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Résumé de l'article

La théorie du lien de causalité établie dans les trois arrêts de la Cour suprême *Pelech, Caron* et *Richardson*, a soulevé bien des dilemmes, sans toutefois y apporter des solutions. Conçue avec l'intention d'être prévisible, certaine et uniforme, elle fut entachée de complications dès le départ. Le professeur McLeod dont les opinions font l'objet de nombreuses citations de la part des tribunaux, conclut qu'un lien de causalité entre les besoins du souscripteur et l'état de dépendance économique engendré par le mariage est un prérequis légal pour le succès de toute demande de soutien du conjoint, qu'elle tombe sous l'égide de la *Loi sur le divorce de 1985* ou d'une législation provinciale, qu'il y ait eu ou non, entente au préalable. Cette approche couvre-tout est une extension inacceptable de l'interprétation des arrêts *Pelech, Caron* et *Richardson*.

Un grand nombre de questions ont été soulevées à l'égard de l'application éventuelle de cette trilogie émanant de la Cour suprême du Canada. Les tribunaux y ont apporté des interprétations et des opinions qui sont à la fois incompatibles et divergentes. Ce conflit judiciaire ne peut être rationalisé par le fait que chaque cause en est une d'espèce qui doit être jugée en considérant les faits qui la caractérisent. Par conséquent ce texte ne veut pas être une étude des différents courants jurisprudentiels; il y a au-delà de 200 décisions qui ont cité les arrêts *Pelech, Caron* et *Richardson*. Un examen méticuleux de ces décisions nous mène à conclure que les *attitudes* individuelles des juges en question à l'égard du mariage, du divorce et de l'obligation de soutien du conjoint, constituent une prémisse non articulée qui explique la grande diversité d'opinions exprimées. En espérant mettre de l'ordre dans ce chaos judiciaire, l'auteur tente d'établir une structure de prise de décisions qui tiendra compte des exigences de la logique et de l'équité.

CHRONIQUE DE JURISPRUDENCE

Further Reflections on Spousal and Child Support After Pelech, Caron and Richardson *

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ABSTRACT

The causal connection thesis espoused in Pelech, Caron *and* Richardson *has provoked more questions than solutions.* [1] *Although conceived with the objective of providing certainty and predictability as well as national uniformity, its subsequent gestation has been fraught with complications. Professor J. McLeod, whose opinions in this context have been cited by the judiciary on frequent occasions, concludes that a causal connection between the applicant's need and a state of economic dependence engendered by the marriage is a legal prerequisite to the success of any*

RÉSUMÉ

La théorie du lien de causalité établie dans les trois arrêts de la Cour suprême Pelech, Caron *et* Richardson, *a soulevé bien des dilemmes, sans toutefois y apporter des solutions* [1]. *Conçue avec l'intention d'être prévisible, certaine et uniforme, elle fut entachée de complications dès le départ. Le professeur McLeod dont les opinions font l'objet de nombreuses citations de la part des tribunaux, conclut qu'un lien de causalité entre les besoins du souscripteur et l'état de dépendance économique engendré par le mariage est un prérequis légal pour le succès de toute demande de soutien du conjoint,*

1. For earlier commentary, see Julien D. PAYNE, "A Practitioner's Guide to Spousal Support in Divorce Proceedings", (1988) 19 *R.G.D.* 701–734, especially pp. 720–730. The prior article concentrates on the identification of questions that have arisen and on the conflict of judicial opinion on those questions. The present analysis focuses on rational solutions to the diverse questions that have arisen.

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claim for spousal support, whether it be governed by the Divorce Act, 1985 *or by provincial statute and whether or not any prior settlement has been reached. This blanket approach is, in the opinion of this writer, an unacceptable extension of* Pelech, Caron *and* Richardson.

Many questions have arisen concerning the prospective application of the Supreme Court of Canada trilogy. Answers to these questions by the judiciary have generated divergent and irreconcilable opinions and dispositions. The judicial conflict cannot be rationalized simply on the basis that each case is to be determined on its own facts. Consequently, this paper does not provide a detailed analysis of the cases nor even cite the diverse judicial rulings. There must be well over two hundred cases wherein Pelech, Caron *and* Richardson *have been cited. An examination of these decisions leads to the inescapable conclusion that the* attitudes *of individual judges towards marriage, divorce, and spousal support obligations constitute a major inarticulate premise that explains the wide diversity of opinions expressed and dispositions reached. In an attempt to provide some semblance of order out of judicial chaos, this writer attempts to provide a framework for future decision making that can accommodate the demands of both logic and fairness.*

qu'elle tombe sous l'égide de la Loi sur le divorce de 1985 *ou d'une législation provinciale, qu'il y ait eu ou non, entente au préalable. Cette approche couvre-tout est une extension inacceptable de l'interprétation des arrêts* Pelech, Caron *et* Richardson.

Un grand nombre de questions ont été soulevées à l'égard de l'application éventuelle de cette trilogie émanant de la Cour suprême du Canada. Les tribunaux y ont apporté des interprétations et des opinions qui sont à la fois incompatibles et divergentes. Ce conflit judiciaire ne peut être rationalisé par le fait que chaque cause en est une d'espèce qui doit être jugée en considérant les faits qui la caractérisent. Par conséquent ce texte ne veut pas être une étude des différents courants jurisprudentiels; il y a au-delà de 200 décisions qui ont cité les arrêts Pelech, Caron *et* Richardson. *Un examen méticuleux de ces décisions nous mène à conclure que les* attitudes *individuelles des juges en question à l'égard du mariage, du divorce et de l'obligation de soutien du conjoint, constituent une prémisse non articulée qui explique la grande diversité d'opinions exprimées. En espérant mettre de l'ordre dans ce chaos judiciaire, l'auteur tente d'établir une structure de prise de décisions qui tiendra compte des exigences de la logique et de l'équité.*

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INTRODUCTION

1. Before *Pelech*[2] *Caron*[3] and *Richardson*,[4] informed lawyers in Canada knew about the legal significance of separation agreements on a subsequent claim for spousal support in divorce proceedings. Although some variations based on provincial appellate rulings might have been perceptible, lawyers were aware of two fundamental principles. First, spouses could not oust the statutory jurisdiction of the courts to order spousal support in divorce proceedings. Secondly, the courts would not lightly interfere with the provisions of a comprehensive separation agreement that purported to finally determine the support and property rights of the spouses. Furthermore, if counsel in divorce proceedings wished to reserve the right to subsequently apply for a variation of the spousal support provisions of a separation agreement, counsel would make every effort to have the court incorporate the support provisions of the separation agreement in the divorce judgment. Such incorporation, which was often on consent, was viewed as a clear indication of the right to apply for variation in the event of a material change of circumstances. If counsel opted to avoid incorporation of the spousal contractual support covenants in the divorce judgment, that was taken to be a clear

2. *Pelech* v. *Pelech*, [1987] 1 S.C.R. 801; [1987] 4 W.W.R. 481; 76 N.R. 81; 14 B.C.L.R. (2d) 145; 22 O.A.C. 1; 7 R.F.L. (3d) 225; 38 D.L.R. (4th) 641.

3. *Caron* v. *Caron*, [1987] 1 S.C.R. 892; [1987] 4 W.W.R. 522; 75 N.R. 36; 14 B.C.L.R. (2d) 186; 7 R.F.L. (3d) 274; 38 D.L.R. (4th) 735.

4. *Richardson* v. *Richardson*, [1987] 1 S.C.R. 857; 7 R.F.L. (3d) 304; 38 D.L.R. (4th) 699.

indication of an election to abide by the terms of the separation agreement. Wise counsel would, of course, carefully assess the pros and cons of incorporation at the time of the divorce hearing.

2. Established legal perceptions and practices were swept aside by the rulings of the Supreme Court of Canada in *Pelech, Caron* and *Richardson*. Judges, whose erudition and wisdom were not tempered by significant experience at the Family Law Bar in Canada, evinced no hesitation in changing the law's approach to spousal support agreements or settlements in divorce proceedings to a position that no provincial appellate court had previously espoused. The concept of contractual autonomy was reinforced in its pristine splendour.

3. Had *Pelech, Caron* or *Richardson* involved a Charter challenge, one might reasonably have expected to hear submissions on the socio-economic implications of specific legal doctrines. How interesting it might have been if data had been furnished to the Supreme Court of Canada concerning the implications of future policy declarations of contractual autonomy. How much more insightful it would have been if the causal connection thesis of *Pelech, Caron* and *Richardson* had been linked to empirical data demonstrating a manifest correlation between parenting roles, both during marriage and after divorce, and the feminization of poverty in Canada. Readily accessible empirical data establishing such a correlation can be found in a two-volume report commissioned by the Institute of Law Research and Reform for the Province of Alberta [5] and in a more recent report commissioned by the Department of Justice, Canada. [6] Although this latter report was published after *Pelech, Caron* and *Richardson* were decided, other data from agencies such as the National Council on Welfare has consistently demonstrated the economic plight of "single parents" after separation and divorce.

4. The principles articulated in *Pelech, Caron* and *Richardson* purport to promote uniformity throughout Canada and supposedly add precision to an area previously plagued by uncertainty. [7] The aspirations of the Supreme Court of Canada appear to have been unrealized in light of subsequent judicial rulings. Indeed, contrary to the presumed expectations of the Supreme Court of Canada, *Pelech, Caron* and *Richardson* have triggered more questions than answers. Issues that have triggered divergent, and sometimes contradictory, judicial responses include :

(i) Do *Pelech, Caron* and *Richardson* survive the enactment of the *Divorce Act, 1985*?

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5. CANADIAN INSTITUTE FOR RESEARCH, *Matrimonial Support Failures : Reasons, Profiles and Perceptions of Individuals Involved*, Alberta, 1981.

6. C. James RICHARDSON, *Court-based Divorce Mediation in Four Canadian Cities : An Overview of Research Results*, February, 1988.

7. *Supra*, note 2, 7 R.F.L. (3d) 225, p. 256.

(ii) Does the "causal connection" thesis apply equally to payors and payees?

(iii) Are sick or disabled spouses or ex-spouses entitled to spousal support? Does this depend on whether the sickness or disability preceded the marriage, arose during matrimonial cohabitation, or was diagnosed, or arose, after separation or divorce?

(iv) What agreements fall within the ambit of *Pelech, Caron* and *Richardson*? Must the agreement be in writing? Will an oral agreement negotiated under the pressure of litigation qualify? Is it material that the agreement was executed prior to *Pelech, Caron* and *Richardson*? When will an agreement be deemed to be a "final" settlement? Is a general release sufficient to demonstrate finality? Must finality be spelled out or may it be implied? Can parole evidence be adduced to demonstrate the future expectations of the spouses? What is signified by the words "the advice of independent legal counsel"? Is the timing of such advice a relevant consideration? Must it be "informed" advice? Do the same considerations apply to marriage contracts as to separation agreements?

(v) How can child support be segregated from spousal support without undermining the economic integrity of the household?

(vi) In what circumstances, if at all, can *Pelech, Caron* and *Richardson* be applied to non-consensual situations where no bargain has been struck?

(vii) What is meant by "causal connection"? Is it analogous to proximate cause in contract and tort law? What if there are multiple causes? Do the words "some causal connection" imply "a" causal connection or "the only" causal connection? When is causal connection established? How is it established?

(viii) Do *Pelech, Caron* and *Richardson* apply to applications for spousal support under provincial statutes?

5. The above questions have generated wide differences of judicial opinion. Few, if any, provincial appellate rulings provide definitive answers to any of the above questions. Judicial disparity at the trial level may be attributable to two considerations. First, each case must be reviewed in light of its own particular facts. Secondly, the language of the governing statute is so general that there is considerable latitude for the exercise of a virtually unfettered judicial discretion. Consequently, subjective considerations inevitably intrude as judges and lawyers seek to interpret and apply statutory provisions that regulate spousal and child support. Some sixty years ago, an American commentator observed that the trial judge's personal beliefs and biases towards marriage, divorce and support

constitute an "inarticulate major premise" of support dispositions. [8] More recently, Judge Rosalie Silberman Abella asserted that Canada's spousal support laws reflect a "Rubik's Cube for which no one yet has written the Solution Book". [9] In the absence of fixed formula financing, this is inevitable.

6. Given a virtually unfettered judicial discretion, it is hardly surprising that judges have moved in different directions in interpreting and applying *Pelech, Caron* and *Richardson*. Attitudes towards spousal support on marriage breakdown or divorce are conditioned by perceptions as to the nature of marriage. And these may differ markedly according to one's background and experience. In addition, marriage is not monolithic in character; it accommodates a variety of lifestyles, which the law must recognize.

7. Any attempt to rationalize current judicial decisions would be a futile task. Even first year law students soon recognize that it is impossible to reconcile the irreconcilable. Consequently, the following conclusions are premised on this author's predisposition towards marriage, divorce and support rights and obligations and his attempt to provide a sense of direction respecting the future role of *Pelech, Caron* and *Richardson* under both federal and provincial legislation.

I. THE RULE IN PELECH, CARON AND RICHARDSON

8. The principles endorsed in *Pelech, Caron* and *Richardson* were defined as follows by Wilson, J. in *Pelech* :

> It seems to me that where the parties have negotiated their own agreement, freely and on the advice of independent legal counsel, as to how their financial affairs should be settled on the breakdown of their marriage, and the agreement is not unconscionable in the substantive law sense, it should be respected. People should be encouraged to take responsibility for their own lives and their own decisions. This should be the overriding policy consideration.
>
> The test of radical change in *Webb* is an attempt to carve a fairly narrow exception to the general policy of restraint. It fails, however, in my opinion in one important particular. It makes the mere magnitude of the change the justification for the court's intervention and takes no account of whether or not the change is in any way related to the fact of the marriage. In order to impose responsibility for changed circumstances on a former spouse it seems to me essential that there must be some relationship between the change and the marriage. Matas J.A. hinted at this in *Ross*. In the case of a wife who has

8. Edward W. COOEY, "The Exercise of Judicial Discretion in the Award of Alimony", (1939) 6 *Law and Contemporary Problems* 213.

9. "Economic Adjustment on Marriage Breakdown : Support", (1981) 4 *Fam. Law Rev.* 1, reprinted in *Payne's Divorce and Family Law Digest*, 1983 tab, pp. 83-875.

> devoted herself exclusively to home and children and has acquired no working skills outside the home, this relationship is readily established. The former spouse in these circumstances should have a responsibility for a radical change in this ex-wife's circumstances generated as a consequence of her total dependency during the period of the marriage. By way of contrast, a former spouse who simply falls upon hard times through unwise investment, business adversity, or a lifestyle beyond his or her means should not be able to fall back on the former spouse, no matter how radical the change may be, simply because they once were husband and wife.
>
> Absent some causal connection between the changed circumstances and the marriage, it seems to me that parties who have declared their relationship at an end should be taken at their word. They made the decision to marry and they made the decision to terminate their marriage. Their decisions should be respected. They should thereafter be free to make new lives for themselves without an ongoing contingent liability for future misfortunes which may befall the other. It is only, in my view, where the future misfortune has its genesis in the fact of the marriage that the court should be able to override the settlement of their affairs made by the parties themselves. Each marriage relationship creates its own economic pattern from which the self-sufficiency or dependency of the partners flows. The assessment of the extent of that pattern's post-marital impact is essentially a matter for the judge of first instance. The causal connection between the severe hardship being experienced by the former spouse and the marriage provides, in my view, the necessary legal criterion for determining when a case falls within the "narrow range of cases" referred to by Zuber J.A. in *Farquar*. It is this element which is missing in *Webb*. Accordingly, where an applicant seeking maintenance or an increase in the existing level of maintenance establishes that he or she has suffered a radical change in circumstances flowing from an economic pattern of dependency engendered by the marriage, the court may exercise its relieving power. Otherwise, the obligation to support the former spouse should be, as in the case of any other citizen, the communal responsibility of the state. [10]

9. The above opinions were formulated in the context of applications for permanent spousal support under section 11 of the *Divorce Act* of 1968. [11] They have been applied to original applications for support in divorce proceedings and to applications to vary minutes of settlement that were incorporated in a prior divorce judgment. [12]

10. The theses espoused in *Pelech, Caron* and *Richardson* specifically addressed the significance of a spousal agreement or settlement on a subsequent claim for permanent spousal support on or after divorce. Although articulated in a statutory context, the language of the judgments is not itself to be interpreted as though it represents a codification of law.

11. The policy declarations espoused by the Supreme Court of Canada in *Pelech, Caron* and *Richardson*, which were formulated in the

10. *Supra*, note 2, 7 R.F.L. (3d) 225, pp. 269-270.
11. S.C. 1967-68, c. 24, subsequently R.S.C. 1970, c. D-8.
12. *Supra*, note 4; compare dissenting judgment of La Forest, J.

context of section 11 of the 1968 *Divorce Act*, must now be re-evaluated in light of sections 15 and 17 of the *Divorce Act, 1985*, which introduce new factors and implement explicit statutory policy objectives. In this latter context, it may be imperative to differentiate between consensual and non-consensual situations that have triggered spousal support claims.

II. CONSENSUAL SITUATIONS

12. *Pelech, Caron* and *Richardson* impose the following limitations on the doctrine that the courts will not disturb consensual arrangements concerning spousal support in the absence of a radical change of circumstances and some causal connection between the changed circumstances and a pattern of economic dependency engendered by the marriage.

13. First, application of the causal connection thesis presupposes that a prior separation agreement is valid according to established common law principles. In the words of Wilson, J. in *Pelech* : "If the contract is invalid then the question as to whether or not the court should defer to its terms disappears". [13]

14. Secondly, the doctrine of unconscionability, as defined in *Mundinger* v. *Mundinger* [14] may negate a spousal contract, but unconscionability in the general sense of unfairness is not, in itself, sufficient to vitiate the contract.

15. Thirdly, the spousal agreement must not only have been freely negotiated; it must also have been negotiated after full disclosure and on the advice of independent legal counsel.

16. Fourthly, a party who seeks to rely upon a negotiated settlement must establish, as a preliminary matter, that its provisions were intended to constitute a final and binding determination of the matters with which they deal. [15]

17. In *Pelech, Caron* and *Richardson*, the Supreme Court of Canada endorsed a policy whereby spousal contracts or settlements will be respected by the courts, subject to clearly delineated exceptions. The twin concepts of contractual autonomy and judicial deference to the wishes of the spouses presumably survive the repeal of the old *Divorce Act* and the commencement of the new *Divorce Act*.

18. The application of the *Pelech, Caron* and *Richardson* criteria to spousal agreements negotiated in the context of the *Divorce Act, 1985*

13. *Supra*, note 2, 7 R.F.L. (3d) 225, p. 268.

14. [1969] 1 O.R. 606; 3 D.L.R. (3d) 338; 14 D.L.R. (3d) 256n (S.C.C.).

15. *Drewery* v. *Drewery*, (1986) 53 O.R. (2d) 680; 50 R.F.L. (2d) 373 (Ont. Unif. Fam. Ct.) (Mendes da Costa, U.F.C.J.); *Jenkins* v. *Jenkins*, Ont. Unif. Fam. Ct., June 21, 1989 (Steinberg, U.F.C.J.).

seems not unreasonable, even though an "agreement" is identified under subsection 15(4) of that *Act* as only one of several factors relevant to an original application for spousal support. [16] Lawyers are now familiar with *Pelech, Caron* and *Richardson* and can draft separation agreements or minutes of settlement in such a manner as will clearly indicate whether finality or variation is envisaged. Just as one can contract into *Pelech, Caron* and *Richardson*, one can contract out.

19. A potential stumbling block to the continued application of *Pelech, Caron* and *Richardson* may arise, however, pursuant to subsection 15(7)(c) of the *Divorce Act, 1985*. This subsection appears to imply that the right to State support is subordinate to the individual responsibilities of the spouses. And if that is the case, the contractual right of people to shift the burden of spousal support from the individual to the State may be open to challenge.

20. To apply the innovative aspects of *Pelech, Caron* and *Richardson* indiscriminately to spousal agreements that were negotiated prior to these decisions would, of course, raise issues both of reasonableness and fairness. Consequently, the disinclination of Manitoba courts to retrospectively apply *Pelech, Caron* and *Richardson* to all such prior agreements is to be welcomed. [17]

21. It has been stated that *Pelech, Caron* and *Richardson* impose three requirements as condition precedents to judicial disturbance of a spousal agreement or settlement, namely :

(i) a radical change;

(ii) that is unforeseen; and

(iii) that is causally related to the marriage.

22. Judicial opinion has split on the question whether the "causal connection" requirement applies equally to payors and payees. If so, few payors will ever satisfy the "causal connection" requirement.

23. In view of the fact that *Pelech, Caron* and *Richardson* are premised substantially on a needs-based approach to spousal support, it might reasonably be contended that the "causal connection" requirement applies only to payees. This would not, of course, obviate the need for the payor to prove a "radical" change, which exacts a much higher standard of proof than the customary "material" change.

24. If the unilateral application of the causal connection thesis to payees is perceived as unfair discrimination between the sexes, perhaps the explanation lies not so much in the theses espoused in *Pelech, Caron* and *Richardson*, but in their narrow and rigid application in subsequent

16. Compare *Brockie* v. *Brockie*, (1987) 46 Man. R. (2d) 33; 5 R.F.L. (3d) 440 (Man. Q.B.) (Bowman, J.), aff'd. 8 R.F.L. (3d) 302 (Man. C.A.).

17. See, for example, *Horn* v. *Horn*, (1987) 11 R.F.L. (3d) 23 (Man. C.A.).

cases. The requirement of "causal connection" may be a question of law, but the existence of causal connection is a question of fact.

25. Although the needs-based criterion of spousal support under the 1968 *Divorce Act*, may now have been tempered by a more broadly based compensatory principle under section 15 of the *Divorce Act, 1985*, [18] it is doubtful whether the strictures imposed by *Pelech, Caron* and *Richardson* with respect to spousal consensual arrangements would be significantly affected by this important change. A different conclusion might be warranted, however, in the absence of consensual arrangements.

III. NON-CONSENSUAL SITUATIONS

26. Professor James G. McLeod has contended that the criteria defined in *Pelech, Caron* and *Richardson* are of general application and extend to provincial support legislation and to non-consensual situations. In his Annotation of *Pelech*, he states :

> Although the three Supreme Court decisions are primarily concerned with the power of a court to override the support provisions of a settlement agreement on divorce, the effect of the decisions is likely to be much broader. The reasons purport to establish the discretion structuring factors which regulate the exercise of judicial jurisdiction to award support in the face of an agreement. Although La Forest J. tries to draw a distinction between the exercise of the support power upon marriage breakdown and divorce, this distinction does not seem to be picked up by the rest of the court. Thus, the same factors should be employed by a court in attempting to decide whether to exercise its power to override an agreement where it is given such power under provincial support legislation : see *Family Law Reform Act*, R.S.O. 1980, c. 152, s. 18(4); *Family Law Act*, S.O. 1986, c. 4, s. 33(4); *Parro* v. *Parro* (1985), 46 R.F.L. (2d) 155 (Ont. Prov. Ct.).
>
> The reasons are also likely to affect the granting of support in the absence of a settlement agreement. The reasons of Wilson J. in *Pelech, Richardson* and *Caron* confirm a basic support model. In order to obtain support, a claimant must prove :
>
> (1) need;
>
> (2) that the need arises for a legally acceptable reason; and
>
> (3) that the need/inability is causally connected to the marriage.
>
> Although there was no real doubt as to the first two components, a number of cases had questioned the final requirement that the need be causally connected to the marriage. Indeed, in *Newson* v. *Newson* (1986), 2 R.F.L. (3d) 137; 3 B.C.L.R. (2d) 1; 27 D.L.R. (4th) 738 (C.A.), the British Columbia Court of Appeal expressly denied the need for a causal connection between the inability and the marriage. It is impossible to read the comments of Wilson J. in the three cases in any way but insisting on the requirement of a causal connection. [19]

18. See *Linton* v. *Linton*, (1988) 11 R.F.L. (3d) 444 (Ont. S.C.) (Killeen, L.J.S.C.).
19. 7 R.F.L. (3d) 225, p. 232.

27. The context within which *Pelech, Caron* and *Richardson* were decided cannot be ignored. Although they imposed severe constraints on opening up spousal agreements, they, nevertheless, temper the fundamental principle of Contract Law that parties are bound by their contractual undertakings. In essence, therefore, *Pelech, Caron* and *Richardson* keep open the door, albeit slightly, to judicial revision of spousal agreements by way of orders for spousal support.

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

29. Notwithstanding the common law's recognition of a spousal agency of necessity, it must not be forgotten that current spousal support laws are of statutory origin. Furthermore, subject to overriding constitutional doctrines, the sovereignty of Parliament (or the provincial legislatures) remains paramount. Judge-made law may explain, but cannot override, statute law. Consequently, the *Pelech, Caron* and *Richardson* needs based and causal connection theses articulated in the context of the 1968 *Divorce Act*, though they may ultimately prevail as contemporary judicial policy, must be scrutinized in light of existing statutory criteria, be they federal or provincial.

30. Professor McLeod's notion that all applications for spousal support under both federal and provincial legislation require proof of need and also a causal connection between that need and a state of dependency engendered by the marital relationship tends to confuse the role of the judiciary with that of the legislature. For example, it is surely not insignificant that the factors defined in subsection 15(5) of the *Divorce Act, 1985* do not incorporate any explicit "causal connection" limitation. Such a limitation is, however, imposed by subsection 17(10), which provides that fixed term orders shall only be varied where the court is satisfied that "a variation order is necessary to relieve economic hardship arising from a change described in subsection (4) *that is related to the marriage* [...]". To apply one of the maxims of statutory interpretation, one might have thought that *expressio unius, exclusio alterius.*

31. And if it be argued that paragraphs 15(7)(a) and (c) of the *Divorce Act, 1985* import a causal connection thesis, let it be realized that these paragraphs envisage causal connection to the breakdown of the marriage and not merely causal connection to the marriage itself. A causal connection between present need and the breakdown of a marriage may be more readily apparent than a causal relationship between such need and the marriage relationship itself. A sick wife, for example, who

was supported by her husband during matrimonial cohabitation, should have no difficulty in proving the former but could have considerable difficulty in establishing the latter. This is not to imply that the sick wife must necessarily be supported by her husband or his estate for the rest of her life. Whether this would be appropriate or not might depend on such factors as the duration of the marriage and the age of the spouses. In the words of Gagne, J. in *Doncaster* v. *Doncaster* :

> In a case where a spouse cannot become economically self-sufficient, the limiting factors to a maintenance order are not to be found in the principle of subsection 15(7) but in the factors to be considered in subsection 15(5). It may be that the court could decide that, although a spouse is suffering from economic disadvantage arising from the breakdown of the marriage and it is not practical for the spouse to become self-sufficient, an order for maintenance would only be made for a shorter time because the marriage was very short and because the disability was not caused by the marriage. [20]

32. There is a fundamental distinction to be made between the existence or absence of causal connection as a relevant matter to be considered and the application of a causal connection thesis as a universal principle of law. Such a distinction is endorsed in *Bush* v. *Bush*, wherein Steinberg, U.F.C.J. examined the policy objectives of spousal support defined in subsections 15(7) and 17(7) of the *Divorce Act, 1985* and stated :

> Some courts have concluded that the causal connection test should be given a broad application in all spousal support applications, whether or not the actions are by way of an initial application or application to vary, whether or not there were prior existing agreements regarding maintenance as between the spouses, and whether or not the proceedings are under the *Divorce Act, 1985* or the *Family Law Act*. Other courts have attempted to apply the ratio in the trilogy in a much narrower manner. My views tend towards the latter approach.
>
> It should be noted that the decisions rendered in the trilogy were decided under the now repealed *Divorce Act, 1968*. This present application is under the *Divorce Act, 1985*, which contains criteria for the granting or varying of maintenance orders, which did not exist under the old legislation. In that context, I agree with the views of my colleague Judge Mendes da Costa that the principles in the trilogy should not be applied so as to "read into legislation words that are not there." (See *Andreeff* v. *Andreeff*, Unified Family Court, May 9th, 1989, unreported, at p. 11). [...]
>
> [Subsections 15(7) and 17(7) of the *Divorce Act, 1985*] which are virtually identical, incorporate a number of considerations for the awarding of spousal support other than the causal connection test espoused in the trilogy. I would list all of the statutory factors to be considered as follows :
>
> (1) the economic advantages accruing to a spouse as a result of the marriage;

20. Unreported, March 16, 1989 (Sask. Q.B.), aff'd. [1989] 5 W.W.R. 723 (Sask. C.A.).

(2) the economic disadvantages accruing to a spouse as a result of the marriage;
(3) the economic advantages accruing to a spouse as a result of the marital breakdown;
(4) the economic disadvantages accruing to a spouse as a result of the marital breakdown;
(5) the apportionment between the parties of any financial consequences of child care over and above the obligations apportioned between them as a result of a child support order;
(6) the relief of economic hardship of a spouse arising from the breakdown of the marriage;
(7) the promotion, where practicable, of the economic self-sufficiency of a spouse.

Of the above criteria, only numbers (2) and (4) directly relate to the doctrine in the trilogy, namely that in order to award spousal support, there must be a "causal connection between the changed circumstances and the marriage". (*Pelech*, p. 270.) Furthermore, there is absolutely nothing in the statute which requires criteria (2) and (4) above to be considered in every case. The other policy factors may be given equal or dominant consideration, where appropriate. For these reasons, I believe that the mandatory application of the causal connection test in every maintenance case, whether by initial application or variation is wrong.

There are, however, cases, whether by way of initial application or on variation, where the test in *Pelech* should be applied, based upon their factual circumstances. Thus, in *Willms* v. *Willms* (1989), 65 O.R. (2d) 151, Madam Justice McKinlay stated at p. 153 :

> We do not feel that such considerations should be limited to situations where the parties have entered into a separation agreement as was the case in *Pelech*, but that they should be considered and applied in all cases where the facts would warrant their application.

It seems to me that in addition to cases where separation agreements exist, the causal connection test should also be routinely applied in those instances where the parties have prior to the application, expressly or tacitly agreed to go their "separate ways", albeit not in writing, and have acted upon their mutual commitments, as evidence of their arrangement. [...]

It seems clear that a fact situation which will prompt the routine application of the causal connection formula is an agreement or arrangement between the spouses that they would henceforth be independent of each other. While it is desirable that such an arrangement be in writing, often it may only be in oral form or inferred by conduct. Nevertheless, once the parties have in some fashion jointly declared themselves independent of each other, the court will only resurrect a previous dependency relationship on very restrictive grounds. [21]

33. Although the above cited observations of McKinlay, J.A. in *Willms* v. *Willms* [22] may be viewed as ambiguous, it is relevant to observe

21. (1989), 21 R.F.L. (3d) 298 at 302–306 (Ont. Unif. Fam. Ct.).
22. (1988) 65 O.R. (2d) 151; 27 O.A.C. 316, 14 R.F.L. (3d) 162; 51 D.L.R. (4th) 757 (Ont. C.A.).

that *Willms*, like *Fyffe* v. *Fyffe*,[23] *Marshall* v. *Marshall*[24] and *Pilon* v. *Pilon*,[25] involved a prior consensual arrangement and thus leaves it open to the Ontario Court of Appeal to re-define its position concerning non-consensual situations.

34. It is also noteworthy that no provincial Court of Appeal in Canada has categorically stipulated that "causal connection" between the applicant's need and a state of dependency arising from the marriage is invariably a *sine qua non* to the recovery of spousal support.

IV. PROVINCIAL SUPPORT LEGISLATION

35. As stated previously,[26] Professor McLeod suggests that provincial statutory support criteria must yield to the overriding thesis of *Pelech, Caron* and *Richardson*. In the context of subsection 33(4) of the *Family Law Act*,[27] which is specifically cited by Professor McLeod, it is difficult to conceive how the strict doctrine of "unconscionability"[28] or "the communal responsibility of the state" philosophy espoused in *Pelech*[29] can be reconciled with the language of the subsection, which expressly provides that the court "may set aside a provision for support or a waiver of the right to support in a domestic contract [...] and may determine and order support in an application under subsection (1) [...] (a) if the provision for support or the waiver of the right to support *results in unconscionable circumstances*; (b) if the provision for support is in favour of or the waiver is by or on behalf of a dependent *who qualifies for an allowance for support out of public money*; or (c) if there is default in the payment of support under the contract [...]".

36. Even in the absence of a spousal agreement or settlement, the *Family Law Act* appears to assert a primary individual responsibility for spousal support, with only a secondary responsibility falling on the State.[30] But is this all for naught, if the respondent to an application for

23. (1988) 63 O.R. (2d) 783; 12 R.F.L. (3d) 196 (Ont. C.A.).
24. (1983) 13 R.F.L. (3d) 337 (Ont. C.A.).
25. (1988) 16 R.F.L. (3d) 225 (Ont. C.A.).
26. See paragraph 26, text to note 19, *supra*.
27. S.O. 1986, c. 4.
28. See *Mundinger* v. *Mundinger, supra*, note 14. And see M.G. PICHER, "The Separation Agreement as an Unconscionable Transaction : A Study in Equitable Fraud", (1972) 7 R.F.L. 257.
29. *Supra*, notes 2 and 10.
30. See, for example, *Family Law Act*, S.O. 1986, c. 4, section 30 (spousal obligation for support) and subsection 33(3) (applications by welfare granting agencies). See now, *Fisher* v. *Fisher*, (1990) 70 O.R. (2d) 336, p. 344 (Ont. Div. Ct.) wherein it was held that "the entitlement provisions of section 30 of the *Family Law Act* [S.O. 1986, c. 4] which are based on need and ability [...] do not require, as a condition precedent to

spousal support under the *Family Law Act* triggers a stay of proceedings under subsection 36(1) by filing divorce proceedings in which the issue of spousal support is raised? Are the *Family Law Act* and the *Divorce Act, 1985* reconcilable or are they in conflict? Whatever the answer, some legislative clarification of the future application of *Pelech, Caron* and *Richardson* under both provincial and federal legislation would appear desirable. In the meantime, courts should exercise the utmost caution in extrapolating from the context of divorce legislation for the purpose of interpreting and applying provincial support laws.

V. INTERIM APPLICATIONS [31]

37. Courts should be extremely cautious about applying the causal connection thesis of *Pelech, Caron* and *Richardson* to interim applications for spousal support. The presence or absence of any causal connection between current need and a state of dependency engendered by the marital relationship is not always self-evident and may merit the close attention of a trial judge.

38. Premature rulings in interim proceedings are not necessarily remediable at trial. Indeed, in many disputes, the outcome of interim motions will constitute the foundation for a negotiated settlement. There will be no trial and, therefore, no opportunity for corrective measures.

VI. CHILD SUPPORT

39. In *Richardson*, Wilson, J. observed that child support, like access, is the right of the child. Parents cannot bargain away their children's rights to reasonable support. The court is always free to intervene and determine the appropriate level of child support. If a child is being inadequately provided for, the concern of the court must be addressed through an order for child support and not by means of an order for spousal support.

40. It is highly debatable whether child support can be realistically severed from spousal support when one parent assumes the primary

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spousal support, any causal connection between cohabitation and need for support or any proof of economic loss or disadvantage caused by cohabitation". Leave to appeal to the Court of Appeal has been denied : see *The Lawyers Weekly*, January 12, 1990 (Ont. C.A.)

31. See generally, Nancy M. MOSSIP, "Interim Spousal Support : To Pay or Not to Pay?" in LAW SOCIETY OF UPPER CANADA, *CAUSAL CONNECTION : A New Support Law for Ontario*, Toronto, March 30, 1989, E-1/E-49. See also J.D. PAYNE, *Payne's Divorce and Family Law Digest*, § 17.6 "Interim support".

responsibility for raising the child after separation or divorce. The economic integrity of a domestic household does not readily lend itself to the segregation of spousal and child support.

41. One beneficial consequence that has flowed from the segregation of spousal and child support under *Pelech, Caron* and *Richardson* is the growing incidence of higher child support allocations. Child support of $ 1,000 or more per month is no longer regarded as excessive when the parent has ample ability to pay. [32]

VII. THE FUTURE ROLE OF CAUSAL CONNECTION

42. As stated previously, *Pelech, Caron* and *Richardson* have generated more questions than answers. Difficulties have been compounded by the failure to discriminate between the conceptual analysis underlying the causal connection thesis in *Pelech, Caron* and *Richardson* and its proper application to diverse factual situations. We must differentiate between the need for causal connection and the existence of a causal connection.

43. *Pelech, Caron* and *Richardson* are best understood in light of the evolution of Family Law in Canada since the enactment of the 1968 *Divorce Act*. They endorse a functional approach to spousal support that is premised on the roles discharged by the spouses during the marriage rather than on the status of marriage itself.

44. The notion that marriage *per se* is not a licence to collect lifelong support is not novel. It did not originate in *Pelech, Caron* and *Richardson* nor in the Supreme Court of Canada judgments in *Messier* v. *Delage*. [33] Although the Law Reform Commission of Canada endorsed a largely functional approach to spousal support rights and obligations in the mid-1970's, which may account for the dissenting judgment of Lamer, J., a former Commissioner, in *Messier* v. *Delage*, it was the *Divorce Act* of 1968 that sounded the death knell to the legally presumed dependence of married women. In the words of Moorhouse, J. some twenty years ago :

> In this day and age the doctrine of assumed dependence of a wife is in my opinion in many instances quite out of keeping with the times and needs reconsideration under the new legislation. The marriage certificate is not a guarantee of maintenance. [34]

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32. See, for example, *Mallen* v. *Mallen*, (1988) 13 R.F.L. (3d) 54 (B.C.C.A.); *Cheng* v. *Cheng*, (1988) 13 R.F.L. (3d) 140 (B.C.C.A.); *Thorsteinson* v. *Thorsteinson*, (1988) 52 Man. R. (2d) 115 (Man. Q.B.) and *Watson* v. *Watson*, (1988) 81 N.S.R. (2d) 29; 203 A.P.R. 29 (N.S.S.C.); *Katz* v. *Katz*, (1989) 21 R.F.L. (3d) 167 (Ont. Unif. Fam. Ct.); *Nicol* v. *Nicol*, (1989) 21 R.F.L. (3d) 236 (Ont. S.C.).

33. [1983] 2 S.C.R. 401; 50 N.R. 16; 35 R.F.L. (2d) 337; 2 D.L.R. (4th) 1.

34. *Knoll* v. *Knoll*, [1969] 2 O.R. 580, p. 584; 6 D.L.R. (3d) 201, rev'd. [1970] 2 O.R. 169; 1 R.F.L. 141; 10 D.L.R. (3d) 199 (Ont. C.A.).

45. In an era of two-income families, when forty per cent of the Canadian married population can be expected to divorce at least once before they die, and when the median duration of dissolved marriages in less than ten years, a functional approach to spousal support rights and obligations seems both reasonable and unavoidable. Thus, some form of causal connection thesis has a logical attraction, although logic must not be purchased at the expense of fairness and justice. In reality, spousal support rights and obligations are conditioned largely, though not exclusively, on the roles discharged by the spouses during their marriage. This is self-evident when the marriage is a going concern. But it also represents one of the basic concepts that underlies current statutory regimes regulating spousal support rights and obligations on marriage breakdown or divorce.

46. Pending legislative clarification or amendments, we must grapple with an ever increasing number of apparently irreconcilable judicial rulings. Significant insight into finding one's way through the maze has been provided by Professor Carol Rogerson in her paper entitled "The Causal Connection Test in Spousal Support Law".[35] She concludes that the primary problem with *Pelech, Caron* and *Richardson* lies in the application of the causal connection thesis, rather than in any inherent unfairness in the criterion itself. Subject to the possible exception of cases involving sickness or disability, Professor Carol Rogerson formulates a compelling argument. She observes :

> In the end, I conclude that with respect to the underlying philosophy of modern support law, some version of the causal connection test makes sense. I argue that it makes sense, given both our current legislation and the social context in which it operates, to understand spousal support as a claim springing not from the fact of marriage *per se* but from the economic relationship which developed between spouses during a particular marriage. In a society which recognizes a right to divorce and to remarry and in which marriage is not a stable social institution, we cannot impose, on the basis of marriage *per se*, a life-long obligation of providing for the economic security of former spouses. This is not to say, however, that I am a supporter of the version of the causal connection test that is currently being practised. The test is being so seriously misapplied that the term causal connection is actually a misnomer, masking what the test is really about. Rather than recognizing and redressing the economic consequences which flow from marriage, the test is one which in practice effectively fails to see existing causal connections and which ignores the economic consequences which flow from the marriage. It arbitrarily severs the causal links which exist between the post-divorce economic hardship of former spouses and what went on during the marriage. In essence it has become a clean break or deemed self-sufficiency theory rather than a true causal connection theory.

35. LAW SOCIETY OF UPPER CANADA, *CAUSAL CONNECTION : A New Support Law for Ontario*, Toronto, March 30, 1989, B-1/B-60.

> What is new about the causal connection test as it has emerged in the past two years is not the terminology or the idea — those have effectively been around for a long time — but the narrow, restrictive understanding of what constitutes a causal connection. [36]

47. Far too little attention has been directed towards the real economic consequences of marriage and marriage breakdown for younger mothers who shoulder the primary responsibility for raising the children after separation and divorce. And the economic plight of displaced long-term homemaking spouses, whose marital roles render them ill-equipped for the labour force and who can never regain lost years of employment experience, has attracted much more lip service than appropriate spousal support allocations on marriage breakdown or divorce. Canadian empirical data, such as the aforementioned Alberta and federal studies, [37] may be neither comprehensive nor conclusive, but they leave no room for doubt concerning a socio-economic causal connection between marriage breakdown or divorce and the feminization of poverty in Canada.

48. It would be simplistic, of course, to assume that the economic crises of marriage breakdown or divorce will be resolved by the private law system of spousal and child support. Where there is an established ability to pay, however, it behoves the court to take account of the statutory objectives of spousal support orders and of the actual effect of the marriage and its breakdown on the future economic welfare of both of the spouses and their children. By way of example, the following observations of Bowman, J. point the way toward a meaningful analysis of the parenting consequences of marriage breakdown and divorce :

> In turning my mind to the factors set out in s. 15 [of the *Divorce Act, 1985*], it is obvious that the functions performed during the period of cohabitation by each spouse, the economic advantages and disadvantages arising from the marriage, and the financial consequences arising from the care of the child, are all factors leading inescapably to a substantial increase in spousal support. These are reinforced by the consideration of the economic hardship arising from a breakdown of the marriage and the promotion of economic self-sufficiency for the wife within a reasonable period of time.
>
> I am further admonished by s. 15(7)(b) as follows in respect of spousal support :
>
> > (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above the obligation apportioned between the spouses pursuant to subsection (8).
>
> This is a new provision and I have given some thought as to what might be encompassed within that consideration. It must be recognized that there are numerous financial consequences accruing to a custodial parent, arising from the care of a child, which are not reflected in the direct costs of support of that child. To be a custodial parent involves adoption of a lifestyle which,

36. *Ibid.*, pp. B-13-B-14.
37. See paragraph 3, *supra*, notes 5 and 6.

> in ensuring the welfare and development of the child, places many limitations and burdens upon that parent. A single person can live in any part of the city, can frequently share accommodation with relatives or friends, can live in a high-rise downtown or a house in the suburbs, can do shift work, can devote spare time as well as normal work days to the development of a career, can attend night school, and in general can live as and where he or she finds convenient. A custodial parent, on the other hand, seldom finds friends or relatives who are anxious to share accommodation, must search long and carefully for accommodation suited to the needs of the young child, including play space, closeness to daycare, schools and recreational facilities, if finances do not permit ownership of a motor vehicle, then closeness to public transportation and shopping facilities is important. A custodial parent is seldom free to accept shift work, is restricted in any overtime work by the daycare arrangements available, and must be prepared to give priority to the needs of a sick child over the demands of an employer. After a full day's work, the custodial parent faces a full range of homemaking responsibilities including cooking, cleaning and laundry, as well as the demands of the child himself for the parent's attention. Few indeed are the custodial parents with strength and endurance to meet all of these demands and still find time for night courses, career improvement or even a modest social life. The financial consequences of all of these limitations and demands arising from the custody of the child are in addition to the direct costs of raising the child, and are, I believe, the factors to which the court is to give consideration under subs. (7)(b). [38]

49. It takes little imagination to identify the potentially broader ramifications of paragraphs 15(7)(a) and 15(7)(c) of the *Divorce Act, 1985*. For example, a displaced long-term homemaking spouse, whose earning capacity is non-existent or extremely modest by reason of age or lack of marketable skills has surely suffered an "economic disadvantage" by reason of "the functions performed by [that] spouse during cohabitation" within the meaning of paragraphs 15(7)(a) and 15(5)(b) of the *Divorce Act, 1985*. Consider also the spouse who has made substantial contributions or sacrifices to advance the career development of his or her married partner. Has not an "economic advantage" been thereby conferred on the beneficiary within the meaning of paragraph 15(7)(a) of the *Divorce Act, 1985* by reason of "the functions performed by the [contributing] spouse during cohabitation" as defined in paragraph 15(5)(b) of the *Divorce Act, 1985*? Surely, the answer to this question is, "Yes".

50. This writer endorses the following opinion of Professor Carol Rogerson :

> I believe that the best understanding of spousal support law is the compensatory model which views support as a form of compensation for the economic disadvantages and advantages which flow from the marriage and its breakdown. I do believe that an appropriate role for modern spousal support is to meet those economic needs derived from the actual economic arrangements between the spouses during the marriage. [39]

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38. *Brockie* v. *Brockie*, (1987) 46 Man. R. (2d) 33; 5 R.F.L. (3d) 440, pp. 447-448 (Man. Q.B.), aff'd (1987) 8 R.F.L. (3d) 302 (Man. C.A.).

39. *Supra*, note 35, p. B-36.

51. I also share Professor Rogerson's opinion that *Pelech, Caron* and *Richardson* have been misapplied in consequence of an unduly restrictive application of the causal connection thesis. Courts have been far too ready to assume that the financial plight of displaced mothers and middle-aged homemaking spouses is attributable to the economic climate rather than to their parenting or marital roles. Within the context of purportedly final spousal agreements or settlements, a continued application of *Pelech, Caron* and *Richardson* may be justified. It is always open to the lawyer representing an economically dependent spouse to protect his or her client by appropriate covenants in the spousal agreement or settlement. What is of far greater concern to me is the notion that *Pelech, Caron* and *Richardson* extend to provide a basic support model that overrides the specific criteria defined in the governing legislation. If *Pelech, Caron* and *Richardson* continue to be applied under current legislation, there is much to be said in favour of Professor Rogerson's opinion that "once a dependency has been created by a division of responsibilities within the marriage, the support obligation is not fulfilled until [the dependent spouse] is actually established in a position of financial autonomy". [40]

CONCLUDING OBSERVATIONS

52. There are, of course, no absolutes in Family Law. Legal principles cannot be divorced from the human equation. Professor Rogerson asserts that "existing support legislation is unclear, confusing and often contains conflicting directives". [41] I would prefer to say that existing spousal support legislation does not, and cannot, reduce a complex issue to simple and precise dimensions and that the *Divorce Act, 1985* and, in Ontario, the *Family Law Act* of 1986 both reflect diverse objectives rather than conflicting directives. As I have stated elsewhere :

> The four policy objectives defined in [subsections 15(7) and 17(7) of] the *Divorce Act, 1985* are not necessarily independent of each other. They may overlap or they may operate independently, depending upon the circumstances of the particular case. The legislative endorsement of four policy objectives manifests the realization that the economic variables of marriage breakdown and divorce do not lend themselves to the application of any single objective. Long-term marriages that ultimately break down often leave in their wake a condition of financial dependence, because the wives have assumed the role of full-time homemakers. The legitimate objective(s) of spousal support in such a case will rarely coincide with the objective(s) that should be pursued

40. *Id.*, p. B-47. See also *Newton* v. *Newton*, (1989) 21 R.F.L. (3d) 289 (B.C.C.A.).
41. *Id.*, p. B-12.

> with respect to short-term marriages [...] Periodic spousal support will ordinarily be denied to a young spouse, who has no children and whose economic status was not materially affected by a marriage of short duration, although a modest lump sum may be ordered to compensate for any economic loss sustained. Childless marriages cannot be treated in the same way as marriages with dependent children. The short duration of a marriage is no bar to periodic spousal support, where a dependent spouse is unable to take full-time employment by reason of parental responsibilities. A wife and mother who is unable to find employment that will generate a reasonable income cannot be reproached if she elects to take full-time care of the child until its admission to kindergarten or school. The two-income family cannot be equated with the one-income family. A "clean break" accommodated by an order for lump sum in lieu of periodic spousal support can often provide a workable and desirable solution for the wealthy, for the two-income family and for childless marriages of short duration. Rehabilitative support orders by way of periodic spousal support for a fixed term may be appropriate where there is a present incapacity to pay a lump sum and the dependent spouse can reasonably be expected to enter or re-enter the labour force within the foreseeable future. Continuing periodic spousal support orders may provide the only practical solution for dependent spouses who cannot be reasonably expected to achieve economic self-sufficiency. There can be no fixed rules however, whereby particular types of order are tied to the specific objective(s) sought to be achieved. In the final analysis, the court must determine the most appropriate kind(s) of order, having regard to the attendant circumstances of the case, including the present and prospective financial well-being of both the spouses and their dependent children. [42]

Similar observations equally apply to the four policy objectives defined in subsection 33(8) of the *Family Law Act, 1986*.

53. The economic variables of marriage breakdown were openly acknowledged in the following observations of Wilson, J. in *Pelech* :

> Each marriage relationship creates its own economic pattern from which the self-sufficiency or dependency of the partners flows. The assessment of the extent of that pattern's post-marital impact is essentially a matter for the judge of first instance. [43]

And the over-arching legal principle that accommodates the economic variables was cogently defined as follows by Wilson, J. in *Richardson* :

> As discussed in *Pelech*, the courts in making an award of spousal maintenance are required to analyse a pattern of financial interdependence generated by each marital relationship and devise a support order that minimizes as far as possible the economic consequences of the relationship's dissolution. [44]

54. It is imperative, therefore, that counsel address the economic dynamics of the marriage and its breakdown from both a legal and evidential standpoint. Lawyers must draft appropriate pleadings that

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42. See note 1, *supra*, pp. 714-715.
43. *Supra*, note 2, 7 R.F.L. (3d) 225, p. 270.
44. *Supra*, note 4, 7 R.F.L. (3d) 304, p. 313.

specifically address "relevant legal facts". [45] Lawyers must also marshall relevant evidence to support a claim for spousal and for child support. [46] It is not sufficient to have the law on your side, if you fail to lay the evidential foundation for appropriate findings of fact. Give the trial judge something to work with. Far better to lay the groundwork for a finding of causal connection than to place all your eggs in one basket by contending that *Pelech, Caron* and *Richardson* are inapplicable under the *Divorce Act, 1985* or under provincial statute law.

45. See J.D. PAYNE, *Payne on Divorce* (2nd ed., Toronto, Butterworths, 1988), Appendix 1, pp. 213-216 : "Sample pleadings of wife respecting spousal support claim".

46. See Julien D. PAYNE, "Permanent Spousal Support in Divorce Proceedings : Why? How Much? How Long?", (1987) 6 *Can. Jl. Fam. Law* 384, p. 390.