadian women's household income, adjusted for family size, drops between 23 to 40 percent. Men's income increases slightly. This gross disparity often continues for years following marital dissolution and is actually more severe in cases where spousal support is paid. Divorced women's precarious economic circumstances may require a depletion of capital to help maintain the family. These financial demands will often preclude saving for retirement when women, in fact, have a greater need for retirement funds, arising from their longer life expectancy. Women's need is also greater since they tend to retire from the paid workforce earlier than men, usually due to familial responsibilities.

30

Family Income, supra at 10-11, 13

Finnie, R. "Women, Men and the Economic Consequences of Divorce: Evidence from Canadian Longitudinal Data" (1993) 30(2) *Canad. Rev. Soc. Anth.* 205 at 225, 228

Townson, M. *Independent Means*. (Toronto: Macmillan Canada, 1997) at 8-9, 19

Vanier Institute of the Family. *Divorce: Facts, Figures and Consequences*. By Dr. Anne-Marie Umbert. (Ottawa: Vanier Institute of the Family, 1999) at 9

12. Almost half of “unattached” women aged 65 or older live in poverty, many as a consequence of divorce. Rather than enjoying the benefits of a lifetime of labour for their families, these women are forced to rely primarily on income security programmes for support. These afford only an economically marginal existence.

Low Income, supra at 14-17

Townson, M. *A Report Card on Women and Poverty*. Canadian Centre for Policy Alternatives, April 2000 at 1,3

10

13. As L’Heureux-Dubé J. held in *Moge*, the analysis of spousal support must be informed by the larger social and economic context. This case must therefore be analyzed with regard to the realities of older women’s vulnerable economic circumstances. The appellant argues that women’s support ought to be reduced or terminated on their former husbands’ retirement, where the pension was previously equalized. To do otherwise is labelled “double dipping”.

Moge, supra at 856, 874

D. Re-framing the Concepts

20

14. “Double dipping” is a prejudicial, false concept. It suggests a spouse receives a fair share of a particular property entitlement and later unfairly seeks double recovery under the rubric of spousal support. By framing the issue as one of “double dipping”, an inequitable result of double recovery is inferred. In an effort to avoid this perceived unfairness, some trial courts have ordered that support be terminated once the pension is in pay. Others have tried to exclude the already equalized portion of the pension asset when assessing ability to pay following retirement.

30

15. These approaches place far too much weight on the dual nature of pensions as both an asset and an income stream. As a result, the payor’s means are newly and narrowly redefined so as to reduce or deny spousal support, with little regard to the recipient’s need or continuing disadvantage. A focus on self-sufficiency becomes overly determinative of the issue of what variation of spousal

support, if any, is appropriate. The dependant's capacity to contribute to her own support is only one of the circumstances to be considered in determining spousal support pursuant to section 33(9) of the *Family Law Act*. Similarly, section 17 of the *Divorce Act* demands a more thorough and balanced determination of the conditions, needs, means and circumstances of both parties. This must be done in a manner that promotes women's equality.

Divorce Act, R.S.C. 1985 (2d. Supp.), c.3
Family Law Act, R.S.O. 1990, c. F.3
Moge v. Moge, *supra* at 852-53, 879
10 *Marzetti v. Marzetti*, [1994] 2 S.C.R. 765 at 801

16. Appellate courts have consistently and correctly assessed the nature of pensions in the variation context. In *Schmidt*, the British Columbia Court of Appeal recognized that the *Divorce Act* mandates the factors to be considered on a variation application. Pension income is not excluded from consideration of the payor's means. While the court acknowledged that "a pension is an almost unique asset", it concluded that it is "inappropriate to disregard the real needs of a spouse solely because of the nature of the assets received or retained at the time of [the] divorce". Similarly, the Saskatchewan Court of Appeal in *Grainger* held that "[t]he pension asset, even though it is a right of an income stream, should not because of its uniqueness be excluded from being considered as one
20 of the factors in determining an ability to pay". In *LeMoine*, Bastarache J.A. (as he then was) expressed it as follows: "Although the pension income stream may belong to the husband...this does not mean that it cannot be accessed in order to redress the economic disadvantages to the wife that continue to flow from the marriage or its breakdown."

Schmidt v. Schmidt (1998), 36 R.F.L. (4th) 1 (B.C.C.A.) at 14-15, Newbury J.A.
Grainger v. Grainger (1992), 39 R.F.L. (3d) 101 (Sask C.A.) at 105, Lane J.A.
LeMoine v. LeMoine (1997), 185 N.B.R. (2d) 173 (C.A.) at 188, Bastarache J.A. (as he then was)

30 17. Many assets derive their value from the income stream they generate either currently or in the future. The court in *Grainger* relies upon this conceptual similarity to conclude that pension income must be considered in assessing ability to pay. Although the court compares pension income

to that of a business, the analysis is equally apt for other assets. These include professional practices, intellectual property, realty and trusts.

Grainger, supra at 105

18. A business may be valued on an earnings approach which takes into account the present value of future income expectations. The value of the business comprises part of the spouse's marital property to be equalized at separation. The income earned through salary or dividends is available for support. Income producing properties are another example. A commercial building's fair market value is more than pure land value; its capacity to produce rental income forms part of its appraised value. Upon separation, the value of the building is factored into the property equalization, while the rental income is factored into the support determination. The potential income from a trust is classified as property. The value of a trust is based on the present value of the contingent future income stream. Again, the income received from the trust asset is available for support.

Brinkos v. Brinkos (1989), 20 R.F.L. (3d) 445 (Ont. C.A.) at 452
Caldwell v. Caldwell (1999), 46 R.F.L. (4th) 446 (Ont. Gen. Div.) at 448

19. These other forms of property have not been treated as presenting the so-called "double dipping" conundrum. Rather, the income-generating asset is valued for the purposes of resolving the property issues and the income itself remains central to the assessment of ability to pay. There is no statutory basis under the *Family Law Act* or the *Divorce Act* for devising a variation analysis that singles out pensions for differential treatment.

20. The purpose of the property division scheme under the *Family Law Act* is to recognize marriage as an equal partnership, the proceeds of which are to be divided equally at separation. As Parliament and the Ontario Legislature have acknowledged, such a distribution may not result in a complete equitable sharing of the advantages and disadvantages of the relationship, apportion the financial burden of childcare, or relieve the economic hardship of the marriage breakdown. A division of assets may be insufficient to fully compensate the disadvantaged spouse or adequately

address her needs. Accordingly, following an equalization payment, spousal support may be available to alleviate the adverse consequences of the relationship or its termination.

Divorce Act, ss. 15.2(4), 15.2(6)4, 17(4.1), 17(7)
Family Law Act, Preamble, s. 5, s. 33(8)

21. On a variation application, a court is required to consider all of the circumstances of both parties in light of the objectives of support. There should be no automatic exemption for pension income in considering ability to pay, although the equalization payment may be considered in assessing the circumstances of the spouses. All of the pension income ought to be included.

E. Rule-bound Approaches Sacrifice Fairness

22. The issues of pension valuation and division are complex and highly contentious. There are various inconsistent approaches, both within and across provincial and territorial jurisdictions. This confusion creates further inconsistencies — and inequities — in the post-retirement variation context. Within this legal landscape, it is tempting to seek a remedy that will yield more predictable and consistent results. Further, a more rule-oriented approach tends to minimise litigation and its attendant financial burden, one that is undoubtedly more onerous for women. In LEAF's submission, however, principles of fairness and equality should not be sacrificed in the quest for certainty and consistency.

Best, supra at 893-94

23. The jurisprudence reveals four general approaches to so-called "double-dipping" cases, namely: (1) those where the entire pension income stream is included for support purposes; (2) those where the entire pension income is excluded from consideration in assessing ability to pay; (3) those where a portion of the pension income is excluded; and (4) those where the pension is divided at source, the "if and when method".

(1) *Entire Pension Income Available*

24. Many courts have found it impossible to determine precisely what portion of the pension income stream is attributable to the previously equalized pension asset. This is quite common since the overwhelming majority of family law cases are negotiated, not adjudicated. Settlements, by their nature, involve a process of “give and take”, of making and extracting concessions on a variety of issues in order to obtain an overall resolution. Frequently, the value ascribed to the pension asset will be the mid-point or average between several values derived by employing different valuation methods. Alternatively, the agreed value of the pension may relate to a specific compromise on the value of another asset. The value of the pension, therefore, is almost invariably an imprecise, negotiated figure. The actual amount used to reach a property settlement is rarely apparent from the contract or minutes of settlement. Courts have held that the only practical and equitable approach, in these circumstances, is to consider the entire pension income stream for support purposes.

Best, supra at 893-94

Donovan v. Donovan (1999), 44 R.F.L. (4th) 111 (Ont. Gen. Div.) at 117

MacLeod v. MacLeod (1999), 3 R.F.L. (3d) 401 (Sask. Q.B.) at 407

Riegle v. Riegle, [1991] O.J. No 3325 (S.C.J.) (QL) at 4

Martin, C. “Unequal Shadows: Negotiation Theory and Spousal Support under Canadian Divorce Law” (Winter 1998) 56 U.T. Fac. L. Rev. 135 at 137

25. This Court found it necessary to include the entire pension income stream for the purposes of spousal support where the method of valuation was unfair. In *Linton*, the Ontario Court of Appeal also considered all of the pension income. It held that the value of the pension attributable to the marriage was so minimal relative to the present income stream as to be immaterial.

Linton v. Linton (1990), 30 R.F.L. (3d) 1 (Ont. C.A.) at 36

Strang v. Strang, [1992] 2 S.C.R. 112 at 120

(2) *Entire Pension Income Excluded*

26. In a few early cases, trial judges made time-limited orders terminating support upon the payor's retirement. Undivided pre-marital and post-separation pension contributions were not considered. Since post-separation contributions generally lead to significant increases in pension income, this approach deprives the wife of any benefit from the enriched pension value. It fails to consider the husband's continuing economic advantages and enhanced earning potential arising from the relationship.

10 27. Most importantly, there is no analysis as to whether the wife has been fully compensated for losses sustained during the marriage. These decisions, which pre-date *Moge*, place undue emphasis on self-sufficiency. There is no examination of the other relevant factors and objectives of support to achieve an equitable sharing of the economic consequences of marriage and its breakdown. An analysis which automatically excludes pension income has rightly been rejected.

Butt v. Butt (1989), 22 R.F.L. (3d) 415 (Ont. H.C.)

Veres v. Veres (1987), 9 R.F.L. (3d) 447 (Ont. H.C.)

contra

Flett v. Flett (1992), 43 R.F.L. (3d) 24 (Ont. U.F.C.)

Grainger, supra at 105

LeMoine, supra at 184

Linton, supra at 35

Nantais v. Nantais (1995), 16 R.F.L. (4th) 201 (Ont. Gen. Div.)

Rivers v. Rivers (1993), 47 R.F.L. (3d) 90 (Ont. Gen. Div.)

(3) *Equalized Portion of Pension Excluded*

28. A third approach is to restrict future support to the unequalized portion of the pension. The income stream related to the equalized pension is excluded from consideration of the payor's means.
30 Contrary to the assertion of the appellant, this method has not been uniformly adopted in Ontario. Such an approach is not even workable in most cases. It cannot be done without a precise pension valuation at separation. It also requires actuarial evidence as to what portion of the present income

stream relates to the equalized share and whether the assumptions at valuation have proved correct. In the case of defined benefit plans, this exercise will necessarily be artificial and inaccurate. In any event, it is extremely costly and invites further dispute about valuation methods.

Appellant's Factum, paragraph 59
Carter v. Carter (1999), 49 R.F.L. (4th) 357 (Ont. S.C.J.)
Donovan v. Donovan, *supra* at 116
Shadbolt v. Shadbolt (1997), 32 R.F.L. (4th) 253 (Ont. Gen. Div.) at 266-67

10 29. Moreover, this approach does not resolve the issue of entitlement or quantum of spousal support. The *Family Law Act* requires the court to consider a spouse's contribution to the relationship and the economic consequences of the relationship. Likewise, the *Divorce Act* requires the court to consider all of the means, needs, conditions and circumstances of the parties in light of the objectives of support. In these analyses, the court will consider that a portion of the pension has been shared. The ultimate question, however, is whether spousal support continues to be necessary to fully compensate the disadvantaged spouse or adequately address her needs.

20 *Flett v. Flett*, *supra* at 32-35
Nantais v. Nantais, *supra* at 210
Rintjema v. Rintjema, [1996] O.J. No. 4717 (Ont. Gen. Div.)

(4) "If and When" Division

30. Some cases and commentators suggest that an "if and when" method of pension division resolves the problem of "double dipping". An "if and when" approach allows a pension member to pay his or her spouse a share of pension benefits if and when they are received rather than by paying a lump sum equalization. An Ontario court may order an "if and when" division of benefits by requiring the plan member or the pension plan administrator to hold the non-member spouse's share in trust.

30 *Family Law Act*, s. 9(1)(d)(i)
Pension Benefits Act, R.S.O. 1990, c. P.8, s. 51; R.R.O. 1990, Reg. 909

Gorman v. Gorman (1996), 20 R.F.L. (4th) 325 (Ont. Gen. Div.) at 335

Marsham v. Marsham (1987), 7 R.F.L. (3d) 1 (Ont. H.C.)

McLeod, J. "Unresolved Matrimonial Property Issues: So Much Time and Energy; So Little Accomplished" (Paper presented to National Family Law Programme. St. John's, 2000) [unpublished] at 28-13

31. An "if and when" division fails to resolve the issue of "double dipping". Once the non-pension member spouse starts to receive her share of the pension, she may have a continuing need for spousal support that is not met by this income. The former husband may well have an ability to pay. The determination of entitlement to support is not answered merely by the fact that the former spouse's pension is in pay.

32. An "if and when" division affords a greater degree of precision in determining the value of the pension related to the period of marriage. The former spouse's pension valuation may be calculated using known variables rather than projected assumptions. In this respect, the "if and when" method may permit a more accurate understanding of the circumstances of the parties on a variation application. Despite this advantage, an "if and when" division is fraught with serious problems and uncertainties. This Court has therefore rejected the "if and when" scheme as a default rule for equalizations involving pensions.

Best, supra at 928

33. An "if and when" pension division may be unfair to the recipient spouse. If the pension member dies prior to retirement, the non-member spouse may receive nothing. The pension member may also retire early thereby reducing the value of the benefit to the recipient. The pension member may leave the country or otherwise thwart payment. The non-member spouse will have difficulties in retirement planning since the value of her pension benefit is unknown. Like the lump sum payment approach, an "if and when" division may employ different pension valuation methods, producing substantially different pension benefits. It is also extremely difficult to ensure compliance

with the prescribed rules. Most troubling, there is serious doubt whether an “if and when” approach is even enforceable in Ontario.

Pension Benefits Act, s. 51; Reg. 909

Best, *supra* at 928-32

Ontario Law Reform Commission. *Report on Pension as Family Property: Valuation and Division*. (Toronto: Ontario Law Reform Commission, 1995)

Patterson, J. *Pension Division and Valuation: Family Lawyers' Guide*, 2nd ed. (Aurora, Ont.: Canada Law Book Inc., 1995) chap. 21, 22

10

34. An “if and when” approach is usually applied to satisfy all pension aspects of the equalization payment. The value of the pension is thereby removed completely from the calculation. This approach does not accord with the scheme of marital property division under the *Family Law Act*. An “if and when” division should not be used in the absence of enabling legislation. Attempts to develop a national “one-size fits all” solution without such legislation are unworkable.

Family Law Act, s. 4(1), s. 5

20

F. The Proper Approach to Support Variations at Retirement

35. In *Bracklow*, this Court outlined two theories of marriage: the “mutual obligation” model and the “independent” model. The “mutual obligation” theory of marriage entails the replacement of income lost as a result of separation. As elaborated by McLachlin J. (as she then was) in *Bracklow*, need alone may suffice to ground a support obligation. The “independent” model of marriage is linked to compensatory support. The decision of *Moge* affirmed this compensatory rationale; spouses are entitled to share in the advantages and disadvantages arising from the marriage or its breakdown. “The federal and provincial legislatures, through their respective statutes, have acknowledged both models. Neither theory alone is capable of achieving a just law of spousal support.” Instead, all of the factors and objectives of spousal support, reflecting elements of both models of marriage, must be considered to arrive at a just result in the individual circumstances of the case.

30

Bracklow, supra at 438-39, McLachlin J. (as she then was)
Moge, supra at 848-49

36. The phrase “double dipping” attempts to identify and solve a “problem” using a rule of calculation. This is precisely the type of analysis rejected in *Bracklow*. A court ought not to fix on a single variable; the equalization of the pension asset is only one consideration. “The quantum awarded, in the sense of both amount and duration, will vary with the circumstances and the practical and policy considerations affecting particular cases.”

10

Bracklow, supra at 450-52, McLachlin J. (as she then was)

37. In family law, the exercise of judicial discretion promotes individual justice tailored to the unique circumstances of each case. As this Court ruled in *Moge*, judicial discretion is necessary for the just determination of spousal support. It is the only means to secure an equitable sharing of the consequences of a particular marital relationship.

Moge, supra at 866

20 **I) Compensatory Support**

38. In the post-retirement context, spouses may well have an on-going obligation to a former partner even when the value of their pension has been shared at separation. Since lump sum payments have not been adopted as a standard form of compensatory support, many periodic awards reflect a large compensatory element. The continuation and non-diminution of spousal support is particularly important in these cases.

Elliot v. Elliot (1993), 48 R.F.L. (3d) 237 (Ont. C.A.)
Rogerson, supra at 317

30

39. The ruling in *Moge* established that spouses are entitled to be compensated, as fully as possible, for the benefits and burdens arising from their relationship or its breakdown. Women are entitled to share in the increase in their husband's earning capacity as a result of their efforts and to restitution for the value of their unpaid domestic labour. Any termination or reduction of compensatory spousal support, simply because a pension is in pay, would deprive many women of full compensation. Spousal support is a substantive entitlement, not a discretionary benefit.

Rogerson, *supra* at 290-291, 299

10 40. Equalization rarely severs the ties between the spouses and puts them in an equal financial position. The advantages and disadvantages of the marriage frequently continue over the lifetime of the parties, particularly where there are insufficient funds to enable the wife to acquire skills or education and attain true economic independence. Women will usually have primary responsibility for the parties' children post-separation. As a custodial parent, a woman will have limited job prospects, greater demands on her time and fewer resources. A divorced woman with children will likely experience sustained economic losses. *Moge* establishes that such ongoing disadvantage requires compensation.

20 *Divorce Act, supra* at s. 15(7)(c)
Moge, supra at 867-68
Willick, supra at 712-15, 718-20
Family Income, supra at 10-11, 13
Kerr, supra at 29-32

41. Perhaps the most important income-generating asset, human capital, does not enter into the equalization calculation. Often, the roles assumed during marriage will enhance the husband's ability to generate income, while the wife never fully recovers from even a brief exit from the paid labour force. The husband's enhanced human capital will continue to be applied post-separation to generate income from already "equalized" assets. A truly equitable sharing will therefore require
30 that the totality of income be considered in assessing support. This is necessary to ensure that a wife is compensated as fully as possible for the advantages she has conferred on the husband.

Moge, supra at 861
Rogerson, *supra* at 300, 322-23, 330-33, 356-58

42. As L'Heureux-Dubé J. wrote in *Moge*, "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." Given the husband's own circumstances, the amount of a periodic support award in favour of the wife will necessarily be limited. In attempting to compensate the wife as fully as possible, support may need to be paid for her lifetime. Accordingly, an award of support should not be reduced unless full compensation has been achieved, except when the payor has insufficient means. Certainly, pension income should not be mathematically assessed and divided so as to artificially reduce the pension member's ability to pay. The relevant statutory schemes direct the court to review a wider spectrum of considerations.

Moge, supra at 866, L'Heureux-Dubé J.

(2) *Self-sufficiency and Income Attribution*

43. Both the *Family Law Act* and the *Divorce Act* seek to promote a spouse's self-sufficiency. Section 33(9)(c) of the *Family Law Act* directs the court to consider, *inter alia*, "the dependant's capacity to contribute to his or her own support". One of the articulated objectives of spousal support in the *Divorce Act* is to "...in so far as practicable, promote the self-sufficiency of each spouse within a reasonable period of time". In *Moge*, this Court rejected the pre-eminence of self-sufficiency in determining spousal support and called for a balanced and contextualized consideration of the enumerated factors and objectives in the *Divorce Act*. The same approach applies to the provincial statutory scheme.

Divorce Act, s.15.2(4), 15.2(6)
Family Law Act, s. 33(9)
Juvatopolos v. Juvatolopos (1994), 8 R.F.L. (4th) 191 (Ont. U.F.C.) at 199, 201-02
Legun v. Legun (1993), 48 R.F.L. (3d) 13 (B.C.C.A.) at 18

Moge, supra at 844-45, 853, 860-61, 879
Bracklow, supra at 439

44. Many of the “double dipping” cases unduly focus on the recipient’s spouse’s obligation to attain self-sufficiency. In some instances, as in *Boston*, trial courts impose unrealistic expectations of a spouse’s ability to obtain employment, having regard to factors such as her age, work experience, education and parenting responsibilities. In other instances, a spouse’s self-sufficiency is scrutinized on the basis of her capacity to generate investment income, especially from her property settlement. Income must not to be imputed by imposing a gender insensitive standard as to how a spouse should have managed her finances since separation and how she ought to in the future.

Endorsement of Robertson, J., Appellant’s Record at 135

45. Often, the equalization of the capitalized value of a pension allows a wife to obtain a transfer of the matrimonial home. This minimizes disruption to the children and provides a measure of comfort for them. It also reduces the wife’s accommodation expenses, to the advantage of the husband in assessing the wife’s need for spousal support. Although a home is not usually a high-growth investment, a spouse should not be penalized for her desire to provide stability for her children and to secure affordable housing for the entire family. In this context, it would be inappropriate for a court to conclude on a variation application that her decision was not financially prudent, or to treat this asset as if it is wholly and readily available to generate income.

46. The appropriate approach to the issue of self-sufficiency is reflected in the rulings of *Carter* and *Grünwald*. In those cases, the court addressed the question of possible income attribution from the recipient spouse’s residence, having regard to her real needs and circumstances. In the absence of evidence regarding the wife’s ability to obtain a reverse mortgage, invest at a particular interest rate or purchase an annuity, courts must decline to impute income based on artificial assumptions. Self-sufficiency should also be assessed having regard to the parties’ standard of living during the relationship.

Carter, supra at 366-69

Grunewald v. Grunewald, [1992] O.J. No. 2151 (Ont. Gen. Div.) (QL) at 2-3

Moge, supra at 807

47. Defined benefit plans are the most common type of pensions. The pensioner will receive a non-exigible asset that provides a secure, constant income, often indexed to inflation, for the rest of his life. It would likely be impossible for the wife to purchase an equivalent annuity with her share of the equalized pension. Since the wife's life expectancy is greater than that of the husband, she will have legitimate reasons for seeking to maintain her capital assets. Without the security of a pension, she will also be less inclined to enter into more risky investment strategies, which generally offer a much higher rate of return.

Grassby, M. "Spousal Support - Assumptions and Myths Versus Case Law" (1995) 12 C.F.L.Q. 187 at 204-06

Patterson, *supra* at 12

48. "Arguments that an ex-spouse should be doing more for herself must be considered in light of her background and abilities, physical and psychological... One must look at the actual social and personal reality of the situation." Many women have little or no experience with financial matters. This makes it difficult, if not impossible, for a wife to attain the same lifestyle from a lump sum payment at separation as a husband will generate by retaining his income-generating assets or pension. The husband's pension is pooled with the monies of a large number of people; the fund is managed with the aid of superior investment advice. In contrast, most women have limited experience and knowledge of investment strategies. They tend to be more risk averse, to the detriment of their future investment returns. Sometimes, they will be precluded from investing the lump-sum altogether. Since support is so frequently unpaid or inadequate, an equalization payment is often spent on child and household related expenses, or on the wife's retraining and education. These social and economic realities must inform the self-sufficiency inquiry.

Drache, A. and S. Schneider. *Head and Heart: Financial Strategies for Smart Women* (Toronto: MacMillan of Canada, 1987) at ix, 55
Moge, supra at 881-82, McLachlin J. (as she then was)
Canada. Department of Justice. Bureau of Review. *Evaluation of the Divorce Act 1985. Phase II: Monitoring and Evaluation*. Ottawa: Department of Justice, 1990 at 89, 92-95
Hornick, J.P., L.D. Bertrand & N.M.C. Bayla. *The Survey of Child Support Awards: Final Analysis of Pilot Data and Recommendations for Continued Data Collection*. (Report presented to the Child Support Team Department of Justice Canada. Ottawa, 1999) at 23-24

10

G. Summary

49. The so-called problem of “double-dipping” represents an attempt by payors to insulate income without proper regard to the recipient’s need or entitlement to compensation. Any mathematical rule must be rejected in favour of a discretionary approach, guided by the relevant legislation. Spousal support cases have exposed women’s inequality as manifested by their economic vulnerability arising from divorce. This Court should adopt a statutory construction which aims to address the feminization of poverty, thereby promoting women’s equality rights.

20

PART IV: ORDER REQUESTED

50. LEAF respectfully requests that this Court dismiss the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 2nd day of November, 2000.

Nicole Tellier

Joanna Radbord

Counsel for the Intervener, LEAF

30

PART V: TABLE OF AUTHORITIES

	<i>Page(s) Cited</i>
<i>Best v. Best</i> , [1999] 2 S.C.R. 868	3, 9, 10, 13, 14
<i>Bracklow v. Bracklow</i> , [1999] 1 S.C.R. 242	2, 4, 15, 18
<i>Brinkos v. Brinkos</i> (1989), 20 R.F.L. (3d) 445 (Ont. C.A.)	8
<i>Butt v. Butt</i> (1989), 22 R.F.L. (3d) 415 (Ont. H.C.)	11
<i>Caldwell v. Caldwell</i> (1999), 46 R.F.L. (4 th) 446 (Ont. Gen. Div.)	8
Canada. Department of Justice. Bureau of Review. <i>Evaluation of the Divorce Act 1985. Phase II: Monitoring and Evaluation</i> . Ottawa: Department of Justice, 1990	20
Canada. Statistics Canada. <i>As Time Goes By.....Time Use of Canadians</i> . By J.A. Frederick. Ottawa: Minister of Supply and Services Canada, 1995	5
Canada. Statistics Canada. <i>Family Income After Separation</i> . By D. Galarneau & J. Sturrock. Ottawa: Minister of Industry, 1997	5, 16
Canada. Statistics Canada. <i>Low Income Persons, 1980 to 1997</i> . Ottawa: Minister of Industry, April, 1999	5, 6
<i>Carter v. Carter</i> , [1999] O.J. 3096 (Gen. Div.)	12, 19
<i>Donovan v. Donovan</i> (1999), 44 R.F.L. (4 th) 111 (Ont. Gen. Div.)	10, 12
Drache, A. and S. Schneider. <i>Head and Heart: Financial Strategies for Smart Women</i> (Toronto: MacMillan of Canada, 1987)	20
<i>Elliot v. Elliot</i> (1993), 48 R.F.L. (3d) 237 (Ont. C.A.)	15
Finnie, R. "Women, Men and the Economic Consequences of Divorce: Evidence from Canadian Longitudinal Data" (1993) 30(2) <i>Canad. Rev. Soc. Anth.</i> 205	5
<i>Flett v. Flett</i> (1992), 43 R.F.L. (3d) 24 (Ont. U.F.C.)	11, 12
<i>Gorman v. Gorman</i> (1996), 20 R.F.L. (4 th) 325 (Ont. Gen. Div.)	13

GPI Atlantic. "Gender Equality in the Genuine Progress Index" (Synthesis Paper prepared for <i>Made to Measure Symposium</i> . Halifax, October 1999) [unpublished]	5
<i>Grainger v. Grainger</i> (1992), 39 R.F.L. (3d) 101 (Sask. C.A.)	7, 8, 11
Grassby, M. "Spousal Support - Assumptions and Myths Versus Case Law" (1995) 12 C.F.L.Q.	187 19
<i>Grunewald v. Grunewald</i> , [1992] O.J. No. 2151 (Gen. Div.) (QL)	19
Hornick, J.P., L.D. Bertrand & N.M.C. Bayla. <i>The Survey of Child Support Awards: Final Analysis of Pilot Data and Recommendations for Continued Data Collection</i> . (Report presented to the Child Support Team Department of Justice Canada. Ottawa, 1999)	20
Hough, J. "Mistaking Liberalism for Feminism: Spousal Support in Canada" (1994) 29:2 <i>Journal of Canadian Studies</i>	147 3
<i>Juvatopolos v. Juvatopolos</i> (1994), 8 R.F.L. (4 th) 191 (Ont. U.F.C.)	17
Kerr, R. <i>An Economic Model to Assist in the Determination of Spousal Support</i> . (Paper prepared for the Department of Justice and Status of Women Canada. Ottawa, 1992)	5, 16
<i>Legun v. Legun</i> (1993), 48 R.F.L. (3d) 13 (B.C.C.A.)	18
<i>LeMoine v. LeMoine</i> (1997), 185 N.B.R. (2d) 173 (C.A.)	7, 11
<i>Linton v. Linton</i> (1990), 30 R.F.L. (3d) 1 (Ont. C.A.)	10, 11
<i>M. v. H.</i> , [1999] 2 S.C.R. 3	4
<i>MacLeod v. MacLeod</i> (1999), 3 R.F.L. (3d) 401 (Sask. Q.B.)	10
<i>Marsham v. Marsham</i> (1987), 7 R.F.L. (3d) 1 (Ont. H.C.)	13
Martin, C. "Unequal Shadows: Negotiation Theory and Spousal Support under Canadian Divorce Law" (Winter 1998) 56 U.T. Fac. L. Rev.	135 10
<i>Marzetti v. Marzetti</i> , [1994] 2 S.C.R. 705	7
McLeod, J. "Unresolved Matrimonial Property Issues: So Much Time and Energy, So Little Accomplished" (Paper presented to National Family Law Programme. St. John's, 2000) [unpublished]	13
<i>Moge v. Moge</i> , [1992] 3 S.C.R. 813	2-4, 6, 7, 15-20

<i>Nantais v. Nantais</i> (1995), 26 O.R. (3d) 453 (Gen. Div.)	11, 12
Ontario Law Reform Commission. <i>Report on Pension as Family Property: Valuation and Division</i> . (Toronto: Ontario Law Reform Commission, 1995)	14
Patterson, J. <i>Pension Division and Valuation: Family Lawyers' Guide</i> , 2nd ed. (Aurora, Ont.: Canada Law Book Inc., 1995)	14, 19
<i>Riegle v. Riegle</i> , [1991] O.J. No 3325 (S.C.J.) (QL)	10
<i>Rintjema v. Rintjema</i> (1996), O.J. 4717 (Gen. Div.)	12
<i>Rivers v. Rivers</i> (1993), 47 R.F.L. (3d) 90 (Ont. Gen. Div.)	11
Rogerson, C. "Spousal Support After Moge" (1997) 14 C.F.L.Q. 281	4, 15-17
<i>Schmidt v. Schmidt</i> (1998), 36 R.F.L. (4 th) 1 (B.C.C.A.)	7
<i>Shadbolt v. Shadbolt</i> (1997), 32 R.F.L. (4 th) 253 (Ont. Gen. Div.)	12
<i>Strang v. Strang</i> , [1992] 2 S.C.R. 112	10
Townson, M. <i>A Report Card on Women and Poverty</i> . Canadian Centre for Policy Alternatives, April 2000	6
Townson, M. <i>Independent Means</i> . (Toronto: Macmillan Canada, 1997)	5
Vanier Institute of the Family. <i>Divorce: Facts, Figures and Consequences</i> . By Dr. Anne-Marie Umbert. (Ottawa: Vanier Institute of the Family, 1999)	5
<i>Veres v. Veres</i> (1987), 9 R.F.L. 3d) 447 (Ont. H.C.)	11
<i>Walsh v. Bona</i> (2000), 5 R.F.L. (5 th) 188 (N.S.C.A.)	3
<i>Willick v. Willick</i> , [1994] 3 S.C.R. 670	3, 4, 16
<i>Young v. Young</i> , [1993] 4 S.C.R. 3	5

SCHEDULE A - EXCERPTS OF RELEVANT LEGISLATION

Canadian Charter of Rights and Freedoms, s.15, Part 1 of the Constitution Act, 1982, being Schedule B of the Canada Act 1982 (U.K.), 1982, c.11, (the "Charter")

Equality Rights

Equality before
under law
and equal
protection and
benefit of law

15. (1) Every individual is equal before and under the law and has the right to protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Divorce Act, R.S.C. 1985 (2nd Supp.), c.3, as amended

15.2(1) Spousal support order — A court of competent jurisdiction may, on application by either or both spouses, make an order requiring a 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 the other spouse.

(2) Interim order — Where an application is made under subsection (1), the court may, on application by either or both spouses, make an interim order requiring a 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 the other spouse, pending the determination of the application under subsection (1).

(3) Terms and conditions — The court may make an order under subsection (1) or an interim order under subsection (2) for a definite or indefinite period or until a specified event occurs, and may impose terms, conditions or restrictions in connection with the order as it thinks fit and just.

(4) Factors — In making an order under subsection (1) or an interim order under subsection (2), the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including

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

(5) Spousal Misconduct — In making an order under subsection (1) or an interim order under subsection (2), the court shall not take into consideration any misconduct of a spouse in relation to the marriage.

(6) Objectives of spousal support order — An order made under subsection (1) or an interim order under subsection (2) 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 any obligation for the support of any child of the marriage;
- (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) Order for variation, rescission or suspension — 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; or
- (b) a custody order or any provision thereof on application by either or both former spouses or by any other person.

(4.1) Factors for spousal support order - Before the court makes a variation order in respect of a spousal support order, the court shall satisfy itself that a change in the condition, means, needs or other circumstances of either former spouse has occurred since the making of the spousal support order or the last variation order made in respect of that order, and, in making the variation order, the court shall take that change into consideration.

(7) Objectives of variation order varying spousal support order — A variation order varying a spousal support order should

- (a) recognize any economic advantages or disadvantages to the former spouse 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 any obligation for the support of any child of the marriage;
- (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.

Family Law Act, R.S.O. 1990, c. F.3, as amended

Preamble — Whereas it is desirable to encourage and strengthen the role of the family; and whereas for that purpose it is necessary to recognize the equal position of spouses as individuals within marriage and to recognize marriage as a form of partnership; and whereas in support of such recognition it is necessary to provide in law for the orderly and equitable settlement of the affairs of the spouses upon the breakdown of the partnership, and to provide for other mutual obligations in family relationships, including the equitable sharing by parents of responsibility for their children;

5. (1) Equalization of net family properties — When a divorce is granted or a marriage is declared a nullity, or when the spouses are separated and there is no reasonable prospect that they will resume cohabitation, the spouse whose net family property is the lesser of the two net family properties is entitled to one-half the difference between them.

33. (1) Order for support — A court may, on application, order a person to provide support for his or her dependants and determine the amount of support.

(8) Purposes of order for support of spouse — An order for the support of a spouse or same-sex partner should,

(a) recognize the spouse's or same-sex partner's contribution to the relationship and the economic consequences of the relationship for the spouse or same-sex partner;

(b) share the economic burden of child support equitably;

(c) make fair provision to assist the spouse or same-sex partner to become able to contribute to his or her own support; and

(d) relieve financial hardship, if this has not been done by orders under Parts I (Family Property) and II (Matrimonial Home).

(9) Determination of amount — In determining the amount and duration, if any, of support for a spouse, same-sex partner or parent in relation to need, the court shall consider all the circumstances of the parties, including,

(a) the dependant's and respondent's current assets and means;

(b) the assets and means that the dependant and respondent are likely to have in the future;

(c) the dependant's capacity to contribute to his or her own support;

(d) the respondent's capacity to provide support;

(e) the dependant's and respondent's age and physical and mental health;

(f) the dependant's needs, in determining which the court shall have regard to the accustomed standard of living while the parties resided together;

(g) the measures available for the dependant to become able to provide for his or her own support and the length of time and cost involved to enable the dependant to take those measures;

(h) any legal obligation of the respondent or dependant to provide support for another person;

(i) the desirability of the dependant or respondent remaining at home to care for a child;

(j) a contribution by the dependant to the realization of the respondent's career potential;

(k) [Repealed 1997, c. 20, s. 3(3).]

(l) if the dependant is not a spouse or same-sex partner,

(i) the length of time the dependant and respondent cohabited,

(ii) the effect on the spouse's or same-sex partner's earning capacity of the responsibilities assumed during cohabitation,

(iii) whether the spouse or same-sex partner has undertaken the care of a child who is of the age of eighteen years or over and unable by reason of illness, disability or other cause to withdraw from the charge of his or her parents,

(iv) whether the spouse or same-sex partner has undertaken to assist in the continuation of a program of education for a child eighteen years of age or over who is unable for that reason to withdraw from the charge of his or her parents,

(v) in the case of a spouse, any housekeeping, child care or other domestic service performed by the spouse for the family, as if the spouse were devoting the time spent in performing that service in remunerative employment and were contributing the earnings to the family's support,

(v.1) in the case of a same-sex partner, any housekeeping, child care or other domestic service performed by the same-sex partner for the respondent or the respondent's family, as if the same-sex partner were devoting the time spent in performing that service in remunerative employment and were contributing the earnings to the support of the respondent or the respondent's family.

(vii) the effect on the spouse's or same sex partner's earnings and career development of the responsibility of care for a child; and

(m) any other legal right of the dependant to support, other than out of public money.

Pension Benefits Act, R.S.O. 1990, c. P.8

Payment on marriage breakdown

51.—(1) A domestic contract as defined in Part IV of the Family Law Act, or an order under Part I of that Act is not effective to require payment of a pension benefit before the earlier of,

(a) the date on which payment of the pension benefit commences; or

(b) the normal retirement date of the relevant member or former member. S.O. 1987, c. 35, s. 52.

Maximum percentage

(2) A domestic contract or an order mentioned in subsection (1) is not effective to cause a party to the domestic contract or order to become entitled to more than 50 per cent of the pension benefits, calculated in the prescribed manner, accrued by a member or former member during the period when the party and the member or former member were spouses or same-sex partners.

Discharge of administrator

(3) If payment of a pension or a deferred pension is divided between spouses or same-sex partners by a domestic contract or an order mentioned in subsection (1), the administrator is discharged on making payment in accordance with the domestic contract or order.

Revaluation of joint and survivor pension

(4) If a domestic contract or an order mentioned in subsection (1) affects a pension, the administrator of the pension plan shall revalue the pension in the prescribed manner. S.O. 1987, c. 35, s. 52.

Transfer

(5) A spouse or same-sex partner on whose behalf a certified copy of a domestic contract or order mentioned in subsection (1) is given to the administrator of a pension plan has the same entitlement, on termination of employment by the member or former member, to any option available in respect of the spouse's or same-sex partner's interest in the pension benefits as the member or former member named in the domestic contract or order has in respect of his or her pension benefits.

R.R.O. 1990, Reg. 909

56. For the purposes of subsection 51(2) of the Act, the pension benefits accrued during the period a member had a spouse shall be determined as if the member terminated employment at the valuation date in accordance with the terms of the plan at that date and without consideration of future benefits, salary or changes to the plan but with consideration for the possibility of future vesting.

TABLE OF CONTENTS

	PART I: THE FACTS	1
	PART II: POINTS IN ISSUE	2
	PART III: ARGUMENT	2
10	A. Overview	2
	B. Situating this Case within Larger Equality Goals	3
	C. The Social and Material Conditions of Divorced Women	4
	D. Re-framing the Concepts	6
	E. Rule-bound Approaches Sacrifice Fairness	9
	(1) Entire Pension Income Available	10
	(2) Entire Pension Income Excluded	11
	(3) Equalized Portion of Pension Excluded	11
	(4) “If and When” Division	12
	F. The Proper Approach to Support Variations at Retirement	14
20	1) Compensatory Support	15
	(2) Self-sufficiency and Income Attribution	17
	G. Summary	20
	PART IV: ORDER REQUESTED	20
	PART V: TABLE OF AUTHORITIES	21