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Luke Taylor

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Article abstract

Since at least the late 1980s, the enforceability of domestic contracts in Canadian common law has tended to be analyzed in terms of a formal equality/substantive fairness dichotomy. This paper suggests that our understanding of the common law of domestic contracts in Canada can be enriched by adding an historical lens to existing analyses. Specifically, the paper argues that the Supreme Court of Canada's decision in the *Pelech v. Pelech* trilogy was not only an attempt to inject the ideology of contract into family law, but also amounted to a continuation of long-standing approaches to separation agreements in English and Canadian law—an approach that rendered the treatment of separation agreements and the result in *Pelech* historical outliers when considered against broader exceptionalizing trends in judicial and scholarly approaches to agreements touching upon the family. From this perspective, the retreat from *Pelech* in the subsequent Supreme Court of Canada cases of *Miglin v. Miglin*, *Hartshorne v. Hartshorne*, and *Rick v. Brandsema* was, therefore, also a move away from the historically distinctive approach to separation agreements, and the continuation of much older processes of exceptionalism within family law.

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Domestic Contracts and Family Law Exceptionalism: An Historical Perspective

*Luke Taylor**

Since at least the late 1980s, the enforceability of domestic contracts in Canadian common law has tended to be analyzed in terms of a formal equality/substantive fairness dichotomy. This paper suggests that our understanding of the common law of domestic contracts in Canada can be enriched by adding an historical lens to existing analyses. Specifically, the paper argues that the Supreme Court of Canada's decision in the *Pelech v. Pelech* trilogy was not only an attempt to inject the ideology of contract into family law, but also amounted to a continuation of long-standing approaches to separation agreements in English and Canadian law—an approach that rendered the treatment of separation agreements and the result in *Pelech* historical outliers when considered against broader exceptionalizing trends in judicial and scholarly approaches to agreements touching upon the family. From this perspective, the retreat from *Pelech* in the subsequent Supreme Court of Canada cases of *Miglin v. Miglin*, *Hartshorne v. Hartshorne*, and *Rick v. Brandsema* was, therefore, also a move away from the historically distinctive approach to separation agreements, and the continuation of much older processes of exceptionalism within family law.

Depuis au moins la fin des années 1980, le caractère exécutoire des contrats familiaux dans la common law canadienne a eu tendance à être analysé sous l'angle d'une dichotomie égalité formelle/équité matérielle. Cet article suggère que notre compréhension de la common law des contrats familiaux au Canada peut être enrichie par l'ajout d'une perspective historique aux analyses existantes. Plus précisément, le document soutient que la décision de la Cour suprême du Canada dans la trilogie *Pelech c. Pelech* n'était pas seulement une tentative d'introduire l'idéologie contractuelle dans le droit de la famille, mais aussi une continuation des approches suivies de longue date en matière de conventions de séparation en droit anglais et canadien — une approche qui a rendu le traitement des conventions de séparation et la décision dans *Pelech* historiquement aberrants lorsqu'on les considère par rapport aux tendances générales plus larges des approches judiciaires et universitaires des conventions dans le domaine familial. De ce point de vue, le recul par rapport à *Pelech* dans les affaires subséquentes de la Cour suprême du Canada *Miglin c. Miglin*, *Hartshorne c. Hartshorne* et *Rick c. Brandsema* a donc également constitué un éloignement de l'approche historique distinctive des conventions de séparation et la poursuite de processus d'exceptionnalisme beaucoup plus anciens au sein du droit de la famille.

* Assistant Professor, Lincoln Alexander School of Law, Ryerson University. This article was completed while I was a CGS Bombardier Scholar and doctoral student at the Faculty of Law, University of Toronto, and a Boulton Fellow at the Faculty of Law, McGill University. I would like to thank the SSHRC and the Faculties of Law at the University of Toronto and McGill University for their support. In particular, I would like to express my profound gratitude to Professors Brenda Cossman and Kerry Rittich, and Dean Robert Leckey, for their insightful comments and feedback on earlier versions of this article. Thanks also to the anonymous reviewers for their excellent suggestions, and to the editors and editorial team of the *McGill Law Journal* for their outstanding work. Any errors are mine alone.

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Introduction

Since at least the late 1980s, the enforceability of domestic contracts in Canadian common law has tended to be analyzed in terms of a formal equality/substantive fairness dichotomy. On the one side stand judges and scholars who view domestic contracts, in particular separation agreements, as tantamount to ordinary commercial contracts. Those on this side of the dichotomy hold that the goal of equality for women is best served by upholding private ordering and treating domestic contracts in a strict, formalistic manner. On the other side, one finds judges and scholars who view domestic contracts as inherently distinct from ordinary contracts owing to their nexus with the family and its distinctive personal relations. From this perspective, judicial intervention into the substance of domestic contracts may advance the goal of fairness in family law dispute resolution by ensuring that parties, particularly women, are not disadvantaged by bargaining practices falling short of ordinary common law unconscionability.

This article takes seriously this narrative of competing interests and ideologies, but it suggests that our understanding of the common law of domestic contracts in Canada can be enriched by adding an historical lens to existing analyses.[1] Specifically, this article argues that the Supreme Court of Canada's decision in the *Pelech v. Pelech* trilogy[2]—usually read as the high-water mark of the formal equality approach—was in fact a continuation of long-standing approaches to separation agreements in English and Canadian law. This historical treatment of separation agreements, and the result in *Pelech*, cuts against broader trends in judicial and scholarly approaches to agreements touching upon the family. As this article shows, judges and scholars in England in the nineteenth and twentieth centuries created the field of family law partly by emphasizing

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1 In this paper I use the term "domestic contract" to denote ante-nuptial and post-nuptial agreements, including agreements governing the terms of marriage and separation (respectively, "marriage contracts" and "separation agreements"). The term "domestic contract" may also include agreements between cohabitants ("cohabitation agreements") and paternity agreements (see *Family Law Act*, RSO 1990, c F.3, s 51). I am only concerned with agreements between married couples (marriage contracts and separation agreements), though the principles outlined in the cases discussed herein may also be applicable to cohabitation agreements, depending upon the particular statutory scheme in question. I am also not concerned in this paper with what might be considered imputed agreements giving rise to claims for restitution based on unjust enrichment.

2 See *Pelech v Pelech*, [1987] 1 SCR 801, 38 DLR (4th) 641 [*Pelech* cited to SCR]; *Caron v Caron*, [1987] 1 SCR 892, 38 DLR (4th) 735; *Richardson v Richardson*, [1987] 1 SCR 857, 38 DLR (4th) 699. The Court's reasoning on the issue was set out in *Pelech* and applied in *Caron* and *Richardson*; accordingly, this paper, like most other commentary, focuses on *Pelech*.

its difference from the consolidating body of principles we now know as the law of contract. In particular, marriage came to be seen as a form of status, not contract, and most agreements touching upon the family were accordingly treated as exceptional species of contract owing to their familial nature. The exception to this emerging family law exceptionalism[3] was separation agreements, which judges and scholars continued to treat as akin to ordinary contracts, with a standard for variation premised on common law unconscionability. This English conceptualization of family law, marriage, and domestic contracts carried over into Canadian common law. I argue here that *Pelech* was as much the culmination of this long-standing historical difference between the (exceptional) approach to most family agreements and the (contractual) approach to separation agreements as it was an effort by the Court to instantiate a model of formal equality by injecting the ideology of contract into family law.[4] From this perspective, the retreat from *Pelech* in the subsequent Supreme Court of Canada cases of *Miglin v. Miglin*,[5] *Hartshorne v. Hartshorne*,[6] and *Rick v. Brandsema*[7] was, therefore, also a move away from the historically distinctive approach to separation agreements, and the continuation of much older processes of exceptionalism within family law. Put differently, the move away from deference to private ordering and toward a model premised on substantive fairness and greater scope for judicial intervention was also an extension of broader trends within judicial and scholarly thought concerning the legal treatment of the family stretching back to the nineteenth century.

By historicizing *Pelech* and subsequent cases, this article deepens our understanding of the broader context of the law of separation agreements and family law in Canada. In so doing, the article contributes to the genealogical dimension of the family law exceptionalism project outlined by Janet Halley and Kerry Rittich. Part I provides a brief discussion of family law exceptionalism and its genealogical project. To that end, Part I con-

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3 See Janet Halley & Kerry Rittich, "Critical Directions in Comparative Family Law: Genealogies and Contemporary Studies of Family Law Exceptionalism" (2010) 58:4 Am J Comp L 753 at 754.

4 See generally Brenda Cossman, "A Matter of Difference: Domestic Contracts and Gender Equality" (1990) 28:2 Osgoode Hall LJ 303 at 306–308; Martha Bailey & Nicholas Bala, "Canada: Supreme Court Decisions and the Continuing Impact of the Charter of Rights" (1989–1990) 28 J Fam L 427 at 428; Martha J Bailey, "*Pelech*, *Caron*, and *Richardson*", Case Comment, (1989–1990) 3:2 CJWL 615 [Bailey, "Case Comment"]; Alison Harvison Young, "The Changing Family, Rights Discourse and the Supreme Court" (2001) 80:1/2 Can Bar Rev 749 at 760–63.

5 2003 SCC 24 [*Miglin*].

6 2004 SCC 22 [*Hartshorne*].

7 2009 SCC 10 [*Rick*].

siders the emergence in the nineteenth and early twentieth centuries of legal visions of the family as an exceptional domain of regulation standing in opposition to the law of contract. In particular, it emphasizes how marriage came to be recharacterized in terms of status owing to its perceived public importance and attendant suite of state-imposed non-modifiable rights and obligations. Part II then proceeds to show how this distinctive approach to family relations played out in the sphere of domestic contracts within English law. It shows that while pre- and post-nuptial agreements (marriage contracts) were treated as void against public policy, separation agreements were treated as not only valid but tantamount to ordinary commercial agreements.[8] Thus, separation agreements were an outlier when considered against much of the rest of what was becoming family law. Part III addresses the transplantation of this English approach to separation agreements and marriage contracts into Canadian common law,[9] culminating in the influential Ontario Court of Appeal case of *Farquar v. Farquar*,[10] which played an important role in the formulation of the approach taken in *Pelech*. Part IV then situates *Pelech* within this longer historical narrative, showing that the decision was both a contemporary effort to achieve formal equality for women by upholding private agreements, *and* the continuation of a long-standing and distinctive approach to separation agreements within English and Canadian law. The article then considers the move toward a more interventionist approach in subsequent cases, most notably *Miglin* and *Rick*, and suggests that the substantive fairness model in these more recent cases brought the law of separation agreements into conformity with the more general and much older exceptionalism of agreements touching upon the family. The discussion of these cases also considers prominent commentary, establishes the terms upon which these cases have generally been considered, and distinguishes the historical analysis here from the formal equality/substantive fairness binary.

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8 See *Hyman v Hyman*, [1929] 1 AC 601 (HL (Eng)) [*Hyman*] which outlines the principle that such agreements cannot oust the jurisdiction of the courts.

9 While I speak of Canadian common law, my jurisdictional focus is primarily Ontario and British Columbia, partly for reasons of scope, but also because they are the jurisdictions in which the major SCC cases discussed herein arose. I am not concerned in this paper with the distinctive civil law regime in Quebec. For an historical overview of the shift from the *Civil Code of Lower Canada* to the *Civil Code of Quebec* focusing on matrimonial law, see generally Jean-Maurice Brisson & Nicholas Kasirer, "The Married Women in Ascendance, the Mother Country in Retreat: From Legal Colonialism to Legal Nationalism in Quebec Matrimonial Law Reform, 1866-1991" (1995) 23:1/2 Man LJ 406.

10 1 DLR (4th) 244, [1983] 43 OR (2d) 423 [*Farquar*].

I. The Exceptional Legal Family

The family law exceptionalism project as defined by Halley and Rittich comprises both a genealogical dimension and a distributive project focused on the economic family.[11] I am concerned here with the former, genealogical aspect: the emergence of family law exceptionalism through the process of inventing family law via the disaggregation of the household and the bifurcation of work and family life. In Halley and Rittich's words, "the legal relations governing employment, even where they retained vestiges of the master servant relationship, were transmuted and reframed within the law of contract. Only the husband and wife and the parent and child remained in the newly private, intimate, and affective space of the home."[12] Hence, the term "economic" shed its etymological basis in the household "and became proper to the market,"[13] while "family" ceased to refer to "lineage and the household and became a term for the nuclear, affective family."[14] In other words, family law and the law of contract came to be viewed as oppositional; the former housed relations defined by or giving rise to forms of status, while the latter came to be defined as "the domain of will."[15]

As I have argued elsewhere, the idea of the family as an exceptional domain of regulation, and the corresponding invention of English family law, hinged on two interrelated shifts in legal thought.[16] One movement involved the staged extrusion of productive work relations (in the narrow sense of work for pay) from the household. This process involved recharacterizing most forms of work as market-based (and hence public) activi-

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11 See Halley & Rittich, *supra* note 3 at 753.

12 *Ibid* at 756–57. See also Frances E Olsen, "The Family and the Market: A Study of Ideology and Legal Reform" (1983) 96:7 Harv L Rev 1497 at 1516; Ruth Gavison, "Feminism and the Public/Private Distinction" (1992) 45:1 Stan L Rev 1 at 21–22.

13 Halley & Rittich, *supra* note 3 at 758. In ancient and medieval times, "market" and "economy" were not homologous; the latter referred to the *oikos* or household—an integrated sphere where boundaries between production, subsistence, and care were not always clear (see Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time*, 2nd ed (Boston: Beacon Press, 2001) at 55; Janet Halley, "What is Family Law?: A Genealogy Part I" (2011) 23 Yale JL & Human 1 at 8).

14 Halley & Rittich, *supra* note 3 at 758. See also Kerry Rittich, "Making Natural Markets: Flexibility as Labour Market Truth" (2014) 65:3 N Ir Leg Q 323 ("while the market was the locus of self-interest, governed by the logic of utility maximisation, the family and the household became identified as the repository of moral values such as altruism and sharing" at 325).

15 Halley & Rittich, *supra* note 3 at 757.

16 See Luke Taylor, "Marriage, Work, and the Invention of Family Law in English Legal Thought" (2020) 70:2 UTLJ 137. For a genealogy of the emergence of family law in the United States, see Halley, *supra* note 13.

ties exterior to the (private) family, and locating those relations within an increasingly free-standing law of master and servant. In turn, that body of law became the general legal template for the regulation of wage labour in the eighteenth and nineteenth centuries through an interplay of legislation, case law, and scholarly texts.[17] Certain household-based forms of work, notably domestic service and apprenticeship, remained nested within the legal household—or the law of domestic relations, as it became known—until the twentieth century when they too were shifted into the domain of work.[18] The final step in this process was the recharacterization of the law of master and servant as the law of employment—a move that responded to the late nineteenth century removal of criminal penalties for workers' breach of contract.[19] This evolution also resulted in some scholars making a further (questionable)[20] move toward characterizing employment law as a specialized branch of the law of contract.[21]

Running in parallel with these shifts in the legal conceptualization and placement of work relations was a newfound emphasis on the public importance of, and state involvement in, marriage.[22] There was also a corresponding elevation of the husband-wife relation to the forefront of domestic relations, and eventually family law. This movement occurred in

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17 See Robert J Steinfeld, *The Invention of Free Labor: The Employment Relation in English and American Law and Culture, 1350–1870* (Chapel Hill: University of North Carolina Press, 1991); Christopher Tomlins, *Freedom Bound: Law, Labor, and Civic Identity in Colonizing English America, 1580–1865* (New York: Cambridge University Press, 2010).

18 Which is not to say that those relations were treated equally in law: domestic service, for instance, remained outside of most legal regulation owing to its *situs* in the home.

19 See *The Employers and Workmen Act 1875* (UK), 38 & 39 Vict, c 90.

20 The continued existence of nineteenth-century common law obligations of loyalty that in practice subordinated workers' interests to those of their employers necessarily undermined the idea that relations between employers and employees, as they were coming to be known, were contractual in ways analogous to commercial contracts. In this respect, the move can be seen as ideological rather than empirical: treatise writers *wanted* employment relations to fit within the paradigm of contractual freedom, but in legal reality they simply didn't because of the lingering influence of nineteenth-century master and servant law. In this respect, the development of the contract of employment, hedged as it was on all sides by rights and obligations that parties could not (or could only with extreme difficulty) contract out of, resembles in important ways the development of the marriage contract traced in this article.

21 See RW Lee, "Law of Contract (Particular Contracts)" in Edward Jenks et al, eds, *A Digest of English Civil Law* (London, UK: Butterworth & Co, 1907) at s V.

22 In this sense the family was generally thought of as a private domain in opposition to the public realm of the market; within legal thought, however, the family also carried a public dimension because of the interference of the state in its operation, while the market is the quintessential private realm of contract (see Duncan Kennedy, *The Rise & Fall of Classical Legal Thought* (Washington, DC: Beard Books, 2006) at xiii, 123).

part through a structural repositioning of the husband–wife relation at the front of the various domestic relations. It also involved a more complex effort by scholars to distinguish the emerging law of contract (which was only consolidated into an abstract form modeled on commercial relations and an ideological commitment to the market-based realization of individual wills in the second half of the nineteenth century)[23] from household-based relations that were seen as not "properly" contractual because of superadded elements that individuals could not "will" their way out of using contract.[24] In particular, scholars (and judges) began to question whether marriage was, as Blackstone put it, "a civil contract,"[25] or whether the non-modifiable terms accompanying marriage, which derived from the social and political significance of marriage as a tool for the management of the population,[26] lent it the character of (achieved)[27] status.[28] Over the course of the nineteenth century, this view of marriage as status gained ground. The essence of marriage, at least in legal terms, came to be seen as the degree of state involvement in its formation, subsistence, and eventually its dissolution.[29] (Nevertheless, scholars never

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[23] See e.g. Hugh Collins, "Contract and Legal Theory" in William Twining, ed, *Legal Theory and Common Law* (Oxford: Basil Blackwell, 1986) 136; DJ Ibbetson, *A Historical Introduction to the Law of Obligations* (New York: Oxford University Press, 1999) at 220.

[24] See Kennedy, *supra* note 22 at 185–206. Treatise writers were not denying that household relations could and did involve the exercise of individual will; the marriage relation, for instance, remained grounded in the consent of the parties. What they were saying was that the imposition of a suite of rights and obligations by the state lent relations such as marriage a public character that distinguished them from the private and putatively *wholly* intention-based relations of commercial parties (see *ibid* at 194–99). That construction of commercial relations was, however, more ideological than empirical since true "freedom of contract," if it ever existed, did so for only a very brief period in the late nineteenth century (see PS Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford: Oxford University Press, 1979) at 231–36).

[25] Sir William Blackstone, *Commentaries on the Laws of England in Four Books*, ed by William Draper Lewis (Philadelphia: Geo T Bisel, 1922) vol 1 at 398.

[26] See generally Michel Foucault, *Security, Territory, Population: Lectures at the Collège de France, 1977-78*, ed by Michel Senellart, translated by Graham Burchell (Houndmills, UK: Palgrave Macmillan, 2009) at 103–105.

[27] In sociological literature "*achieved* statu[s]" is open to individual achievement and not dependent on birth, while "[*a*]*scribed* statu[s is] assigned to individuals without reference to their innate differences or abilities" (Ralph Linton, *The Study of Man*: *An Introduction* (New York: Appleton-Century-Crofts, 1936) at 115).

[28] See Kennedy, *supra* note 22. This was not status in the medieval sense of an ascribed condition; rather, it was a modern form that "grouped together and explained the peculiar character of rules incompatible with the new vision of the nature of 'real' contracts" (*ibid* at 185).

[29] In social terms one of the primary functions of marriage in the nineteenth century came to be seen, broadly speaking, as companionate relations between husbands and

dispensed entirely with the idea that contract was the formal legal device by which the status of marriage was created.)[30]

It is thus apparent that the move away from a contractual conception of marriage, and the concomitant invention of the field of family law, relied on and extended distinctions between family and market, public and private, and contract and status. These binaries were also constructed along gender lines, with an association in both legal and social thought between women and the family, and men and the market.[31] The result was the legal construction of the family as a private entity housing affective relations giving rise to forms of status. The law of contract, as it coalesced into the abstract body of principles which today form its core, came to be viewed as oppositional to the family. In Halley and Rittich's words, "the law of family versus the law of contract ... in which the former housed a nuclear affective unit and the latter housed the individualist ethos of freedom of contract."[32] In other words, the family and family law became exceptional domains of regulation standing in opposition to the law of contract.

II. Exceptionalism in English Law

This exceptional approach to marriage and the family also applied to most types of domestic contracts, with one key exception: separation agreements. This part first outlines the ways that English courts generally followed the pattern outlined above by treating most domestic contracts as distinct from ordinary commercial agreements owing to their nexus with the family. It then shows how this approach did *not* carry over into the treatment of separation agreements, which were instead treated as akin to commercial contracts.

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wives (see Michael Anderson, *Approaches to the History of the Western Family 1500–1914* (Cambridge: Cambridge University Press, 1995) at 30; Olsen, *supra* note 12 at 1521; Wally Seccombe, *A Millennium of Family Change: Feudalism to Capitalism in Northwestern Europe* (London, UK: Verso, 1992) at 235).

30 See e.g. Frederick Pollock, *Principles of Contract at Law and in Equity*: *Being a Treatise on the General Principles Concerning the Validity of Agreements*, *With a Special View to the Comparison of Law and Equity*, *and With References to the Indian Contract Act*, *and Occasionally to Roman*, *American*, *and Continental Law* (London, UK: Stevens and Sons, 1876) at 232; William Pinder Eversley, *The Law of the Domestic Relations*, *Including Husband and Wife*: *Parent and Child*: *Guardian and Ward*: *Infants*: *and Master and Servant* (London, UK: Stevens & Haynes, 1885) at 6.

31 See generally Olsen, *supra* note 12.

32 Halley & Rittich, *supra* note 3 at 758.

Under ecclesiastical law, pre- and post-nuptial agreements (marriage contracts), as well as separation agreements, were void.[33] In other words, the only sort of domestic contract countenanced by the Church was marriage itself. As discussed below, equity and the common law developed a more nuanced position that permitted separation agreements.[34] Pre- and post-nuptial agreements, however, including agreements countenancing a *future* separation, remained *contra bonos mores* and void within the temporal courts because of the public importance of the marital relationship.[35]

The other major restriction on married couples' freedom to contract with one another in relation to their marriage was spelled out in *Hyman v. Hyman*,[36] in which the House of Lords declared invalid any attempt to oust the statutory jurisdiction of the courts to order maintenance.

At common law then, marriage contracts and provisions in separation agreements that purported to restrict the intervention of courts were void because of both the interests of wives (who were presumed to be reliant on their husbands) and of the public (who would have to foot the bill if husbands did not).[37]

In contrast, as the House of Lords also made clear in *Hyman*, separation agreements were, subject to the restriction noted above, perfectly valid. Indeed, the House actually affirmed the contractual nature of separation agreements. Lord Atkin declared: "Full effect has therefore to be given in all Courts to these contracts as to all other contracts. ... Agreements for separation are formed, construed and dissolved and to be enforced on precisely the same principles as any respectable commercial agreement, of whose nature indeed they sometimes partake."[38] Accordingly, he said, "the ordinary law of contract" was applicable to separation agreements.[39] In fact, it was clear by the turn of the nineteenth century (and probably

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33 See Eversley, *supra* note 30 at 468.

34 See *ibid* at 468–69.

35 See *ibid* at 467, 476; Pollock, *supra* note 30 at 246; John D McCamus, *The Law of Contracts*, 2nd ed (Toronto: Irwin Law, 2012) at 458–59. See also *Radmacher (formerly Granatino) v Granatino*, [2010] UKSC 42 at para 31 [*Radmacher*].

36 See *supra* note 8.

37 This gendered assumption is evident in *Supreme Court of Judicature (Consolidation) Act 1925* (UK), 15 & 16 Geo V, c 49, s 190, which refers only to the possibility of a court ordering a husband to pay maintenance to his former wife. See also *Hyman, supra* note 8 at 608.

38 *Hyman*, *supra* note 8 at 625–26.

39 *Ibid* at 626.

much earlier)[40] that agreements between spouses who had already separated were valid and enforceable.[41]

While judges in the nineteenth century often expressed their discomfort with the moral dimensions of separation agreements,[42] they nevertheless treated them as akin to ordinary contracts. In *Wilson v. Wilson*,[43] the House of Lords upheld the validity of a separation agreement that contained a clerical error that imposed liability on Mr. Wilson for Mrs. Wilson's present and future debts, instead of indemnifying him. Lord Cottenham in the House of Lords affirmed a line of authorities upholding the validity of separation agreements and declared, "[i]f the consideration or fact of separation does not contaminate all that proceeds from it, the court is only exercising its ordinary jurisdiction in giving effect to the arrangement of property agreed upon."[44]

Soon after the introduction of judicial divorce in England in 1857,[45] courts were given the statutory power to vary marriage settlements in divorce cases.[46] Judges nevertheless still tended to treat separation agreements (which at common law were treated as settlements for the purposes of the *Matrimonial Causes Act*)[47] as presumptively binding.[48] *Hunt v. Hunt*[49] is an apt example. Reflecting long-standing assumptions around male dominance in marital relationships, the case concerned a deed providing, *inter alia*, that the wife "should be absolutely and to all intents and purposes whatsoever freed and discharged from the power, command, will, restraint, authority and government" of her husband, and enjoining

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40 See *Hunt v Hunt* (1861), 4 De G F & J 221 at 226–28, 54 ER 1071 [*Hunt*].

41 See *St John (Lord) v St John (Lady)* (1805), 11 Ves Jr 525, 32 ER 1192 [*St John*]; *Lord Rodney v Chambers* (1802), 2 East 283, 102 ER 377. *Contra* agreements between spouses who had not separated at the time of the agreement which were deemed non-contractual in *Balfour v Balfour*, [1919] 2 KB 571, 88 LJKB 1054.

42 See *St John, supra* note 41; *Westmeath (Earl of) v Westmeath (Countess of)* (1821), Jac 126, 37 ER 797.

43 [1846–48] I HL Cas 538, 9 ER 870.

44 *Ibid* at 574.

45 See *Matrimonial Causes Act 1857* (UK), 20 & 21 Vict, c 85.

46 See *An Act to Make Further Provision Concerning the Court for Divorce and Matrimonial Causes* (UK), 1859, 22 & 23 Vict, c 61 [*Matrimonial Causes Act 1859*]. See also *Chetwynd v Chetwynd* (1865), 4 Sw & Tr 151, 164 ER 1474.

47 See e.g. *Worsley v Worsley and Wignall* (1869), LR P & D 648, 20 LT 546.

48 See Eversley, *supra* note 30 at 468, 475.

49 See *Hunt, supra* note 40.

the husband from seeking restitution of conjugal rights in the ecclesiastical courts.[50]

Lord Westbury stated, "we are warranted from finding a deed treated and spoken of as an ordinary contract in concluding that at a very early period deeds of separation with the covenants contained therein were recognized and treated as contracts capable of being enforced at common law."[51] On this footing, Lord Westbury held that the provision concerning ecclesiastical suits was specifically enforceable in equity and issued an injunction to restrain the husband.[52] On the nature of separation agreements, Lord Westbury was clear: "[The common law] ... regards a deed of separation as any other legal contract"[53] and "there can be no difficulty upon principle or upon the ground of the policy of the law as to the validity of such a contract."[54] In other words, courts were not empowered to ignore or vary the terms of separation agreements simply by virtue of their connection to the marital relationship (i.e., such agreements could only be set aside on ordinary contractual principles).[55]

This brief history shows that the long-standing ecclesiastical prohibition on marriage contracts carried over into English common law. The prohibition remained the law in England until very recently,[56] owing to the perceived public importance of the marital relationship. In this respect, marriage contracts, like the marital relationship itself, were treated as distinct from the body of principles that came to be known as the law of contract in the nineteenth century. In stark contrast, English common law not only departed from ecclesiastical law by permitting separation agreements, it also treated those agreements as tantamount to ordinary commercial agreements (subject to the *Hyman* principle, a variation of which also applies to ordinary contracts).[57]

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50 *Ibid* at 222.

51 *Ibid* at 228.

52 See *Hunt*, *supra* note 40. See also *Wilson*, *supra* note 43.

53 *Hunt, supra* note 40 at 238.

54 *Ibid* at 233.

55 See Pollock, *supra* note 30 ("[a] contract providing for and fixing the terms of an immediate separation is treated like any other legal contract" at 246).

56 See *Radmacher*, *supra* note 34 (the court held that this prohibition on ante-nuptial contracts should no longer apply).

57 See McCamus, *supra* note 35 at 465.

III. Transplanting Exceptionalism into Canadian Law

Both of these dimensions carried over into Canadian common law.[58] As this Part shows, the long-standing English prohibition on marriage contracts and agreements that contemplated future (instead of actual) separation, and the English conception of separation agreements as a species of ordinary contract to be enforced along the lines of a commercial agreement, came to form part of Canadian common law.

With respect to marriage contracts, the English prohibitory position continued until the 1970s, when Canadian provincial legislatures introduced provisions that expressly recognized the validity and enforceability of pre- or post-nuptial agreements. For example, in 1979 British Columbia enacted the *Family Relations Act* (FRA).[59] Section 48(2) of that Act defined a marriage agreement as "an agreement entered into by a man and a woman prior to or during their marriage ... for ... (b) ownership in, or division of, family assets or other property during marriage, or on the making of an order for dissolution of marriage, judicial separation or a declaration of nullity of marriage". Such agreements, when made in the proper form, were declared "binding between the spouses whether or not there is valuable consideration".[60] Judicial variation of marriage agreements was based on a standard of fairness.[61]

While it was clear that marriage contracts were valid under provincial law, it took until 2004 for the Supreme Court to weigh in on the circumstances amounting to an unfair contract warranting judicial variation. As discussed below, the Court in *Hartshorne* held that the agreement was

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58 On the transplantation of English common law into Canada, see generally D Mendes da Costa, "The Divorce Act, 1968 and Grounds for Divorce Based Upon Matrimonial Fault" (1970) 7:2 Osgoode Hall LJ 111.

59 RSBC 1979, c 121.

60 *Family Relations Act*, RSBC 1979, c 121, s 48(4) [*FRA*].

61 See *ibid*, s 51. In contrast, Ontario's *Family Law Reform Act, 1978*, SO 1978, c 2, s 51(1) declared that "[t]wo persons may enter into an agreement, before their marriage or during their marriage while cohabiting, in which they agree on their respective rights and obligations under the marriage or upon separation or the annulment or dissolution of the marriage." See also Derek Mendes da Costa, "Domestic Contracts in Ontario" (1978) 1:2 Can J Fam L 232 (noting that "section 51 of the Act has effected a great change, both in public policy and in law" at 234). Reflecting the common law approach that was at that time applicable to separation agreements, *The Family Law Reform Act*, *supra* note 61, s 18(4)(a) also provided that marriage contracts (and separation agreements) could be set aside "where the provision for support or the waiver of the right to support results in circumstances that are unconscionable." This ordinary unconscionability standard suggested an approach to marriage contracts that aligned with ordinary contractual principles.

fair, but also warned against applying ordinary contractual principles to this class of agreement.

Paralleling the initial diffusion of the English prohibition on marriage contracts into Canadian law, English common law's insistence that separation agreements were to be treated in the same manner as ordinary contractual agreements also came to form part of Canadian common law. In *Gordon v. Gordon*,[62] a case from Ontario heard before the passage of that province's 1930 *Divorce Act*,[63] the Ontario Supreme Court treated a separation deed as binding and found that a husband was required to pay the sums stipulated in the agreement in spite of the wife's adultery. A similar conclusion was reached in 1934 in *Jasper v. Jasper*,[64] in which Justice Kerwin observed that "no reference was made to the possibility of there being power in the Court in the divorce proceedings to vary the provisions of the separation agreement."[65] Nearly 30 years later, in *Burns v. Burns*,[66] Justice Gale also held that there was no power to vary a voluntary separation agreement. Counsel for the husband, who sought a variation in the amounts payable under the agreement, "agreed that the Court would not be able to change the agreement if this were an ordinary commercial contract, but contended that the Court has a wider and different power to modify agreements made between spouses than it has to rectify other contracts."[67] Rejecting this proposition, Justice Gale said, "this was a voluntary agreement made between the parties and [counsel] was quite unable to produce any authority to suggest that at common law a power of variance in favour of a husband also applies or has ever applied to agreements of this nature. And clearly it has not been provided in this Province by any statute."[68] While the outcomes in these cases were reached by strict interpretation of the relevant agreements and governing statutes, the fact that in all three cases the rights of wives to agreed-upon sums were upheld perhaps reflects a deeper concern with ensuring the financial security of women in a distinctly gendered era.

By contrast, courts in British Columbia did have the power to vary separation agreements in divorce cases by reason of the *Matrimonial*

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62 (1916) 32 DLR 626 at 626, [1916] OJ No 23.

63 SC 1930, c 14 (a federal act introducing the English law of divorce into Ontario).

64 (1935) 3 DLR 64, [1935] OR 269.

65 *Ibid* at 65.

66 (1963) 38 DLR (2d) 572, [1963] 2 OR 142.

67 *Ibid* at 574.

68 *Ibid*. *Cf Murdoch v Ransom* [1963] 2 OR 484, 40 DLR (2d) 146 (finding that a husband's obligations in a separation agreement ended when a wife remarried).

Causes Act 1859.[69] Nevertheless, in *Painter v. Painter*,[70] the British Columbia Supreme Court refused to free a husband from his obligations under a separation agreement once the parties had divorced because the agreement did not expressly provide for the termination of obligations in the event of divorce. As Justice Wood put it, "[t]hat was the bargain which the petitioner made, and I see no good reason why he should not adhere to it."[71]

Prior to the passage of the federal *Divorce Act* in 1968, then, separation agreements were essentially a species of ordinary contract under the laws of Ontario and British Columbia, meaning that they would only be set aside upon proof of a vitiating factor applicable to contracts generally. This was precisely the finding in *Mundinger v. Mundinger*.[72] In that case, the wife sought to have a separation agreement set aside on the basis that it had been procured by fraud, threats, and undue influence. She alleged that her husband's cruelty had caused her to have a nervous breakdown and that she had been hospitalized after taking an overdose of tranquilizers. The agreement provided her with a lump-sum payment of $10,000 in return for her foregoing maintenance and signing over to the husband interests in property worth about $60,000. The Ontario Court of Appeal held that the "transactions in question are unconscionable and improvident on their very face."[73] In reaching this conclusion, Justice Schroeder relied on the approach to unconscionability set out by Bradley Crawford in a commentary appearing in a 1966 issue of the *Canadian Bar Review*.[74] That commentary referred exclusively to agreements of a commercial nature, and (referring to the case of *Morrison v. Coast Finance Ltd*)[75] included the following remark: "It is the combination of inequality and improvidence which alone may invoke this jurisdiction [to set aside a contract freely entered into]. Then the onus is placed upon the party seeking to uphold the contract to show that his conduct throughout was scrupulously considerate of the other's interests."[76] According to Justice Schroeder, "[t]his correctly sets forth the effect of the decision bearing upon this and

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69 See *supra* note 45.

70 1955 CarswellBC 163, [1955] BCJ No 82.

71 *Ibid* at para 17.

72 (1968) 3 DLR (3d) 338, [1969] 1 OR 606 [*Mundinger*], leave to appeal to SCC refused, (1970) 14 DLR (3d) 256, CarswellOnt 1041 (26 May 1970).

73 *Ibid* at 341.

74 See Bradley E Crawford, "Comments" (1966) 44:1 Can Bar Rev 142, cited in *Mundinger*, *supra* note 72 at 342.

75 (1965), 55 DLR (2d) 710, [1965] BCJ No 178 [*Morrison* cited to DLR].

76 Crawford, *supra* note 74 at 143.

like problems and I adopt it as an accurate statement of the law."[77] In other words, the standard for avoiding a separation agreement on the basis of unconscionability was the same as that applicable to ordinary commercial agreements.

The *Divorce Act* put beyond question the power of Canadian courts to make maintenance orders irrespective of the provisions of a separation agreement. Nevertheless, courts remained "reluctant" to interfere with the terms of such agreements.[78] In *Poste v. Poste*, Justice Wright referred to the "binding effect" of such agreements and declared that "the party wishing such amendment must show not only some change in circumstances but conditions which arouse *the conscience of the court*, and call for action."[79] While "rights to contract and bargain freely" were subject to the jurisdiction of the divorce courts, "such jurisdiction ... should be sparingly exercised."[80] To similar effect, Justice DuPont in *DiTullio* declared "that when a separation agreement provides for maintenance, the court should not amend such provision or lightly go behind the terms of that agreement" in the absence of "clear and compelling reasons and circumstances to justify the amendment."[81] Courts "must give effect to the terms of such agreement unless compelled by conscience to do otherwise by a gross change of circumstances."[82] Likewise, in *Dal Santo v. Dal Santo*,[83] Justice Anderson in the British Columbia Supreme Court said, "contracts of this kind should not be lightly disturbed. ... The modern approach in family law is to mediate and conciliate so as to enable the parties to make a fresh start in life on a secure basis. If separation agreements can be varied at will, it will become much more difficult to persuade the parties to enter into such agreements."[84]

Similar reasoning underpinned the judgment of the Ontario Court of Appeal in *Farquar v. Farquar*.[85] As in *Mundinger*, the Court in *Farquar* drew upon scholarly commentary and specifically subscribed to the claim made by James McLeod that "[i]t is contrary to contractual principles to allow the main or a major consideration received by one party under the

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77 *Mundinger*, *supra* note 65 at 342.

78 *DiTullio v DiTullio* (1974), 46 DLR (3d) 66 at 68, 3 OR (2d) 519 [*DiTullio*].

79 (1973), 35 DLR (3d) 71 at 72–73, [1973] 2 OR 674 [emphasis added].

80 *Ibid* at 73.

81 *DiTullio*, *supra* note 78 at 68.

82 *Ibid* at 69. See also *Bjornson v Bjornson*, 1970 CarswellBC 24, 2 RFL 414 (referring to "a very significant change in the circumstances" at para 7).

83 1975 CarswellBC 45.

84 *Ibid* at para 16.

85 See *Farquar, supra* note 10 at 252.

separation agreement to be rewritten."[86] The Court then declared it "obvious that since the settlement is a contract, all of the common law and equitable defences to the enforcement of ordinary contracts are available."[87] This did little to help Mrs. Farquar, though, whose failure to request an accurate breakdown of her husband's assets was held to be her own fault, given that her husband (like a commercial party) had no positive duty to disclose his interests.[88]

What this overview tells us is that the treatment of separation agreements as tantamount to ordinary commercial contracts was a long-standing feature of both English and Canadian law. It also tells us that this approach was distinctive when considered alongside the public policy-oriented treatment of both marriage and marriage contracts (where the social importance of the relation resulted in a status-based conception of marriage), and a restrictive approach to party autonomy in matters touching upon that relation.

IV. From *Pelech* to *Rick*; or, Contract to Exceptionalism

As noted at the outset of this article, judges and scholars since the 1980s have tended to analyze the treatment of domestic contracts, and particularly of separation agreements, in terms of a formal equality/substantive fairness dichotomy. Within this narrative, *Pelech* stands as the example *par excellence* of an atomistic, liberal conception of contract premised on party autonomy, private ordering, and formal equality. By contrast, *Miglin*, *Hartshorne*, and *Rick* are, to varying extents, viewed as retreats from this formalistic approach, emphasizing instead the structural disadvantage faced by women, and carving out a more interventionist role for judges to achieve substantive fairness. Building upon the preceding analysis, this Part places *Pelech*, *Miglin*, *Hartshorne*, and *Rick* within a longer historical narrative, showing that these cases were not only reflections of contemporary ideological battles but were also the products of much older trends within legal thought concerning the nature of separation agreements and the exceptional nature of the family.

A. Separation Agreements as Ordinary Contracts

Pelech concerned an application brought by Mrs. Pelech under section 11(2) of the *Divorce Act* to vary an award of maintenance made pur-

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[86] *Ibid*.

[87] *Ibid* at 252.

[88] See *ibid* at 253.

suant to an agreement between her and Mr. Pelech in 1969.[89] Between the time of the agreement and Mrs. Pelech's application, Mr. Pelech's net worth increased dramatically, while Mrs. Pelech eventually found herself in receipt of welfare payments as a result of severe psychological and physical difficulties that depleted her maintenance ($28,760 over thirteen months) under the agreement.[90] Justice Wilson, writing for a plurality of the Court, characterized the issue as a contest between two approaches. On the one hand, what she called "the private choice approach" displayed in *Farquar* (and the decision of the British Columbia Court of Appeal in *Pelech*), emphasizing "individual responsibility and freedom of contract."[91] On the other hand, "the Court's overriding power," which she explained by reference to the "paternalistic philosophy" evident in the Manitoba cases of *Newman v. Newman*[92] and *Ross v. Ross*,[93] "which minimize the importance of freedom of contract and impose on the parties a judicial standard of reasonableness notwithstanding their agreement to the contrary."[94] A third "compromise" approach, evident in the Ontario case of *Webb v. Webb*,[95] was said by Justice Wilson to "suggest[] that the change in circumstances which triggers the court's discretionary power in s. 11(2) must be a 'gross' or 'catastrophic' change."[96]

In the end, Justice Wilson developed an alternative approach that drew upon the private choice and compromise positions. In the former vein, Justice Wilson stated:

> It seems to me that where the parties have negotiated their own agreement, freely and on the advice of independent legal counsel, as to how their financial affairs should be settled on the breakdown of their marriage, and *the agreement is not unconscionable in the sub-*

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89 See *Divorce Act*, *supra* note 62; *Pelech*, *supra* note 2.

90 At first instance, Wong J upheld Mrs. Pelech's claim on the basis that, at the time of the agreement, the parties had assumed her future ability to work and support herself; the reality therefore constituted "a gross change in circumstances" warranting the intervention of the Court (*Pelech v Pelech* (1984) 41 RFL (2d) 274 at 274–75). The British Columbia Court of Appeal unanimously overturned that finding on the authority of *Farquar*, *supra* note 10, finding that "since changes in circumstance are inevitable, such changes should not be used to justify judicial intervention into otherwise valid and binding contractual agreements" absent some other vitiating factor (which the BCCA interpreted as "the traditional common law and equitable defences to the enforcement of ordinary contracts"): *Pelech*, *supra* note 2 at paras 12–13.

91 *Pelech*, *supra* note 2 at 835.

92 (1980), 114 DLR (3d) 517, 19 RFL (2d) 122.

93 (1984), 6 DLR (4th) 385, 39 RFL (2d) 51.

94 *Pelech*, *supra* note 2 at 832.

95 (1984), 46 OR (2d) 457, 10 DLR (4th) 74.

96 *Pelech*, *supra* note 2 at 833.

> *stantive law sense*, it should be respected. People should be encouraged to take responsibility for their own lives and their own decisions. This should be the overriding policy consideration.[97]

However, Justice Wilson also emphasized the *Hyman* principle concerning the Court's inherent jurisdiction to supervise marital agreements as a partial fetter on parties' abilities to contract out of statutory rights and obligations.[98] Accordingly, drawing upon but modifying *Webb*'s compromise approach, Justice Wilson proposed that domestic agreements should only be varied under section 11(2) of the *Divorce Act* "where an applicant seeking maintenance or an increase in the existing level of maintenance establishes that he or she has suffered a radical change in circumstances flowing from an economic pattern of dependency engendered by the marriage."[99] In her view, Mrs. Pelech's misfortune did not meet this standard because her change in circumstances and hardship was not causally related to the marriage.

In essence, Justice Wilson treated separation agreements as an ordinary species of contract by finding that rescission of such an agreement required proof of unconscionability in the sense applicable to the general law of contracts; that is, "an unfair advantage gained by an unconscientious use of power by a stronger party against a weaker."[100] While Justice Wilson did recognize the specificity of separation agreements by holding that courts retained a power of variation "where the future misfortune has its genesis in the fact of the marriage,"[101] this threshold was in reality virtually insurmountable for claimants.[102] So, while it is arguable that *Pelech* planted the seed of its own demise by recognizing the *possibility* of judicial variation due to circumstances arising out of the marital relationship, the stringency of the test means that *Pelech* is still best seen as the culmination of this line of cases treating separation agreements as akin to ordinary contracts. Accordingly, I suggest that *Pelech* was both a product of its era, reflecting a general enthusiasm at the time for applying contractual ideas in the family context,[103] *and* a continuation of the long-

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97 *Ibid* at 850 [emphasis added].

98 See *ibid* at 659–60.

99 *Ibid* at 851.

100 *Morrison*, *supra* note 75 at 713.

101 *Pelech*, *supra* note 2 at 851.

102 See Martha Shaffer, "Separation Agreements Post-*Moge*, *Willick* and *LG v GB*: A New Trilogy?" (1999) 16:1 Can J Fam L 51 at 55 [Shaffer, "Separation Agreements"].

103 See Carol Rogerson, "They Are Agreements Nonetheless" (2003) 20:1 Can J Fam L 197 at 198 [Rogerson, "Agreements"] (case comment on *Miglin v Miglin*). This being said, the decision should *not* be read as an example of the (then) nascent economic reordering that has come to be classified as neoliberalism because the flipside to Wilson J's in-

standing contractual approach to separation agreements. From a broader perspective attuned to the nature and ideological contours of family law (exceptionalism) and its intersection with contract law, then, *Pelech* and its predecessors, in collapsing the distinction between familial and commercial contracts,[104] appear as the historical outliers.

This point does not appear to have been appreciated by commentators. In her nuanced and sensitive analysis of the ideological dimensions of the case, Brenda Cossman noted that that the decision "specifically denies that compensation for systemic gender inequality is a ground for exercising the supervisory power. The decision suggests that the enforcement of separation agreements is not a question of gender equality."[105] Instead, she characterized the compromise approach as essentially instantiating a model of formal equality,[106] albeit with a limited (and in her view overly narrow) exception premised on a (partial and incomplete) recognition of the potential unfairness of the default approach.[107] Carol Rogerson criticized the Court's failure to "recogniz[e] and [redress] the economic consequences which flow from marriage," resulting in a test "which in practice effectively fails to see existing causal connections and which ignores the economic consequences which flow from the marriage."[108] Similarly, Ali-

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sistence on individual autonomy was state assistance. Far from the privatizing impetus in family law seen since the 1990s (a true hallmark of neoliberalism), Wilson J noted that when a maintenance agreement fails to adequately provide for a spouse, and that person is incapable of supporting themselves, "the obligation to support the former spouse should be, as in the case of any other citizen, the communal responsibility of the state" (*Pelech*, *supra* note 2 at 852). See also Robert Leckey, "What is Left of Pelech?" (2008) 41 SCLR (2d) at 112.

104 A somewhat similar approach can be discerned in the context of unjust enrichment. In *Peter v Beblow*, [1993] 1 SCR 980 at 996–97, 101 DLR (4th) 621, McLachlin J for the majority rejected the idea, put forward by Cory J for the minority, that the ordinary requirement of a link between contribution and property to ground a constructive trust should not be "rigorously applied in a family relationship" (*ibid* at 1022). Justice McLachlin "doubt[ed] the wisdom of dividing unjust enrichment cases into two categories—commercial and family—for the purpose of determining whether a constructive trust lies" (*ibid* at 996).

105 Cossman, *supra* note 4 at 308.

106 The model of formal equality is one in which "any admission of gender difference, and any corresponding attempt to provide for such difference, will simply provide a justification for continued unequal and discriminatory treatment" (*ibid* at 310).

107 See *ibid* at 323–30.

108 Carol J Rogerson, "The Causal Connection Test in Spousal Support Law" (1989) 8:1 Can J Fam L 95 at 104 [Rogerson, "Causal Connection"]. Indeed, even law and economics scholars, whom one might have expected to applaud the decision's emphasis on individual contract-making, criticized aspects of the decision, notably its failure to properly account for "the governing background legal entitlements as to compensation for Mrs Pelech's investment in household production" (see Michael J Trebilcock & Ro-

son Harvison Young observed that *Pelech* was "emblematic of liberal feminism and formal equality"[109]—positions that were subsequently revealed to have negative "consequences for women in terms of the 'feminization of poverty.'"[110] As Martha Bailey and Nicholas Bala wrote, "the values of sanctity of contract and a clean break after separation, which form the basis of the Trilogy, are not fully responsive to the realities of inequality of bargaining power between husband and wife, and the complex ways in which marriage is implicated in creating financial dependency."[111] Writing in the wake of the Ontario Court of Appeal decision in *Miglin v. Miglin*, Martha Shaffer and Carol Rogerson suggested "that the trilogy's emphasis on finality and on sanctity of contract comes at the expense of fairness between the spouses,"[112] and "should be abandoned in part because it produces ... harsh results but, even more fundamentally, because the premises on which it is founded are unsound,"[113] in particular, the idea "that settlement *per se* is the objective of the family law regime."[114]

My point here is not to question the veracity of these approaches to *Pelech*. From a contemporary perspective I think the broad contours of these scholars' claims are undoubtedly correct, particularly in the way that they highlight the tension between private ordering and judicial interference in family agreements. I also want to suggest, however, that this existing analysis can be enriched through an appreciation of the broader historical framework in which *Pelech* arose—most notably, the fact that separation agreements had long been treated as a distinctive class of agreements bucking the more general trend toward exceptionalism within family law. From this perspective, *Pelech* was both an attempt to inject the ideology of contract and formal equality into family law, as well as a continuation of long-standing trends within both Canadian and English law. In other words, the Supreme Court in *Pelech* actually reinforced the outlier status of separation agreements vis-à-vis the broader corpus of family law.

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semin Keshvani, "The Role of Private Ordering in Family Law: A Law and Economics Perspective" (1991) 41:4 UTLJ 533 at 569).

109 See *supra* note 4 at 763.

110 *Ibid* at 760.

111 *Supra* note 4 at 428. See also Bailey, "Case Comment", *supra* note 4; Shaffer, "Separation Agreements", *supra* note 102.

112 Martha Shaffer & Carol Rogerson, "Contracting Spousal Support: Thinking Through *Miglin*" (2003) 21 Can Fam LQ 49 at 78.

113 *Ibid* at 79.

114 *Ibid* at 80.

B. Seeds of Exceptionalism

As the commentary noted above suggests, the outcome and reasoning in *Pelech* were not generally well-received. In *Moge v. Moge*,[115] heard some five years after *Pelech*, the Supreme Court dealt with an application to vary court-ordered spousal support (rather than support pursuant to a separation agreement). The Court emphasized that the support provisions in the 1985 *Divorce Act* are concerned with the economic consequences of marriage and its breakdown, and that a "self-sufficiency" approach to support does not reflect the objectives of the Act. Justice L'Heureux-Dubé for the majority observed that "[i]n Canada, the feminization of poverty is an entrenched social phenomenon"[116] and "there is no doubt that divorce and its economic effects are playing a role."[117] According to Martha Shaffer and Daniel Melamed, "L'Heureux-Dubé J.'s emphasis on the need for courts to consider all of the objectives of the 1985 *Divorce Act*, and her acknowledgement that marriage may create long term if not permanent support obligations, can be viewed as incompatible with Wilson J's emphasis in the trilogy on finality and clean break."[118] Similarly, Julien Payne wrote that "[i]t is doubtful whether the principles defined in *Pelech* ... can survive."[119]

Soon after, in the case of *LG v. GB*,[120] Justice L'Heureux-Dubé expressly declared that the *Pelech* trilogy was no longer applicable to the 1985 *Divorce Act*, by reason of section 15(5), which provides that a separation agreement is only one factor to be considered by a court in making a support award.[121] In her words, "[t]he more the agreement or support order takes into account the various objectives of the Act, especially that of promoting an equitable distribution of the economic consequences of the marriage and its breakdown, the more likely it will be to influence the outcome of the variation application."[122]

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115 [1992] 3 SCR 813, 99 DLR (4th) 456.

116 *Ibid* at 853.

117 *Ibid* at 854, referring to Lenore Weitzman, *The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America* (New York: Free Press, 1985).

118 Shaffer, "Separation Agreements", *supra* note 102 at 56.

119 Julien D Payne, "Spousal and Child Support After *Moge*, *Willick*, and *Levesque*" (1995) 12 Can Fam LQ 261 at 271.

120 [1995] 3 SCR 370, 127 DLR (4th) 385.

121 See *ibid* at 393.

122 See *ibid* at 398.

In the 2000 case of *Leopold v. Leopold*,[123] Justice Wilson of the Ontario Superior Court of Justice applied *Pelech* to the application for spousal support variation before her, but she also attempted to develop "a less restrictive definition of common law unconscionability that would fit the unique dynamics of family law,"[124] and suggested that "the traditional dual test defining what is unconscionable requiring both inequality and improvidence [i.e., the test set out in *Mundinger*] ignores *the special nature of marital relationships*. A rigid application of the inequality requirement ignores the reality that *these are not commercial contracts* negotiated for commercial gain in emotionally neutral circumstances."[125] In other words, the unique nature of family agreements means that judges should more readily interfere in this class of agreement than other forms of private ordering. The decisive break, however, came in 2003 in *Miglin*.

C. Exceptionalism Recognized

As is well known,[126] *Miglin* concerned "the proper approach to determining an application for spousal support pursuant to s. 15.2(1) of the *Divorce Act*, RSC 1985 ... where the spouses have executed a final agreement that addresses all matters respecting their separation, including a release of any future claim for spousal support."[127] Despite the existence of the release, the trial judge awarded Linda Miglin $4,400 per month in spousal support for five years.[128] The Court of Appeal upheld the monetary award but removed the five-year limit.[129]

The majority of the Supreme Court allowed the appeal and held that the parties were bound by the separation agreement.[130] Crucially, though, Justices Bastarache and Arbour for the majority disavowed *Pelech*'s "singular emphasis on self-sufficiency as a policy goal to the virtual exclusion of other objectives" and held instead that "the language and purpose of the 1985 Act militate in favour of a contextual assessment of all the circumstances," meaning that "judges must balance Parliament's objective of equitable sharing of the consequences of marriage and its breakdown

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123 (2000), 195 DLR (4th) 717, 51 OR (3d) 275 [*Leopold* cited to DLR].

124 *Miglin*, *supra* note 5 at para 177.

125 *Leopold*, *supra* note 123 at para 141 [emphasis added].

126 See Rogerson, "Agreements", *supra* note 103; Robert Leckey, "Contracting Claims and Family Law Feuds" (2007) 57:1 UTLJ 1 at 4 [Leckey, "Contracting Claims"].

127 *Miglin*, *supra* note 5 at para 1.

128 See *LSM v EJM* (1999), 3 RFL (5th) 106 at para 35, [1999] OJ No 5011 (QL).

129 See *Miglin v Miglin* (2001), 198 DLR (4th) 385 at paras 101, 103, 53 OR (3d) 641.

130 See *ibid* at paras 92–107.

with the parties' freedom to arrange their affairs as they see fit."[131] The result of this effort to balance competing interests was a convoluted two-part test. The first stage required: (1) a determination as to whether the agreement was fairly negotiated, or whether there was a fundamental flaw in the negotiation process based upon the exploitation of vulnerability that would provide a reason to discount the agreement; and (2) a determination of the extent to which the agreement takes into account the *Divorce Act*'s emphasis on equitable sharing of the economic consequences of marriage and its breakdown, with a "significant departure" (only) warranting intervention.[132] The second stage of the test considers the circumstances at the time of the application for spousal support and permits intervention on the basis of "a significant change in the parties' circumstances from what could reasonably be anticipated at the time of negotiation" to an extent that the agreement no longer reflects the parties' intentions and results in a situation that "cannot be condoned" in light of the objectives in the *Divorce Act*.[133]

For present purposes, the first stage of the test is most relevant. In accordance with earlier authority, the appellant had submitted that the appropriate threshold for judicial intervention into the terms of a separation agreement was ordinary common law unconscionability. In response, the majority, ignoring *Mundinger* and instead building on the approach in *Leopold*, observed that when determining whether vulnerability existed in one party and was exploited by the other, it must be recalled that "[n]egotiations in the family law context of separation or divorce are conducted in a unique environment. ... Unlike emotionally neutral economic actors negotiating in the commercial context, divorcing couples inevitably bring to the table a host of emotions and concerns that do not obviously accord with the making of rational economic decisions."[134] Thus, in accordance with the framework set out in the *Divorce Act*, Justices Bastarache and Arbour declared that "contract law principles are not only better suited to the commercial context, but it is implicit in s. 15 of the 1985 Act that *they were not intended to govern the applicability of private contrac-*

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131 *Miglin*, *supra* note 5 at paras 40, 46. It remained the case that "a court should be loathe to interfere with a pre-existing agreement" (*ibid* at para 46), but the test for variation was reconfigured to take into account "whether one party was vulnerable and the other party took advantage of that vulnerability" (*ibid* at para 4), and whether the substance of the agreement complied, at formation, with the objectives of the *Divorce Act*; and also whether, at the time of the application, the agreement still reflected the original intention of the parties and complied with the objectives of the Act.

132 See *ibid* at paras 79–86.

133 See *ibid* at para 88. See also Rogerson, "Agreements", *supra* note 92 at 214–16.

134 *Miglin*, *supra* note 5 at paras 74–75.

tual arrangements for spousal support."[135] The implications of this distinction for the role of unconscionability were spelled out in the following terms:

> [W]e are not suggesting that courts must necessarily look for "unconscionability" as it is understood in the common law of contract. There is a danger in borrowing terminology rooted in other branches of the law and transposing it into what all agree is *a unique legal context*. There may be persuasive evidence brought before the court that one party took advantage of the vulnerability of the other party in separation or divorce negotiations that would fall short of evidence of the power imbalance necessary to demonstrate unconscionability in a commercial context between, say, a consumer and a large financial institution.[136]

In other words, while separation agreements are contracts, their "unique nature ... and their differences from commercial contracts"[137] must be recognized. On this point the Court was in agreement.[138] Justices LeBel and Deschamps (dissenting as to the appropriate test and the result) noted that unconscionability in the ordinary law of contracts requires proof of exploitation of inequality, and unfairness or improvidence in the agreement, citing *Mundinger* in support.[139] The Justices then observed that "[t]he stringency of the test for unconscionability reflects the strong presumption that individuals act rationally, autonomously and in their own best interests when they form private agreements."[140] In their view, "[i]t is inherently problematic to apply this strict standard, which is more appropriate to arm's-length commercial transactions, in the *polar opposite* negotiating context of family separation and divorce."[141] That is, separation agreements are *not* ordinary contracts and should not be treated as such.

While the majority's test was a clear departure from *Pelech*,[142] Linda Miglin still failed in her effort to have the separation agreement varied.

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135 *Ibid* at para 77 [emphasis added].

136 *Ibid* at para 82 [emphasis added].

137 *Ibid* at para 91.

138 See Leckey, "Contracting Claims", *supra* note 126 ("[a]ll the judges explicitly adopt a contextual method and sharply distinguish the scenario of negotiating spouses from commercial settings" at 2).

139 *Miglin*, *supra* note 5 at para 208.

140 *Ibid*.

141 *Ibid* [emphasis added].

142 According to Rogerson, this new standard still "sounds a lot like" the test in *Pelech* (Rogerson, "Agreements", *supra* note 92 at 223). Substantively this may be correct (for analysis of decisions post-*Miglin* see Carol Rogerson, "Spousal Support Agreements and the Legacy of *Miglin*" (2012) 31:1 Can Fam LQ 13 [Rogerson, "Legacy of *Miglin*"]), but as a matter of legal classification the distinction is utterly crucial.

For present purposes, though, the crucial point is the distinction drawn by both the majority and the dissenting judges between domestic contracts and commercial contracts. By reason of their connection to the family, domestic contracts were treated by the Court as an exceptional species of contract, attracting a lower threshold for judicial intervention (one tethered to the provisions of the *Divorce Act*) than the unconscionability standard applicable to commercial contracts. This feature of the decision was not just an acknowledgement of the need for contextual evaluation of the particular circumstances of each case; it was also a stark departure from the idea espoused in *Pelech* and a long line of English and Canadian authorities that domestic contracts are analogous to ordinary contracts, and an assertion instead of the exceptional nature of contracts that touch on the domain of the family.[143]

As with *Pelech*, commentary in the wake of *Miglin* largely focused on the extent to which it did, or did not, constitute a shift toward a model premised on substantive fairness and economic justice for women.[144] In one of the most detailed analyses of the cases, Carol Rogerson argued that the "complex, multi-part, fact-driven test" decision in *Miglin* still clung to the autonomy-based values put forward in *Pelech*, most obviously through the majority's repeated statement that separation agreements "are contracts nonetheless."[145] While there was some recognition by the Court of the unique environment in which separation agreements are drawn up, and that they are and ought to be treated as distinct from commercial contracts, "the majority reasons reflect an extremely idealized view of contracts as a transparent reflection of the parties' true, subjective understandings and expectations of their relationship"—a vision that is "out of touch with the reality of the context in which separation agreements are

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[143] In the more recent case of *LMP v LS*, 2011 SCC 64 [*LMP*], the Supreme Court of Canada considered an application to vary an existing court order that incorporated a separation agreement between the parties, pursuant to s 17 of the *Divorce Act*, rather than an initial application to modify a separation agreement under s 15.2 (see e.g. *Miglin*, *supra* note 5). The majority in *LMP*, *supra* note 125, observed that "it is important to keep the s. 15.2 and s. 17 analyses distinct" (at para 23). They affirmed the material change test developed in *Willick v Willick*, [1994] 3 SCR 670, 119 DLR (4th) 405 to deal with s 17 applications (*LMP*, *supra* note 125 at para 30), and concluded that *Miglin* does not apply to such applications (*ibid* at para 28). Notably, Justices Abella and Rothstein rejected the argument made by Justice Cromwell that "the parties' comprehensive, final agreement must be accorded significant weight at the variation stage" (*ibid* at para 45), arguing that this approach was reminiscent of *Pelech* and that "contract law principles are not rigidly applied in the family law context" (*ibid* at para 15).

[144] The most notable exception to this general framing is found in Robert Leckey's analysis of *Miglin* (*supra* note 5) and the subsequent decision in *Hartshorne* (*supra* note 6), arguing that both cases were more sensitive to context than most commentators realized (see Leckey, "Contracting Claims", *supra* note 110).

[145] Rogerson, "Agreements", *supra* note 92 at 202, 222.

typically negotiated."[146] With respect, I tend to think Rogerson underestimates the shift that occurred in *Miglin*[147]—while a clearer test and greater concern for distributive justice might have been preferable, in my view the decision nevertheless clearly disarticulated the historical association between separation agreements and commercial contracts. Instead, the decision reoriented the treatment of these contracts toward a more exceptionalist trajectory that comports with the general treatment of agreements touching upon the family. In other words, from a longer historical perspective, *Miglin* effected a significant rupture in the long-standing view of separation agreements as a species of ordinary contract; instead, it recharacterized them as an exceptional species of contract based upon their nexus with the family.

D. A Tentative Extension

In 2004, the Supreme Court finally heard a case concerning the enforceability of a pre-nuptial agreement: *Hartshorne*. Unsurprisingly, the Court affirmed the general validity of this form of domestic contract in line with the statutory schemes noted above. The real question was the appropriate standard for variation, which the majority approached in a distinctly formal manner. Indeed, Martha Shaffer characterized the approach as "more consistent with contracting in the commercial context than ... with contracting in the family realm."[148] Justice Bastarache found that *Miglin* was relevant to the question at hand "for its general legal proposition that some weight should be given to marriage agreements" (as well as separation agreements, of course), but it was not to be applied "without qualification" to the particular fairness-based regime of the *Family Relations Act* (FRA).[149] Accordingly, his analysis suggested a test based on the factual question of whether the circumstances attending the making and execution of the agreement, and its terms, were unfair; where present circumstances were within the contemplation of the parties, and an agreement "and circumstances surrounding it reflect consideration and response to these circumstances, then the plaintiff's burden to establish unfairness is heavier."[150] In Justice Bastarache's estimation, the agreement was fair, partly because the financial and domestic arrange-

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146 *Ibid* at 224–25.

147 See also Leckey, "Contracting Claims", *supra* note 110, arguing that the majority required "contextual assessment of all the circumstances" (at 22) and "sharply distinguish[ed] the scenario of negotiating spouses from commercial settings" (at 2).

148 Martha Shaffer, "Domestic Contracts, Part II: The Supreme Court's Decision in *Hartshorne v. Hartshorne*" (2004) 20:2 Can J Fam L 261 at 286.

149 *Hartshorne*, *supra* note 6 at paras 40, 42. See also *FRA*, *supra* note 60.

150 *Ibid* at para 47.

ments between the parties unfolded as they had expected. Moreover, Justice Bastarache said that the spousal and child support to which Kathleen Hartshorn was entitled under the agreement made provision for the economic disadvantage she had suffered by postponing her career to care for the couple's two children.

In dissent, Justice Deschamps (with whom Justices Lebel and Binnie agreed) argued that the majority's approach actually amounted to a standard of unconscionability: "The majority states that by choosing to execute the agreement despite having noticed that it might be unfair, the respondent signaled that she was not concerned. This analysis, in my view, is not acceptable and confuses fairness with unconscionability."[151] On this view, then (shared by Martha Shaffer),[152] the majority judgment in *Hartshorne* effectively undid, or at least ignored, the distinction between domestic and commercial contracts set out in *Miglin*, and the lower standard for variation of domestic contracts developed in that case. With respect, however, it is somewhat difficult to reconcile the idea that the majority was surreptitiously or inadvertently substituting unconscionability for fairness (and thereby equating domestic contracts with commercial contracts) in light of the attention paid to *Miglin*, which, as we have seen, clearly established such a distinction. In particular, Justice Bastarache noted *Miglin*'s emphasis on the "peculiar aspects of separation agreements generally," [153] and gave no indication that the domestic/commercial contract distinction (and accompanying different standards of review) was in doubt.[154] In this respect, *Hartshorne* effectively confirmed the exceptional status of marriage contracts in Canadian law and tentatively extended the test developed in *Miglin* to this class of agreement.

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[151] *Ibid* at para 89.

[152] Shaffer characterized the majority decision as "more consistent with contracting in the commercial context than ... with contracting in the family realm." In her view, the majority failed to pay due regard "to the emotional and personal context in which marriage contracts are negotiated," and ignored Kathleen Hartshorne's "resistance to signing the contract and her extreme emotional distress when she did," finding instead that her receipt of independent legal advice made up for the unfairness of the agreement. In this respect, the approach was "focused less on ensuring that an agreement provides fair compensation than it is on ensuring that people are entitled to enter into and rely upon contracts" (Shaffer, *supra* note 130 at 281, 284–86).

[153] *Hartshorne*, *supra* note 6 at para 40.

[154] See also Leckey, "Contracting Claims", *supra* note 110 at 30, arguing that the majority was "aware of the complex emotional dynamics" but simply placed more weight on the fact of Mrs. Hartshorne being a lawyer (and hence capable of understanding what she was getting herself into). Martha Bailey also emphasizes the decision's concern with context (See Martha Bailey, "Marriage *À La Carte*: A Comment on *Hartshorne v. Hartshorne*" (2004) 20:2 Can J Fam L 249 at 257–58).

E. Exceptionalism Confirmed (and Extended)

While the Supreme Court of Canada's approach in *Hartshorne* was cautious, there was no such hesitation in the next major domestic contracts case before the court: *Rick v. Brandsema*.[155] In *Rick*, the Supreme Court of Canada returned to the issue of separation agreements, again in the context of British Columbia's FRA. After a protracted process of negotiation, Nancy Rick and Ben Brandsema executed a separation agreement in 2001 that asserted their intention to divide the marital assets equally, and which provided Nancy Rick with an equalization payment of $750,000. The separation agreement in fact reflected inaccurate financial information provided by Ben Brandsema, including undisclosed withdrawals from the couple's joint account of nearly a quarter of a million dollars. Nancy Rick subsequently sought to have the agreement set aside on the basis of unconscionability and misrepresentation, or in the alternative a judicial reapportionment of assets under section 65 of the FRA.

At first instance, Justice Slade found that Nancy Rick's mental condition during the negotiations "rendered her vulnerable in the sense that the term is used in *Miglin*," and that Ben Brandsema "took the advantage that he was given"; hence, the agreement was unconscionable.[156] The British Columbia Court of Appeal overturned Justice Slade's judgment on the basis that he overestimated Nancy Rick's vulnerabilities, which were, in any event, adequately compensated for by the availability of counsel.[157] The Supreme Court of Canada reversed the British Columbia Court of Appeal's judgment. Justice Abella, writing for a unanimous Court, declared that the appeal "attracts a spotlight to the duties owed by separating spouses during the process of negotiating and executing a separation agreement for the division of matrimonial assets."[158] In particular, the circumstances of the case required consideration of "the implications flowing from *Miglin* for the deliberate failure of a spouse to provide all the relevant financial information in negotiations for the division of assets."[159] Accordingly, Justice Abella declared, "it is a corollary to the realities addressed by this Court in *Miglin* that there be a duty to make full and honest disclosure of such information when negotiating separation agreements."[160] While neither case was mentioned in *Brandsema*, the Supreme Court of Canada's judgment essentially amounted to a rejection of

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155 See *Rick*, *supra* note 7.

156 *R(N) v B(B)*, 2006 BCSC 595 at paras 105, 113.

157 See *Rick v Brandsema*, 2007 BCCA 217 at para 47; *Rick, supra* note 7 at para 3.

158 *Rick*, *supra* note 7 at para 4.

159 *Ibid* at para 5.

160 *Ibid*.

the Ontario Court of Appeal's ruling in *Farquar* that spouses owed each other no positive duty of disclosure when negotiating a separation agreement, and an extension of the Ontario Court of Appeal's more recent decision in *LeVan v. LeVan*, which affirmed the duty to disclose in the context of a pre-nuptial agreement pursuant to section 56(4) of Ontario's *Family Law Act*.[161] Upon this footing, Justice Abella affirmed Justice Slade's finding that Ben Brandsema acted in an exploitative manner.[162]

In the course of reaching this conclusion on the duty to disclose, Justice Abella made a number of important observations concerning *Miglin* and the scope of the doctrine of unconscionability in the context of domestic contracts. Noting that *Miglin* "dealt with spousal support agreements in the context of a divorce," Justice Abella declared that the case "nonetheless offers guidance for the conduct of negotiations for separation agreements generally, including negotiations for the division of matrimonial assets."[163] In this respect, she gave tacit approval to the line of lower court decisions that had treated *Miglin* in this manner.[164] Justice Abella then specifically noted the majority's finding in *Miglin* that, as she put it, "because of the uniqueness of this negotiating environment, bargains entered into between spouses on marriage breakdown are not, and should not be seen to be, subject to the same rules as those applicable to commercial contracts,"[165] and that a lower threshold for intervention than common law unconscionability was appropriate.

Then, however, Justice Abella made the rather startling claim that "*Miglin* represented a reformulation and tailoring of the common law test for unconscionability to reflect the uniqueness of matrimonial bargains," referring to the majority's clarification in that case that, "we are not suggesting that courts must necessarily look for 'unconscionability' as it is

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161 2008 ONCA 388. As Carol Rogerson has noted, *LeVan* breathed life into what had up to that point been a relatively dormant provision, leading her to question whether the case "suggested that a more aggressive approach to judicial review of domestic contracts was taking hold" (see Rogerson, "Legacy of *Miglin*", *supra* note 142 at 18).

162 Accordingly, Justice Abella in *Rick, supra* note 7, affirmed Justice Slade's award of $649,680 and declared that "damages are appropriate as equitable compensation" at para 69. As Leckey noted in his response to the case, Justice Abella erroneously claimed that Justice Slade's award was "made as damages or, in the alternative, as a compensation order under section 66(2)(c)" of the *Family Relations Act* (see Robert Leckey, "A Common Law of the Family? Reflections on *Rick v. Brandsema*" (2009) 25:2 Can J Fam L 257 at 263 [Leckey, "Reflections"]). In fact, the reverse was the case (see *ibid* at 264). Leckey also discusses the problems attending this mingling of remedies (see *ibid* at 273–79).

163 *Rick, supra* note 7 at para 39.

164 See *supra* note 147.

165 See *Rick*, *supra* note 7 at para 40.

understood in the common law of contract."[166] This reading of *Miglin* is questionable.[167] The majority in *Miglin* distinguished marriage contracts from commercial contracts and held that a lower standard for intervention than common law unconscionability was appropriate in the domestic context; however, as Robert Leckey has noted, judges up to this point had read *Miglin* "as relating not to an agreement's validity at common law, but to its weight for a judge exercising statutory discretion."[168] Justice Abella's reading of the case, however, was much more expansive and suggested not only a standard of review lower than ordinary unconscionability but *a separate, free-standing* common law test of unconscionability tailored to the specific context of domestic contracts (standing alongside the stricter standard of unconscionability applicable to commercial contracts). In this respect, the Court in *Rick* put to rest the idea, first advanced in *Mundinger*, that separation agreements are subject to the same standard of unconscionability as ordinary contracts.[169]

Justice Abella then proceeded to link this reformulated standard of unconscionability (and the corresponding common law duty to disclose) back to statutory schemes governing domestic contracts: "In other words, the best way to protect the finality of any negotiated agreement in family law, is to ensure both its procedural and substantive integrity with the relevant legislative scheme."[170] In the context of *Rick*, that meant section 56 of the FRA, with its presumption of equality in matrimonial property division. Based on the "misleading informational deficits and psychologically exploitative conduct" evident in the case, Justice Abella found that Justice Slade's conclusion "that the resulting, significant deviation from the wife's *statutory entitlement* rendered the agreement unconscionable and therefore unenforceable" was "amply supported by the evidence."[171]

Rick therefore reinforced and extended *Miglin*'s distinction between domestic and commercial contracts by asserting not simply different

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166 *Ibid* at para 43 citing *Miglin, supra* note 5 at para 82.

167 See Rogerson, "Legacy of *Miglin*", *supra* note 124 at 27–28. *Cf* Payne and Payne, suggesting that *Rick* "reiterates the opinion expressed in *Miglin v Miglin* that there may be persuasive evidence of unconscionability arising from the vulnerability of a spouse in the negotiation of a settlement on marriage breakdown that will not be found in typical commercial negotiations" (Julian D Payne and Marilyn A Payne, *Canadian Family Law*, 6th ed (Toronto: Irwin Law, 2015) at 66–67).

168 Leckey, "Reflections", *supra* note 143 at 267–68.

169 As with its implicit rejection of *Farquar*, though, the Court in *Rick* made no mention of *Mundinger*.

170 *Rick*, *supra* note 7 at para 50.

171 *Ibid* at para 63 [emphasis added].

standards of review, but different standards of common law unconscionability for each species of contract (though a finding of unconscionability in the context of a separation agreement remains tethered to the relevant legislative scheme). In this respect, whether or not one agrees with the Court's reading of *Miglin*, *Rick* stands for the proposition that domestic contracts (i.e., marriage contracts and separation agreements) are, *at common law*, an exceptional species of contract, and subject to a lower threshold for intervention on the ground of unconscionability than commercial contracts—a shift that lower courts appear to have taken seriously.[172] In this respect, *Rick* is best viewed not only as an endorsement of an approach to separation agreements premised on substantive fairness, the value of women's domestic work, and the duty to give complete financial disclosure to a spouse, but also as the (current) culmination of a shift away from a rigidly contractualist understanding of separation agreements, toward a view of them instead as an exceptional species of contract owing to their nexus with the family.

In sum, the preceding analysis shows that in the past two decades, the Supreme Court of Canada (partly pursuant to earlier legislative developments concerning marriage contracts) has departed from the historical position under both English and Canadian law that separation agreements are simply a species of ordinary contract—a position that reached

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[172] See e.g. *LEM v DMI*, 2013 BCSC 450 at para 80 [*LEM*], where the court held that a separation agreement was unconscionable at common law pursuant to *Miglin*, *supra* note 5, and *Rick*, *supra* note 7, and therefore varying it pursuant to s 65 of the *Family Relations Act*; *SLC v CJRC*, 2014 BCSC 1814 (Gray J followed *LEM*, *supra* note 172, and declared that *Rick*, *supra* note 7, "confirmed that separation agreements should not be subject to the same rules as those applicable to commercial contracts negotiated between two parties of equal strength, because of the uniqueness of the negotiating environment" at para 419); *Gibbons v Livingston*, 2018 BCCA 443 (Willcock J applies the analysis in *Rick*, *supra* note 7, to a case concerning settlement negotiations upon the death of the appellant's common law spouse, who was the respondent's father).

In Ontario, see e.g. *Katz v Katz,* 2010 ONSC 158 (Hughes J noted that *Rick*, *supra* note 7, gave "clear direction on the *special considerations that must come into play when we are called upon to evaluate the enforceability of domestic contracts as distinct from other forms of contract*" at para 171 [emphasis added] and upheld a claim of unconscionability concerning a marriage contract at para 180); *Stevens v Stevens*, 2012 ONSC 706 (Harper J set aside a marriage contract for unconscionability and specifically noted Abella J's emphasis in *Rick*, *supra* note 7, on "the uniqueness of matrimonial bargains," and her "reformulation and tailoring of the common law test for unconscionability" to reflect the exceptional nature of domestic contracts at para 154); *Toscano v Toscano*, 2015 ONSC 487 (Blishen J affirmed the finding in *Rick*, *supra* note 7, that "[m]atrimonial negotiations occur in a unique environment and therefore unconscionability in the matrimonial context is not equivalent to unconscionability in a commercial context" at para 64, but refused to set aside the marriage contract; *Butler v Butler*, 2015 ONSC 6796 (Vogelsang J recognized "the applicable basic principles" concerning domestic contracts at para 48, as set out by Abella J in *Rick*, *supra* note 7).

its high point in Canada in *Pelech*. Instead, by developing a new standard of unconscionability that was initially tied to the *Divorce Act* but subsequently expanded into a new common law standard of unconscionability applicable to domestic contracts generally, the Court drew a clear distinction between domestic contracts and commercial contracts on the basis of the former class of agreements' connection to the family. Accordingly, the Supreme Court effectively undid the long-standing outlier status of separation agreements vis-à-vis other agreements touching upon the family. In this respect, the family-based exceptionalization of domestic contracts seen in *Miglin*, *Hartshorne*, and *Rick* parallels, and may be viewed in some respects as a belated extension of, the nineteenth-century process by which marriage itself was rendered exceptional vis-à-vis ordinary contracts.

Conclusion

It is often said that we understand ourselves and the world we live in through stories. And, as the legal historian Robert Gordon has observed, drawing upon different storylines "has the effect ... of *relativizing* the old story-lines," revealing "what they are: some among many possible interpretive frameworks in which to stick historical evidence."[173] In this paper I have suggested that the dominant storyline concerning *Pelech*, *Miglin*, *Hartshorne*, and *Rick*—one in which the contractual formalism of *Pelech* is supplanted by the contextualism of a substantive fairness model—is but one interpretive framework. To be sure, it is an important way of conceptualizing these cases, and unquestionably reflects the ideological and socio-legal concerns that have underscored variations in the Canadian common law of the family in the past four decades, as well as the ongoing tension between private ordering and judicial intervention in the family sphere. However, to focus only on these polarities obscures the ways that these cases also fit within a much longer historical narrative concerning the place of contract within family ordering, and the extent to which the law of the family is or ought to be treated as distinct from the "core" of private law— contract.

From this perspective, *Pelech* was not only an effort to instantiate equality through contract; it was also the culmination of older historical distinctions between separation agreements and other domestic contracts, including marriage. Accordingly, *Miglin*, *Hartshorne*, and *Rick* were also not just efforts to ameliorate the harshness of *Pelech* by paying greater attention to the substantive fairness of family agreements; they were also the continuation of much older processes of exceptionalism within the

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[173] Robert W Gordon, "Critical Legal Histories" (1984) 36:1/2 Stan L Rev 57 at 96–98.

law's treatment of agreements touching upon the family. In other words, these cases undid the outlier status of separation agreements vis-à-vis other classes of domestic contract, and in so doing extended the idea that there is something distinctive and exceptional about domestic agreements that warrants a different standard for judicial intervention than that which applies to ordinary commercial contracts. In this respect, the evolution of the Canadian common law concerning domestic contracts and especially separation agreements points to the existence not only of increased concerns with substantive fairness and the situation of women upon relationship breakdown, but also to an important aspect of the more general exceptionalism of family law as a discrete body of legal thought and doctrine distinct from the general law of contract because of the personal nature of the relations with which family law is concerned. Read this way, the cases revisited in this paper also suggest that private ordering in the family sphere cannot simply be read as a move toward contract (and away from status). Acceptance of the validity and enforceability of ante-nuptial agreements[174] certainly points toward greater legislative and judicial acceptance of contractual ordering between married couples; however, it is also clear that this shift has been accompanied by judicial recognition of the exceptional nature of the family and the need for a different approach to that which applies in the law of commercial contracts.[175]

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[174] In England as well as in Canada, following the decision of the UK Supreme Court in *Radmacher*, *supra* note 34.

[175] For an overview of private ordering in Canadian family law, see Robert Leckey, "Shifting Scrutiny: Private Ordering in Family Matters in Common-Law Canada" in Frederik Swennen, ed, *Contractualisation of Family Law: Global Perspectives* (Cham, Switzerland: Springer, 2015) 93.