

Ideas of Spousal Support Entitlement

Prepared For: Legal Education Society of Alberta

46th Annual Refresher: Family Law

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For Presentation In:

Lake Louise – Apr. 28 - 30, 2013

IDEAS OF SPOUSAL SUPPORT ENTITLEMENT

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I was going to use the word “theory” in my title, but I knew that would be off-putting, so I went with the dressed-down, casual term “ideas”. Ideas, or “theories”, underpin the law of entitlement to spousal support. Not the language of sections 15.2(4) and (6) of the *Divorce Act*, or that of sections 58 and 60 of the Alberta *Family Law Act*, although lawyers and judges will dutifully cite those provisions, “like drunks use lampposts, more for support than for illumination”.¹ Theory matters more than statute, even though spousal support is a statutory remedy.

My task in this paper is to reconsider our law of entitlement to spousal support. The time is ripe. We are now twenty-one years after *Moge*,² fourteen years after *Bracklow*,³ and eight years after the Spousal Support Advisory Guidelines *Draft Proposal*.⁴ The Supreme Court decisions remain the twin pillars of Canadian support law, especially the law of entitlement. Neither case gave much direction on the amount or duration of support. The Spousal Support Advisory Guidelines now dominate the resolution of amount and duration, and inevitably affect our understanding of entitlement too.

My review is essentially a history of ideas about spousal support: some old ideas, some compensatory ideas, some non-compensatory ideas, some SSAG ideas. To suggest that there is a “Canadian theory” of spousal support would certainly overstate the coherence of either *Moge* or *Bracklow*. Thanks to these two decisions, though, Canada has a broader approach to spousal support entitlement than just about any other jurisdiction, especially compared to countries like the United States, England, Australia, or any European country.

When it comes to “ideas”, John Maynard Keynes got it right:

the ideas of economists and political philosophers, both when they are right and when they are wrong, are more powerful than is commonly understood. Indeed the world is ruled by little else. Practical men, who believe themselves to be quite exempt from any intellectual influences, are usually the slaves of some defunct economist. Madmen in authority, who hear voices in the air, are distilling their frenzy from some academic scribbler of a few years back.⁵

Keynes went on to point out that “there are not many who are influenced by new theories after they are twenty-five or thirty years of age”. Thus, old ideas live on and even “new” ideas are often a decade or two old.

Our spousal support law of today still contains remnants of yesterday’s ideas. So we must start with old ideas, and work our way forward. Once we allow for divorce, the question is why one spouse should pay support to the other spouse after divorce. The name may change – alimony, spousal

¹ Judge Robert Sack, speaking about judges’ use of law review articles, quoted in the New York Times and repeated in Clisham and Wilson, “The American Law Institute’s *Principles of the Law of Family Dissolution*, Eight Years After Adoption: Guiding Principles or Obligatory Footnote”, 42 F.L.Q. 573 (2008) at 576.

² *Moge v. Moge*, [1992] 3 S.C.R. 813, 43 R.F.L. (3d) 345.

³ *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420, 44 R.F.L. (4th) 1.

⁴ Rogerson and Thompson, *Spousal Support Advisory Guidelines: Draft Proposal* (Justice Canada, January 2005), superseded by *Spousal Support Advisory Guidelines* (Justice Canada, July 2008), known as the *Final Version*.

⁵ Keynes, *The General Theory of Employment, Interest and Money* (London; Macmillan, 1936, reprinted 1967) at 383.

maintenance, spousal support, compensatory payments – but it has often seemed to be “a remedy without a rationale”,⁶ especially after no-fault divorce.

Remember that spousal support after divorce has always been a statutory remedy. There is no “common law” of spousal support. That said, the statutes have always been vague and discretionary, leaving much room for ideas to work. And not always good ideas. As often as not, we see preconceptions, misconceptions, biases, stereotypes, unstated assumptions, and the like.

As we sift through these ideas, we have to recognise tensions between the “lay intuitions” of our clients (or bad or inexperienced lawyers),⁷ theoretical articles by academics, court decisions by judges and the practicalities of amount and duration. I would argue these tensions reflect “the history of ideas” about spousal support, much more than any of us realise.

1. Old Ideas: Status, Fault, Clean Break

These are old ideas, but still around, still creeping in here and there, in our thinking and that of our clients. Clients are more likely to talk about these older ideas, as they live on in popular discussions long after lawyers have moved on. These older ideas also turn up amongst the lawyers we call “dabblers”, those who do the occasional family law case and still cite *Pelech* as good authority.

1(1) Status and Need

Back when spousal support was just “alimony”, it was used to describe the payment by a husband to a wife after divorce *a mensa et thoro*, i.e. from bed and board, which today we would call “judicial separation”.⁸ Divorce was difficult for English spouses before the *Matrimonial Causes Act* of 1857,⁹ when judicial divorce first arrived. Until then, divorce could only be obtained by private act of Parliament. Alimony was the payment for support by the still-married husband to the still-married wife, part of his duties during coverture. The alimony obligation flowed from the status of marriage, that simple. He had an obligation to keep her in the style to which she had become accustomed, the marital standard of “need”. This old status-based remedy was only available to wives, as their husbands had the property and the income. Alimony would be paid permanently, given the difficulty of getting a parliamentary divorce. A wife could be denied alimony for her own misconduct.

Status is long gone as a basis for support. In *Bracklow*, Justice McLachlin repeated and endorsed the same phrase used in *Moge* and *Messier v. Delage*: “marriage *per se* does not automatically entitle a spouse to support”.¹⁰ The term “alimony” survived the creation of judicial divorce, even though technically it referred only to the obligation of support while the legal marriage had not been terminated.

1(2) Fault and Contract

The next explanation for the survival of alimony after divorce was “fault”. The primary grounds for divorce under the *Matrimonial Causes Act* of 1857 were adultery by the wife or adultery with

⁶ Ellman, “The Maturing Law of Divorce Finances: Toward Rules and Guidelines”, 33 F.L.Q. 801 (1999) at 809.

⁷ For an example of some American lay intuitions on the subject, see Ellman and Braver, “Lay Intuitions About Family Obligations: The Case of Alimony” (July 8, 2011), at ssrn.com/abstract=1737146.

⁸ See Davies, *Power on Divorce and other Matrimonial Causes*, 3rd ed. (Toronto: Carswell, 1980), Vol. II, Chapter 9, “Alimony as an Independent Remedy”.

⁹ 20 & 21 Victoria, c. 85. As Davies explains, the laws of England on divorce applied in the Territories before Alberta joined Confederation and the English laws as of July 15, 1870 were continued by the Alberta Act of 1905: *ibid.*, Vol. I (1976) at 2. See *Board v. Board*, [1919] A.C. 956, [1919] U.K.P.C. 59.

¹⁰ *Bracklow*, above, note 3 at para. 44, *Moge*, above, note 2 at para. 74, and *Messier v. Delage*, [1983] 2 S.C.R. 401 at 416-7.