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The Supreme Court and the New Family Law: Working through the *Pelech* Trilogy*

The trilogy of family law decisions, released by the Supreme Court of Canada on 4 June 1987,¹ represents perhaps the most important statement of the past two decades by Canada's highest court on this rapidly changing area of law.² Although decided under the repealed *Divorce Act* of 1968,³ judicial analyses of support and domestic contracts are likely to be little altered under the 1985 Act.⁴ Furthermore, that these cases reveal the Court's underlying philosophy of the new family law as a whole suggests a significance that transcends specific amendments to the Act.

With respect to the outcome of each individual case, specific pronouncements of legal doctrine, and the Supreme Court's apparent understanding of the central features and purposes of the new family law, this comment is largely critical of the decisions. In particular, three arguments are made. First, while the Court's conceptualization of support conforms to the norms of the new family law, the majority demonstrates insufficient sensitivity to the real barriers to the economic independence of spouses disadvantaged by a division of functions within marriage, and/or enduring consequences of the marriage. Second, the majority's inadequate inquiry into the application of contract law principles to the family context and its related failure to distinguish clearly between the separate subjects of support and domestic contracts at issue in each case contribute to its formulation of a confused and inappropriate test to govern the exercise of judicial

* I am greatly indebted to Carol Rogerson, whose valuable comments upon earlier drafts and reference to various sources helped shape the final form of this paper, and to Kathleen Gallivan for numerous discussions, in which particular issues were recognized and clarified.

1. *Pelech v. Pelech* (1987), [1987] 1 S.C.R. 801, 38 D.L.R. (4th) 642 (S.C.C.) [hereinafter *Pelech*]; *Richardson v. Richardson* (1987), [1987] 1 S.C.R. 857, 38 D.L.R. (4th) 699 (S.C.C.) [hereinafter *Richardson*]; *Caron v. Caron* (1987), [1987] 1 S.C.R. 892, 38 D.L.R. (4th) 735 (S.C.C.) [hereinafter *Caron*]. For convenience and in light of the leading character of the *Pelech* decision, I refer throughout to the decisions collectively as the *Pelech* trilogy.
2. The only cases of comparable significance are the series on the use of trust doctrine in family law: *Rathwell v. Rathwell*, [1978] 2 S.C.R. 436, 1 R.F.L. (2d) 1; *Pettus v. Becker*, [1980] 2 S.C.R. 834, 19 R.F.L. (2d) 165; *Sorochan v. Sorochan*, [1986] 2 S.C.R. 38, 2 R.F.L. (3d) 225. Nevertheless, their significance has been greatly overshadowed by provincial legislative action in the area of property division on marriage breakdown.
3. R.S.C. 1970, c. D-8 [hereinafter DA (1968)]. Repealed by *Divorce Act*, 1985, S.C. 1986, c. 4, s. 32 [hereinafter DA (1985)].
4. This is particularly so because the Court had before it as a guide to determining these cases the clear expression of public policy on these issues embodied in the 1985 *Divorce Act*. On the continued relevance of the case law under the 1968 *Divorce Act* to the current Act, see *Fyffe v. Fyffe* (1986), 4 R.F.L. (3d) 215 (Ont. H.C.). See also Berend Hovius, *Family Law: Cases, Notes and Materials*, 2d ed. (Toronto: Carswell, 1987) at 502 [hereinafter Hovius].

discretion under the *Divorce Act* to overlook the terms of a domestic agreement. Third, leaving aside this highly problematic test, the Court's general posture of considerable deference to the terms of such agreements is neither required under the Act nor consistent with the central principles animating the new family law. An alternative approach to this exercise of the Court's jurisdiction is then advanced. Finally, this comment considers the implications of the decisions for future cases involving domestic contracts.

Facts

Of the three, the leading case is *Pelech*. The parties had divorced in 1969, at which time the registrar approved a maintenance agreement providing for \$28 760 over thirteen months "in full satisfaction" of the wife's claim for support.⁵ Fifteen years later, with the ex-husband's net worth at \$1.8 million, Mrs Pelech — who suffered from "ongoing physical and emotional problems"⁶ and was then living at the poverty level — applied for a variation of the original award.⁷

In *Richardson*, the spouses separated in 1979 after twelve years of marriage, during which Mrs Richardson had worked as a clerk-typist until the birth of her second child in 1974 and only twice of "very short duration"⁸ thereafter. A settlement agreement drafted in 1980 granted each spouse custody of one child and — apart from a modest property division — provided that the husband was to pay spousal support of \$175/month for one year and child support of \$300/month with no limit as to duration. By the time of the divorce action in 1983, during which the wife claimed maintenance for herself and increased maintenance for the child,⁹ the wife was receiving social assistance.

Caron dealt with a separation agreement, incorporated into the parties' divorce decree of 1980, which provided, *inter alia*, for the ex-wife to receive \$600/month spousal support "until such time as she shall remarry or cohabit as man and wife with any person for a continuous period in excess of ninety (90) days".¹⁰ When the respondent ceased payments following Mrs Caron's cohabitation with a man in violation of the agreement and, after this second relationship broke

5. It is a curious and unexplained aspect of the case that this agreement followed a ruling by the British Columbia Supreme Court, which awarded permanent maintenance to the wife and "referred the case to the Registrar for recommendations in this regard" (*Pelech, supra*, note 1 at 644).

6. *Pelech v. Pelech* (1984), 41 R.F.L. 274 at 279 (B.C. S.C.) [hereinafter *Pelech* (1984)].

7. The application was made with reference to s. 11(2) of the DA (1968).

8. *Richardson, supra*, note 1 at 702.

9. The application was made with reference to s. 11(1)(a) of the DA (1968).

10. *Caron, supra*, note 1 at 737.

down, the ex-wife applied in 1984 for a resumption of maintenance payments.¹¹ At the time of the application, the thirty-eight-year-old woman was in custody of an eleven-year-old daughter and had come to rely on public assistance.

Two features of these fact situations deserve particular attention. First, although *Pelech* represents a somewhat extreme example, the story the cases tell is far from atypical. Available data reveal a clear pattern in which marriage breakdown consistently results in an improved standard of living for men and represents an economic disaster for women. Based on the experience of California families eight years after the introduction of no-fault divorce in that jurisdiction, Lenore Weitzman discovered that, on average, a woman suffers a seventy-three per cent decline in her standard of living in the first year after divorce, while her former husband experiences a forty-two per cent improvement.¹² Closer to home, a recent report of the National Council of Welfare estimates that one-third of women in Alberta are on social assistance "solely because of marriage breakdown".¹³ It is important to keep this social context in mind while considering the cases.

The second notable characteristic of the trilogy is that, in each case, two legal issues are intertwined: one dealing with the principles governing spousal support, the other with the manner in which the courts should approach domestic agreements determining the rights and obligations of each spouse on marriage breakdown.¹⁴ This peculiarity represents a complicating element to analysis of the cases and to their resolution by the Court. In an effort to avoid the confusion that beset the Court in this respect, each subject is examined in turn.

11. The application was made with reference to s. 11(2) of the DA (1968).

12. Lenore Weitzman, "The Economics of Divorce" (1980/1981) 28 U.C.L.A. L. Rev. at 1251. See also Lenore Weitzman, *The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America* (London: Collier-Macmillan, 1985). These results, for Weitzman, were entirely unexpected. On entering into this research, she assumed that the California experiment with no-fault divorce: "could only have positive results [but she discovered that] these modern and enlightened reforms have had unanticipated, unintended, and unfortunate consequences. [In particular,] gender-neutral rules — rules designed to treat men and women 'equally' — have in practice served to deprive divorced women (especially older homemakers and mothers of young children) of the legal and financial protections that the old law provided. Instead of recognition for their contributions as homemakers and mothers, and instead of compensation for the years of lost opportunities and impaired earning capacities, these women now face a divorce law that treats them 'equally' and expects them to be equally capable of supporting themselves after divorce" (at xi).

13. National Council of Welfare, *Welfare in Canada: The Tangled Safety Net* (Ottawa: Ministry of Supply and Services, November 1987) at 9.

14. In fact, the Court in *Caron* dealt only incidentally with the issue of support, concerning itself instead with the disputed clause in the parties' separation agreement. As a result, this case is examined below only in the section on domestic agreements: *infra*, notes 128-133 and accompanying text.

Support and the New Family Law

Traditionally, alimony was a right, rooted in the wife's status and triggered by the conduct of the parties. Maintenance was available to wives at common law or under provincial legislation¹⁵ only where the husband was guilty of matrimonial misconduct in the form of adultery, cruelty, or desertion and the wife was blameless. As long as she continued to lead a faultless life, the husband's obligation endured.¹⁶

The 1968 *Divorce Act* signalled a new approach, introducing a régime of formal juridical equality by recognizing the eligibility of husbands to corollary relief,¹⁷ and liberating the marital relationship itself from state regulation through the introduction of a form of no-fault divorce.¹⁸ Since state enforcement of marriage as a lifetime commitment has eroded, increasing emphasis has been placed on the desirability of securing, where possible, a speedy termination of all relations between former spouses. This "clean break" philosophy has informed provincial schemes for equal property division¹⁹ and a general shift in the focus of family law during the past two decades from the content of the marriage to the consequences of its breakdown.

The transformation of family law during this period has required a complete rethinking of the grounds for support. With equality has come a philosophy of individual responsibility. Nevertheless, while provincial legislation obliges each spouse to provide for his or her own support and "for the other spouse, in accordance with need, to the extent that he or she is capable of doing so",²⁰ the 1968 *Divorce Act* itself articulated no specific rationale, stipulating only that the court could make such orders "if it thinks fit and just to do so having regard to the conduct of the parties and the condition, means and other circumstances of each of them".²¹

The absence of any principled basis in the Act for continuing support obligations after divorce was singled out for particular criticism by the Law Reform Commission of Canada in its 1975 working paper on *Maintenance on*

15. *Deserted Wives' and Children's Maintenance Act*, R.S.O. 1970, c. 128; *Matrimonial Causes Act*, R.S.O. 1970, c. 265.

16. See Christine Davies, "Principles Involved in the Awarding of Spousal Support" (1985) 46 R.F.L. (2d) 210 at 210-211.

17. DA (1968), s. 11(1)(b).

18. *Ibid.* s. 4(1)(e). The Act nevertheless retained as well the traditional grounds of misconduct: *ibid.* s. 3.

19. See, eg, *Family Law Reform Act*, R.S.O. 1980, c. 152 [hereinafter FLRA]; *Family Law Act*, S.O. 1986, c. 4 [hereinafter FLA].

20. FLRA, s. 15; FLA, s. 30.

21. DA (1968), s. 11(1); the identical wording appears in s. 11(2), dealing with variation.

Divorce.²² Instead, the commission articulated a philosophy, which, it argued, should be explicitly recognized in legislative reform:

The purpose of the maintenance obligations on divorce should be to enable a former spouse who has incurred a financial disability as a result of marriage to become self-sufficient again in the shortest possible time. This should be achieved through new rules for financial provision in the *Divorce Act* that would be based on need and that are neither punitive nor fault-oriented.²³

Within this framework, marriage itself creates no rights to maintenance, which stem instead from "reasonable needs" arising from the marriage.²⁴ In addition, support is rehabilitative in nature: lasting only during "the transition period between the end of the marriage and the time when the maintained spouse should reasonably be expected to assume responsibility for his or her own maintenance".²⁵

Despite the commission report, for the ten years that ensued before parliament finally enacted the 1985 *Divorce Act*, the law of support remained, in the words of Judge Rosalie Abella: "a patchwork of often conflicting theories and approaches [resembling] a Rubik's cube for which no one yet has written the Solution Book".²⁶ Contrary to the commission's recommendations, courts continued to award support in the absence of a causal connection between the

22. Law Reform Commission of Canada, *Maintenance on Divorce: Working Paper 12* (1975), in Hovius, *supra*, note 4 at 344.

23. *Ibid.*

24. The working paper also allowed two exceptions to this general principle: where "physical or mental disability" impairs the ability of either spouse to support himself or herself, and where a spouse is unable to obtain gainful employment (*ibid.* at 345).

25. *Ibid.* The economic concept of moral hazard suggests that temporary orders should normally be the rule, to discourage "malingering" and to encourage efforts at rehabilitation. Nevertheless, the commission recognized that in some cases, "considering the age of the spouses, the duration of the marriage, the nature of the needs of the maintained spouse and the origins of those needs, it would be unreasonable to require the maintained spouse ever to assume responsibility for his or her own maintenance, and it would not be unreasonable to require the other spouse to continue to bear this responsibility".

26. Rosalie S. Abella, "Economic Adjustment on Marriage Breakdown: Support" (1981) 4 Fam. L. Rev. 1.

recipient's needs and the marriage.²⁷ So too did courts differ widely in assessing reasonable needs and prospects for economic rehabilitation.²⁸

The Supreme Court decision in *Messier v. Delage*²⁹ did little to resolve the confusion. In a 4-3 judgment, the Court rejected the ex-husband's application to terminate spousal maintenance in spite of the fact that the ex-wife was thirty-eight years old, had completed a Master's program in translation, had obtained part-time employment, and was no longer required to remain at home to care for the children of the marriage. Writing for the minority, Lamer J. concluded that the husband's obligations had been discharged, reasoning that the "evolution of society and the status of women" required former wives to accept "responsibility for their own upkeep",³⁰ so that maintenance should last only "for so long as it takes to acquire sufficient independence".³¹ Although the majority accepted the principle that "the obligation of support between ex-spouses should [not] continue indefinitely when the marriage bond is dissolved", it deliberately refrained from enunciating any general principles to govern the Court's decision — arguing that the *Divorce Act* established "an intentional flexibility"³² and that "each case is *sui generis*" to be decided in accordance with the factors mentioned in the Act: namely, the parties' conduct, condition, means, and other circumstances.³³ What is more, by failing to explain why the husband's application should be rejected, the majority lent credence to the traditional view of maintenance as "lifetime security for wives in need who are unable to support themselves and who were fortunate enough to marry men of ample means".³⁴

27. *Grime v. Grime* (1980), 16 R.F.L. (2d) 365, 3 Fam. L. Rev. 75 (Ont. H.C.). See also *Newson v. Newson* (1986), 2 R.F.L. (3d) 137 (B.C. C.A.), where Anderson J.A. declared: "it is not necessary in order to succeed in a claim for maintenance to show that one's need was caused by the marriage" (at 159).

28. Thus, for example, while the Ontario Court of Appeal in *Lashley v. Lashley* (1985), 47 R.F.L. (2d) 371 (Ont. C.A.), restricted support to five years where the ex-wife had a Grade XI education and custody of three young children, noting that "the wife is young [and] there is no reason why she should not be able to so arrange her life that she will be in a position to earn an income and maintain herself within the five-year period" (at 372), the Saskatchewan Court of Queen's Bench, in *Richards v. Richards* (1985), 45 Sask. R. 55 (Sask. Q.B., U.F.C.), awarded spousal support to enable the wife to care for her child full time despite her youth and the short duration of the marriage — because she had been put in "a position of want" caused by the "joint decision" that the wife give up her job and have a baby (at 58).

29. (1983), 35 R.F.L. (2d) 337, [1983] 2 S.C.R. 401.

30. *Ibid.* at 356.

31. *Ibid.* at 363.

32. *Ibid.* at 344.

33. *Ibid.* at 350.

34. Berend Hovius, "Case Comment: *Messier v. Delage*", in Hovius, *supra*, note 4 at 397. In the final analysis, Hovius maintains (at 390) that the majority decision turned mainly on a mistaken characterization of the trial court's order as one of limited-term maintenance rather than termination.

This traditional view is reflected in the trial decisions in *Pelech* and *Richardson*. In the former, Wong L.J.S.C. ordered payments of \$2000/month, explaining that "the only reason maintenance has been permitted to revive now is because the wife has dire need and the husband has ample means to provide".³⁵ In the latter, Perras L.J.S.C. (Ont.) cited the "present handicaps experienced by Mrs. Richardson" as sufficient reason to restore spousal support and increase it to \$500/month.³⁶

By the time these cases reached the Supreme Court of Canada, however, parliament had enacted the 1985 *Divorce Act*, giving statutory recognition to the principles of individual responsibility articulated ten years earlier by the Law Reform Commission of Canada and subsequently by the minority in *Messier*.³⁷ That support was denied in *Pelech*, *Richardson*, and *Caron* is testimony to the significance of this clear statement of public policy. Therefore, Wilson J. (Dickson C.J.C., McIntyre, Lamer, and LeDain JJ. concurring) writes in *Pelech* that, although

Mrs. Pelech's hardship is great, to burden the respondent with her care fifteen years after their marriage has ended for no other reason than that they were once husband and wife [creates] a fiction of marital responsibility at the expense of individual responsibility.³⁸

Spousal support, therefore, is justified on the basis of rehabilitation rather than retribution, is conditioned on reasonable needs arising from a division of functions in the marriage, and is normally of temporary duration. In the words of Wilson J., once independence has been attained, "a former spouse who simply falls upon hard times . . . should not be able to fall back on the former spouse, no matter how radical the change may be, simply because they were husband and wife".³⁹ Rather, the imposition of responsibility for changed circumstances

35. *Pelech* (1984), *supra*, note 6 at 285.

36. Unreported decision, cited in *Richardson*, *supra*, note 1 at 703.

37. According to the Act, support should: "(a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown; (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above the obligation apportioned between the spouses pursuant to sub-section (8) [child support]; (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable time" (DA (1985), s. 15(7)). Identical factors are to be taken into consideration in respect of variation: *ibid.* s. 17(7). Furthermore, although the Act retains the fault grounds of adultery and physical or mental cruelty (*ibid.* s. 8(2)(b)), it stipulates that misconduct is not to be taken into consideration in an application for support or variation: *ibid.* s.-ss. 15(6), 17(6).

38. *Pelech*, *supra*, note 1 at 678.

39. *Ibid.* at 677.

on the former spouse requires "that there be some relationship between the change and the marriage".⁴⁰

This formulation surely accords with the norms of equality and individual responsibility reflected in the new family law. What remains problematic in the Court's approach is the manner in which it conceptualizes the causal nexus between current circumstances and a division of functions within the marriage and the requirements of and possibilities for economic rehabilitation.

In *Pelech*, for example, although the wife had largely withdrawn from the labour market from the time of her marriage in 1954 at age twenty-three until the divorce in 1969 — merely assisting her husband in his contracting business as a receptionist and bookkeeper — the Court found "no link" between her poverty and the marriage.⁴¹ While a more sensitive interpretation might suggest that support payments were inadequate for purposes of rehabilitation, the Court attributes her inability to care for herself to "psychological problems which . . . pre-dated the marriage".⁴² In fact, although the trial judge *did* reject the submission that Mrs Pelech's physical and emotional problems stemmed from the husband's physical or mental cruelty, there appears to have been no evidence before the Court that these problems actually *pre-dated* the marriage.⁴³ Regardless, it is arguable that, since the law expects the first resort of the married person in financial need to be his or her spouse rather than public assistance (excluding assistance, such as unemployment insurance, for which the spouse has paid), a similar obligation should survive the dissolution of the partnership for a reasonable period of time.⁴⁴ The Court, however, did not consider this point directly. Therefore, although it obviously decided that Mr Pelech's obligations to his former wife had been discharged, the lack of explicit justification for this conclusion — and the evidentiary basis on which it rests — render it highly problematic.

Similarly, in *Richardson*, the Court — with the sole exception of LaForest J. (dissenting) — betrays an insensitivity to the real barriers to the economic rehabilitation of women who for some time have been out of the job market (or participating in a manner subsidiary to a domestic role) or are burdened

40. *Ibid.* at 676.

41. *Ibid.* at 678.

42. *Ibid.*

43. See *Pelech* (1984), *supra*, note 6 at 277-280.

44. This point is made by the Law Reform Commission of Canada in its 1975 report and is the rationale behind the commission's stated exceptions to individual responsibility for maintenance where "physical or mental disability" impairs the ability of either spouse to maintain himself or herself, and where a spouse is unable to obtain gainful employment (Law Reform Commission of Canada, *Maintenance on Divorce* (1975), *supra*, note 4 at 345, 347). This issue has resurfaced in post-*Pelech* decisions, with the courts adopting widely divergent positions. See Cristin Schmitz, "Cases clash over linking support need to marriage", *The Lawyer's Weekly* (15 January 1988) at 1.

with the care of young children from the marriage. Although Mrs Richardson worked during the early years of the marriage, her withdrawal from the labour market on the birth of her second child confirms that her career took second place to that of the husband — who, by the time of divorce proceedings in 1983, had attained the rank of sergeant with the Ottawa police force. Nevertheless, Wilson J. (Dickson C.J.C., McIntyre, Lamer, and LeDain JJ. concurring) rejects the argument that “the marriage atrophied her skills and impaired their marketability”.⁴⁵ Furthermore, although Mrs Richardson had custody of one of the children of the marriage and was receiving social assistance at the time of the divorce, the majority concludes that “[n]o event has occurred which the appellant is peculiarly unable to deal with because of a pattern of economic dependency generated by the marriage”.⁴⁶

In the end, therefore, while the Court's emphasis on individual responsibility and finality in relations between ex-spouses represents a progressive development, in accordance with principles of gender equality embedded in the new family law, the specific decisions at which the majority arrives in *Pelech* and *Richardson* reveal a failure to examine carefully the practical impediments to financial independence confronting each appellant.⁴⁷ As a result, the Supreme Court has established an unfortunate example to guide the decisions of lower courts.

On the other hand, two factors suggest caution against overstating the implications of the *Pelech* trilogy when it comes to the law of support. First, the specific findings in each case are determined less by broad legal principles of individual responsibility than by factual matters regarding the degree of economic dependency engendered by the marriage. Lower courts are free to arrive at different conclusions of fact involving a more sympathetic reading as to the real barriers to an ex-spouse's economic rehabilitation. Second, and

45. *Richardson, supra*, note 1 at 706. In contrast, LaForest J. concludes that not only would Mrs Richardson's skills have atrophied during the years that she remained at home with the children, but that “she would not have been able to gain the new skills that are so necessary today in her field as well as in others” (at 720).

46. *Ibid.* at 705. Again, LaForest J. displays a refreshing sense of realism here, pointing out that: “Mrs. Richardson is now in her mid-forties and must find time and energy to care for a child, factors that are by no means negligible in asserting her competitive position as against younger people with recent training” (at 720).

47. In contrast, Judge Rosalie Abella has cautioned (extra-judicially) that the courts “must be wary, in attempting to encourage speedy economic recovery and financial independence, about finite support orders that bear no relationship to a spouse's history”, observing that: “It is hard to be an independent equal when one is not equally able to become independent. Independence will not be possible for everyone; it should therefore not be used, as it has sometimes been, prematurely. It should not be used, in other words, where the realities of the marketplace and community combine to make it impractical. The pattern of a given marriage is critical to the possibility of independence” (Abella, “Opening Address” (1985), in Hovius *supra*, note 4 at 8).

of greater significance, is the fact that each case involves not only issues of support, but also questions as to the manner in which a court should approach the terms of a domestic agreement. Reliance cannot, therefore, be placed on one branch of the decisions without examining the other as well.⁴⁸ It is to the latter task that this comment now turns.

Domestic Agreements and the New Family Law

The transformation of spousal support over the past two decades reflects a more general emphasis within the new family law on individual responsibility and individual rights. Conjointly, the law has recognized the freedom of cohabitees to determine the content of their own relationship and to make their own arrangements in settlement of financial matters on the breakdown of their relationship. In this respect, it has been suggested, the law appears to have abandoned the traditional vision of the family as an organic unity, in favour of a conception of cohabitation relationships analogous to contracts.⁴⁹ Given this characterization, it would be surprising not to observe a change in the manner in which the courts have approached domestic contracts.

As late as 1919, the English Court of Appeal refused to enforce a separation agreement on the ground that settlements of this sort "are not contracts because the parties did not intend that they should be attended by legal consequences".⁵⁰ With respect to such promises, the Court held that: "each house is a domain into which the King's writ does not seek to run and to which his officers do not seek to be admitted".⁵¹ Similarly, the courts denied spouses the right to opt out of the legally determined incidents of marriage and divorce. In *Hyman v. Hyman*,⁵² for example, the House of Lords set aside the wife's waiver of legal rights on the grounds that:

[T]he power of the court to make provision for a wife on dissolution of her marriage is a necessary incident of the power to decree such a dissolution, conferred not

48. In fact, the post-*Pelech* decision in *Smith v. Smith* (unreported) would restrict *Pelech* only to those cases in which the parties have settled their affairs by private agreement. The courts in *Winterle v. Winterle* (1987), 10 R.F.L. (3d) 129 (Ont. S.C.) and in *Fisher v. Fisher* (unreported), on the other hand, have read into the decisions more direct statements on the law of support. See Schmitz, *supra*, note 44.

49. See, eg, Mary Ann Glendon, *The New Family and the New Property* (Toronto: Butterworth, 1981). Glendon invokes Sir Henry Maine's often-quoted observation that "the movement of the progressive societies has hitherto been a movement from *Status to Contract*" (at 42). For a critical analysis of this interpretation, see Martha Minow, "Forming Underneath Everything that Grows: Toward a History of Family Law" [1985] Wisc. L. Rev. 819.

50. *Balfour v. Balfour*, [1919], 2 K.B. 571 at 579 (C.A.), *per* Atkin L.J.

51. *Ibid.*

52. [1929] A.C. 601 (H.L.) [hereinafter *Hyman*].

merely in the interests of the wife, but of the public. . . . [Therefore] the wife cannot by her own covenant preclude herself from invoking the jurisdiction of the Court or preclude the Court from the exercise of that jurisdiction.⁵³

As might be expected, more recent authority is substantially more deferential to the consensual arrangements entered into by both spouses on marriage breakdown.⁵⁴ In *Farquar v. Farquar*,⁵⁵ for example, the Ontario Court of Appeal enumerated several reasons for the courts to uphold the terms of a maintenance agreement.⁵⁶ First, it concluded, settlement is desirable both because the parties are likely to be happier with their own solutions than with those imposed by the courts and because it relieves the courts of the burden of resolving disputes.⁵⁷ Second, settlement can be encouraged only if the parties to an agreement can expect it to be binding and recognized by the courts.⁵⁸ Third, parties need to be able to rely on such agreements as final, if they are to plan their future affairs.⁵⁹ Finally, since property and spousal maintenance matters are "inextricably intertwined" in most settlements, it would ordinarily be unfair to reopen the issue of maintenance, while allowing the settlement of property issues to stand.⁶⁰

These objectives — efficiency, certainty, finality, and fairness — are consistent with the norm of individual responsibility and with the "clean break" philosophy of the new family law and are worthy in their own right. On the other hand, where — as is likely to be the case in the context of domestic contracts⁶¹ — imperfect information and disparate bargaining power characterize the negotiation of these agreements, neither efficiency nor fairness are served by a strict adherence to contractual provisions. Rather, the pursuit of these two objectives may require the court to grant relief from harsh terms. In this situation, therefore, the goals of predictability and finality conflict with those of efficiency and fairness. To uphold "freedom of contract" as the primary legal value is thus to make an implicit policy choice favouring the former over the latter — an

53. *Ibid.* at 614, *per* Lord Hailsham L.C.

54. The freedom of cohabitants to make their own financial arrangements in the event of the termination of their relationship is expressly recognized in provincial statutes enacted in the 1970s and 1980s. Both the FLRA and the FLA allow domestic contracts to prevail where in conflict with the Act except where the Act provides otherwise: FLRA, s. 2(9); FLA, s. 2(10).

55. (1983), 1 D.L.R. (4th) 244 (Ont. C.A.) [hereinafter *Farquar*].

56. See also *DalSanto v. DalSanto* (1975), 21 R.F.L. 117 (B.C. S.C.), commenting on "the importance not only to the parties but to the community as a whole that contracts of this kind should not be lightly disturbed" (at 120); and *Harrington v. Harrington* (1981), 22 R.F.L. (2d) 40 (Ont. C.A.): agreements not to be "lightly disregarded".

57. *Farquar*, *supra*, note 55 at 251.

58. *Ibid.*

59. *Ibid.*

60. *Ibid.* at 252.

61. See *infra*, notes 113–114, 122–125 and their accompanying text.

approach that, while characteristic of nineteenth-century contract law, is not immediately obvious today.⁶²

Furthermore, given the absence of any express mention of separation agreements in the 1968 *Divorce Act* and, in light of the stipulation in the 1985 *Divorce Act* that a support order shall merely "take into consideration . . . [an] agreement or arrangement relating to support of the spouse or child",⁶³ it is clear that the judge retains ultimate jurisdiction to overlook the terms of such agreements where, in the words of the 1968 Act, he or she considers this "fit and just".⁶⁴ Consequently, the court must determine the manner in which this authority ought to be exercised.⁶⁵

In resolving this question, three points should be taken into account. First, discretion ought not to be left to each individual judge's intuitive sense of justice⁶⁶ but should instead be structured in some principled manner.⁶⁷ The latter approach not only reduces the incentives to litigate under an uncertain set of criteria but diminishes arbitrariness and, thereby, furthers equality before the law. Second, the factors structuring the exercise of this discretion to overlook the terms of a domestic agreement must be distinguished from those operative in contract law as a whole. Even the most cursory review of this area of the law reveals the existence of numerous doctrines, specific to the law of contracts, which operate to excuse contractual non-performance:⁶⁸ mistake as to contractual

62. See S.M. Waddams, *The Law of Contract*, 2d ed. (Toronto: Canada Law Book, 1984) at 3.

63. DA (1985), s. 15(5)(c) [emphasis added].

64. LaForest J. (dissenting) writes in *Richardson*: "the discretion to award maintenance is vested in the judge in the divorce action, not anyone else. The parties, therefore, cannot oust his or her jurisdiction by contract" (at 711). Similarly, Wilson J. determines in *Pelech* that "the court's supervisory jurisdiction over maintenance cannot be extinguished by contract" (at 663).

65. Wilson J. writes in *Pelech*: "The question thus becomes the nature and extent of the constraint imposed on the courts by the presence of an agreement which was intended by the parties to settle their affairs in a final and conclusive manner" (at 675-676).

66. This approach, one can recall, had dominated the law of support under the 1968 *Divorce Act* (reaching its apogee in the majority decision in *Messier*) but was decisively rejected by the Court in *Pelech* (*supra*, notes 20-40 and accompanying text).

67. See, generally, Kenneth C. Davis, *Discretionary Justice: A Preliminary Inquiry* (Baton Rouge: Louisiana State University Press, 1969). In his "Annotation" to *Webb v. Webb* (1984), 39 R.F.L. (2d) 113 (Ont. C.A.) [hereinafter *Webb*], McLeod remarks that "to be a proper judicial act," the exercise of judicial discretion "must be subject to discretion structuring factors which set out the relevant discretion factors and the weight to be accorded them" (at 114).

68. See, generally, Waddams, *supra*, note 62.

terms, mistake in assumptions, misrepresentation,⁶⁹ unconscionability,⁷⁰ and public policy generally. If parliament's apparent bestowal of *additional* discretion under the *Divorce Act* is to mean anything, therefore, surely it requires something more than mere scrutiny on the basis of *already applicable* contract doctrine. On the contrary, and third, the principles structuring the specifically *statutory* exercise of judicial discretion should find their origin in those values informing the Act and the new family law generally.⁷¹ Only this approach is consistent with the legitimate role of an unelected judiciary.

While some recognition of these factors (or, more often, recognition of some of these factors) is apparent in recent decisions involving domestic agreements, much of the caselaw in this area is unclear.⁷² The *Pelech* trilogy, unfortunately, reproduces this confusion.

In *Farquar*, as noted, the Ontario Court of Appeal favoured a policy of considerable deference to the terms of a domestic agreement. On the other hand, Zuber J.A. wrote for a unanimous Court: "since the settlement is a contract, all of the common law and equitable defences to the enforcement of ordinary contracts are available to the spouse or ex-spouse who seeks to avoid the

69. See *Lamers v. Lamers* (1978), 6 R.F.L. (2d) 283 (Ont. S.C.); *Hood v. Hood* (1981), 4 F.L.R.R. 81 (Ont. S.C.); *Couzens v. Couzens* (1981), 24 R.F.L. (2d) 243 (Ont. C.A.). In each of these cases, moreover, the Court also required full disclosure of assets in the negotiation of a domestic agreement, in recognition of a fiduciary relationship between the parties. Indeed, the FLA recognizes this special duty, providing in s. 56(4)(a) that a court may set aside a domestic contract or a provision in it: "if a party failed to disclose to the other significant assets, or significant debts or other liabilities, existing when the domestic contract was made". The Court in *Farquar*, on the other hand, rejected this approach.

70. See *Munding v. Munding* (1968), 3 D.L.R. (3d) 338 (Ont. C.A.), aff'd 14 D.L.R. (3d) 256 (S.C.C.) [hereinafter *Munding*]; *Trottier v. Altobelli* (1983), 36 R.F.L. (2d) 199 (Ont. C.A.); *Redl v. Redl* (1983), 35 R.F.L. (2d) 117 (Ont. H.C.); *Richie v. Richie*, (1980), 19 R.F.L. (2d) 199 (Ont. H.C.) [hereinafter *Richie*]. The FLA permits the court to set aside private arrangements regarding support "in accordance with the law of contract" (s. 56(4)(c)), where they result in "unconscionable circumstances" (s. 33(4)(a)), or "if a party did not understand the nature or consequences of a domestic contract" (s. 56(4)(b)). Nonetheless, more recent decisions have demonstrated considerably less paternalism than characterized previous decisions such as *Munding*, emphasizing instead the advantages of settlement and the public policy of encouraging parties to bargain seriously. See *Salonen v. Salonen* (1986), 2 R.F.L. (3d) 273 (Ont. U.F.C.).

71. Integrity, writes Dworkin, requires the "Herculean" judge "to construct, for each statute he [or she] is asked to enforce, some justification that fits and flows through the statute and is, if possible, consistent with other legislation in force" (Ronald Dworkin, *Law's Empire* (Cambridge, Mass.: Belknap, 1986) at 338). See also Owen Fiss, "The Death of the Law?" (1986) 72 Cornell L. Rev. 1. In a similar interpretivist vein, McLeod [*supra*, note 67] comments that as "an exercise of legal power" judicial discretion "must reflect the dominant societal views if it is to operate as an effective vehicle of social regulation. Just as society changes, so discretion structuring factors must change in nature and weight to reflect societal aims" (at 115). His subsequent conclusion that the objective of encouraging settlement requires this exercise of discretion to "protect the settlement reached", on the other hand, need not (and, it is argued below, should not) follow from these principles.

72. See *infra*, notes 73-81 and 93-94 and their accompanying text.

agreement".⁷³ The application of these defences, he continued, was to be carefully distinguished from a "narrow range of cases" in which relief is available in spite of the existence of an otherwise valid agreement.⁷⁴ Nevertheless, Zuber J.A. found it unnecessary further to identify this "narrow range".⁷⁵

It was for Blair J.A., in a subsequent case before the Ontario Court of Appeal,⁷⁶ to attempt to put some structure on this discretion. His approach, however, was not — as outlined above — one of principle but, instead, the identification of situations "clearly accepted" by past courts "as justifying a departure from the terms of a separation agreement".⁷⁷ Specifically, he noted three such circumstances: where the failure to provide support is likely to result in one spouse becoming a public charge,⁷⁸ where the maintenance agreement contains inadequate provisions for children,⁷⁹ and where the contract is unconscionable because of "circumstances surrounding its execution".⁸⁰

These remarks should have been approached with considerable caution. To begin with, any method of judicial decision-making that merely catalogues the previous decisions of other courts is liable to reproduce their errors. More seriously, in attempting to define Zuber J.A.'s "narrow range", Blair J.A. blurs the distinction that his brother judge had begun to draw between "all of the common law and equitable defences to the enforcement of ordinary contracts" and the exercise of a specific *statutory* discretion to overlook the terms of a domestic agreement.⁸¹ Unconscionability, in particular, surely falls within the former rather than the latter category.

73. *Farquar, supra*, note 55 at 252.

74. *Ibid.*

75. *Ibid.*

76. *Webb, supra*, note 67.

77. *Ibid.* at 133.

78. *Ibid.* See, eg, the *dicta* of Atkin L.J. in *Hyman supra*, note 52 at 628-629. In Canada, the leading case is *Fabian v. Fabian* (1983), 34 R.F.L. (2d) 313 (Ont. C.A.), where Lacourcière J.A. refers to the "interest of the public" declaring that: "A spouse's primary obligation and duty of maintenance should be enforced when necessary to prevent the other spouse from having or continuing to receive public support" (at 316). Similarly, s. 33(4)(b) of the FLA allows the court "to set aside a provision for support or a waiver of the right to support in a domestic contract . . . if the provision for support is in favour of or the waiver is by or on behalf of a dependent who qualifies for an allowance for support out of public money." A similar rationale was expressed in *Pelech* by the trial judge, who stated that: "The burden of maintaining the wife under these circumstances should not be shifted to the public purse" (at 285).

79. *Webb, supra*, note 67 at 133-134. See *Jull v. Jull* (1984), 42 R.F.L. (2d) 113 (Alta. C.A.); *Binns v. Binns* (1985), 45 R.F.L. (2d) 369 (N.S. Fam. Ct.). The FLA also recognizes this exception to the sanctity of domestic contracts, stating in s. 56(1) that "the court may disregard any provision of a domestic contract" with respect to support where "in the opinion of the court, to do so is in the best interests of the child."

80. *Webb, supra*, note 67 at 134.

81. The majority decision of Arnup J.A. (Weatherston J.A. concurring), on the other hand, was clear on this distinction (*ibid.* at 125).

In the *Pelech* trilogy, however, the Supreme Court appears to accept uncritically Blair J.A.'s framework. Thus, it adopts his threefold itemization of the "narrow range of cases" to which Zuber J.A. had referred, replicates and amplifies his problematic treatment of unconscionability, and disregards Zuber J.A.'s attempt to distinguish between common law and equitable defences to contractual enforcement and the court's discretionary jurisdiction under the *Divorce Act*. Finally, the Court fails to consider seriously the existence of any basis *other than* the "narrow range of cases" as defined by Blair J.A. for judicial exercise of its *statutory* discretion to overlook the terms of a domestic agreement. Each of these components of the trilogy is examined below.

PUBLIC CHARGES AND DEPRIVATION OF CHILDREN

Although it adopts Blair J.A.'s catalogue of situations in which relief is available under the *Divorce Act*, the Court nevertheless rejects both reliance on public assistance and indirect deprivation of children as unjustified grounds for departing from the spousal support provisions of a domestic agreement. The facts of all three cases involved the former circumstance; the latter situation arose in *Richardson*. With regard to the so-called "principle of saving the public purse", the Court's reasoning is consistent with the norms of individual responsibility and the "clean break" philosophy informing the new family law. Absent "a radical change in circumstances flowing from an economic pattern of dependency engendered by the marriage," the Court concludes, "the obligation to support the former spouse should be, as in the case of any other citizen, the communal responsibility of the state."⁸² In so far as indirect deprivation to children is concerned, while recognizing that a spouse cannot barter away the child's right to support, the Court concludes that the different bases and characteristics of child and spousal support dictate that "if the court's concern is that the child is being inadequately provided for, then that concern should be addressed by varying the amount of child support" rather than increasing the amount of spousal support.⁸³ In each instance, the Court's arguments are compelling.

82. *Pelech*, *supra*, note 1 at 677.

83. *Richardson*, *supra*, note 1 at 707. Wilson J. notes several advantages to this approach: "First, it explicitly identifies the area of the court's concern. Second, the benefit accrues to the individual whose legal right it is. The duty to support the child is a duty owed to the child not to the other parent. Third, the traditional characteristics of the child maintenance order better reflect the court's concern for the child's welfare than do the traditional characteristics of the spousal maintenance order. For example, while the court could order that a spousal maintenance order would cease when the children are no longer dependent, child maintenance always ceases when the children are no longer dependent. Further, the amount of child support in child maintenance orders is based on the demonstrated need of the child. Although increased child support may indirectly benefit the custodial spouse, it will not be based on the court's assessment of the spouse's need" (at 707-708).

UNCONSCIONABILITY AND CONTRACT LAW

The court's treatment of contract law proper, on the other hand, is particularly disappointing. Although agreeing with Zuber J.A.'s remarks on the continued availability of "all of the common law and equitable defenses to the enforcement of ordinary contracts", Wilson J. appears to identify these excuses for nonperformance with the single doctrine of unconscionability. In this, she not only follows Blair J.A.'s failure to distinguish between relief under principles of ordinary contract law and the exercise of judicial discretion under the *Divorce Act* but she actually *equates* Blair J.A.'s third category within the "narrow range of cases" acknowledging relief under the Act with all common law and equitable defences to contractual enforcement. Having done so, she dismisses the need for further inquiry into the subject, concluding that:

If the contract is invalid then the question as to whether or not the court should defer to its terms disappears. Thus, unconscionability in the technical sense . . . is not properly a part of this discussion.⁸⁴

Where a central element in each case involves the appellant's request that the Court grant relief from the terms of a contract, it is difficult to imagine how unconscionability can possibly be excluded *a priori* from the discussion. The answer advanced by Wilson J. would appear to be that, because the existence of a contract is a question of fact for the trier of first instance and because an unconscionable contract ceases to be a contract (so that "the question as to whether or not the court should defer to its terms disappears") if a trial judge rules against unconscionability, the question cannot be considered by a higher court.

This approach to the law of contracts exhibits a long-abandoned notion that defences to contractual enforcement operate only by avoiding the genuine "meeting of the minds" required for contract formation. For modern doctrine, on the other hand, these defences do not abrogate the contract but rather excuse nonperformance of an otherwise enforceable agreement.⁸⁵ Consequently, even though the trial judge in *Pelech* failed to rule that the contract had been "vitiated",⁸⁶ "unconscionability in the technical sense" could not properly be excluded *a priori* from discussion by the Court.

On the other hand, it would appear, the Court *was* right to deny relief on the basis of unconscionability in each case of the trilogy. In *Pelech*, the bargain had been entered into "freely and on full knowledge and with the advice of

84. *Pelech*, *supra*, note 1 at 674-675.

85. See Waddams, *supra*, note 62.

86. *Pelech*, *supra*, note 1 at 668.

counsel".⁸⁷ The same conditions applied in *Richardson*⁸⁸ and *Caron*,⁸⁹ so that in no case could the agreement be considered "unconscionable in the substantive law sense".⁹⁰

FRUSTRATION AND THE PELECH TEST

For Wilson J. all analysis of contract doctrine begins and ends with unconscionability — since, as has been pointed out,⁹¹ she identifies the full panoply of common law and equitable defences to contractual enforcement with the single doctrine of unconscionability. Thus, the Court neglects to consider the application of any other doctrine excusing nonperformance to the facts of the *Pelech* trilogy.⁹² As a further result, moreover, it misinterprets as judicial discretion under the *Divorce Act* the operation of these doctrines in several cases that it considers.⁹³

While this is not the place to enter into a detailed discussion of the application of each such defence to the family law context, of particular importance in *Pelech* and *Richardson* is the doctrine of frustration, well-established in the law of contract.⁹⁴ In the former, according to the trial judge, "the parties contemplated at the time of the agreement that the wife would be able to obtain gainful

87. *Ibid.* at 643.

88. See *Richardson*, *supra*, note 1 at 709.

89. See *Caron*, *supra*, note 1 at 736.

90. *Pelech*, *supra*, note 1 at 676; *Richardson*, *supra*, note 1 at 709; and *Caron*, *supra*, note 1 at 744.

91. *Supra*, note 84 and accompanying text.

92. See *supra*, notes 68–70 and accompanying text.

93. This is true, for example, of the Court's treatment of *Ross v. Ross* (1983), 39 R.F.L. (2d) 51 (Man. C.A.) [hereinafter *Ross*], in which the husband was ordered to pay an additional \$18 000 lump sum support in divorce proceedings after he had engaged in threats, pressure and intimidation to get the wife to agree to an "unfair and unbalanced settlement". Instead of interpreting this judgment in terms of the contract doctrine of unconscionability, Wilson J. groups it together with other decisions of the Manitoba Court of Appeal [*Newman v. Newman* (1980), 4 Man. R. (2d) 50 (C.A.); *Katz v. Katz* (1983), 33 R.F.L. (2d) 412 (Man. C.A.)] manifesting a "paternalistic philosophy" respecting the exercise of judicial discretion under the *Divorce Act* (at 663). On the other hand, in this interpretation Wilson J. merely reproduces the approach of the Manitoba court, which is itself unclear on the distinction emphasized here.

94. See *Krell v. Henry*, [1903] 2 K.B. 740 (C.A.). A leading Canadian case on the subject is *Capital Quality Homes v. Colwyn Construction* (1975), 9 O.R. (2d) 617 (Ont. C.A.) [hereinafter *Capital Quality Homes*]. For an application of this doctrine to the context of a maintenance agreement, see *Webb*, *supra*, note 67, in which performance by the husband was excused after he suffered a large and unforeseeable financial loss. As with *Ross*, *supra*, note 93, in which Wilson J. misinterprets unconscionability as statutory discretion, similarly here, the doctrine of frustration is misunderstood as a separate test for the exercise of judicial discretion comprising "a middle ground between the *Farquar* and *Ross* approaches" (at 668).

employment"⁹⁵ — a condition that was obviously not realized.⁹⁶ In the latter, LaForest J. (dissenting) considers it a "reasonable inference" that both parties anticipated at the time of the agreement "that Mrs. Richardson would be able to find work within the one-year period for which support was provided".⁹⁷ Since the majority in *Richardson* rules that the parties' expectations at the time of the agreement were "unclear";⁹⁸ however, it is only in *Pelech* that the Court is forced to address this defence. Here, the treatment by the majority adds to the confusion.

First, Wilson J. is quick to point out that, although the trial judge regarded Mrs Pelech's impoverishment as a "gross" change in circumstances and held that the settlement was predicated on the assumption of the ex-wife's employability, he "does not expressly find that this vitiates the agreement".⁹⁹ Again, this statement betrays a misunderstanding both as to the range of available defences to the enforcement of ordinary contracts and as to their effect (which is not to vitiate the agreement but to excuse nonperformance). While it is true that Wong L.J.S.C. refused to find the agreement unconscionable "at the time the parties entered into it",¹⁰⁰ the fact that he allowed Mrs Pelech's application for variation proves that he *did* consider the settlement unenforceable: "since the circumstances of the parties since the signing have so changed as to make the provision for maintenance contained therein manifestly unfair".¹⁰¹

95. *Pelech* (1984), *supra*, note 6 at 280.

96. The mere fact that the expectations of contracting parties are not realized is, of course, not alone grounds for the defence of frustration; otherwise, the law would permit no bargain that is later revealed to have been bad for either party. Thus, in *Capital Quality Homes*, *supra*, note 94, the Ontario Court of Appeal declared that: "The supervening event must be something beyond the control of the parties and must result in a significant change in the original obligation assumed by them" (at 623). While the former requirement that the cause of frustration be "beyond the control of the parties" would appear to pose an insurmountable barrier to an attempt to apply the doctrine to the support context where an inability to find gainful employment is generally thought to be within the "control" of the ex-spouse, it is important to place a liberal interpretation on this term. The essential question, as Wong L.J.S.C. suggests in *Pelech* (1984), is whether the frustrating circumstances could be fairly attributed to the ex-spouse herself. In this respect, he is clear that Mrs Pelech is blameless: "She managed the settlement funds well and did not squander them. She has not been lazy in seeking employment or to improve herself for such purpose. Despite her efforts, the wife's unstable emotional and physical health has prevented her from becoming self-supporting, and this situation will likely continue. The maintenance fund given to her in 1969 has now been depleted *through no fault of hers*" (*supra*, note 6 at 285) (emphasis added).

97. *Richardson*, *supra*, note 1 at 721.

98. *Ibid.*

99. *Pelech*, *supra*, note 1 at 668.

100. *Pelech* (1984), *supra*, note 6 at 280.

101. *Ibid.* at 284. Of course, the expression "manifestly unfair" implies a particular standard of fairness, and — one can recall — the trial judge imports into this standard both notions of fairness to the public purse and fairness as "lifetime security" that contradict the philosophy of individual responsibility informing the new family law.

In any event, Wilson J. finds more compelling the emphasis on "finality in the financial affairs of former spouses"¹⁰² that Zuber J.A. expresses in the following passage from *Farquar*.

In my view, changed circumstances, even substantially changed circumstances, are not a sufficient basis for avoiding the minutes of settlement. It is inevitable that the circumstances of the contracting parties will change following the agreement. If the change of circumstances would allow a party to avoid an otherwise enforceable agreement, then it is apparent that no separation agreement or minutes of settlement can ever finally resolve anything.¹⁰³

Nevertheless, finding the rule in *Farquar* somewhat too restrictive, she proceeds to formulate a separate test, allowing for judicial intervention in the limited occurrence in which "there has been a radical change in circumstances related to a pattern of economic dependency generated by the marriage relationship".¹⁰⁴

That this statement follows a particularly confused treatment of the law of contract in the context of family law would suggest, at the very least, considerable caution in approaching this test. The problems, however, do not end there. On examination, it is readily apparent that this test is the product of two errors. First, it transforms a test that applies only to those fact situations in which issues of frustration arise into a general test "to be applied by the courts in interfering with the minutes of settlement entered into by former spouses".¹⁰⁵ Second, it confuses the two issues of support and domestic contracts at issue in the *Pelech* trilogy. The radical change that excuses performance of a contract is distinct from the radical change in the fortunes of an ex-spouse that justifies a court order awarding or varying spousal support. The former addresses the deference with which a court should approach the terms of a maintenance agreement; the latter speaks to the principles governing the law of support. While predicating support on a causal connection between an ex-spouse's financial condition and a division of functions within the marriage corresponds to the norm of individual responsibility contained within the new family law, there is simply no reason for relief to be granted from the terms of a separation agreement *only* where "a radical change in circumstances [relates to] a pattern of economic dependency generated by the marriage". Such a test effectively rewrites the doctrine of frustration in the context of domestic agreements.

The majority's confusion in this respect is particularly manifest in *Richardson*, where it holds that the same test applies to the original order for maintenance

102. *Pelech*, *supra*, note 1 at 676.

103. *Farquar*, *supra*, note 55 at 283.

104. *Caron*, *supra*, note 1 at 738. The original statement of the test appears in *Pelech*, at 676-677.

105. *Ibid.*, at 738.

under s-s. 11(1) as is formulated in *Pelech* with respect to *variation* under s-s. 11(2). Surely, this cannot be right. As LaForest J. points out in dissent, there are significant differences between the two types of decision:

When the trial judge exercises an original discretion in a divorce action to make an order for maintenance where the parties have entered into an agreement, it comes to the judge for the first time and he or she must review all the circumstances as a whole in exercising the discretion given by the *Divorce Act* to do what is fit and just. When a variation of such an order is sought, however, the judge is dealing with an order by which it has already been determined under the Act that the agreement was fit and just. The judge's authority is under the Act then confined to considering the circumstances that have since intervened. Under these circumstances a judge should adopt a far more stringent attitude before disturbing the agreement incorporated into a maintenance order.¹⁰⁶

Thus, where an application is made to vary spousal support established under a maintenance agreement and subsequently incorporated into a decree of divorce, it is relevant to consider the causal connection between the changed circumstances and the marriage. This inquiry, however, has nothing to do with deference to the terms of the maintenance agreement — which, and this is the key, has already received its seal of approval by the judge granting the decree of divorce — but everything to do with the previous order of the court.

On the other hand, where the court is requested to overlook the terms of a maintenance agreement on an initial application for divorce, the existence of a causal connection between changed circumstances and the marriage may well be irrelevant to the actual dispute before the court. First, circumstances may not have changed during the intervening period. This, for example, was the case in *Richardson*, where, as Wilson J. points out, “the same conditions” existed at the time of the separation agreement and at the time of the divorce proceedings: “Mrs. Richardson was unemployed and Mr. Richardson was a sergeant in the Ottawa police force earning approximately \$40,000 per annum.”¹⁰⁷ While undoubtedly true, this fact is simply irrelevant to the real issue confronting the Court of whether the original settlement was “fit and just”. To have withheld restoration of support to Mrs Richardson on the basis of the *Pelech* test, therefore, was simply wrong.

Second, even where changes are not “related to a pattern of economic dependency generated by the marriage relationship”, grounds for relief may lie on the basis of frustration. Thus, the Ontario Court of Appeal in *Webb* excused

106. *Richardson*, *supra*, note 1 at 715-716.

107. *Richardson*, *supra*, note 1 at 705.

the husband from previously agreed on support payments after he suffered a catastrophic and unforeseeable financial loss, which was in no way connected to "a pattern of economic dependency created by the marriage relationship".¹⁰⁸ Under the *Pelech* test, this decision would have been reversed.

In both instances, therefore, by asking the wrong questions, the *Pelech* test generates the wrong result.

DISCRETION UNDER THE ACT

Finally, it is necessary to reconsider the question raised at the outset as to the proper basis for the exercise of judicial discretion under the *Divorce Act* to overlook the terms of a private agreement. In this respect, two markedly divergent positions are apparent in the *Pelech* trilogy, separating Wilson J. (writing for the majority) from La Forest J. in singular dissent.

For Wilson J. — who interprets the dominant features of the new family law as: "1) the importance of finality in the financial affairs of former spouses and 2) the principle of deference to the right and responsibility of individuals to make their own decisions"¹⁰⁹ — the exercise of the court's discretion must be narrowly circumscribed. Apart from the *Pelech* test, therefore, she writes:

It seems to me that where the parties have negotiated their own agreement, freely and on the advice of independent legal counsel, as to how their financial affairs should be settled on the breakdown of their marriage, and the agreement is not unconscionable in the substantive law sense, it should be respected. People should be encouraged to take responsibility for their own lives and their own decisions. This should be the overriding policy consideration.¹¹⁰

Furthermore, she adds, such a policy respects "the main stream of recent authority [emphasizing] mediation, conciliation and negotiation as the appropriate means of settling the affairs of spouses when the marriage relationship dissolves".¹¹¹ In this respect, therefore, the majority's deference to the terms

108. See *Webb*, *supra*, note 94.

109. *Richardson*, *supra*, note 1 at 704.

110. *Pelech*, *supra*, note 1 at 676.

111. *Ibid.* at 675.

of a maintenance agreement corresponds to a conviction that the private sphere of the family requires cautious legal intervention.¹¹²

LaForest J. challenges the majority on two grounds. First, he insists, human behaviour within the context of marriage breakdown is unlikely to accord with the ideal vision of contractual interlocutors as rational and self-interested, which is advanced by those who attribute efficiency and fairness to freedom of contract.¹¹³ Thus, he writes, "many people under these circumstances do very unwise things, things that are anything but mature and sensible, even when they consult legal counsel".¹¹⁴ It is for this reason, LaForest J. continues, that parliament adopted an "intentionally flexible policy" in favour of judicial discretion "to order what he or she thinks is 'fit and just' having regard to the factors spelled out in the legislation".¹¹⁵ Thus, he concludes, the majority's policy choice in favour of freedom of contract "is effectively to rewrite the Act", both in violation of the legitimate role of the judiciary and in direct opposition to the intent of the legislature.¹¹⁶

In establishing a basis for the exercise of its discretion to overlook the terms of a maintenance agreement, therefore, the Court appears torn between the majority's approach of consummate deference to freedom of contract and family privacy, and LaForest J.'s insistence on unrestricted powers of judicial discretion. Neither solution is satisfactory. While the former consciously opts for "freedom"

112. While legal recognition of family privacy under the traditional régime — as evidenced by the decision in *Balfour, supra*, notes 50–51 and accompanying text — took the form of "non-legalization," the Court here favours informal justice and "deregulation". See Katherine O'Donovan, "Reforming the Private: Why Can't a Man Be More like a Woman?" in *Sexual Divisions in the Law* (London: Weidenfeld and Nicolson, 1985). It is interesting to note, however, the persistence of the former concept of family privacy. Thus, in *Frame v. Smith* (1987), 9 R.F.L. 225 (S.C.C.), the Supreme Court recently refused to recognize tort liability of an ex-wife who had denied the father liberal access to the children that had been stipulated in the court's custody order, emphasizing "the undesirability of provoking suits within the family circle" (at 258, *per* LaForest J.). For provocative analyses of the intervention/nonintervention debate, see Frances Olsen, "The Myth of State Intervention in the Family" (1985), 18 Mich. J. Law Reform 835, and Martha Minow, "Beyond State Intervention in the Family: For Baby Jane Doe" (1985), 18 Mich. J. Law Reform 933.

113. See *supra*, note 61 and accompanying text.

114. *Richardson, supra*, note 1 at 717. In *Richie, supra*, note 70, for example, Clements L.J.S.C. points out that: "The courts must and do recognize that these agreements entered into upon the breakdown of a relationship are not entered into under ideal conditions. The parties inevitably are under stress, in some cases fearful, and the issues are emotionally charged. The application of the rules of interpretation or determination of commercial contracts in their strict sense, is not possible, on the whole in dealing with domestic contracts" (at 205–206). See also Robert Mnookin, "Divorce Bargaining: The Limits on Private Ordering", in John M. Eekelaar and N. Katz, eds., *The Resolution of Family Conflict: Comparative Legal Perspectives* (Toronto: Butterworths, 1984) 364.

115. *Richardson, supra*, note 1 at 717. The affinity of this approach with that of the majority of the Court in *Messier* is no accident, as LaForest J. expressly cites Chouinard J.'s remarks in that case.

116. *Ibid.* at 713.

over "fairness"¹¹⁷ and appears to entail an illegitimate exercise in judicial policy making,¹¹⁸ the latter produces no uniform standard of fairness by which to constrain the exercise of judicial discretion — thus inhibiting both equality *before* the law and predictability *of* the law, and fostering a climate of frequent, costly, and time-consuming litigation that does little to benefit the parties concerned.¹¹⁹

Fortunately, there remains one final and as yet unexplored basis for the exercise of the court's jurisdiction to overlook the privately agreed terms of a maintenance agreement — a basis that both provides a principled constraint on the exercise of this discretion and accords with the animating value of gender equality informing the transformation of family law during the past two decades. This would require that all domestic agreements conform to a standard of substantive fairness determined according to the principles of gender equality and equal partnership in marriage embedded in the new family law.¹²⁰ While the existence of such a test would not (as did the traditional family law)¹²¹ seek to impose a uniform pattern on the arrangements that spouses may wish to make upon marriage breakdown, it would establish a minimum standard against which such arrangements would be evaluated in determining the respect they are to be accorded.

Of particular importance, such a criterion would recognize explicitly the continued persistence of inequality in the social relations between men and women¹²² — a condition that renders formal juridical equality before the law a necessary but not sufficient condition for the attainment of actual gender

117. *Pelech*, *supra*, note 1 at 675. See *supra*, note 61 and accompanying text.

118. See *supra*, note 71 and accompanying text.

119. See *supra*, notes 66–67 and accompanying text.

120. Katherine O'Donovan writes: "A system of principles governing private relations is an attractive alternative to the present combination of privacy and discretion. The major principle would be that of equality" (*supra*, note 112 at 202).

121. See *supra*, notes 52–53 and accompanying text.

122. Matas J.A. observes in *Ross*: "we have not yet reached the stage where we can safely say that generally husbands and wives are equal or nearly so, in earning capacity, or where we can necessarily say that generally the responsibilities of marriage have not disadvantaged the earning potential of the wife" (*supra*, note 93 at 64).

equality.¹²³ Furthermore, it would acknowledge the impediments to fair and informed "bargaining in the shadow of the law" during a period in which the legal parameters defining the negotiation of private agreements have experienced such rapid change.¹²⁴ Finally, while taking account of LaForest J.'s concerns regarding the context in which domestic agreements are negotiated,¹²⁵ the adoption of such a standard would neither confer on the courts unconstrained discretion to apply individual and potentially conflicting notions of fairness in reviewing maintenance agreements nor transgress the legitimate exercise of judicial authority by independently formulating a policy not explicitly or implicitly contained in legislative pronouncements.¹²⁶

While LaForest J. hints at this approach, in commenting on "the central philosophy [of recognizing] the equal position of the spouses in the marriage partnership" under the new family law,¹²⁷ his perspective remains, in the end, fundamentally conservative. Thus, in *Caron* — where support was terminated according to the terms of a settlement agreement after Mrs Caron cohabited with a man for longer than ninety days — LaForest J. joins the remainder of the Court in refusing the ex-wife's application for variation.¹²⁸

Under the fairness test advocated here, the result should have been the opposite. According to the new family law, as noted,¹²⁹ spousal support is rehabilitative in nature, usually of temporary duration, and based on reasonable needs arising from a division of functions established within the marriage and/or from enduring consequences of the relationship (in particular, the need to care for children) permanent maintenance is available only in the event of a traditional marriage

123. Wilson J. would appear to dispute this statement, replying in *Pelech* to the comments of Matas J.A. in *Ross* (*supra*, note 122) that, although she sympathizes with his concern, she believes "that the case by case approach and the continuing surveillance by the courts over the consensual arrangements of former spouses which he advocates will ultimately reinforce the very bias he seeks to counteract" (*supra*, note 1 at 675). Two responses are in order. First, Wilson J. is addressing in this passage not the principled constraint of substantive fairness advanced here, but rather a perceived "case by case approach" of open-ended judicial discretion. Hence, her reaction to the standard advocated here remains in doubt. In any event, a firm determination that judicial regulation will ultimately undermine progress toward gender equality requires considerable empirical support, which Wilson J. does not provide. On the other hand, if Weitzman's data (see *supra*, note 12 and accompanying text) and, more generally, our experience with employment law over the last century are to be of any guide, one would do well to approach her position with considerable caution.

124. See Robert M. Mnookin and Lewis Kornhauser, "Bargaining in the Shadow of the Law: The Case of Divorce" (1979) 88 Yale L.J. 950.

125. See *supra*, notes 113–114 and accompanying text.

126. See *supra*, notes 66–67, 71 and accompanying text.

127. *Richardson*, *supra*, note 1 at 718.

128. While Wilson J. (Dickson C.J.C., McIntyre, Lamer, and LeDain JJ. concurring) simply defers to the terms of the agreement, consistency with LaForest J.'s approach in *Richardson* (see *supra*, note 106 and accompanying text) requires that LaForest J. defer to the original decree of divorce incorporating the terms of the agreement: see *Caron*, *supra*, note 1 at 744.

129. *Supra*, notes 37–40 and accompanying text.

of long duration, where it would be unreasonable to expect the ex-wife to become self-supporting.¹³⁰ Only in the latter case is the decision of an ex-spouse to cohabit with another at all relevant to this right — and there, only where a choice is made to resume cohabitation in a relationship of economic dependency.¹³¹ To conclude otherwise is to determine that the needs of the dependent spouse and therefore the obligations of the self-reliant partner are automatically extinguished on the former's renewed cohabitation — a view that corresponds to the traditional family, in which women rely on men for their upkeep, but conflicts with the framework of individual rights and responsibilities under the new family law.¹³² On this ground, the Court should have exercised its discretion under the Act to overlook the disputed clause in *Caron* and to restore support.¹³³

Conclusion

While the *Pelech* trilogy clarifies the law of support and, except for the Court's insensitivity to the real requirements of economic rehabilitation, brings it into conformity with the central principles of the new family law, its conclusions with respect to domestic contracts are both confused and ultimately inconsistent with these same principles.

The *Pelech* test, it is submitted, is plainly wrong. It is unfortunate that lower courts are bound to follow it. In any event, it would appear from at least one post-*Pelech* decision,¹³⁴ by adhering to the verbal formula of the test, the court may still achieve a just result. More generally, however, since the Court in *Pelech* expressly refused to enter into an examination of "the substantive law" of

130. See, eg, *Johnstone v. Johnstone* (1985), 48 R.F.L. (2d) 30 (B.C. S.C.).

131. Where support payments permit an ex-spouse to engage in full-time child care, the rationale for support remains unaffected by any subsequent cohabitation — whether or not in a relationship of economic dependency. Similarly, where an ex-spouse in receipt of "rehabilitative" support to finance reacquisition of marketable skills cohabits "as man and wife" while participating, for example, in a retraining program, the rationale for support persists. Even where the ex-spouse chooses to cohabit with another in a relationship of economic dependency, thereby rejecting the rehabilitative objective of the support payments, a free choice to this effect should not be discouraged by the imposition of a financial penalty in the form of termination of support.

132. Note also that such a rule produces a windfall to the self-reliant spouse who is thereby relieved from support obligations.

133. It is difficult to imagine that the Court could have determined that a reasonable period of time had elapsed to justify termination of support payments independently of the settlement agreement — particularly given its admittedly limited knowledge as to the specific work pattern and skills of the appellant. See *Caron*, *supra*, note 1 at 743.

134. See *Isaacson v. Issacson* (1987), 10 R.F.L. (3d) 121 (B.C. S.C.), where an agreement for temporary spousal support was predicated on the mistaken assumption that the wife's retraining course concluded six months sooner than was actually the case. The parties' mutual mistake was said to give rise to "a changed circumstance, and a changed circumstance to which there is a causal connection with the former marriage" (at 127).

contract, lower courts presumably retain their freedom to apply "all of the common law and equitable defenses to the enforcement of ordinary contracts" that Zuber J.A. mentioned in *Farquar*. Characterized as such, rather than as an exercise of discretion under the *Divorce Act*, a court will be able to employ the doctrines of frustration and unconscionability to arrive at results identical to those in *Ross* and *Webb* — each of which is criticized by Wilson J. in *Pelech*.

On the other hand, by adopting an over-riding policy of deference to the terms of such agreements, the Court appears to have forestalled for now the development of a general standard of fairness to govern judicial discretion under the Act.¹³⁵ In so doing, the Court is sending out a strong message against public regulation of the content of domestic contracts. Given the inequality in existing social relations between men and women, this decision is unfortunate. Respect for privacy in this context is resignation to the persistence of inequality.

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135. While it might be argued that ordinary principles of contract law, recognizing nonperformance on the grounds of public policy generally, afford an opportunity to import this standard in spite of the Court's decision, this would go against the majority's clear statement that freedom of contract should be "the overriding policy consideration".