

**IN THE SUPREME COURT OF CANADA**

(Appeal from the Court of Appeal for  
the Province of Manitoba)

**BETWEEN:**

**ANDRZEJ MOGE**

**APPELLANT**

- and -

**ZOFIA MOGE**

**RESPONDENT**

- and -

**WOMEN'S LEGAL EDUCATION AND ACTION FUND**

**INTERVENER**

---

**FACTUM OF THE WOMEN'S LEGAL  
EDUCATION AND ACTION FUND (LEAF)**

---

**HELENA ORTON**

Women's Legal Education and  
Action Fund  
489 College Street  
Suite 403  
Toronto, Ontario  
M6G 1A5

(416) 963-9654

**ALISON DIDUCK**

Wilder, Wilder & Langtry  
1500 - 1 Lombard Place  
Winnipeg, Manitoba  
R3B 0X3

(204) 947-1456

**NELLIGAN, POWER**

Barristers & Solicitors  
1900 - 66 Slater Street  
Ottawa, Ontario  
K1P 5H1

Catharine Aitken  
(613) 238-8080

Ottawa Agent for the  
Intervener, Women's  
Legal Education and  
Action Fund (LEAF)

Solicitors for the Intervener,  
Women's Legal Education and Action Fund (LEAF)

TO: **THE REGISTRAR OF THIS COURT**

AND TO: **MYERS WEINBERG KUSSIN WEINSTEIN BRYK**  
724 - 240 Graham Avenue  
Winnipeg, Manitoba  
R3C 0J7

Solicitors for the Appellant  
Counsel: **DOUGLAS E. JOHNSON**

**SOLOWAY, WRIGHT & COMPANY**  
99 Metcalfe Street  
Ottawa, Ontario  
K1P 6L7

Ottawa Agents  
(**R.E. HOUSTON, Q.C.**)

AND TO: **TESKEY & CO.**  
Suite 906, 363 Broadway  
Winnipeg, Manitoba  
R3C 3N9

Solicitors for the Respondent  
Counsel: **PETER J. BRUCKSHAW**

**BURKE-ROBERTSON**  
70 Gloucester Street  
Ottawa, Ontario  
K2P 0A2

Ottawa Agents  
(**MARK CHARRON**)

## INDEX

	<u>Page</u>
PART I:           FACTS	1
PART II:          POINTS IN ISSUE	1
PART III:         ARGUMENT	
A.   Women's Economic Disadvantage Flowing From Marriage and Marriage Breakdown is a Sex Equality Issue	1
i)   The Relationship between Women's Economic Disadvantage and the Gender-Based Division of Labour within Marriage	1
ii)  The Dynamics and Implications of the Gender-Based Division of Labour within Contemporary Marriages	3
iii) The Role of Spousal Support in Valuing Unpaid Domestic Labour and Addressing Women's Economic Disadvantage flowing from Marriage and Marriage Breakdown	6
B.   Interpretation of the Spousal Support Provisions in the <u>Divorce Act</u> must be Guided by the Charter's Guarantees of Sex Equality	8
C.   Interpretation of Sections 15 and 17 of the <u>Divorce Act</u>	10
i)   Assessment of Economic Disadvantages and Advantages and the Causal Connection Test	11
ii)  The Traditional - Modern Marriage Dichotomy	14
iii) Economic Self Sufficiency and the Clean Break Philosophy	16
PART IV:         ORDER SOUGHT	20
PART V:          AUTHORITIES	21

## PART I: FACTS

1. The Women's Legal Education and Action Fund (LEAF) adopts the facts as set out in the Respondent's Factum.

## PART II: POINTS IN ISSUE

2. This case raises issues of the interpretation of the spousal support provisions of the Divorce Act in a manner consistent with s. 15 of the Charter, including:

- a) principles for assessment of economic disadvantages and advantages arising from marriage and marriage breakdown; and
- b) the nature of the obligation to become economically self sufficient.

## PART III: ARGUMENT

### **A. WOMEN'S ECONOMIC DISADVANTAGE FLOWING FROM MARRIAGE AND MARRIAGE BREAKDOWN IS A SEX EQUALITY ISSUE**

#### **i) The Relationship between Women's Economic Disadvantage and the Gender-Based Division of Labour within Marriage**

3. Separation and divorce are strongly associated with the economic disadvantage of women relative to men. Despite recent family law reforms in the direction of gender equality, including improved property laws, recent research shows that the poverty rate of divorced or separated women and children in their custody continues to be extremely high and far exceeds that of divorced or separated men.

Dept. of Justice, Canada, Evaluation of the Divorce Act Phase II: Monitoring and Evaluation (Ottawa: Dept. of Justice, Bureau of Review, May, 1990) at 91-96.

Lenore Weitzman, The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America, (New York: The Free Press, 1985) at 36.

M. McCall, Background Paper: Options for the Reform of the Law of Spousal Support Under the Divorce Act, 1985 (1991). Prepared for the Dept. of Justice, Canada, at 56-61.

4. Forty six percent of divorced women in a 1988 study had total incomes, including employment and support income, below the poverty line. In contrast, only 13% of men who paid support fell below the poverty line. The average income of male one-person households after marriage breakdown was

\$13,500.00 above the poverty line.

Department of Justice, Evaluation of the Divorce Act, supra, at 93-94.

5. A major factor contributing to women's economic disadvantage on separation and divorce, both historically and today, has been the differential work patterns of women as compared with men during and following marriage. Historically, women were almost exclusively responsible for the unpaid labour of caring for home and family during marriage, whether or not they were also employed in paid work. Men were largely responsible for the financial support of the family.

Gunderson, L. Muszinski, and J. Kleck, Women and Labour Market Poverty (Ottawa: Canadian Advisory Council on the Status of Women, 1990) at 13-14.

6. Despite significant increases in labour force participation, a greater diversity of marital relationships and gradually changing understandings and expectations of those entering marriage, women continue to be primarily responsible for the unpaid work of homemaking and child care and encouraged or limited so as to make this work their first priority. Women also generally continue to be responsible for care of children on separation.

Gunderson, supra at 20, 24-27.

Statistics Canada, Women in Canada: A Statistical Report (2nd ed.). (Ottawa: Min. of Supply & Services, 1990) at 10, 20, 74-75 and 80.

7. Canadian society continues to be organized around a gender-based division of labour during marriage. Child care and domestic work are largely treated as a private responsibility. The work world is generally unresponsive to family needs, having been historically structured on the assumption of a wife at home.

R. Abella, Equality in Employment: Royal Commission Report, Royal Commission on Equality in Employment, (1984) at 28-29.

8. The gender-based division of household labour has been used to socially define women as secondary earners who are likely to limit their workforce participation and is associated with the systemic economic devaluation of childcare, cleaning and other domestic work. As a basis of societal organization, this division of labour has exacerbated the unequal position of women in the paid workforce by contributing to the creation and perpetuation of systemic pay and employment inequity on the basis of sex. For individual married women who work outside the home, the "secondary

earner" ideology and the devaluation of skills involved in domestic work frequently results in discrimination in employment.

Abella, supra at 28-32

9. At the same time, the division of labour during marriage is gender-based in large part because the overall sex segregation and stratification of the workforce has meant that women are generally paid less, with the result that it has frequently been economically rational for the family that married women rather than men limit workforce participation to address child care and other family needs.

E.D. Pask and M.L. McCall, eds., How Much and Why? Economic Implications of Marriage Breakdown: Spousal and Child Support, (Calgary: Canadian Research Institute for Law and the Family, 1989) at 56-60.

Abella, supra at 62-69, 245-247.

10. Although the increasing participation of married women in the paid labour force will often improve those women's economic possibilities on divorce, there are significant negative economic consequences to the accommodation of paid work to responsibilities for care of children and home, and to husband's career needs.

ii) **The Dynamics and Implications of the Gender-Based Division of Labour within Contemporary Marriages**

11. Most married women who are employed, even those who work full-time in non-traditional jobs, continue to bear prime responsibility for care of children and home with the result that their total working hours are markedly greater than their husband's.

Statistics Canada, General Social Survey Analysis Series: Where Does Time Go? (Ottawa: Min. of Industry, Trade & Tech., 1991) at 50-54, 58-61.

Statistics Canada, Women in Canada, supra at 13 and 26 (Table 20).

W. Michelson, From Sun to Sun: Daily Obligations and Community Structure in the Lives of Employed Women and Their Families, (Totowa, New Jersey: Rowman & Allanheld, 1985), Chapter 5.

Gunderson, supra at 24-26 and 34.

12. As a consequence of the conflicting physical and emotional demands of paid work and responsibilities for home and family, compounded by a lack of adequate childcare, women are often forced to make sacrifices affecting their paid work opportunities with which men are not confronted.

Pask and McCall, supra at 56-72.

National Council of Welfare, Women and Poverty Revisited, (Ottawa: Min. of Supply & Services, 1990) at 2, 42-53.

13. A significant majority of women with children continue to interrupt their careers because of matters relating to the home and family, whereas extremely few men do so.

10 T.K. Burch Family History Survey: Preliminary Findings (Ottawa: Ministry of Supply & Services Canada 1985) Statistics Canada Cat. No. 99-955 at 25-27.

P. Robinson Women's Work Interruptions: Results from the 1984 Family History Survey (Ottawa: Ministry of Supply & Services Canada 1985) Statistics Canada Cat. No. 99-962, at 27-29.

14. Work interruptions significantly harm women's present and future earning potential. Women who interrupt their employment experience losses in numerous employment related areas, including seniority, opportunity for advancement, development of job skills, opportunity to keep skills up-to-date, fringe benefits, and the ability to accumulate future benefits such as pensions and disability insurance.

Pask and McCall, supra at 56-65.

15. Average lifetime earning power has been estimated to decline by 1.5% for every year out of the workforce. For occupations requiring post-secondary education, the loss may be as high as 4.3% per year. The rate of depreciation rises the longer the period of absence.

E.S. Beninger and J.W. Smith, "Career Opportunity Costs: A Factor in Spousal Support Determination" (1982), 16 Fam. L. Q. 201 at 207.

16. The longer women spend outside the work force, the harder it is to return. The possibility of returning decreases with age.

40 D. Boothby, Economic Council of Canada, Women Re-Entering the Labour Force (Ottawa: Min. of Supply & Services, 1986) at 11.

17. Women make up the majority of part-time workers and the largest proportion is accounted for by married women with young children. Part-time jobs often pay only the minimum wage or little above that, and rarely involve private pension plan coverage or other benefits.

Statistics Canada, Women in Canada, supra at 75-76, 87-89.

McCall, supra at 53-54.

50 18. Women's responsibilities for care of children also mean women forego skills development, and employment and promotional opportunities involving overtime, a demanding work schedule, long hours, travel or relocation.

P. Hudis, "Commitment to Work and Family: Marital Status Differences in Women's Earnings" (1976), 38 J. of Marriage and the Fam. 267 at 269 and 276-277.

Pask and McCall, supra at 59.

19. Married women are disproportionately concentrated in lower paying jobs which often lack fringe benefits like disability insurance and medical and dental benefits. Where pension plans exist, they tend to be calculated on a percentage of earnings resulting in the accumulation of low pensions.

Gunderson, supra 102-104.

Statistics Canada, Women in Canada, supra at 99.

20. Those aspects of childcare which involve disruption of the workday fall most heavily on female parents. Women are more likely than their husbands to take time off work to deal with child care crises, to stay home with a sick child or to take children to medical or dental appointments.

Michelson, supra at 69-70.

21. Married immigrant women have historically had high rates of labour force participation, but are concentrated in the lowest paying and least secure job sectors. For women with limited official language skills, the fewer opportunities to upgrade these skills compared to husbands mean that the negative economic consequences of giving priority to responsibility for care of home and family are particularly great.

S. Dutt, The Social Reality of Immigrant Women: A Changing Demographic Perspective (1989). A Report prepared for The Review of Demography and its Implications for Economic and Social Policy. (Multiculturalism Sector, Dept. of the Secretary of State, Canada) at 20-30, 38-43.

A. Estable, Immigrant Women in Canada: Current Issues. (Background paper prepared for the Canadian Advisory Council on the Status of Women, 1986) at 17-25, 39-46.

22. While most of the economic disadvantage associated with marriage arises from childrearing responsibilities, it is by no means limited to that. Women often sacrifice their own career aspirations to help promote their husband's careers, including relocation to accommodate their husband's job requirements and goals. Next to childrearing, relocation as a result of their husband's jobs has the most detrimental financial effect on women's employment earnings.

Pask and McCall, supra at 59-60.

J. Mincer (1978), "Family Migration Decisions", 86, J. of Political Economy, 749 at 771.



23. Consequences for women who have accommodated career to family responsibilities frequently include: lower education and skills; deteriorated skills and skills that are not up-to-date as well as skills that are devalued or unrecognized; lower job level, income and income potential; poorer employment benefits including pensions, disability insurance and unemployment insurance entitlement; poor job security and experience. Women in these circumstances are less able to cope with or overcome employment and pay inequity, high levels of unemployment and other such barriers to self sufficiency, as well as illness and disability.

Women and Poverty Revisited, *supra* at 2, 38-56.

24. While most women are economically disadvantaged on the termination of marriage, marriage has significantly benefitted most men. The division of labour in most homes has enabled husbands to expand their knowledge and experience in work-related areas, develop a higher income potential than their wives and achieve more secure employment.

Beninger, *supra* at 203.

**iii) The Role of Spousal Support in Valuing Unpaid Domestic Labour and Addressing Women's Economic Disadvantage flowing from Marriage and Marriage Breakdown**

25. Historically, entitlement to spousal support was made available to women only. When ordered, spousal support has provided some financial recognition of the impact that women's contributions to their marriage and society, through assumption of responsibility for care of children and other work in the home, have had on their economic status. As such, spousal support has advanced sex equality. However, even where support was available, women continued to be economically disadvantaged on separation and divorce relative to men.

C. Rogerson, "The Causal Connection in Spousal Support Law" (1989), 8 Can. J. of Fam. Law, 95 at 105-106.

26. Although support provisions are now expressed in gender neutral terms, women almost exclusively continue to be in the position of needing spousal support.

Department of Justice, Evaluation of the Divorce Act, *supra* at 75, fn. 70.

27. Spousal support awards, including those under the Divorce Act, are inadequate and have only a marginal impact on reducing women's poverty on

separation. Reasons for inadequate spousal support awards include:

- a) a failure to recognize when, why and to what extent women have been economically disadvantaged as a result of family responsibilities;
- b) a failure to recognize the financial advantages accruing to men from the assumption of family responsibilities by women; and
- c) unrealistic assumptions about the ability of women to become self-sufficient.

Department of Justice, Evaluation of the Divorce Act, supra at 93-94, 131.

C. Rogerson, "Judicial Interpretation of the Spousal and Child Support Provisions of the Divorce Act (Part I)" (1991), 7 Canadian Family Law Q. 155 at 196, 215-217.

28. LEAF submits that the availability of spousal support is an important mechanism for providing equal access to economic resources and relieving against the economic disadvantage of women, particularly in the absence of significant government initiatives concerning child care, pay and employment inequity, and income security. Spousal support remains crucial in relieving against women's economic disadvantage in comparison to men related to marriage and marriage breakdown, and for adequately recognizing women's contributions to their marriage and society through childbearing, care of children and other work in the home.

29. This Court unanimously held that it is unfair and contrary to the principles of equality when the costs of an activity by which society benefits are disproportionately placed upon women. In particular,

Combining paid work with motherhood and accommodating the childbearing needs of working women are ever increasing imperatives. That those who bear children and benefit society as a whole thereby should not be economically or socially disadvantaged seems to bespeak the obvious.

Brooks v. Canada Safeway Ltd., [1989] 1 S.C.R. 1219 at 1238 and 1243.

30. LEAF submits that just as it is contrary to the principles of sex equality that the individual and systemic costs of having children be borne by women, it is inconsistent with sex equality principles that the costs of caring for children and maintaining family households fall primarily on women.

31. LEAF therefore submits that denial of effective relief against economic disadvantage related to women's contributions to their marriage

and society through application of spousal support provisions under the Divorce Act is a denial of equal protection and benefit of the law.

**B. INTERPRETATION OF THE SPOUSAL SUPPORT PROVISIONS IN THE DIVORCE ACT MUST BE GUIDED BY THE CHARTER'S GUARANTEES OF SEX EQUALITY**

10 32. The Charter is the supreme law of Canada and, accordingly, statutes must be interpreted and applied in a manner consistent with the fundamental values enshrined in the Charter.

Hills et al. v. Canada (Attorney-General), [1988] 1 S.C.R. 513 at 558.

R. v. Thompson, [1990] 2 S.C.R. 1111 at 1158.

RWDSU v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573 at 603.

20 33. This Court has identified equality as one of the fundamental values of our society, against which the objects of all legislation must be measured. This Court has also stated that "the section 15(1) guarantee is the broadest of all guarantees [in the Charter]. It applies to and supports all other rights guaranteed by the Charter."

Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143 at 185.

30 34. In this Court's developing jurisprudence, while section 15 does not itself guarantee social equality, equal law is seen as a means to attaining an equal society. Thus, the purpose of section 15 "is to ensure equality in the formulation and application of the law. The promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration".

40 Andrews, supra at 171.

35. This Court has acknowledged the importance of promoting the equality of disadvantaged groups. In the words of Madam Justice Wilson, (as she then was), "... s.15 is designed to protect those groups who suffer social, political and legal disadvantage in our society..."

Andrews, supra at 154.

50 36. LEAF submits that the spousal support provisions in the Divorce Act must be interpreted and applied in a manner consistent with constitutional equality standards, and in particular, the equality standards articulated by this Court in Andrews v. Law Society of British Columbia.

37. Where a statute can reasonably bear a meaning which would accord with

Charter values, such an interpretation should be favoured. In interpreting legislation, "the values embodied in the Charter must be given preference over an interpretation which would run contrary to them".

Hills, supra at 558.

10 38. This Court has considered the social and economic context of women's lives to ensure its decisions develop legal doctrine in a manner that affords equality for Canadian women. It has considered that the specific reality of women's experience of social, economic and sexual disadvantage must be appreciated in order to ensure that women are truly accorded equal protection and benefit of the law.

Brooks, supra.

20 Janzen and Govereau v. Platy Enterprises Ltd. [1989] 1 S.C.R. 1252.

R. v. Lavallee, [1990] 1 S.C.R. 852 at 874-875.

30 39. For example, in determining that pregnancy discrimination constituted discrimination on the basis of sex, this Court assessed and recognized the impact of women's social and economic disadvantage in society associated with procreation, and stated that removal of such disadvantage is a key purpose of anti-discrimination legislation. This case also requires a contextual approach to elaboration of legal doctrine in light of the continuing significant poverty and other economic disadvantage of women flowing from marriage and marriage breakdown.

Brooks, supra at 1238.

40 40. Spousal support law under the Divorce Act, by definition, is concerned with addressing the economic consequences of marital relationships, and in particular the roles of the spouses during cohabitation. Mr. Justice LaForest, in Richardson v. Richardson, recognized that it is largely women who are economically disadvantaged by marriage and its breakdown. The majority justices in the Court below recognized that principles for determination of spousal support under the Divorce Act are to be measured against their impact on achieving "true equality" for women.

Richardson v. Richardson [1987] 1 S.C.R. 857 at 877.

50 Moge v. Moge (1990), 25 R.F.L. (3d) 396 at 400 and 404 (Man. C.A.)

41. In actions for spousal support, the Charter requires that principles for the determination of spousal support must not impose a detrimental burden on women as compared to men by virtue of the division of labour

within marriage. It is respectfully submitted that the legal analyses adopted by the trial judge and the majority and dissenting justices in the Court of Appeal do not meet this requirement and are therefore discriminatory.

10 42. An interpretation of the law is discriminatory when it has the effect of imposing burdens and obligations or when it withholds or limits access to opportunities and benefits to historically disadvantaged groups. In formulating its approach to equality, this Court has ruled that the overriding concern is to increase the substantive equality of disempowered, disenfranchised and socially excluded groups.

Andrews, supra at 174.

20 Brooks v. Canada Safeway Ltd., supra at 1238.

R. v. Turpin, [1989] 1 S.C.R. 1296 at 1329.

43. Denial of adequate spousal support perpetuates the relative disadvantage of women, who are already disadvantaged in society.

44. LEAF submits that interpretation of the spousal support provisions of the Divorce Act consistent with the principles and values enshrined in the Charter would occur within a framework which recognizes the impact of the  
30 continuing gender-based division of labour during marriage and after separation on women's economic status and ability to become self-sufficient.

#### C. INTERPRETATION OF SECTIONS 15 AND 17 OF THE DIVORCE ACT

45. Sections 15 and 17 of the Divorce Act were part of a trend to reform  
40 family law to recognize the terminability of the marital relationship and to address more directly and fully the economic consequences to the spouses of marriage and divorce.

46. These reforms were intended to promote sex equality. The framing of spousal support entitlement in terms of economic disadvantage and advantage was an important further shift towards valuing the functions of childcare and maintenance of the home, rather than presenting women's need for  
50 support in terms of a dependency on men. It countered stereotypical assumptions that most women's lives were or should be centered almost exclusively around the home, and it eliminated a fault based entitlement to support with its entrenched sexist assumptions about the blameless wife.

Law Reform Commission of Canada, Maintenance on Divorce, Working Paper No. 12 (1975).

47. While marriage is increasingly understood as a relationship in which spouses can determine their own division of functions unconstrained by traditional legal preconceptions of gender roles, it was recognized that for the foreseeable future, at the termination of most marriages women will need spousal support as a result of a gender-based division of labour during marriage.

Law Reform Commission of Canada, supra at 22.

i) **Assessment of Economic Disadvantages and Advantages and the Causal Connection Test**

48. As noted in the Appellant's factum at paragraphs 49-61, in the majority of decisions the support provisions in the Divorce Act have been interpreted so as to require that need for support following marriage breakdown be causally connected to the marriage or its breakdown.

49. The Pelech, Richardson and Caron decisions (the "trilogy"), the jurisprudential source of the "causal connection test", were decided under the 1968 divorce legislation in the context of applications to vary final support agreements and without consideration of subsequent equality jurisprudence under human rights codes and s. 15 of the Charter. Causal connection principles therefore cannot be readily transferred to the interpretation of the Divorce Act without closer examination.

Pelech v. Pelech, [1987] 1 S.C.R. 801.

Caron v. Caron, [1987] 1 S.C.R. 892.

Richardson, supra.

50. The fact of marriage itself does not justify an award of support to address financial need. In Linton v. Linton, the Ontario Court of Appeal found that the Divorce Act was designed to address financial need which arises from the economic consequences of the division of responsibilities within marriage. LEAF submits that an interpretation of the Divorce Act that bases support on addressing the economic disadvantages and advantages flowing from marriage and its breakdown, including the functions of the spouses, is consistent with the terms of the Act and s. 15 of the Charter.

Linton v. Linton (1990), 1 O.R. (3d) 1 at 26.

Divorce Act, 1985, ss. 15(5)(b), 15(7)(a) and (c) and 17(7)(a) and (c).

51. The causal connection test has excluded the legislative requirement to address economic advantages arising from marriage, including how the division of family responsibilities often increases the ability of one spouse to pursue income enhancing opportunities. It is also respectfully submitted that while the concern to find a causal connection between need and the marriage can be applied to reflect the legislative policy of compensating spouses for any disadvantage suffered as a result of roles undertaken within marriage and other sacrifices made, it has not been interpreted and applied this way. The application of the test, including in the trilogy, has limited the availability of spousal support to women through the imposition of a narrow view of economic disadvantage.

Rogerson, "The Causal Connection Test", supra at 104, 110-112, 122-132.

52. For example, in Richardson v. Richardson the majority of this Court questioned whether there was any economic disadvantage flowing from the marriage where a former wife, who was a secretary during marriage, was unemployed on divorce after being out of the workforce to care for the two children of the marriage for essentially five years prior to separation. Mr. Justice LaForest, in his dissent, noted that while the husband's career advanced, the wife's absence from the workforce during marriage entailed a deterioration in skills, and loss of seniority and opportunity to keep skills up-to-date. His dissent also recognizes the practical difficulties for Mrs. Richardson in finding another job, particularly when combined with her post-separation responsibility for care of a child.

Richardson, supra at 886-887.

Rogerson, "Causal Connection", supra at 124.

53. It is respectfully submitted that the reasoning of the majority in Richardson also ignores the likely impact of the division of family responsibilities on the wife's job choices. Recent cases have rejected the "once a secretary always a secretary" argument, and recognized that a spouse who has the same job after separation as she had prior to or during marriage may well have suffered significant economic disadvantage.

Linton, supra at 28.

Mullin v. Mullin (1989), 24 R.F.L. (3d) 1 (P.E.I.C.A.) at 16.

54. LEAF submits that interpretation of ss. 15(7) and 17(7) of the Divorce

Act consistent with s. 15 of the Charter would preclude judicial termination of support entitlement until:

- a) a spouse economically disadvantaged by marriage or its breakdown, including post-separation child care responsibilities, has had a reasonable and sufficient opportunity or has in fact reached an adequate level of financial autonomy, where this is possible; and
- b) there has been adequate financial recognition of any economic advantages to a spouse arising from the marriage.

55. An approach to the Divorce Act that fully recognizes the economic advantages and disadvantages flowing from marriage and its breakdown would include recognition of the consequences of:

- a) the division of labour within the home during marriage, including the connection between current need and a traditional role during marriage for a woman who is ill, unemployed or underemployed;
- b) the contributions to the other spouse's income earning capacity and other contributions to the family not adequately compensated by the award of matrimonial property;
- c) detrimental reliance flowing from the assumption by one spouse of economic support of the family, with the resulting failure to pursue economic opportunities by the other spouse;
- d) giving up spousal support or pension benefits upon marriage, or a job in order to relocate;
- e) post-separation custodial responsibilities.

56. In recent cases, the future economic loss associated with career sacrifice, and gain associated with increased earning capacity, have been quantified by experts and used as the basis for awarding spousal support.

Ormerod v. Ormerod (1990), 27 R.F.L. (3d) 225.

Keast v. Keast (1986), 1 R.F.L. (3d) 401 (Ont. Dist. Ct.) at 409.

57. In the case at bar, to accept the Appellant's argument that the Respondent's current need does not flow from the marriage fails to recognize:

- a) over a lengthy marriage Zofia Moge was primarily responsible for care of the three children of the marriage as well as other work in the home;
- b) in addition she worked outside the home as a cleaner, tailoring



her paid work to her family responsibilities;

- c) during marriage she relied on her husband's assumption of primary responsibility to support the family, affecting her work-related decisions;
- d) after the separation she had custodial responsibility for the three children of the marriage, one of whom remained dependent until very recently;
- e) the Moges separated at a time when family law did not provide for division of family property;
- f) Zofia Moge has a limited education and work experience, and has some health difficulties which restrict her employment options;
- g) she had no real opportunity to upgrade her earning potential, including improvement of her English language skills;
- h) the possibilities for enhancing earning capacity are limited for an immigrant woman in her 50's with limited English and job experience; and
- i) low levels of child and spousal support have affected her ability to acquire assets or save for retirement years. By contrast the Appellant's financial position has steadily improved following separation.

58. LEAF submits that these factors associated with Zofia Moge's economic disadvantage, which are typical of Canadian women, are both inter-related, cumulative, and related to her marriage and its breakdown.

59. The Appellant's argument, like the case law upon which he relies, reflects an interpretation of s. 17(7) of the Divorce Act that minimizes the economic consequences for both spouses of a gender-based division of labour during marriage so as to give priority to the legislative object of promoting self sufficiency. LEAF submits that any rationales for emphasizing self sufficiency in the context of a final separation agreement do not apply to other original and variation applications.

#### ii) **The Traditional - Modern Marriage Dichotomy**

60. Courts recently have employed a categorization of marriages as either traditional or non-traditional for purposes of assessing support entitlement. The terminology has been used by courts as a short form

indicator of support entitlement. A classification as "traditional" provides the basis for holding that a woman's economic need, at least on separation, is related to or "causally connected" to her role in marriage.

Moge, supra at 401-403.

Heinemann v. Heinemann (1989), 20 R.F.L. (3d) 236 (N.S.C.A.) at 272-274.

Rogerson, "Judicial Interpretation", supra at 179-196.

61. For those who are not considered to be in a "traditional" marriage, expeditious self-sufficiency "has become the rule". Support is seen as short term and transitional. Particularly for women more recently married, entitlement to support is assessed against false assumptions of women's equality within marriage, in employment and training, and under family property laws. The presumption is therefore that need is not related to marriage; instead, extrinsic factors to financial autonomy or individual choices are considered responsible unless there is strong and direct evidence to the contrary.

Moge, supra at 400.

Heinemann, supra at 272-274.

Rogerson, "Judicial Interpretation", supra at 197-244.

62. The categorization of marriages as traditional or modern invites and in practice operates on the basis of inaccurate and often stereotypical views about the role of women in each type of marriage and women's economic possibilities on divorce.

63. Although it has been recognized that a wife could work outside the home for most of the marriage and yet be part of a traditional marriage, recognition of significant or long-term economic disadvantage becomes largely limited to a narrow female homemaker/male breadwinner model of household. This family occurs infrequently in Canadian society, even in marriages of longer duration.

Heinemann, supra at 272-274.

Gunderson, supra at 14-15.

64. The debate in the case at bar about whether the Moge marriage was a traditional one demonstrates how the process of categorization becomes a subjective search for a stereotypical marriage, and shifts the focus away from a concrete examination of the economic disadvantages and advantages

arising from all varieties of marriage. As such, it is an interpretative tool that is of little assistance in addressing the criteria in ss. 15(7) and 17(7) of the Divorce Act, and superimposes criteria that the Divorce Act was designed to eliminate and that are inconsistent with s. 15 of the Charter.

10 65. While increasingly marriages may appear to be non-traditional in the sense that women often work outside the home, even in non-traditional occupations, women's roles within marriage remain significantly unchanged. Women's continued disproportionate responsibility for child care and household work within marriage means that in most recent marriages, women's poorer financial position on separation will be attributable, at least in part, to the marriage.

20 66. With the traditional-modern marriage categorization, a woman's paid employment during marriage is seen as the prime gauge for determining the existence or depth of economic disadvantage. LEAF submits that the more appropriate focus for determining economic disadvantage is the extent to which the marriage is characterized by a differential and/or inequitable division of labour.

30 Rogerson, "Judicial Interpretation", supra at 206-209.

67. LEAF further submits that entitlement to spousal support should be based on an examination of the events and actual roles played by the parties in the marriage, and assessed within a framework which recognizes the significant negative economic consequences for women of all forms of a gender-based division of labour within marriage.

40 iii) **Economic Self-Sufficiency and the Clean Break Philosophy**

68. The goal of economic self sufficiency at ss. 15(7)(d) and 17(7)(d) of the Divorce Act has been used as the legislative basis for an interpretation of the spousal support provisions where the priority is to cut the economic ties between the spouses as quickly as possible and allow spouses to go their separate ways. Spouses are declared self sufficient and support terminated after a short period, regardless of any continuing economic disadvantage flowing from the marriage and a poor standard of living.

50 69. This "clean break philosophy", where circumstances are viewed through

the lens of promotion of self sufficiency and a narrow view is taken of economic disadvantage and advantage, is the model of support upon which the courts now frequently operate. LEAF submits that this approach is inconsistent with the terms of the Divorce Act and s. 15 of the Charter.

Moge, supra at 400.

10 Rogerson, "Judicial Interpretation", supra at 162-163, 177-178 and 198-231.

Rogerson, "The Causal Connection Test", supra at 115-118 and 122-127.

20 70. The objective of promoting economic self sufficiency in the Divorce Act is carefully qualified and is only one of four objectives that a support order must address. There is no indication that Parliament intended that this provision be given priority over other objectives. LEAF submits that some legislative objectives will be more relevant to some marriages because of the variety of marriage situations that exist, but in each case all objectives must be addressed in assessing entitlement, quantum and duration of support.

Linton, supra at 26-27.

Thorsteinson v. Thorsteinson (1988), 52 Man. R. (2d) 115 at 118.

30 71. LEAF submits that to be consistent with and further s. 15 of the Charter, the objective of promoting economic self-sufficiency through the spousal support provisions in the Divorce Act must be interpreted and applied so as to truly promote the economic and social equality of women following marriage breakdown.

40 72. While women are increasingly equal to men in legal status, de facto women remain disadvantaged on marriage breakdown. It would undermine women's equality to apply the legislative object of self-sufficiency in a manner that presumes women, whenever they were married, are on an equal social and economic footing with men on marriage breakdown when they are not. It would further undermine women's equality to assess the degree of women's economic disadvantage and the necessary steps and barriers to becoming self sufficient according to a standard reflecting the life circumstances of men.

50 73. LEAF submits that an assessment of the ability of women to achieve economic self sufficiency following marriage breakdown must take account of the ongoing nature of the economic disadvantage arising from the marriage.

74. Divorce does not provide women with a "clean break" from the consequences of the roles they play during marriage. The majority in the court below recognized that when women take low-paid relatively unskilled work during marriage, their ability to improve their earning capacity after marriage breakdown is diminished by their limited skills, training and experience. Even when a woman has been employed during the marriage in a full time occupation, she may never be able to compensate for all the opportunities she has lost or had to turn down because of her family responsibilities.

Moge, supra at 402.

75. While the support provisions of the Divorce Act are not designed to address the disadvantage women experience due to extrinsic barriers to autonomy, assessment of the practicability of self sufficiency or a reasonable time-frame in which to achieve same must include consideration of the reduced ability to overcome extrinsic barriers to self sufficiency. For example, women will be more vulnerable to unemployment due to lack of seniority or limited job experience, as occurred in the case at bar.

76. Women's post separation responsibility for care of dependent children also frequently affects their ability to become self sufficient. The Divorce Act recognizes that there are negative economic consequences to the custodial parent that are not addressed by child support obligations. Primary responsibility for care of children on separation affects training and employment possibilities, often more so than during marriage, because of limited time and money, and a lack of adequate childcare.

Divorce Act ss. 15(7)(b) and 17(7)(b).

Brockie v. Brockie (1987), 5 R.F.L. (3d) 440 (Man. Q.B.) at 446-447, aff'd (1987) 8 R.F.L. (3d) 302 (Man. C.A.).

Rogerson, "Judicial Interpretation", supra at 202-203.

77. In addition, low levels of child support, as in the case at bar, mean that a woman already economically disadvantaged by the marriage is unable to save for significant expenses and retirement, or cope with financial crises, because all her "extra" money has been required for the support of the children.

78. An approach to spousal support which ignores the interrelationship between the needs of former spouses as adults and their needs as parents

leads to an inadequate resolution of the economic and custodial problems resulting from marriage breakdown. The custodial parent needs relief not only because of her status as former spouse, but by virtue of her role as parent, and in order to enable her to perform the on-going function of the provision of child care.

10 C. Rogerson, "Winning the Battle, Losing the War: The Plight of the Custodial Mother After Judgement" in M.E. Hughes and E.D. Pask, National Themes in Family Law (Toronto: Carswell, 1988) 20 at 22, 43-46.

79. The economic disadvantage experienced by women who have been primarily responsible for care of children and home during marriage often means, particularly in long-term marriages, that economic disadvantage is permanent and the ability to be self supporting at an adequate level is limited. This is the case not only for women divorcing at age 50 or 60, but also for women in their 30's or 40's, especially when post separation responsibility for dependent children continues for some time.

80. The greater the participation in the workforce during marriage and the more time for unconstrained post-separation participation in the workforce prior to retirement, likely the better a woman's relative income earning possibilities in the years following divorce. Nevertheless, there may still be on-going economic disadvantages and advantages to the spouses flowing from the marriage and its breakdown that require spousal support to bring her to an appropriate standard of living.

81. LEAF submits that the level of self sufficiency, or the standard of living to which a divorced spouse is entitled, should be subjectively determined. The length of the marriage, the marital standard of living, the impact of roles assumed during marriage on earning capacity, the expectations of the parties, and the relative earnings of the spouses should be considered.

82. Concern to cut the economic ties has led some courts in recent years to set a glass ceiling as to the amount of income a spouse could earn before her right to support was terminated. Generally, a wife was self sufficient if she earned approximately \$20,000.00 per annum or if she was or could be employed full time.

Rogerson, "Judicial Interpretation", supra at 207.

Cymbalisty v. Cymbalisty (1989), 56 Man. R. (2d) 28 (Q.B.) at 32.

83. Recently some courts have defined the post-divorce standard of living as a reasonable standard which in the case of a long-term marriage should be assessed in the context of the marital standard of living.

Lynk v. Lynk (1989), 21 R.F.L. (3d) 337 at 352.

Mullin v. Mullin (1989), 24 R.F.L. (3d) 1 (P.E.I.C.A.) at 18.

Linton, supra at 27.

Row v. Row (Unreported, Alta. Q.B., Judicial District of Edmonton, 4803 81175), (August 22, 1991) at 2.

84. LEAF submits that to be consistent with s. 15 of the Charter, the concept of need, and the determination of what constitutes economic self sufficiency or the appropriate standard of living, should include recognition of economic advantages to a higher income spouse arising from marriage as well as the consequences of on-going economic disadvantages. The legislative objectives of spousal support should be read together such that a spouse, although able to meet her current expenses, may nevertheless be entitled to support to address other legislative concerns and thereby improve her standard of living. The longer the marriage and the greater the degree of economic interdependency of the spouses, including role differentiation, the stronger the claim to equal standards of living after marriage breakdown, or the marital standard where financially possible.

85. It is further submitted that the concept of economic self sufficiency should address future as well as current needs. Recognition of the economic cycles of a family, involving the need to save for retirement years particularly for women who are separated in their forties, would be an important factor in alleviating the poverty of divorced elder women.

M. Grassby, "Women in their Forties" (1991), 30 R.F.L. (3d) 369.

#### PART IV: ORDER SOUGHT

86. Based on the principles of interpretation outlined above, LEAF submits that this appeal should be dismissed and the Respondent's entitlement to support should not be time limited.

All of which is respectfully submitted.



Melena Orton



Alison Diduck

Of counsel for the Women's Legal Education and Action Fund

**PART V - AUTHORITIES****A. CASES**

	<b><u>Factum Page</u></b>	<b><u>Reference</u></b>
1. <u>Andrews v. Law Society of British Columbia</u> , [1989] 1 S.C.R. 143		8, 10
2. <u>Brockie v. Brockie</u> (1987), 5 R.F.L. (3d) 440 (Man. Q.B.). aff'd (1987) 8 R.F.L. (3d) 302 (Man. C.A.)		18
3. <u>Brooks v. Canada Safeway Ltd.</u> , [1989] 1 S.C.R. 1219	7, 9, 10	
4. <u>Caron v. Caron</u> , [1987] 1 S.C.R. 892		11
5. <u>Cymbalisty v. Cymbalisty</u> (1989), 56 Man. R. (2d) 28 (Q.B.)		19
6. <u>Heinemann v. Heinemann</u> (1989), 20 R.F.L. (3d) 236 (N.S.C.A.)		15
7. <u>Hills et al. v. Canada (Attorney-General)</u> , [1988] 1 S.C.R. 513		8, 9
8. <u>Janzen and Govereau v. Platy Enterprises Ltd.</u> [1989] 1 S.C.R. 1252		9
9. <u>Keast v. Keast</u> (1986), 1 R.F.L. (3d) 401 (Ont. Dist. Ct.)		13
10. <u>R. v. Lavallee</u> , [1990] 1 S.C.R. 852		9
11. <u>Linton v. Linton</u> (1990), 1 O.R. (3d) 1	11, 12, 17, 20	
12. <u>Lynk v. Lynk</u> (1989), 21 R.F.L. (3d) 337		20
13. <u>Moge v. Moge</u> (1990), 25 R.F.L. (3d) 396 (Man. C.A.)		9, 15, 17, 18
14. <u>Mullin v. Mullin</u> (1989), 24 R.F.L. (3d) 1 (P.E.I.C.A.)		12, 20
15. <u>Ormerod v. Ormerod</u> (1990), 27 R.F.L. (3d) 225		13
16. <u>Pelech v. Pelech</u> , [1987] 1 S.C.R. 801		11
17. <u>Retail Wholesale and Department Store Union</u> <u>v. Dolphin Delivery Ltd.</u> , [1986] 2 S.C.R. 573		8
18. <u>Richardson v. Richardson</u> [1987] 1 S.C.R. 857		9, 11, 12



19. Row v. Row (Unreported, Alta. Q.B., Judicial District of Edmonton, 4803 81175), (August 22, 1991) 20
20. R. v. Thompson, [1990] 2 S.C.R. 1111 8
21. Thornsteinson v. Thorsteinson (1988), 52 Man. R. (2d) 115 17
22. R. v. Turpin, [1989] 1 S.C.R. 1296 10

#### **B. OTHER AUTHORITIES**

23. Abella, R. Equality in Employment: Royal Commission Report. Royal Commission on Equality in Employment. (1984) 2, 3
24. Beninger, E.S. and J.W. Smith, "Career Opportunity Costs: A Factor in Spousal Support Determination" (1982), 16 Fam. L. Q. 201 4, 6
25. Boothby, D., Economic Council of Canada, Women Re-Entering the Labour Force (Ottawa: Min. of Supply & Services, 1986) 4
26. Burch, T.K., Family History Survey: Preliminary Findings (Ottawa: Ministry of Supply & Services Canada 1985) Statistics Canada Cat. No. 99-955 4
27. Department of Justice, Canada, Evaluation of the Divorce Act Phase II: Monitoring and Evaluation (Ottawa: Dept. of Justice, Bureau of Review, May, 1990) 1, 2, 6, 7
28. Dutt, S., The Social Reality of Immigrant Women: A Changing Demographic Perspective (1989). A Report prepared for The Review of Demography and its Implications for Economic and Social Policy. (Multiculturalism Sector, Dept. of the Secretary of State, Canada) 5
29. Estable, A., Immigrant Women in Canada: Current Issues. (Background paper prepared for the Canadian Advisory Council on the Status of Women, 1986) 5
30. Grassby, "Women in their Forties" (1991), 30 R.F.L. (3d) 369 20
31. Gunderson, L., Muszinski, and J. Kleck, Women and Labour Market Poverty (Ottawa: Canadian Advisory Council on the Status of Women, 1990) 2, 3, 5, 15

32. Hudis, P., "Commitment to Work and Family: Marital Status Differences in Women's Earnings" (1976), 38 J. of Marriage and the Fam. 267 5
33. Law Reform Commission of Canada, Maintenance on Divorce, Working Paper No. 12 (1975) 11
34. McCall, M. Background Paper: Options for the Reform of the Law of Spousal Support Under the Divorce Act, 1985 (1991). Prepared for the Dept. of Justice, Canada 1, 4
35. Michelson, W. From Sun to Sun: Daily Obligations and Community Structure in the Lives of Employed Women and Their Families, (Totowa, New Jersey: Rowman & Allanheld, 1985) 3, 5
36. Mincer, J., (1978), "Family Migration Decisions", 86 J. of Political Economy, 749 5
37. National Council of Welfare, Women and Poverty Revisited, (Ottawa: Min. of Supply & Services, 1990) 4, 6
38. Pask, E.D. and M.L. McCall, eds., How Much and Why? Economic Implications of Marriage Breakdown: Spousal and Child Support, (Calgary: Canadian Research Institute for Law and the Family, 1989) 3, 4, 5
39. Robinson P., Women's Work Interruptions: Results from the 1984 Family History Survey (Ottawa: Ministry of Supply & Services Canada 1985) Statistics Canada Cat. No. 99-962 4
40. Rogerson, C., "The Causal Connection in Spousal Support Law" (1989), 8 Can. J. of Fam. Law 95 6, 12, 17
41. Rogerson, C. "Judicial Interpretation of the Spousal and Child Support Provisions of the Divorce Act (Part I)" (1991), 7 Canadian Family Law O. 155 7, 15, 16, 17, 18, 19
42. Rogerson, C., "Winning the Battle, Losing the War: The Plight of the Custodial Mother After Judgement" in M.E. Hughes and E.D. Pask, National Themes in Family Law (Toronto: Carswell, 1988) 20 19
43. Statistics Canada, General Social Survey Analysis Series: Where Does Time Go? (Ottawa: Min. of Industry, Trade & Tech., 1991) 3

44. Statistics Canada. Women in Canada: A Statistical Report (2nd ed.). (Ottawa: Min. of Supply & Services, 1990) 2, 3, 4, 5
45. Weitzman, L. The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America, (New York: The Free Press, 1985) 1

#### **C. STATUTES**

46. Divorce Act, S.C. 1986, c.4, ss. 15 and 17 11, 18