

PELECH: VARIATIONS ON A THEME

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This article reviews the aftermath of the Supreme Court of Canada's 1987 "trilogy" of decisions on spousal maintenance. The author examines the inconsistencies arising from divergent interpretations of Pelech, Caron, and Richardson, focusing on the courts' attempts to make sense of the test of a "radical change in circumstances causally connected to the marriage". The questions confronting the courts include: whether or not Pelech must be confined solely to cases decided under the Divorce Act 1968?; whether Pelech applies to maintenance variation applications pursuant to provincial legislation?; whether Pelech applies at first instance or for interim support or to cancel arrears of support?; and finally, whether disabled spouses and payor spouses must also satisfy the Pelech test? The author suggests that the answer to each of these questions may depend on which judge is sitting on a particular day. A single answer must await definition and structure of the concept of "radical change" and of the equally confusing doctrine of "causal connection".

Dans cet article l'auteur examine les conséquences de la "trilogie" de décisions rendues par la Cour suprême du Canada en matière d'obligation de soutien entre époux. Elle étudie les divergences créées par les diverses interprétations des affaires Pelech, Caron et Richardson et s'intéresse particulièrement à la façon dont les tribunaux ont tenté de donner un sens au critère de "changement radical des circonstances lié de cause à effet au mariage". Les tribunaux se demandent par exemple si oui ou non Pelech s'applique seulement aux affaires qui ont été jugées en vertu de la Loi sur le divorce de 1968; si Pelech s'applique quand il s'agit des demandes de modification du soutien déposées en vertu de la législation provinciale; si Pelech s'applique en première instance ou pour un soutien temporaire ou pour annuler les arriérés de soutien; et si, finalement, les époux infirmes et les époux qui payent doivent aussi se conformer au critère de Pelech. L'auteur suggère que la réponse à ces questions dépend parfois du juge qui siège au jour donné. Pour savoir la réponse il faudra attendre qu'on ait donné une définition et une structure au concept de "changement radical" ainsi qu'à la doctrine aussi difficile à comprendre de "liaison de cause à effet"

Introduction

The family law bar sighed with relief in its expectation that the Supreme Court of Canada's pronouncements in the "trilogy", (*Pelech v. Pelech*¹; *Richardson v. Richardson*²; and *Caron v. Caron*³) would inject a measure

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¹ [1987] 1 S.C.R. 801, (1987), 7 R.F.L. (3d) 225.

² [1987] 1 S.C.R. 857, (1987), 7 R.F.L. (3d) 304.

³ [1987] 1 S.C.R. 892, (1987), 7 R.F.L. (3d) 274.

of certainty that has been lacking in the law on the variation of maintenance agreements. The Supreme Court held that where, on the basis of independent legal advice, spouses have entered into a maintenance agreement which provides, either expressly or by implication, for finality, and the agreement is not otherwise wanting at common law, in equity, or due to a statutory impediment, the maintenance agreement is not susceptible to judicial intervention unless the court is satisfied, on a civil burden, of all of the following:

- (1) that there has been a radical change in circumstances of one or both of the spouses;
- (2) that the radical change in circumstances is causally connected to the marriage, such as an economic pattern of dependence or hardship resulting from the marriage; and
- (3) that the radical change, causally connected to the fact of marriage, was not foreseen by the spouses.

However, the warm reception accorded the trilogy was short-lived when the family law bar and bench discovered that the trilogy raised more questions than it answered.

This article will review the law as enunciated by Wilson J. and examine how the courts have interpreted and applied it. This exercise will demonstrate that the three decisions do *not* provide the panacea hoped for and have, in fact, fostered inconsistency and confusion in the law of maintenance.

I. *The Trilogy*

A. *Pelech v. Pelech*

The husband and wife divorced after fifteen years of marriage. The wife agreed to accept the sum of approximately \$29,000.00 over a period of thirteen months in full satisfaction of any claim with respect to spousal maintenance. This agreement was incorporated into the decree nisi. At the time of the divorce proceedings Mr. Pelech's net worth was \$128,000.00 and Mrs. Pelech worked part time. Some fifteen years later Mr. Pelech's net worth had increased to nearly two million dollars and Mrs. Pelech was in ill health and on welfare. She applied pursuant to section 11(2) of the Divorce Act 1968⁴ to vary the original maintenance award.

At trial Wong L.J.S.C. held that a court could "in appropriate circumstances . . . act when its conscience is shocked or when there is a gross change in the circumstances of the parties".⁵ He stated that the burden of supporting Mrs. Pelech ought to rest with her former husband rather than with the state. On appeal,⁶ Lambert J.A. overturned the trial

⁴ R.S.C. 1970, c. D-8.

⁵ (1984), 41 R.F.L. (2d) 274, at p. 284 (B.C.S.C.).

⁶ (1985), 17 D.L.R. (4th) 147, 45 R.F.L. (2d) 1 (B.C.C.A.).

court's decision, stating that in the face of a valid maintenance agreement judicial intervention should be the exception and not the rule.

In the Supreme Court of Canada Wilson J. upheld the decision of the Appeal Court and articulated the following test:⁷

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. . . . It is only, in my view, where the future misfortune has its genesis in the fact of marriage that the court should be able to override the settlement of their affairs made by the parties themselves.

In separate concurring reasons La Forest J. held that the changes confronting the wife, although radical, were in no way related to the marriage itself.

B. *Caron v. Caron*

The husband and wife separated after fourteen years of marriage. At the time of the divorce proceedings the husband and wife entered into an agreement whereby the husband agreed to pay the wife maintenance until such time as she remarried or cohabited with any person for a continuous period in excess of ninety days. This agreement was incorporated in the divorce decree. Several years after the final decree of divorce the wife lived with a man for a period in excess of ninety days. The husband learned of this relationship and ceased paying support to his former wife. The wife applied for a variation of the decree nisi so as to provide for the resumption of maintenance.

At trial the application was denied without reasons and the Court of Appeal upheld the trial decision. In the Supreme Court of Canada Wilson J. affirmed that the test in *Pelech* ought to be applied, and that the wife must satisfy the court that there had been a radical change in circumstances related to a pattern of economic dependency generated by the marriage relationship. The court concluded that the *Pelech* test had not been met.

C. *Richardson v. Richardson*

The husband and wife separated after twelve years of marriage. Proceedings were commenced under Ontario's Family Law Reform Act⁸ and subsequently settled by way of an agreement providing for, *inter alia*, spousal maintenance of \$175.00 per month for a one year period. At the time the agreement was negotiated the wife was on welfare. Some time later the wife initiated divorce proceedings and applied for spousal maintenance, since the one year term of support previously established had expired.

⁷ *Pelech v. Pelech*, *supra*, footnote 1, at pp. 851 (S.C.R.), 270 (R.F.L.).

⁸ R.S.O. 1980, c. 152.

The trial judge held that since the wife was a public charge he ought to ignore the earlier agreement with respect to spousal support and fix anew the appropriate term and quantum of support. The Court of Appeal struck down the award holding that the requisite "catastrophic" change had not been proven. The Supreme Court of Canada held that the *Pelech* test applied to originating applications as well as variation applications and declined to vary the original order. La Forest J., in dissent, stated that a settlement agreement made pursuant to provincial family law legislation prior to divorce is different from one approved by a divorce court.⁹

... a separation agreement sanctioned by a provincial Family Relations Act while the parties are married serves a different purpose from that of an agreement sanctioned in a divorce proceeding. A separation agreement made under a regime of provincial law is intended to deal, and can only constitutionally deal, with continuing marital obligations. A divorce, on the other hand, is a final dissolution of a marriage and should be interpreted with finality in mind.

II. Developments Since The Trilogy

While the trilogy clarifies the approach appropriate to situations where the facts mirror those in *Pelech*, *Caron*, and *Richardson*, the courts are not in agreement when it comes to "variations on the theme". A number of those variations will now be discussed.

A. Divorce Act 1968 versus Divorce Act 1985

The maintenance provisions of the Divorce Act 1968¹⁰ were considered in the trilogy. A question has arisen whether the trilogy can be distinguished on that basis and confined solely to applications pursuant to that Act. In *Hunkin v. Hunkin*,¹¹ Bowman J., of the Manitoba Court of Queen's Bench, suggested that the trilogy ought to be restricted to cases under the 1968 statute and has no application to the Divorce Act, 1985.¹² Her reasons for this distinction were two-fold. First, all the cases in the trilogy arose under the 1968 Act, and secondly, section 17 of the 1985 Act specifically indicates that the existence of a prior agreement is only one element for the court to consider on a variation application. This approach was also taken by Veit J. of the Alberta Court of Queen's Bench in *Fenwick v. Fenwick*.¹³

However, McDermid D.C.J. of the Ontario District Court in *Fisher v. Fisher*¹⁴ asserted that if the *Pelech* support model applies under the

⁹ *Richardson v. Richardson*, *supra*, footnote 2, at pp. 881-882 (S.C.R.), 321 (R.F.L.).

¹⁰ *Supra*, footnote 4.

¹¹ (1988), 14 R.F.L. (3d) 157 (Man. Q.B.).

¹² S.C. 1986, c. 4; R.S.C. 1985, 2nd Supp., c. 3.

¹³ (1988), 15 R.F.L. (3d) 18 (Alta. Q.B.).

¹⁴ (1988), 11 R.F.L. (3d) 42 (Ont. D.C.).

1968 Act, it is even more applicable given the language of the 1985 Act. This assertion is somewhat weakened because McDermid D.C.J. was overturned on appeal¹⁵ with respect to the core of his decision. Nonetheless, as Professor McLeod states in his annotation to *Hunkin*,¹⁶ it is unreasonable to believe that the Supreme Court of Canada would spend the time it did on the trilogy only to have it confined to cases under the 1968 legislation, particularly when the 1968 Act had been repealed for almost one year before the court released its reasons in the trilogy. For the most part, the applicability of *Pelech* to the 1985 Act is accepted without question, and consequently is a "non-issue" in most Canadian courts.

B. Provincial Legislation

Does the *Pelech* support model apply to maintenance variation applications pursuant to provincial legislation? The Ontario courts have tackled this issue and the answer is "yes" and "no". McDermid D.C.J. considered a support application under the provincial Family Law Act¹⁷ in *Fisher*.¹⁸ He held that the policies enunciated by Wilson J. in *Pelech* ought to apply to support applications generally.¹⁹

While it may be argued that such a support model applies only upon the severance of matrimonial ties upon divorce, I conclude that it is also applicable where the marriage relationship is in fact at an end but the parties have not gone through the formalities of obtaining a divorce.

McDermid D.C.J. compared the language of sections 29 to 34 of the Family Law Act with section 15 of the Divorce Act 1985, and concluded that both contained a common philosophy. He stated that "need" in section 30 of the provincial legislation meant "need" which is causally connected to the marriage. He also relied on section 33(8) of the Family Law Act to buttress his opinion. Those sections read, in part, as follows:

30. Every spouse has an obligation to provide support for himself or herself and the other spouse, in accordance with need, and to the extent that he or she is capable of doing so.

33.(8) An order for the support of a spouse should,

- (a) recognize the spouse's contribution to the relationship and the economic consequences of the relationship for the spouse;
- (b) share the economic burden of child support equitably;
- (c) make fair provision to assist the spouse to be able to contribute to his or her own support; and
- (d) relieve financial hardship if this has not been done by orders under Parts 1 (Family Property) and 2 (Matrimonial Home).

¹⁵ (1989), 62 D.L.R. (4th) 544, 22 R.F.L. (3d) 225 (Ont. Div. Ct.).

¹⁶ *Supra*, footnote 11, at pp. 157-159.

¹⁷ S.O. 1986, c. 4.

¹⁸ *Supra*, footnote 14.

¹⁹ *Ibid.*, at p. 49.

This view was shared by Morrissey J. in *Currie v. Currie*.²⁰

On appeal,²¹ the Divisional Court reversed McDermid C.J.C., holding that the entitlement provisions of the Family Law Act do not require, as a condition precedent to spousal support, any causal connection between cohabitation and need for support or any proof of economic loss or disadvantage caused by the cohabitation. The court stated that need for support and ability to pay support continue to be the test for entitlement under section 30 of the Ontario legislation. It distinguished *Pelech* as involving a contrary and inapplicable principle derived from a different statute of a different level of government in relation to a different subject matter, namely, divorce.

This view of the Ontario maintenance provisions finds earlier support from the Ontario Provincial Court which held that the Supreme Court of Canada never intended to interfere with support in the provincial arena. In *Madill v. Madill*,²² the wife applied for support pursuant to the Family Law Act.²³ The court noted that the trilogy specifically articulated a test for intervention in the face of changed circumstances after a valid support agreement. King P.J. held that in a support application under section 30 the statute itself was "clear and expansive".²⁴ The court did not interpret "need" in section 30 as importing the requirement of a causal connection to the marriage. In fact, King P.J. held that such a finding would be inconsistent with the plain meaning of the section and would "radically change the law of spousal support as we know it".²⁵ In her view the introduction of causality to section 30 would import the notion of fault into the law of support.²⁶

The wife would have a team of detectives to prove her husband committed adultery, another team of psychiatrists to prove that his adultery affected her ability to work.

In yet another Ontario case, *Nadeau v. Nadeau*,²⁷ this time on an application for an interim support, Wright D.C.J. stated that the trilogy does *not* apply to an interim maintenance application pursuant to the Family Law Act:

[The trilogy] were all cases dealing with final orders under the Divorce Act. It may well be that the standard under the Family Law Act differs from that under the Divorce Act.

²⁰ (1988), 13 R.F.L. (3d) 414 (Ont. D.C.).

²¹ *Supra*, footnote 15.

²² (1988), 15 R.F.L. (3d) 181 (Ont. P.C.). For further proceedings in this case, see (1988), 17 R.F.L. (3d) 160 (Ont. P.C.).

²³ *Supra*, footnote 17.

²⁴ *Supra*, footnote 22, at p. 189 (15 R.F.L.).

²⁵ *Ibid.*, at p. 190.

²⁶ *Ibid.*

²⁷ (1988), 10 R.F.L. (3d) 117, at p. 119 (Ont. D.C.).

Unfortunately, the court did not expand on its conclusion and offered no analysis or supporting law. For these reasons the decision is of suspect authority.

It is noteworthy that the reasons at the District Court level in *Fisher*²⁸ were released in December 1987, some six months before the judgment in *Madill*,²⁹ and in accordance with the doctrine of *stare decisis* King P.J. was bound by it. However given the reversal on appeal of the District Court decision in *Fisher*,³⁰ both *Madill* and *Nadeau* accurately capture the Ontario position with respect to support pursuant to provincial legislation. While appellate guidance is always welcomed, it may be persuasively argued that *Fisher* only serves to confuse further the law of spousal support by establishing a separate test for maintenance under the Ontario provincial statute than exists under the federal Divorce Act. While the trilogy examined provisions of the old Divorce Act, there is nothing in *Pelech* to suggest that the principle of causality does not apply in the provincial context. The new model of support envisaged by the Supreme Court of Canada clearly introduces a significant change in the law of maintenance, notwithstanding King P.J.'s admonition that the introduction of causality would change the law radically. Despite *Fisher*, *Madill* and *Nadeau*, it is suggested that in fact the law has changed.

C. First Instance Support

Does the trilogy also apply to a spouse seeking maintenance at first instance? Again, the Ontario courts have set the pace and, for the most part, they have said it does. In *Winterle v. Winterle*³¹ Salhany L.J.S.C. considered a first instance application from a husband who suffered from schizophrenia and was unable to maintain employment. The court held that although the statutory criteria are different than on a variation application, the broad principles of *Pelech* are equally applicable at first instance. The court stated that absent a causal connection between the husband's need and the marriage, no support would be ordered. Fleury L.J.S.C. in *Goering v. Goering*,³² and McDermid D.C.J. in *Fisher*³³ concur in this finding.

*Madill*³⁴ is however a quirk in an otherwise united Ontario front. King P.J. examined the decision in *Winterle*, but preferred the reasoning in *Smith v. Smith*,³⁵ where the court considered an application for interim

²⁸ *Supra*, footnote 14.

²⁹ *Supra*, footnote 22.

³⁰ *Supra*, footnote 15.

³¹ (1988), 10 R.F.L. (3d) 129 (Ont. H.C.).

³² (1988), 13 R.F.L. (3d) 383 (Ont. H.C.).

³³ *Supra*, footnote 14.

³⁴ *Supra*, footnote 22 (15 R.F.L.).

³⁵ (1987), 11 R.F.L. (3d) 214 (Ont. H.C.).

maintenance. In *Smith* Rosenberg J. specifically distinguishes the trilogy and *Winterle* as dealing with a change in circumstances that took place *after* the rights of the spouses had been settled by agreement. King P.J. emphasized that, absent a settlement agreement, the trilogy does not apply, and therefore an originating application for support must be scrutinized solely under the appropriate support legislation. She distinguished *Richardson*:³⁶

We must remember the Supreme Court was not dealing with the right to support per se. The court was only concerned with the right to support *after* an agreement had been assigned, and *after* circumstances had changed.

At present, however, the scales are tipped toward the applicability of the trilogy on an originating application for maintenance.

D. Interim Support/No Settlement Agreement

With respect to interim maintenance the weight of authority supports the application of the *Pelech* principles at this stage as well. In *Miller v. Miller*,³⁷ Mossop L.J.S.C. held that on an application for interim spousal support there must be evidence of a causal connection between the need of the party seeking support and the marriage itself. The court in *Weppler v. Weppler*³⁸ also favoured this approach. Clarke L.J.S.C. acknowledged that the shift in judicial policy and philosophy emanating from the trilogy runs counter to the argument that women in Canadian society require support from their husbands because of the "systematic" discrimination against women generally. The court cited Wilson J. in *Pelech*, where she states that the law of support is not a vehicle to remedy "systematic" gender bias or create a pension for those incapable of supporting themselves.

However, in *Smith*,³⁹ decided some six months before *Miller* and *Weppler*, Rosenberg J. dismissed an appeal from a husband ordered to pay interim support to his disabled wife. The husband had appealed alleging there was no causal connection between his wife's need for support and the marriage. The court held that where a spouse contracts an illness *during* the course of the marriage, even in the absence of a causal connection to the marriage, that spouse ought to be supported. Rosenberg J. distinguishes *Pelech* on the basis that it concerned a binding and enforceable settlement agreement which was not the case in *Smith*. Unfortunately, the court does not specify the basis for entitlement for support, and one is left to conjecture that the court has awarded maintenance out of sympathy for a disabled spouse. If an exception to *Pelech* is indicated, and it may well be, perhaps it should develop along a more principled route.

³⁶ *Supra*, footnote 22, at p. 188 (15 R.F.L.).

³⁷ (1988), 13 R.F.L. (3d) 366 (Ont. H.C.).

³⁸ (1988), 15 R.F.L. (3d) 279 (Ont. H.C.).

³⁹ *Supra*, footnote 35.

The approach espoused in *Smith* leads to a discussion of the necessity of a separation or settlement agreement for the invocation of the trilogy. In *Willms v. Willms*⁴⁰ the Ontario Court of Appeal confirmed that the trilogy was *not* restricted to cases where the parties had entered into a formal agreement with respect to maintenance. The husband in *Willms* had supported his mentally ill wife for twelve years pursuant to a court order. On a variation application, the court relied on *Pelech* to rescind spousal maintenance. In light of the court's unequivocal statement in this regard and relying on the doctrine of *stare decisis*, it is clear that the analysis in *Smith*⁴¹ with respect to restricting *Pelech* to cases where the parties entered into a formal agreement, is *not* the correct approach. Nevertheless, the *Smith* line of reasoning has garnered support elsewhere. Carter J., in *Trainor v. Trainor*,⁴² held that where a fifty-five year old wife had raised four children during a twenty-nine year marriage and was unable to work full time due to an arthritic condition, *and* where no settlement agreement had been entered into with respect to support, *Pelech* did not apply. Carter J. approved of the reasoning of King P.J. in *Madill*,⁴³ and Rosenberg J. in *Smith*.

In British Columbia, MacDonald J. in *Smithson v. Smithson*⁴⁴ addressed the opposing views represented by *Smith* and *Willms*. While he declined to engage in a lengthy analysis of the general applicability of *Pelech* beyond its specific facts, MacDonald J. made this comment:⁴⁵

... in the absence of any judicial statement in this jurisdiction to which counsel could refer me, I say only this. The general principles in *Pelech* ... should be applicable generally and not limited to cases where a formal settlement agreement exists.

The British Columbia Court of Appeal has since provided the "judicial statement" sought by MacDonald J. In *Story v. Story*,⁴⁶ an appellate panel consisting of McEachern C.J.C., Proudfoot, Taggart, Locke and Anderson J.J.A., considered an appeal from a judgment dismissing an application to terminate spousal support payable pursuant to a consent order made in 1986. The payee wife was unable to achieve self-sufficiency due to illness and her twenty-year absence from the work force. The court concluded that the concept of a causal connection only applies when one is considering an application to vary support after rights have been finalized pursuant to an agreement or order. This decision brings the interpretation of the trilogy in British Columbia in direct conflict with the approach espoused by the Ontario Court of Appeal.

⁴⁰ (1988), 14 R.F.L. (3d) 162 (Ont. C.A.).

⁴¹ *Supra*, footnote 35.

⁴² (1988), 16 R.F.L. (3d) 349 (Sask. Q.B.).

⁴³ *Supra*, footnote 22.

⁴⁴ (1988), 15 R.F.L. (3d) 393 (B.C.S.C.).

⁴⁵ *Ibid.*, at p. 400.

⁴⁶ December 1989, Victoria Registry No. V00793 (B.C.C.A.).

E. Arrears

The apparent versatility of the trilogy knows no bounds and has also been applied where a spouse has sought to cancel the arrears of maintenance. In *Fetterley v. Fetterley*⁴⁷ the court applied the principles of the trilogy where arrears deriving from a settlement agreement had accumulated. The court held that the arrears ought not to be cancelled unless the test in *Pelech* was met:⁴⁸

If respect for such a negotiated settlement is to be given full accord and the maintenance payments themselves are to be sustained, then, absent delay amounting to laches, the arrears of such payments are to be left intact and should not be subject to reduction or cancellation.

F. Illness Cases

The cases which I will refer to as the "illness" cases are particularly troublesome. Does the philosophy of the trilogy apply where the serious, debilitating illness of one spouse precludes that spouse from ever achieving self-sufficiency or economic independence such as is envisaged by the new support regime? This is but one of several areas of matrimonial law where "hard" facts make "hard" law. The courts have responded to the disabled spouse in a variety of ways.

In *Schroeder v. Schroeder*,⁴⁹ Dureault J. of the Manitoba Queen's Bench was faced with a support application from a wife who, in the first years of the marriage, was diagnosed as suffering from multiple sclerosis. After five years of cohabitation the spouses separated and the wife, who required assistance to feed, dress and bathe, was institutionalized. The husband had paid interim support which covered the cost of the hospital's *per diem* rate of \$19.30. The court was satisfied that the wife required permanent maintenance and that the husband had the ability to provide support, although not at the level required. The court considered the objectives of a support order as provided in sections 15(5) and 15(7) of the Divorce Act, 1985,⁵⁰ and, invoking *Pelech*, held that the wife's economic circumstances had their genesis in the "unfortunate onslaught of the disabling effects of the disease afflicting her"⁵¹ and had nothing to do with the marriage. Dureault J. adopted Wilson J.'s direction that absent a causal connection the support obligation becomes the communal responsibility of the state, rather than the ex-husband's. However, despite the court's recognition that the fact of marriage alone did not entitle a spouse to support absent a causal link between the need and the marriage, Dureault J. allowed the

⁴⁷ (1988), 14 R.F.L. (3d) 47 (Alta. Q.B.).

⁴⁸ *Ibid.*, at p. 55.

⁴⁹ (1987), 11 R.F.L. (3d) 413 (Man. Q.B.).

⁵⁰ *Supra*, footnote 12.

⁵¹ *Supra*, footnote 49, at p. 417.

wife a "transitory period" to adjust to her new "situation" and ordered the husband to pay support in the amount of \$600.00 a month for a six month period.

It appears that while Dureault J. properly applied *Pelech* he tempered its stringent application with a temporary support order without explaining the basis for the award. Perhaps the impetus for this result can be found in the husband's express willingness to provide some form of support for his wife. One must query whether a less generous ex-husband would have escaped any support obligation?

The *Smith*⁵² decision must be re-examined in the context of the "illness" cases. There Rosenberg J. upheld an award of interim maintenance where, during the course of a three year marriage, the wife was treated for ulcerative colitis and was unable to be gainfully employed. The court held that where a spouse becomes seriously ill *during* the marriage the principles of *Pelech* were not applicable. Rosenberg J. distinguished the trilogy as dealing with a change of circumstances that took place *after* the parties had agreed by way of a formal settlement agreement:⁵³

A spouse cannot avoid responsibility for the care of the other spouse during illness that arises while the marriage is continuing. If a wife becomes seriously ill while happily married her husband is responsible for the support and the expenses resulting from her illness. He does not avoid that responsibility by obtaining a divorce.

Rosenberg J.'s approach has been both lauded and condemned. The Saskatchewan Court of Queen's Bench in *Trainor*⁵⁴ adopted the reasoning in *Smith* in the case of a very long marriage involving an "older" wife with an arthritic condition. The Ontario District Court in *Wettlaufer v. Wettlaufer*⁵⁵ considered itself bound by *Smith*, stating that the spouse's illness arose while the spouses were apparently "happily married" and so the husband remained liable for support. The *Smith* test of "illness contracted during a happy marriage" is characterized chiefly by its absence of legal logic. A more recent judgment of the Ontario Court of Appeal, while not expressly overruling *Smith*, arguably has settled the matter in Ontario. A panel consisting of Morden, Cory and McKinlay J.J.A. held in *Willms*⁵⁶ that an individual is not responsible indefinitely for the support of a chronically ill spouse where the illness has no causal connection to the marriage. In *Willms* the husband had paid his wife maintenance for twelve years. The Court of Appeal agreed with the trial judge's finding that the husband was now aware that the wife's psychiatric condition would never improve and this constituted a change in circumstances so as to rescind the husband's maintenance obligation. While the result in *Willms* is legally

⁵² *Supra*, footnote 35.

⁵³ *Ibid.*, at p. 219.

⁵⁴ *Supra*, footnote 42.

⁵⁵ (1988), 12 R.F.L. (3d) 379 (Ont. D.C.).

⁵⁶ *Supra*, footnote 40.

sound, the approach is unusual. The court found that the wife's continuing illness constituted a radical change in circumstances. This characterization stretches the meaning of "radical" beyond its usual bounds and is particularly odd in light of decisions where poverty, bankruptcy and other assorted social ailments were held not to be radical. The court does not confront the obvious dilemma that to uphold this support award absent a causal connection to the marriage, is to prolong and promote an approach to spousal support which has been abandoned. Mr. Willms was relieved of the onerous obligation of supporting a legal "stranger", but the court did not suggest that continued maintenance was contrary to the law as enunciated in *Pelech*; rather the court fashioned a novel change in circumstances to justify rescission.

Smith was also considered by Matheson J. in *Hammermeister v. Hammermeister*,⁵⁷ where the court expressed empathy for Rosenberg J.'s test, while acknowledging that it was not without its problems. Specifically, the Saskatchewan court identified the anomaly that a spouse who contracted a debilitating illness one week after separation would not be supported by a former spouse, while a spouse who became ill one week before separation would enjoy the benefits arising from the *Smith* test. The court cited a passage of Wilson J.'s from *Pelech* where she states that former spouses should be free to make new lives for themselves without an ongoing liability for "future misfortunes".⁵⁸ Matheson J. suggested that illness arising during the course of a marriage did not constitute a "future misfortune". However, notwithstanding a glimpse of insightful analysis, Matheson J. declined to comment on the correctness of the *Smith* approach, finding instead a "way out": "[a] rather significant circumstance which developed at the time the Hammermeister marriage was terminated...".⁵⁹ Mrs. Hammermeister suffered from a mental illness of such severity that a certificate of incompetence had been issued. At the time of the divorce proceedings the matrimonial assets were valued at nearly half a million dollars, but Mrs. Hammermeister's one half share of the property was not distributed pending her recovery. Since her husband had retained all the matrimonial property Matheson J. ordered permanent maintenance of \$725.00 per month.

In British Columbia, *Smithson v. Smithson*⁶⁰ merits consideration. The parties were married for ten years and had been separated for seven years when the wife applied for a division of family assets and maintenance. The wife had been diagnosed as suffering from a severe case of Crohn's disease several months into the marriage. She was completely and permanently disabled. MacDonald J. acknowledged the conflicting inter-

⁵⁷ (1988), 14 R.F.L. (3d) 27 (Sask. Q.B.).

⁵⁸ *Ibid.*, at p. 33.

⁵⁹ *Ibid.*, at p. 35.

⁶⁰ *Supra*, footnote 44.

pretations of *Pelech* as evidenced in *Smith*⁶¹ and *Willms*.⁶² However, in view of his decision to provide for the disabled wife by way of an unequal division of the family assets, he found it necessary to analyse the contradictory authorities. He did state that the general principles of the trilogy ought to be applicable generally, and held that there was no causal connection between the illness and the marriage, neither had there been any change in circumstances. However, the court concluded that the wife's illness was such a dominant factor that the only means of accommodating her needs was to strip the husband of most of the family assets in exchange for relieving him of the onerous burden of an ongoing support commitment. If this approach had not been possible, MacDonald J. stated that he would have been obliged, notwithstanding his express statement that *Pelech* ought to apply generally, to ignore *Pelech* and award permanent maintenance.

With respect, MacDonald J. ought to have at least stated on what basis he would have distinguished *Pelech* since he declined to adopt the approach of Rosenberg J. in *Smith*. Having strayed into that territory, a discussion of the illness dilemma would have been of great assistance to the bench and bar. Like Matheson J. in *Hammermeister*,⁶³ MacDonald J. was able to find an "escape hatch" through an unequal division of family assets.

Since *Smithson*, the British Columbia Court of Appeal has had an occasion to consider the case of an ill payee spouse in *Story*.⁶⁴ The Appeal Court expressly disagreed with the position taken in Ontario as articulated in *Willms*. Anderson J.A. stated:⁶⁵

If the judgment of the Ontario Court of Appeal in *Willms v. Willms* (1988) 14 R.F.L. (3d) 162 is to be taken as holding that there cannot be a permanent support obligation in the case of a person chronically disabled as the result of a disability not causally connected to the marriage, I respectfully disagree with that holding.

Anderson J.A. cited with approval the Saskatchewan Court of Appeal's admonition from *Doncaster v. Doncaster*:⁶⁶

Blind and absolute application of the *Pelech* principle to all initial applications for maintenance would lead . . . to results of unacceptable harshness and injustice.

This resolution of the illness dilemma for spouses in British Columbia makes it all the more necessary for the Supreme Court of Canada to settle the issue nationally. It is unconscionable that an ill spouse in Ontario may not receive spousal support while a similarly situated spouse in British Columbia may receive such support.

⁶¹ *Supra*, footnote 35.

⁶² *Supra*, footnote 40.

⁶³ *Supra*, footnote 57.

⁶⁴ *Supra*, footnote 46.

⁶⁵ *Ibid.*, at p. 10.

⁶⁶ [1989] 5 W.W.R. 723, at p. 728 (Sask. C.A.).

The courts seem to have less difficulty applying a strict interpretation of *Pelech* in cases of disabled spouses where the spouse is only partially disabled. For example, in *Winterle*,⁶⁷ and *Williams v. Williams*⁶⁸ courts in Ontario and Newfoundland declined to award support to an ill spouse where that illness was not causally linked to the marriage. However, in these instances the medical condition of the spouses seeking support did not render them totally unemployable. In *Winterle* the husband was a chronic schizophrenic who was on welfare but expected to find employment; and in *Williams* the wife suffered from depression and a mild form of Parkinson's disease, but her condition did not affect her ability to secure some type of employment. The courts are apparently in agreement that a reduced standard of living may be unavoidable in cases like these. A compromise has also been suggested wherein a spouse, who during the marriage voluntarily assumes responsibility for the health problems of the other spouse, cannot thereafter "walk away". However, this solution is not ideal since a responsible spouse who has supported an ill wife or husband will be penalized, while a spouse who has refused to support a stricken husband or wife during the marriage would be rewarded.

The disparity of approach in the "illness" cases is apparent. Clearly, disabled spouses will find more sympathy for their plight in Manitoba, Saskatchewan and British Columbia. Disabled spouses residing in Ontario should not expect to be supported unless their illness has its general genesis in the marriage. Realistically, it will be the rare illness that is causally linked to the fact of marriage. Stress related syndromes come to mind; however, difficulties with respect to proof will be inevitable.

G. Payor Cases

The principles espoused in the trilogy emanate from a fact situation wherein the *payee* spouse was seeking to obtain or extend maintenance beyond the termination date or event provided for in the settlement agreement. The question has emerged whether *Pelech* applies to *payor* spouses seeking to vary or rescind maintenance previously agreed to. There are as many answers to that question as there have been cases which raise the issue. The emerging direction is that *Pelech* ought to apply to both payor and payee spouses equally. The disappointment with this trend is the unreasonableness of the application of "radical change—causally connected" test to a payor spouse, and the lack of sound analysis in the case law with respect to its application.

For example, in *Leman v. Leman*⁶⁹ the Ontario High Court declined to reduce the payor husband's support obligation despite a decrease in his income and an increase in his wife's income, whereby she had achieved

⁶⁷ *Supra*, footnote 31.

⁶⁸ (1988), 13 R.F.L. (3d) 321 (Nfld. T.D.).

⁶⁹ (1988), 14 R.F.L. (3d) 122 (Ont. H.C.).

economic self-sufficiency. The court concluded that the *Pelech* test was applicable and therefore the payor husband had to show a sufficient change in circumstances which had its genesis in the marriage. The court also noted that there is no statutory or judicial authority that a spouse's settlement agreement should automatically expire where the dependent spouse attains a level of self-sufficiency. Barr J. acknowledged that, from a practical point of view, it would be difficult to extract support payments from an impecunious payor spouse; however, in his view, pragmatism was second to the law as declared by the Supreme Court of Canada. In the end, Barr J. stated that he did "not regard this result as fair" and it "gave him no satisfaction";⁷⁰ however, he felt constrained to apply the law as he understood it to be.

The Alberta Court of Queen's Bench considered this question on at least two occasions. In *Fetterley v. Fetterley*⁷¹ Dixon J. dismissed the payor husband's application to cancel maintenance where he had resigned from his employment to assist his second wife in her business without remuneration. The court stated that the husband's change in circumstances was not related to the marriage:⁷²

While the trilogy cases dealt with applications by the payee former spouses for increases in maintenance payments, the reasoning enunciated therein must apply, in my judgment, to applications by payor former spouses for a reduction in maintenance.

While the result is clearly equitable where a former spouse under a continuing maintenance obligation seeks to circumvent that obligation by resigning from his paid employment to work without pay, the court fails to explain why or how the *Pelech* test applies. Dixon J. did not even explore the requirement of a radical change: was Mr. Fetterley's voluntary retirement at age sixty-five a "radical" change to begin with? The Fetterleys were in their sixties at the time the maintenance agreement was negotiated. Retirement must have been a contingency that was in their minds and hardly "radical" at that stage of their lives.

One month later Veit J. released her reasons in *Fenwick v. Fenwick*.⁷³ In that case a payor husband sought to terminate maintenance previously agreed to and incorporated into the decree nisi. Veit J. did not consider the reasons of her brother Dixon J. in *Fetterley*; instead, she followed a different path. At the outset she stated that the trilogy applied equally to cases where a payor spouse was seeking to terminate support obligations. Again, she offered no analysis for this point of view. However, the payor spouse's application was not dismissed as in *Fetterley*; rather the court held that *Pelech* did not apply to a case under the Divorce Act 1985⁷⁴

⁷⁰ *Ibid.*, at p. 130.

⁷¹ *Supra*, footnote 47.

⁷² *Ibid.*, at p. 54.

⁷³ *Supra*, footnote 13.

⁷⁴ *Supra*, footnote 12.

and the applicable test was the less stringent test enunciated in section 17(4) of the new Act. Section 17(4) reads:

Before the court makes a variation order in respect of a support order, the court shall satisfy itself that there has been a change in the condition, means, needs or other circumstances of either former spouse or of any child of the marriage for whom support is or was sought occurring since the making of the support order or the last variation order made in respect of that order, as the case may be, and, in making the variation order, the court shall take into consideration that change.

The court found that the husband's financial position had worsened dramatically since the settlement agreement, and since section 17(4) did not impose the requirement of a causal connection to the marriage, the court ordered a cancellation of the arrears of support and a suspension of spousal maintenance for two years. A similar approach was taken by Oliver L.J.S.C. in *Davies v. Davies*.⁷⁵ The court invoked the test in section 17(4) rather than the *Pelech* test in the case of a payor husband seeking to terminate spousal support where he had supported his former wife for ten years and she had attained economic independence. However, in this case, counsel for the parties did not argue *Pelech* and did not indicate the nature of the original maintenance award.

Several decisions from Saskatchewan echo the notion that the trilogy ought to apply to both payee and payor spouses. In *Tomlin v. Christie*⁷⁶ the parties entered into an agreement whereby the husband would pay his wife \$100.00 a month in spousal support. The agreement did not stipulate a termination date. The payor husband applied to terminate the agreement citing a change in his employment and his remarriage. He also proffered evidence with respect to changes in his former wife's financial circumstances, including her acquisition of a university degree and a concomitant increase in income. Armstrong J. held that none of these changes of either party qualified as a "radical" change pursuant to the principles enunciated in the trilogy. The court stated that the parties must have had the types of events that had occurred in mind, and, not having made any provisions for them must be taken to have accepted them under the maintenance agreement. Hrabinsky J. followed the *Tomlin* case in *Swiderski v. Swiderski*,⁷⁷ but not happily. The court grudgingly held that *Pelech* applied to both payee and payor spouses, but was puzzled that courts were seemingly directed to uphold orders which might be impossible for payor spouses to perform or which blatantly overlook the fundamental concept of need.

Tomlin has also been approved in Nova Scotia where the Family Court in *Cook v. Cook*⁷⁸ declined to terminate a payor's support obligation, holding that a decrease in the payor's income due to ill health, stress and

⁷⁵ September 23, 1988, Vancouver Registry No. 5396/D933547 (B.C.S.C.).

⁷⁶ (1988), 10 R.F.L. (3d) 292 (Sask. Q.B.).

⁷⁷ (1988), 15 R.F.L. (3d) 295 (Sask. Q.B.).

⁷⁸ (1988), 17 R.F.L. (3d) 35 (N.S. Fam. Ct.).

age was *not* a radical change in circumstances unforeseen at the time and related to the fact of marriage. However, the view espoused in *Cook* may not be the law in Nova Scotia. In an appellate case, *Kalavrouziotis v. Kalavrouziotis*,⁷⁹ decided five months before *Cook* (but not considered therein) the majority of the Nova Scotia Appeal Division implicitly declined to apply the "radical change—causal connection" test to a payor spouse. Unfortunately, the majority did not expressly distinguish *Pelech*, but reversed the trial judge who had applied *Pelech* to the payor spouse who was an undischarged bankrupt. The dissenting judge approved of the trial court's application of *Pelech* to the payor spouse.

The New Brunswick Court of Queen's Bench has been less reticent in rejecting the *Pelech* test in the case of a payor spouse. In *Swan v. Swan*,⁸⁰ Deschênes J. held that a payor spouse who had demonstrated a radical change need not also show a causal link between such change and the marriage itself.

The trilogy seems to be receiving mixed reviews in British Columbia. In *Pidgeon v. Pidgeon*⁸¹ Hardinge L.J.S.C. held that the payee wife's recent employment and new relationship did not constitute a radical change; however, even if it could be considered radical, it was not related to the marriage so as to justify granting the payor husband's application for termination of spousal support. The court, with no discussion or analysis, adopted the *Pelech* test.

Proudfoot J. considered the applicability of the trilogy to a payor spouse in *Kuntz v. Kuntz*,⁸² where the parties had separated after eight years of marriage, and an agreement with respect to maintenance was incorporated into the divorce decree. It provided for indefinite support for the wife. Several years passed, and the husband, who had since remarried, was discharged from his employment due to a corporate reorganization. He subsequently sought to rescind his maintenance obligation citing unemployment and remarriage. Proudfoot J. stated that the starting point was *Pelech*; however, she admitted that *Pelech* did not deal with a payor spouse. She referred to *Tomlin v. Christie*⁸³ where the Saskatchewan Court of Queen's Bench in similar circumstances decided that remarriage and reduction of income did not constitute a radical change in circumstances. She agreed that Mr. Kuntz had not established a radical change and, in fact, it appeared he had deliberately rejected employment opportunities and was living comfortably with his second wife. Proudfoot J. also stated that even if the changes could be said to be radical they were in no way related to the fact of marriage itself. However, having said this, Proudfoot

⁷⁹ (1988), 14 R.F.L. (3d) 376 (N.S. App. Div.).

⁸⁰ (1988), 14 R.F.L. (3d) 385 (N.B.Q.B.).

⁸¹ (1988), 15 R.F.L. (3d) 373 (B.C.S.C.).

⁸² November 4, 1988, Vancouver Registry No. K880000 (B.C.S.C.).

⁸³ *Supra*, footnote 76.

J. deliberately left open the question of causality with respect to a payor spouse:⁸⁴

I agree that *Pelech* never dealt with the ability to pay and that may well be an issue yet to be determined. And there might be circumstances where the payor cannot meet his obligations that would call for court intervention to vary or rescind maintenance payments, however, the case at bar is not one of those cases.

In a judgment released one month before *Kuntz* Prowse L.J.S.C. canvassed the issue of the payor spouse in *Ritchie v. Ritchie*.⁸⁵ In a particularly well reasoned decision she stated that the broad two-pronged test from *Pelech* cannot be rigidly applied in every instance where a spouse seeks to terminate spousal maintenance. In *Ritchie* the payor husband applied to terminate support where the payee wife unexpectedly became economically self-sufficient. The husband submitted that his former wife's financial independence was a radical change in circumstances. Prowse L.J.S.C. noted at the outset that the trilogy had significantly narrowed the scope of the court's discretion to vary a spousal maintenance order. She stated that, given the specific policy objective of economic self-sufficiency in the Divorce Act 1985,⁸⁶ she was not satisfied that the *Pelech* test could automatically apply in the case of a payor spouse seeking to terminate support where a once dependent spouse had achieved economic independence. A mechanical application of the trilogy in circumstances exemplified by *Ritchie* would give little if any weight to the statutory policy articulated in section 17(7)(d) of the Act:

(7) A variation order varying a support order that provides for the support of a former spouse should . . .

(d) in so far as practicable, promote the economic self-sufficiency of each former spouse within a reasonable period of time.

Dr. Ritchie had supported his former wife for seven years in accordance with an agreement that provided for spousal support until his former wife remarried or died. He had not obtained independent legal advice. Prowse L.J.S.C. found that Mrs. Ritchie's career success had produced a 1987 personal income of nearly \$60,000.00 before maintenance payments. This clearly constituted a radical change in circumstances and satisfied the first arm of the *Pelech* test. The court was also satisfied that this radical change was *not* causally connected to the marriage, but that this portion of the *Pelech* test was not applicable on these facts. Prowse L.J.S.C. distinguished both *Leman*⁸⁷ and *Pidgeon*⁸⁸ since in those cases the court had been unable to identify a radical change. Further, and despite this distinction, Prowse

⁸⁴ *Supra*, footnote 82, at p. 8.

⁸⁵ (1988), 16 R.F.L. (3d) 163 (B.C.S.C.).

⁸⁶ *Supra*, footnote 12.

⁸⁷ *Supra*, footnote 69.

⁸⁸ *Supra*, footnote 81.

L.J.S.C. acknowledged that her interpretation of the trilogy was a narrower one. She stated:⁸⁹

One has to be cautious about applying broad tests to factual situations which were not before the court establishing the tests.

Prowse L.J.S.C. emphasized the payee spouse's lack of need in *Ritchie* and declined to overlook the express direction in the Divorce Act 1985 that support is to be based on need.

McCart L.J.S.C., in *Goddard v. Goddard*,⁹⁰ reinforces this approach, stating that *Pelech* establishes a threshold requirement that a spouse seeking support must show need. And in *Roulston v. Roulston*⁹¹ the Ontario High Court held that where a maintenance agreement did not include a termination date it was open to the court to imply that support must cease when need no longer exists. And yet the same court in *Leman*⁹² stated that there exists no judicial or statutory authority that a dependent spouse's maintenance should expire where a level of self-sufficiency has been attained. This view overlooks the express direction in section 17(7)(d) of the Divorce Act 1985 referred to by Prowse L.J.S.C.

Conclusion

The concept of lifetime support based on the mere fact of marriage has been eclipsed by a model of support which centres on need engendered by the marriage relationship. However, the courts are divided on the interpretation and effect of this new model so that a particular result in a particular case depends, in part, on which judge and which court is hearing the application. This article has identified numerous inconsistencies arising from the application of *Pelech*. A further startling example of the incongruent results generated from divergent interpretations of the trilogy are the Ontario cases of *Fyffe v. Fyffe*⁹³ and *Marshall v. Marshall*.⁹⁴ In *Fyffe* the spouses negotiated a settlement agreement wherein the wife received a lump sum of \$257,000.00 in full satisfaction of any spousal support claim. Several years later, in the context of divorce proceedings, the wife sought to re-open the question of maintenance. She submitted that a significant decline in interest rates had affected her investment income and constituted a radical change in circumstances. Lacourciere J.A., writing for himself and Blair and Goodman J.J.A., held that the change in interest rates was totally unrelated to the marriage and was not an unforeseeable event which justified judicial intervention. Accordingly, the application for an upward variation was dismissed.

⁸⁹ *Supra*, footnote 85, at p. 174.

⁹⁰ (1988), 16 R.F.L. (3d) 453 (Ont. H.C.).

⁹¹ (1988), 14 R.F.L. (3d) 315 (Ont. H.C.).

⁹² *Supra*, footnote 69.

⁹³ (1988), 12 R.F.L. (3d) 196 (Ont. C.A.).

⁹⁴ (1988), 13 R.F.L. (3d) 337 (Ont. C.A.).

In *Marshall*, an Ontario Court of Appeal panel consisting again of Blair J.A., together with Cory and Finlayson JJ.A., considered the variation application of a payee wife who sought to increase the amount of maintenance payable by her former husband. The spouses had been married for twenty-three years and had negotiated a final settlement for permanent support. The payee wife argued that inflation, resulting in a decline in the value of her support, together with a decrease in income aggravated by fragile health, constituted a radical change in circumstances generated by a previous pattern of dependency. Relying on *Pelech* Blair and Cory JJ.A., for the majority, accepted the wife's submission and affirmed the trial court's increase in support from \$728.00 a month to \$1228.00 a month. Finlayson J.A., dissenting, took a different view of the matter, and stated that the hardship resulting from inflation and ill health could not be described as flowing from a pattern of economic dependency engendered by the marriage as contemplated in *Pelech*. The majority did not refer to *Fyffe*, decided three months earlier, notwithstanding that Blair J.A. sat on both appeals. A possible explanation for this apparent oversight may be the fact that *Marshall* was an oral decision delivered from the bench. Nevertheless, these two cases are a further illustration of the confusion that abounds in the law of support post-*Pelech*.

The family law bar, for now, must chart its course through the murky waters of matrimonial law awaiting definition and structure of the concept of "radical change" and the equally confusing doctrine of "causal connection". Until then, the result in any case is anybody's guess.