Family property reform in British Columbia— the rule of discretion and the discretion of rules

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Overview
This paper provides a helicopter and speculative view of the new property division sections of the Family Law Act (FLA) 2011 in British Columbia, Canada. The comments are made from the perspective of an outsider, from his experience as a lawyer, mediator and family law reform adviser particularly in Australia. The paper assumes that all family property reform laws necessarily address similar international and historic patterns of family behaviour, with a predictable range of solutions on a rule-discretion spectrum in different cultures and regions. The paper relies upon various assumptions that are based upon international trends. All of these assumptions may be confirmed or qualified by statistical studies and anecdotal reflections in BC and the rest of Canada. The paper suggests that:

- The FLA initially provides that rules with a degree of certainty will govern the division of family property in BC in the future. In reality, rules travel in pairs. The vast majority of marriages and relationships will be governed by vague and currently unknown mystery maths. However, there are some standard and helpful templates for each line of uncertainty.
- At least a decade of mystery maths will have some unintended social consequences.
- Added pressures to the stressed court system, and other factors in BC, will predictably lead to a decrease in the number of awards, agreements and variations of spousal support (both “compensation” and “needs” based). This is a shift away from periodic, lifelong and variable towards (cyclically once again) more lump sum, short term and clean break spousal support.
- Another consequence of the high transaction costs of narrowing down the new mystery maths will be that in BC, there will be one form of family property “settlement law” for the rich, and another for the poor and middle class.

Introduction
The Family Law Act (“FLA”) of 2011 law in British Columbia received royal assent on 24 November 2011, and came into effect on a later date by regulation (18 March, 2013).
Reform to the existing *Family Relations Act* 1978 of British Columbia was arguably overdue in relation to the division of family property. The 44 year old definition of “family property” based on “use” of property, seems clumsy in retrospect. Hindsight is 20-20 vision. However, almost half a century ago, that awkward and uncertain definition probably represented a politically acceptable small step in the evolution of married women’s power over property.

Another key reform in the FLA, following national and international trends, is the extension of property and spousal support rights and obligations to certain informal marriages, particularly those which last for more than two years.

The FLA is initially deceptive. It suggests false certainty of 50/50 division of property between the majority of separating couples after deducting certain “excluded” categories of property, such as pre-relationship assets. In reality, the standard exceptions to this framework of deducting certain assets and dividing the remainder equally, do and will overwhelm the rule. This pattern is common in many western countries—mystery maths override allegedly simple maths. Not only is this a pragmatic reality of matrimonial property reform, but almost all commentators suggest that this victory of discretion (and mystery) over certainty, is fair, just and good. Family law commentators in the 1970s and 1980s chanted the mantra, “rule equality is not result equality”.¹

**Unintended Social Consequences of Uncertainty and Mystery Maths**

This new era of uncertainty has interesting (and predictable) consequences including—

1. A decade of expensive litigation by lawyers and risk-taking clients (usually wealthy or DIY clients) who are willing to roll the dice despite and because of the new mystery maths;

2. A further increase in unrepresented poor and middle class clients filing in court to reduce their own costs in the judicial lottery;

3. A statistical spike of conflict, filing and litigation for thousands of informal relationships which have lasted for two or more years, and where one partner is waiting quietly to separate after the arrival of new property rights and obligations on 18 March 2013. This statistical bump will include complex situations where one person has two or more informal relationships operating concurrently.

4. Extra costs for government and lawyers to educate disappointed and angry spouses that the apparent simple maths of “equal” property division are not so simple; and that the BC version of financial agreements do not produce mythical Hollywood certainty.

5. Government and judicial disappointment at the stress and taxpayer costs associated with this decade niche of education, filing and litigation;

6. A statistical boom in “pre-relationship” agreements (and valuation of pre-relationship assets) as an attempt to minimise the uncertain shadow of the new law;

7. A statistical surge in litigation attempting to set aside those pre-relationship agreements;

8. A need for a new industry to advise and draft agreements for couples if and when either receives a gift or inheritance;

9. A blossoming education industry, especially amongst specialist family lawyers, mediators and judges, who are eager to discern if there is any emerging shadow of the new law to assist in the assessment of settlement ranges;

10. An irony that the public will become increasingly dependent upon specialist family lawyers and mediators to assist with the drafting of pre-relationship agreements, post inheritance agreements, and settling family property disputes;

11. An increased rate of professional negligence claims against journey-person and specialist lawyers for predicting narrow and optimistic property ranges, and for drafting non-binding pre-relationship property agreements.²

12. Continued pressure for the creation of a specialist group of family judges to manage the new family property discretions and filing business; and for the creation of a specialist class of government-paid mediators and med-arb officers to manage the flow of poor and middle class DIY clients; and for the development of user-friendly educational websites which give initial legal information and advice to spouses and tribal supporters.

**Standard exceptions to “Rule Certainty” as reflected in the BC Legislation**

As suggested previously, there are at least ten standard generic family types which are usually exceptions to the basic FLA rule namely— deduct excluded property and divide the residue equally (“DEPDRE?”). These exceptions are contained in many matrimonial property statutes in different western countries.³ Certain “facts” become “factors”. The new FLA in BC arguably follows that model, with varying degrees of verbal camouflage, which will be partly uncovered with the passage of time, the emergence of pithy litigious precedents, and systematising guide books and websites.

The exceptions to the “rule” of DEPDRE are particularly trumpeted in sections 95-96 where the threshold phrase of “significantly unfair” reinstates unranked discretionary factors and mystery maths. Presumably the word “significantly” is attempting to narrow the fearsome floodgate of exceptions opened by an isolated “unfair”. Equivalent verbal qualifiers such as “grossly”; “obviously”; “clearly”; “patently” and “unduly” have had only marginal effect on expanding text books of exceptions elsewhere.⁴

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² Professional liability will also be triggered where a lawyer fails to warn a client in writing about the two year post-separation limitation period for making financial claims under the FLA, s.198.


⁴ In *Asselin v. Roy* 2013 BCSC 1681, Mr Justice Harvey considered ‘the concept of “significant unfairness” to be elusive and he avoided defining it. At para 251ff, he stated: “Otherwise, I conclude that an equal division of the family property as earlier found would not be ‘significantly unfair’ to either party. In concluding this I refer to the remarks of Justice Stewart who, in *Jacobelli v. Ohio* (1964), 378 U.S. 184, famously stated: ‘ I shall not today attempt further to define the kinds of material understand to be embraced within the shorthand description [“hard-core pornography”]; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that [Emphasis added]: I, too, will leave to others to formulate an intelligible definition of “significantly unfair” as that term is defined in section 95 and elsewhere in the Act. However, “I know it when I see it” and this-----is not “it”’. Extract from paper by
The generic and frequent exceptions to exclusion of certain property and equal division of the residue are arguably as follows. (There may be other common statistical relationship patterns in BC and Canada to add to this list):

1. Pre-relationship assets subsequently “intermingled”
2. Gifts and inheritances to one of the couple and subsequently intermingled
3. Tortious damages paid to one
4. Systematic debilitating violence upon one
5. Drug or alcohol addiction; mental or physical illness of one
6. Pre or post-relationship agreements
7. Farms and other capital fragile businesses
8. Income rich/asset poor couples
9. Maintenance needs; limited capacity to pay
10. Backdoor financial provision via spousal support

This tenth exception to the “rules” will be discussed later in some detail. Sometimes, (often in Canada), an exception to exclusion of certain property and equal division of the residue is achieved in part or whole via other financial labels—namely spousal support and child support. Spousal support and property provision are always indirect forms of child support; and child support is always an indirect form of spousal support for the caretaking parent. Moreover, no convincing distinction between “property”, “support” and “maintenance” calculations (as compared to category consequences) has ever been achieved. Therefore, this backdoor “property” division device, sometimes perceived as an accounting trick, can now be used often especially in British Columbia, where the overlapping non-distinction between property and spousal support is expressly embraced (eg FLA s 95(3); 161-162). Additionally since 1997 in Canada, there has been different income tax deductibility for payments of periodic spousal support (yes) and child support (no). Presumably this difference has led to many creative settlement practices whereby the interchangeable labels of “property”, “spousal support” and “child support” are strategically reassigned in order to achieve tax-effective negotiated settlement packages.

Both federal and provincial governments have an ongoing interest in how “financial” redistribution takes place between separating couples, whatever the label. This is at least because government uses taxpayer funds to pay spiralling social welfare costs to families who did not receive “enough” from the private division of assets upon separation. More commentary on the tenth exception is set out later.

As already mentioned, one theme of this paper is that in British Columbia, the ten exceptions above, statistically overwhelm the FLA “rule” to deduct certain excluded property and divide the residue equally. That is, at a guess, at least 80% of Canadian and BC heterosexual married or cohabiting


5 See e.g. FLA s.150(4): a court order can vary mandatory child support guidelines if a property order or agreement provides direct or indirect child support.

6 See e.g. see H. Clark, The Law of Domestic Relations, (West, 1989); Family Law Council of Australia, Spousal Maintenance (AGPS, 1989)
couples fall under one or more of the exceptions. Conversely, less that 20% of heterosexual couples in Canada and BC dwell in the following cumulative sociological bubble:

- marry or cohabit young with few assets; and
- have no pre, during or post-relationship agreements; and
- receive no gifts or inheritances from relatives; and
- if either spouse does receive gifts or own pre relationship assets, these are kept “isolated” from any contributions of the partner; and
- do not receive any tort or compensation payouts; and
- do not experience systematic violence, drug or alcohol addiction, mental or physical illness during their relationship; and
- both have secure employment at the time of separation; and
- neither own a capital intensive business which would close if divided.

Such ethereal relationships are rare indeed. So the neat “rule” deals with less than say 20% of relationships, and the messy “exceptions” with the rest. If these fictional statistics are in the range, will the new legislation promote equal division after deduction of certain excluded property?

**Ten Standard Exceptions to Equal Division after Deduction of Excluded Assets; and their Statutory Embodiments in BC**

1. **Pre-relationship assets, subsequently “intermingled” with efforts and contributions.**
   In Canada and some other western industrialised countries, it is statistically common for couples to enter into a marriage-like relationship or a marriage between the ages of 28-40 years. Accordingly by that time, one or both usually own some property, perhaps at least car, and some accumulated pension entitlements. Such pre-relationship property can subsequently either be:
   a. Wholly or partly spent on living expenses;
   b. Wholly or partly transformed into other identifiable property;
   c. Kept isolated and increase, decrease or maintain its pre-relationship value.

   It is statistically uncommon for neat fact situations to occur whereby under the new law in BC, one partner receives an easily calculated credit for pre-relationship property. For example, where one party owns a pre-relationship gold bar, or some other isolated non-labour intensive asset, in a bank. Thereby the owner would keep its initial value (s.85(1)(a)), plus one half of the increase in value which occurred during the period of the relationship (s. 84(2)(g); 81).

   However, there are several more common fact patterns involving “intermingling” of efforts, and where the easy mathematical rules of ss. 81-85 create a “significantly unfair” outcome (ss.95-96) and therefore trigger mystery maths. For example:

   1. Both parties own pre-relationship houses. The wife sells her house and the parties live off the proceeds of sale for ten years before separating. Result under ss.81-85 standing alone? The husband keeps his house and the wife receives zero.
2. The husband owned a pre-relationship business which was sold and the proceeds intermingled with joint wages to pay for living expenses, holidays and cars for 10 years. They separate with one car and $330,000 in investments. Result under the rule maths of ss.81-85? Husband receives the car (s.85(1)(g)—arguably the car can be traced as “derived from” the excluded pre-relationship business) and the $330,000 is divided equally.

3. Husband had a large ($150,000) pre-relationship debt which was paid off during the relationship by his partner with her wages and her pre-relationship assets. They separated with “new” assets worth say $200,000. Result under easy maths of ss 81-85? Equal division of the visible new $200,000.

4. The wife owned a pre-relationship farm or business which the husband sustained by his labour as a second unpaid job for 15 years; no increase in value of the farm or business. Result based on the rules of ss. 81-85? Wife keeps 100% of the farm or business.

Initially, there will be some mangled attempts to show that certain surviving post-separation property was “derived from” (s.84(1)) or perhaps traceable to, part or all of the original pre-relationship property. Tracing and its legislative cousin, “derived from”, provide delightful flow charts for analytical philosophers and equity lawyers.

Fortunately, a wider gate is open. To repeat, these common pre-relationship property situations followed by intermingling of efforts, will almost certainly trigger the “significantly unfair” exceptions (or norms?) found in s.95(1) and s.96, or the spousal support back door (s.95(3); 161-162). Once one or both of these thresholds are passed, total uncertainty follows about mathematical methods.

Section 96 attempts to limit the wide gate to excluded property by a shorter shopping list of discretionary factors than is contained in s.95. However, this does not limit avenues to make orders directly or indirectly against the “excluded” property because:

(i) S.96(b) (i) contains the mysterious factor of “the duration of the relationship”. Whatever this means, it could include that the door to access opens in proportion to the length of the marriage?

(ii) S.96(b) (ii) contains the factor of “direct contribution to the ----excluded property”. Once an excluded asset is out of isolation, it is easy to argue “direct” contribution in most families.

(iii) And even if the threshold tests of s.96 keep excluded property momentarily “safe” for one spouse, that very success will usually trigger a backdoor compensation claim via unequal division under s.95 (2) (c), (i) and (3).

(iv) And the momentarily excluded property makes one spouse capital richer than the other, and therefore a target to an immediate or delayed spousal support claw-back. (s.161-162).

In these common intermingling situations, there are various vague mathematical formulae to give the original owner a reducing amount of credit for the original contribution. What is clear is that the original pre-relationship owner is unlikely to receive 100% credit, unless it is a gold bar in the bank situation, or ultra short relationship. Depending upon the passage of
time, intermingling and proportional value to the whole estate, the initial credit will gradually diminish to zero.

Accordingly, the “clarity” of the rule that credit is given for pre-relationship property, disappears into a scale of discretion and a predictable abacus of credit outcome from zero to 100%. The new rule emerging from the case law is likely to be—“Where one party to a marriage or relationship had pre-relationship assets, then the 100% credit given for the initial value of such assets will gradually diminish (eventually reaching zero) with the intermingling of that asset with other contributions, time and proportionality to the total value of the assets.”

For example:

- A wife who brought a bank account of $10,000 into a relationship fifteen years ago; and then intermingled this with expenditures, will receive zero credit today in the division of family property of say $200,000 or more.
- A husband who brought a house worth $400,000 into a relationship which lasted only two years will receive a credit of 100% despite his partner’s intermingling efforts by painting the house. (NB he may occasionally indirectly “lose” some of this credit by the backdoor of spousal support.)
- A wife who brought an apartment worth $300,000 into an informal relationship eight years ago; and this was immediately sold to start a joint business and to pay off debts; and the family property is now worth $800,000; will receive a credit of between 50% to 70% of her initial contribution of $300,000.
- A common scenario is for pre-marriage assets to decrease in value. For example, a husband brought a business worth $400,000 into a relationship. Ten years later upon separation, the same or derived business has fallen in value to $100,000. Meanwhile, his partner’s pre-relationship house has stayed at a steady value of $500,000. The husband will not normally bear 100% of the $300,000 loss, and will receive a gradually increasing, from zero to 50%, contribution to his loss from his partner’s house.

2. Gifts and Inheritances to one of the couple

The underemployed XY generation in western countries has an important form of expectant wealth. This wealth will arrive in large amounts over the next 20 years upon the deaths of their parents, the notorious baby boomers.

All of the factors discussed in the previous section on pre-relationship property also apply here. The apparently simple “rule” in s.85(1) excludes from “family property” —(b) “gifts and inheritances to a spouse”.

However, the sociological norm will again be that these gifts and inheritances will be “intermingled” with other efforts by, and finances of, the couple (see previous examples). Accordingly, judges will conclude that in the majority of BC families (some notable exceptions will confirm the new discretionary rule), a 100% credit to the donee would be “significantly unfair” (s.96). Alternatively, what the one gains on the swings of property orders, she will lose in part on the roundabout of balancing lump sum (s.95) or periodic spousal support orders (ss.95(3); s.161-162).
Therefore, again the donee partner will usually receive between 0%-100% credit dependent on forthcoming judicially developed tests of intermingling(s.96(b)(ii)), time(s.96(b)(i)), and proportionality of the gift to the whole property pool (the opposite of “significantly unfair” being significantly fair?).

Of course, a creative judge has a standard third peg by which to avoid the 100% exclusion rule for gifts and inheritances under s.85(1). There must be a threshold “gift” or “inheritance” to “a spouse”. Conversely, a gift to both partners or a transfer as promised remain in the pool of family property. Every family member, lawyer and judge knows that—the words and “donative” intentions surrounding these family transactions are notoriously vague (“Mom said that this is for you both”; “Thanks for all your assistance while I was ill” etc); and contradictory (“he said, she said”); and that the evidence and reconstructed memories separate into tribal allegiances (“my blood relations—predictably—all support my version of events”).

The excluded partner can usually assemble some credible evidence that the transfer was not a gift to one, but to both; and/or that the transfer was part of another oral agreement to benefit one or both partners to repay their kindnesses to an ageing parent or relative. Once the transfer is deemed to be a gift to both; or a contractual payment to one or both, then s.85(1) exclusion of the gift or inheritance to one (“a”) spouse, no longer applies. Rules masking discretion abound.

3. Tortious or other “Compensation” paid to one of the couple.

It would be an interesting statistical study to see how many people living in marriage relationships in BC receive lump sum or periodic payments for personal injuries, or loss of employment, or some other loss.

Section 85(1) foresees this perhaps statistically common event with these words: “The following is excluded from family property: (c) a settlement or an award of damages to a spouse as compensation for injury or loss, unless the settlement or award represents compensation for

(i) loss to both spouses
(ii) lost income of a spouse”

This apparent clarity is obscured by the following—

1. Tortious or similar damages payments are usually claimed under at least six headings of: medical expenses past and future; lost wages past and future; and pain and suffering past and future. Section 85(1)(c) suggests that three of these categories, if indentifiable, namely pain and suffering past and future, and future medical expenses, remain as excluded property of the injured partner.

2. Insurance companies usually offer and pay out a single sum of money with no written evidence of how the amount was calculated or subdivided.
3. Fully litigated tort damages outcomes are statistically very rare, and so judicial mathematical clarity on the six (or more) categories is equally rare.

4. It is not realistic to hold an enquiry into what categories of damages were, or might have been discussed verbally, years before in a confidential settlement conference.

5. Even if identified in writing, the settlement spread between the six categories may have been allocated for tax minimisation, or emotional reasons.

Accordingly, in the statistically “normal” or “average” family situation, the legislative rule which excludes a portion of tortious damages from the pool of family property is impossible to apply. Therefore, judges will necessarily develop a creative new rule or approach to decide on the proportion of the compensation payment which stays out of the pool of “family property”. “Discretion” and the abacus of maths prevails again.

More importantly, if one spouse spends high transaction costs arguing about this new threshold discretion, (on a sliding scale, what proportion of the compensation is “in” and what portion is “out”?),(s)he may well achieve a partial and Phyrric victory. This follows because no matter what side of the marital fence each part of the compensation falls, some portion is likely to be clawed back again. Further, this is because especially in poor and middle class families, the presence of an injury to one partner usually jeopardises future employment of one or both, and therefore triggers a notional or actual claim for spousal support by one or both (s.95 (3); 160-162). For example, “I looked after you and I have a diminished career, and almost no assets” versus “I am still injured, depressed and partly employed and have many increasing expenses”.

4. **Systematic Debilitating Violence by One Partner**

Statistical studies which reveal rates of violence in domestic relationships, marriage or marriage-like relationships tend to be wildly inconsistent. In some countries, reporting of domestic violence has increased, due to the victim feeling safer whilst notifying authorities, less social stigma against victims of domestic violence, and less tolerance towards the perpetrators.

In British Columbia, an estimated 100 000 women between 1999 and 2004 were victims of spousal abuse. A rising concern within BC and Canada is domestic violence not only resulting in injury but also death. Of the 605 homicides in BC between 2003 and 2008, 73 were due to domestic violence, of which 75% were women.

More generally, some statistics suggest that across Canada, 6% of people over the age of 15 have suffered from physical or sexual violence by a partner.

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9 Statistics Canada, note 6. In 2009, 6% of Canadians who had a current or former spouse reported being physically or sexually victimised in the 5 years preceding the survey conducted by Statistics Canada: *Family Violence in Canada: a statistical profile*, 11.
Stephen Pinker has stated that “[worldwide], it has been estimated that between a fifth and one half of all women have been victims of domestic violence, and they are far worse off in countries outside Western Europe and the Anglosphere. In the United States, Canada and Australia, fewer than 3 percent of women report that their partners assaulted them in the previous year."\(^\text{10}\) Predictably the statistics vary dramatically. In Australia, a recent large study of separating couples found that in almost 80% of the couples, one or both self-reported patterns of violence, alcoholism, drug addiction and/or mental illness of one or both of the couple.\(^\text{11}\) Lawyers and mediators interviewed in that Australian study estimated that more than 50% of female clients with children had experienced some physical violence from partners.

The overwhelming majority of families where systematic violence occurs, involve the male partner as the perpetrator. Canadian statistics report that almost four times as many women were killed by a current or former spouse as men in the year 2007.\(^\text{12}\) Additionally, in the same year 83% of victims of police-reported spousal violence were female.\(^\text{13}\)

Even if “self reporting” statistics are halved, it is likely that more objectively observed studies of systematic violence by males against female partners and their children, would indicate high and “normal” patterns of family violence in Canada.

In these situations, the assaulted women often spend years trying to hide from or “manage” violent partners, and protect children from the next foreshadowed outburst. They exit the relationship eventually with long term trauma, loss of confidence and limited job skills. It is clearly “significantly unfair” in poor and middle class families for assets to be divided equally, where the female’s coping strategies and contributions to the wealth and welfare of the family, far exceed her partner’s systematic negative contributions.

However, at present in BC and Canada, compensation for systematic violence via family property law appears to be rare—perhaps overshadowed by “no fault” rhetoric and floodgate fears? This is not so elsewhere where “types” of fault have been distinguished.\(^\text{14}\)

The new FLA in BC may provide an opportunity to provide those remedies. If the systematically assaulted female has sufficient financial and emotional strength, once she is safely “away from” the violent male, she can theoretically pursue financial compensation for her extra contributions to the marriage; and for various “losses” past and future via one or more of the following:

\(^\text{11}\) Australian Institute of Family Studies, Evaluation of the 2006 Family Law Reforms, (Commonwealth of Australia, 2009), chs 2, 10. This impressive and expensive study conducted interviews with over 23000 clients and service providers.
\(^\text{13}\) Ibid, at 5.
\(^\text{14}\) Eg in Australia, see add-on property percentages awarded to the victims of systematic family violence; Kennon (1997) 92-757.
1. Spousal support (ss.160-162; 166). This is often an unsatisfactory option as the male has fluctuating or no income; the assaulted female fears long term “payment contact” and applications for variation; and fears that the male will use ongoing contact with the children as payback and negotiation leverage.

2. Extra percentages of property, and/or access to “excluded” property under the FLA ss. 95(2) (c) (i), S.95(3), s. 96(b).

3. Tortious damages for assault upon her and/or the children.

4. Crimes Compensation legislation.\textsuperscript{15}

This package of possible remedies sometimes leads to expensive, diverting and complex gamesmanship about “double dipping”, or double compensation. This tactical and mathematical complexity can sometimes be avoided by a settlement or orders restricting total compensation to a specified category.

However, it is far more common for the female to abandon all financial remedies in exchange for safety, distance and peace away from the violent partner. Occasionally financial remedies are sought, and the injured spouse has enough courage and persistence to file a claim. These situations require vigilant judges to grant one or more of the above lump sum financial remedies, while the applicant still has the resolve and courage to act. Such judicial vigilance may also give the female a defence—“It was the judge’s fault, not mine again”.

Of course on the abacus of outcomes, the compensation for the consequences of systematic violence may be nominal in amount or collection; or may be hundreds of thousands of dollars payable immediately out of the perpetrator’s share of the property pool.

5. Drug, alcohol or gambling addiction; serious mental or physical illness

The above afflictions amount to normal features of the human condition, often denied or hidden. They are statistically “standard” in the helping professions, including lawyers and medical doctors, wherever such studies are boldly undertaken and publicised. Increased rates of marital breakdown appear to be associated with all such afflictions, in a mixture of cause and effect.

That is, these conditions of family life are presumably normal in Canada as elsewhere; and are therefore not exceptional at the time of marriage breakdown. At a guess, at least 40% of Canadian couples have one or both partners who suffer from such addictions or mental illness at the time of separation. Will the family property “rule” (DEPDRE) under the FLA apply? Or is this a time for the mystery maths of the “exceptions”? In full-blown hearings, it will probably be the latter.

However, there is a variety of competing policy and value arguments especially around the concepts of degrees of “fault” for certain afflictions and conditions. These provide initial threshold discretion before the mystery maths are even reached. Legislation provides zero

guidance on the competing values associated with “afflicted families”, and the thankless task of finding some balance is left to the different views of the judiciary, or the negotiating spouses, or their lawyers.

The legislative pegs to enable first, an increased property share for the healthy and supportive spouse, and then secondly a claw back of property or finance by the afflicted partner, can be found as follows in the provisions of the FLA:

Unequal division is appropriate “if it would be significantly unfair” to divide property, pension or debts equally (s. 95(1)) due to:

- “[A] spouse’s contribution to the career or career potential of the other spouse” (s.95(2)(c)). Using a broad interpretation of “contribution”, an afflicted spouse normally makes negative or no contribution to the career of the healthy partner.

- And/or— the consideration “whether family debt was incurred in the normal course of the relationship between the spouses” (s. 95(2)(d)). Of course, afflicted partners sometimes leave large debts by the time of separation—medical bills, loans for gambling or drugs. The weasel word “normal” hides many possible interpretations—Does “normal” mean patterns of affliction and expenditure existing already at the time of cohabitation or marriage? Or patterns which became routine over a long period of time? Or only those afflictions and resulting expenditures which were agreed to impliedly (no overt complaining, or sighs with resignation) or expressly (“I understand dear, that you are not the man or woman I married”; or” I did marry you mostly for better or worse”) by the supportive spouse?

- And/or “the fact that a spouse, other than a spouse acting in good faith, (i) substantially reduced the value of family property” (s.95 (g)(i)). This subsection catches most situations because the emotional, time and financial burdens of caring for the afflicted partner have a direct causal effect upon family wealth. However, once again the weasel word “good faith” leaves open the value debates for the judges—when is an alcoholic, drug addicted, gambling, physically ill or mentally ill partner at “fault” to some extent for this condition and behaviour; and when is she suffering from the slings and arrows of fortune? Or what is the appropriate mixture of responsibility for personal afflictions between nature, nurture and personal choice? These are not only philosophical questions---the answers lead immediately to more or less cash. Presumably the more evidence that is presented about “honestly facing”, “struggling with” and “treatments for” the expensive addictions, then the more likely is a conclusion that the sufferer acted partly or wholly in “good faith”—that is, at least (s)he tried persistently to control the condition? Discretion and degree abound. The financial abacus will slide between “fault” and “circumstance”; between “fault” and “good faith”.

- The same discussion as contained in the previous paragraph is also contained in s.166 of the FLA via the words “arbitrarily” or “unreasonably” which are necessarily no more enlightening concepts than “good faith”. Section 166 states:

In making an order respecting spousal support, the court must not consider any misconduct of a spouse, except conduct that arbitrarily or unreasonably (a) causes, prolongs or aggravates the need for spousal support….

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6. Financial Agreements Between Spouses—pre, during and post relationship

It is “common” for spouses to make informal oral agreements about finances and property as their relationships begin, continue or end. This anecdotal generalisation probably does not have support from statistical studies in Canada, or elsewhere. However, some spouses also enter into written financial agreements with degrees of formality at these three stages of their relationships (“prenups; midnups; postnups”). The more formal variety of agreements particularly emerge after separation in the form of written agreements or consent orders.

- What proportion of living Canadian adults have been divorced or separated from one or more formal or informal relationships? Above 50%?
- What proportion of these ended that relationship with a separation agreement or consent order or contested order about finances?
- What proportion of these financial arrangements have been complied with?
- What proportion of these have re-entered the “legal system” to effect variations by negotiation or litigotiation? How many times?

To what extent do these agreements provide more certainty to spouses than the wash of discretions in family property legislation such as the BC FLA? Predictably, in different countries there is a scale of certainty ranging from zero to more binding than a commercial contract. Under the words of the FLA, the situation in BC appears to be close to the zero certainty, or total uncertainty end of the scale.

Wherever is chosen on the scale of certainty involves balancing the competing social interests of informed consent, capacity, clean break, reducing public welfare expenditure, finality and some flexibility when certain post agreement circumstances change.

The BC legislation has adopted parallel balances of uncertainty for both property and spousal support agreements. These financial agreements:

1) Acquire an increased, though illusory, level of effectiveness (prima facie binding until set aside; s. 81, s. 94(2), s. 163(2), s. 165(3)) with a very minimal level of formality—namely writing and at least one common witness (s.93(1), s. 164). This minimal level of formality makes agreements cheap and accessible to the public, but also error prone and readily set aside. There is no expensive statutory requirement for independent legal advice and certificates of independent advice, though abundance of caution no doubt encourages such steps in practice.

2) Can be set aside by the Supreme Court on multiple vague grounds which deal with preconditions to the agreement. (s.93(3); s.164(3)). These circumstances include:
   s. 93(3)—(a) a spouse failed to disclose significant property or debts, or other information relevant to the negotiation of the agreement:
   (b) a spouse took improper advantage of the other spouse’s vulnerability, including the other spouse’s ignorance, need or distress;
(c) a spouse did not understand the nature or consequences of the agreement;
(d) other circumstances that would, under the common law, cause all or part of a contract to be voidable. (See also the same language in s. 164(3) in relation to spousal support agreements).

3) Can also be set aside or varied on multiple vague grounds which occur after the agreement is entered into (s. 93(5); s. 164(5). These post-entry circumstances for setting aside or varying property agreements are:

s.93(5)—[Where] the agreement is significantly unfair on consideration of the following:
(a) the length of time that has passed since the agreement was made;
(b) the intention of the spouses, in making the agreement, to achieve certainty;
(c) the degree to which the spouses relied on the terms of the agreement.

The post-entry circumstances for setting aside or varying spousal support agreements repeat these above three unranked factors applicable to property agreements, plus two other much broader avenues:

s.164(5)—[Where] the agreement is significantly unfair on consideration of the following:
(a) the length of time that has passed since the agreement was made;
(b) any changes, since the agreement was made, in the condition, means, needs or other circumstances of a spouse;
(c) the intention of the spouses, in making the agreement, to achieve certainty;
(d) the degree to which the spouses relied on the terms of the agreement;
(e) the degree to which the agreement meets the objectives set out in section 161 [objectives of spousal support].

This cumulative uncertainty, confirmed by current case law, makes financial agreements about spousal support, particularly unhelpful to spouses, and to risk-averse lawyers. Lawyers bear the risk of accusations (and professional liability) that they “failed” to explain in sufficient detail and in writing just how many methods are available to expensively render the agreements useless.17

When will an agreement turn out to be “significantly unfair” based upon an array of pre-agreement pressures and post-agreement foreseeable and unforeseeable events? Neither that nebulous phrase of “significantly unfair” or the lists which follow of sometimes curious and unranked factors gives much guidance. (s. 93(5); s.164(5)). In all but extreme fact situations, it will require an expensive litigious lottery to discover whether a particular agreement about property and/or spousal support will be set aside in whole, part or not at all. Accordingly, few poor and middle class spouses would even consider such an expensive and uncertain litigious lottery—unless unemployed, time rich, angry and unrepresented.

Predictably, the market place demands a greater degree of certainty and clean break than is offered by the legislation. Accordingly, for spouses with “spare” money, and access to

specialised family lawyers, the degree of certainty of financial agreements can be substantially increased by:

1) Hiring two specialised family lawyers who certify in exchanged written assurances that clients have capacity, informed consent and that the settlement is “within the broad range”; AND

2) Two specialised family lawyers supervise written and comprehensive disclosure of all material facts, finances and values; AND

3) Inserting a lengthy formulaic clause which states that the agreement is intended to be final despite the occurrence of any of the specified encyclopedia of good and bad life events; AND

4) The agreement is converted into a consent order thereby raising the implication that the order complied with statutory requirements and is “within the broad range” of orders which a judge might\(^{18}\) make.

This “clean break” solution is available to the wealthy who have access to specialised and conscientious family lawyers.

The double-whammy of potential professional negligence is that lawyers can easily make mistakes in either:

- written advice on how many life events can destabilise a financial agreement; and/or
- following the above procedures precisely and expensively to capture maximum clean break and certainty.

Predictably, an ongoing game will occur between encyclopaedic drafters and the courts. Certain creative judges will declare that even though the “read-down” encyclopaedic list of events specifically includes certain sling, arrows or joys of life, (hospitalisation, traumatic injury, lottery wins, etc), it is “against public policy” for private contract to exclude statutory obligations in certain “extreme” cases.

7. Farms and other Capital “Fragile” Businesses

Anecdotally, there is a considerable number of economically fragile businesses in BC and Canada, such as farms, hotels, small industries and retailers. These are “fragile” because the income levels of the businesses are not high enough to support another mortgage needed to pay out a departing spouse under the FLA, or any other family property legislation. Nor is the business or farm large enough to divide into two viable businesses; or valuable enough to sell quickly and produce sufficient capital to divide equally and allow the two spouses to “start again” and support themselves.

Accordingly, judges, and lawyers, and spouses as negotiators, are standardly faced with a gradation of predictable choices. All of these choices are possible under the FLA (s.97), but none is mandated. The farm or business can:

- Be sold immediately, and net proceeds divided equally (s.81), and no spousal maintenance be payable to either spouse; or

\(^{18}\) LMP vs LS 2011 SCC 64.
• Be transferred to one spouse, and the departing partner has his/her percentage share secured by mortgage with yearly “property” payouts plus interest until that percentage entitlement is reached; or

• Be transferred to one spouse, and the departing partner has a “reduced” percentage share secured by mortgage, plus “full” spousal maintenance for life, or for a specified term of years. This last alternative may make the mortgage more manageable, keep up a flow of predictable of income, make spousal support tax deductible, at least in Canada, and give the option for a sale later upon the retirement of both parties, or when sale prices peak.

It will take some years of litigation for BC courts to develop guiding precedents about which facts, are likely to trigger which judges, to fall where upon the abacus of immediate to delayed financial distribution via a mixture of property and spousal support labels, or not.

8. Income Rich and Asset Poor Spouses

There is a persistent group of “modern” spouses who separate at a time when one or both are income rich, and both are asset poor. Notoriously, these are spouses who separate just before or soon after long years of study or apprenticeship which qualifies one into an allegedly well paid career. At that time of separation they own the ubiquitous VW car and some furniture. Most publicised are the traditional situations where one spouse, usually the female, (and notably now includes “informal” relationships of at least two year’s duration), works in paid employment for 5 to 10 years to assist the other become qualified in a field of expertise.

They separate soon after graduation, sometimes allegedly because the female worker has become too “dull” for the now-educated male partner. In the future, these gender stereotypes will increasingly be reversed. One half of a VW car (under s.81), or even 100% of a VW car (under s.95(2)), is small financial consolation to the working spouse. The BC FLA does not appear to allow use of common compensatory devices such as:

* Adjourn the family property proceedings for say a decade until the qualified spouse has enough tangible property to target. This is because s.84 requires “property” to exist at the time of the separation.

* Deeming an expert qualification to be “property” and assigning a present value to a future income stream. This is because s.84 requires family property to be “real property and personal property” which is “owned”.

However, the use of “spousal support” is also a standard device to make adjustments to the losses and gains of human capital between spouses in these situations. Section 161 of the FLA expressly opens this doorway:

In determining entitlement to spousal support, the parties to an agreement or the court must consider the following objectives:
(a) To recognise any economic advantages or disadvantages to the spouses arising from the relationship between the spouses or the breakdown of that relationship; etc.

Predictably, this legislative device gives zero guidance on maths. The periodic or lump sum payments can be based on a mysterious gradation of payments for losses and gains of human capital:

- A refund of half of past shared wages
- Half of the graduate spouse’s wages for 2 years to compensate for his “leapfrog” start
- Half of the graduate spouse’s future wages for the same period of time as he studied
- Sufficient salary for the worker spouse to upgrade qualifications also for X years (“my turn” principle)
- A guess at what salary increases the working spouse may have acquired if studying also, and pay that amount to her as a lump sum; etc

These alternative mathematical methods, based on anticipated losses and/or gains of human capital, produce a “range” of financial outcomes. It is guesswork where on that range a particular judge, or the “shadow” of future precedent will fall. Moreover, the Spousal Support Advisory Guidelines produce a wide range of possible outcomes in dollars and duration. It is not possible to guess if and in what amount a compensation payment might be included within that range for losses and gains of respective earning capacities or human capital. At best, judicial and settlement precedents will helpfully narrow the ranges, not eliminate them.

9. Support Needs: and Limited or No capacity to Make Periodic Payments

In a large number of poor and middle class families in Canada, one spouse (or both spouses) has a “need” for financial support to pay for moderate weekly expenses. However, the other spouse has a small income which barely provides for his/her own moderate weekly living expenses. In classical language, there is a spousal “need”, but little or no balancing “ability to pay” from income.

In what circumstances should a court subtract some capital from the still income-receiving partner, to provide at least some “extra” money in the hands of the needy partner?

If so, how much?

Once again, there is clearly power in s.95(3) and s.161(a)-(c) of FLA to take property from a poor or middle class spouse (or any spouse), as a form of spousal support. However, again there is zero guidance on the maths of adjusting capital in such circumstances. 19 A judge has

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19 Compare the sophisticated Spousal Support Advisory Guidelines which assist with calculation of time and amount of periodic support. See SSAG: A New and Improved User’s Guide to the Final Version, March, 2010 by Carol Rogerson and Rollie Thompson, at www.justice.gc.ca paras 12.6.1 to 12.6.2—“[T]here is a minority view --that a high property award always justifies lower spousal support. We have left the law to develop further in this area....”. 

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a discretion to decide anywhere on a gradation of outcomes in such poor and middle class families as follows:

1. No extra percentages of property above 50% are payable, as the payer has socially acceptable housing and lifelong needs to be met from his/her limited capital. The needy spouse must rely on social welfare, possible employment, and perhaps an unlikely change to, or review of nominal spousal support in the future (s.167-168);
2. A small and nominal extra few percentages of property are payable to the needy spouse;
3. A substantial portion of property is payable to the immediately needy spouse which portion attempts to “equalise” net incomes of each spouse at least for a fixed period of time. In Canada, this device requires considered balancing of different tax consequences arising from payment characterisation. Lump sums are not tax deductible and are not income in the hands of the payee; whereas periodic “spousal support” is tax deductible for the payer, and is taxable in the hands of the payee.

In middle-upper and upper class families, there is a similar diminishing gradation of percentages of property which could be paid to a spouse with moderate and weekly “needs”. At some point, (eg each spouse has received $2 million or more as family property distribution), the potential spousal support add-on under s.95(3) will probably reduce to zero. The capital wealthy can meet their own needs.20 The predictably increasing complexity of the Spousal Support Advisory Guidelines, and explanations thereof do not provide a rule or formula for this common scenario where allegedly capital is “available” or not, to pay spousal support.

Once again, each of the above three justifiable outcomes fall within the discretion of the judges who are attempting to provide some guidance about the “normal” ranges of outcomes for particular, but still common family “types” in BC, and in Canada.

In Australia, a recurring pattern of conflict has emerged –again involving the long-lived baby boomers. As one spouse becomes ill with dementia or Parkinson’s disease, the other refuses to pay for “exhorbitant” care facilities on offer. The partner with the illness, sometimes supported or not by divided family members, makes a property application in order to extract capital to pay for several years of care.21

10. Backdoor Financial Provision Via Spousal Support

It is not possible to distinguish between “spousal support” and “property” provision or orders by purpose, maths of calculation or form. An agreement or order to pay $400 per week; or a lump sum of one million dollars; or a right to occupy exclusively a house or business; or to pay for forthcoming accountant’s or legal fees, can be labelled as either, or even as child support. Classical and wobbly attempts have been made to distinguish the form and purpose of spousal support as follows:

20 Compare Leskun v Leskun [2006] S.C.J. no.25 (husband’s assets of $1 million amounted to “capacity to pay” spousal support); Chutter v Chutter 2008 BCCA 507 ( husband and wife each received $4 million in property, and the wife an additional add-on of spousal support).
The above distinction has been expressly rejected in Canada, where “compensatory” spousal support orders are common, and are arguably classical, add-on or backdoor property orders with a new label, and new consequences. Nevertheless, the “label” attached to each dollar or financial provision at the time of the order or agreement or perhaps ex post facto—either “property” or “spousal support”—is vital. This is because the legal consequences of the label differ dramatically. For example:

<table>
<thead>
<tr>
<th>Spousal Support Orders and Agreements</th>
<th>Property Orders and Agreements</th>
</tr>
</thead>
<tbody>
<tr>
<td>*Periodic payments</td>
<td>*Lump sum</td>
</tr>
<tr>
<td>*Based predominantly on balancing future living needs and ability to pay</td>
<td>*Based predominantly on past contributions to family wealth and welfare</td>
</tr>
</tbody>
</table>

The legal consequences of the label differ dramatically for example:

- Spousal Support Orders and Agreements
  - Readily variable (s.164(5))
  - Tax deductible, if in periodic form, in some countries, including Canada
  - Payer’s obligations continue on his/her insolvency
  - Terminate on death of payee
  - Can expressly terminate on death of payer
  - More readily can affect child support calculations (s.150 (4); 173)
  - Will affect Testator’s Family Maintenance on the death of the payer
  - Reduce certain social welfare payments to the payee

- Property Orders and Agreements
  - Variable much less often (s.93(5))
  - Not tax deductible
  - Payer’s obligations continue on his/her bankruptcy
  - Do not terminate on death of payee
  - Do not terminate on death of payer
  - Less readily affect child support calculations
  - Will also affect calculation of TFM benefits on the death of the payer
  - Less often will reduce payee’s social welfare payments

At the time inter-spousal financial orders or agreements are made, it is easy to adjust the labels and move money from one ledger to another. For example, family property can be divided as a “property” order H:W = 60:40; and then the wife can immediately receive a “claw-back”; or ledger adjustment in the form of a spousal support order. If capitalised on the wife’s life expectancy tables, this might amount to 15% of the property pool. Result? — the final financial/ property/ spousal maintenance/ hybrid order is H:W=45:55. Such hybrid orders are expressly encouraged, or at least enabled, by the interesting terms of s.95(3) of the FLA. This subsection is one in the shopping list of unranked discretionary factors which enable deviation from equal division of family property. It states as follows:

The Supreme Court may consider also the extent to which the financial means and earning capacity of a spouse have been affected by the responsibilities and other circumstances of the relationship between the spouses if, on making a determination respecting spousal support, the objectives of spousal support under section 161 [objectives of spousal support] have not been met.

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22 See e.g. FLA s.95(3); and also s. 150(4) whereby child support can also be paid in the form of a property order; Carol Rogerson, “Spousal Support After Moge” (1996-97) 14 Can. Fam.LQ 287.
Notably, there is no current statutory requirement to label the proportions hidden in a hybrid order or agreement. Compare s.173 of FLA which requires some identification of proportions of child support and spousal support. The spousal support appears to “disappear” into the label of a property order under s.95(3), unless spouses or a judge specifically label the proportions. As mentioned above, once classified as a 100% property order (despite the hidden hybrid elements), this label has important ex post facto consequences.

The Spousal Support Advisory Guidelines also encourage consideration of “restructuring”; “trading off”; “front-end loading” and “lumps sums” of spousal support in order to achieve settlements.23

To conclude, it is a common feature in family property legislation to undermine any perceived rule certainty for property division by the use of “backdoor” financial adjustments via spousal support orders or agreements, whether calculated on “needs”, compensation or a mixture of both methods.

The next section of the paper hypothesises a further tremor beneath the veneer of certainty ---namely the gradual change and contraction of the spousal support industry in BC, particularly the variability of spousal support orders and agreements.

**The Pendulum between Financial Finality and Flexibility; between Clean Break and Ongoing and Variable Financial Relations---forecasting Contraction and Change in the Spousal Support Industry?**

There is a pendulum in family financial provision between finality and flexibility, or between clean break and variable ongoing financial relationships. This pendulum tends to swing to and fro over decades in many countries. In Canada, the latter appears to have been emphasised in black letter law since the *Moge* decision in the Supreme Court of Canada in 1992,24 and appears by anecdote and reported cases to have led to a booming, complex and uncosted spousal support “industry”. However, is the lawyer-centric idea of spousal support “rights” then followed by increased statistical rates of payment? Unlikely. Moreover, it is probable that the rights-talk pendulum will swing again.

Prior to *Moge* case, there was a momentary emphasis in doctrine and practice on attempting to effect clean break wherever possible in financial relations between spouses.25 Anything old can be new again. Change is so readily possible because the vague and conflicting shopping lists of discretionary “factors” applicable to spousal support are unranked in both the *FLA* and the *Divorce*...

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25 See e.g. the “trilogy” of cases in 1987 of *Pelech v Pelech* (1987) 7 RFL (3d) 225 (SCC); *Caron v Caron* (1987) 7 RFL (3d) 274 (SCC); *Richardson v Richardson* (1987) 7 RFL (3d) 304 (SCC); N.Bala, “Domestic Contracts in Ontario and the Supreme Court of Canada Trilogy: ‘A Deal is a Deal’” (1988) 13 Queens L J 1.
Therefore it is relatively easy for each judge, or generation of judges, to rearrange which statutory factors trump, without waiting for legislative permission (as in BC), or media prompts.

The arguments in favour of more (not universal!) long term, unsecured and variable inter-spousal financial obligations (aka spousal support) are as follows:

1. This emphasis encourages initial property settlements and decisions, as the hard choices attached to clean financial break can be deferred into the future (into the “never-never” of variations and reviews). The immediate negotiators’ or decision-makers’ pain of “losing” another X% of family property can be deferred in exchange for the possibility of paying or receiving more or less in unsecured part payments for some unknown time into the future.

2. As discussed above, in certain family types, ongoing financial obligations offer a real or vain hope of rebalancing some of the losses and gains of human capital which flow from spousal roles. For example, in poor and middle class families, (eg with assets valued at less than $500,000—the “average” Canadian family?), tangible assets are limited at the time of separation. Accordingly, ongoing financial obligations offer a hope and perhaps a reality of later partly redistributing losses and gains of “human capital” arising from the marriage relationship, or from subsequent life events. The classical hope reflected in Moge, is that higher awards, more predictable ranges, cheaper enforcement methods, and lifelong variability of spousal support, will alleviate the ubiquitous post-divorce poverty of women, with minimal side effects.

3. Following the private interest reflected in the previous paragraph, the public also has an interest in a cost efficient system of ongoing inter-spousal payments. This is at least because both the government and the taxpayers hope that such ongoing payments will reduce escalating social security welfare and disability pensions being paid to support separated and divorced women, and increasingly, separated and divorced men. This factor is particularly politically persuasive where an indebted government is searching for methods to pass current social welfare and disability expenditure back to taxpayers.

4. Both government and some payers may prefer periodic payments as a lump sum can be readily “lost” by unsuccessful investment, or other forms of gambling; or may need to be renegotiated if older children decide to move in with the payer father or mother; or other life events reverse spousal needs and abilities to pay.

5. Ironically, some payers presumably prefer to reach packaged financial agreements which increase periodic spousal support, which is tax deductible, as a trade for decreased child support payments, which are not tax deductible in Canada since 1 May 1997. Same gross dollars paid, but better net result for the payer.

6. After the Second World War, there was a large cohort of married men and women with children who “expected” lifelong ongoing financial support from husbands and ex-husbands. This social contract was reinforced by the pressures for married women to be the primary unpaid parent and homemaker, and by hurdles for women to gain education and enter the paid workforce.

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However, the following traditional arguments against ongoing and variable financial dependency of former spouses, and in favour of more (not all!) clean break and finality provisions, are predictable and have regained analytical and political weight (again!) in some “modern” industrialised countries. Arguably, these will also swing the pendulum in Canada as follows:

1. In line with other jurisdictions, the Supreme Court of Canada, when applying the Divorce Act, has already reinstated the clean break option, if the settlement is surrounded by specified degrees of formality and verbal formulae.\(^{27}\)

What percentage of financial settlements use the specified clean break procedures? In what “types” of relationships?

2. In Canada, it is perceived to be increasingly difficult to vary initial spousal support agreements or consent orders. This is because the variation is only triggered by proof of original circumstances plus an unforeseen and “material” change in those circumstances.\(^{28}\)

Therefore, it is dangerous for payer males to agree to indefinite spousal support as a carrot for a quick property settlement in the vague hope that spousal support will be “fixed” later. The settlement carrot may usually turn into a nasty fixed life sentence.

Therefore, arguably payer males (and increasingly payer females) should negotiate firmly for non-variable zero, lump sum, or fixed term spousal support in exchange for the carrot of extra property percentages to the package.

3. How “efficient” is the spousal support industry in Canada? Of course, there are many measures of efficiency. What studies of “efficiency” have been done? Do the private and public expenditures on the national spousal support industry justify the limited returns? What proportion of separating couples have an initial spousal support arrangement? What proportion of these are paid, abandoned, or varied?\(^{29}\)

Former partners and the shrinking public infrastructures use time, energy and money to study, calculate, negotiate, litigate, defend, strategically leave or hide employment, re-open, review, collect more facts and evidence, re-negotiate, re-litigate DIY or via lawyers, write and publish long, dense, dissenting and endlessly analysed judgements, pay spousal support for a limited time, seek to collect, cease payment, and start the cycle again etc. Has the spousal support industry decreased or increased the poverty of women after divorce? Could the costs of that activity be more effectively spent otherwise? What studies exist to identify which are the few types of families where spousal support is assessed and paid “efficiently” (usually the wealthy, or government employed payers)?

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\(^{27}\) LMP vs LS 2011 SCC 64; see text above note 16.


\(^{29}\) See for example M. Galanter, “Justice in Many Rooms” (1981) 19 J. of Legal Pluralism 1; “A World Without Trials?” (2006) J. Disp. Resol. 7. At the end of this paper is a preliminary prototype of a pyramid of conflict illustrating and hypothesising about the tiny few who actually achieve long term spousal support payments in Canada. Of course, many research projects are needed to fill in possible statistics at each stage of the evolution of these conflicts—see appendix A.
4. The stressed court systems in Canada and elsewhere plead in vain for the appointment of more judges, court staff, mediators, legal aid officers and educational helpers for the queues of DIY unrepresented supplicants. The limits on court resources lead inevitably to courts restricting and delegating business. Labour intensive “return” business from family law disputes, including spousal support, are easy targets for courts to restrict and delegate; likewise for legal aid authorities to cease funding. This is especially the situation under the BC FLA (and other equivalent provincial legislation), which have dramatically increased court “business” by retrospectively conferring new property and spousal support obligations on informal marriages. A statistical floodgate of work opens. More court work, and fewer resources.

Informal marriages also involve the additional judicial task of determining when a marriage commences without the easy evidentiary assistance of a marriage certificate. How many thousands of extra court filings will informal marriages involve in BC per year especially in the catch-up early years of the operation of the FLA? How many extra interim and “full-blown” hearings? Using standard management techniques, it is likely that both trial and appellate courts will:

(i) Decrease the number of long term spousal support orders whether based on “compensation” or “needs”

(ii) Increase the number of clean break property orders by adding percentages or lump sums in favour of partners with clear needs and/or losses of human capital

(iii) Refuse more applications to vary existing spousal support orders and agreements in order to deter this traffic.

(iv) Delegate some or all spousal support topics to a mandatory pre-filing or pre-hearing tribunal and/or mediation process. There is the obvious risk that one underfunded and inefficient system will delegate to another underfunded and inefficient system.

This predicted and publicised court hostility will quickly cast a shadow into the negotiation and advice-giving arenas where the vast majority of family financial decisions (99% in BC) are made or abandoned. Folklore and settlement law will emerge (and by some anecdotes, has already emerged) such as:— “Include initial requests for unsecured, variable, future spousal support obligations in negotiations and court applications; however be ready to trade these chips for


32 Perhaps straws in the wind indicating court reluctance to grant variations of spousal support can be found in the two recent decisions of the Supreme Court of Canada, LMP v LS 2011 SCC 64; PP v RC 2011 SCC 65.

33 See SSAG at note 14 on “trading off” and “front-end loading”.
increased percentages of family property or fixed term or lump sum spousal maintenance; a bird in, or out of the hand, is less risky for both partners than the two or more or less, in the bush of the court process.”

5. For spouses with young children, the payment of child support has probably become more statistically efficient due to assessment at higher amounts, located in printed tables and with yearly formulaic updating available, together with easier collection methods since the introduction of mandatory child support guidelines. Moreover, this is child support which bites into the Canadian payers’ post-tax dollars because it is not tax deductible. Accordingly, in poor and middle class families once child support is paid, there is limited income and capacity “left” to pay any spousal support.Statistically, does this effectively eliminate or render nominal periodic spousal support from the vast majority of poor and middle class Canadian families who are paying child support for dependent children? 34 The possible resurrection of spousal support obligations and payments upon expiration of child support payments (“crossover payments”-FLA, s.173), and predictable defences or cross-claims at that time, are likely to receive a cool reception from busy courts which are trying to limit return business.

6. If the spousal support variation door is left wide, or even half open, then there is arguably an increasing number of actual life events in Canada and elsewhere which justify re-opening the “needs” and “ability to pay” maths by request, self-help, negotiation and litigation. These life events dramatically affect the needs and ability to pay of many individual Canadian spouses. For example,

(i) The illnesses and deaths of several cohorts (millions?) of married, cohabiting, separated and divorced baby boomers in the next twenty years
(ii) Wild fluctuations in world stock markets
(iii) Governments everywhere reducing levels of expenditures, jobs, and pensions
(iv) Statistical jump in insolvencies in Canada in 2008-2009 (though slowly declining since then), especially in retail and manufacturing industries
(v) Job outsourcing and redundancies, particularly for males in construction, IT and manufacturing work. Boom and bust in certain large industries
(vi) Increased employment of females in education, administration and healthcare industries
(vii) In western industrialised societies, a dramatic increase in visible drug and alcohol addiction, and mental illness
(viii) The long life expectancies of the baby boomers will lead to decades of expensive old age care and health services


Compare the hope of L’Heureux-Dube J. in Moge in 1992: “Equitable distribution can be achieved in many ways by spousal and child support, by the division of property and assets or by a combination of property and support entitlements. But in many, if not most cases, the absence of accumulated assets may require that one spouse pay support to the other in order to effect an equitable distribution of resources.” Moge v Moge [1992] 43 RFL (3d) 345 at 374.
Increasing incidence of sequential and concurrent informal marriage relationships lasting two or more years, with competing financial obligations arising between relationships.

In the light of the above and other standard life uncertainties, informed poor, middle class and wealthy “needy” spouses should normally negotiate vigorously for an increased slice of visible family property, rather than hope for an uncertain variable spousal support supplement.

Conversely, more payer’s will be advised to, and eventually will be reluctantly willing to pay, a lump sum clean break “premium” rather than live for his/her remaining days as an “encumbered male” or an “encumbered female”. Those long term labels (a lifelong brand for Canadian males based on existing longer life expectancies of females) have serious deleterious effects on the payer’s employment motivation; self-esteem; future partners; borrowing capacity; and future business partners.

7. Regional differences in Canada may also affect settlement and judicial practices (“litigating in the shadow of the bargains”). For example, Vancouver seems to have the most expensive housing in Canada (and perhaps the world), and at least some women and men prefer a capital payout to enable a bank loan and payment of an immediate deposit on another house somewhere in BC, than be drip fed uncertain periodic payments for rent.35

8. The “rules” applicable to the current apparently high incidence of spousal support orders and agreements in Canada, are particularly conducive to conflict. They appear to be caught in a “simplicity-complexity” spiral familiar in tax law, the seven habits of highly effective people, and the ten commandments. Seven (or arguably more) factors in the ss.161-162 of FLA (equivalent to the seven or more factors in the Divorce Act RSC 1985 s. 15); are mystified by thousands of reported cases and commentaries, and unreported settlement practices; are simplified by the Spousal Support Advisory Guidelines (SSAG); which in turn are mystified and simplified by the Spousal Support Advisory Guidelines (SSAG); which in turn are simplified by the profound and evolving “non-final” New and Improved User’s Guide to the Final Version [of SSAG], which systematises some of the hundreds of the most significant cases and gradually extends the list of exceptions to the formula36; which in turn are simplified by the long standing principle of “split the difference” once the possible market range is established. At para 9 of the User’s Guide, the authors offer the following profound and helpful insight while also expressing some frustration, “The ranges [under the Spousal Support Advisory Guidelines] are quite broad, under both formulas [amount and duration] especially when the disparity of incomes is large or the marriage is long. Too often, the lawyer for the recipient asks for the high end,

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the lawyer for the payor offers the low end, and then the court opts for the mid-range, all with little in the way of reasons”. Such an inglorious but manageable conclusion as “split the difference” in litigation and perhaps also in negotiation, may be viewed as wise simplicity, or despicable laziness, or somewhere in between.

9. The impending wave of deaths of the wealthy and powerful baby boomers will also put pressure on stressed government and court systems under the heading of “succession”, rather than “family law” conflicts. This is because:

- The arguably less privileged “X-Y” generations of adult children are awaiting their “last chance” for a slice of parental boomers’ capital. Conflict and DIY litigants will abound. There will be new business opportunities for dispute-solving lawyers, as the law will follow this money.
- Additionally, there are many ex-spouses and companions who will also take their last chance to make a claim for Testator’s Family Maintenance provision, or for variation of spousal support against a deceased ex-partner’s estate.
- The administration of deceased estates in Canada will become an even more complex industry, with distributions withheld and spent over decades on managing increased conflict, litigation and provision for dependant tribes and future variable spousal support. *Jarndyce v Jarndyce* revisited many times?

Ironically, succession laws may favour “clean break” lump sums or life tenancies for Testator’s Family Maintenance claimants more often than the traditional periodic and variable patterns of spousal maintenance?37

10. Apart from the above financial reasons to restrict the availability and variability of spousal support (2 above being very persuasive at this stage of history), there has been a much publicised ideological shift about expected female “dependence”. The social contract and common expectations for the majority of men and women in Canada and in other western societies has obviously changed since 1945. More women in marriage relationships now expect to be employed, and are so employed; have several informal partners before formal marriage; marry later in age after experiencing patterns of paid employment; or remain unmarried in increasing numbers; attend universities in greater numbers than males; occupy positions of political and financial power; experience multiple relationship and marital separations; and marital separation is now the publicised statistical norm, rather than a scandalous exception. In contrast, males are experiencing increasing rates of unemployment, social alienation, addictions and mental illnesses. And dramatically, BC and other provinces have imposed the same vague but onerous property and spousal support obligations on not only

37 See A.H. Oosterhoff, *Oosterhoff on Wills and Succession* (7th ed), 2011, pp 893-897
“serious” formal marriages, but also on informal and “casual” 2 year short relationships.

Conversely, (apart from the super-wealthy), how likely is it that the new generation of financially successful (and voting) females will be willing to make long term or lifelong payments to the new generation of once companionate, and now needy males?

New urban horror and wonder stories will emerge, (always more persuasive than “mere” statistics), about short term male companions, who are now unemployed and needy artists, musicians and recovering lawyers, who are “living off” their former female partners. How many female judges will be willing to interpret the weasel words of the BC legislation to allow such long term payments and lifelong variations thereof, other than in the most “exceptional” cases?

The ideological shift away from long term dependency is partly reflected in the maths of the 2005 and revised 2008 Spousal Support Advisory Guidelines. These embody limited periods of periodic spousal support based on duration of relationship, and dependency of children.

When there are ideological, financial and infrastructure changes, some minority groups, especially some older married or separated females living under the old expectations, will “lose”. There are rarely publicised sunset and sunrise clauses for creeping ideological and economic changes. This shift also raises the practical question again (see argument 1 above) of just how much, or probably how little, spousal support has been actually paid in poor and middle class families in Canada since Moge, and at what social costs?

**Different “Settlement Laws” for the Rich and for the Poor**

“Settlement laws” are the pragmatic principles and rules developed, modified and used by experienced repeat players (often lawyers), to resolve disputes in a particular area of conflict. Current interpretations of trial judge and appellate judge law (“black letter law”) are only one important element of settlement law.

Settlement law is arguably more important than judicial determinations as the former determines the outcome of at least 90% of disputes which enter a lawyer’s office. Ironically, there is not much accessible writing about settlement law. One of the many consequences of the predictable discretions in the FLA, is the emergence of different “settlement” laws for the rich and for the poor and middle class.


39 In 2010-2011, 35% of all cases filed in civil courts in BC were about “family law”. 80% of these filings were not contested, and 20% were initially contested at the time of filing. However, only 1% of the initially contested filings reached a full blown hearing--that is 99% of filed cases settled at some time. See M.B. Kelly, Divorce Cases in Civil Court 2010/2011 (2012) Statistics Canada www.statcan.gc.ca

Predictions for the Wealthy in BC

For upper-middle and the upper class couples (“UMUC”-- say who have an asset pool over $700,000), equal division will rarely occur in settlements or in full-blown litigation; nor will they keep their pre-relationship assets intact. Instead, the UMUCs have available resources to argue for “finely tuned justice” and for one or more of the ten standard exceptions to equal property division. The UMUCs can “sensibly” afford to spend between 1%-10% of the total asset pool to achieve a 2%-30% adjustment in the property division. In raw dollar calculation of “legal” costs, and omitting personal and business goals, this is usually a sound investment in the lottery of “litigotiation”.

Additionally, the UMUCs can use the alternative label of “spousal support” as an extra shotgun negotiation lever; and as a backdoor method of achieving delayed property/monetary/financial/asset division outside the 50/50 “rule”; and as an accounting trick or clawback to gain a share of “excluded” property.

Wealthy couples will not receive much social sympathy for “losing” 1%-10% of their assets in negotiation and litigation costs; they have plenty left over, though sometimes only as ubiquitous renters in a high-price BC housing market. However, the taxpayer, the judges and the Attorney General will not be pleased when the UMUCs use filing in the very expensive court system, (paid for from shrinking taxpayer dollars, with zero political return to the government), as negotiation leverage and, in statistically diminishing situations, as a final decision-maker. Pressure for increased government expenditure on family court systems will particularly occur over the next say ten years, as the normal pattern occurs of wildly inconsistent judicial interpretation of new legislation. Will the diversity of judicial interpretation ever stabilise? Yes, but only a little. Momentary guidelines will eventually emanate in long, divided and unclear judgments from appellate courts. These vague epics sometimes reduce, but do not eliminate the bargaining shadows from inconsistent trial decisions.

Judicial guidance also necessarily contains a new set of weasel words which add new factors to the original legislative lists of vague terminology. Somebody once said, “family law is largely immune from precedent”.

During the next decade and thereafter, there will inevitably be renewed public cost-cutting moves on the UMUC disputes by aggressive “managerial” judges; pre-filing mandatory mediation and ENE rules; high court filing costs and recovery of court fees; double costs awards for unaccepted offers in the range; the usual post-Woolf legislative and practical arsenal to make the court system unfriendly to UMUC lawyers and clients; and some attempts to revive family property arbitration.

The reduction of public expenditure on UMUCs will again depend largely on the emergence and expansion of an expert club of user-pays city and regional family lawyers, case appraisers and mediators (plus perhaps a few arbitrators if the courts become sufficiently delayed, stressed and uncertain), who develop settlement law, “going rates” and settlement “products” to narrow the range of outcomes, and then pressure clients to agree within those ranges. However, there will be renewed requests for the expert old clubs to come up with fast, cheap, entrepreneurial and no-filing dispute resolution options—something old clubs have been comfortably reluctant to do, at least in some countries.

**Predictions for the Poor and Middle Class (“PAMC”) in BC**

As always, there will be one set of “settlement laws” for the rich, and another for the poor. Traditionally in western industrialised countries, “poor” individuals in family disputes have been women. But in those countries, post-2000 recessions seem to be gradually increasing male poverty, and shrinking the middle class.

For poor and middle class couples, 50/50 division will probably initially be a common outcome of settled disputes about family property. Why? This is not what the legislation says. The written “law” has at least the ten exceptions mentioned above, and the backdoor of spousal support adjustment, to equal division for rich and poor alike. However, PAMC couples (with asset pools under say $500,000), do not have the resources to negotiate or litigate towards “finely tuned justice/outcomes”. This is because PAMC couples will spend between 20% and 100% of the asset pool to achieve or defend a potential 5%-50% adjustment. For example, a wife who wants a 60/40 division of a $300,000 pool in her favour due to one of the standard legislative exceptions, will spend about 10% ($30,000) in transaction costs, for the hope of gaining another 10% ($30,000). Net return zero, even when successful on the gross. Obviously this is a very unattractive “commercial” investment or lottery ticket.

Moreover, the higher the percentage sought, the more likely that defensive reactions and mutual transaction costs increase. For grieving PAMC couples, scorched earth and Phyrric victories are standard. The expenditures on the dispute will often produce a net dollar outcome for both PAMC parties which is less than 50/50—woops. (To repeat, this analysis does not apply to the wealthy, for whom the transaction costs of disputing often provide a “sensible” investment, with minimal net “loss”).

Experienced family lawyers will normally very reluctant to act for PAMC clients who want to achieve “justice”, a “matter of principle”, or a “fair” gross outcome above 50%—even though on the written law the client has a “strong” case to rise above 50%. Experienced family lawyers want PAMC clients to offer or accept 50% as quickly as possible, so that transaction costs are minimised, and so that the clients net above 45% ---this net amount being the equivalent of 60%-80% gross in a settlement at the door of the court, or a full blown court hearing.

If a PAMC client is not willing to listen to and accept quickly this disappointing 50/50 settlement advice, usually an experienced family lawyer will find a way to “cease to act” for that client. Danger signs and pragmatic ethics prevail over professional martyrdom.
Good News-Bad News

If the above predicted initial settlement pattern of 50/50 for PAMC couples is correct, this is at first good news for the public purse, the cost- cutting Attorney General, and the “more for less” court system. However, there are some dark financial clouds for courts, the government and private lawyers. There is some evidence that the public likes finely- tuned and discretionary outcomes over “rule justice”; and that people with few assets often argue more intensely about a little than those who have a lot—proportionally, they have “more to lose”. And there is a lot of evidence that the rate of DIY, pro se, unrepresented or LIPS disputants has risen dramatically over the last 15 years in both trial and appeal courts in all areas of law—especially family law. 44 As the proportional transaction costs of disputing are high for the PAMC, then they will “do-it-yourself” and dispute in ways which minimise their own costs, but usually increase the costs and frustration of everyone else. LIPS have the ability to mire court systems in misery while judges, opposing lawyers and court officials attempt to educate them about appropriate procedures. The increasing dysfunctions of the court system will further encourage LIPS to dispute and litigate, and lawyers to settle and stay away from filing in the unfriendly courts. 

Ironically, this flow of ragged DIY litigation in BC will eventually produce a stream of reported precedents which show that in certain “types” of poor and middle class relationships, one party (often a woman caring for young children with an absent or unemployed father), will receive between 60%-80% of the family property.

Meanwhile, many more PAMC couples in BC will probably “lump it” or “clump it” with a fast 50/50 settlement, than will attempt to achieve their “legal entitlement range” by arguing one of the standard exceptions. It is important for this prediction to be proved or disproved by systematic studies over the next decade, as “normal” and publicised patterns of settlement assist others to follow; and the BC government needs to know what benefits if any actually flow from the expense and disruption of legislative change. However, the worldwide plea for statistical measurement of settlement and litigation patterns will probably go unheeded and unfunded in British Columbia as elsewhere? The next round of family property reforms in BC will again be based on anecdotes rather than statistical studies of disputing paths, family types and settlement patterns.

Conclusion

This paper has suggested that:

1. The apparent certainty of rules for property division between formal and informal spouses as contained in the new BC Family Law Act is necessarily illusory. The vast majority of inter- spousal property divisions are governed by judicial discretions which are vague in threshold, and then involve mystery maths. However, those uncertainties can be helpfully managed by emerging templates of the standard topics and current ranges for each.

44 Eg Canadian Judicial Council, Statement of Principles on Self-Represented Litigants and Accused Persons ( September, 2006); D.A. Rollie Thompson, “ No Lawyer: Institutional Coping with the Self-represented” (2001) 19 CFLQ 455.
2. At least a decade of mystery maths about how should property be divided in BC, will have some unintended social consequences, also experienced in other jurisdictions.

3. One interesting hypothesis is that this BC reform will contribute to the gradual contraction of the current spousal support industry in BC—a statistical contraction of spousal support awards, agreements and attempted variations (both “compensation” and “needs” based) away from periodic, lifelong and variable towards (once again) more lump sum, short term and clean break obligations.

4. Another consequence of the high transaction costs of narrowing down the new mystery maths will be that initially and say for a decade, there will be one form of family property settlement law for the rich, and another for the poor and middle class.

These predicted patterns in BC may send anecdotal ripples to other provinces, or may remain as idiosyncratic to the regional west of Canada and to the new Family Law Act. Ideally, the above standard hypotheses, which are common to family property reforms in other countries, should be verified or modified by careful statistical studies in BC over the next decade. This would provide some more accurate guidance to websites, spouses, cheer squads, lawyers, mediators, arbitrators and government about regional “settlement law” and litigation behaviour; and on the “real” patterns of financial division by abandonment, agreement or order, which are key to further reforms to family property law. Such an information flow would probably increase “early” settlement rates (behaviour follows known common practices), and reduce the management work of stressed courts.

However, this plea for accurate data has been statistically futile elsewhere! 

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Further Reading
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Family Law Council of Australia, Spousal Maintenance (Aust GPS, 1989)

45 Anne-Marie Ambert, Divorce, Causes and Consequences (Vanier Institute of the Family, November, 2009) 24.