

WHAT DID THE ONTARIO COURT OF APPEAL IN *FISHER v. FISHER* SAY?

- *Fisher v. Fisher* is a 2008 decision of the Ontario Court of Appeal regarding spousal support. It was notable because the OCA ordered an ending date for spousal support after a 19-year marriage. There were no children, and the OCA appeared to have determined that the basis for the support was largely need, and not compensation.
- **FACTS:** 19-year marriage, no children. At the time of separation, the husband was earning well over \$100,000 annually. Wife was earning \$35,000. Husband's income increased substantially post-separation, to approximately \$139,000. Husband had re-married, and his new partner was a qualified physiotherapist, but she had chosen to stay home and raise her children from a previous relationship. The trial judge ordered the husband to pay the wife \$2,600 in spousal support from March 1 to December 1, 2006; \$1,800 per month for the calendar year 2007; and \$1,050 per month for the calendar year 2008. There was no award of support for 2009. However, the order provided that, after January 1, 2009, either party could seek a review of entitlement and/or quantum without the need to establish a material change in circumstances. The basis for the trial judge's decision had been, in part, the judge's speculation that the wife would find a new partner;
- Wife appealed, on the basis that she should have an indefinite award of spousal support, or something close to it. The appeal was allowed, but not in the way the wife might have anticipated. She was awarded retroactive support, to 2004, at the rate of \$3,000 per month, and on-going support of \$1,500 per month from April 1, 2008 to September 1, 2011 - a total of 7 years of support on a 19 year marriage, albeit at a higher rate than she might otherwise have received (front-end loading, which is encouraged by the SSAG's)

What did we think was going on before?

- Many practitioners assumed that a marriage of 20 years, or something close to it, would result in indefinite support. This assumption was based on recent, but previous, decisions of the OCA, such as *Allaire v. Allaire*, in which the "merger over time" notion seemed to be given some credibility [2003 decision in which the OCA said that the idea of self-sufficiency was not a "free-standing concept", and that over time, spouses depended on each other financially], and on the structure of the SSAG's themselves, which suggest termination dates for marriages of 20 years or less, but indefinite support for 20 years or longer. The draft SSAG's discussed the possibility of lowering the threshold for indefinite support to below 20 years.
- As practitioners, we did not necessarily think the 20 year mark was a cliff - we saw it as more of a continuum - that marriages close to 20 years might draw similar results to marriages over 20 years, regardless of whether the support was compensatory or need-based - and that marriages in this range should draw indefinite support

What did *Fisher* say about:

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Duration

- It appears that the 20-year suggestion for indefinite support has become more or less a sharp dividing line. There is a clear cut-off at 20 years of total cohabitation for indefinite spousal support, and anything less than that may well draw a termination date - see paragraph 110, in which the OCA defines the *Fisher* marriage as “medium-term”. This appears to create a cliff, where a gradual slope might have been more desirable. The court notes the possibility that in the right circumstances, indefinite support might be ordered in a marriage under 20 years, and that there might be a termination date in a marriage over 20 years, but the case itself suggests that the 20 year mark is a firm line;
- An important statement is that entitlement should begin from the date of separation - sometimes arrears back to DOS are lost as a result of procedural issues (too hard to get an interim retro order; by the time the matter comes to court, arrears seem to be harder to get);

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Quantum

- “quantum” and “duration” are now inextricably linked - see footnote 1 to the judgment, in which the court makes it clear that in using the word “quantum”, duration is included. This is consistent with the SSAG, which encourage creative thinking about duration and quantum together (“front-end loading”, or stretching support out over more time, but reducing the amount, or lump sums)

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Post-separation increases in income

- In *Fisher*, the husband’s income increased late in the marriage, and gained momentum following separation - OCA held that the wife’s dependence on the marital standard at the higher income level was not as “entrenched” as it would have been if his income increases had been gradual, and throughout the marriage - accordingly, spousal support was based on the husband’s income as averaged for the three years up to and including the year of separation;

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Review orders

- a strict application of *Leskun*, in which the SCC said that a final order should be made if at all possible - that review orders were to be reserved for situations in which the facts were not easily knowable in the immediate future:

“Review orders in effect turn an initial order into a long-term interim order made

after trial. Accordingly, they should be the exception, not the norm. They are appropriate when a specified uncertainty about a party's circumstances at the time of trial will become certain within an identifiable timeframe. When one is granted, it should include specifics regarding the issue about which there is uncertainty and when and how the trial judge anticipates that uncertainty will be resolved.” - at para. 70

- Between *Leskun* and *Fisher*, trial judges are encouraged to state the facts that are unknowable at the time of trial, but that are anticipated to become known within a the review timeframe - for example, if a recipient is finishing retraining, but does not yet have a job, a review might be ordered to coincide with a 6 months to a year following the completion of her training, to see if she has found employment. Pursuant to *Leskun*, trial judges and counsel drafting consent orders need to think about the fact that “reviews” are generally triggered on a timeline, and there is ordinarily no need to prove a material change in circumstances - agreements and orders need to be drafted to set this out clearly, as a direction to the court hearing the review;
- Trial judges are encouraged to think about who bears the burden of proof on either a review or a variation proceeding, and to make this clear in their judgments - i.e., is the support to continue until further order (meaning that potentially the payor must prove it should end) or is it to end on the review date, with the recipient required to prove it should continue?
- Trial judges are supposed to be specific, if they order a review, about the facts that are subject to review, to avoid the entire matter being litigated afresh - also to specify what the procedure is for a review - is it a return to court? discussion between counsel? discussion followed by variation proceeding if no settlement? what disclosure is required from each side to facilitate the review

- The use of the SSAG’s

- *Fisher* endorses the use of the SSAG’s on a number of fronts: as a useful tool in negotiating spousal support (*à la Yemchuk*); as a distillation of existing decisions regarding quantum and duration, and not as a “radical new approach”; as a cross-check for the court in determining whether quantum is appropriate; and most importantly, as a standard for appellate review:

“In my view, when counsel fully address the Guidelines in argument, and a trial judge decides to award a quantum of support outside the suggested range, appellate review will be assisted by the inclusion of reasons explaining why the Guidelines do not provide an appropriate result. This is no different than a trial court distinguishing a significant authority relied upon by a party.”

- Second Families
 - *Fisher* made it clear that a payor cannot use second family obligations that he has intentionally taken on as a way to reduce spousal support - but the door is left open to payors who have new children with their new partners to raise the new children as a possible reason to reduce spousal support to the first wife - all in all, a contextual, balanced approach is called for
- The Basis for Support
 - *Fisher* makes it clear that in marriages under 20 years, or to which the Rule of 65 does not apply, if the support is compensatory, it will be for longer, and will be at the higher end of the range - need-based support, even after 19 years, will be to help the recipient transit into her new lower standard of living
 - It is really important, therefore, to think carefully about not just the duration of the marriage, but the basis for support - *Fisher* was criticized by Phil Epstein in his annotation to the case (at 2008 CarswellOnt 43), because there were facts in *Fisher* which suggested compensation would be appropriate, and these had been ignored by both the trial judge and the OCA - further, that having children is not the only basis for compensatory support