



## **Relational theory and choice rhetoric in the Supreme Court of Canada**

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# RELATIONAL THEORY AND CHOICE RHETORIC IN THE SUPREME COURT OF CANADA\*

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*The issue of personal choice has become central to Canadian family law. Much of the debate derives from the competing models of autonomy posited by neoliberal and feminist theorists. Neoliberalism, which currently dominates Canadian public discourse, views individuals as atomistic agents who can and should make “responsible” choices. However, feminists have highlighted the effects of structural barriers and social context on personal decision-making, particularly for women, and have advanced alternative relational autonomy models. These models are particularly appropriate to family law, but their application to family financial ordering has not been widely considered. This article discusses the practical significance of a relational autonomy approach in the context of spousal support (maintenance) and property agreements, focusing on the jurisprudence of the Supreme Court of Canada from 1987 to date. However, while the article centres on Canadian law, it also speaks to the broader debate on autonomy and fairness in family law generally. The article asks two core questions: First, to what extent has relational theory*

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*informed the Court's decisions on spousal support and marital property agreements? Second, do or would relational understandings make a practical difference in spousal support and marital property agreement cases? The article traces the evolution of autonomy theory in the Court's decisions on marital property and spousal support agreements. It contends that the Court has gradually adopted a largely, though not consistently, relational approach. This approach may not always make as much practical difference as some feminists might expect. Nevertheless, the article argues that a relational approach may be vitally significant in some cases. Consequently, the article concludes that it would be regrettable if so-called "choice rhetoric" were to displace relational understandings in this context.*

## INTRODUCTION

What does it mean to make a meaningful choice in a family context? Should individuals be held to agreements and decisions made in difficult personal circumstances or under significant social pressures? These questions have become central to Canadian family law, where there has been a continuing debate on the significance and the nature of personal choice. Much of the debate derives from the competing models of autonomy posited by neoliberal and feminist theorists. Neoliberalism, currently the dominant ideology in Canadian public discourse,<sup>1</sup> views individuals as atomistic, independent agents, who have the ability, and the duty, to make "responsible" decisions in their own best interests. Feminists, by contrast, have highlighted the effects of structural barriers and social context on personal decision making. They have also emphasized the structural implications of what Williams has termed the "rhetoric of choice,"<sup>2</sup> where negative

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<sup>1</sup> See e.g. Alexandra Dobrowolsky, ed, *Women and Public Policy in Canada: Neo-liberalism and After?* (Toronto: Oxford University Press, 2009) [Dobrowolsky, ed].

<sup>2</sup> Joan Williams, "Gender Wars: Selfless Women in the Republic of Choice" (1991) 66 NYUL Rev 1559 at 1561. The phrase "choice rhetoric" is subsequently used by Gillian Calder, "The Personal *Is* Economic: Unearthing

consequences are deemed to flow from “personal choice,” without further interrogation of that “choice” or its gender implications. However, feminists are also concerned with vindicating women’s agency. To reconcile these apparently opposing objectives—the vindication of choice and the recognition of constraints on the exercise of that choice—feminists have offered a range of alternative autonomy models. Broadly described as “relational,”<sup>3</sup> these models focus on the social situation of the individual (including the social connections and pressures that may affect personal decision making), and the impact of social forces on the development of personal capacities for reflection and action.

The “choice” debate is particularly resonant in the context of prenuptial agreements and divorce settlements, which commonly restrict property or support entitlements. However, although the emphasis of relational theory on caring obligations and social connections is particularly relevant to family law,<sup>4</sup> the application of relational models to financial ordering within the family has received surprisingly little attention.<sup>5</sup> The most sustained analysis to date in the Canadian context has been offered by Robert Leckey, who has

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the Rhetoric of Choice in the Canadian Maternity and Parental Leave Benefit Debates” in Rosemary Hunter & Sharon Cowan, eds, *Choice and Consent: Feminist Engagements with Law and Subjectivity* (New York: Routledge-Cavendish, 2007).

<sup>3</sup> See e.g. Catriona Mackenzie & Natalie Stoljar, eds, *Relational Autonomy: Feminist Perspectives on Autonomy, Agency and the Social Self* (Oxford: Oxford University Press, 2000) at 4.

<sup>4</sup> Jonathan Herring, “Relational Autonomy and Family Law” [Herring] in Julie Wallbank, Shazia Choudhry & Jonathan Herring, eds, *Rights, Gender and Family Law* (New York: Routledge, 2010) at 259.

<sup>5</sup> For two exceptions, see Penelope E Bryan, “Women’s Freedom to Contract at Divorce: A Mask for Contextual Coercion” (1999) 47 Buff L Rev 1153 [Bryan, “Women’s Freedom”] and Robert Leckey, “Contracting Claims and Family Law Feuds” (2007) 57 UTLJ 1 [Leckey, “Contracting Claims”].

considered the Supreme Court of Canada's jurisprudence on adult couples in the light of relational theory.<sup>6</sup> This paper further explores the application of relational theory in the spousal agreement context, focusing on spousal support (maintenance) and property agreements.<sup>7</sup> It engages particularly with Leckey's critique, concurring with some aspects of his case analysis and disagreeing with others, and extending the analysis to subsequent decisions. However, while Leckey has argued that the self-sufficient, rational, "choosing" subject of liberal theory has now been supplanted by the contextualized legal subject in Canadian family law, this paper argues, *inter alia*, that this transition is still highly contested, and that liberal and neoliberal conceptualizations of the subject continue to compete with more relational understandings, even in contextualized judicial discourse.

While the article focuses on Canadian law, the analysis offered is of wider relevance. The article speaks to the broader debate on autonomy and fairness in family law, particularly as it applies to prenuptial and postnuptial agreements. It especially recalls the tensions evidenced by the recent decision of the Supreme Court of England and Wales in *Radmacher v. Granatino*,<sup>8</sup> in which the majority's emphasis on respecting autonomy contrasted with the dissent's highlighting of the gender equality implications of upholding prenuptial agreements.<sup>9</sup> The article is also pertinent to current proposals for the legal

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<sup>6</sup> Leckey, "Contracting Claims", *supra* note 5; Robert Leckey, *Contextual Subjects: Family, State, and Relational Theory* (Toronto: University of Toronto Press, 2008) [Leckey, *Contextual Subjects*].

<sup>7</sup> Other terms of marital agreements, such as those relating to child custody and support, are not specifically addressed in this paper, though obviously they may be connected to financial and property issues.

<sup>8</sup> [2010] UKSC 42, [2011] 1 AC 534.

<sup>9</sup> For a detailed analysis of the decision in *Radmacher*, see Lucy-Ann Buckley, "Ante-nuptial Agreements and Proper Provision: An Irish Response to *Radmacher v Granatino*" (2011) 14:1 Irish Journal of Family Law 3.

recognition of prenuptial agreements in jurisdictions such as England and Wales and Ireland.<sup>10</sup>

The paper focuses on two core research questions. First, to what extent have understandings drawn from relational autonomy theory informed the decisions of the Supreme Court of Canada on spousal support and marital property agreements? Second, do or would relational understandings make any practical difference in spousal support and marital property agreement cases? The article begins by briefly summarizing neoliberal conceptualizations of autonomy and the principal feminist critiques. It explains relational autonomy theory and examines how a relational approach might apply to family agreements. It outlines key features of the Canadian law of marital property and spousal support and highlights relevant aspects of the broader legal and ideological context. It then traces the evolution of autonomy theory in the jurisprudence of the Supreme Court of Canada on marital property and spousal support agreements from 1987 to date.<sup>11</sup> Finally, the article evaluates the degree of practical difference

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<sup>10</sup> The Law Commission, *Matrimonial Property, Needs and Agreements*, LAW COM No 343, (London: Stationery Office, 2014); Department of Justice, Equality and Law Reform, *Report of the Study Group on Pre-nuptial Agreements* (Dublin: Government Publications, 2007).

<sup>11</sup> The article focuses on judgments of the Court between 1987 and May 2014 relating to prenuptial or postnuptial agreements dealing with property division or spousal support. The year 1987 was significant because some of the original leading cases relating to financial autonomy were heard in that year: *Pelech v Pelech* [1987] 1 SCR 801; *Caron v Caron* [1987] 1 SCR 892; *Richardson v Richardson* [1987] 1 SCR 857 [the *Pelech* trilogy]. Cases were identified from the judgments listed on the Supreme Court of Canada's website. Cases analyzed were: *Pelech v Pelech* [1987] 1 SCR 801; *Caron v Caron* [1987] 1 SCR 892; *Richardson v Richardson* [1987] 1 SCR 857; *G (L) v B (G)* [1995] 3 SCR 370; *Boston v Boston* [2001] 2 SCR 413, 2001 SCC 43; *Miglin v Miglin* [2003] 1 SCR 303, 2003 SCC 24; *Hartshorne v Hartshorne* [2004] 1 SCR 550, 2004 SCC 22; *Rick v Brandsema* [2009] 1 SCR 295, 2009 SCC 10; *LMP v LS* [2011] SCJ No 64, [2011] 3 SCR 775 (SCC); *RP v CP* [2011] SCJ No 65, [2011] 3 SCR 819 (SCC). Most cases concerned the weight to be accorded

that a relational approach can make and contends that, quite often, it may make less difference than many feminists might expect. This may be because of the way that cases are presented (which in turn may depend on structural and other factors) or because situations may offer a range of relational narratives and much depends on which narrative is preferred by the court. However, the article also contends that there are cases in which a relational approach may make a very significant difference. It therefore concludes that it would be highly regrettable if so-called “choice rhetoric” were to displace the relational understandings which, it argues, have been at least partially espoused by the Court.

### **AUTONOMY: NEOLIBERAL CONCEPTIONS AND FEMINIST CRITICISMS**

In classical liberal theory, individuals are atomistic agents of their own good, possessing a self-determined moral identity<sup>12</sup> and motivated by self-interest. This conceptualization also accords with the “rational choice” theory of neoclassical economics.<sup>13</sup> Since decisions motivated

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to such agreements in subsequent divorce proceedings or in applications to vary the agreed provision, though one case concerned the validity of the agreement itself. The article does not analyze the variation of previous non-consensual orders (such as spousal support orders), as the focus is on autonomy rather than the variation of support as such. Owing to space restrictions, only the most relevant cases are discussed in the article, with relevance determined by the significance of the case for the analysis of autonomy.

<sup>12</sup> Mackenzie & Stoljar, *supra* note 3 at 5.

<sup>13</sup> Laura T Kessler, “Is There Agency in Dependency? Expanding the Feminist Justifications for Restructuring Wage Work” in Martha A Fineman & Terence Dougherty, eds, *Feminism Confronts Homo Economicus* (Ithaca, NY: Cornell University Press, 2005) at 384.

by self-interest are considered more likely to be efficient,<sup>14</sup> state intervention with agreements should be minimized.<sup>15</sup> The liberal/neoclassical economic model therefore serves both to justify the status quo and to preclude intervention.<sup>16</sup>

This understanding is deeply embedded in the prevailing neoliberal model.<sup>17</sup> Philosophically, neoliberalism valorizes individualism, choice, responsibility, and self-sufficiency.<sup>18</sup> This valorization is reflected in both the private and public spheres: as Lessard notes, neoliberalism differs from classical liberalism due to the merger of social and economic relations.<sup>19</sup> Hence, “market principles are internal to *both* the state and society,”<sup>20</sup> and “market-inspired imagery also shapes neo-liberal conceptions of the citizen.”<sup>21</sup> Furthermore, “choice” is not simply a good in itself; nor is it limited to freedom from state control. Rather, it is “the marker of the responsible

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<sup>14</sup> Marcia Neave, “Private Ordering in Family Law—Will Women Benefit?” in Margaret Thornton, ed, *Public and Private: Feminist Legal Debates* (Oxford: Oxford University Press, 1995) at 165.

<sup>15</sup> Linda Mulcahy, *Contract Law in Perspective*, 5th ed (New York: Routledge-Cavendish, 2008) at 26.

<sup>16</sup> Neil H Buchanan, “Playing with Fire: Feminist Legal Theorists and the Tools of Economics” in Fineman & Dougherty, *supra* note 13 at 85.

<sup>17</sup> For a more detailed account of neoliberalism, see Alexandra Dobrowolsky, “Introduction: Neo-liberalism and After?” [Dobrowolsky, “Introduction”] in Dobrowolsky, *supra* note 1; Rachel Treloar & Susan B Boyd, “Family Law Reform in (Neoliberal) Context: British Columbia’s New *Family Law Act*” (2014) 28 *Int’l JL Pol’y & Fam* 77 at 79.

<sup>18</sup> See Dobrowolsky, “Introduction”, *supra* note 17 at 6.

<sup>19</sup> Hester Lessard, “Charter Gridlock: Equality Formalism and Marriage Fundamentalism” (2006) 33 *SCLR* 291 at 300.

<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid* at 301.



individual,”<sup>22</sup> as the individual can, and should, choose to act in a self-sufficient way, befitting the “active citizen” of neoliberal discourse.

In the family context, neoliberalism reinterprets conduct based on relational values (such as love and altruism) in the language of rationality and self-interest.<sup>23</sup> It also privatizes welfare considerations, including caring responsibilities. Families are essentially expected to be both self-governing and self-sufficient, rather than relying on state support. However, the tensions between personal and family self-sufficiency are disregarded. This has particular consequences for women, who are assumed to be active labour market participants, while simultaneously expected to be the primary familial care-providers.<sup>24</sup> These gendered outcomes are, however, obscured by neoliberalism’s emphasis on formal equality and the gender-neutral framing of legal and policy measures, which (in practice) constrain women’s real autonomy and freedom of choice<sup>25</sup> while ignoring and maintaining their systemic disadvantage.<sup>26</sup> In this way, “choice rhetoric” reinforces

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<sup>22</sup> *Ibid* at 312.

<sup>23</sup> *Ibid* at 301. For a discussion of the inappropriateness of applying exchange values to family situations, see Ann Laquer Estin, “Love and Obligation: Family Law and the Romance of Economics” (1995) 36 *Wm and Mary L Rev* 989 at 1018. Estin also contends that decision making may be based on emotional rather than economic rationality: *ibid* at 1018.

<sup>24</sup> Treloar & Boyd, *supra* note 17 at 79. For a more detailed discussion of the public policy significance of privatizing caring work, see Susan B Boyd, “(Re)Placing the State: Family, Law and Oppression” (1994) 9 *CJLS* 39 at 69; Martha A Fineman, “Cracking the Foundational Myths: Independence, Autonomy, and Self-sufficiency” [Fineman] in Fineman & Dougherty, eds, *supra* note 13.

<sup>25</sup> Treloar & Boyd, *supra* note 17 at 80.

<sup>26</sup> Dobrowolsky, “Introduction”, *supra* note 17 at 14. For instance, gender-based labour market discrimination may seriously affect women’s economic independence, resulting in unequal bargaining power: see e.g. Neave, *supra* note 14 at 167; Susan M Okin, *Justice, Gender, and the Family* (New York: Basic Books, 1989) at 147. Women may also be seriously disadvantaged by

the gendered division of labour, while disguising how the costs of childrearing and caring work are generally allocated to women.<sup>27</sup>

Feminists also criticize the neoliberal failure to consider social context and social relations. Far from being atomistic, independent actors, humans are unavoidably interdependent and connected to others,<sup>28</sup> particularly in the family context. This interdependency restricts the options realistically open to the socially connected individual,<sup>29</sup> particularly where religious or cultural pressures apply.<sup>30</sup> Feminists further emphasize the constitutive nature of social relations, arguing that personal identities are inevitably informed by social norms, traditions, and expectations.<sup>31</sup> Accordingly, socialization processes affect individuals' freedom to reflect and act.<sup>32</sup>

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domestic violence: see e.g. Neave, *supra* note 14 at 169 and Hunter & Cowan, *supra* note 2 at 158.

<sup>27</sup> See Fineman, *supra* note 24 at 184; Calder, *supra* note 2 at 130, citing Williams, *supra* note 2 at 1596; and Rebecca Johnson, "If Choice is the Answer, What is the Question? Spelunking in *Symes v. Canada*" in Dorothy E Chunn & Dany Lacombe, eds, *Law as a Gendering Practice* (Ontario: Oxford University Press, 2000) at 199.

<sup>28</sup> Paula England, "Separative and Soluble Selves: Dichotomous Thinking in Economics" in Fineman & Dougherty, *supra* note 13 at 32.

<sup>29</sup> See Herring, *supra* note 4 at 267; Margaret F Brinig, "Some Concerns about Applying Economics to Family Law" in Fineman & Dougherty, *supra* note 13 at 455.

<sup>30</sup> Examples of this might include parental pressure to marry or cultural pressure to permit family issues to be dealt with by a religious court.

<sup>31</sup> Marilyn Friedman, "Autonomy, Social Disruption, and Women" in Mackenzie & Stoljar, *supra* note 3 at 35.

<sup>32</sup> *Ibid.*

### FEMINIST ALTERNATIVES: RELATIONAL AUTONOMY

These criticisms cause serious difficulties for feminists. How can recognition of the constitutive nature of social forces be reconciled with autonomy?<sup>33</sup> And how can women be protected from the oppression arising from restricted choices but allowed to retain agency?<sup>34</sup> One response is to deny that social conditioning precludes agency; for instance, Barclay contends that autonomy does not require complete freedom from external or social influences, even if this were possible. Instead, she suggests that the point of autonomy is not to evade externalities, but to be able to “fashion a certain response” to them through reflective engagement.<sup>35</sup> However, many feminists go further, arguing that autonomy should be reconceived to take account of relational values. Mackenzie and Stoljar propose “relational autonomy” to take account of the fact “that persons are socially embedded and that agents’ identities are formed within the context of social relationships and shaped by a complex of intersecting social determinants, such as race, class, gender, and ethnicity.”<sup>36</sup> All of these factors necessarily affect agency, either in the formation of preferences or the development of the personal capacities required for autonomy or in restricting action through social or cultural norms.<sup>37</sup> More simply, as Llewellyn and Downie put it, “The central question. . . is not so much

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<sup>33</sup> Mackenzie & Stoljar, *supra* note 3 at 13; Jennifer Nedelsky, *Law’s Relations: A Relational Theory of Self, Autonomy, and Law* (New York: Oxford University Press, 2011) at 53.

<sup>34</sup> Gillian K Hadfield, “An Expressive Theory of Contract: From Feminist Dilemmas to a Reconceptualization of Rational Choice in Contract Law” (1998) 146 U Pa L Rev 1235 at 1236.

<sup>35</sup> See e.g. Linda Barclay, “Autonomy and the Social Self” in Mackenzie & Stoljar, *supra* note 3 at 54.

<sup>36</sup> Mackenzie & Stoljar, *supra* note 3 at 4.

<sup>37</sup> *Ibid* at 22.

‘what is X in relationship to or with?’ but, rather, ‘what is the effect of being in relation?’”<sup>38</sup>

Proponents of relational autonomy emphasize that individuals are emotional and feeling as well as rational,<sup>39</sup> and that this affects their decision making. However, accepting relational autonomy creates other difficulties, particularly where someone makes a “choice” that is objectively “bad” for herself, or which conflicts with her personal wishes, but which she perceives as necessary for relational reasons (such as ensuring her children’s well-being, sustaining a relationship, or remaining within her community). Immediate priorities may require choices that are ultimately oppressive.<sup>40</sup> Refusing to respect such choices undermines agency, yet upholding them may reinforce not only personal but collective gender inequality. There is therefore a risk that “community” needs or wishes may too easily override those of the individual, reinforcing traditional feminine social or cultural roles.<sup>41</sup> This difficulty is compounded where oppressive social norms are internalized, so that an individual may not even contemplate alternative possibilities.

Feminist responses to this dilemma may be classified as “procedural” or “substantive.” An individual is procedurally (or formally) autonomous if she has reflected appropriately on her

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<sup>38</sup> Jennifer J Llewellyn & Jocelyn Downie, eds, *Being Relational: Reflections on Relational Theory and Health Law* (Vancouver: UBC Press, 2012) at 4.

<sup>39</sup> *Ibid* at 21.

<sup>40</sup> Carolyn McLeod & Susan Sherwin, “Relational Autonomy, Self-trust, and Health Care for Patients Who Are Oppressed” in Mackenzie & Stoljar, *supra* note 3 at 261.

<sup>41</sup> Jonathan Herring, *Medical Law and Ethics* (Oxford: Oxford University Press, 2006) at 128.

thoughts and wishes, irrespective of the nature of those wishes.<sup>42</sup> Hence, as Stoljar notes, “preferences for dependence and connection can be autonomous,” thus permitting diversity.<sup>43</sup> The chief difficulty with a procedural view is that it overlooks the socialization processes that affect the formation of beliefs, desires, capacities, and attitudes, which are an essential aspect of self-examination.<sup>44</sup> This difficulty is addressed by “substantive” theories, whereby an individual is not autonomous if socialization inhibits her capacity to analyze critically an internalized norm.<sup>45</sup> Alternatively, substantive theories restrict in some way the preferences that an autonomous individual may hold (for instance, by reference to normative criteria).<sup>46</sup> “Substantive” theories may be criticized for their reliance on normative standards (which may not be universal) or because their emphasis on psychological capacity may still permit oppression.<sup>47</sup>

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<sup>42</sup> Mackenzie & Stoljar, *supra* note 3 at 13; Natalie Stoljar, “Autonomy and the Feminist Intuition” [Stoljar] in Mackenzie & Stoljar, *supra* note 3 at 94.

<sup>43</sup> Stoljar, *supra* note 42 at 95.

<sup>44</sup> Mackenzie & Stoljar, *supra* note 3 at 13; Susan J Brison, “Relational Autonomy and Freedom of Expression” in Mackenzie & Stoljar, *supra* note 3 at 284.

<sup>45</sup> Stoljar, *supra* note 42 at 95.

<sup>46</sup> Mackenzie & Stoljar, *supra* note 3 at 19-20. Mackenzie and Stoljar distinguish between “weak” and “strong” substantive theories of autonomy. A “weak” substantive approach requires further conditions to be satisfied, beyond procedural aspects, before an agent can be deemed autonomous. These might include a sense of self-worth or confidence in one’s own judgment. “Strong” substantive approaches go further and impose restrictions on the kinds of preferences that autonomous agents can hold. This is because they commonly require “normative competence” (*ibid* at 20), that is, individuals must be able to “discern the false norms accepted and perpetuated by the oppressive context in which they are operating” (*ibid* at 21).

<sup>47</sup> *Ibid* at 21. For example, an agent might trust her own judgment, yet make choices based on internalized, oppressive norms.

Although the conceptualizations of individual relational theorists differ, Leckey has identified three common elements to their overall approach, which provide a useful reference point for legal analysis. First, the individual is identified as “relationally embedded,” rather than atomistic. Second, a contextual methodology is adopted, which focuses not only on the personal situation of the individual but also considers the broader social, economic, political, and cultural context. Third, there is a “normative commitment to relational autonomy and to promoting constructive relationships conducive to it,” since only this permits critical evaluation of the law.<sup>48</sup> The significance of these elements for marital agreements will be considered below.

### **Relational Autonomy and Marital Agreements**

Autonomy is relevant to marital agreements in two ways. First, where a spouse was not acting autonomously, the court may set an agreement aside for duress, undue influence or unconscionability. However, each doctrine has particular requirements (sometimes legislatively modified), which may prove difficult to satisfy.<sup>49</sup> Second, the weight

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<sup>48</sup> Leckey, “Contracting Claims”, *supra* note 5 at 9-10.

<sup>49</sup> Duress traditionally requires the application of pressure to such a degree that no true consent is given by the pressured party. However, the pressure of difficult circumstances is insufficient here, as is fear or subordination arising from a historically abusive relationship. Undue influence arises where one person exerts an unusual degree of dominion over another, which is sufficient to negate the independent will and judgment of that other and which enables the dominant party to obtain an unfair advantage. However, quite apart from the fact that the relationship of husband and wife does not raise a presumption of undue influence, the doctrine does not address power disparities, pressures, and unequal bargaining power arising from other causes, such as economic inequality. Potentially the most useful doctrine is that of unconscionability, whereby a court can set aside a contract in equity if the parties had unequal bargaining power (such that one party was unable to protect her interests adequately), with the result that the more powerful party obtained an undue advantage or benefit. The question here is to what degree a person’s bargaining ability must be affected before the court will intervene, and what

that the court accords to a marital agreement under family law legislation may be reduced by a perception of unfair pressure, disadvantage, or exploitation, even where this is insufficient to set the agreement aside under the law of contract. Relational theory may therefore either expand traditional doctrines, or explain why an otherwise valid agreement should be accorded less weight in family law.

Drawing on the common elements identified by Leckey, a relational approach to autonomy emphasizes the social situation of the actors and the context in which the bargaining occurred. This highlights discrepancies in the parties' bargaining positions, as well as the emotional concerns and vulnerability arising in the prenuptial and marital breakdown contexts and the pressures arising from abusive relationships or concern for children. It highlights the implications of structural inequalities (such as gender inequality in the market place and in caring work) for individual decision making. The relational approach also acknowledges the social constitution of individuals and the significance of broader social context (such as the cultural location of the subject). All of these offer potential grounds for contesting the neoliberal assumption of atomistic self-interest. However, while relational theory stresses the significance of relationships and context in respect of personal decision making, it also holds that individuals can move beyond those contexts and shape their own lives, rather than simply accepting social roles and definitions.<sup>50</sup> Hence, although relational theory emphasizes the role of emotion and interdependency in personal decision making, it does not suggest that either emotion or emotional pressure precludes autonomy. Indeed, as Leckey has argued, women might be pathologized by assumptions of emotionalism and

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factors will be taken into account in assessing this. For a discussion of all three doctrines, see Raymond J Friel, *The Law of Contract* (Dublin: Round Hall Press, 1995) ch 18.

<sup>50</sup> Nedelsky, *supra* note 33 at 47.

vulnerability.<sup>51</sup> From a relational perspective, emotion is an essential aspect of humanity that may actually enhance the quality of decision making by promoting altruism, empathy, and connection. Emotion can be empowering, particularly in contexts of support and concern. Emotions such as fear may indeed undermine autonomy, but emotional pressure does not necessarily vitiate an individual's decision-making capacity, since capacity is a continuum, with a wide range between competence and incompetence.<sup>52</sup> Although relational theory rightly emphasizes the potential effects of exploitation and relational pressure, thereby promoting greater insight into the nature of oppression,<sup>53</sup> it also permits individuals to prioritize relational over economic concerns.

How does relational autonomy respond if a spouse or intending spouse makes an agreement that is financially disadvantageous or manifestly unequal? An obvious focus is on procedural concerns (such as whether adequate independent advice was available). Substantive approaches are also possible, though some are problematic. One substantive approach might incorporate normative equality standards, so that unequal agreements, or agreements which deviate significantly from statutory entitlements based on equality principles, would be deemed non-autonomous. However, this precludes diversity and undermines freedom of choice, since individuals may forego their statutory entitlements for compelling reasons.<sup>54</sup> Although "choice rhetoric" is clearly open to abuse, it does not follow that "bad" choices, even those made in "bad" circumstances, are invariably non-autonomous. A second substantive response might derive from Leckey's emphasis on the promotion of "constructive relationships."

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<sup>51</sup> Leckey, "Contracting Claims", *supra* note 5 at 13.

<sup>52</sup> Emily Jackson, *Medical Law: Text, Cases and Materials* (Oxford: Oxford University Press, 2006) at 193.

<sup>53</sup> Llewellyn & Downie, *supra* note 38 at 6.

<sup>54</sup> For example, individuals may wish to provide for their children or to obtain a clean break or may feel guilty for the breakdown of their marriage.



Here one might uphold decisions taken for what might be termed “positive” relational reasons (for example, decisions influenced by considerations of altruism, concern, and love), while decisions based on “negative” relational factors (such as fear or psychological domination) might be impugned as “non-constructive.” Such distinctions might be difficult to draw in practice, particularly since even loving relationships may be (unconsciously) exploitative, while empowerment may exist even within apparently negative situations. A third possibility, preferred here, would be to hold that individuals must be able to reflect critically on equality norms, even if they ultimately depart from them, and must feel that they have a real choice in how they respond to a particular situation. This encourages a consideration of a broader range of factors than those traditionally legally recognized as potentially negating volition,<sup>55</sup> and suggests an increased level of scrutiny where an agreement made in emotional or pressured circumstances seems particularly one-sided, without however adopting any presumption of non-autonomy. This would permit both diversity and responsiveness to the particular context, consistent with relational methodology and would also, as Leckey notes, ensure that the weaker party, as well as the stronger, can reasonably rely on agreements.<sup>56</sup>

In summary, relational theory requires us to be aware of relational issues, pressures, and context when considering whether

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<sup>55</sup> The law has traditionally focused on extreme factors negating volition (such as duress in the form of threats to life or of bodily harm): see Michael Furmston, *Cheshire, Fifoot and Furmston's Law of Contract*, 15th ed (Oxford: Oxford University Press, 2006) at 384. However, coercion and pressure in the marital breakdown context may be more subtle than this. Threats may be made regarding a child or access; a non-earning spouse may be financially desperate; legal advisors or supposedly neutral mediators may apply pressure to reach agreement on particular terms: see Bryan, “Women's Freedom”, *supra* note 5 at 1237. Furthermore, emotional distress, such as that arising on the marital breakdown, has not traditionally been recognized by the courts as negating legal capacity (*ibid*).

<sup>56</sup> Leckey, “Contracting Claims”, *supra* note 5 at 19.

someone acted autonomously. However, it also suggests that economically “irrational” behaviour may be “rational” in a particular context, so that “bad” agreements are not necessarily non-autonomous. It is suggested here that relational theory offers a more profound and detailed contextual examination of autonomy, which goes much further than traditional legal doctrines in its examination of pressure and capacity, yet which still recognizes and maintains the role of contract and permits diverse choices where individuals have real reflective capacities.

## RELATIONAL AUTONOMY IN CANADA

To what extent has relational autonomy established a place within the Canadian case law, and does or would it make a difference within the decided cases? The remainder of this article examines the decisions of the Supreme Court of Canada in light of these questions. However, prior to evaluating the case law on marital agreements, it is worth highlighting some significant structural and ideological features of the decision-making context.

### Structural Background

Canada distinguishes between marital property and spousal support, and the legislative aspects of each are separate.<sup>57</sup> This duality may be significant for the conceptualization of autonomy. Marital property is governed by provincial law,<sup>58</sup> usually through equal-sharing regimes; several provinces have also enacted sharing regimes for unmarried

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<sup>57</sup> Marital property and spousal support may be interrelated in practical terms, as property entitlements may affect the appropriateness or quantification of spousal support.

<sup>58</sup> Sections 92(13) and (16) of the *Constitution Act 1867* (UK), 30 & 31 Vict, c 3, reprinted in Appendix II, No 5, confer jurisdiction over “property and civil rights” and “matters of a merely local or private nature in the province” on provincial government.

cohabitants (“*de facto* spouses”).<sup>59</sup> Spousal support on divorce is governed by federal law,<sup>60</sup> and support is also available under provincial or territorial legislation, outside of the divorce context (e.g. on separation). In addition, the laws of all provinces other than Quebec provide for spousal support for unmarried cohabitants.

In theory, default marital sharing regimes should enhance the bargaining power of the economically weaker spouse in financial negotiations, as parties bargain “in the shadow of the law.”<sup>61</sup> This suggests that systemic gender disadvantage in marital property bargaining should be less prevalent in Canada than in systems with less defined entitlements. This may encourage greater deference to marital property agreements, and in fact spouses (or intending spouses) may generally derogate from the applicable marital property regime.<sup>62</sup> However, most Canadian provinces mandate some judicial oversight of marital property agreements, either on fairness grounds or on contractual or autonomy-related grounds.<sup>63</sup>

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<sup>59</sup> See e.g. s 3 of the *Family Law Act*, SBC 2011, c 25; *Law Reform 2010 Act*, SNS 2000, c 29.

<sup>60</sup> The federal Parliament has constitutional jurisdiction over marriage and divorce (s 91(26) of the *Constitution Act 1867*, *supra* note 58), and this has been interpreted to include corollary (or ancillary) relief.

<sup>61</sup> Robert H Mnookin & Lewis Kornhauser, “Bargaining in the Shadow of the Law: The Case of Divorce” (1979) 88 *Yale LJ* 950.

<sup>62</sup> The exception to this general rule is Quebec, where spouses cannot contract out of the primary regime (art 391 CCQ, CQLR c C-1991).

<sup>63</sup> Some provinces have expanded the grounds on which agreements may be set aside as invalid. In Ontario, an agreement can be set aside for inadequate disclosure, failure to comprehend the nature or consequences of the contract, or otherwise under the law of contract (*Family Law Act*, RSO 1990, c F-3, s 56(4)). Agreements in Nova Scotia may be set aside if they are “unconscionable, unduly harsh on one party or fraudulent” (*Matrimonial Property Act*, RSNS 1989, c 275, s 29). British Columbia previously permitted courts to adjust agreements in the interests of fairness (*Family Relations Act*, RSBC 1996, c 128, s 65(1)), thus according less weight to a (valid) agreement

Spousal support on divorce is discretionary and is governed by the federal *Divorce Act* 1985.<sup>64</sup> The *Divorce Act* lists factors for consideration in evaluating spousal support claims<sup>65</sup> and specifies objectives for such support.<sup>66</sup> Spousal support is based on considerations of need, contract, and compensation,<sup>67</sup> leading to an uneasy balance between the recognition of social realities and an egalitarian emphasis on individual responsibility and choice.<sup>68</sup> Although guidelines have been introduced on the quantification of

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on policy grounds. However, it has now adopted a more restrictive approach: *Family Law Act*, SBC 2011, c 25, s 93.

<sup>64</sup> *Divorce Act*, RSC 1985, c 3 (2nd Supp). The spousal support rules of particular provinces are outside the scope of this article.

<sup>65</sup> *Divorce Act*, *supra* note 64 s 15.2(4). Relevant factors include the spouses' "condition, means, needs and other circumstances" (*ibid*).

<sup>66</sup> *Divorce Act*, *supra* note 64 s 15.2(6). The objectives for spousal support are the recognition of economic disadvantage arising from the marriage or its breakdown, the apportionment of the financial consequences of child-rearing (over and above child support), relief from economic hardship resulting from marital breakdown, and the promotion of each spouse's economic self-sufficiency within a reasonable timeframe insofar as is possible (*ibid*).

<sup>67</sup> *Bracklow v Bracklow*, [1999] 1 SCR 420 [*Bracklow*].

<sup>68</sup> Eichler notes that the "individual responsibility" model of the family operative in Canada is based on the egalitarian assumption that both parents are equally capable of fulfilling, simultaneously, both the economic and the caring role within the family, and should therefore be equally responsible for doing so, if required: Margrit Eichler, *Family Shifts: Families, Policies, and Gender Equality* (Toronto: Oxford University Press, 1997) at 13. This precludes public assistance, or, indeed, long-term spousal support.

support<sup>69</sup> and have had a significant impact in this context,<sup>70</sup> the guidelines have no statutory basis and do not address the issue of entitlement. From an autonomy perspective, the absence of fixed support entitlements means that women lack bargaining endowments in this context, except insofar as the guidelines create parameters for the quantification of support in practice, where support is deemed appropriate.<sup>71</sup> Furthermore, the importance of spousal support in addressing the long-term economic consequences of a marriage may only become apparent over time, so that spouses negotiating on support issues may find it difficult to make informed decisions.<sup>72</sup> Courts may therefore approach support agreements more cautiously than property agreements. Conversely, the spouses' inability to exclude the court's jurisdiction under the *Divorce Act*<sup>73</sup> may encourage the enforcement of

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<sup>69</sup> Carol Rogerson & Rollie Thompson, *Spousal Support Advisory Guidelines* (Department of Justice Canada, 2008) [SSAG].

<sup>70</sup> Carol Rogerson, "Child and Spousal Support in Canada: The Guidelines Approach Part 2" (2012) 15:1 IJFL 18 at 24 [Rogerson, "Child and Spousal Support"].

<sup>71</sup> Rogerson considers that clearer support entitlements "would change the dynamics of bargaining": Carol Rogerson, "*Miglin v. Miglin* 2003 SCC—They Are Agreements Nonetheless" (2003) 20 Can J Fam L 197 at 228 [Rogerson, "*Miglin v. Miglin*"]. However, she has emphasized that the SSAG do not determine entitlement to spousal support, but merely give a range for the appropriate amount, as a starting point for discussion: Rogerson, "Child and Spousal Support", *supra* note 70 at 25. Even so, she has recently suggested that "[t]he SSAG give spousal support recipients stronger bargaining chips and spousal support is not so quickly being taken off the bargaining table as it was in the past": Carol Rogerson, "Spousal Support Agreements and the Legacy of *Miglin*" (2012) 31 Can Fam LQ 13 at 44 [Rogerson, "Spousal Support Agreements"].

<sup>72</sup> Rogerson, "Spousal Support Agreements", *supra* note 71 at 20.

<sup>73</sup> *Miglin*, *supra* note 11.

marital property agreements, since spousal support will (theoretically) still be available to alleviate need.<sup>74</sup>

### **Ideological Background**

The broader political and ideological context in Canada must also be considered. The rise of neoliberalism in Canada is well documented.<sup>75</sup> This is significant for legal analysis because neoliberalism clearly has implications for legal decision making, as well as for political, economic, and social policy. Although Canada subscribes to an egalitarian model of the family and particularly emphasizes gender equality, its focus on “individual responsibility” (as described by Eichler)<sup>76</sup> renders it vulnerable to neoliberal encroachment. From a family law perspective, one would expect neoliberal theory to generate decisions emphasizing formal equality rather than systemic disadvantage, social relations, or context. One would also expect rulings limiting access to state support, applying more traditional and conservative understandings of marriage and family relationships, and (in the context of family agreements and arrangements) emphasizing personal responsibility and choice.<sup>77</sup> All of this renders the feminist critique of neoliberalism particularly apposite in the Canadian context.

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<sup>74</sup> In practice, spousal support awards have been comparatively rare: see Julien D Payne & Marilyn A Payne, *Canadian Family Law*, 3rd ed (Toronto: Irwin Law, 2008) at 223 [Payne & Payne].

<sup>75</sup> See e.g. Dobrowolsky, ed, *supra* note 1; Lessard, *supra* note 19 at 297; Treloar & Boyd, *supra* note 17; Janine Brodie, “We Are All Equal Now: Contemporary Gender Politics in Canada” (2008) 9 *Feminist Theory* 145.

<sup>76</sup> For a general discussion of models of the family and their implications, see Eichler, *supra* note 68, ch 1. Canada’s commitment to an egalitarian model (described by Eichler as an “individual responsibility” model) is expressed in section 15 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, which expressly refers to gender equality.

<sup>77</sup> In fact, many of these phenomena have been identified in the literature: see e.g. Lessard, *supra* note 19; Alexandra Dobrowolsky, “Charter Champions?”

However, even if neoliberalism now dominates political discourse, it does not follow that judicial decisions will automatically or consistently apply neoliberal principles. Neoliberal practice is often contradictory, particularly in the gender context.<sup>78</sup> These discrepancies may be partly attributable to the process of political transformation, where one dominant mode of “truth-telling” is gradually displaced by another, with neither dominating in the transitional period.<sup>79</sup> Furthermore, neoliberalism is not a monolithic force, but can be applied differently in different contexts.<sup>80</sup> Hence, variation remains possible, and even likely,<sup>81</sup> particularly since the effects of changes in the policy framework may take time to manifest in different “policy realms.”<sup>82</sup> This is significant in the legal sphere, where judges appointed in a particular political or ideological climate may only gradually be replaced.<sup>83</sup> Hence, contemporaneous judicial decisions may appear contradictory in emphasis and approach, depending on the constitution of the court, and courts may split along ideological lines.<sup>84</sup>

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Equality Backsliding, the *Charter*, and the Courts”, ch 10 [Dobrowolsky, “Charter Champions?”] in Dobrowolsky, ed, *supra* note 1; Lois Harder, “Intimate Relationships and the Canadian State” ch 9 in Dobrowolsky, ed, *supra* note 1.

<sup>78</sup> Brodie, *supra* note 75 at 148.

<sup>79</sup> *Ibid* at 148, citing John Clarke, “Subordinating the Social? Neo-liberalism and the Remaking of Welfare Capitalism” (2007) 21 *Cultural Studies* 974.

<sup>80</sup> Dobrowolsky, “Introduction”, *supra* note 17 at 2.

<sup>81</sup> *Ibid* at 3.

<sup>82</sup> *Ibid* at 16.

<sup>83</sup> See Dobrowolsky, “Charter Champions?” *supra* note 77 at 217 for a discussion of significant changes in the constitution of the Supreme Court of Canada and their political and ideological ramifications. However, as discussed below, the constitution of the Court is not necessarily as significant for analytical purposes as might be expected.

<sup>84</sup> For example, describing the Canadian courts’ response to equality claims under the *Charter*, Dobrowolsky notes that “there was a lag in neo-liberal

Nevertheless, as Brodie notes, “political rationalities . . . privilege specific vocabularies, styles of truth-telling and truth-tellers.”<sup>85</sup> Hence, claims framed in the language of “choice” and “personal responsibility” may receive a more sympathetic hearing than arguments premised on “equality” or “fairness.” Combined with an insistent assumption of gender equality, this may render courts skeptical of claims based on gender discrimination or systemic disadvantage.<sup>86</sup>

Against this background, it is unsurprising that a brief survey of the broader case law of the Supreme Court of Canada in recent years suggests that autonomy and choice are recurring judicial concerns, and that the views expounded are often strongly, though not exclusively, neoliberal in tone.<sup>87</sup> For instance, the recent decision in *Kerr v. Baranow* evidences a strong emphasis on choice and autonomy concerns in the unjust enrichment context.<sup>88</sup> Cromwell J. emphasized that people might deliberately choose not to marry and their intentions in this regard must be given “considerable weight” in determining whether they intended to embark on a “joint family venture.”<sup>89</sup> However, although this aspect of the judgment accords with neoliberalism, Cromwell J. also emphasized the need to look at how

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consolidation and the right-wing critique did not immediately take hold, nor did it have the intended blanket effect.” Gradually, however, in response to shifts in public discourses, “Neo-liberal justifications . . . crept into court decisions.” Dobrowolsky, “Charter Champions?” *supra* note 77 at 207.

<sup>85</sup> Brodie, *supra* note 75 at 147.

<sup>86</sup> Brodie, *supra* note 75 at 160; Dobrowolsky, “Charter Champions?” *supra* note 77 at 215.

<sup>87</sup> This article does not purport to provide a comprehensive analysis of the Supreme Court’s decisions outside of the context of spousal property and support agreements.

<sup>88</sup> 2011 SCC 10, [2011] 1 SCR 269.

<sup>89</sup> *Ibid* at para 94.



the parties “have actually lived their lives,”<sup>90</sup> suggesting a more relational approach. He also noted that conduct could demonstrate a concern for the family as a whole, including personal sacrifice in the family interest.<sup>91</sup> This clearly recognizes that decision making is not always motivated by self-interest, though Cromwell J. makes no reference to the relational or structural pressures that might also apply.<sup>92</sup> Thus, even though some of the issues highlighted by the feminist relational critique do feature in the judgment, the overall tenor is broadly consistent with neoliberal ideology.<sup>93</sup>

Neoliberal “choice” concerns are also evident in equality decisions under the *Canadian Charter of Rights and Freedoms*,<sup>94</sup> notably in *Nova Scotia (Attorney General) v. Walsh*,<sup>95</sup> which upheld the exclusion of unmarried spouses from Nova Scotia’s matrimonial property regime.<sup>96</sup> Bastarache J., for the majority, emphasized that people can choose whether to marry and that this choice should be respected; the marital property regime can only be imposed on those

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<sup>90</sup> *Ibid* at para 88.

<sup>91</sup> *Ibid* at paras 93, 98.

<sup>92</sup> Cromwell J. makes a brief reference to “encouragement” to detrimental reliance (*ibid* at para 99), but otherwise makes no reference to relational pressures.

<sup>93</sup> For a more detailed critique of the neoliberal aspects of the Supreme Court of Canada’s decision in *Kerr*, see Jennifer Flood, “Share the Wealth? *Kerr v Baranow* and the ‘Joint Family Venture’” (2011) 27 Can J Fam L 361.

<sup>94</sup> Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

<sup>95</sup> *Nova Scotia (Attorney General) v Walsh* [2002] SCJ No 84, [2002] 4 SCR 325 [*Walsh*].

<sup>96</sup> The majority held that marriage is a valid difference for the purpose of drawing distinctions, and the case may also be analyzed in terms of its conservative approach to family relationships: see Lessard, *supra* note 19 at 306.

who choose to be subject to it.<sup>97</sup> This approach is clearly consistent with the neoliberal shift in the Canadian polity. However, the dissent of L'Heureux-Dubé J. must also be noted. She highlighted that, for many cohabitants, the choice of one party to marry is denied by the (often exploitative) choice of the other not to do so,<sup>98</sup> reiterating her previous comments in *Miron v. Trudel*.<sup>99</sup> This illustrates the conflicting ideological approaches that may co-exist, and which feature in many of the decisions on family agreements.

Most recently, the Court has revisited the issue of choice in *Attorney General of Quebec v. A.*,<sup>100</sup> in which, as in *Walsh*, the plaintiff challenged the constitutionality of a provincial marital property regime that excluded unmarried partners.<sup>101</sup> Although the case centred on the test for unlawful discrimination under section 15 of the *Charter*, the Court spent considerable time discussing the importance of autonomy and respect for personal choice. This emphasis was most apparent in the judgment of LeBel J.,<sup>102</sup> who held that the marital regime could

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<sup>97</sup> *Walsh*, *supra* note 95 at para 48. Bastarache J. considered that this approach “enhances rather than diminishes respect for the autonomy and self-determination of unmarried cohabitants and their ability to live in relationships of their own design” (*ibid* at para 50).

<sup>98</sup> *Ibid* at para 153.

<sup>99</sup> [1995] SCJ No 44, [1995] 2 SCR 418.

<sup>100</sup> 2013 SCC 5 [*Quebec v A.*].

<sup>101</sup> *Walsh* was particularly relevant in *Quebec v. A.*, since it too concerned the exclusion of common law spouses from a provincial property-sharing regime (in that case, Nova Scotia). The lower courts in *Quebec v. A.* therefore felt bound by *Walsh*. Abella J., however, for the majority, felt that it was appropriate to conduct the section 15(1) analysis “untethered by *Walsh*” (*supra* note 100 at para 347), as the Court’s equality analysis had since “evolved substantially” (*ibid* at para 338).

<sup>102</sup> Speaking for the minority on section 15, though for the plurality on the outcome.

only be imposed on those who had demonstrated a wish to be subject to it, that this consent must be explicit, and that it must be demonstrated by marriage or a civil union. This is because individuals are free to choose different types of conjugal relationships, and to “shape their relationships as they wish.”<sup>103</sup> While conceding that “individuals sometimes make uninformed choices” and might “be unaware of the consequences of their choice of conjugal lifestyle,”<sup>104</sup> the court could not take judicial notice of this. LeBel J. took a classic liberal view of autonomy, construing choice in terms of freedom from state interference, rather than positive empowerment.<sup>105</sup> Notwithstanding the plaintiff’s claim that the assumption of autonomy did not conform to her reality,<sup>106</sup> LeBel J. concluded that the plaintiff “chose to live with [the respondent] in a conjugal relationship without making marriage a precondition to their cohabitation.”<sup>107</sup>

By contrast, Abella J.<sup>108</sup> emphasized the complex, nuanced and potentially illusory nature of “choice,” echoing the recognition in

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<sup>103</sup> *Quebec v A*, *supra* note 100 at para 114.

<sup>104</sup> *Ibid* at para 274.

<sup>105</sup> *Ibid* at para 139.

<sup>106</sup> *Ibid* at para 36.

<sup>107</sup> *Ibid* at para 45. Although the plaintiff’s claims are not described in detail in the judgments, it is possible to identify significant inequalities, which might well have impacted on how the relationship played out. There was a 15-year age gap between the parties, who met while the plaintiff was still at school; there was a vast gulf in the parties’ economic situations; the plaintiff was living far away from her home country and family; the plaintiff became pregnant when the parties were living apart, and it was only after this that cohabitation resumed. For a more detailed account of the facts, see Martin Patriquin, “A Billionaire, the Law, His Brazilian Ex: The Stormy Breakup that May Redefine Marriage in Canada” *Maclean’s* (19 February 2009) online: <[www.macleans.ca/news/canada/a-billionaire-the-law-his-brazilian-ex/](http://www.macleans.ca/news/canada/a-billionaire-the-law-his-brazilian-ex/)>.

<sup>108</sup> Giving the majority judgment on section 15, though in the minority regarding the outcome.

*Miron* that theoretical freedom to marry may be constrained in practice by factors beyond the individual's control.<sup>109</sup> Likewise, McLachlin C.J.<sup>110</sup> referred to a "false stereotype of choice" rather than "the reality of the claimant's situation."<sup>111</sup> Both Abella J. and McLachlin C.J. held that the failure to marry did not reflect the plaintiff's autonomous wish to avoid Quebec's marital regime.<sup>112</sup> The strong differences in approach in *Quebec v. A.* demonstrate both the fraught nature of the autonomy debate and the significance of the underlying ideological paradigms.

### **Analysis of Marital Property and Spousal Support Agreement Cases**

Against this background, what do the analyzed cases say about autonomy in the marital property and spousal support contexts? Given the different structural considerations that apply, this article distinguishes between spousal support and marital property agreement cases. However, this distinction is not rigid, as courts hearing property

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<sup>109</sup> *Supra* note 100 at para 316. Abella J.'s judgment primarily focused on demonstrating how family property reforms in Quebec had subordinated spousal choice to the protection of economically vulnerable spouses.

<sup>110</sup> Concurring with Abella J. on section 15, though with the plurality regarding the outcome.

<sup>111</sup> *Quebec v A*, *supra* note 99 at para 423.

<sup>112</sup> However, it should be noted that McLachlin C.J., unlike Abella J., ultimately held that the discriminatory effects of the legislation were justified by the legislative objective of promoting choice and autonomy with regard to property division and support (*ibid* at para 435); hence, the plaintiff ultimately lost her case.

agreement cases have drawn on spousal support cases,<sup>113</sup> though not always felicitously.<sup>114</sup>

### *Weight accorded to support agreements*

Although the support provisions of the *Divorce Act* cannot be excluded, the *Act* places considerable emphasis on agreement.<sup>115</sup> Section 9(2) obliges legal practitioners “to discuss with the spouse the advisability of negotiating” support and custody matters and to inform spouses of known mediation facilities.<sup>116</sup> However, a separation agreement is simply a matter for “consideration” for the court.<sup>117</sup> In practice, significant weight is likely to be attached to a support agreement, although a court may vary an agreement where the parties’ circumstances have changed and it is just to do so.<sup>118</sup>

Although the predominant emphasis in the case law has been on upholding agreements, the jurisprudence shows a considerable evolution. In the earliest decisions examined for this article, the so-called *Pelech* trilogy (*Pelech, Richardson and Caron*),<sup>119</sup> the spouses had agreed on spousal support with the benefit of legal advice. In all three cases the wife subsequently sought, unsuccessfully, to vary the agreement. The Supreme Court of Canada emphasized the importance of respecting agreements and held that a support agreement or waiver could only be overridden if there was a causal connection between the need for

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<sup>113</sup> For example, in *Hartshorne*, *supra* note 11 (discussed below), both the majority and the minority judgments drew on *Miglin*, *supra* note 11.

<sup>114</sup> Rogerson, “Spousal Support Agreements”, *supra* note 71 at 28.

<sup>115</sup> *Supra* note 64.

<sup>116</sup> *Ibid.*

<sup>117</sup> *Ibid.*, s 15.2(4)(c).

<sup>118</sup> *Ibid.*, s 15.2, 17.

<sup>119</sup> *Supra* note 11.

support and the marriage, together with a radical change in circumstances.

The *Pelech* approach was widely criticized as too restrictive,<sup>120</sup> and subsequently, in *Miglin v. Miglin*,<sup>121</sup> the Supreme Court held that it no longer applied. Under *Miglin*, the key question is whether, at the time of application, the total circumstances make it unacceptable to uphold the agreement. A change in circumstances is part of this overall evaluation, rather than essential in itself.<sup>122</sup> The Court stressed that some changes in circumstances could always be expected; only if there was a significant discrepancy between the parties' expectations and their present circumstances should the court significantly discount the agreement.<sup>123</sup>

In *Miglin*, the spouses signed a separation agreement containing (*inter alia*) a full and final release of spousal support. The wife subsequently obtained a spousal support order under the *Divorce Act*, which was overturned by the Supreme Court of Canada on appeal. Applying a two-tier approach, the Supreme Court held that the court should first consider whether the agreement should be discounted for unfairness in the negotiation process, such as exploitation of one party's vulnerability, or because it failed to comply substantially with the general objectives of the *Divorce Act*. The court should then consider whether, at the time of the support application, the agreement still reflected the parties' original intentions and still complied substantially with the statutory objectives of certainty, finality,

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<sup>120</sup> See e.g. Colleen Sheppard, "Uncomfortable Victories and Unanswered Questions: Lessons from *Moge*" (1994) 12 Can J Fam L 283 at 289; Martha J Bailey, "*Pelech, Caron, and Richardson*" (1990) 3 CJWL 615 [Bailey, "*Pelech, Caron, and Richardson*"]; Carol Rogerson, "The Canadian Law of Spousal Support" (2004) 38 Fam LQ 69 at 78.

<sup>121</sup> *Supra* note 11.

<sup>122</sup> *Ibid* at para 63.

<sup>123</sup> *Ibid* at paras 88–89.

agreement, and equitable sharing.<sup>124</sup> While the court would not simply “endorse any agreement, regardless of the inequities it reveals,”<sup>125</sup> it would not “unduly” interfere with “agreements freely entered into and on which the parties reasonably expected to rely.”<sup>126</sup> Accordingly, although the dissent expressed strong views to the contrary,<sup>127</sup> it appears that statutory fairness objectives alone may not override other policy considerations.<sup>128</sup> On the facts, neither party was particularly vulnerable during the negotiations. Both had had extensive and expert legal and financial advice. The negotiations were not rushed or pressured, and the agreement was “sophisticated”<sup>129</sup> and “exhaustive.”<sup>130</sup> The majority decided that the agreement was fair, both when concluded and at the time of application, and should be upheld.

If the *Pelech* trilogy represents the high point of enforcing agreements, *Miglin* represents an uneasy compromise between the desire to uphold bargains and the recognition that agreements may be unfair or exploitative. However, its exact application continues to be debated and

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<sup>124</sup> *Ibid* at para 4.

<sup>125</sup> *Ibid* at para 43.

<sup>126</sup> *Ibid*.

<sup>127</sup> In *Miglin*, the dissent considered that a support agreement could be overridden if it was objectively unfair at the time of the application; for policy reasons, agreements should reach a threshold of fairness before they are upheld (*ibid* at para 228).

<sup>128</sup> In the previous case of *G (L) v B (G)*, *supra* note 11 [*G (L) v B (G)*], the court considered that the weight accorded to an agreement would vary depending, *inter alia*, on the degree to which it took account of the statutory objectives, particularly that of equitable sharing: para 56. However, the court also emphasized the need for finality and personal responsibility (*ibid* para 55), so that the cases are not necessarily inconsistent.

<sup>129</sup> *Miglin*, *supra* note 11 at para 12.

<sup>130</sup> *Ibid* at para 14.

evolve.<sup>131</sup> Following an extensive review of the post-*Miglin* case law, Rogerson found that the courts initially interpreted the ruling strictly, as meaning that agreements should be upheld unless there were very serious flaws in the negotiation process.<sup>132</sup> Little attention was paid to overall substantive fairness or compliance with the statutory objectives, and many unfair agreements were upheld.<sup>133</sup> However, Rogerson found that the courts gradually became more concerned with both substantive and procedural fairness and more reluctant to uphold agreements that departed significantly from the norms of the *Divorce Act*.<sup>134</sup>

*Miglin's* emphasis on upholding agreements has arguably been further eroded by two recent decisions, *L.M.P. v. L.S.*<sup>135</sup> and *R.P. v. R.C.*<sup>136</sup> Both decisions addressed the weight to be accorded to spousal support agreements which were incorporated into support orders in subsequent applications to vary those orders.<sup>137</sup> In *L.M.P.*, the Supreme Court of Canada held that there is no statutory obligation to consider prior agreements in this context.<sup>138</sup> Applications to vary support orders are made under section 17 of the *Divorce Act*, while applications for spousal support, such as the application in *Miglin*, are made under

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<sup>131</sup> See e.g. the detailed analysis of Rogerson, "Spousal Support Agreements", *supra* note 71.

<sup>132</sup> *Ibid* at 14.

<sup>133</sup> *Ibid*.

<sup>134</sup> *Ibid* at 20.

<sup>135</sup> *Supra* note 11 [*LMP*].

<sup>136</sup> *Supra* note 11 [*RP*].

<sup>137</sup> Rogerson notes that *Miglin* was not actually relevant in either case, as the spousal support agreements in each case, though open-ended, did not expressly purport to be "final." See Rogerson, "Spousal Support Agreements", *supra* note 71 at 62.

<sup>138</sup> *LMP*, *supra* note 11.



section 15.2. The majority of the Supreme Court held that the principles applicable under each section are different, as section 17, unlike section 15.2, does not list prior agreements as a factor for consideration.<sup>139</sup> Under section 17, the only question is whether there was a “change in the condition, means, needs or other circumstances” of either former spouse since the making of the last order, which would probably have resulted in different terms if the change had been known or contemplated at the time.<sup>140</sup> This is because the previous order (and any incorporated agreement) is presumed to have complied, when made, with the objectives of the *Divorce Act*. The same principles were applied in *R.P.*, with the result that the support orders in both cases were upheld, since no material change of circumstances was established in either case.

The decisions in *L.M.P.* and *R.P.* substantially reduce the significance of spousal agreements that have been incorporated into consent support orders.<sup>141</sup> Notwithstanding the contrary views expressed by Cromwell J. in *L.M.P.*,<sup>142</sup> it appears that an agreement is only relevant in section 17 applications to the extent that it addresses the issue of what should amount to a material change in circumstances or clarifies what was in the parties’ contemplation at the time of the

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<sup>139</sup> *Ibid* at para 23.

<sup>140</sup> *Divorce Act*, *supra* note 64; *Willick v Willick*, [1994] 3 SCR 670; *G (L) v B (G)*, *supra* note 11.

<sup>141</sup> For a more detailed discussion of *L.M.P.* and *R.P.*, see Robert Leckey, “Developments in Family Law: the 2010–2012 Terms” (2012) 59 SCLR 193 [“Leckey, ‘Developments’”]; Carol Rogerson, “Spousal Support Agreements”, *supra* note 71 at 61.

<sup>142</sup> The minority judgment of Cromwell J. considered that the provisions of a comprehensive and final separation agreement, incorporated into a court order, must be given “a central role” (*LMP*, *supra* note 11 at para 63) and “accorded significant weight” (*ibid* at para 76) in subsequent applications to vary the court order. *Miglin* applied in this regard, notwithstanding the minor differences between sections 15 and 17.

agreement.<sup>143</sup> The majority noted that “even significant changes” in circumstances might not be “material” for variation purposes “if they were actually contemplated by the parties by the terms of the order at the time of the order.”<sup>144</sup> However, a mere statement that the agreement was intended to be final could not exclude the application of section 17, any more than it could exclude the application of section 15.<sup>145</sup>

Despite these restrictions, the parties’ autonomy is not totally undermined, as the court will only consider varying the order (and hence the agreement) if the threshold of a material change in circumstances is met. Even then, the court will only consider what variation is merited by the change in circumstances; it will not consider the entire matter *de novo*. Finally, since the Court emphasized that *Miglin* remained good law,<sup>146</sup> a spousal agreement that has not been incorporated in a support order may still be considered in support applications under section 15.

### *Weight accorded to marital property agreements*

Two important Supreme Court of Canada decisions dealing with marital property agreements with implications for autonomy occurred within the analyzed time-frame. The first, *Hartshorne v. Hartshorne*,<sup>147</sup> dealt with the interpretation of British Columbia law on marital property agreements.

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<sup>143</sup> *LMP*, *supra* note 11 at para 39.

<sup>144</sup> *Ibid.*

<sup>145</sup> *Ibid* at para 41.

<sup>146</sup> Leckey casts some doubt on this, suggesting that “[t]he implicit message must surely be, however, that the Court has retreated from its enthusiasm for consensual ordering, at least around support”: Leckey, “Developments”, *supra* note 141 at 229.

<sup>147</sup> *Supra* note 11 [*Hartshorne*].

The second, *Rick v. Brandsema*,<sup>148</sup> centred on whether a separation agreement was unconscionable, and hence whether it was valid at all.

*Hartshorne* involved a prenuptial contract. The intending spouses, Robert and Kathleen, cohabited for some years. Both were lawyers, but Kathleen left her employment to care for their first child. Shortly before their wedding, Robert required Kathleen to sign a prenuptial agreement as a condition of marriage. The agreement permitted Kathleen to accrue a share in the family home but otherwise preserved the spouses' separate property entitlements. Kathleen received legal advice that the agreement would probably be set aside as grossly unfair under British Columbia law. Nevertheless, she signed it, after obtaining some relatively minor amendments stating that she signed the agreement against her will and preserving her right to spousal support. On divorce, Kathleen argued that the agreement should be set aside on common law principles or alternatively that the distribution of assets should be reapportioned because the agreement was unfair under the British Columbia *Family Relations Act* 1996.<sup>149</sup>

The trial judge held that there had been no duress, coercion, or undue influence, and that the agreement was not unconscionable. However, it was unfair under British Columbia law because it did not compensate Kathleen for giving up her career. This finding was upheld by the majority of the British Columbia Court of Appeal, which emphasized Kathleen's time out of the workforce, limited work experience, lack of human capital, and childcare responsibilities. However, the majority of the Supreme Court of Canada held that the contract was not unfair. Although the court could intervene where an agreement operated unfairly at the time of distribution, it must respect

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<sup>148</sup> *Supra* note 11 [*Rick*].

<sup>149</sup> Under the 1996 Act, prenuptial domestic contracts moderating the British Columbia matrimonial property regime could be judicially modified if found to be unfair at the date of distribution of the assets: *Family Relations Act*, *supra* note 63 at s 65 (now repealed).

the parties' private agreements where they were properly negotiated with the benefit of independent legal advice. Where, as here, the parties' circumstances on separation accorded with their reasonable expectations at the time of the agreement, and the agreement made adequate arrangements to cater to those circumstances, the agreement should be upheld. The court briefly acknowledged "systemic problems," but emphasized that the immediate concern was "fairness between the parties" rather than broader concerns of gender equality.<sup>150</sup> The evaluation of fairness had to encompass the parties' perspectives,<sup>151</sup> and the court should not interfere unless the parties failed to consider the effects of their decision "in a rational and comprehensive way."<sup>152</sup>

*Hartshorne* was widely criticized for its apparent prioritization of reliance over fairness.<sup>153</sup> However, *Hartshorne* does not mean that marital property agreements will invariably be upheld. *Rick v. Brandsema*<sup>154</sup> centred on whether a separation agreement should be upheld where the husband knowingly exploited the wife's mental instability and deliberately concealed or undervalued assets to reduce the "equalization payment" due to her under British Columbia law. Nancy, the wife, subsequently claimed that the agreement should be set aside as unconscionable or, alternatively, that it was unfair under British Columbia law and should be varied. On appeal, the Supreme Court of Canada held that spouses in separation negotiations had a duty to avoid exploitative behaviour.<sup>155</sup> Where exploitation results in an

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<sup>150</sup> *Hartshorne*, *supra* note 11 at para 46.

<sup>151</sup> *Ibid* at para 44.

<sup>152</sup> *Ibid*.

<sup>153</sup> See e.g. Martha Schaffer, "Domestic Contracts Part II: The Supreme Court's Decision in *Hartshorne v. Hartshorne*" (2003) 20 Can J Fam L 261 at 280-281.

<sup>154</sup> *Supra* note 11.

<sup>155</sup> *Ibid* at para 4, citing *Miglin*, *supra* note 11.

agreement that significantly departs from the statutory objectives, the agreement may be unenforceable due to unconscionability.<sup>156</sup> Since spouses' ability to make proper decisions depends on the provision of complete and accurate information, seriously inadequate disclosure may also justify judicial intervention.<sup>157</sup>

The Supreme Court drew particularly on *Miglin*, stating that it “represented a reformulation and tailoring of the common law test for unconscionability to reflect the uniqueness of matrimonial bargains.”<sup>158</sup> However, as Leckey and Rogerson have argued, this seems to misrepresent *Miglin*. *Miglin* concerned the significance of a spousal support agreement when a court was exercising its discretion to order support under the *Divorce Act*; the focus was therefore on how fairness concerns should be balanced with autonomy and finality in the light of legislative policy. The court might accord less weight to an agreement that was tainted by pressure or exploitation, even if it was not unconscionable. *Rick*, however, concerned the enforceability of a property agreement at common law, so that it is difficult to see how a *Miglin* approach could be appropriate; if an agreement is void, there is nothing for the court to enforce. *Rick* therefore appeared to blur family law legislation with common law and equitable theory, irrespective of the very different contexts of spousal support and property agreements.<sup>159</sup> Accordingly, Rogerson contends that *Rick* is best interpreted as drawing on some of the concepts in *Miglin* to refine the doctrine of unconscionability, rather than as applying the *Miglin* principles directly to property agreements.<sup>160</sup>

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<sup>156</sup> *Ibid* at para 63.

<sup>157</sup> *Ibid* at para 47.

<sup>158</sup> *Ibid* at para 43.

<sup>159</sup> Robert Leckey, “Common Law of the Family—Reflections on *Rick v. Brandsema*” (2009) 25 Can J Fam L 257 [Leckey, “Reflections”]; Rogerson, “Spousal Support Agreements”, *supra* note 71 at 28, 30.

<sup>160</sup> Rogerson, “Spousal Support Agreements”, *supra* note 71 at 32.

## What do the Cases Tell Us about the Supreme Court's Interpretation of Autonomy?

Again, it is necessary to differentiate between spousal support and property agreements, as the Court's approach to autonomy appears mutable.

### *Autonomy in the spousal support context*

The view of autonomy presented in Canadian Supreme Court decisions on spousal support agreements has evolved considerably, although the court's conceptualization appears still to be in a state of flux. The strongest expression of the neoliberal view of autonomy is found in the *Pelech* trilogy, perhaps mirroring the rise of neoliberalism in the 1980s. Giving the majority judgment in *Pelech*, Wilson J. emphasized the need to respect the parties' agreement, where it was freely negotiated and not legally unconscionable, as this would encourage personal responsibility.<sup>161</sup> Personal decision making was preferable to court-imposed solutions, and upholding agreements was essential to encourage settlement. Autonomy was also a good in itself; enforcing agreements showed respect for the individual, whereas fairness-based intervention was arguably paternalistic. *Pelech* was also strongly based on the policy objectives of encouraging self-sufficiency and a "clean break," both of which fit well with neoliberal autonomy concepts.<sup>162</sup> Although the Court adverted on several occasions to structural issues (without however discussing how these might impact on autonomy as opposed to fairness and gender equality), the majority concluded that

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<sup>161</sup> *Pelech*, *supra* note 11 at para 83.

<sup>162</sup> For a discussion of policy concerns in *Pelech*, see Martha Shaffer & Daniel S Melamed, "Separation Agreements Post-*Moge*, *Willick* and *L.G. v. G.B.*: A New Trilogy?" (1999) 16 Can J Fam L 51 at 53; Rogerson, "*Miglin v. Miglin*", *supra* note 71 at 198.

excessive judicial surveillance could ultimately prove counter-productive in addressing such concerns.<sup>163</sup>

The Supreme Court of Canada's most detailed discussion of autonomy in the spousal support context is contained in *Miglin*, where the court's approach appears radically different to that in the *Pelech* trilogy.<sup>164</sup> Noting that an agreement might be vitiated due to oppression, pressure, or other vulnerabilities, the Court held that there was no need to establish "unconscionability" in the commercial law sense of the term when considering how much weight to accord a support agreement under the *Divorce Act*.<sup>165</sup> The Court emphasized the "unique environment" of marital breakdown negotiations, where "emotional turmoil" could render the parties vulnerable and unable to make "rational economic decisions."<sup>166</sup> Feelings of guilt, depression, or anger might be exacerbated by "potential power imbalances" in the marital relationship, and these might affect the negotiations even without deliberate exploitation.<sup>167</sup> The court should therefore "be alive to the conditions of the parties, including whether there were any circumstances of oppression, pressure, or other vulnerabilities."<sup>168</sup> However, the court rejected any presumption of unequal bargaining power, and emphasized that professional advice might counteract vulnerabilities.<sup>169</sup>

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<sup>163</sup> *Pelech*, *supra* note 11 at para 80 (per Wilson J).

<sup>164</sup> However, as Rogerson notes, it took some time for this aspect of the decision to have an impact on the case law: Rogerson, "Spousal Support Agreements", *supra* note 71 at 20.

<sup>165</sup> *Miglin*, *supra* note 11 at para 82.

<sup>166</sup> *Ibid* at para 74.

<sup>167</sup> *Ibid* at para 75.

<sup>168</sup> *Ibid* at para 81.

<sup>169</sup> *Ibid* at para 82.

The dissent in *Miglin* went significantly further, emphasizing that autonomy is affected by situational differences and established patterns of interaction<sup>170</sup> as much as by obvious power imbalances and exploitation. It particularly stressed the significance of “social context”<sup>171</sup> and the “importance of recognizing the degree to which social and economic factors may constrain individuals’ choices at the bargaining table.”<sup>172</sup> It also emphasized the “complicated and gender-based interdependencies” that often arise during marriage and cannot be addressed by formal equality or individualistic doctrines.<sup>173</sup> Furthermore, it noted that women generally have less bargaining strength than men due to financial dependency.<sup>174</sup> Because the parties’ economic and family roles (which are largely gendered) can affect the negotiating process,<sup>175</sup> and because even independent advice might not prevent inequality,<sup>176</sup> excessive deference to separation agreements is inappropriate.

The dissent in *Miglin* clearly draws on feminist criticisms of neoliberal autonomy, incorporates relational approaches, and goes considerably further than the majority in its emphasis on and analysis of relational pressures, power imbalances, and contextual nuances. Indeed, it is possible to characterize the majority judgment as essentially a modified form of neoliberalism, reaffirming the presumption of autonomy even in the face of emotional distress and potential imbalances of power, particularly where suitable independent advice was provided. Hence, despite the “unique nature” of separation

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<sup>170</sup> *Ibid* at para 212.

<sup>171</sup> *Ibid* at para 199.

<sup>172</sup> *Ibid* at para 214.

<sup>173</sup> *Ibid* at para 204.

<sup>174</sup> *Ibid* at para 209.

<sup>175</sup> *Ibid* at para 216.

<sup>176</sup> *Ibid* at paras 212, 218.



agreements, they were “contracts nonetheless,” for which parties “must take responsibility.”<sup>177</sup> However, it is also arguable (and is argued here) that the majority’s approach is sufficiently nuanced and alive to contextual considerations to fall within the relational camp; the theoretical differences between the majority and minority seem to be in degree rather than fundamental conceptualization.<sup>178</sup>

### *Autonomy and marital property agreements*

The Supreme Court of Canada has attached relatively little weight to the emotional pressures applicable in the prenuptial context. The Court did not explicitly analyze autonomy in *Hartshorne*, since its focus there was on the interpretation of the fairness provisions in British Columbia law. Nevertheless, its understanding of autonomy is implicit in the majority judgment of how prenuptial agreements should be treated.

The majority in *Hartshorne* presented a narrative whereby the contract unilaterally prepared by the intended husband, with minimal final amendments by the intended wife, was construed as a freely-negotiated agreement that represented the wishes of both parties. The parties had received independent legal advice and were not under duress, coercion, or undue influence. The emotional context and power imbalance between the parties were effectively screened out. Accordingly, and in contrast to *Miglin*, *Hartshorne* essentially presented a neoliberal view of autonomy. While fair agreements were to be encouraged, the court emphasized that where parties “take personal responsibility for their financial well-being,” the judiciary “should be reluctant to second-guess the arrangements on which they reasonably expected to rely.”<sup>179</sup> The emphasis is on self-determination

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<sup>177</sup> *Ibid* at para 91.

<sup>178</sup> For a similar view, see further Leckey, “Contracting Claims”, *supra* note 5: Leckey sees in *Miglin* “a richer sense of autonomy . . . more consistent with relational theory” (*ibid* at 21).

<sup>179</sup> *Hartshorne*, *supra* note 11 at para 36.

and reliance and the language chosen reflects this; the court felt that the parties' agreement should be respected as they had "truly considered the impact of their choices,"<sup>180</sup> and any intervention must be "in light of the personal choices made."<sup>181</sup>

Although the dissent also focused on fairness, Deschamps J. considered that the circumstances of the negotiation required "increased scrutiny" of the agreement.<sup>182</sup> While Kathleen was not so vulnerable as to render the agreement unconscionable, there was enough to suggest possible unfairness.<sup>183</sup> Kathleen was financially dependent on Robert, the agreement was concluded in pressurized circumstances immediately prior to the wedding, and there was an imbalance of power within the relationship.<sup>184</sup>

Leckey has argued that both the majority and minority in *Miglin* and *Hartshorne* speak in relational terms; that is, they "explicitly adopt a contextual method and sharply distinguish the scenario of negotiating spouses from commercial settings," while also emphasizing the importance of "individual choice."<sup>185</sup> He contends that "differences arise at the point of subjecting the facts to a contextual methodology and normative principles that are more or less shared."<sup>186</sup> He concedes that "[u]nmodified references to choice and autonomy pepper the majority judgments" in *Miglin* and *Hartshorne* and that this suggests "a thin, atomistic subject disengaged from its relationships."<sup>187</sup>

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<sup>180</sup> *Ibid.*

<sup>181</sup> *Ibid.*

<sup>182</sup> *Ibid* at para 90.

<sup>183</sup> *Ibid.*

<sup>184</sup> *Ibid.*

<sup>185</sup> Leckey, "Contracting Claims", *supra* note 5 at 2.

<sup>186</sup> *Ibid.*

<sup>187</sup> *Ibid* at 11.

However, he argues that “the majority and dissenting reasons in *Miglin* and *Hartshorne* demonstrate convergence upon crucial elements of relational theory. Those points on which the judges disagree are internal to relational theorists’ concerns.”<sup>188</sup>

This view, while sustainable in relation to *Miglin*, seems inapposite to *Hartshorne*. It is true that the majority in *Hartshorne* adopted a contextual analysis, but the analysis is limited and constrained by atomistic assumptions, and omits a truly “relational” perspective. For instance, Kathleen’s decision to give up her job to care for the couple’s children was repeatedly characterized by the majority as personal “choice,”<sup>189</sup> and she was assumed to have understood and accepted the consequences of what she had “chosen.”<sup>190</sup> But why did Kathleen make this choice, and where was Robert in the decision-making process? Kathleen’s “choice” necessarily depended on Robert’s support. Furthermore, one of the children had special needs (something not mentioned by the majority); how did this affect Kathleen’s decision to remain at home? It is surely incorrect to suggest, as the dissent does, that Kathleen’s decision to remain at home indicates an unequal power dynamic;<sup>191</sup> she may have been happy to adopt a caring role, may have believed it was “right,” or may simply have believed that it was necessary, given her child’s needs. Relational autonomy should allow her to make this decision, provided she can reflect critically on the issue. However, relational autonomy also holds that the context in which the decision was made is relevant and should not be simply screened out, so that the decision and its consequences are automatically attributed to “personal choice.” Although Leckey argues that the majority “is aware of the complex emotional dynamics”

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<sup>188</sup> *Ibid* at 2–3.

<sup>189</sup> *Hartshorne*, *supra* note 11 at paras 45, 62.

<sup>190</sup> *Ibid* at para 63.

<sup>191</sup> *Ibid* at para 90.

and “simply draws a different conclusion than do the dissenting judges and some critics,”<sup>192</sup> there is no evidence of this in the judgment.

The repeated use of “choice rhetoric” is highly suggestive in terms of how the court conceptualized broader autonomy issues. The majority attributes an unrealistic level of mutuality to the parties’ financial arrangements, implicitly assuming that separate bank accounts were a matter of mutual agreement and satisfaction.<sup>193</sup> Yet Robert was the sole earner and clearly the controlling party in terms of making financial arrangements. Likewise, the fact that Kathleen signed the agreement is taken to imply that it represented her wishes and understanding of fairness, even though the agreement explicitly stated otherwise. The majority emphasized that if Kathleen “truly believed” that the agreement was “unacceptable,” she should not have signed it.<sup>194</sup> This ignores the relational aspects of the decision-making process, including the clear power imbalance between the parties.<sup>195</sup> None of this is to suggest that the agreement should not be upheld. The point is that the contextual discussion actually ignores or misrepresents significant aspects of the context, which contained sufficient indications of vulnerability (as the dissent put it) to suggest potential unfairness and warrant additional scrutiny.<sup>196</sup> The Court’s reluctance to engage with these concerns may be due to what Rogerson describes

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<sup>192</sup> Leckey, “Contracting Claims”, *supra* note 5 at 30.

<sup>193</sup> *Hartshorne*, *supra* note 11 at para 46.

<sup>194</sup> *Ibid* at para 65.

<sup>195</sup> For a detailed analysis of *Hartshorne*, see Schaffer, *supra* note 153; Martha Bailey, “Marriage à la Carte: A Comment on *Hartshorne v. Hartshorne*” (2004) 20 Can J Fam L 249 [Bailey, “Marriage à la Carte”].

<sup>196</sup> *Hartshorne*, *supra* note 11 at para 90. Such “indications” included Kathleen’s lack of employment, the pressure arising from the proximity of the wedding, and Kathleen’s inability to persuade Robert to make more than minor changes to the agreement.

as its “commitment to the value of upholding spousal agreements,”<sup>197</sup> bolstered by an interpretation of *Miglin* that focuses on that decision’s general presumption of spousal autonomy, rather than its emphasis on potential power disparities and recognition of vulnerabilities.

*Rick* presents an interesting contrast with *Hartshorne*. This may be due to the fact that *Rick* dealt with a separation agreement rather than a prenuptial contract, since the Supreme Court of Canada emphasized the “singularly emotional negotiating environment” and “uniquely difficult context” of marital breakdown.<sup>198</sup> This context mandated particular care to ensure that the negotiations were “free from informational and psychological exploitation.”<sup>199</sup> *Rick* stressed the potential vitiation of autonomy by inadequate disclosure, noting that disclosure “anchors the ability of separating spouses to genuinely decide for themselves what constitutes an acceptable bargain.”<sup>200</sup> Accordingly, “full and honest disclosure” *prima facie* implies informed consent.<sup>201</sup>

*Rick* is significant for the Supreme Court of Canada’s reaffirmation of the broader approach to vulnerability taken in relation to separation, if not prenuptial agreements, and also for its acknowledgement of potential bargaining inequalities and power

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<sup>197</sup> Rogerson, “Spousal Support Agreements”, *supra* note 71 at 15.

<sup>198</sup> *Rick*, *supra* note 11 at para 1.

<sup>199</sup> *Ibid.*

<sup>200</sup> *Ibid* at para 48.

<sup>201</sup> *Ibid.* Presumably, one might well have full disclosure without any form of true “consent” or indeed properly “informed” spouses (where adequate advice is lacking to help the spouse make sense of the information provided). Surprisingly, the court suggested that unintentional failure to disclose might be less heavily penalized (*ibid* para 49). However, if the effect of non-disclosure is the vitiation of consent, intent is surely irrelevant.

disparities in spousal relations and the marital breakdown context.<sup>202</sup> In this respect, the Court arguably drew on the more relational aspects of *Miglin*.<sup>203</sup> However, the court was careful to emphasize that the mere presence of vulnerabilities would not necessarily undermine an agreement.<sup>204</sup> The decision is also important for its clarification of the significance of independent legal advice in this context. The Court of Appeal had concluded that the wife's access to professional advice (though she did not take it) was sufficient to counteract her vulnerability.<sup>205</sup> This clearly re-asserted the traditional narrative of autonomy and volition over that of context and vulnerability. However, the Supreme Court of Canada emphasized that it could not be assumed "that the mere presence of professional assistance automatically neutralized vulnerabilities."<sup>206</sup>

### A Paradigm Shift?

It is difficult to draw firm conclusions regarding overarching ideological trends from so few cases. Taken at face value, the cases on both spousal support agreements and marital property agreements suggest a movement from a neoliberal model of autonomy to a more relational perspective. In relation to spousal support, this is evidenced by the differences between the early *Pelech* trilogy and the later decision in *Miglin*, while in relation to property, there is a clear difference in the model of autonomy applied in *Hartshorne* and that underlying *Rick*.

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<sup>202</sup> *Rick*, *supra* note 11 at para 41.

<sup>203</sup> Rogerson, "Spousal Support Agreements", *supra* note 71 at 32.

<sup>204</sup> *Rick*, *supra* note 11 at para 61.

<sup>205</sup> *Ibid* at para 59.

<sup>206</sup> *Ibid* at para 60.

However, it cannot be said that there is a clear, overall shift from neoliberal to relational views within the Court<sup>207</sup>—for instance, (neoliberal) *Hartshorne* was decided a year after (relational) *Miglin*.<sup>208</sup> Nor can the different paradigms be explained simply by reference to the constitution of the Court,<sup>209</sup> as the approaches of individual judges vary considerably. For example, the majority judgments in *Hartshorne* and *Miglin* were both given by Bastarache J., and four of the concurring judges in *Hartshorne* also concurred in *Miglin*. Even if *Miglin* is better construed as based on modified neoliberalism, this does not explain why two of the concurring judges in (neoliberal) *Hartshorne* also concurred subsequently in (relational) *Rick*. This apparent inconsistency is mirrored in the broader case law. For instance, in the constitutional context, McLachlin C.J. took a neoliberal perspective in *Walsh* and *Hodge*, but not in *Miron*, while in *Quebec v. A.* her relational approach to the nature of choice contrasted with her ultimate emphasis on the legislative goal of maximizing respect for autonomy in general, which led her to uphold the impugned regime. LeBel J. gave the leading, neoliberal judgment in *Quebec v. A.* and also concurred with the neoliberal majority in *Walsh* and *Hodge*, but gave the highly relational dissenting judgment in *Miglin* and concurred with the partly relational dissent in *Hartshorne*. How, if at all, can these discrepancies be reconciled?

One possibility is that it takes longer for relational ideas to gain acceptance in some areas than others, and that the shift from neoliberal to relational perspectives occurred later in relation to marital property agreements than for spousal support agreements.<sup>210</sup> These different

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<sup>207</sup> For an opposing view, see Robert Leckey, *Contextual Subjects*, *supra* note 6.

<sup>208</sup> However, note Rogerson's comments on this: Rogerson, "Spousal Support Agreements", *supra* note 71 at 15.

<sup>209</sup> See e.g. Dobrowolsky, "Charter Champions?" *supra* note 77 at 217–219.

<sup>210</sup> The shift towards a relational view in the support context might also be evidenced, more broadly, by the decisions in *Moge v Moge* [1992] 3 SCR 813 and *Bracklow*, *supra* note 67.

evolutionary timelines might be attributable to the different structural and policy considerations applying to each context, with courts more willing to uphold marital property agreements due to the parties' stronger bargaining endowments. However, a similar ideological shift is not evident in the constitutional context, where the admittedly few cases referenced above suggest that the court has fluctuated from more relational perspectives in *Miron* to (largely) more neoliberal views in *Walsh* and *Hodge*, and arguably less neoliberal views in *Quebec v. A.*, where the overall result contrasted with the relational perspectives espoused by the plurality of the court. Therefore, while there does not appear to be an *overall* movement towards more relational perspectives, it seems possible that different ideological approaches may predominate in particular policy contexts.

A second possibility is that, as Brodie suggests,<sup>211</sup> legal ideology is currently in a (prolonged) state of flux, and that relevant policy spaces are highly contested in the transitional period (as evidenced by the Supreme Court of Canada's decision in *Quebec v. A.*). The apparent inconsistencies also accord with Dobrowolsky's reminder that neoliberalism is not immutable, and may be applied differently depending on the context and the actor.<sup>212</sup>

A third possibility is that it is a false dichotomy to distinguish between marital property agreements and spousal support agreements. The real distinction may be between prenuptial and separation agreements, with the Court attaching greater weight to relational factors and pressures in the emotional context of marital breakdown. This might reconcile the approaches taken in *Miglin* and *Rick* (both concerning marital breakdown agreements) with that in *Hartshorne* (a prenuptial contract). However this interpretation seems inconsistent with the majority's emphasis in *Quebec v. A.* on the frequently illusory nature of "choice" in the non-marital context.

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<sup>211</sup> Brodie, *supra* note 75 at 148, citing Clarke, *supra* note 79 at 974.

<sup>212</sup> Dobrowolsky, "Introduction", *supra* note 17 at 2.



## Relational Autonomy in Practice

Do relational understandings of choice and autonomy make any real difference in practice to spousal support and marital property agreement cases? Again, both categories are considered separately.

### *Spousal support cases*

The *Pelech* trilogy was criticized for the court's assumption of free will and rational decision making.<sup>213</sup> However, a broader conception of autonomy might not have made much difference, since it was not contended in any of the cases that the original agreements were involuntary or exploitative<sup>214</sup> or that any of the wives lacked bargaining capacity. Although Shirley Pelech had a history of mental health problems, this was not raised to impugn the agreement. Nor was the quality of legal representation queried in any of the cases, a point particularly emphasized in *Richardson*, where the agreement seemed least fair.<sup>215</sup> There, even the strong dissent of LaForest J. focused on the substantive fairness of the agreement rather than autonomy; that is, the question was whether fairness concerns should override an autonomous agreement, not whether the agreement was really autonomous. Although the majority and dissenting judicial narratives differed regarding Donna Richardson's possible economic dependency and loss of human capital due to non-employment, both narratives addressed this issue in terms of the support objective of minimizing economic disadvantage arising from the marriage, and neither considered whether economic dependency might have affected Donna's bargaining capacity. Hence, relational theory might

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<sup>213</sup> See e.g. Sheppard, *supra* note 120 at 289; Bailey, "*Pelech, Caron, and Richardson*", *supra* note 120; Nicholas Bala, "Domestic Contracts in Ontario and the Supreme Court Trilogy: 'A Deal Is a Deal'" (1988) 13 *Queen's LJ* 1.

<sup>214</sup> Even retrospectively, there was no suggestion that the original agreement in *Pelech* had been unfair (see *Pelech*, *supra* note 11 at para 94), though the objective fairness of the original agreement in *Richardson* seems debatable.

<sup>215</sup> *Richardson v Richardson*, *supra* note 11 at para 3 (per Wilson J).

only have made a difference if the cases were framed differently, and the parties' autonomy in respect of the original agreements was contested.<sup>216</sup>

As to *Miglin*, this article has argued that both the majority and dissenting judgments are highly relational in their conceptualization of autonomy. Both emphasize the importance of context, including all the circumstances of the agreement, and the parties' needs and concerns. Although the dissent went further than the majority in terms of relational analysis (for example, expanding greatly on the inherently gendered nature of bargaining inequalities and the fraught nature of separation negotiations), the majority also appeared fully alive to these issues. The question is therefore whether relational theory made, or could have made, any practical difference to the outcome.

Although the conceptual analysis of autonomy was relational in each judgment, one might argue that the dissent's narrative was more relational in practice. The dissent depicted Linda, the wife, as economically vulnerable and with little human capital, as she had not worked outside the family business for many years, whereas the majority felt that because she had worked, she should be employable. The dissent considered that Linda was prevented from working outside the home due to her increased childcare burden; the majority felt that she could have employed a baby-sitter, as she had done while married, irrespective of her changed circumstances. The dissent, but not the majority, also implicitly represented Eric, the husband, as controlling,<sup>217</sup> though it did not explicitly consider whether this impacted on the negotiation process. Both judgments noted that Linda claimed to have felt pressured, confused, and emotional at the time of the agreement; while the dissent seemed inclined to give more credence to this than the majority, neither judgment actually ruled on this

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<sup>216</sup> The same may be said of many of the cases sampled: see e.g. *LMP v LS*, *supra* note 11; *G (L) v B (G)*, *supra* note 11; *Boston v Boston* *supra* note 11.

<sup>217</sup> *Miglin*, *supra* note 11 at para 125.

issue.<sup>218</sup> However, the tenor of the dissenting judgment suggests that, if pushed, the dissent would have found that the bargaining process was not unimpeachable, even with legal advice. The majority felt that there was no requirement to address the question of whether, given *inadequate* advice, Linda's evidence of pressure would have been sufficient to demonstrate either vulnerability or exploitation for the purposes of the *Act*.<sup>219</sup> This question therefore remains open.

Both narratives therefore depend on contextual interpretation. The dissent highlights concerns identified in the feminist literature, and while its interpretation is arguably stereotypical and disempowering, it is also more relational in its deeper examination of context. Nevertheless, even if the majority had adopted a similar characterization, it might well still have considered that any vulnerabilities were counteracted by the high level of professional advice Linda received.<sup>220</sup> Accordingly, a more relational analysis of the facts might have made little significant difference, once the majority had decided to eschew the dissent's greater emphasis on objective fairness.

A relational approach would have made little difference in *L.M.P.* or *R.P.* Once the majority of the Supreme Court had determined that spousal support could not be revisited under section 17 of the *Divorce Act* without evidence of a material change in circumstances, the autonomy of the parties in reaching the original agreement did not arise, as it was assumed that the agreement had been properly

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<sup>218</sup> The majority concluded that any ensuing vulnerability had been adequately counteracted by the professional advice Linda had received (*ibid* at para 93), while the minority noted that Linda had not pleaded that the agreement was vitiated on this ground, and that the trial judge had made no findings of fact on this issue (*ibid* at para 244).

<sup>219</sup> *Ibid* at para 93.

<sup>220</sup> The dissent had highlighted that independent advice may not counteract established inequalities and patterns of domination: *ibid* at para 212.

scrutinized at the time of the order. However, even if the majority had concurred with the emphasis placed by Cromwell J. on the importance of agreements, it is hard to see how a relational approach could have led to a different outcome. In each case, the husband sought to reduce or terminate the support payable to the wife under a consent order, but there was no evidence that either husband was particularly vulnerable. By contrast, both wives were homemakers, so were presumably more economically vulnerable than their husbands, and the wife in *L.M.P.* also suffered from a serious disability. Accordingly, to the extent that any relational factors might potentially have applied, they could not have been used by the actual applicants to challenge the agreements.

#### *Marital property agreement cases*

Would a relational approach to autonomy have made a difference in *Hartshorne*? One problem here is that the case centred on the interpretation of fairness provisions rather than autonomy as such. Even the dissent (which took a more relational view of autonomy) emphasized that fairness under the British Columbia legislation must be evaluated at the time of the application. It followed that an agreement that was originally unfair or that was impeachable from an autonomy perspective could have become fair by the time of the hearing.<sup>221</sup> Accordingly, the parties' autonomy was something of a side issue, unless duress, unconscionability, or undue influence could be established to set the agreement aside altogether. However, this does not mean that autonomy was irrelevant. The majority stressed that the evaluation of fairness must incorporate the parties' perspectives, as evidenced by the agreement. An agreement where either spouse's autonomy can be impugned must necessarily carry less weight as evidence of his or her view of fairness.

Although there are clear problems with the majority interpretation of autonomy in *Hartshorne*, does this mean that

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<sup>221</sup> *Hartshorne*, *supra* note 11 at para 77.

Kathleen was not acting autonomously when she signed the agreement? This depends on how the case narrative is constructed, and at least two possible relational narratives present themselves in *Hartshorne*.

In the first, Kathleen was a qualified lawyer who had practised for some years and had the benefit of legal advice before signing the agreement. She should have known that her entitlements under the prenuptial agreement were potentially less favourable than if she remained single.<sup>222</sup> She was amenable to Robert retaining ownership of the assets he had acquired before marriage,<sup>223</sup> though she was upset when the agreement he prepared went much further than this. Did she prioritize the marriage, even at a potential financial cost, because she wanted an “official” relationship, or had invested emotionally in the relationship to such a degree that marriage seemed necessary to her, or because she feared the embarrassment of cancelling the wedding at the last minute? If so, it is arguable that she made a voluntary and autonomous choice, based on a relational concern. Clearly, the agreement was not “mutual” or “voluntary” in the sense of being desired by Kathleen or of embodying her concerns or concept of fairness. However, many people enter agreements that do not accord with their personal preferences, and this does not necessarily mean that they are not acting autonomously.

In the second relational narrative, Kathleen had the agreement sprung on her at short notice, immediately before her wedding, when she was particularly emotional. She was already economically vulnerable because she had left her job for family reasons and was

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<sup>222</sup> Bailey has suggested that she might have had a claim in unjust enrichment as a cohabitant, though the judgments in *Hartshorne* do not reveal whether this point was addressed in the legal advice Kathleen received: Bailey, “Marriage à la Carte”, *supra* note 195.

<sup>223</sup> This was indicated in the advice letter of Kathleen’s lawyer, as summarized by Bastarache J.: *Hartshorne*, *supra* note 11 at para 60.

financially reliant on Robert. This should not be construed solely as “her” choice; Robert was involved in the decision as well, as he agreed to support the family. Because of her financial vulnerability, Kathleen had significantly less bargaining power than Robert, and she may have feared that the relationship would end if she did not sign. The emotional pressure and context and the economic disparity between the parties deprived Kathleen of realistic alternatives and also impaired her capacity to think clearly and make informed decisions.

It is therefore possible to make relational arguments both for and against Kathleen’s autonomy, and Leckey is correct that much depends on the contextual application. In fact, the first narrative may be more persuasive. Shaffer has argued that it is not possible simply to “walk away” from a bad deal in a family or personal context, given the high degree of emotional investment in the relationship.<sup>224</sup> However, there is no suggestion in the judgments that Robert was likely to end the relationship if Kathleen failed to sign the agreement. The explicit *quid pro quo* was that Kathleen must sign if she wished to marry Robert; implicitly, if she did not sign, the relationship would continue as before, on a cohabitational basis. As Kathleen had been divorced before, she must have known that marriage is not necessarily permanent or a greater guarantee of security than a non-marital relationship, although she obviously hoped otherwise. This suggests that Kathleen knew she had a viable alternative. Overall, a relational approach to autonomy *could* have made a difference in *Hartshorne*, even within the scope of the legislation, but it would depend on which relational narrative the court found more persuasive.

The relational approach taken in *Rick* clearly did affect the outcome. Again, two potential narratives applied. The trial judge represented Nancy as emotionally vulnerable, a “deeply troubled person” with a flawed “perception of reality” due to “an unhealthy

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<sup>224</sup> Schaffer, *supra* note 153 at 286.

condition of the mind.”<sup>225</sup> Her understanding of the legal process was “misguided”<sup>226</sup> and her thinking was “disordered.”<sup>227</sup> Ben, her husband, was aware that she was vulnerable and deliberately exploited this. Although Nancy had occasional legal advice, it did not compensate for her vulnerability as she was unable to benefit from it. This narrative was accepted by the Supreme Court of Canada as being “amply supported by the evidence,”<sup>228</sup> and was a significant factor in the court’s finding of unconscionability. The Court’s finding was also heavily premised on its acknowledgement of the emotional forces prevalent in the marital breakdown context, which justified lowering the standard for unconscionability.

By contrast, the Court of Appeal had rejected the trial judge’s finding that Nancy’s mental instability affected her ability to comprehend the negotiations and the legal processes, holding that “she knew what she was doing” and that any vulnerability was counteracted by the *availability* of professional advice.<sup>229</sup> Ben was not responsible for Nancy’s inability to benefit from advice and was entitled to the best deal he could get. This interpretation seems premised on an atomistic conception of the parties as individualists who were expected to do their best for themselves. Notional autonomy based on the availability of advice was therefore sufficient for the enforcement of agreements, even if the party receiving the advice was unable to benefit from it. The Court of Appeal did not emphasize the marital breakdown context, which might have encouraged a more nuanced evaluation of the pressures potentially affecting the parties.

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<sup>225</sup> *Rick*, *supra* note 11 at para 23, citing Slade J at trial.

<sup>226</sup> *Ibid.*

<sup>227</sup> *Ibid* at para 28, citing Slade J.

<sup>228</sup> *Ibid* at para 63.

<sup>229</sup> *Ibid* at para 29, citing the Court of Appeal (emphasis added).

## CONCLUSION

This article advocates a relational approach to family property and spousal support agreements. Feminists have identified serious flaws in the neoliberal conceptualization of autonomy; economic rationality and self-interest do not necessarily guide personal decision making, and gendered bargaining disparities may arise from structural conditions. Social context and relations affect not only the development of personal decision-making capacities but also the quality and nature of personal choices. A relational approach to autonomy is more profound and realistic than the neoliberal paradigm and fits better with family relationships. It is also normatively preferable as it vindicates the importance of emotion and connection in the decision-making process.

However, as this article emphasizes, relational theory does not mean that contracts will readily be set aside on emotional grounds. Relational theory recognizes that individuals may have non-economic priorities. Therefore, someone making an objectively “bad” agreement, even in emotional circumstances, may well be acting autonomously. Nor does relational theory mean setting agreements aside simply because one party was vulnerable.<sup>230</sup> The agreement in *Miglin* was upheld, despite the majority’s relational approach to autonomy, since the high level of professional advice Linda received counteracted her vulnerability. Even in *Rick*, where the agreement was held to be unconscionable, the point was not merely that Nancy was vulnerable, but that her vulnerability was unfairly exploited. Accordingly, while vulnerability *may* undermine respect for agreements, it will not always do so. The crucial consideration is whether the individual has the freedom and capacity to consider her situation and feels that she has genuine alternatives in how she responds to it. Often, but not always, professional advice may play a significant role in ensuring the individual has such capacity.

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<sup>230</sup> Cases of duress are of course different.



Although relational theory is more realistic and nuanced in its conceptualization of autonomy than neoliberalism, this article argues that relational theory may not always make the degree of practical difference that many feminists might expect. The case law on marital property and spousal support agreements suggests two explanations for this. The first explanation lies in statutory fairness standards: where courts can intervene to rectify agreements that are considered objectively unfair, the issue of autonomy becomes less important. This is demonstrated by the dissent in *Miglin*, which prioritized objective fairness at the time of distribution over respect for the parties' autonomy. Of course, this position may itself be strongly informed by relational concerns; the *Miglin* dissent was heavily influenced by the potential for unequal bargaining power and emotional confusion in the marital breakdown context, as well as structural gender equality concerns. However, the solution proposed by the dissent was to limit autonomy rather than to reconceive it. On the other hand, where the law emphasizes agreement, or "fairness" is interpreted in light of the parties' stated or assumed preferences (as in *Hartshorne*), autonomy theory becomes more important; it is then essential to ensure that the parties were acting autonomously when they made the agreement that is relied on as indicative of their wishes. Even here, however, a relational view may make less difference than might be expected, since few of the cases analyzed for this article presented an autonomy argument where a relational approach might have had an effect. This may be because the established paradigm of autonomy, as well as the statutory framework, affects how cases are presented. As noted herein, some of the cases examined (particularly *Richardson*) might have been presented differently had there seemed any point in doing so.

The second reason why relational theory may not always have the expected impact lies in the potential for different relational narratives. As this article emphasizes, a relational approach does not necessarily mean that the court will automatically overturn "bad" agreements since relational theory must accommodate agency and choice. Accordingly, much depends on the contextual analysis and the application of theory to the facts. As this article illustrates, the agreement in *Hartshorne* might still have been upheld under relational principles, depending on which factual narrative the court preferred.

Nevertheless, this article also shows that relational autonomy theory can make a very significant difference in some cases. Courts taking a relational approach to autonomy may accord less weight to agreements or set them aside where they were tainted by exploitation or unfair pressure, where legal advice was inadequate to counteract vulnerability, or where procedures are questionable in some way that potentially undermines the quality of consent. This was most notably demonstrated in *Rick*, and might also have been demonstrated in *Miglin*, had the professional advice in that case been lacking, or in *Hartshorne*, had the court preferred a particular relational narrative. Accordingly, there are situations where a relational approach can prove vitally important.

It is therefore a matter of deep concern that the Supreme Court of Canada should continue to espouse the relational approaches it has adopted in *Miglin* and *Rick*, in relation to both spousal support and marital property agreements. However, notwithstanding the decisions in both these cases, the Court's overall approach seems inconsistent. This may be due to the different contexts in which particular agreements are made; it is notable that the Court's repeated emphasis on the emotional turmoil involved in marital breakdown, and the resulting potential for vulnerability, has not been echoed in relation to prenuptial agreements. This difference may be attributable to a concern that prenuptial agreements might too easily be set aside, but as this article's analysis of *Hartshorne* suggests, adopting a relational approach does not prevent a court from upholding agreements in appropriate circumstances.

Alternatively, the apparent disparities in approach may arise from perceived structural and functional differences between spousal support and marital property division. Seen in this light, *Hartshorne* might be regarded as the norm in relation to marital property agreements, with *Rick* being viewed as something of an aberration, based on the extreme nature of its facts. If that is indeed the case, this article contends that it would be preferable to adopt a relational approach to marital property agreements, as well as spousal support agreements. Property division may be highly significant for addressing gender equality concerns, particularly given the discretionary nature of support, and the court may still consider structural bargaining endowments as part of its overall contextual analysis.

A third possibility is that the variable approaches to marital property and spousal support agreements simply reflect the broader legal debate in Canada on autonomy concerns. It is clear from decisions in related areas, such as the recent decision in *Quebec v. A.*, that autonomy theory is part of a highly contested and divisive discussion on freedom, equality, and personal responsibility, which is linked to an ongoing ideological struggle arising from the growth of neoliberalism. The strong neoliberal tone of many recent judgments (notably those in *Walsh*, *Hodge*, *Hawthorne*, and (partly) *Quebec v. A.*), demonstrates that the shift to more relational values evident in *Miglin* and *Rick* is by no means conclusive, particularly as judges have adopted contrasting approaches in different cases. Given the intensity of the debate, it is to be hoped that the Supreme Court of Canada does not regress from its adoption of relational theory and continues to apply relational understandings to marital agreements.