

Family Law

Grant C. Taylor



Spousal Support: Negotiated Settlements vs. Court Imposed Orders

The Supreme Court of Canada published its decision in *Miglin v. Miglin*¹ on April 17, 2003. Not since *Bracklow v. Bracklow*² has there been so much interest in a decision of the Supreme Court of Canada regarding spousal support.

The parties were married in 1979 and separated in 1993, after having had four children. At the time of separation, the wife was 41 and the husband was 43. Five years after they were married, they purchased a lodge in northern Ontario as equal shareholders, and ran it together as a family business. They each drew a salary from the business of \$80,500 per year.

Following more than a year of negotiations upon separation, the parties executed a separation agreement containing a full and final spousal support release clause. It was agreed that the children would reside primarily with the wife in the matrimonial home and that the husband would pay \$60,000 per year for their support as well as the mortgage on the home.

The husband transferred his half-interest in the matrimonial home to the wife; she transferred her half-interest in the lodge to the husband. Each half-interest was valued at \$250,000. The parties also executed a consulting agreement between the wife and the lodge, which provided her a salary of \$15,000 per year for five years, renewable on the consent of the parties.

Relations between the parties became acrimonious after the divorce such that about four years after the execution of the separation agreement, and six months before the consulting agreement was to expire, the wife sought sole custody, child support, and spousal support under section 15 (now section 15.2) of the *Divorce Act*. At trial, the wife was awarded spousal support in the amount of \$4400 per month for a period of five years. The Ontario Court of Appeal upheld the quantum of support and removed the five-year term. The husband appealed to the Supreme Court of Canada.

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The issue on the appeal was stated at Paragraph 1 of the majority decision co-written by Bastarache, J. and Arbour, J. as follows.

This appeal concerns the proper approach to determining an application for spousal support pursuant to section 15.2 of the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.) (the "1985 Act"), where the spouses have executed a final agreement that addresses all matters respecting their separation, including a release of any future claim for spousal

support. Accordingly, this appeal presents the Court with an opportunity to address directly the question of the continued application of the *Pelech* trilogy...in light of the significant legislative and jurisprudential changes that have taken place since its facts arose and since its release.³

In essence, the Court reviewed its earlier decisions dealing with spousal support commencing with the *Pelech*⁴ trilogy forward through *Moge v. Moge*⁵, including the legislative changes made to the *Divorce Act* between its inception in 1970 and the 1985 Act.

The Court also indicated that the appeal raised a broader question as to the weight to be given to any type of spousal support agreement where one of the parties wishes to have it modified by an application to the court. The majority of the Court answered this question by stating it believes "a fairly negotiated agreement that represents the intentions and expectations of the parties and that complies substantially with the objectives of the *Divorce Act* as a whole should receive considerable weight."⁶

Put another way, the Court said that the only grounds for interference in the parties' affairs would be when one party was particularly vulnerable and unable to negotiate a fair deal and that there must be a significant departure from the circumstances under which the agreement was signed. This significant

change in circumstances must not have been capable of reasonably being foreseen. Since the court did not find grounds sufficient for it to interfere or to alter the terms negotiated by the parties, it allowed the husband's appeal.

The *Divorce Act*, R.S.C. 1970, c. D-8, provided for spousal maintenance as follows.

- 11.(1) Upon granting a decree *nisi* of divorce, the court may, if it thinks it fit and just to do so having regard to the conduct of the parties and the condition, means, and other circumstances of each of them, make one or more of the following orders, namely:
 - (a) an order requiring the husband to secure or to pay such lump sum or periodic sums as the court thinks reasonable for the maintenance of
 - (i) the wife;
 - (b) an order requiring the wife to secure or to pay such lump sum or periodic sums as the court thinks reasonable for the maintenance of
 - (i) the husband;
- (2) an order made pursuant to this section may be varied from time to time or rescinded by the court that made the order if it thinks it fit and just to do so, having regard to the conduct of the parties since the making of the order or any change in the condition, means, or other circumstances of either of them.

The *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supplement), as amended, substantially changed the methodology for a court to use to determine whether or not spousal support should be paid by one spouse to another. The conduct of the parties was no longer an appropriate consideration.

15.2(1) A court of competent jurisdiction may, on application by either or both spouses, make

an order requiring a spouse to secure or pay, or to secure and pay, such lump sum or periodic sums, as the court thinks reasonable for the support of the other spouse.

- (4) In making an order under subsection (1) or an interim order under subsection (2), the court shall take into consideration the condition, means, needs, and other circumstances of each spouse, including:
 - (a) the length of time the spouses cohabited;
 - (b) the functions performed by each spouse during cohabitation; and
 - (c) any order, agreement, or arrangement relating to support of either spouse.

The conduct of the parties was no longer an appropriate consideration.

- (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.

Significant to the Court arriving at its conclusion is what the court calls “The Proper Approach to Applications Under Section 15.2” as follows.

An initial application for spousal support inconsistent with a pre-existing agreement requires an investigation into all the circumstances surrounding that agreement, first, at the time of its formation, and second, at the time of the application. In our view, this two-stage analysis provides the court with a principled way of balancing the competing objectives underlying the *Divorce Act* and of locating the potentially problematic aspects of spousal support arrangements in their appropriate temporal context. Before doing so, however, it is necessary to discuss some of the interpretive difficulties affecting spousal support.

As a starting point, we endorse the reasoning of this Court in *Moge*, where L’Heureux-Dube J. held that the spousal support objectives of the *Divorce Act* are designed to achieve an equitable sharing of the economic consequences of marriage and marriage breakdown. By explicitly directing the court to consider the objectives listed in section 15.2(6), the 1985 Act departs significantly from the exclusive “means and needs” approach of the former statute... . Contrasted with the former Act, then, these objectives expressly direct the court to consider different criteria on which to base entitlement to spousal support, while retaining the objective of fostering the parties’ ability to get on with their lives.

The role that these objectives was intended to play, however, must be understood in the proper statutory context. Whether by way of an

initial application or an application to vary, the criteria listed in section 15.2(6)...pertain to spousal support orders *imposed by the court*. ***Nowhere in the Divorce Act is it expressed that parties must adhere strictly, or at all, to these objectives in reaching a mutually acceptable agreement. Rather, the listed objectives relate only to orders for spousal support, that is, to circumstances where the parties have been unable to reach an agreement.***⁷

Consideration of the statutory entitlements will undoubtedly influence negotiations.

Moreover, the positive obligation that the Act places on counsel [in Section 9(2)] to advise their clients of alternatives to litigation... indicates Parliament’s clear conception of the new divorce regime as one that places a high premium on private settlement. Parliament’s preference appears to be that parties settle their dispute, without asking a court to apply section 15.2(6) to make an order. This is not to suggest that the objectives are irrelevant in the context of a negotiated agreement. The parties, or at least their counsel, will be conscious of the likely outcome of litigation in the event that negotiation fails. Consideration of the statutory entitlements will undoubtedly influence negotiations.

But the mutually acceptable agreement negotiated by the parties will not necessarily mirror the spousal support that a judge would have awarded. Holding that any agreement that deviates from the objectives listed in section 15.2(6) be given little or no weight would

seriously undermine the significant policy goal of negotiated settlement. It would also undermine the parties’ autonomy and freedom to structure their post-divorce lives in a manner that reflects their own objectives and concerns. Such a position would leave little room to recognize the terms that the parties determined were mutually acceptable to them and in substantial compliance with the objectives of the *Divorce Act*.

Having said this, we are of the view that there is nevertheless a significant public interest in ensuring that the goal of negotiated settlements not be pursued, through judicial approbation of agreements, with such a vengeance that individual autonomy becomes a straightjacket. Therefore, assessment of the appropriate weight to be accorded a pre-existing agreement requires a balancing of the parties’ interest in determining their own affairs with an appreciation of the peculiar aspects of separation agreements generally and spousal support in particular.⁸

The Court then provided a framework by way of a two-stage approach for assessing whether or not the impugned agreement is in substantial compliance with the Act by examining in stage one, the circumstances of the execution of the Agreement and the substance of the Agreement, and then in stage two, a determination of whether there has been a change in the post-divorce circumstances not contemplated by the Agreement.

Once having made the examinations as set out above, the Court went on to say that “the court should set aside the wishes of the parties as expressed in a pre-existing agreement only where the applicant shows that the agreement fails to be in substantial compliance with the overall objectives of the Act. These include not only those apparent in section 15.2 but also...certainty, finality, and autonomy.”⁹

The Court reinforces this approach where when assessing whether there has been an unforeseeable change in circumstances in stage two, it says a court “should assess the extent to which enforcement of the agreement still reflects the original intention of the parties and the extent to which it is still in substantial compliance with the objectives of the Act.”¹⁰

The decision of the majority in *Miglin* is the strongest statement yet from the Courts to give emphasis to and encourage private settlement and to discourage, whenever possible, the interference of the Court unless an agreement is found not to be in substantial compliance with the objectives of the *Divorce Act* as set out in section 15.2.

Accordingly, substantial compliance with the statute and its objectives is the key to whether or not a court should or would interfere with a privately negotiated settlement agreement regarding spousal maintenance. ▲

1 2003 SCC 24

2 [1999] 1 S.C.R. 420

3 *Miglin* (infra)

4 *Pelech v. Pelech*, [1987] 1 S.C.R. 801; *Richardson v. Richardson*, [1987] 1 S.C.R. 857; *Caron v. Caron*, [1987] 1 S.C.R. 982

5 [1992] 3 S.C.R. 813

6 *Miglin*, paragraph 4

7 emphasis added

8 paragraphs 64 – 67

9 paragraph 78

10 paragraph 87

Grant Taylor is in his 29th year of practice as a barrister, and is a qualified mediator. He is a Bencher of the Law Society of BC; he sits on the Practice Standards Committee of the Law Society. Grant practises in association with Quay Law Centre on the Quay in New Westminster.

Voice: 604 527-1161

Fax: 604 527-1165

gtaylor@QuayLawCentre.com

www.QuayLawCentre.com