INEQUALITY IN EQUAL DIVISION:

Embracing a Canadian Approach to Remedy Economic Inequality Upon Relationship Breakdown

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1. INTRODUCTION

1.1 History

The Matrimonial Property Act 1976 (the MPA) introduced a presumption of equal sharing of the matrimonial home and chattels between the husband and wife upon the breakdown of the marriage. It was an act "to recognise the equal contribution of husband and wife to the marriage partnership."[1] Under the Act contributions were to be measured by reference to the relationship rather than to property.[2] This conceptual change was aimed at recognising that all contributions to a relationship are to be regarded as equal and because they are equal, the spouses should receive an equal result upon the breakdown of the relationship.

1.1 Inequality of Equal Division

The 1988 Report of the Royal Commission on Social Policy[3] (the "April Report") identified that an equal division under the MPA did not result in an equal outcome for spouses at the end of a marriage. One of the major obstacles to a fair and equal result was that receiving half the equity in the home, commonly the largest or only matrimonial asset, did not leave the husband and wife on an equal footing.[4] The situations where the inequality was at its highest occurred when the wife had been primary caregiver to the children and a homemaker while the husband was the main breadwinner. The husband had the opportunity to enhance his skills and ascend the career ladder, providing him with the enhanced income position required to service a mortgage. The wife would be in a difficult position as a half share in the equity in the former matrimonial home may not be enough to purchase a new home outright and her lack of skills and training provided a low-income position insufficient to service a mortgage.

The Report of the Working Group on Matrimonial Property and Family Protection[5] (the "Working Group Report") further notes that the continued care of children of the

[1] Matrimonial Property Act 1976, Title
[2] See for example section 15 of the Matrimonial Property Act 1976.
[3] *Report of the Royal Commission on Public Policy/Te Kōmihana a te Karauna mō ngā Āhuatanga-Ā-Iwi*. Vol. IV. April 1988
[4] Ibid, at pp 217-223.
[5] *Report of the Working Group on Matrimonial Property and Family Protection* (Government Printer, Wellington, 1988)

marriage can increase the disparity between the husband and wife after separation[6]. Where the wife retains primary care of the children, she will suffer from reduced employment opportunities. Additionally, the April Report[7] notes that the inequality and unfairness is particularly severe where a wife has supported the husband in obtaining his degree, which may lead to a lower value of matrimonial assets in addition to the husbands much enhanced earning capacity.

In 1996 the case of Mr and Mrs Z came before the Court of Appeal and was a textbook illustration of the actual inequality that was persisted for many women, despite the formal equality provided by the MPA.[8] The April Report had highlighted that the most valuable asset of the marriage, the husband's income, is not divisible as matrimonial property and is left in the hands of the husband alone.[9] In *Z v Z (No 2),* Mrs Z argued that her husband's income could be classified as matrimonial property and subject to equal division. Ultimately this argument was unsuccessful. However, the Court of Appeal explicitly recognised that an equal division under the MPA did not produce an equal outcome.

1.2 *Z v Z (No 2)*

When Mr and Mrs Z separated they had been married for twenty-eight years and had three adult children. Mrs Z had been the homemaker and primary caregiver of the children, working only five years part time after the birth of the first child. Mr Z was a successful partner in an accounting firm, earning over $300,000 per year, while Mrs Z relied on a Social Security benefit of $7000 per year. In total the matrimonial property was in the vicinity of $900,000, of which each party was entitled to half of under the MPA.

The Court of Appeal recognised that Mrs Z's entitlement under the Act did not produce a just result, highlighting that both parties had focused their efforts on increasing Mr Z's earning capacity, albeit in different ways. They found however, that incorporating earning capacity into the definition of property in section 8(e) did not fit within the context of the Act and would result in a broader interpretation than Parliament intended.

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[6] Ibid, at pp5-6
[7] April Report, supra fn 3, at pg 219
[8] *Z v Z (No 2)* [1997] 2 NZLR 258
[9] April Report, supra fn 3, at pg 219.

Under the MPA Mrs Z received $450,000 of matrimonial property. Although this is a relatively substantial sum, the outcome of the equal property division failed to put her on an equal footing with her husband. Mrs Z invested herself and her life in Mr Z at the expense of investing in herself. As a result she lacks the skills needed to obtain employment, whilst Mr Z's high earning capacity is expected to be retained for at least six years. Over these six years his net earnings are expected to provide him with an additional $1.8 million on top of his $450,000 share of the relationship property. Mrs Z is likely to be able to house herself with her share of the matrimonial property. However, her standard of living will be much lower on $7000 per year.

Mr and Mrs Z invested their time and skills equally into the relationship. During the twenty-eight years they were together they made joint decisions that would affect both of their futures. Mr Z was still studying when they married and Mrs Z was working full time, earning more than her husband. When Mrs Z fell pregnant the couple made the decision that they would invest in Mr Z's earning potential, while Mrs Z was to be primarily responsible for the household and children. When Mr. Z's enhanced earning capacity is characterised as a return on the investment that both parties have equally contributed to, it is easy to see how disparate the final outcome of an equal division of relationship property was to Mrs Z. The MPA encompassed the notion that contributions to the relationship should be treated as equal, but the results under the equal sharing regime failed to reflect this.

Mrs Z received the benefit of interim spousal maintenance, however this ceased at the date of the matrimonial property decision. This decision was not on appeal in the Court of Appeal but the Court did take the opportunity to comment on how the provisions for spousal maintenance have been applied in a manner that was more restrictive than the statute required. A wider approach to spousal maintenance may have facilitated an outcome with a more equal result for Mrs Z, by providing her with a more equal footing in terms of living standard. As it was, a narrow interpretation restricted the spousal maintenance provisions from remedying the deficiencies in the matrimonial property regime.

1.3 Parliaments Response to the Inequality

The Justice and Electoral Select Committee heard how it was generally women and custodial parents that suffered economically upon breakdown of a relationship.[10] The majority report recognised that equality of division did not lead to an equality of outcome.[11] Twelve years before the issue was brought before Parliament the April Report had recommended that the aim of the legislation should be equality of result rather than focusing on formal equality through the equal division of tangible assets. In particular a future orientated outcome was recommended in which both spouses had equal ability to attain a reasonable standard of living.[12] It can be seen from the Parliamentary debates that addressing this inequality was a priority in the amendments.

On the Bill's third reading the Honourable Margaret Wilson spoke of the serious injustices that were acutely suffered by the primary caregivers and homemakers, highlighting that the Property (Relationships) Amendment Bill was "designed to ensure that each partner has a fair division of *resources*, and that each is placed on a fair footing to deal with life after separation."[13] The minister also spoke of the bill being "fundamentally about fairness" and it was only fair to recognise that all contributions, financial or otherwise are valuable to a relationship.[14]

Keith Locke also highlighted the numerous submissions from women who were on the Domestic Purposes Benefit or held low-income jobs while their former partners earned high incomes.[15] One example that had come before the Select Committee was of a woman who had been forced to sell the family home as she was on the Domestic Purposes Benefit and could not afford the mortgage repayments. Her husband was earning $100,000 per year.

It is within this context that section 15 of the Property (Relationships) Act 2001 (the P(R)A) was enacted. The intention was to address the inequality that persisted as an outcome of relationship breakdown, in particular the hardship suffered by the partner who had been primarily responsible for the children and home. The emphasis is clearly on equality of result and the section provides that a departure could be taken from equal

[10] (2001) 40 NZPD pp 8435 – 8444, at pg 8441.
[11] Matrimonial Property Amendment Bill & Supplementary Order Paper No 25 2000 (109-3), at pp 33-34
[12] The April Report, supra fn 3, at pg 223.
[13] (2001) 41 NZPD pp 8625 – 8640, at pg 8626 (emphasis added).
[14] Ibid, at pg 8625.
[15] (2001) 41 NZPD pp 8625 – 8640, at pp 8634-8635.

sharing in order to achieve this.

This equality of result is evocative of that set forth by the United Kingdom House of Lords in *Miller v Miller and McFarlane v McFarlane*. Baroness Hale recognised that the breadwinner's unimpeded earning capacity is a powerful resource to replace capital lost through unequal division and that strictly adhering to equal sharing can decrease the primary carer's living standard and increase the breadwinner's.[16] The ultimate objective of the division of property and ancillary relief under the United Kingdom Matrimonial Causes Act 1973 was considered to be "to give each party an equal start on the road to independent living."[17]

The ideal of an equal start is comparable to the ministers' statements when the Bill was passing through Parliament. Section 15 was enacted with the intention of remedying the loss of income and living standards that a homemaking partner suffers at the end of the relationship by looking forward to determine what the prospective income and living standards will be and attempting to equalise outcome when there is a disparity. This accords with the recognition that all contributions to a relationship are to be regarded as equal and the policy decision that the law should provide an equal outcome when the relationship ends.

1.4 Dissertation Outline

The focus will begin with the New Zealand legislation and approaches the courts have taken to applying it, particularly the influential cases that have been decided by the Court of Appeal. This analysis will provide insight to why equality of result remains an unachievable objective under the 2001 amendments.

A brief overview of matrimonial property law in Canada will then be provided. Similar to New Zealand, Canada has distinct provisions for matrimonial property division and maintenance and a deferred community of property system of dealing with matrimonial property, which allows for effective comparisons to be made and can be applied with relative ease to a New Zealand context. Comparing New Zealand and Canada will highlight which areas of the law are functioning more or less effectively and provide a

[16] *Miller (Appellant) v. Miller (Respondent) and McFarlane (Appellant) v. McFarlane (Respondent)* [2006] UKHL 24, at para [142].
[17] Ibid, at para [144].

model on which reform can be based.

Finally, modifications that could be made to address the inequality of result that is suffered by homemakers and primary caregivers. This will include approaches a proposal for reform by Parliament.

2. ECONOMIC DISPARITY UNDER THE PROPERTY (RELATIONSHIPS) ACT

2.1 The Failure of the Amendments to Address Inequality of Outcome

(a) Introduction

In 2001 Parliament amended the Matrimonial Property Act, extending the legislation to cover de facto couples, increasing the power of the Court to deal with trusts and introducing the economic disparity provisions. The latter reform was a response to the criticism levelled at the equal sharing regime of the Matrimonial Property Act,[18] implementing a departure from equal sharing when circumstances demand.[19] The economic disparity provisions of the P(R)A are sections 15 and 15A. For present purposes I will be concentrating on section 15, as section 15A deals with the power for the court to order one party pay the other compensation for contributions to increase in value of separate property.

The history behind the 2001 amendments to the P(R)A and the Parliamentary debates indicate section 15 was intended to remedy the inequality of outcome that results from the roles the partners play during the relationship. However, both the substantial discretion conferred and inadequate direction in terms of objectives have led to issues in application. If the section cannot be applied with ease then ultimately it will lead to outcomes that do not fulfil its aims. This chapter will attempt to outline a number of the main problems the courts have face to date.

(b) Jurisdiction

(i) *Income and Living Standards*

The first limb of the jurisdictional hurdle under section 15 is to satisfy that the income *and* living standards of one spouse or partner are likely to be *significantly higher* than the other. The section provides no guidance as to the level of disparity required before the threshold is reached. So how significant is significant? The determination is in part discretionary, relying on the individual judges opinion, which facilitates individualised justice. However, this can add an element of uncertainty when similar cases have different outcomes. This can easily be illustrated by comparing the approach of two

[18] *Z v Z*, supra fn 8.
[19] This approach was considered a valuable option in Young, W. & Bridge, C. (1988) Justice. In the April Report (supra fn 3), at page 224.

different judges in *A v A*.[20] The Family Court Judge had held that a disparity of $10,000 was significant between parties who were earning around $86,000 and $76,000. On appeal to the High Court the issue of what is significant was not raised, but Ronald Young J commented that he would not have held $10,000 disparity to be significantly disparate.

A balance needs to be reached between arriving at a just outcome in all cases and providing certainty for parties in a dispute. Justice in individual cases is desirable given the diverse nature of family property law. However, this should not be at the expense of certainty. When the outcome is uncertain the party that is suffering the hardship may be discouraged from seeking an award they are entitled to because of the costs involved. The Court of Appeal in *X v X* has recently provided guidance that may help establish some certainty. Robertson J observed that the significance of the disparity would be related to the overall earning capacity of the two parties,[21] so that a $20,000 disparity would be significant where the annual incomes are $40,000 and $60,000, but not where they are $980,000 and $1,000,000. Cases where the disparity has been found to be significant can be utilised as a comparative aid to discern whether any given discrepancy in earning capacity is significantly disparate.

The relationship between income and living standards is another issue that has posed a problem. The conjunction "and" requires that a significant disparity exist in both before the jurisdictional threshold is reached. The issue arises because of the strong link between a high income and an increased standard of living. The courts have accepted that income can be a major factor in determining disparity in living standards.[22] Robertson J explicitly recognises the impact income levels will have on living standards where he notes that a persons standard of living includes their possessions, facilities available to them and lifestyle opportunities to which they have access.[23] His Honour goes as far as accepting that income will sometimes be a critical indicator of standard of living and "[i]n such cases a finding of income disparity may lead automatically to a

[20] *A v A* (*JA v SNA*) [2008] NZFLR 2007
[21] *X v X* [2009] NZCA 399 at paras [83] and [88].
[22] *Beran v Beran* (2004) 24 FRNZ 69; [2005] NZFLR 204: Income was a direct component of living standards. *Cunningham v Cunningham* (High Court, Auckland, CIV-2003-404-002393, 28 Nov 2003, O'Reagan J): The Family Court was entitled to find higher living standards because of greater capital assets and disposable income.
[23] *X v X*, supra fn 21, at para [94].

finding of disparity of living standards."[24]

(ii) *Causation*

The second limb of the jurisdictional threshold is that the disparity found in the first limb needs to be *because of* the divisions of functions within the relationship. There is no guidance given in section 15 as to its purpose or objectives. This is regrettable as the section confers a broad discretion in the context of a prescriptive regime and departs from the presumption of equal sharing. Without clear guidance on what the section is attempting to achieve, it is difficult to expose what the causation test really requires.

Deriving guidance from the principle in section 1N(c) of the Act, the courts have outlined two main situations where the causation threshold is likely to be satisfied. As explained by William Young P in *M v B*, the situations encompassed by section 15 can either be compensatory or redistributive.[25] The compensatory situation encompasses the loss that the lower income partner has experienced due to the their role as a primary caregiver or homemaker. The redistribution situation encompasses the benefits the higher income earner has received such as the opportunity to enhance their skills and earning capacity due to the roles within the relationship.

While the courts have readily accepted the compensatory limb of causation, establishing causation under the redistributive limb has been less successful. William Young P notes in *M v B*[26] that it will be more difficult to reach the required causative threshold in relation to a redistributive award. The threshold for causation in this context may be higher because of the difficulty in determining what proportion of causation stems from the higher income earners earning capacity is attributable to his or her own personal skills and abilities. Determining this requires the court to take an in-depth analysis of decisions made within the relationship. For instance, the causal link between a wife not being employed outside the home during the relationship and her low income may be easy to determine in comparison to the causal link between the husbands high income and his employment as a highly regarded actor.

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[24] Ibid, at para [81].

[25] *M v B* [2001] 3 NZLR 660; (2006) 25 NZFLR 171; [2006] NZFLR 641 (CA), at para [199]. This resonates with the analysis of Robertson J in the Court of Appeal judgement of *X v X* (supra fn 21). His Honour notes at paras [49] – [50] that the two major circumstances where section 15 will apply are where someone has supported their spouse to obtain a degree (i.e. redistributive) and where one spouse has foregone pursuing their own career (compensatory).

[26] Ibid, at para [199]

Achieving an equality of outcome for the parties is less likely as a result of the difficulty in satisfying causation for a redistributive award for two reasons. First, it may lead to an award lower than the applicant is entitled to. Where a lower income earner has facilitated their partner's ability to work outside the home and gain skills, in addition to their own loss of opportunity to up skill a higher level of award may be just. However, as the court is less likely to be satisfied as to the causal link in regard to the gains of the higher income spouse, the level of the resulting award may be affected.

The second reason involves the situation where a partner has been employed outside the home and as a result fails to satisfy the compensatory limb of causation. There may be a very significant disparity, with an award appearing just in the circumstances, but it is difficult for the low-income earner to satisfy causation because of the narrow approach entitlement. This is a particularly important issue now it is common for both partners to be employed outside the home. In *A v A*[27] both parties were trained as teachers and had worked throughout the marriage. Mrs A had taken 24 months maternity leave to give birth to the two children. At the time of the hearing Mr A was on a higher salary as a principle than Mrs A as a teacher. The High Court upheld the Family Court's decision that the disparity was not because of the divisions of functions within the marriage even though the Family Court had acknowledged that Mrs A had had greater responsibility for the children.

A v A illustrates how, as a consequence of inadequate guidance regarding the objective of section 15, the discretion that exists in the causation stage may open the door for stereotypical assumptions surrounding gender roles to influence the ultimate outcome. If Mrs A had made extra contributions during the marriage by being the primary caregiver while at the same time working, underlying expectations about her role as a mother may disregard this as a detriment to her. Again in this case the benefits received by Mr A were disregarded.

S v C[28] illustrates the complexity of determining whether a set of circumstances is causal enough to satisfy causation for the purposes of section 15. The High Court notes:

[27] *A v A*, supra fn 20.
[28] *S v C* (*JES V JBC*) [2007] NZFLR 472

> *"[t]he statute does not ask whether the division of function caused the overall disparity, merely whether the income and living standards of one spouse are likely to be significantly higher because of it. … The approach matters because the overall disparity may comprise distinct elements not all of which are attributable to division of function."*[29]

The Family Court had held that the facts did not satisfy the causation element because Mr C had gained his qualification before the marriage. This amounted to seeking a single dominant reason for the disparity, which was held on appeal to be an incorrect approach.

The wording of the section itself does not clarify whether this requires the divisions of functions to be the primary cause or simply a cause of the disparity. The wording of section 15(1) would be expected to be more demanding to support an interpretation requiring the division of functions to be the sole causative aspect. This accords with the compensatory intent of the section, as such a narrow interpretation would restrict the application to a few rare cases. It also supports the purpose of the Act to provide for just division[30] and the principle that just division has regard to economic advantages and disadvantages arising from the relationship or relationship breakdown.[31] The correct approach endorsed by *M v B* and taken by the High Court is to assess the extent of the different reasons that are causal to the disparity.

Priestly J sitting in the High Court in *de Malmanche v de Malmanche*[32] discussed the causal link, observing that in some cases the disparity would be solely because of natural flair. Hammond J took this further in *M v B* outlining that there was a spectrum of causation with natural flair at one end and the division of functions at the other.[33] William Young P also took this approach to causation, noting that the "but for" approach to causation taken by Judge Ellis in *G v G*[34] was incorrect.[35] The Court was satisfied that Ms M's income was affected by the division of functions enough to satisfy the causation hurdle.

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[29] Ibid, at para [31]
[30] P(R)A, s 1M(c)
[31] Ibid, s 1N(c)
[32] *de Malmanche v de Malmanche* [2002] 2 NZLR 838; (2002) 22 FRNZ 145; [2002] NZFLR 579
[33] *M v B,* supra fn 25, at paras [254] – [255]
[34] *G v G* (2002) 22 FRNZ 990; [2003] NZFLR 289
[35] *M v B*, supra fn 25, at para [201]

In *X v X* Robertson J effectively adopted the spectrum test and held that Mrs X's situation fell in the middle.[36] The possibility that causation may not be satisfied because of the higher income earning party's so called natural flair does not sit well with the concept that a relationship is a partnership of equals.

While the Court of Appeal has now provided guidance on causation, uncertainties still remain which may deter deserving partners from challenging for a compensatory award under the section. The guidance provided by Roberson J is helpful in identifying the spectrum test. However, how to determine where on the spectrum any particular fact situation may sit or where on the spectrum the cut off point for jurisdiction is, remains uncertain.

This level of discretion may be beneficial in that it enables courts to deliver individualised justice. However, it also leads to a very high level of uncertainty for potential litigants and partners attempting to negotiate a settlement. This may deter those who have limited resources from attempting to get an award, which perpetuates the injustice to the homemaker spouse upon relationship breakdown. Both cases that have been heard in the Court of Appeal involved substantial pools of relationship property.[37] The compensatory provisions are intended for universal use and should not limited to those who have the means to pursue expensive court cases in the face of an uncertain outcome.

(c) Exercising the Discretion

Following a decision that the jurisdictional hurdles are satisfied the Court must consider whether an award would be just in the circumstances. It is important to note that making an award is not mandatory following a finding that the jurisdictional threshold has been reached. Subsection two provides that the court can consider the likely earning capacity of each partner and the responsibilities of each to care for children of the relationship. Both are likely to have already been considered for the jurisdictional hurdle, so it could be questioned why this extra step is necessary. Additionally the court may consider any other relevant circumstances. This stage confers a broad discretion, with the bounds of

[36] *X v X*, supra fn 21, at para [101]
[37] In *M v B* (supra fn 25) the relationship property pool was in the vicinity of $1 million, while in *X v X* (supra fn 21) it was in the vicinity of $7.5 million.

the considerations only limited by relevance.

This additional step does not receive a lot of judicial consideration, although in *Cunningham v Cunningham*[38] the High Court found that the Family Court Judge had erred by not taking it. It was also noted that justice does not follow from a finding of disparity. However, an award was still found to be just in the case, particularly considering section 15(2)(c) which allows the court to have regard to any other factors.

In *X v X* Robertson J was of the view that a partner who did not work outside the home when they had the opportunity to do so could be relevant to the justice of an award.[39] This observation was not justified in any way in regard to the section and contradicts the view of the relationship as a partnership that His Honour emphasised in the preceding paragraph. In addition, His Honour relies on the fact that the jurisdictional threshold has been reached to conclude that an award is just in saying that "there is an established potential disparity between Mr and Mrs X on the measures provided for in section 15(1) and (2), and they are causally linked to the division of marital functions as they occurs. It is just to compensate Mrs X."[40]

As the factors that are considered when determining the justice of making an award will have been considered at the jurisdictional stage the discretion is largely unnecessary. This stage poses an additional hurdle to the claimant. Even when a low-income homemaking spouse has satisfied the restricted jurisdictional requirements, the court may decline an award under section 15. If Robertson J's approach is taken it is foreseeable that a claim could be defeated at this stage in the case of a lower income spouse who chose to attend tennis lessons and drink cocktails all day rather than seek paid employment. This approach probes into decisions made during the relationship and allows the court to evaluate the merits of those decisions, undermining the notion that a relationship is a partnership of equals.

(d) Calculating Quantum

After satisfying the jurisdictional requirements and determining an award would be just, the court is required to determine the quantum of the award to be made. In light of the

[38] *Cunningham v Cunningham*, supra fn 23.
[39] *X v X*, supra fn 21, at para [115]
[40] Ibid, at para [116]

substantial discretion conferred by section 15 in comparison with the prescriptive nature of the P(R)A, it is surprising that the objectives of any award were not made explicit. The award may be a sum of money or transfer of property but is limited to the pool of relationship property.[41] In light of the legislature omitting to specify objectives, the courts have struggled to provide clear and consistent approaches to determining quantum, although some guidance can be drawn from the principles and purposes of the Act. This gives rise to a number of problems including what method should be used to determine quantum, what deductions for contingencies should be made and whether the final award should be halved.

In *M v B,*[42] Ms M submitted that the Court had an unfettered discretion in determining quantum once the jurisdictional threshold was met. Ms M argued the award should calculate the difference between the partners income and then allow for a differential sum over a period of years. Robertson J dismissed this approach finding that it was not supported by the words of the statute.[43] His Honour advocates for a discretionary approach to quantum but contradicts this by dismissing Ms M's argument without demonstrating why he believes the section does not support such an approach.

The approach to determining quantum has been discussed in a number of cases. Robertson J in *M v B* was of the view that "[s]ection 15 awards are necessarily a matter of impression and rote applications of formula will not be appropriate."[44] His Honour re-emphasised this stance sitting in the Court of Appeal in *X v X*.[45] Panckhurst and Chisholm JJ sitting in the High Court in *P v P*[46] held that judges are bound to follow a reasoned and transparent method. More recently, the majority in *X v X* was of the opinion that the basic methodology used in the case could be applied relatively easily to simpler cases and were inclined to the view that some structure for the exercise of discretion in calculating quantum awards was of value.[47] However, aside from endorsing the approach they took in relation to "but for" cases, no guidance on structure was provided.

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[41] P(R)A, s 15(3).
[42] *M v B*, supra fn 25, at paras [146] – [147]
[43] Ibid, at para [147]
[44] Ibid, at para [147]
[45] *X v X*, supra fn 21 at para [125]
[46] *P v P* (2005) 24 FRNZ 407; [2005] NZFLR 689, at para [68]
[47] *X v X*, supra fn 21, at paras [174] – [175]

(i) *Methods of Calculation*

A commonly used method of determining quantum involves calculations from an actuarial perspective and compares the homemaking partner's present earning capacity (also referred to as actual income) with an informed estimate of what it would have been if she had remained in, or entered, the workforce (also referred to as "but for" income).[48] In *B v M*[49] the High Court calculated quantum by deducting Ms B's present income from her future earning capacity and multiplying it by the number of years it would take her to reach that capacity. The resulting award of $75,000 was not disturbed on appeal.[50]

The Court of Appeal in *X v X* endorsed this method in relation to cases where the lower income partner had lost the opportunity to increase their earning capacity due to the division of functions within the marriage and expected it could provide a framework for settlement negotiations.[51] The annual difference in Mrs X's "but for" income, the $220,000 annual salary she was expected to have been on if not for her role as homemaker during the relationship, and her projected actual income was calculated for each year until her expected retirement. Her actual income began at $2463 and incrementally increased to the predicted maximum achievable income of $140,000. After deducting contingencies and halving the final value of the award was $240,000.

This was also the approach that the High Court in *Monks v Monks*[52] was prepared to take, although an award was not made because of a lack of evidence. This case illustrates the difficulties involved with attempting to gauge what would have happened in a party's life if they had not left the workforce. Mrs Monks "but for" income as a flight attendant was $100,000 per annum. However, she had recently retrained as a landscape architect with a prospective income of somewhere between $25,000 and $35,000 on which Courtney J was prepared to base her actual income.[53]

These cases illustrates the core weakness of the "but for" method of determining

[48] A number of cases have used this methodology. In particular in *P v P* (supra fn 46) the Family Court found it would take seven years for the wife to achieve her full earning potential as a nurse ($36,000). The award was $254,000 (i.e. $36,000 x 7) less deductions for tax and contingencies.
[49] *B v M* (2004) 24 FRNZ 610; [2005] NZFLR 730
[50] *M v B*, supra fn 25.
[51] X v X, supra fn 21.
[52] *Monks v Monks (*2005) 25 FRNZ 36; [2006] NZFLR 161
[53] Ibid, at para [56]. A final order was not made because of a lack of evidence. The matter was remitted to the Family Court.

quantum, that it fails to adequately take into account the advantages that have been conferred on the higher income partner. In *Monks v Monks* it was acknowledged that Mr Monks had irregular work patterns that could be accommodated because Mrs Monks was available to care for the children.[54] By only considering the income the homemaker would have had "but for" her role within the relationship no compensation is given for advantages conferred on the breadwinner.

A similar option, still approaching calculation from an actuarial perspective, termed the "added value" assessment, was also considered in *H v H (No 2).*[55] This assessment involves analyzing:

> *"the increase in income Mr H has been able to achieve because of Mrs H's support compared with his expected income if he had shared the household responsibilities. And in turn, Mrs H's potential earning capacity was reassessed based on the same propositions as they applied to her."*[56]

The method involved determining what the net earnings would have been if both partners had worked and shared the household responsibilities, and comparing this with the total income that has resulted from the actual experience. The disparity between these two totals is to be halved, as it is the loss of income that the party's have jointly suffered.

An average wage was attributed to Mrs H, as it was difficult to determine her "but for" income given her first pregnancy was at fifteen years old. Mr H had an income of $150,000. The final award was $60,000, calculated to cover a period of between seven and nine years, with decreasing disparity over time. Although this method incorporates both the advantages and disadvantages to both partners, the final award is very low considering Mr H's annual income of $150,000 and the annual disparity of $125,000 at the hearing date. This result cannot be considered to be providing the Mr and Mrs H with an equal footing in light of the fact that Mr H retains a substantial income to increase his standard of living.

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[54] Ibid, at para [27]
[55] *H v H (No 2)* [2007] NZFLR 711, at para [10].
[56] Ibid, at para [13].

Finally *S v S* took an entirely different approach to quantum, based on the difference in the partner's incomes.[57] Mr and Mrs S's net incomes were $125,000 and $76,000 respectively, taking into account child support payments, generating a disparity of $38,000. Judge Murfitt compensated Mrs S with reference to the difference between the two party's incomes to recognise the diminution suffered by Mrs S and the enhancement gained by Mr S. The Court of Appeal in *M v B*[58] specifically rejected this method of determining quantum for the purposes of section 15.

Section 15 does not prohibit equalizing incomes with a diminishing amount per year, as no guidance is provided regarding quantum. A wide interpretation incorporating the principle in section 1N(c) of having regard to the economic advantages and disadvantages would support a comparative income approach, particularly given a just division also has regard to the economic advantages and disadvantages of the relationship breakdown. This approach considers causal factors external to the relationship, such as the generally higher salary of accountants in comparison to nurses and it could be argued that this was further than parliament was willing to legislate for, in light of the causation requirement.

The Court of Appeal has now had two opportunities to address the issues surrounding the method of calculating quantum but regrettably have not provided any clarification. In particular it remains unclear whether the courts should adopt a set method or follow whichever method seems just in the circumstances. Different methods may be appropriate in different situations, possibly depending on how the jurisdictional hurdle is satisfied. However, the only method approved by the Court of Appeal is the "but for" method in situations where a lower income partner is claiming for lost opportunity. Although awards that take account of advantages gained by the higher income spouse have been accepted as possible under the section there has been no guidance as to possible methods of calculation.[59] The current narrow focus on the lost opportunities of the lower income spouse has failed to lead to awards that would set partners on an equal footing for the future.

[57] *S v S* (Alt cit *Smith v Smith*) (2006) 26 FRNZ 141; [2007] NZFLR 33
[58] *M v B*, supra fn 25 at para [147].
[59] *X v X*, supra fn 21, at para [237].

(ii) *Deductions*

The quantum calculations for section 15 awards are prospective, aiming to address future disparities between the parties. As the future is uncertain, deductions need to be made to account for the possibility that the circumstances upon which the determinations are made may change. Different cases have taken different approaches to determining the type and level of deductions to make, because of the lack of guidance from Parliament and the Court of Appeal.

A common deduction is for general contingencies. The figure is often determined by the party's respective experts and covers possibilities such as early retirement of the higher income earner or the lower income earner reaching a higher income than expected, therefore lessening the disparity. The length of time the award is designed to compensate for will affect the level of general contingencies. In *X v X*[60] the general contingency for eighteen years compensation was fifty per cent, based on figures from expert actuaries.

X v X also illustrates how the general contingency figure can be arbitrary. The experts had disagreed on how the general contingency should be calculated, whether there should be a standard discount of fifty per cent per year, culminating in a total discount of fifty per cent, or a sliding scale cumulative approach, which produced a discount of about thirty-five percent at seven years, and fifty percent at eighteen years.[61] While the majority utilised the overall discount of fifty per cent, Robertson J made a one third deduction as a result of basing the award on a shorter time span of ten years.[62] This figure is to some extent arbitrary as it is not in line with either of the experts' general contingency figure and no principled basis is given for the amount.

A deduction is sometimes made to address the uncertainty in determining the likely earning capacity of the parties. In *V v V*[63] the High Court discounted the award made by the Family Court by twenty-five percent because of an incorrect assessment of the husband's earning capacity. In *X v X*, Rodney Hansen J in the High Court had directed the Family Court to either take a but for income at the lower end of the range or discount for uncertainty in determining the but for income, with the latter option being

[60] Ibid, at para [177]
[61] Ibid, at para [191]
[62] Ibid, at para [134]
[63] *V v V* (High Court, Wellington, CIV-2006-485-764, 08/12/06, Mallon J)

taken.[64] The majority of the Court of Appeal would have instead taken a lower but for income, achieving a similar result.[65]

The courts have accepted that a general contingency to account for the uncertainty of the future is necessary. However, no consideration is taken of the possibility that the higher income spouse will do better than expected, or that the lower income spouse will not do as well as expected. In determining Mrs X's actual income, there was no contingency to account for the possibility that Mrs X may never actually reach the $140,000 expected.[66] These outcomes are equally as possible as the higher income earner retiring early, which is accounted for. Logically contingencies could be expected to cancel each other out, rendering any deduction based on uncertainty of future income unnecessary.

The current approach to deductions prevents the court reaching a quantum of award that would provide an equal start, looking to the future. In *X v X* the fifty per cent deduction for general contingencies reduced the award from around $950,000 to around $475,000,[67] removing a substantial chunk of the award that the court has determined the wife is entitled to. This figure does not compensate Mrs X for the income she has lost as a result of the divisions of functions within the marriage, or place the partners on an equal footing looking to the future.

The uncertainty regarding which deductions will be made in any particular case increases the ineffectiveness of lump sum payments to compensate for disparity. In addition, a great deal of reliance is placed on expert analysis, who almost always have completely different methods resulting in widely disparate values of award,[68] and which may be out of the reach of many litigants.

[64] *X v X* [2008] NZFLR 512 (FC)
[65] *X v X*, supra fn 21, at para [221]
[66] Ibid, at para [203].
[67] Ibid. Taking a mid point of the experts values provided at para [226] as a demonstrative tool only.
[68] See for example: *M v B*, supra fn 25, at para [144] with values of $99,000 - $143,000 and $41,500 from the husband's and wife's experts, respectively; *S v S*, supra fn 57, at para [87] with values of $211,673 and $580,591 for the husband's and wife's experts, respectively. See also *X v X* (supra fn 21) where the majority outline the different matters where the experts disagreed at paras [185] to [191].

(iii) *Halving the Award*

Courts have been divided on the issue of whether an economic disparity award is to be shared equally. Some cases have said that it would be unjust to award the whole award as that shifts the inequality to the payor spouse.[69] In contrast other cases have refused to halve because the award itself is not relationship property.[70,71]

In *X v X* the majority of the Court of Appeal was in favour of the award being halved while Robertson J was not. In support of this conclusion, O'Reagan and Ellen France JJ provide an example illustrating why they believe that not halving the award simply shifts the loss to the higher earning partner.[72] Therefore sharing the loss equally removes this problem. With respect, the example provided by the majority would rarely be considered under section 15 as they have attributed a much higher income and less disparity than most applicants would have. In addition, sharing the loss equally is contrary to the purpose of the "but for" method which is premised on compensating the lower income spouse for what they have lost and ignores the position of the higher income spouse.

Robertson J observes that an award under section 15 is not an item of relationship property subject to section 11 and there is nothing in section 15 that requires it to be halved. However, His Honour also states that justice requires that a section 15 award does not invert the partners' fortunes. Robertson J believes that halving the quantum of an award is acceptable in terms of creating a just award between the parties, but is unwilling to halve the award on a principled basis, which unhelpfully adds to uncertainty. The majority state that taking a nine rather than an eighteen-year time span is broadly speaking a halving of the award.[73] This oversimplifies the difference between the two judgments as they in fact take two entirely different approaches, with conflicting justifications.

Again the perplexity surrounding whether or not to halve the award could be removed with some guidance from the legislature or Court of Appeal. Section 15 awards are

[69] See for example *S v S*, supra fn 57, at para [56].
[70] Section 15(4) provides that section 15 overrides the section 11 presumption of equal sharing.
[71] See for example *P v P*, supra fn 46, at para [75].
[72] X v X Supra fn ? at para [234]. If the spouses actually earn $180,000 and $140,000 per year, and the lower income spouse's but for income is $180,000. An order that the higher income spouse compensates the lower income spouse by the $40,000 they have lost, it simply shifts the loss.
[73] *Ibid*, at para [242].

intended to provide a more equal outcome for the partners at the time of relationship breakdown through compensation, but halving awards has resulted in awards that are too low to achieve this. After contingency deductions had been made in *X v X*, the award of around $480,000 was halved to provide a final figure of $240,000.[74] Without a clear indication of intent from the legislature that the loss is to be shared equally between the partners, awards should not be halved as this decreases the level of compensation and reduces the possibility of achieving an equal outcome. The issue of halving also adds to the uncertainty of section 15. While the majority in *X v X* were of the view that awards should be halved in lost opportunity cases, uncertainty remains as to whether halving is appropriate in other situations.

2.2 *Z v Z (No 2)* under Section 15

Mr Z's income will easily satisfy the "significantly higher" threshold being $300,000 compared with Mrs Z's $7000 Social Security benefit. Mrs Z was facing significantly reduced living standards, as she would need to invest some of her matrimonial property to generate income, whereas it could be inferred that Mr Z would have a high standard of living based on his high income. The causation threshold will be satisfied as Mrs Z ceased working when pregnant and only had limited part time work due to her primary carer role. Mrs Z would be able to satisfy the jurisdictional threshold with relative ease. Her situation is of the kind that Parliament was endeavouring to improve with the 2001 amendments.

Additionally it is probable the court will exercise the discretion to make an award in Mrs Z's favour. The Court of Appeal in *Z v Z (No 2)* outlined three reasons why not allowing Mrs Z to share in her husband's enhanced earning capacity perpetuated an injustice.[75] This has proved to be a relatively easy requirement to satisfy in the cases unde section 15 heard to date.

Mrs Z's position in terms of quantum of a section 15 award under the P(R)A is uncertain. The Court could legitimately take any of the approaches outlined above.[76] Perhaps the easiest to calculate is the first method, Mrs Z's earning capacity if she had

[74] Ibid, at para [240].
[75] *Z v Z (No 2)*, supra fn 8, at pp 280 - 281.
[76] Keeping in mind that the lower courts are bound by *M v B* so could not take an approach comparing the party's respective incomes.

remained in the workforce. In 1998 an average secretarial income was around $23,500 gross per annum.[77] As Mrs Z would have had twenty-eight years experience, a higher income of around $40,000, net tax at nineteen per cent, would be attributed. The disparity between Mrs Z's "but for" earning capacity ($32,400) and her social security benefit ($7000) would be $25,400 per annum. As Mrs Z has been out of the workforce for a substantial period of time, a longer duration for increasing her skills base is likely to be allowed, although it is uncertain how long this period would be. In *X v X* as Mrs X was never expected to reach her full earning potential, the period of compensation was eighteen years, her expected retirement date.[78] Fixing the duration at ten years, and deducting a contingency of thirty per cent the total award will be $177,800.[79] As the relationship property pool is around $900,000 it is possible to make this award from Mr Z's share. Mrs Z would receive nearly seventy per cent of the relationship property, possibly a high calculation but arguably a just result considering her very low earning capacity, age and the duration of the relationship.

Alternatively if the Court decides to halve the award Mrs Z would receive $88,900. This would result in a ratio of 60:40 in Mrs Z's favour. The uncertainty of whether this would occur illustrates there is a considerable lack of predictability in quantum of the award Mrs Z would receive, in addition to the uncertainty that results from the different methods of calculation and a lack of clear direction on deductions.

2.3 Overall Outcomes

Section 15 fails to achieve an equality of outcome for partners upon relationship breakdown. One key reason for the failure is the lack of guidance in the Act as to the objective of the economic disparity provisions, which would logically be an important step when drafting a provision that is deviates from the structured nature of the Act. This lack of guidance leads to uncertainty in outcome at all the stages of a section 15 determination and combined with the high cost of litigation, applicants could be deterred from gambling on an outcome.

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[77] This was the closest available data to the date of the judgement in 1996, using data from www.stats.govt.nz. The amount is the average gross income for females in the 25-64 age groups for the general occupation of "clerks".

[78] *X v X,* supra fn 21. Note that the general contingency deduction was high because the increased duration of the award leads to more uncertainty.

[79] Both of these figures have been plucked somewhat randomly from the range that is justifiable under the Act and in the circumstances, highlighting the uncertainty that the broad discretion creates.

In cases that have been successful, equality of result is seldom reached because of the unpredictable nature of the future. Deductions for contingencies are determined by actuaries and tend to be high. As a result the lower income spouse who satisfies the jurisdictional hurdles does not receive the full amount of compensation they are entitled to. The final award ultimately received by Ms M in *M v B* was $75,000, with an additional $15,000 total spousal maintenance.[80] As the total relationship property pool was in the vicinity of $1,000,000 Ms M was awarded a 57.5 per cent share and Mr B received 42.5 per cent. However, as this award is less than Mr B's annual income, it will be replaced within a short period of time. In *X v X* the final award of $240,000 was also insignificant in relation to the pool of relationship property, which was in the vicinity of $7.5 million. Although the award was one of the largest to date, the ratio of division was nearly equal, with Mrs X receiving a fifty-three per cent share.[81]

A further weakness of section 15 is that it is ineffective when there relationship property pool is small or non-existent. This may occur where on party has a high income earning capacity in comparison to the other party but during the relationship this income was spent on an extravagant lifestyle rather than a family home. The jurisdictional hurdle will easily be satisfied but there is no relationship. Maintenance under the Family Protection Act is needs based and limited by the clean break principle so may be inadequate to compensate the loss suffered by the lower income partner in this situation.

[80] *M v B*, supra fn 25.
[81] *X v X*, supra fn 21.

3. COMPENSATION FOR ECONOMIC DISPARITY UNDER CANADIAN LAW

3.1 Introduction

Canadian matrimonial property law is similar in structure to New Zealand with the division of matrimonial property and awards of maintenance being governed by two separate pieces of legislation with two distinct purposes. Property division is governed by provincial legislation, so differs between the provinces, while spousal support is governed by federal legislation in the Divorce Act.[82]

In the province of British Columbia each spouse is entitled to equal division of the family property when the parties separate.[83] The court has the power to order the property to be divided into such shares as it feels necessary, if an equal share would be unfair having regard to particular considerations.[84] Awards are commonly made under this provision, as the threshold of fairness is relatively undemanding. In Ontario matrimonial property law the presumption of equal sharing can only be displaced by unconscionability.[85] Matrimonial property under Ontario jurisdiction is very rarely divided unequally as a result of this high threshold.[86]

Canadian courts also have the ability to compensate by ordering periodic spousal support payments under section 15.2 of the Divorce Act.[87] When making an order the court must determine first whether the applicant is entitled to support and then the amount and duration of any award. Factors for the court to consider are mandatory[88] and both compensatory and needs based objectives are specified.[89]

In order to guide determinations of quantum under the Divorce Act, academics and the Canadian Department of Justice have recently established the Spousal Support Advisory

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[82] Divorce Act, R.S.C. 1985, c. 3. Section 15. Maintenance is referred to as spousal support in the Canadian Act but performs the same function, although spousal support is wider in scope.
[83] Family Relations Act R.S.B.C. 1996, s 56.
[84] Ibid, s 65.
[85] Family Law Act, R.S.O. 1990, s 5. Note that the structure of the process for determining division is different to that used in British Columbia and New Zealand, but the same result would occur. In Ontario each spouses "net family property" is calculated by subtracting their liabilities from their assets. Equalisation is achieved by halving the difference in value of the two calculations. See sections 4(1) and 5(1).
[86] Hovius, B. (2008) Unequal Sharing of Net Family Properties under Ontario's Family Law Act. 27 *Canadian Family Law Quarterly* 147, pp 150-151.
[87] Divorce Act, supra fn 82.
[88] Ibid, s 15.2(4).
[89] Ibid, s 15.2(6)

Guidelines (the Guidelines)[90] in response to criticism of the highly discretionary nature of and uncertainty surrounding spousal support awards.[91] The Guidelines have been endorsed by several of the provincial Court of Appeals,[92] but do not have the force of law, only providing a framework to guide determinations on amount and duration.

The Canadian system has managed to incorporate a framework of principles that provide certainty while still retaining elements of discretion to provide individualised justice. Application of a similar structure to New Zealand may achieve the objective of the equality of result that the 2001 amendments were aimed at.

3.2 Entitlement to Spousal Support

Spousal Support orders are made in accordance with the objectives in section 15.2(6) of the Divorce Act. The first two are compensatory, dealing with the economic consequences of the marriage and apportioning financial consequences of care of children such as being the primary caregiver. The former is similar to section 15 of the P(R)A as it considers the advantages and disadvantages of the marriage. However, it is wider in scope as it also incorporates the consequences of the marriage breakdown.

The Canadian provisions are also wider than the New Zealand maintenance provisions by encompassing need and compensation. In *Moge v Moge*[93] the Supreme Court of Canada confirmed that need on its own could be the basis for entitlement to spousal support under the Divorce Act. In addition, the Canadian approach to need has a broader scope than New Zealand. In *Bracklow v Bracklow,*[94] Mrs Bracklow had suffered from emotional and physical illness before and during the seven-year relationship. The Supreme Court of Canada held that a spouse could be under an obligation to support a former spouse over and above compensation for loss caused as a result of the marriage or its breakdown.[95] This result was premised on the principle that marriage is a joint endeavour and the mutual obligations of marriage as a union creates interdependence that cannot be easily unravelled.

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[90] "Spousal Support Advisory Guidelines" (July 2008), prepared for the Department of Justice by Professor Carol Rogerson and Professor Rollie Thompson.
[91] Ibid, at pg 10.
[92] Including the British Columbia Court of Appeal in *Yemchuk v Yemchuk* ((2005) 44 B.C.L.R. (4th) 77; 2005 BCCA 406) and the Ontario Court of Appeal in *Fisher v Fisher* ((2008) 88 O.R. (3d) 241; 2008 ONCA 11).
[93] *Moge v Moge* [1993] 99 D.L.R. (4th) 456.
[94] *Bracklow v Bracklow* [1999] 1 S.C.R. 420.
[95] Ibid, at para [13].

The final objective encompasses the clean break principle. However, this is qualified by the words "in so far as practicable". The British Columbia Court of Appeal in *Tedham v Tedham* held that the Act seeks to promote self-sufficiency and regard must be had to all circumstances including age, gender, skills or lack thereof, retraining and ability to "find not just a job, but one which enables her/him to become self-sufficient."[96] Accordingly the courts have less emphasis on the clean break principle than the courts in New Zealand.

The Canadian approach to entitlement is vastly different to New Zealand due to the policy adopted by the Canadian legislature and courts that spouses have an obligation to support each other for extended periods. The New Zealand Parliament opted to provide compensation through property division rather than extending the parameters of maintenance, which was recommended in the Working Group Report[97] and *Z v Z,*[98] particularly in regard to placing less emphasis on the clean break principle. The emphasis on the clean break in New Zealand operates to limit any award to the low-income spouse upon relationship breakdown and lead to unequal results between the partners. As a result, where section 15 of the P(R)A is not applicable or provides an inadequate result, maintenance is not available to fill the gap.

3.3 Quantum and the Spousal Support Advisory Guidelines

The Guidelines were introduced in the form of a draft proposal in 2005,[99] modified and released in a final version in July 2008.[100] The Guidelines provide two formulas for calculating the amount and duration of a spousal support award, these being the "without child support formula" and the "with child support formula". For present purposes the former, less complex formula will be concentrated on as it could be applied to a New Zealand context taking into account child support payments.

A major factor of the formula used to determine the amount payable is the duration of the relationship. Where a relationship has endured for 20 years or longer, spousal

[96] *Tedham v Tedham* [2005] B.C.J. No. 2186; [2005] BCCA 502, at para [33]
[97] Working Group Report, supra fn 5.
[98] *Z v Z*, supra fn 8.
[99] "Spousal Support Advisory Guidelines: A Draft Proposal" (January 2005), report prepared for the Department of Justice Canada by Professor Carol Rogerson and Professor Rollie Thompson.
[100] The Guidelines, supra fn 90.

support is payable for an indefinite period. Indefinite support has no specified end date rather than being permanent.[101] A similar durational element could be utilised in New Zealand, keeping in mind the stronger emphasis on a clean break between the parties.

The amount of spousal support payable is calculated by determining the difference between the spouses incomes at the time of the hearing and multiplying this by a range of 1.5 to two per cent for each year of the relationship, up to a maximum of twenty-five years.[102] The duration of liability for support also depends on the duration of the relationship with the minimum duration being half the length of the marriage and the maximum is the full length of the marriage.[103] Therefore with a couple who earn $145,000 and $45,000 that have been in a relationship for 14 years, the higher income earner will be liable to pay between the range of $21,000 and $28,000 per year for a duration of between seven and fourteen years.[104]

The Guidelines have managed to retain an element of judicial discretion, which ensures there is individualized justice. One stage where this discretion is present is in determining where within the range of award the order is to be made, with the Guidelines merely suggesting some general considerations that the Court should have regard to.[105] Factors that may suggest an award at the higher end of the range include a strong compensatory claim, high needs of the recipient, or a high amount of property received in division. The need of the recipient and payor's ability to pay may indicate a lower award. Self-sufficiency incentives may indicate a higher award to facilitate retraining or a lower award to encourage a greater effort to be self-sufficient. These factors are not exhaustive but are reflective of factors commonly considered in the case law.

Another source of discretion is the possibility of departing from the formula in exceptional cases. One of these exceptions applies in cases where there has been reapportionment under the British Columbia Family Relations Act. *Tedham v*

[101] The Guidelines, supra fn 90, at pg 140
[102] Ibid, at pp 56-57
[103] Ibid, at pg 60
[104] The difference = $100,000 ($145,000 - $45,000); the durational factors = 21% (1.5% x 14) and % (2% x 14)
[105] The Guidelines, supra fn 90, at pp 99-101.

Tedham[106] involved a 16-year marriage where the husband and wife had annual incomes of around $343,000 and $30,000 respectively. The range of support was $6300 to $8500 per month for duration of between eight and sixteen years. An award was made of $6000 for an indefinite duration. Awarding an amount lower than the Guidelines recommended was aimed at reflecting the fact that the reapportionment, 65:35 in Mrs Tedham's favour, had to some extent covered the compensation objective. The Court noted that a spousal support order might be unnecessary where reapportionment affects the relative means and needs of each party to fully address the factors and objectives in section 15.2 of the Divorce Act.

Under the guidelines the award can be altered to better fit the circumstances of the parties without changing the overall quantum of the award. By "front-end loading" the Court can order the annual amount to be increased and duration shortened. This may be a helpful tool in cases involving a mid length marriage where the recipient still has income earning years ahead, as it will facilitate retraining while a shortened duration emphasises the clean-break principle. Similarly a lump sum can be formulated, which is particularly helpful to achieve independence at the end of shorter marriages where there has been less time for intertwining to occur.

The third option outlined in the Guidelines is to extend duration and decrease amount. This will accommodate circumstances where the recipient is in need and less likely to be able to become self-sufficient, possibly because of age or health reasons. This is fair to both parties as the overall amount paid is the same and the recipient has the benefit of more time in which to become self-sufficient.

3.4 *Z v Z (No 2)* under Canadian law

Under current Canadian law Mrs Z would have received more than she did in 1996 or would under current New Zealand law. In British Columbia it is possible that Mrs Z would receive an unequal division of the family property. Section 65 deals with reapportionment on the basis of fairness, with the two applicable principles in this case being sections 65(1)(a), duration of the marriage and 65(1)(e), Mrs Z's need to become economically self sufficient. In *Narayan v Narayan*[107] the parties had been married for eighteen years and the wife had demonstrated a need to become economically self-

[106] *Tedham v. Tedham*, supra fn 96.
[107] *Narayan v Narayan* (2006) 62 B.C.L.R. (4th) 116; [2006] BCCA 561.

sufficient under section 65(1)(e) of the Family Relations Act. The wife received 100 per cent of the family home on the basis of this need, which amounted to seventy-five per cent of the total relationship property pool.

Narayan and *Z v Z (No 2)* are factually similar as both wives were primary caregivers with husbands who had increased their skills base to relatively similar levels and a moderate but not excessively large relationship property pool. An award to compensate Mrs Z and cover her need to become self-sufficient would award her the home with a value of $405,000, in which she could live. In addition she would require substantial assets through which she could draw an income to support her while she retrained. A possible form of this award could be a 100 per cent share in the proceeds of the sale of the holiday home, worth $122,000 and a half share in the investments providing an additional $140,000. In total the relationship property pool would be split 74:26 in Mrs Z's favour.

Under section 15.2 of the Canadian Divorce Act Mrs Z will be entitled to spousal support, satisfying both the compensatory and needs objectives in 15.2(6). Mrs Z has been economically disadvantaged by the marriage and its breakdown because of her diminished earning capacity, while Mr Z has had the advantage of increasing his earning capacity. Additionally, Mrs Z is experiencing the full effect of the financial consequences arising from being primary caregiver, which satisfies section 15.2(6)(b). Mrs Z has also suffered economic hardship from the marriage breakdown, satisfying section 15.2(6)(c).

The first step under the guidelines is to determine the difference between the spouses annual income. On the facts of *Z v Z*[108] Mr Z was found to be earning $300,000 per annum and Mrs Z received a benefit of $7000, generating a difference is $293,000. The second step is to determine the amount payable per annum and duration. Given the relationship lasted twenty-eight years the durational factor range would be from forty-two per cent[109] to fifty-six per cent.[110] This provides a range of $123,060 to $164,080 per year or $10,255 to $13,673 per month. As Mr and Mrs Z's relationship endured for twenty-eight years it is longer than the twenty-year threshold for indefinite duration.

[108] *Z v Z (No 2),* supra fn 8.
[109] 1.5 % x 28
[110] 2 % x 28

The third step involves determining where within the range the award should sit. Applicable factors in this case include the strength of the compensatory claim, which would operate to indicate a higher award because of the fact that Mrs Z remained in the home and cared for the children throughout the marriage, her high level of need and the time and expense that she would need to retrain. The award may be decreased by the higher than average property settlement, receiving $450,000 out of an equal division of relationship property. As a result, a durational factor of 1.85 per cent would be appropriate, leading to a 51.8 per cent of the difference in income. As the upper limit is fifty per cent so the party's net incomes would be equalised providing a monthly spousal support payment of $7917.[111]

The restructuring options are not applicable in cases that award support for an indefinite duration.[112] Additionally, none of the exceptions contemplated by the drafters apply in the circumstances and there are no exceptional facts that would imply an exception should be made.

3.5 A comparison of the New Zealand and Canadian approaches to inequality upon relationship breakdown

Section 15 of the P(R)A was introduced for the purpose of relieving the hardship that is suffered by one spouse, traditionally the wife, at the end of a relationship because of the role she has played as a homemaker or primary caregiver during the relationship. Sections 15.2(6)(a) and (b) of the Canadian Divorce Act are likewise aimed at addressing this disparity. In *Moge* this was explicitly recognised by the Supreme Court of Canada, with the L'Heureux-Dubé J noting "[t]he doctrine of equitable sharing of the economic consequences of marriage or marriage breakdown, upon its dissolution the Act promotes, which, in my view seeks to recognize and account for the economic disadvantages incurred by the spouse who makes such sacrifices and the economic advantages conferred upon the other spouse."[113]

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[111] In this situation, to account for the difference tax rates the partners would face, their net incomes are equalised. Mrs Z is on a benefit so will receive the entire $7000. Assuming Mr Z is subject to tax at 39 c in the dollar his net income will be $183,000. The combined net income of the party's is $190,000. Mrs Z is entitled to half of this ($95,000), providing a monthly payment amount of $7917.

[112] The Guidelines, supra fn 90, at pg 106.

[113] *Moge v Moge*, supra fn 93, at pg 490.

(a) Entitlement

The Canadian Divorce Act addresses both compensation for the advantages and disadvantages of the relationship and the need that one partner suffers at the end within one provision.[114] The applicant is only required to satisfy one or the other of these grounds for entitlement, although both may be present. Need and compensation are addressed together in the same award, with regard being paid to how entitlement is satisfied when determining quantum. Under the Guidelines this is a component of determining where within the ranges the amount and duration will sit.

In New Zealand separate provisions in two different Acts deal with these two objectives and as a result there has been confusion in the courts in regard to how the two interrelate. The divergent views taken by the Court of Appeal in *M v B* is the most significant example of this. While Hammond J does not have an opinion, William Young P believes that the order in which the assessments occur is not important in contrast to Robertson J who considers property matters should be resolved before maintenance is dealt with.

Robertson J holds that any award under section 15 is required to be made before turning to issues of maintenance.[115] His Honour notes that the court must consider "likely earning capacity" rather than "income" for the purposes of section 15(2). Earning capacity cannot incorporate maintenance payments received whereas the term income could, so Parliament must have intended section 15 awards to be made first. Supporting this argument is the fact that awards under section 15 are restricted by the relationship property pool, reinforcing that section 15 is part of the division of relationship property and a maintenance determination has regard to means derived from the relationship property division.[116]

In *M v B*[117] William Young P construes the High Court award as covering the shortfall in Ms M's expenses by utilising maintenance to cover Ms M's needs until 2006 and

[114] Note that the situation is different in British Columbia where reapportionment may affect both the compensatory and needs aspects of spousal support. It is clear that reapportionment, in other words the property division aspect, is to occur before spousal support is considered: Narayan v Narayan, supra fn 107, at para [33]

[115] *M v B,* supra fn 25, at paras [125] – [128].

[116] Family Proceedings Act 1980, s 65(2)(a)(ii).

[117] *M v B*, supra fn 25, at para [190]

then a P(R)A section 15 award to compensate for the lower income she will have until she retrains to achieve a full income in 2011. The maintenance award is around $12,000 per year and the section 15 award is $75,000 for five years disparity. Essentially two different provisions are being used to make the same award, with the same objectives. During the period when maintenance is being paid both objectives of compensating and covering needs are being met as the lower income spouses reasonable needs may wholly or partially arise because of her lack of training and experience, therefore the award will have the effect of compensating. This is particularly so given the correlation between the considerations in section 15 of the P(R)A and the section 63 and 64 of the Family Proceedings Act. Disadvantages arising from the division of functions considered in section 15 is very similar to the Family Proceedings Act sections 63(2)(a)(i) and 64(2)(a)(i) consideration of inability to become self-supporting deriving from the division of functions.

William Young P recognises that a properly assessed section 15 award may reduce the need for maintenance. In other words, a compensation award may cover the recipient's needs. The interrelatedness of the sections illustrates the importance of clarity in how the two provisions are to be approached. Unfortunately neither the legislature nor the courts have provided this clarity. Additionally, a synchronised approach to awards made under these provisions would be advantageous because of the considerable overlap between the objectives of the two provisions.

Another difference between the two jurisdictions is that the Canadian approach to entitlement is much wider than the approach in New Zealand. Under the Canadian Divorce Act, a spouse suffering hardship from the breakdown of the relationship is not required to show a causal link to the roles each party played in the relationship. The section has been interpreted Supreme Court of Canada in *Bracklow v Bracklow*[118] to allow support payments to a sick or disabled spouse when a marriage ends. In New Zealand this moral obligation only endures until the marriage or civil union is dissolved or the de facto relationship ends.[119]

This broader approach to entitlement is more likely to provide an equal outcome. In

[118] *Bracklow v Bracklow*, supra fn 94, at para [13].
[119] Family Proceedings Act 1980, ss 63(2)(d)-(e) and 64(2). Although s 64A allows maintenance to be extended based on age and duration of the marriage.

New Zealand a spouse may fail to reach the jurisdictional threshold for an award under section 15 and therefore not be entitled to any award. In this situation the spouse may still have contributed to the advantages that the higher income spouse has gained from the relationship, but has no way to receive a redistribution of property award for this. Allowing a broader basis for entitlement allows the spouse to achieve this award. If a consideration of the extent to which higher income spouses "natural flair" contributes to their income is required this could be considered in regard to quantum.

Under the Canadian Guidelines the basis of entitlement may affect the final determination of amount and duration. Consequently where a partner has a low income but was employed throughout a childless marriage the quantum may be at the lower end of the range. In *Lam v Chiu*[120] the wife was awarded a mid range amount for a duration of fourteen months, after a twenty year childless marriage during which she had been employed outside the home. The wife had needs as a result of being made redundant. This case illustrates that a combined approach to the objectives of meeting reasonable needs and compensating for advantages and disadvantages can be effective where there is discretion to vary quantum based upon entitlement.

(b) Quantum

The Canadian approach illustrates that when the low-income spouse is suffering hardship because of the role they played in the relationship, periodic payments can provide an effective alternative to the section 15 one-off property transfer. There are advantages and disadvantages to both systems. The main disadvantage with periodic payments is that they detract from the clean break principle. This principle was reinforced when section 64A was introduced into the Family Proceedings Act in 2001, even though both the Working Group Report[121] and the Court of Appeal in *Z v Z*[122] advocated a broader approach to the principle.

The Working Group Report highlighted the difficulty of one spouse to support two households and the resentment felt by husbands at the obligation as the criticisms of long-term periodical maintenance that had existed before 1980. [123] A response to the

[120] *Lam v Chiu* [2008] BCSC 1777.
[121] Working Group Report, supra fn 5, at pg 14. The Working Group advocated encouraging the courts to make greater use of lump sum maintenance payments.
[122] *Z v Z (No 2),* supra fn 8, at pp 294 - 295.
[123] Working Group Report, supra fn 5, at pg 12-13

first criticism is that in the majority of cases the lower income spouse is employed, therefore the second household is not being entirely supported by one spouse. The second criticism is based on the perceptions that arise from characterising maintenance as an obligation. If the award is framed as compensation, which the low-income spouse is entitled to because he or she has satisfied certain legal requirements, then there is likely to be less resistance.

Periodic payments have the key advantage of not requiring deductions based on the uncertainty of the future, enabling the recipient to collect the full compensation they are entitled to. In *M v B* William Young P felt it was not right that to curtail Mr B's freedom to change career or retire by a large award to the wife. His Honour also believed a substantial redistributive award would be "very unfair if the husband were to develop cancer and die."[124] Such considerations illustrate how a judge may take issue with awarding the entire amount that a low-income partner may be entitled to, which in turn negates the likelihood of an equal outcome.

A periodic payment order can be subject to review when circumstances change, removing the need to discount for contingencies. The periodic payment system also has the advantage of enough flexibility to award a lump sum payment out of relationship property, allowing compensation in a wider variety of circumstances. A lump sum payment can effectively operate in the same way as section 15. As it would still require deductions for contingencies it would be most effective if limited to awards that cover a shorter duration of time.

In New Zealand the duration of the award is commonly based on the amount of time it is predicted that the wife will take to reach her "but for" earning capacity. In contrast the Canadian Guidelines determine duration of an award based on the duration of the relationship. Under the Guidelines this emphasis is explicit, with the duration of the relationship being a main factor in calculating the range of values for both amount and duration. The P(R)A recognises the role duration plays with special provision for short duration relationships.[125] While duration is not explicitly recognised by New Zealand

[124] *M v B*, supra fn 25, at para [202]

[125] These relationships are defined in section 2E. Sections 14 and 14AA apply to short duration marriages and civil unions, respectively, and provide that the equal division provisions do not apply where there has been a disproportionately greater contribution by one spouse or partner. Section 14A provides that

courts in determining quantum, it plays an underlying role. In *S v C*[126] and *P v P*[127] quantum of compensation was based on duration of seven years after relationships of seventeen and ten years, respectively. In *S v S*[128] the award was based on three years compensation after an eleven-year relationship. The quantum in these cases was determined on the basis of the time it would take for the wife to up skill, which in turn reflects the duration of the relationship.

In *X v X*[129] the quantum calculation incorporated a duration of eighteen years, which was the projected period that Mrs X would remain in the workforce. Mrs X had been a homemaker for thirteen of the twenty-one years the marriage lasted. The eighteen year compensation duration was based on the expectation that Mrs X would never reach her "but for" earning capacity. The disadvantage that Mrs X has suffered from the length of time she was out of the workforce is the purpose of the compensation and this is connected to the duration of the marriage.

The principle behind the durational factor in the Canadian Guidelines is that spouses' financial situations merge over time.[130] In *Bracklow v Bracklow* the Supreme Court of Canada highlights the policy objective of recognising the intermingling of peoples affairs as the cohabit over a period of time.[131] Comparing income can take into account how long one spouse has been out of employment and also account for the higher income earners ability to work. Additionally in a short duration relationship, where there has been less time for the party's finances to merge and less time for advantages to arise, the award will reflect this. The durational aspect takes into account many of the factors that our courts take into account when determining quantum, but does so using a much simpler process. This may in turn make a compensatory award more accessible to parties on lower incomes. Instead of requiring expert evidence of a lower income spouse's "but for" income, which is difficult to predict with certainty, the values required are only the party's actual incomes and the duration of the relationship. Both of these are relatively easy to determine.

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the P(R)A does not apply to short duration de facto relationships unless particular requirements are satisfied.

[126] *S v C*, supra fn 28.
[127] *P v P*, supra fn 46.
[128] *S v S*, supra fn 57.
[129] *X v X*, supra fn 21.
[130] The Guidelines, supra fn 90, at pg 51.
[131] *Bracklow v Bracklow*, supra fn 94, at para [31].

It could be argued that a more detailed and accurate determination of what the wife has lost is taken in New Zealand and as a result better fulfils the objective of compensation. However, any determination of how long it will take the wife to reach her "but for" earning capacity is at best an educated guess. There is also the drawback of not compensating the lower income partner for what the higher income partner has gained from the relationship.

A final key difference that enables the Canadian courts to achieve a result nearer to equality of outcome than the New Zealand courts is the source of the award. Compensation under section 15 of the P(R)A is limited to the relationship property pool and is no use in a case where one spouse has a high income but the spouses have lived extravagantly during relationship leaving few assets. Compensation in Canada does not have this limit as it involves periodic payments based on the higher income earner's earning capacity. The only limit is if the high-income earner has a drastic decrease in income, which may be a ground for variation.

4. OPTIONS FOR REFORMING NEW ZEALAND LAW

4.1 Introduction

Under current New Zealand law there remains an inequality in the outcomes of relationship breakdown between the homemaking and breadwinning partners. This is attributable to jurisdictional requirements that do not correspond with the problem that Parliament was attempting to remedy and to a lack of guidance for courts in determining quantum of an award. Amending either of these would improve the position of low-income partners, however the best option is to address the jurisdictional hurdles and quantum for both compensatory and needs based awards holistically. The proposed amendments incorporate a periodic payment approach that would be incompatible with the current distinction between relationship and separate property in the P(R)A. For this reason the sections are numbered one and two.

4.2 The Proposed Amendments

(a) Section 1(1)

1 Court may award lump sum or periodic payments

(1) This section applies if, on the division of relationship property, the Court is satisfied that, after the marriage, civil union, or de facto relationship ends,
   (a) the income and living standards of one spouse or partner are likely to be significantly higher than the other spouse or partner; or
   (b) one spouse or partner cannot practicably meet the whole or any part of their reasonable needs.

Subsection one deals with entitlement to an award. This retains the significantly higher income and living standards test from section 15 and the reasonable needs based test from the current maintenance provisions. Under the current law issues can arise where a party may satisfy one provision but the award under that provision is unable to be made. To illustrate, the jurisdictional hurdles in section 15(1) of the P(R)A may be satisfied but there is limited relationship property in regards to which an order can be made, so it fails to provide an equal result. Considering the two objectives and awards together combats this problem.

Additionally, the causative aspect to entitlement has been removed and is to be considered subsequently in relation to quantum. Causation has been problematic as the New Zealand courts place significant emphasis on the payor spouse's own skills and abilities that got him to his current income position. This ignores the fact that he has

been able to get to this position in part because of the role his partner played in freeing his time and results in the lower income partner not being compensated for the payor partner's gains. The Canadian cases take a more balanced view of the advantages and disadvantages that are caused by the roles of each partner in the relationship. As illustrated in *Chutter v Chutter*[132] both the husband and wife had received a share of the business and matrimonial property and both had children to show from the marriage. However, only the husband was able to continue receiving the benefit of skills and international expertise the wife's homemaker role had enabled him to accrue. The broader Canadian approach to entitlement provided a more equal outcome through compensating Mrs Chutter for this benefit her husband received.

Under current New Zealand law the causation requirement means that jurisdiction will be established at some point along the spectrum of causation and all lower income partners who fall below that point will have no entitlement. Shifting the causation requirement to the quantum determination step allows awards to be made at all points along the spectrum of causation in proportion to the strength of the causation. The case of a popular musician illustrates how this provides a fair result to both, as the lower income partner will be able to establish entitlement and receive recognition for any advantages she has conferred on her partner but the musician's natural flair can still be recognised by a lower award.

(b) Section 1(2)

(2) If this section applies, the Court may make an order under section 2 of this Act:
  (a) requiring a spouse or partner to pay such periodic sums as the Court finds reasonable; or
  (b) where the duration of an award is less than five years, requiring a spouse or partner to pay such lump sum as the Court finds reasonable.

Subsection two provides that the court may order periodic payments or a lump sum payment in particular circumstances. A major factor in the inequality of outcome currently experienced under section 15 of the P(R)A is the large deductions that are required to be made for contingencies as a result of the uncertainty of the future.

[132] *Chutter v Chutter* [2009] 301 D.L.R. (4th) 297; [2008] BCCA 507, at para [70]. The marriage lasted twenty-eight years and involved a relationship property pool of around $8 million. The party's incomes were $214,000 and $83,000 annually, with a difference of $131,000. The Guidelines range of amount was $49,125 - $65,500 per year, however the final award was $33,600 given the higher income spouses need to save for retirement whereas the lower income spouse had the benefit of the pension accrued during the relationship.

Periodic payments resolve this problem as the ability to vary the payments makes contingency deductions unnecessary.

When amending the law in 2001 the legislature declined to take this option, which had recommended by the Working Group Report[133] and the Court of Appeal in *Z v Z (No 2)*[134] because of the importance of a clean break between the former partners. This policy fails to recognise the partnership nature of a relationship where partner's affairs become more entwined as time passes. Allowing shorter duration awards, to be formulated into lump sums in cases of shorter relationships, will maintain a better balance between the competing aims of encouraging a clean break and recognising that partners affairs become more intertwined the longer the relationship endures.

This also removes the gap in the law where the lower income spouse can meet their own reasonable needs but a significant disparity in income and living standards persists and a lack of relationship property means a section 15 award is not possible. Periodic payments achieve this is achieved by the ability to extend the award to the higher income spouses income stream.

(c) Section 1(3)

(3) In making an order under subsection 2, the Court shall have regard to:
  (a) the likely earning capacity of each partner;
  (b) the functions performed by each spouse or partner during the marriage, civil union, or de facto relationship;
  (c) the responsibilities of each spouse or partner for the ongoing daily care of any minor or dependent children of the marriage, civil union, or de facto relationship;
  (d) the standard of living of the spouses, civil union partners or de facto partners while they lived together;
  (e) any other relevant circumstances.

Subsection three encompasses the causation considerations in relation to quantum, in addition to covering the reasonable needs of a spouse or partner. These considerations are by and large the same considerations that are made under the current law in relation to section 15 of the P(R)A and maintenance. Subsection (3)(b) recognises the policy that support at the break down of a relationship is no longer based upon a moral obligation but needs to be causal linked to the functions within the relationship. Subsection (3)(c) explicitly recognises that ongoing care of children can positively or

[133] Working Group Report, supra fn 5.
[134] *Z v Z (No 2),* supra fn 8.

negatively affect the earning capacity of either party. Subsection (3)(e) recognises that an element of discretion is necessary due to the highly variable nature of family law.

While this section imports the discretion that leads to uncertainties in the current law, it does so within a set range of values derived from the party's respective incomes and duration of the relationship. This creates certainty in the award while still allowing the discretion to vary the amount to an extent, based on individual circumstances. The court is bound by the legislation to determine the range of quantum before any discretion can be exercised. So if there is a couple that were in a relationship for twelve years with respective incomes of $100,000 and $20,000, the range will be $14,400 to $19,200 per annum for a duration of three to nine years. It is only at this point that the court has a discretion, which is to be exercised having regard to the mandatory factors in subsection three.

(d) Section 1(4)

(4) An order made under subsection (1) should
  (a) recognise any economic advantages or disadvantages to the spouses arising from the marriage;
  (b) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
  (c) promote the economic self-sufficiency of each spouse within a reasonable period of time.

Subsection four explicitly states the objectives of the section so will solve the current problem of the courts failing to give adequate regard to the advantages that a spouse or partner has gained from the relationship.

(e) Section Two

An overriding issue in relation to determining quantum of an award is the inconsistency between the courts regarding the method to be used. Canada faced this same issue before the introduction of the guidelines and had varying approaches that created uncertainty.[135] Under section 15 the legislature has provided no indication of the method that should be taken in determining an award. While the Court of Appeal has advocated the benefits of a more structured approach, they too have failed to provide adequate guidance.

[135] Bilby, L. (2004/2005) Creating Order out of Chaos: Introducing Spousal Support Guidelines. 23 *Canadian Family Law Quarterly* 199, at pp 210 – 211.

The proposed section two involves a method that places emphasis on the duration of the relationship and compares the party's respective incomes. Although Robertson J explicitly rejected the income comparison method of calculation in *M v B*, however His Honour gave no principled basis was given for doing so. Utilising duration as a main factor is not a perfect solution but provides a simple method and inherently takes into account factors that go towards causation.

Essentially the method involves determining the difference in the partners earning capacity's and awarding the lower income spouse a percentage of this difference to a maximum of half the higher income earners net income, with the percentage dependant on the causative factors and need present in the circumstances. Duration of the award likewise depends on the duration of the relationship, taking into account the causative factors and need. The durational factors proposed are lower than those in Canada, to recognise the stronger emphasis in New Zealand society upon a clean break.

An important component of the quantum determination is section 2(1)(c), which provides flexibility in allowing the court to restructure the award if just in the circumstances. It may be just in the situation of a marriage of long duration to increase the duration of an award and decrease the annual amount to recognise that the lower income earner may not ever be able to achieve a their full earning capacity. In the case of a short duration relationship where one party had left the workforce to care for a child of the relationship for five years and both partners currently share care of that child, it may be fair to increase the annual amount and decrease duration. This may enable the lower income spouse to gain a qualification in a shorter period of time and facilitate a clean break, which is more appropriate in a short duration relationship. The total overall award will remain the same after restructuring.

4.3 *Z v Z (No 2)* under the Proposed Amendments

Under the proposed amendments Mrs Z would satisfy both limbs of section 1(1) as there is a substantial disparity in income and living standards and Mrs Z is unable to meet her reasonable needs given her income of a $7000 annual benefit. The difference between the party's incomes is $293,000 and the duration of the relationship was twenty-eight years. These figures provide a range for annual amount of $123,060 to

$164,000[136] and a range for duration of seven to fourteen years.

Having regard to the applicable factors the amount and duration should be awarded at a mid to high level with an amount of $14,000 per annum and a duration of eleven years. The amount will need to be adjusted to take into account the effect of tax on Mr Z's income. The amount factor for an annual payment of $92,000 is 47.8 per cent, so applying this to the net income difference of $176,000,[137] the annual payments will be $84,128.

Mrs Z received $450,000 in the property division under the Matrimonial Property Act. In the five years after the hearing Mr Z was expected to have the additional benefit of $880,000[138] in income whereas Mrs Z was expected to have $35,000 or slightly more if she was able to find employment. At this stage Mr and Mrs Z's respective positions would be vastly different. Mrs Z's asset base would have been depleted to accommodate her expenses whereas Mr Z will have had the opportunity to invest his income and increase his asset base.

Under the P(R)A Mrs Z would have received between $538,900 and $627,800, leaving Mr Z with between $361,100 and $272,200, depending on whether the award was halved. The additional property received by Mrs Z would allow her to retrain and possibly increase her earning potential, but her expenses would still deplete her asset base. In contrast Mr Z would be able to replace the property that was redistributed under section 15 by means of the $880,000 he is expected to earn over the subsequent five years.

Under both the Matrimonial Property Act and the P(R)A Mrs Z remains in a disadvantaged position and her income and living standards remain much lower than Mr Z's five years after separation. This indicates that the objective of providing the partners with an equal outcome at the breakdown of the relationship has not been met. In contrast under the proposed amendments Mrs Z would receive an award that comes closer to substantive equality of outcome. Mr and Mrs Z would receive equal shares in

[136] ([1.5% x 28 = 42%] x income differential) – ([2% x 28 = 56%] x income differential).
[137] $300,000 less tax at 39 c in the dollar is $183,000, less Mrs Z's income of $7000 provides a disparity of $176,000
[138] The expected income is $300,000 per year providing an after tax income of around $176,000. Deducting tax is necessary for a comparison with the result under the proposed amendments.

the relationship property, and Mr Z's income will be redistributed so that five years after the marriage Mr Z will have retained $459,360 of his earnings to invest or cover his expenses and Mrs Z will have received the benefit of $420,640 enabling her to cover her expenses. This result means that both parties will have had similar income stream to invest (or spend frivolously) and neither will have been required to deplete their asset base. This award more effectively recognises the advantages that Mr Z has gained from his breadwinner role in the relationship and the disadvantages that Mrs Z has faced by her homemaker role.

5. CONCLUSION

Section 15 has failed to remedy the inequality in outcome that the lower income partner faces upon the breakdown of a relationship. In dealing with the section the courts have to a large extent taken a narrow approach solely focusing on the disadvantages to the lower income partner because of their role during the relationship. Canadian courts have taken a wider view compensating for both the advantages and disadvantages that result from the relationship as a result of the less restrictive entitlement requirements and explicit objectives. The proposed amendments will improve the position of the lower income partner by removing the difficult hurdle of establishing a causal link between the advantages gained by the higher income partner and their earning capacity. Explicit objectives will also direct the courts to have regard to both advantages and disadvantages.

A major obstacle to the lower income partner is the uncertainty regarding the quantum of an award if the jurisdictional threshold is reached. The Canadian also encountered this problem and a solution was found in the form of the Guidelines, which provide structure while allowing elements of discretion. A framework for determining quantum in New Zealand will remove a substantial portion of this uncertainty, with a limited amount of discretion remaining through which individualised results can occur.

Deductions for general contingencies also play a large part in diminishing the award and preventing an equal outcome. The deductions are a response to the uncertainty of the future so the amendments respond to this by removing the need for the court to consider the likelihood of future events occurring. This will lead in outcomes that are in line with the recommendations of the Working Group Report, the Court of Appeal in *Z v Z (No 2)* and the intention of Parliament in enacting section 15.

The proposed amendments address all of these problems, drawing on recent developments in Canadian matrimonial property law and applying them to a New Zealand context. The result is a legislative framework that can be utilised to place both partners on an equal footing to begin the next chapter in their lives.

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APPENDIX 1: PROPOSED AMENDMENTS

Orders to address economic disparities and financial hardship

1 Court may award lump sum or periodic payments

(1) This section applies if, on the division of relationship property, the Court is satisfied that, after the marriage, civil union, or de facto relationship ends,

(a) the income and living standards of one spouse or partner are likely to be significantly higher than the other spouse or partner; or
(b) one spouse or partner cannot practicably meet the whole or any part of their reasonable needs.

(2) If this section applies, the Court may make an order under section 2:

(a) requiring a spouse or partner to pay such periodic sums as the Court finds reasonable; or
(b) where the duration of an award is less than five years, requiring a spouse or partner to pay such lump sum as the Court finds reasonable.

(3) In making an award under subsection 2, the Court may/shall have regard to:

(a) the likely earning capacity of each partner:
(b) the functions performed by each spouse or partner during the marriage, civil union, or de facto relationship:
(c) the responsibilities of each spouse or partner for the ongoing daily care of any minor or dependent children of the marriage, civil union, or de facto relationship:
(d) the standard of living of the spouses, civil union partners or de facto partners while they lived together
(e) any other relevant circumstances.

(4) An order made under subsection (1) should

(a) recognise any economic advantages or disadvantages to the spouses arising from the marriage;
(b) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
(c) promote the economic self-sufficiency of each spouse within a reasonable period of time.

2 Calculating Quantum of an Award

(1) In determining quantum for the purposes of an award under section 1, the Court shall:

(a) Determine the ranges for amount and duration:

(i) The range for amount is to be calculated using the following formula:[139]

([1.5% x length of relationship] x earning capacity differential) to ([2% x relationship length of relationship] x earning capacity differential)

(ii) The range for duration is to be calculated using the following formula:

[0.25 x length of relationship] to [0.75 x length of relationship]

(iii) For the purposes of section 2(1)(a), earning capacity differential means the difference between the spouses or partners annual earning capacities.

(b) And then, determine where within the range the award should sit, having regard to the factors set out in section 1(3), the objectives in section 1(4) and in particular:

(i) the strength of the recipient's compensation claim;
(ii) the reasonable needs of the recipient, having regard to the standards of living during relationship
(iii) the ability of the payor to pay;
(iv) the continued needs and childcare of any children of the relationship
(v) the value of property received upon division.

(c) If the Court considers it just having regard to the objectives in section 1(4) and the circumstances of the case, the award may be restructured to,

(i) Increase duration and decrease amount, while maintaining the same total award; or
(ii) Decrease duration and increase amount, while maintaining the same total award.

(2) The Court may depart from the formula specified in subsection 1 if, having regard to the objectives in section 1(4), it would be just in the circumstances.

[139] The specified percentages of 1.5 and 2 are the result of a policy decision regarding the maximum number of years before duration is to be indefinite. In Canada this maximum is 25. In New Zealand society's view on the importance of a clean break may mean it needs to be lower.

APPENDIX 2: STATUTES

New Zealand

FAMILY PROCEEDINGS ACT 1980

Maintenance of spouses and de facto partners

63 Maintenance during marriage or civil union

(1) During a marriage or civil union, each party is liable to maintain the other party to the extent that such maintenance is necessary to meet the reasonable needs of the other party, where the other party cannot practicably meet the whole or any part of those needs because of any 1 or more of the circumstances specified in subsection (2).

(2) The circumstances referred to in subsection (1) are as follows:

(a) the ability of the parties to be or to become self-supporting, having regard to—

(i) the effects of the division of functions within the marriage or civil union while the parties are living together or lived together:

(ii) the likely earning capacity of each party:

(iii) any other relevant circumstances:

(b) the responsibilities of each party for the ongoing daily care of any minor or dependent children of the marriage or civil union after the parties ceased to live together:

(c) the standard of living of the parties while they are living together or lived together:

(d) any physical or mental disability:

(e) any inability of a party to obtain work that—

(i) it is reasonable in all the circumstances for that party to do; and

(ii) is adequate to provide for that party:

(f) the undertaking by a party of a reasonable period of education or training designed to increase that party's earning capacity or to reduce or eliminate that party's need for maintenance from the other party, where it would be unfair, in all the circumstances, for the reasonable needs of the party undertaking that education or training to be met immediately by that party—

(i) because of the effects of any of the matters set out in paragraphs (a)(i) and (b) on the potential earning capacity of that party; or

(ii) because that party has previously maintained or contributed to the maintenance of the other party during a period of education or training.

(3) Except as provided in this section, neither party to a marriage or civil union is liable to maintain the other party during the marriage or civil union.

64 Maintenance after marriage or civil union dissolved or de facto relationship ends

(1) Subject to section 64A, after the dissolution of a marriage or civil union or, in the case of a de facto relationship, after the de facto partners cease to live together, each spouse, civil union partner, or de facto partner is liable to maintain the other spouse, civil union partner, or de facto partner to the extent that such maintenance is necessary to meet the reasonable needs of the other spouse, civil union partner, or de facto partner, where the other spouse, civil union partner, or de facto partner cannot practicably meet the whole or any part of those needs because of any 1 or more of the circumstances specified in subsection (2).

(2) The circumstances referred to in subsection (1) are as follows:

(a) the ability of the spouses, civil union partners, or de facto partners to become self-supporting, having regard to—

(i) the effects of the division of functions within the marriage or civil union or de facto relationship while the spouses, civil union partners, or de facto partners lived together:

(ii) the likely earning capacity of each spouse, civil union partner, or de facto partner:

(iii) any other relevant circumstances:

(b) the responsibilities of each spouse, civil union partner, or de facto partner for the ongoing daily care of any minor or dependent children of the marriage or civil union or (as the case requires) any minor or dependent children of the de facto relationship after the dissolution of the marriage or civil union or (as the case requires) the de facto partners ceased to live together:

(c) the standard of living of the spouses, civil union partners, or de facto partners while they lived together:

(d) the undertaking by a spouse, civil union partner, or de facto partner of a reasonable period of education or training designed to increase the earning capacity of that spouse, civil union partner, or de facto partner or to reduce or eliminate the need of that spouse, civil union

partner, or de facto partner for maintenance from the other spouse, civil union partner, or de facto partner if it would be unfair, in all the circumstances, for the reasonable needs of the spouse, civil union partner, or de facto partner undertaking that education or training to be met immediately by that spouse, civil union partner, or de facto partner—

(i) because of the effects of any of the matters set out in paragraphs (a)(i) and (b) on the potential earning capacity of that spouse, civil union partner, or de facto partner; or

(ii) because that spouse, civil union partner, or de facto partner has previously maintained or contributed to the maintenance of the other spouse, civil union partner, or de facto partner during a period of education or training.

(3) For the purposes of subsection (2)(a)(i), if the marriage or civil union was immediately preceded by a de facto relationship between the spouses or civil union partners, the effects of the division of functions within the marriage or civil union include the effects of the division of functions within that de facto relationship.

(4) Except as provided in this section and section 64A,—

(a) neither party to a marriage or civil union is liable to maintain the other party after the dissolution of the marriage or civil union:

(b) neither party to a de facto relationship is liable to maintain the other de facto partner after the de facto partners cease to live together.

64A Spouses, civil union partners, or de facto partners must assume responsibility for own needs within reasonable time

(1) If a marriage or civil union is dissolved or, in the case of a de facto relationship, the de facto partners cease to live together,—

(a) each spouse, civil union partner, or de facto partner must assume responsibility, within a period of time that is reasonable in all the circumstances of the particular case, for meeting his or her own needs; and

(b) on the expiry of that period of time, neither spouse, civil union partner, or de facto partner is liable to maintain the other under section 64.

(2) Regardless of subsection (1), if a marriage or civil union is dissolved or, in the case of a de facto relationship, the de facto partners cease to live together, 1 spouse, civil union partner, or de facto partner (party A) is liable to maintain the other spouse, civil union partner, or de facto partner (party B) under section 64, to the extent that such maintenance is necessary to meet the reasonable needs of party B if, having regard to the matters referred to in subsection (3),—

(a) it is unreasonable to require party B to do without maintenance from party A; and

(b) it is reasonable to require party A to provide maintenance to party B.

(3) The matters referred to in subsection (2) are as follows:

(a) the ages of the spouses, civil union partners, or de facto partners:

(b) the duration of the marriage or civil union or de facto relationship:

(c) the ability of the spouses, civil union partners, or de facto partners to become self-supporting, having regard to—

(i) the effects of the division of functions within the marriage or civil union or de facto relationship while the spouses, civil union partners, or de facto partners were living together:

(ii) the likely earning capacity of each spouse, civil union partner, or de facto partner:

(iii) the responsibilities of each spouse, civil union partner, or de facto partner for the ongoing daily care of any minor or dependent children of the marriage or civil union or (as the case requires) any minor or dependent children of the de facto relationship after the dissolution of the marriage or civil union or (as the case requires) after the de facto partners ceased to live together:

(iv) any other relevant circumstances.

(4) If the marriage or civil union was immediately preceded by a de facto relationship between the husband and wife,—

(a) for the purposes of subsection (3)(b), the de facto relationship must be treated as if it were part of the marriage or civil union; and

(b) for the purposes of subsection (3)(c)(i), the effects of the division of functions within the marriage or civil union include the effects of the division of functions within that de facto relationship.

Matrimonial Property Act 1976 (repealed)

Title

An Act to reform the law of matrimonial property; to recognise the equal contribution of husband and wife to the marriage partnership; to provide for a just division of the matrimonial property between the spouses when their marriage ends by separation or divorce, and in certain other circumstances, while taking account of the interests of any children of the marriage; and to reaffirm the legal capacity of married women

Nature of Matrimonial Property and Separate Property

8. Matrimonial property defined---Matrimonial property shall consist of---
   (a) The matrimonial home whenever acquired; and
   (b) The family chattels whenever acquired; and
   (c) All property owned jointly or in common in equal shares by the husband and the wife; and
   (d) All property owned immediately before the marriage by either the husband or the wife if the property was acquired in contemplation of his or her marriage to the other and was intended for the common use and benefit of both the husband and the wife; and
   (e) Subject to subsections (3) to (6) of section 9 and to section 10 of this Act, all property acquired by either the husband or the wife after the marriage, including property acquired for the common use and benefit of both the husband and the wife out of property owned by either the husband or the wife or both of them before the marriage or out of the proceeds of any disposition of any property so owned; and
   (f) Any income and gains derived from, the proceeds of any disposition of, and any increase in the value of, any property described in paragraphs (a) to (e) of this section; and
   (g) Any policy of assurance taken out by one spouse on his or her own life or the life of the other spouse, whether for his or her benefit or the benefit of the other spouse (not being a policy that was fully paid up at the time of the marriage and not being a policy to the proceeds of which a third person is beneficially entitled), whether the proceeds are payable on the death of the assured or on the occurrence of a specified event or otherwise; and
   (h) Any policy of insurance in respect of any property described in paragraphs (a) to (e) of this section; and
   (i) Any pension, benefit, or right to which either the husband or the wife is entitled or may become entitled under any superannuation scheme if the entitlement is derived, wholly or in part, from contributions made to the scheme after the marriage or from employment or office held since the marriage; and
   (j) All other property that the spouses have agreed, pursuant to section 21 of this Act, shall be matrimonial property; and
   (k) Any other property that is matrimonial property by virtue of any other provision of this Act or by virtue of any other Act.

Property (Relationships) Act 2001

1M Purpose of this Act

The purpose of this Act is—

(a) to reform the law relating to the property of married couples and civil union couples, and of couples who live together in a de facto relationship:

(b) to recognise the equal contribution of husband and wife to the marriage partnership, of civil union partners to the civil union, and of de facto partners to the de facto relationship partnership:

(c) to provide for a just division of the relationship property between the spouses or partners when their relationship ends by separation or death, and in certain other circumstances, while taking account of the interests of any children of the marriage or children of the civil union or children of the de facto relationship.

1N Principles

The following principles are to guide the achievement of the purpose of this Act:

(a) the principle that men and women have equal status, and their equality should be maintained and enhanced:

(b) the principle that all forms of contribution to the marriage partnership, civil union, or the de facto relationship partnership, are treated as equal:

(c) the principle that a just division of relationship property has regard to the economic advantages or disadvantages to the spouses or partners arising from their marriage, civil union, or de facto relationship or from the ending of their marriage, civil union, or de facto relationship:

(d) the principle that questions arising under this Act about relationship property should be resolved as inexpensively, simply, and speedily as is consistent with justice.

15 Court may award lump sum payments or order transfer of property

(1) This section applies if, on the division of relationship property, the Court is satisfied that, after the marriage, civil union, or de facto relationship ends, the income and living standards of 1 spouse or partner (party B) are likely to be significantly higher than the other spouse or partner (party A) because of the effects of the division of functions within the marriage, civil union, or de facto relationship while the parties were living together.

(2) In determining whether or not to make an order under this section, the Court may have regard to—

(a) the likely earning capacity of each spouse or partner:

(b) the responsibilities of each spouse or partner for the ongoing daily care of any minor or dependent children of the marriage, civil union, or de facto relationship:

(c) any other relevant circumstances.

(3) If this section applies, the Court, if it considers it just, may, for the purpose of compensating party A,—

(a) order party B to pay party A a sum of money out of party B's relationship property:

(b) order party B to transfer to party A any other property out of party B's relationship property.

(4) This section overrides sections 11 to 14A.

Canada - Federal

Divorce Act, R.S.C. 1985, c. 3

Spousal Support Orders

Spousal support order

15.2 (1) A court of competent jurisdiction may, on application by either or both spouses, make an order requiring a spouse to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump sum and periodic sums, as the court thinks reasonable for the support of the other spouse.

Interim order

(2) Where an application is made under subsection (1), the court may, on application by either or both spouses, make an interim order requiring a spouse to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump sum and periodic sums, as the court thinks reasonable for the support of the other spouse, pending the determination of the application under subsection (1).

Terms and conditions

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

Factors

(4) In making an order under subsection (1) or an interim order under subsection (2), the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including

(a) the length of time the spouses cohabited;
(b) the functions performed by each spouse during cohabitation; and
(c) any order, agreement or arrangement relating to support of either spouse.

Spousal misconduct

(5) In making an order under subsection (1) or an interim order under subsection (2), the court shall not take into consideration any misconduct of a spouse in relation to the marriage.

Objectives of spousal support order

(6) An order made under subsection (1) or an interim order under subsection (2) that provides for the support of a spouse should

(a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
(b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
(c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
(d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

Canada - British Columbia

Family Relations Act, RSBC 1995

Equality of entitlement to family assets on marriage breakup

56 (1) Subject to this Part and Part 6, each spouse is entitled to an interest in each family asset on or after March 31, 1979 when

(a) a separation agreement,
(b) a declaratory judgment under section 57,
(c) an order for dissolution of marriage or judicial separation, or
(d) an order declaring the marriage null and void respecting the marriage is first made.

(2) The interest under subsection (1) is an undivided half interest in the family asset as a tenant in common.

(3) An interest under subsection (1) is subject to

(a) an order under this Part or Part 6, or
(b) a marriage agreement or a separation agreement.

(4) This section applies to a marriage entered into before or after March 31, 1979.

Judicial reapportionment on basis of fairness

65 (1) If the provisions for division of property between spouses under section 56, Part 6 or their marriage agreement, as the case may be, would be unfair having regard to

(a) the duration of the marriage,
(b) the duration of the period during which the spouses have lived separate and apart,
(c) the date when property was acquired or disposed of,
(d) the extent to which property was acquired by one spouse through inheritance or gift,
(e) the needs of each spouse to become or remain economically independent and self sufficient, or
(f) any other circumstances relating to the acquisition, preservation, maintenance, improvement or use of property or the capacity or liabilities of a spouse,

the Supreme Court, on application, may order that the property covered by section 56, Part 6 or the marriage agreement, as the case may be, be divided into shares fixed by the court.

(2) Additionally or alternatively, the court may order that other property not covered by section 56, Part 6 or the marriage agreement, as the case may be, of one spouse be vested in the other spouse.

(3) If the division of a pension under Part 6 would be unfair having regard to the exclusion from division of the portion of a pension earned before the marriage and it is inconvenient to adjust the division by reapportioning entitlement to another asset, the Supreme Court, on application, may divide the excluded portion between the spouse and member into shares fixed by the court.

Canada – Ontario

Family Law Act, RSO 1990, c. F.3

Equalization of net family properties

Divorce, etc.

5. (1) When a divorce is granted or a marriage is declared a nullity, or when the spouses are separated and there is no reasonable prospect that they will resume cohabitation, the spouse whose net family property is the lesser of the two net family properties is entitled to one-half the difference between them.

Death of spouse

(2) When a spouse dies, if the net family property of the deceased spouse exceeds the net family property of the surviving spouse, the surviving spouse is entitled to one-half the difference between them.

Improvident depletion of spouse's net family property

(3) When spouses are cohabiting, if there is a serious danger that one spouse may improvidently deplete his or her net family property, the other spouse may on an application under section 7 have the difference between the net family properties divided as if the spouses were separated and there were no reasonable prospect that they would resume cohabitation.

No further division

(4) After the court has made an order for division based on subsection (3), neither spouse may make a further application under section 7 in respect of their marriage. R.S.O. 1990, c. F.3, s. 5 (4).

Idem

(5) Subsection (4) applies even though the spouses continue to cohabit, unless a domestic contract between the spouses provides otherwise. R.S.O. 1990, c. F.3, s. 5 (5).

(6) The court may award a spouse an amount that is more or less than half the difference between the net family properties if the court is of the opinion that equalizing the net family properties would be unconscionable, having regard to,

(a) a spouse's failure to disclose to the other spouse debts or other liabilities existing at the date of the marriage;
(b) the fact that debts or other liabilities claimed in reduction of a spouse's net family property were incurred recklessly or in bad faith;
(c) the part of a spouse's net family property that consists of gifts made by the other spouse;
(d) a spouse's intentional or reckless depletion of his or her net family property;
(e) the fact that the amount a spouse would otherwise receive under subsection (1), (2) or (3) is disproportionately large in relation to a period of cohabitation that is less than five years;
(f) the fact that one spouse has incurred a disproportionately larger amount of debts or other liabilities than the other spouse for the support of the family;
(g) a written agreement between the spouses that is not a domestic contract; or
(h) any other circumstance relating to the acquisition, disposition, preservation, maintenance or improvement of property. R.S.O. 1990, c. F.3, s. 5 (6).