Self-Sufficiency: What Does it Really Mean and How to Raise

By Sara L. Knowles and Sean M. Sinclair, Robertson Stromberg LLP

Spousal support cases in family law, while interesting to most family law lawyers, rarely attract the attention of the general public. However, a pdecision of the Ontario Superior Court of Justice was recently the subject of a National Post article. It was entitled, "Faint hope case for men with money': Judge cuts off Sask. woman's spousal support after she asked to triple it".[i] The former payor, Kevin Choquette, had been paying $57,000 per year in spousal support for 22 years, after a 15 year marriage. The Ontario Superior Court of Justice terminated the spousal support, on the basis that the former wife had made "no effort" to become self-sufficient.[ii] We imagine the article was read with great interest to many payors of spousal support.

In this paper, we will examine the historical current on the concept of self-sufficiency in relation to spousal support. We will also highlight the ways in which self-sufficiency is presently being raised in spousal support cases.

Self-Sufficiency: The Basics

Self-sufficiency is one of the objectives of spousal support orders enumerated in s. 15.2(6) of the *Divorce Act*:

> **(6)** An order made under subsection (1) or an interim order under subsection (2) that provides for the support of a spouse should
>
> > **(a)** recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
> >
> > **(b)** apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
> >
> > **(c)** relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
> >
> > **(d)** in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

The Supreme Court of Canada in *Moge v. Moge* underscored that all four of the objectives must be taken into account; none is paramount.[iii]

The Historical Current

The landscape concerning the role of self-sufficiency in spousal support changed with the Supreme Court of Canada's decision 25 years ago, in *Moge*.[iv] Prior to *Moge,* the so-called "*Pelech* trilogy"[v] directed the thinking of litigants and the Courts on the issue. Those cases are often associated with the "clean break" theory.

The trilogy dealt with agreements between the former spouses following the termination of their marriages. Mr. Moge attempted to rely upon the *Pelech* trilogy for the proposition that the model for spousal support was "characterized by such notions as self-sufficiency and causal connection."[vi] Madam Justice L'Heureux-Dube, for the majority of the Court in *Moge,* summarized Mr. Moge's position as follows:

> Effectively, his position is that his ex-wife should have been self-sufficient by now and, if she is not, no link may be drawn between that lack of self-sufficiency and the marriage. In other words, her current financial position is no concern of his.[vii]

That argument was rejected by the Court in *Moge.* Madam Justice L'Heureux-Dube clarified that the trilogy merely paid deference to the final agreements made between spouses; it did not create a new spousal support regime:

> A careful reading of the trilogy in general and *Pelech* in particular indicates that the Court has not espoused a new model of support under the Act. Rather, the Court has shown respect for the wishes of persons who, in the presence of the statutory safeguards, decided to forego litigation and settled their affairs by agreement under the 1970 *Divorce Act*. In other words, the Court is paying deference to the freedom of individuals to contract.[viii]

Moge also rejected the "clean break" model, noting its role in poverty among divorced women and their children.[ix]

One impact of *Moge* in terms of self-sufficiency was to clarify that it is only one of a number of objectives; it is not paramount. *Moge* also established that, in some cases, long-term support may be

required in order to meet the objectives set out in the *Divorce Act*. Madam Justice L'Hereux-Dube stated:

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

After *Moge*, it is clear that self-sufficiency is not determinative of spousal support applications.

Two recent decisions of the Saskatchewan Court of Queen's bench provide some indication as to the court's present views on the matter of self-sufficiency: *J.E.S. v. J.G.B.*[xi] and *P.M. v. S.M.*[xii]

In *J.E.S. v. J.G.B*, the parties had entered into a consent order, which included a requirement that the husband would pay spousal support to the wife in the amount of $4,000 per month. The consent order permitted the wife to seek a review of spousal support if she was not able to obtain employment income at a specified quantum by a particular date.[xiii] The wife was not able to find employment with an income at the level specified in the consent order, and made an application to the court to increase the spousal support.[xiv] An interim order increased the spousal support to $11,000 per month.[xv]

Madam Justice Wilkinson ordered the husband to pay spousal support to the wife indefinitely, in the amount of $11,000 per month. The husband's income was $700,000 per year, and the wife's income was imputed to be $175,000 per year. The parties had been married 26 years. Justice Wilkinson provided a definition of self-sufficiency:

> Self-sufficiency relates to the ability to sustain a reasonable standard of living: *Fisher v Fisher*, 2008 ONCA 11 (CanLII), 47 RFL (6th) 235. In a financially integrated relationship of 26 years, and with a high-income payor, there are inevitably lifestyle considerations. Marriage is a joint endeavour and the longer it

> lasts, the stronger the presumption of equal standards of living on dissolution: *Chutter v Chutter*, 2008 BCCA 507 (CanLII), [2009] 3 WWR 246.[xvi]

Justice Wilkinson continued, stressing that self-sufficiency means more than addressing basic needs.[xvii]

The factors relevant to the spousal support analysis in *J.E.S. v. J.G.B* included, *inter alia*: the long marriage; the facts that the parties had been financially conservative during their marriage; the fact that the husband's career had been prioritized and his ability to pay; the wife's care of the children until they were in school and the fact that she maintained employment during that time; the wife's employment history; the wife's education, skills, job experience and age at separation; the interim arrangements for child and spousal support; the health of the wife; the magnitude of the property settlement that the wife would receive; the present parenting arrangements; and that the husband had contributed disproportionately to the financial support of the children.[xviii]

Justice Wilkinson noted that the wife had employment with an investment firm in Vancouver, the annual salary respecting which was $175,000, and concluded that the wife lost that job after a short period of time due to her own actions.[xix] Justice Wilkinson imputed income to the wife in the amount of $175,000, which was the salary she would have earned at the Vancouver investment firm.[xx] As we will describe below, imputing income is one of the ways in which self-sufficiency can be raised in spousal support litigation.

In *P.M. v. S.M.*[xxi], the parties had been married 29 years. Based on incomes of $431,000 and $72,549[xxii], at trial, the husband was ordered to pay the wife $8,000 per month in spousal support to December 31, 2019 (when he would be 65) and then $3,000 thereafter on an on-going basis.[xxiii] The trial decision[xxiv] was appealed to the Court of Appeal.

The Court of Appeal varied the trial decision to permit a review of the $8,000 per month spousal support award upon the payor's 60th birthday, so that his retirement situation could be assessed.[xxv] The Court of Appeal noted that, by making a step-down order, the trial judge had contemplated retirement; that made it unclear how the payor's retirement would constitute a "material change of circumstances":

> Thus, given the wording of the trial judgment, particularly at para. 98, P. may be forgiven for being concerned that he is locked into the payment regime

> prescribed by the trial judge regardless of what happens to his actual income in light of a good-faith decision to retire or scale back at work. In other words, the trial judge expressly contemplated this prospect but made the support order notwithstanding it and, as a consequence, it is not easy to see how a decision by P. to retire or work less would fit within the *Willick* sense of "material change of circumstance."[xxvi]

The review came before Mr. Justice Smith[xxvii], who determined that the payor had not experienced a decline in his income.[xxviii] The payor was ordered to pay $8,000 per month.

The matter came back for a further review before Madam Justice Krogan. Justice Krogan discussed the difference between the scope of review on a variation application and upon a review, noting that "a review does not require a threshold finding of a change in circumstances".[xxix] Justice Krogran looked at the event that triggered the review, as had been identified by the Court of Appeal. That was when the payor turned 60 and his retirement plans took more shape.[xxx]

Justice Krogan analyzed the issues of entitlement; the length of cohabitation and functions performed by the spouses; and the conditions, means, needs and other circumstances of the parties. The reasonableness of the payor's decision to retire was examined, as was his income (which had decreased; but his 3-year average income was $355,216). Justice Krogran determined the facts established the payor's ability to continue paying $8,000 per month in support, until October 2019.[xxxi] With respect to duration, Justice Krogan indicated that further information could be provided to the court in the summer of 2019 for further consideration.[xxxii]

How to Raise the Self-Sufficiency Argument

The caselaw and commentary point to three primary ways in which the failure to achieve self-sufficiency is raised. The first is in imputing income to the recipient for the purposes of the *Spousal Support Advisory Guidelines*. The second is to implement a review of spousal support. The third is to make a variation application.

1. Imputing Income

Legislative authority for imputing income to a spouse where the spouse is intentionally under-employed or unemployed can be found in s. 19(a) of the *Federal Child Support Guidelines*, which provides:

> **19 (1)** The court may impute such amount of income to a spouse as it considers appropriate in the circumstances, which circumstances include the following:
>
> **(a)** the spouse is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of a child of the marriage or any child under the age of majority or by the reasonable educational or health needs of the spouse;

The Court of Appeal in *Frank v. Linn*[xxxiii] highlighted four principles concerning imputing income:

> Four principles emerge from the appellate authorities cited by Ms. Frank and from this expanded list. First, a person is expected to take reasonable steps to obtain employment commensurate with such factors as age, health, education, skills and work history. Second, a supportable finding that a person is intentionally under-employed carries considerable weight. Third, a trial judge's decision to impute or not to impute income is still a decision about support and must be accorded deference on appeal. Fourth, appellate intervention may be required if the evidentiary base does not support the trial judge's decision to impute income. In that regard, some factors like physical and mental health, current useable skills and age play a significant role.[xxxiv]

Income was imputed to the wife in *J.E.S. v. J.G.B.*[xxxv], which is discussed above. In that case, the wife had a combined law and commerce degree, and had had a number of different professional positions over the course of her career. She had a position in Vancouver at Coast Capital earning $175,000 per annum, but was dismissed from that position less than 2 months after she started. The wife's explanation for her termination was that there was "concern that she had too much "drama" in her life"[xxxvi], which she blamed on actions that had been taken by the husband.[xxxvii] The Court rejected that explanation. The Court noted that the wife was quite skilled and had numerous accomplishments, and imputed income to her in the amount of $175,000, which was the amount she would have earned at Coast Capital in Vancouver.[xxxviii]

Imputing income can be an effective way to raise the issue of self-sufficiency.

2. <u>Reviews of Spousal Support</u>

Review orders are a further vehicle whereby the issue of self-sufficiency can be addressed. Such orders permit spousal support awards to be altered, potentially, without the need for the applicant to demonstrate a material change of circumstance pursuant to s. 17(4.1) of the *Divorce Act.*[xxxix] Professor Rollie Thompson observed that review orders "came to prominence after *Moge*, as a mid-station between time-limited and indefinite spousal support, a mechanism to encourage efforts toward self-sufficiency by the recipient spouse."[xl]

As noted by Professor Thompson, s. 15.2(3) of the *Divorce Act* is often cited as authority for review orders to be made, even though the *Divorce Act* makes no explicit reference to such orders.[xli] Section 15.2 is the section pertaining to spousal support orders. Section 15.2(3) provides:

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

The leading authority on review in the context of spousal support is the Supreme Court of Canada decision in *Leskun.*[xlii] While the Court confirmed the ability of the courts to implement review orders, the circumstances in which such orders are appropriate was highly circumscribed:

> Insofar as possible, courts should resolve the controversies before them and make an order which is permanent subject only to change under s. 17 on proof of a change of circumstances. If the s. 15.2 court considers it essential (as here) to identify an issue for future review, the issue should be tightly delimited in the s. 15.2 order. This is because on a "review" nobody bears an onus to show changed circumstances. Failure to tightly circumscribe the issue will inevitably be seen by one or other of the parties as an invitation simply to reargue their case.[xliii]

The Court in *Leskun* provided examples of situations in which review orders may be appropriate, including "the need to establish a new residence, start a program of education, train or upgrade skills, or obtain employment."[xliv]

In *Linn v. Frank,*[xlv] the Saskatchewan Court of Appeal recently underscored that review orders are appropriate where there is a "genuine and material uncertainty at the time of the original trial".[xlvi] However, the Court of Appeal also highlighted the requirement for review orders to set out a properly delineated issue. Where no such issue has been set out, the review order will be overturned.

The facts in *Linn v. Frank* in relation to spousal support were these: the parties had cohabited for 16 years. At the time the judgment was issued, the wife was 57 years old and the husband was 55 years old. The wife had earned $75,000 per year as a journeyman instrument mechanic prior to moving to the husband's farm. The husband was part-owner of a John Deere dealership business. Each party had a 7 year old son from a prior relationship when they started cohabiting, and the children lived primarily with Ms. Frank and Mr. Linn. Throughout the relationship, Ms. Frank took care of the 2 boys and supported the family business. She did not work outside the home.[xlvii]

The trial judge ordered Mr. Linn to pay spousal support in the amount of $10,000 per month on an indefinite basis. A review was ordered upon Mr. Linn's retirement and sale of his shares in his company. At that time, it was ordered that Ms. Frank would bear the onus "to show that spousal support should continue (para. 209)".[xlviii] The Court of Appeal set aside the review, on the basis of the following:

> The difficulty with the trial judge's order is that by ordering a review and placing the onus on Ms. Frank to prove her continued need in light of Mr. Linn's retirement and his ability to pay, he took off the table any question of the reasonableness of his retirement or what retirement means in relation to someone with Mr. Linn's skills.[xlix]

The Court of Appeal determined that the usual rules concerning the burden of proof upon an application to vary should apply.[l]

Professor Thompson helpfully set out a list of practice points concerning review orders, which we have paraphrased below (the direct quotation is set out in the end notes):

1. As long as the *Leskun* requirements are met, a review order can be made on a variation hearing. Additionally, further review can be ordered at a review hearing.

2. A variation can always be sought upon a material change, regardless of the terms of the review.

3. A terminating review order is an order that allows for a review prior to termination of support. This type of review order shifts the burden of proof to the recipient, who is required to prove that support should be extended.

4. The time line for the conduct of a review should be short (Professor Thompson suggests 3 to 5 years, maximum, and usually much shorter). Changes expected to occur further into the future are better left as the subject of variation orders.

5. The terms "review" and "variation" are not interchangeable and should be used with care. No material change is required for a review. A review order must be specific in terms of the issues to be reviewed, the terms of the review, and what will occur in the meantime.

6. The issue or issues to be reviewed should be carefully circumscribed. Wider assessments will require an application to vary.[li]

3. Variation Application

Where a recipient spouse has failed to make adequate efforts to become self-sufficient, that can be treated as a material change justifying variation. That was the nature of the application before the Ontario Superior Court of Justice in *Choquette v. Choquette*[lii]. Mr. Choquette had been ordered to pay spousal support of $4,750 per month, in 1996. He paid that amount for over 20 years, after a 15 year marriage.[liii] The trial judge had noted that Mrs. Choquette intended to return to work.[liv] The Court on the variation application noted that the trial judge "fully expected her to re-enter the work force in a position compatible with her education and past employment history."[lv] The Court upon the review further noted that the Court of Appeal, in dismissing Mr. Choquette's cross-appeal, had relied, *inter alia*, upon the trial judge's statement "that he was satisfied on the evidence that Mrs. Choquette would 'return to the workplace and move relatively quickly towards self-sufficiency.'"[lvi]

In ruling on the application to vary, the Court concluded, "[t]his never happened."[lvii] The Court determined that the wife had made no effort to obtain employment consistent with her education and experience. The Court concluded:

> Her husband from approximately 22 years ago, despite his wealth and his arguable ability to pay support (certainly at the current level of $4,750 per month and maybe even at $15,000) should not have to fund her chosen lifestyle and provide spousal support when she made no legitimate effort to become self-sufficient in all the years following separation.[lviii]

The Court determined that the wife's failure to achieve self-sufficiency was a material change. The result was an order terminating spousal support.

Conclusion

While promoting self-sufficiency does not play the prominent role that it once did when the *Pelech* trilogy were the leadings cases, it still has a role to play, particularly in relation to imputation of income and variation/review applications. It is expected that support recipients will make reasonable efforts towards self-sufficiency. The SSAGs may have brought the issue of self-sufficiency more to the fore, as it is explicitly indicated in the *Guidelines* that imputing income to support recipients should be considered.

---

[i] Victor Ferreira," Faint Hope Case for Men with Money': Judge cuts off Sask. Woman's Spousal Support After She Asked to Triple It", *National Post* (15 March 2018), online: <http://nationalpost.com/news/canada/faint-hope-case-for-men-with-money-judge-cuts-off-sask-womans-spousal-support-after-she-asked-to-triple-it>.
[ii] *Choquette v Choquette*, 2018 ONSC 1435 at para 34 [*Choquette*].
[iii] *Moge v Moge,* 1992 CanLii 25 (SCC), [1992] 3 SCR 813 at 852 [*Moge*].
[iv] *Ibid.*
[v] *Pelech v Pelech,* 1987 CanLII 57 (SCC), [1987] 1 SCR 801; *Richardson v Richardson*, 1987 CanLII 58 (SCC), [1987] 1 SCR 857; *Caron v Caron,* 1987 CanLII 59 (SCC), [1987] 1 SCR 892.
[vi] *Moge, supra* note iii at 834.
[vii] *Ibid*.
[viii] *Ibid,* at 836.
[ix] *Ibid,* at 857.
[x] *Ibid,* at 860-861.
[xi] *J(ES) v J(GB),* 2018 SKQB 17 [*JES*].
[xii] *M(P) v M(S),* 2018 SKQB 10, 288 ACWS (3d) 312 [*PM*].
[xiii] *JES, supra* note xi at para 12.
[xiv] *Ibid,* at para. 15.
[xv] *Ibid,* at para. 16.
[xvi] *Ibid,* at para 190.
[xvii] *Ibid,* at para 191.
[xviii] *Ibid,* at para 208.
[xix] *Ibid,* at para 208.
[xx] *Ibid,* at para 215.
[xxi] *PM, supra* note xii.
[xxii] *M(P) v. M(S),* 2011 SKQB 126 at para 100, 370 Sask R 196.
[xxiii] *Ibid,* at para 101.
[xxiv] *Ibid.*
[xxv] *M(P) v M(S)*, 2012 SKCA 55, 292 Sask R 229.
[xxvi] *Ibid,* at para 61.
[xxvii] *Mehlsen v. Mehlsen,* 2015 SKQB 292, 483 Sask R 66.
[xxviii] *Ibid,* at para 40.

[xxix] *PM, supra* note xii at para 9.
[xxx] *Ibid,* at para 11.
[xxxi] *Ibid,* at para 59.
[xxxii] *Ibid,* at para 70.
[xxxiii] *Frank v. Linn*, 2014 SKCA 87, 442 Sask R 126 [*Frank*].
[xxxiv] *Ibid,* at para 96.
[xxxv] *JES, supra* note xi.
[xxxvi] *Ibid,* at para 206.
[xxxvii] *Ibid.*
[xxxviii] *Ibid,* at para 215.
[xxxix] *Leskun v. Leskun*, 2006 SCC 25 at para 37, [2006] 1 SCR 920 [*Leskun*].
[xl] Rollie Thompson, "To Vary, To Review, Perchance to Change: Changing Spousal Support" (2012) 31 CFLQ 355 at 8 (WestlawNext).
[xli] *Ibid.*
[xlii] *Leskun, supra* note xxxix.
[xliii] *Ibid,* at para 39.
[xliv] As noted in Rollie Thompson, *supra* note xl at 9, citing *Leskun, supra* note xlii at para 36.
[xlv] *Frank, supra* note xxxiii.
[xlvi] *Ibid,* at para 127.
[xlvii] *Ibid,* at paras 63-67.
[xlviii] *Ibid,* at para 72.
[xlix] *Ibid,* at para 131.
[l] *Ibid,* at para 132.
[li] Rollie Thompson, *supra* note xl at 9-10: "First, a review order can be made on a variation hearing, provided it meets the *Leskun* requirements. The source of statutory authority is section 17(3) of the *Divorce Act*, the parallel provision on variation to those found in ss. 15.2(3), s. 15.1(4) and s. 16(6). Similarly, a further review can be ordered at a review hearing.

Second, whatever the future date or terms for review, a variation can always be sought at any time when there is a material change, as the Ontario Court of Appeal made clear in *Bemrose v. Fetter.*

Third, the review order in *Fisher* was a terminating review order, an order which fixes a time limit for spousal support and then permits a review before termination. This order originated in the earlier Ontario Court of Appeal decision in *Bildy v. Bildy.* Practically, its effect is to allocate a burden of proof to the recipient, who faces the end of support unless she or he can convince the court to extend the order.

Fourth, there must be some maximum range for the conduct of a review, maybe 3 to 5 years maximum and usually much shorter. For example, for a payor who is now 55 and who intends to retire at age 65, it makes no sense to order a "review" upon his retirement. The "uncertainty" under *Leskun* and *Fisher* must be likely to be resolved within a relatively short time frame. The B.C. Court of Appeal said so in *Armstrong v. Armstrong*, striking out a seven-year review as "not within the parameters for such orders." Otherwise, it is simpler and cleaner to leave the issue to variation and material change. The further into the future that a change is expected, the more likely that a court will leave it to variation, rather than order a review.

Fifth, lawyers and judges are often sloppy in their use of language, using "review" and "variation" almost interchangeably. Agreements and orders should be drafted with care and precision. A "review" is not the same as a variation and no "material change" is required for a review. If a review condition is included, it must specify the issues and terms of the future review hearing, including what a court expects to occur in the meantime. The words, "material change" and "review" should not be used in the same sentence, as occurred in *Jordan v. Jordan*.

Sixth, the courts have been increasingly vigilant in circumscribing the issue or issues to be reviewed, given the comments in *Leskun* and *Fisher.* A bare "review" should never be ordered. Upon review, the review judge must

stay within those circumscribed issues, and not conduct a *de novo* review, as the review judge wrongly did in *Westergard v. Buttress.* In that case, the B.C. Court of Appeal ruled that the review judge should have stuck to the identified issues around the wife's self-sufficiency and any wider assessment required an application to vary."

[lii] *Choquette, supra* note ii.
[liii] *Ibid,* at para 7.
[liv] *Ibid,* at para 33.
[lv] *Ibid,* at para 33.
[lvi] *Ibid,* at para 33.
[lvii] *Ibid,* at para 34.
[lviii] *Ibid,* at para 42.