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Unequal Shadows: Negotiation Theory and Spousal Support Under Canadian Divorce Law

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Unequal Shadows:
Negotiation Theory and Spousal Support
Under Canadian Divorce Law

CRAIG MARTIN**

There has been considerable academic consideration of the adverse economic impact of divorce upon women in Canada. However, most of the attention has been focused on the manner in which the law has been interpreted by the courts. Yet less than 10 per cent of all divorce settlements are decided in court. What is more, negotiated settlements reflect lower support than the courts likely would have ordered. To understand the unequal impact of the law on women, one must look at the conduct of negotiations. This article brings negotiations theory to bear on the analysis of why women might be disadvantaged in negotiations for spousal support within the framework established by Canada’s divorce laws. Rather than accept any inherent gender-based differences in negotiating ability or approach as an explanation, the article argues that the legal framework is structured in such a way as to systematically place the spousal support claimant at a disadvantage in negotiations for support. The argument is advanced by examining the structure of the negotiations from the perspective of prospect theory and other aspects of negotiation theory. The application of these theories suggests that the support claimant is placed in a position of real weakness relative to the respondent. The claimant is likely to be less loss-averse, less concession-averse, and more risk-averse than the respondent. These characteristics by themselves have been demonstrated to be disadvantages in negotiations. Moreover, the greater risk-aversion makes the support claimant more vulnerable to strategic behaviour and reduces the subjective value of her best alternatives to a negotiated agreement. These systemic tendencies are caused by the extent to which support is characterized by the law as a redistribution of the respondent’s income, at the sole discretion of the court, and then only if the claimant can prove need or a right to compensation, in combination with the vagueness of the provisions and indeterminacy of the process.

Un nombre considérable de spéculations a été fait au sujet de l’incidence économique défavorable du divorce sur les canadiennes. Cependant, ces conjectures mettent surtout l’accent sur la façon dont les lois sont interprétées par les tribunaux. Pourtant, moins de 10% de toutes les conventions de divorce sont réglées

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par les tribunaux. Qui plus est, les règlements négociés hors cour octroient des pensions alimentaires moins élevées que celles qui auraient probablement été accordées par la cour. Pour bien comprendre l'incidence défavorable de la loi sur les femmes, il faut se pencher sur la façon dont se déroulent les négociations. Le présent article remet en question la théorie de la négociation pour analyser les raisons pour lesquelles les femmes demandant des pensions alimentaires pourraient être désavantagées dans le cadre de la loi sur le divorce au Canada. Plutôt que de se contenter d'une explication fondée sur le sexisme, ou sur les aptitudes à la négociation, ou sur l'approche adoptée lors du processus de négociation, nous sommes d'avis que le cadre législatif est structuré de façon telle que la partie demanderesse se trouve toujours désavantagée lors des négociations. Ce raisonnement est avancé après avoir examiné la structure des négociations du point de vue d'une théorie potentielle et des autres aspects de la théorie de la négociation. L'application de ces théories suggère que la demanderesse est dans une position très précaire comparativement à la partie intimée. La demanderesse craint vraisemblablement de perdre et est moins encline à faire des concessions. Il a été prouvé que ces caractéristiques constituent un sérieux handicap lors des négociations. En outre, plus la demanderesse redoute le risque, plus elle devient vulnérable aux considérations stratégiques. Ce comportement réduit la valeur subjective des solutions possibles qui pourraient être négociées. Ces tendances systématiques résultent du fait que la pension alimentaire est considérée par la loi comme étant une redistribution, à la discrétion du tribunal, du revenu de la partie intimée, et que cette redistribution ne sera autorisée que dans le cas où la demanderesse prouve qu'elle a besoin, ou a droit, à une pension. Elles résultent également de l'imprécision des conditions et des procédures.

I Introduction

There has been a wealth of literature describing and examining the effects of divorce law on women in Canada and the US since the divorce reforms of the late 1960s and early 1970s. Although there may be still some debate in the margins, there is little dispute that the effect of divorce law in Canada during the 1970s and 1980s has been to distribute inequitably the adverse economic consequences of marriage breakdown to the disadvantage of women.1 Yet while most of the literature, and what little empirical research there has been done on the subject, have focused on the economic condition of women following divorce, most of the criticism and explanation of the

cause of women’s disadvantage has centred on the manner in which the courts have interpreted and applied the federal divorce statutes\(^2\) and provincial family law legislation\(^3\) in awarding support payments in divorce and separation proceedings.

How the courts interpret the law is of course important. Yet the percentage of divorces that are actually contested in court is generally less than 5 percent of all divorces. The rest are settled through negotiated agreements.\(^4\) Thus, if one is to discuss meaningfully and attempt to explain the economic condition of people resulting from divorce, one cannot focus purely on the outcomes of court decisions. What is more, it appears from what empirical data there is that women have received no spousal support at all in an inordinately high percentage of divorces that are settled by negotiated agreement.\(^5\) This suggests that women are actually receiving less spousal support in negotiated settlements than they would have received at the hands of the courts.

It has been more than 15 years since Robert Mnookin and Lewis Kornhauser published their important work on how divorce law functions as a framework within which spouses negotiate the ordering of their rights and obligations.\(^6\) In their view, the law and how courts decide cases are important, but they are important because of how and the extent to which they influence the bargaining process. Surprisingly, there is still little focus within the legal literature on this interaction between the law and the bargaining process,\(^7\) and specifically on how that interaction might systematically operate to the disadvantage of parties in a given circumstance or sharing a certain attribute. The little that has been written has often asserted inherent gender-based inequality of bargaining power as the cause of unfair outcomes to negotiations. Barbara Bedont, for instance, relying on Carol Gilligan’s theories relating to the difference between the approaches of men and women to the resolution of moral dilemmas, suggests that women are inherently at a disadvantage in bilateral negotiations with men.\(^8\) The disadvantage arises, argues Bedont, because “men are more inclined to maximize their own interests” while women, who are essentially characterized by an “ethic of care,” “are more concerned with interpersonal accommodation.”\(^9\) The

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4. Bureau of Review, supra note 1 at 45. For a US study see M.S. Melli, H.S. Erlanger, & E. Chambiss, “The Process of Negotiation”: An Exploratory Investigation in the Context of No-Fault Divorce” (1988) 40 Rutgers L.Rev. 1,133 [hereinafter Melli *et al*], which found that 9 percent of cases studied had to go to court.
5. *Infra*, text accompanying note 71 *et seq*.
7. An obvious exception is Melli *et al*. supra note 4.
remedy suggested is the reform of the contract law doctrine of unconscionability to create a legal presumption of inequality of bargaining power in the family law context. However, in my view, before pointing to some inherent gender differences as the cause of systemic disadvantage, which is difficult to demonstrate or explain convincingly, not to mention counterproductive to the effort to gain equal treatment of women in other spheres, a more rigorous analysis of the structure of the negotiation itself should be conducted.

There has been almost no attempt in Canada to examine the interaction of law and bargaining in the divorce context from the perspective of the growing field of negotiation theory. I suggest that several principles and theories developed in the area of negotiation theory, and that field's elaboration and incorporation of powerful new findings in cognitive psychology, can in fact be very helpful. Not only can such principles help explain observed inequalities in negotiated results in a more empirically sound and credible fashion than tenuous appeals to inherent gender-based difference, but they can also provide powerful insights into how one might go about reshaping the law so as to actually prevent systematic disadvantage from arising in negotiations, rather than simply providing ex post remedies for varying unfair agreements.

In this article I bring negotiation analysis to bear on the question of how women are disadvantaged by the legal system in divorce negotiations—disadvantaged not because of any immutable characteristic inherent to their gender, but because society has evolved or been shaped in such a way that women are typically in the position of claimants in divorce negotiations. The argument is that support claimants are disadvantaged in negotiations by virtue of the structure of the law, and women are usually the claimants in our society. I advance this argument by looking more specifically at spousal support—despite the fact that spousal support is only one of four intertwined issues being negotiated—since it is the one issue that most clearly reflects distinct disadvantages that are most amenable to analysis. I argue that Daniel Kahneman's prospect theory, and the notions of reference points and norms as they apply to decision analysis, would predict that the support claimant will be placed in a position that will make her less loss-averse than the support provider, more likely to make concessions, and far more risk-averse. As will be explained, each of these is a disadvantage in negotiations. What is more, this risk-aversion, coupled with the uncertainty created by the legal regime, drives the comparative value of the support claimant's 'best alternative to negotiated agreement' down and makes her more

10. Spousal support is only one of four main issues that are potentially the subject of negotiation in divorce proceedings if dependent children are involved. The other three are property division, child support, and custody. But it is with respect to spousal support that women are most seriously disadvantaged empirically. It should also be noted at this juncture that property division is not provided for in the Divorce Act, 1985, property being a provincial head of power under s. 92(13) of the Constitution Act, 1867, c. 3 (UK). In Ontario, family property is governed by Part I of the Family Law Act, supra note 3.

vulnerable to strategic behaviour. All of this, I contend, gives real meaning to the often empty notion of inequality of bargaining power.

Support claimants are placed in this disadvantaged position because of the manner in which the spousal support provisions are characterized in the Divorce Act, 1985, the manner in which courts have interpreted those provisions, and the manner in which our societal views of marriage and divorce shape norms affecting the negotiations. Negotiation theory suggest that if the legislation characterized spousal support more in terms of a legal entitlement, with clearer rules as to how to calculate the quantum of that entitlement, it would place the support claimant on a more even playing field in the negotiations. She would then be more likely to be as loss-averse, concession-averse, and risk-seeking as the support provider.

This article attempts to provide some empirical support for these propositions. However, given the dearth of empirical research on the subject in Canada, particularly with respect to the outcomes in uncontested divorce settlements, it was impossible to gather enough evidence to verify or refute conclusively all the propositions explored. But there is certainly enough evidence to suggest that support claimants are receiving less through negotiation than might be mandated by the courts. It is on this basis that I attempt to construct a new theoretical framework upon which further research can be developed. It is a framework that provides support for reform to the spousal support provisions of the statutes, and may be of assistance to counsel in preparing spousal support claimants for the negotiation process.

II THE LEGAL FRAMEWORK

In 1968 the federal government passed the Divorce Act, 1968, which for the first time allowed unilateral petition for divorce in the absence of fault-based grounds for the divorce. While it retained a long list of possible fault-based grounds, it allowed a petition to be brought on satisfying the non-fault-based condition that the spouses had lived separate and apart for three years. In response to criticism of this legislation, stemming in large part from the perceived failure of the compromise between fault and no-fault, the Divorce Act, 1985, was introduced. Two of the government's primary objectives were to make divorce less adversarial and to provide a more equitable resolution of the consequences of divorce, particularly with respect to custody and economic outcomes.

By 1988 all jurisdictions but Quebec and Newfoundland allowed divorce to proceed by affidavit alone, so that in uncontested cases there was no need for a court appearance at all. In a Department of Justice study conducted in 1988, 84.9 per cent

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12. While the argument is that any support claimant, regardless of gender, will be similarly disadvantaged, I will use gendered pronouns because in practical terms it is women who have been systematically disadvantaged.


of all divorces outside Quebec and Newfoundland were found to be resolved without any hearing, and another 10.4 per cent were settled in uncontested hearings. Even when Quebec and Newfoundland are included, 96.2 per cent of all divorces in the sample were uncontested in court and were resolved through negotiated settlement.\(^{15}\) The 1985 Act was thus apparently successful in making the process less adversarial. This fact makes an examination of how those negotiations are conducted all the more important.

On the subject of spousal support, the legislation that provides the basis for such negotiated settlements, *The Divorce Act, 1985*, states:

s. 15(2) A court of competent jurisdiction may, on application by either or both spouses, make an order requiring one spouse to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump sums and periodic sums, as the court thinks reasonable for the support of

the other spouse;

...

In doing so the court is to consider such factors as the condition, means, needs, and other circumstances of each spouse, including the length of their cohabitation and the functions performed by each spouse within the marriage.\(^ {16}\) It can also make the order for a definite or an indefinite period, or until the satisfaction of some condition in the future. Lastly, the court itself may impose any terms or conditions that “it thinks fit and just.”\(^ {17}\) To guide the courts in their consideration of an application, the Act provides that the legislation seeks to achieve the following objectives with respect to support:

s. 15(7) An order under this section that provides for 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 the obligation apportioned between the spouses pursuant to subsection (8);

(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.

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15. *Ibid.* at 44-45. The study also addressed the ambiguity inherent in the term “uncontested” and defined it as cases in which no counter-petition had been filed with the court, in which event cases were found to require between 5 and 15 minutes of court time to conclude. Counter-petitions were filed in only 23 per cent of the cases studied, and the majority of these obviously settled before making it to trial. *Ibid.* at 44 and 48.


It is generally accepted that underlying these four objectives are three models or rationales for spousal support: the income-security model, the self-sufficiency model, and the compensatory model. The income-security model reflects the more traditional notion that support flows from the very status conferred by the institution of marriage in accordance with the need of the claimant. The self-sufficiency model reflects more recent notions of equality and the belief that both parties are independent autonomous actors, as well as the view that it is in the interests of both parties to make a clean break and move on with their lives. The compensatory model is predicated on the recognition that the contribution of women to the marriage, particularly in terms of childcare and household labour, is not sufficiently acknowledged or compensated by market forces or by divorce law itself. The compensatory model thus requires that spouses be compensated for any disadvantage they incurred or advantage they conferred within, and as a result of, the marriage.

The wording of the statute reflects that none of the four objectives, and thus none of the three models, should be seen as paramount. However, the courts’ application of the Divorce Act, 1985, and indeed the 1968 legislation as well, reflected a clear implementation of the self-sufficiency or clean-break model. This tendency gathered steam with the strong dissent in the 1983 Supreme Court of Canada decision in Messier v. Delage and was given greater impetus by the 1987 Supreme Court decisions in the so-called the Pelech trilogy, named after the case of Pelech v. Pelech. Despite the fact that these three cases were specifically about claims for the variation of separation agreements several years after their execution, the judgments were interpreted by the courts below as mandating the paramountcy of the self-sufficiency model in general terms. Further, the income-security and compensatory models were seen as being inconsistent with the era of equality and the recognition of the parties’ independence. The courts’ orders for support awards were consequently inordinately low and for short time-frames. In Madam Justice L’Heureux-Dubé’s words, the approach constituted “equality with a vengeance.”

This trend was halted in 1992 with the Supreme Court decision in Moge v. Moge. The Supreme Court refuted the interpretation of the Pelech trilogy as having established any new model of support and as having made self-sufficiency the paramount objective. The Court went on to examine in detail the economic disadvantage women suffer as a result of marriage, in terms of their absence from the labour market owing to home and childcare activity, and the extent to which divorced women quickly slide into poverty after marriage breakdown. From an examination of court

files, the 1988 Department of Justice study determined, for instance, that fully 66 per cent of divorced women lived below the poverty line—a figure that increased to 75 per cent when their spousal and child-support payments were not included in their income.23 The Court reiterated that all four objectives should be considered and that they should be viewed as an attempt to achieve an equitable sharing of the economic consequences of marriage and its breakdown, albeit with some emphasis on the compensatory model. Significantly, however, the decision concluded that courts nonetheless retain considerable judicial discretion in applying the Act.

As a result of Moge, the present state of the law is that the awards made by lower courts have increased, as has the duration of the support ordered.24 Nonetheless, while signalling a shift towards the compensatory model, the case left the issue of actual assessment unclear, and thus courts as well as lawyers have little guidance in terms of calculating the actual quantum of support. This lack of guidance has manifested itself in continued variations and disparities among the decisions of different courts in cases of like facts, further contributing to uncertainty and indeterminacy.25 Such uncertainty, and further variation, is reinforced by the level of judicial discretion provided by the Act and confirmed by the Court in Moge.26

What is to be particularly noted is that the Act’s language in no way suggests that the support claimant has any entitlement in law to an interest in the resources or income of the respondent spouse, or even to any support at all—support is to be ordered at the discretion of the court in view of the circumstances of the case and guided by the objectives of the legislation. The court will order the respondent to provide payment from what is still perceived to be his or her resources, and only if the claimant can convince the court that there is a sufficient level of need or economic disadvantage arising from the marriage for which there should be compensation. In other words, the woman (typically) must convince the court to order the man to give her some of his money. The claimant has no right to payment, no legal entitlement to it, and no property interest in it. As Joan Williams puts it in an examination of similar US legislation, “formulating the issue of post-divorce entitlements as an issue of family law leaves men’s entitlements defined as property, while women’s and children’s remain in the discretionary realm of family law.”27 [Emphasis in original.]

This article is concerned with these two points in particular—that is, the manner in which the legislation characterizes support and the level of judicial discretion and

23. Bureau of Review, supra note 1 at 95; L’Heureux-Dubé, “Equality,” supra note 1 at 19. It should be noted, however, that these figures are based on a review of court files, which means that they reflect the reality flowing from only those divorces that were contested in court.
25. Ibid.
26. Ibid.
27. Ibid.
consequent uncertainty. Before we turn to the theory that makes these points particularly significant, it would be helpful to look briefly at the application of negotiation theory to divorce by Mnookin and Kornhauser. Their work was the first to argue that the law was important in that it permitted private ordering (that is, the private negotiation of outcomes) in divorce proceedings and significantly affected the bargaining process itself. Mnookin and Kornhauser pointed out that there are four main issues in the negotiations: property division, spousal support, child support, and child custody and access. They emphasized that these issues are intertwined.28 In the model that they established, they identified five variables that would affect the outcomes of negotiation on these issues: (1) the preferences of the parties; (2) the bargaining endowments of legal rules indicating the likely court-imposed allocation; (3) the degree of uncertainty concerning the legal outcome if the parties were to go to court; (4) the transaction costs and ability of the two spouses to bear those costs; and (5) any strategic behaviour engaged in by either or both parties.29

To the extent that legal rules are clearly articulated and unambiguous as to what the outcome of a claim would be if it were adjudicated, they help to define the claim. They 'endow' the bargainer making that claim. The rules also inform what the alternative to agreement is for the parties—that is, what the court will likely decide in the absence of a negotiated agreement. The more uncertain the rule is, the less it can meaningfully endow the bargainer with a basis for his or her claim.30

General uncertainty as to the alternatives to agreement also acts as an independent variable because it will influence the bargaining behaviour of the parties differently according to their risk-preferences. The more risk-averse party will attempt to avoid uncertainty, and so, if alternatives to agreement are fraught with uncertain outcomes, the more risk-averse will be at a disadvantage in the negotiations. Take, for example, the choice between having access to a child 50 per cent of the time and having a 50 per cent probability of winning exclusive custody. A party who is indifferent to the two choices will be risk-neutral. A person who makes concessions to avoid the gamble of the second choice will be risk-averse—and if that tendency is known to the other side, that person will be vulnerable to pressure to accept less than 50 per cent access.31 Similarly, risk preference will determine the likelihood of engaging in, and of being subjected to, strategic behaviour (the employment of such devices as threats, promises, and bluffs). The greater the degree of uncertainty in the operation of the law, the greater the opportunity for engaging in strategic behaviour, which again tends to operate to the disadvantage of the risk-averse.32

28. Mnookin & Kornhauser, supra note 6 at 959.
29. Ibid. at 966.
30. Ibid. at 968-69.
31. Ibid. at 971.
32. Ibid. at 973 and 976. Mnookin and Kornhauser point out that the concept of strategic behaviour can be ambiguous and define it as behaviour in which the parties misrepresent their own intentions, desires, or chances of winning in order to obtain a strategic advantage in negotiations. Ibid. at 973 note 78.
The significance of these insights in the context of Canadian divorce law should already be somewhat apparent. However, they do not go far enough. There have been other advances in the field of negotiation theory that explore areas not addressed by Mnookin and Kornhauser’s models and that also add value to certain aspects of it by clarifying what the likely risk preferences of the parties will be under certain conditions. We turn next to examine such theories.

III BATNA, BARGAINING POWER, AND DIVORCE

The term inequality of bargaining power is used often in law. The concept informs such doctrines as unconscionability and undue influence in contract law, and economic duress in the law of restitution. It is often used in family law to suggest that there is an unfair imbalance between the bargaining powers of men and women in concluding domestic contracts. However, its users often fail to articulate exactly what form this power is supposed to take, or how it is apparently brought to bear in a manner that can effectively influence the outcome of negotiations. As Hugh Beale puts it, “it seems odd in volumes on law and inequality of bargaining power to find so little discussion of the ways in which one party is in a ‘weaker’ position.”

What is more, empirical work in negotiation theory casts doubt on many of the attributes that the law has traditionally viewed as endowing one party with power in negotiations. Recent studies indicate, for instance, that less information or ignorance, and lower levels of sophistication (features often identified as both characterizing and explaining the bargaining position of women in financial negotiations with men), can lead to better outcomes in certain types of negotiations.

BATNA — Best Alternative to a Negotiated Agreement

Negotiation theory suggests that one element that can provide content to the notion of bargaining power (though not necessarily to the question of fairness) is that of the value placed on the alternatives to the negotiated agreement. The basic test of any proposed joint agreement is whether it offers a higher subjective value to each party than their respective best courses of action without the agreement.

33. See in particular Lloyds Bank Ltd. v. Bundy, [1975] 1 Q.B. 326 (C.A.), in which Lord Denning attempts to unify these various strands into a single comprehensive doctrine.


35. Bedont, supra note 8; Majury, supra note 8.


action, or more precisely, the value of the point beyond which this course of action is preferable to an agreement, is called the “best alternative to a negotiated agreement” or BATNA. It is an important step in the analysis of negotiations to examine each party’s perceptions of their own BATNA and their evaluation of their counterparts’. The BATNA of any given party may be clear and fixed, or it may vary over time and be influenced by the negotiations or the actions of the other side.³⁹

The BATNA of the parties in negotiations will often be incommensurable and impossible to compare. But under certain conditions, such as where the failure to agree will lead to the alternative of legal action and thus a clear adjudicated outcome to a dispute between two parties, it becomes possible to compare the subjective and objective impacts of the BATNA on each of the parties.⁴⁰ Where the best alternative to a negotiated agreement open to one party is clearly going to cost more than the cost of no agreement to the other side, one can speak meaningfully of bargaining power. Put another way, the lower the subjective value of a party’s BATNA relative to either the value of the proposed agreement or the value of the other side’s BATNA, the weaker that party is, for the more leverage their counterpart possesses to drive down the value at which agreement may be reached.⁴¹

To put this in more concrete terms, let us consider an example of a dispute between person B and person W (let us call it the case of B. v. W.), in which B is claiming that $2,000 is owed to her by W. If B estimates that a court is likely to award her no more than $1,000 for her claim, and legal fees will cost her $400, B will, all other things being equal, accept anything over $600 by way of settlement. Conversely, B will go to court rather than accept $599. B’s BATNA is thus defined objectively by the value of the potential receipt of $600. Now suppose that W also estimates that he will have to pay $400 in legal fees, and he too thinks the court would likely award $1,000 to B. The alternative to a negotiated agreement will thus cost W $1,400 in objective terms. He should thus agree to pay any amount that is less than $1,400 by way of negotiated settlement. There is therefore an objective range of possible agreement between $1,400 and $600. Our intuition and rational choice theory would both lead us to suspect that a settlement would tend toward the $1,000

³⁹. Ibid.
⁴⁰. This must be qualified, however, by the problems inherent in trying to compare subjective values. Such problems have been illustrated in the area of restitution by Peter Birks, who has elaborated the notion of subjective devaluation. This concept suggests that it is open to a party to argue that, despite having been enriched in objective terms, they subjectively place no value on the supposed benefit received and thus should not be required to compensate the party thus impoverished. However, where money is the currency of exchange, this argument is not available, since it is admitted that one cannot really devalue money, which is itself a pure measure of value. See P. Birks, An Introduction to the Law of Restitution (Oxford: Clarendon Press, 1985).
⁴¹. P. Siller, Lecture (Negotiation Theory Class, University of Toronto, Faculty of Law, 5 November 1996). Janice Stein has also pointed out that, despite the popularization of negotiation as a question of “getting to yes,” it is really about “getting to No”—for it is No, the point at which no agreement is preferable to an agreement, which defines the outer boundaries of the negotiations, and determining and understanding this is thus the essence of negotiation. Lecture (Negotiation Theory Class, University of Toronto, Faculty of Law, 5 November 1996).
median. Negotiation theory, for reasons that will become clearer below, suggests that in fact the settlement amount will gravitate toward the $600 figure. This tendency will become more pronounced the more uncertain the estimation of the court's order becomes, the greater discrepancies there are in ability to sustain initial costs, the larger the differences there are in risk-tolerance, and when other subjective evaluations are factored in. There are problems involving the incommensurability of subjective values, but these are reduced when the values are purely monetary.

**Applied to Divorce Negotiations**

The only alternative both parties in a divorce proceeding have to agree with respect to the overall divorce settlement is to contest the issues in court. The parties share a reciprocal objective BATNA with respect to the overall negotiations. The alternative of going to court, however, may be subject to differing subjective evaluations of the likely outcome and may be seen as exacting disproportionate subjective costs, even when one considers only the financial costs. Depending on the financial resources each spouse can command, the transaction costs alone associated with the trial may have a disproportionate impact on the parties. These subjective differences may be difficult to quantify and capture for the purposes of analysis but are intuitively understood by parties to any negotiation. A party who has a good sense that his or her counterpart can less easily bear the costs of no agreement may engage in strategic behaviour, such as making threats, or adopt strategies that actually increase the costs of no agreement for the other side, such as prolonging litigation through the excessive use of motions.\textsuperscript{42} Typically, the support claimant in divorce negotiations is the party who will have the least resources and so will be least able to bear the transaction costs associated with alternatives to agreement.\textsuperscript{43} These conditions are not caused by the legislation but should be kept in mind as the context in which the legislation operates.

Of course, there are four different issues involved in the overall negotiations, and each issue will have a separate BATNA informed by what the courts would likely decide with respect to that issue. It is at this level that we must recognize the separate yet interdependent nature of these issues. While there are technically separate BATNA for each issue, and each is informed by different reference points (a term to be explained presently), concessions will often be made on one issue for gains with respect to others and vice versa. Agreements reached on one issue may shift the subjective value of the BATNA of a party with respect to one of the other issues. It has often been argued, for example, that men are able to exact concessions on support by

\textsuperscript{42} Sebenius, supra note 38 at 27.

\textsuperscript{43} There are of course other transaction costs in terms of emotional and psychological effects of litigation, and one party can engage in behaviour to maximize these costs too. Mnooin and Kornhauser, supra note 6 at 972. These costs, however, are truly incommensurable values and so cannot meaningfully be incorporated into any comparative analysis of BATNA.
using threats with respect to custody.\textsuperscript{44} Put another way, once there is conditional agreement on custody, a woman may view the costs of non-agreement on the issue of spousal support, valued in terms of risk, as being very high.

The value that either party would place on the BATNA for the custody issue is unquantifiable, being a purely subjective value.\textsuperscript{45} The other three issues, however, are monetary, and the potential gains and costs can be quantified sufficiently to make BATNA comparison meaningful. The more predictable the judgment of the court and the costs of the litigation, the more precisely the parties themselves can assess their BATNA and the difference between the value of agreement and no agreement. As an example, suppose that the difference between the net family properties of two spouses is $10,000, and there is a clear rule that half this sum will be awarded as an equalization payment to the spouse with the lesser assets, and further suppose that litigating the issue would cost $1,000 each. One would expect that the claimant spouse would rather litigate than accept anything less than $4,000, and that the respondent spouse would litigate rather than pay any more than $6,000.

The more uncertain or less predictable the result of the litigation, the more unclear the BATNA will be in objective terms, and, as we have already discussed, the greater will be the significance of the risk preferences of the parties. As suggested above, the effects of the risk preference will in turn affect the subjective value the parties place on the alternatives to no agreement, though in terms that are problematic for the purposes of empirical analysis. Theoretically, however, the more a party is risk-averse, the more vulnerable they are to threats, and the more likely they are to make concessions, as the uncertainty of non-agreement outcomes increases. As explained earlier, the provisions of the \textit{Divorce Act, 1985}, coupled with how the courts have interpreted and applied them, have led to considerable uncertainty as to likely judicial outcomes. In addition, prior to \textit{Moge}, the average support awards were low and of limited duration. Legal costs alone for divorce litigation were reported to average $2,325 in 1988, and were highest for litigation on issues of spousal support.\textsuperscript{46} What is more, the respondent can play on the fact that if the claimant should insist on proceeding to court, and the court award is equal to or less than any offer of the respondent's that is still on the table, the Rules of Civil Procedure provide that he will be entitled to party and party costs calculated from the date the offer was made.\textsuperscript{47} These features all reduce the subjective value of the BATNA of the claimant for this issue, or put another way, weaken her bargaining position relative to her less risk-averse counterpart. To return to our example of \textit{B. v. W.}, the more uncertain the

\textsuperscript{44} \textit{Ibid.} at 978.

\textsuperscript{45} Mnookin and Kornhauser also argue, however, that even access becomes negotiable, with percentages of time becoming a unit of currency to be traded against amounts of support measured in dollars. \textit{Ibid.} at 964.

\textsuperscript{46} \textit{Bureau of Review, supra note 1 at 67-68.}

\textsuperscript{47} Ontario, Rules of Civil Procedure, r. 49.10(2). See also \textit{Berdette v. Berdette} (1988), 66 O.R. (2d) 410 at 428 (H.C.), aff'd (1991), 3 O.R. (3d) 513 (C.A.), in which the Court held that the rule as to costs applies to matrimonial litigation.
court’s decision is—that is, the less sure B is of receiving an award of $1,000—the greater will loom the cost of $400 for legal fees and the lower her BATNA will fall.

This weakness in the claimant’s bargaining position is all the more acute when the issue is only one of four, of which some have more predictable non-agreement outcomes with respect to which the party is far more loss-averse. In other words, a risk-averse party is not going to hold out over an issue about which the rules are highly uncertain, if they have already secured reasonable terms on the other three issues. It should be noted that the property division provisions of the Family Law Act of Ontario are very clear bright line rules, which are generally applied consistently by the courts; that custody continues to be awarded to women in the vast majority of divorces; and that child support is awarded (if not actually paid) to women in 93 per cent of the cases in which it is requested.

In short, the uncertainty of the spousal support provisions, the high transaction costs associated with litigating the issue, and the historically low awards will all tend to reduce the value of the BATNA with respect to the issue of spousal support for the support claimant. Depending on the level of risk-aversion of the support claimant, the value may be reduced even more by the level of uncertainty. The value of the BATNA will tend to be driven down further still—or, put another way, agreement at ever lower levels of support will be seen as preferable to no agreement—by the state of negotiations on the other three issues, which have very clear rules and about which the support claimant may be more loss-averse. The enhanced level of risk created by the uncertainty and the fear of jeopardizing agreements on other issues will make the support claimant who is more risk-averse vulnerable to manipulation. In the terms outlined above, her bargaining power is low. To get a clearer understanding of whether the support claimant is more or less likely to be risk-averse than her counterpart, we turn next to explore prospect theory.

IV PROSPECT THEORY, REFERENCE POINTS, AND BARGAINING POWER IN DIVORCE

In the previous section we examined how the concept of bargaining power can be given some meaning and content by considering the comparative values of the parties’ BATNA. Further, we have seen how the value of one’s BATNA and correspond-

48. The analysis of multi-issue negotiations is complex and beyond the scope and objectives of this paper. Generally, however, see H. Raiffa, The Art and Science of Negotiation (Cambridge: Belknap Press, 1982) at 131 et seq.

49. See, for example, Skrlj v. Skrlj (1986), 2 R.F.L. (3d) 305 (Ont. H.C.).

50. The Bureau of Review study indicates that 72 per cent of women received sole custody in divorce proceedings in 1986, and shared joint custody in 12 per cent of the cases. Men received sole custody in only 16 per cent of the cases, and the study further concluded that longitudinal analysis indicated that men were less likely in the late 1980s to receive joint custody if they sought it than was the case in the 1970s. Bureau of Review, supra note 1 at 133-34.

51. Ibid. at 81. This does not mean of course that the support payments are actually made, as the problem with “deadbeat dads” reflects.
ing bargaining power can be driven down by a combination of uncertainty and high risk if the party is risk-averse, and by manipulation of the transaction costs associated with the alternatives to no agreement. We now consider a theory that suggests that a party's loss aversion and concession-aversion can be meaningfully analyzed and predicted and that these features can give further content and substance to the concept of bargaining power. This theory will also assist us in identifying factors that determine the risk preferences of a party.

Prospect Theory

Prospect theory, developed by Kahneman and Tversky in 1979,\textsuperscript{52} is one of the contributions to a growing body of work that empirically and theoretically challenges the validity of the instrumental rationality that lies at the foundation of economic theory and game theory. Contrary to the assumptions and predicted outcomes of rational choice theory, there is increasing evidence of systematic deviations from instrumental rationality under certain conditions. Prospect theory reflects just such a deviation. It posits (based on a considerable wealth of empirical evidence) that people will systematically behave in ways that indicate that they value losses differently than gains. That is, while rational choice theory suggests that a person should be indifferent between losing $5 and foregoing a gain of $5, it has been demonstrated that in fact the person will subjectively value the loss of $5 higher than the foregone gain of $5. He or she is, as are we all, loss-averse.

To put this more in the precise language of prospect theory, the value function, which can be seen as cutting the x-axis at a point zero which demarcates the border between the domain of gain and the domain of loss, is steeper in the domain of loss (negative) than it is in the domain of gain (positive). This reflects the loss-aversion of individuals. Each incremental unit of objective value (measured along the x-axis) will have a higher corresponding subjective value (measured along the y-axis) in the domain of loss than it would in the domain of gain.

\textbf{Figure 1 VALUE FUNCTION}

\begin{figure}[h]
\centering
\includegraphics[width=0.5\textwidth]{value_function.png}
\caption{Value Function}
\end{figure}

\textsuperscript{52} Kahneman & Tversky, \textit{supra} note 11 at 263.
The second insight of prospect theory is that people will be more risk-averse in the domain of gain than in the domain of loss.53 This is related to the extent to which people are motivated to avoid losses: they will be more prepared to engage in risk to avoid losses than they will be to ensure gains. Put another way, people will be reluctant to risk losing that which they have in order to secure a potential gain. This is not an altogether new insight, captured as it is by the old saying “a bird in the hand is worth two in the bush.” What is new is evidence that we systematically behave this way.

The final insight this theory provides in the context of negotiations is that parties will be concession-averse in the domain of loss, or more precisely, will be highly resistant to making concessions that will require a loss and less resistant to making concessions that constitute only forgone gains. Concessions that increase losses will be felt as being more painful than those that only sacrifice potential gains.54 These insights explain in part why a negotiated settlement in our hypothetical case of B. v. W. above would likely gravitate toward the $600 figure rather than toward the median $1,000 or higher; for any concessions W makes will result in actual losses, while B’s concessions will lead only to forgone gains.

It should be clear from the preceding discussion that the point zero in Figure 1, which separates the domain of loss from the domain of gain, is important. It is known as the reference point. Ascertaining where the reference point is for any given issue under negotiation will obviously be of great importance. One of the most powerful insights provided by work in negotiation theory, however, is that not only can the reference point be ascertained, but that it can also be determined, and shifted, by the manner in which the subject matter of negotiation is framed or characterized.55

Margaret Bazerman and Max Neale conducted an experiment in which two groups of subjects negotiated the sale of a product. The bottom-line results being negotiated over were the same, but one set of figures was ‘framed’ in terms of profits, making the reference point $0 (gain framed), while the other group calculated in terms of expenses, making the reference point $8,000 (loss framed). Despite the fact that the two groups were negotiating the same objective terms (that is, amounts between $0 and $8,000), the group negotiating in the loss frame (that is, in the domain of loss) demonstrated stronger loss aversion and were less able to come to any agreement. The group negotiating over the level of profits, who were thus in the domain of gain, were less loss-averse, less concession-averse, and were more likely

53. Kahneman, supra note 11 at 297. It should be noted that while the figure above reflects the value function as linear, Kahneman suggests it is actually S-shaped, being concave in the domain of gain and convex in the domain of loss, and that it is this characteristic which explains/reflects the risk aversion. Ibid. For simplicity of explanation I have used a linear function.
54. Ibid. at 298.
55. Kahneman & Tversky, supra note 11; for more recent work on this subject see D. Pruitt & P. Carnevale, “Cognitive and Decision Processes in Negotiation” in Negotiation in Social Conflict (Buckingham: Open University Press, 1993) at 95 et seq.; M. A. Neale & M.H. Bazerman, supra note 11 at 120 et seq.
to reach agreement. However, those in the domain of loss, if they were able to forge an agreement at all, were more likely to exact more favourable outcomes than those in the domain of gain.\textsuperscript{56}

Put more simply, an employee who is negotiating for an annual bonus for the first time will view a $2,000 offer as a gain. The reference point is zero. If the same employee was told that all other employees historically received $5,000 as an annual bonus, he or she would view the $2,000 offer as a loss of $3,000. The historic amount of $5,000 is the reference point. That point can be determined by the manner in which the issue is framed.

To summarize briefly, the reference point is often determined (prescriptively speaking) by the manner in which an issue is framed. The reference point is the point of demarcation between the domain of loss and the domain of gain. A negotiating party in the domain of loss—or, putting it differently, the party for whom the issue is negatively framed—will be more loss-averse, more concession-averse, and more risk-seeking than a party in the domain of gain. Negotiations involving two parties both of whom are in the domain of loss are less likely to be resolved successfully. However, it is to the advantage of a party to be in the domain of loss. When one party is in the domain of loss and one in the domain of gain, the party in the domain of loss consistently tends to achieve more favourable settlements.\textsuperscript{57}

Applied to Divorce Negotiations

The question, then, is what constitutes the reference point for the parties in spousal support negotiations. I would argue that, just as was suggested in the discussion of BATNA above, each of the four issues at play in divorce negotiations will have its own reference points. This is so despite the interconnectedness of the issues. Further empirical work would be required to bear this out, but there is some evidence to support the proposition. Marygold Melli’s study of divorce cases in the United States, for example, found that when the FCC set an interim amount of child support at the initial stages of divorce proceedings, in four out of five cases that amount would be the figure finally settled on, despite the fact that the amount was not meant to be a final figure and was based on incomplete information. The FCC’s interim support figure formed a reference point for the issue of child support that operated regardless of activity surrounding the other issues being negotiated.\textsuperscript{58}

Melli’s study also suggested that the clear presumption of equal division of property in Wisconsin legislation had a strong influence on negotiations.\textsuperscript{59} This would be consistent with what we would expect—the clearer the rule that the court will employ to determine legal entitlements in the event of no negotiated agreement, the more

\textsuperscript{56} As discussed in Pruitt et al., supra note 55 at 96-98.
\textsuperscript{57} Ibid. at 98.
\textsuperscript{58} Melli et al., supra note 4 at 1,150.
\textsuperscript{59} Ibid. at 1,172.
likely that the predicted outcome will form the reference point around which the parties will negotiate. Each may in fact have subjectively optimistic interpretations of how the court will employ the rule, and so each will have a slightly different reference point which will widen the range of the negotiations.\textsuperscript{60}

The property division provisions of the \textit{Family Law Act} of Ontario and other similar provincial legislation should have the same effect. The provisions under Part I of the \textit{Act} provide a clear means of calculating the entitlements of each spouse\textsuperscript{61} and the courts have applied the provisions quite literally.\textsuperscript{62} Because property division comes under provincial legislation, the Department of Justice did not examine property division outcomes in its 1988 study, nor has there been any other systematic analysis of the subject. But anecdotal evidence suggests that the provisions form the basis for negotiations and that most property settlements reflect a figure quite close to the amount that the application of the formula would produce on the facts of the case. This suggests that in the division of property as well the legislative provisions establish a reference point independent of the other issues under negotiation.

If the issue of spousal support is informed by its own reference points (and recall that the point will not necessarily be the same for both parties), what determines the points? Earlier we established that the legislation fails to provide any clear formula for calculating spousal support. The combination of the various factors to be considered, the four objectives that are to guide the court, and the heavy reliance on judicial discretion in the process of determining each case according to its particular facts preclude the parties from predicting with any level of precision or certainty what amount of support, if any, a court would order.\textsuperscript{63} Even after \textit{Moge}, with the amount and duration of awards having increased somewhat and the courts' greater apparent emphasis on the compensatory model as their guiding philosophy, neither party's

\textsuperscript{60} See Pruitt, \textit{supra} note 55 at 90-91 on over-confidence.

\textsuperscript{61} \textit{Family Law Act}, \textit{supra} note 3, Part I (Family Property) and Part II (Matrimonial Home).

\textsuperscript{62} In contrast to the reaffirmation of the degree of judicial discretion by the Supreme Court in \textit{Moge}, Galligan \textit{J.} of the Ontario High Court stated, in \textit{Skrilj v. Skrill}, \textit{supra} note 49 at 309:

\begin{quote}
As I read the \textit{Family Law Act}, 1986, it leaves the court with no discretion to decide spouses' affairs in accordance with a particular court's sense of fairness. Subject to a discretion if it finds unconscionability, under s. 5(6), the courts must decide the rights of separating spouses in strict compliance with the terms of the \textit{Act}, even if, in an individual case, a judge may feel that the result does not appear fair... I think the legislature has clearly expressed its intent to remove judicial discretion from property disputes between separating spouses.
\end{quote}

\textsuperscript{63} Melli \textit{et al.} note that parties generally were influenced heavily by their lawyer's predictions of likely trial outcomes. Melli \textit{et al.}, \textit{supra} note 4 at 1,144. In the Justice Department study, it was found that 71 per cent of men and 86 per cent of women had legal representation: Bureau of Review, \textit{supra} note 1 at 37. The question of the role of lawyers as agents in these negotiations is not addressed in this article, and is assumed as a constant. It is not, of course, a constant, and considerable useful work could be done on the agency effects of legal counsel in divorce negotiations. See generally J.K. Sebenius & D. Lax, "Negotiating Through an Agent" (1991) 35 J. of Conflict Resolution 474; R.J. Gilson & R.H. Mnookin, "Cooperation and Competition in Litigation: Can Lawyers Dampen Conflict?" in K. Arrow \textit{et al.} eds., \textit{Barriers to Conflict Resolution} (New York: W.W. Norton, 1995) at 184.
reference point is likely to be determined by a prediction of a court’s application of the provisions.

Furthermore, it will be recalled that the provisions fail to characterize spousal support in terms of any legal entitlement that the support claimant might have to the respondent’s resources. Rather, it characterizes the support as an award that the court has the discretion to order if it is convinced of sufficient financial need or of a requirement to compensate a spouse for disadvantage incurred or advantage conferred during the marriage. In the absence of agreement, the support claimant is required to bring an application for support and to demonstrate to the court’s satisfaction that the requisite level of need or grounds for compensation exist. In the absence of an application by the support claimant, the respondent spouse, the spouse with the greater income, need do nothing to retain full control of that income. As Williams puts it, “the key drawback of the current system goes much deeper, to its underlying decision to place men’s claim in the realm of entitlement, while relegating women’s and children’s claims to family law’s discretionary redistribution of the ‘man’s income.’” 64 Yet there is no reason why support, simply because it is a claim in respect of future income streams of the respondent, could not be characterized more in terms of a property interest. Such a property interest could be described as a percentage of future income, calculated according to a formula using such variables as years in the relationship, income disparities at the time of separation, and so forth. It is useful to note, for instance, that the property division regime in the Family Law Act characterizes as real property a spouse’s interest in a pension plan in which the spouse’s rights have vested, including contributions to the plan made by other persons. 65 As real property, such future pension income becomes part of the calculation of family property for the purposes of determining equalization payments.

I suggest that the result of this characterization of support in the Act, together with the consequent lack of clarity and uncertainty of outcomes, makes the reference point for spousal support simply the status quo income of each of the two parties. That is, the level of support is zero and each spouse has full command over their own present and future income but no right or entitlement to the other’s wages (with the exception of child support, which may be negotiated alongside spousal support). The spouse with the lower income, or no income, may intend to apply for a court order for support in the event agreement cannot be reached. But even then, given the uncertainty about which his or her legal counsel will advise them, it is highly unlikely that they could begin negotiations with a sense that they were owed a specific amount.

Even if some spouses do feel some sense of being owed something, and are able to arrive at some figure by applying the vague factors and considerations of the legislation to the facts of their case, it is questionable how strong their expectation of receiving it would be. Prospect theory suggests that it is possible for more than one reference point to exist, and multiple reference points create “mixed feelings.” For

64. Williams, supra note 27 at 2,229.
65. Family Law Act, supra note 3, section 4(1) definition of “property”, paragraph (b).
example, if a person expects to get a raise of $5,000 but only gets $3,000, it can be experienced as either a gain or a loss depending on whether zero or $5,000 is the reference point at any given point in time. The person may experience both a gain and a loss periodically as the reference point shifts back and forth. Evidence suggests, however, that there is no intermediate position between the two. Like a necker cube, or a vase-and-face relief, only one aspect will be experienced at a time, and after a few reversals the duality of the precept is understood. One reference point will be dominant, as measured by the time each is experienced.66 I would argue that in the context of support negotiations, even if a potential court award may operate as a reference point for some support claimants, that point will be dominated by the reference point of the status quo and zero support.

Finally, it is important to note that reference points do not operate in isolation. They may also be influenced by norms. The term norm in negotiation theory has the precise meaning of representations that reflect a person’s perceptions of normality with respect to some given activity or concept. This perception itself is shaped by recollections of the frequency of related events as well as by the exercise of one’s imagination and cognition with respect to the activity or concept in question. Put simply, the greater the frequency of a type of event or a state of being that a person can recall in his or her immediate range of experience, the more “normal” the event or state is perceived to be. Such norms not only affect what will appear normal but will also become normative in the sense of influencing conformity to that behaviour that is perceived as being “normal” and shaping expectations.67 Norms can thus also have a significant influence on perceptions of fairness. If support is expressly portrayed in society as being infrequently awarded, and is something that is commonly described as being money “given” to a woman (or the spouse in need) and “taken” from a man (or the spouse with the greater income), then perceptions of such treatment may create norms regarding support that will also help to determine the location of the reference point at zero.

The preceding discussion leads to the fundamental proposition that, with respect to spousal support negotiations, the claimant is in the domain of gain and the respondent is in the domain of loss. This may all seem counter-intuitive to some, particularly those most familiar with the plight of women in the wake of divorce. Indeed, it may seem nonsensical that a woman in the throes of a divorce, likely on the threshold of economic impoverishment or, at minimum, a significant drop in her living standard, should view herself as being in the domain of gain. However, it should be recalled that it is only suggested that this is so specifically with respect to the issue of spousal support. What is more, it is crucial to understand that being in the domain of gain does not imply any self-perception of being “better-off.” Indeed, the claimant is,

66. Kahneman, supra note 11 at 306.
67. Ibid. at 307-8. The above is an overly brief and simplistic sketch of the operation of norms, and more work could be done to examine the relationship between norms and the reference points in divorce negotiations. As an example, see H. Jacob, “The Elusive Shadow of the Law” (1992) 26 Law & Soc. Rev. 565.
by definition, in a *position* of loss and likely feels herself to be so, in that her standard of living is in decline. But with respect to the negotiations, due to the uncertainty of the law (which will have been explained to her by legal counsel) and the operation of powerful social norms, she will be negotiating for what will be viewed as a possible gain—spousal support ordered at the discretion of the court on the basis of her need. Similarly, while the respondent is likely in a *position* of gain, he will be in the domain of loss with respect to the subject of negotiation in that he will view any support payment ordered or conceded as a direct personal loss.

**Some Empirical Support**

The scant empirical evidence available suggests that the norms discussed above are indeed operating to influence perceptions in spite of the reality of the claimant being in a reduced financial state. Further, the available data are also consistent with the proposition that the reference point is the status quo, and that the support claimant is thus in the domain of gain. In the follow-up phase of the 1988 Department of Justice study, in which half of the subjects of the original court files were extensively interviewed, 22 per cent of the women indicated that they had asked for support, while 30 per cent of the men indicated that they had been asked for support (the men and women interviewed were not all corresponding spouses, which is at least partial explanation for the difference). Of those who had not sought support, 24 per cent suggested that they did not do so because they either did not believe in support or wanted a clean break from their former spouse. (A full 63 per cent of those who had not sought support indicated that they either did not need support or were self-sufficient—which seems at odds with the economic reality).

Madam Justice L’Heureux-Dubé wrote in a recent paper that “the demeaning image of spousal support, perpetuated under the self-sufficiency model as a form of welfare for dependent women instead of as a well-earned compensation for domestic and child rearing work performed within the family, very well may have contributed to these statistics.” What is more, the Department of Justice study found that even though women were objectively worse off after the divorce, “women did not necessarily view themselves as worse off following divorce,” and in fact the number of women who viewed their standard of living as “better” after the divorce was higher (39 per cent) than the number of men (28 per cent). These figures suggest, though

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69. It should be noted that the study posits the suggestion that the interview sample was of somewhat higher socio-economic status than the sample as a whole, being self-selected by traceability and availability, as well as readiness to be interviewed. This may partially explain the high number of self-sufficiency. *Ibid.* at 25-26.
71. The number who rated their standard of living as “worse” was 32 per cent for both women and men, while 35 per cent of men and 25 per cent of women rated it as “the same”. Bureau of Review, *supra* note 1 at 96-97.
obviously do not prove, that women did not even particularly consider themselves in a position of loss—far less the domain of loss—with respect to support.\textsuperscript{72} More significantly, of the women in the study who had not asked for support, 11 per cent indicated that though they had thought they needed it, they felt that they either would not get it or that their former spouse could not pay it.\textsuperscript{73} Of the 22 to 30 per cent of the women who did ask for support, there are no data as to how they viewed their chances, or what their reference point might have been. But of the court files that formed the full sample, only 16 per cent contained any indication of a request for support. The study suggests that one possible explanation for this disparity (that is, between the 22 to 30 per cent who said they had asked for support and only 16 per cent of the court files reflecting such requests) is that the support issue might have been resolved prior to the issues being formalized in affidavits and court records.\textsuperscript{74} This explanation is lent further credence by the fact that while 16 per cent of the court files indicated formal requests for support, only in 6.2 per cent of the files was a support agreement incorporated into the court order.\textsuperscript{75} Of course, not all support agreements have to be formally incorporated, but a study of divorce in Manitoba also found that only 10 per cent of all women in divorce proceedings received support agreements.\textsuperscript{76} At a minimum these figures reflect the extent to which women apparently make considerable concessions on the issue of spousal support as divorce negotiations proceed, and suggest that women may be receiving even less spousal support in negotiated settlements than they would otherwise be granted by the courts.

Obviously, a significant amount of empirical study is required to get a more complete picture of the dynamics here. In particular, specific empirical work would be required to substantiate conclusively the proposition that an inordinately small percentage of women actually manage to achieve a negotiated divorce settlement that includes spousal support, and that the number is significantly lower than the number

\textsuperscript{72} Another variable which this article has not addressed is that of who initiates the divorce. One study indicates that this variable is in fact far more significant than gender, and that psychologically the initiator is in a much stronger position. Ironically, however, the initiator will be in the domain of gain and is often impatient to move on, which translates into being far less concession-averse. The non-initiator will often hold out in negotiations in an attempt to forestall the inevitable. See S. Margulies & A. Luchow, “Litigation, Mediation and the Psychology of Divorce” (1992) 20 The J. of Psych. & L. 483 at 484-86. Interestingly, the Department of Justice study found that some 58 per cent of all petitions were brought by women and only 4 per cent were brought jointly. While filing the petition is not synonymous with having initiated the divorce, it is suggestive. Bureau of Review, supra note 1 at 37-38.

\textsuperscript{73} Bureau of Review, supra note 1 at 77.

\textsuperscript{74} Ibid. at 75. Other plausible explanations offered in the report are that support might have been dealt with under provincial legislation, and that since the women represented in the interview sample were of a high socio-economic class, they might have been more acutely aware of the career sacrifices they had made in marriage and so more likely to have applied for support. Ibid. at 75-77. Conversely, however, this latter effect would likely be offset by the fact that women in a higher socio-economic class would have less need for support.

\textsuperscript{75} Ibid. at 76.

of women who initially request such support. Even more important, specific research is required to explore what the reference points are for both men and women. In the absence of such work, I am unfortunately forced to look to the very phenomenon that I am trying to explain to help confirm my essential premise. That is, citing evidence of women’s inability to negotiate support settlements, which is what I am trying to explain, as confirmation that the reference point is zero and that they are thus in the domain of gain. Nonetheless, bearing this problem of circularity clearly in mind, let us look at what we would expect if the support claimant was indeed in the domain of gain.

Assuming that the reference point is zero, any amount of support being discussed will be viewed by the claimant as a potential gain and by the respondent as a loss. The claimant will not value any incremental shift in a given figure under discussion nearly as much as the respondent, who is squarely in the domain of loss. The claimant will be more likely to make concessions and will be more risk-averse. The respondent will be highly concession-averse. He will be more prepared to engage in strategic behaviour and to embrace risky action, such as driving up transaction costs or accepting the uncertainty of trial rather than any agreement at all. One may predict that in this scenario the party in the domain of loss will exact maximum concessions from the party in the domain of gain—increasingly so the more risk-averse the latter is. Furthermore, one may predict that this effect will be amplified by the man’s ability to leverage off other issues regarding which the claimant is more loss-averse. This scenario is totally consistent with the scant evidence we have from the 1988 study: only 22-30 per cent of women even brought spousal support up as an issue for negotiation; only 16 per cent of formal court records reflected such requests; and only some 6 per cent of women were successful in actually getting support awards incorporated into their divorce settlements.

Again bearing in mind the problem of circularity in the argument, it must be acknowledged that the empirical evidence presented demonstrates only that such evidence is consistent with the proposition that the reference point is zero and that the support claimant is in the domain of gain. The evidence does not prove this proposition. Indeed, the counter-argument could be made that the empirical evidence does nothing but prove that women are disadvantaged in support negotiations, our very starting point, and that this can be explained by other theories, such as gender-based differences in negotiating ability. However, there is evidence to suggest that in fact women do not suffer any apparently significant disadvantage in negotiations on the other three issues in divorce proceedings, which undermines such gender-based arguments.

With respect to custody, for instance, 93 per cent of women who requested sole custody received it, compared with only 40 per cent of men who requested sole custody, and women were awarded sole or joint custody in 75 per cent of all cases where

77. More precisely, this argument takes the form of the common fallacy known as “the fallacy of confirming the consequent”: if $p$, then $q$; $q$; $\therefore p$. 
a counter-petition was filed.\textsuperscript{78} With respect to child support, 90 per cent of the custodial women in the interview sample of the Department of Justice study sought child support, and 93 per cent of that number succeeded in getting support settlements.\textsuperscript{79} Finally, as was discussed above, property settlements generally reflect the equal-division formula laid out in the \textit{Family Law Act}. Certainly, each of these issues is characterized by its own dynamic, and it is possible to argue that the success of female claimants in negotiations with respect to these issues reflects the operation of different norms, for example, norms regarding motherhood and nurturing. Yet if there was some general disadvantage, or gender-based inability to negotiate on equal terms with men, one would expect to find that disadvantage reflected to some extent in the outcomes of negotiations on all four issues and not just on spousal support. Furthermore, there are no obvious stereotypical norms relating to property division, yet settlements with respect to property division and equalization payments significantly reflect the equal division of matrimonial property that is unambiguously mandated by the \textit{Family Law Act}. In that context it is most significant that Herbert Jacob has determined that in the few US jurisdictions in which there was a minimum spousal support provision in the divorce legislation, that minimum amount was often taken as definitive in negotiations on support and formed the basis of settlements.\textsuperscript{80} This further supports the view that it is the reference point and the BATNA, both of which were arguably influenced by the same clarity and certainty of the law in these cases, that are the key to explaining the absence of any disadvantage in negotiating those issues.

V Conclusions

I have tried to use negotiation theory in this paper to show that the spousal support provisions of the \textit{Divorce Act, 1985}, together with the courts’ approach to the issue, will systematically operate to place the support claimant in a disadvantageous position in negotiations. The law does so by characterizing support as a redistribution of the respondent’s income at the court’s discretion, by placing an onus on the claimant to move the court to order such redistribution, and by the vagueness of its provisions and heavy reliance upon judicial discretion to decide individual cases. This vagueness of formulation and uncertainty of outcome, in distinct contrast to the legislative provisions and settlement patterns on issues of property division, leads the parties to view the status quo as the reference point for negotiations—that is, with support at zero and each spouse in full control of his and her own income. The result is that the support claimant will be in the domain of gain and the respondent in the domain of loss for any amount that is greater than zero. By being placed in the domain of gain with respect to spousal support, the support claimant is put at a significant disadvan-

\textsuperscript{78} Bureau of Review, \textit{supra} note 1 at 104.
\textsuperscript{79} \textit{Ibid.} at 81. It should be noted that the study did find that the child support awards continue to be inadequate—but that is not the point being addressed here.
\textsuperscript{80} Jacob, \textit{supra} note 67 at 577-78.
tage in negotiations. It makes her more risk-averse, and at the same time less loss-averse and more likely to make concessions. The respondent, being in the domain of loss, will be more loss-averse, more risk-seeking, and more concession-averse. This by itself will likely lead to the respondent exacting favourable outcomes. But the risk preferences so determined also operate to the disadvantage of the claimant in other ways. The combination of her risk-aversion and the considerable uncertainty in the law will reduce the value of her subjective BATNA relative to the respondent’s and make her more vulnerable to the operation of strategic behaviour, which the respondent will be more prone to engage in.

In sum, the support claimant’s bargaining power will be significantly weakened in systematic ways by the structure and operation of the law. Such disadvantage could be prevented or reduced by a reformulation of the support provisions in such a way as to provide a very clear formula conferring a time-limited entitlement to a percentage of the future income of the primary wage earner in the family, in line with the notions of economic partnership espoused in the Act and in accord with the compensatory model. Such an approach has been suggested by others, and this is not the place to elaborate the argument. The important point to be made here is that negotiation theory can provide further support for such lines of inquiry, and indeed can reward the area of family law with deep and much needed insights into the operation of divorce in our society. What is more, I would suggest that the insights are helpful and positive in the context of what is often a hostile discourse. For the insights not only help explain how systematic disadvantage to women arises, but also demonstrate that such disadvantage does not have its origin in some immutable gender differences. Rather, the disadvantage to women in particular arises from the structure of a society that places them predominantly in the position of support claimant in divorce, while the disadvantage to claimants generally arises from the operation of the current divorce laws and the too-little-understood systematic irrationality of people in the context of negotiations.