**The Charter and the Supreme Court of Canada as Agents of Change in Family Law**

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1. INTRODUCTION

This article shall examine, as the title implies, the relationship between principles articulated in the Charter and the implementation of those principles within the context of Supreme Court of Canada Family Law decisions. The premise of my article is that the Supreme Court of Canada has acknowledged the importance of the Charter of Rights and Freedoms within the context of legislation pertaining to family law, but more importantly, at least at the initial stages of interpretation, the Charier was used by the Court as a corrective tool in the analysis of family law cases and relationships emanating from before and after the inception of the Charter. Over time, the use of the Charter has become not merely corrective, but has evolved to become a complete template suggesting the stage society has reached and where it should be headed. Thus, the Supreme Court of Canada is now interpreting the Charter along contextual principles of rights balanced with responsibilities. In other words, it is in the family law context that we see the contrasting dynamics between recognition of individual rights and collective rights. Beginning with the case of Walsh and subsequent decisions such as Miglin and Hartshorne, the Court appears to be moving towards a model of balancing collective norms and responsibility and yet, conversely, providing flexibility for individual freedom of choice within the context of family relationships.

2. ANALYSIS

a) The Corrective Decisions

The seminal case concerning the Charter is R v. Oakes.1 When dealing with section 1, Justice Dickson stated as follows:

(This section).. ..Refers (he Court to (he very purpose lor which the Charier was originally entrenched in the constitution: Canadian society is to he tree and democratic. The Court must be guided hy the values and principles essential to a tree and democratic society, which I believe embody to name but a lew, respect lor the inherent dignity ? the human person, commitment to social justice and equality, accommodation of the wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions, which enhance the participation of individuals and groups in society. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the Charter and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect to be reasonable and demonstrahly justified.

Following the trilogy cases of Pelech,2 Caron,3 and Richardson4 one of the first major tests lor the Supreme Court of Canada within a family context came with Moge v. Moge.5 The issue before the Court was that the wife was not economically self-sufficient 16 years alter separation. The question to he determined was whether or not support should he continued or terminated pursuant to section 17 of the Divorce Act and whether the objective of sell-sufficiency should he given priority over continued support.

This case did not explicitly deal with the issue of the Canadian Character of Rights and Freedoms. There is no outward reference to the Charter. However, what is of interest is that the concepts and precepts of the Charter of building a new society within the context of the enumerated heads of the Charter, permeates the reasoning of the Court. Moge also provides the first corrective decision under Charter principles. As Madam Justice L'Heureux-Dubé stated:

The second observation I wish to make is that in determining spousal support it is important not to lose sight of the fact, that the support provisions of the Act are intended to deal with the economic consequences, for both parlies, of the marriage or its breakdown. Marriage may unquestionably be a source of benefit to parties that is not easily quantified in economic terms. Many believe that marriage and a family provides for the emotional, economic and social well-being of its members. It may be the location of safety and comfort and may be the place where its members have their most intimate human contact. Marriage and the family act as emotional and economic support system as well as a form for intimacy. In this regard, it serves vital personal interest and may be linked to building a comprehensive sense of personhood. Marriage and the family are a superb environment for raising and nurturing the young of our society by providing the initial environment for the development of social skills. These institutions also provide a means to pass on the values that we deem to be central to our sense of community.6 (Emphasis added.)

Justice L'Heureux-Dubé went further:

A third point worthy of emphasis, is that this analysis applies equally to both spouses, depending on how the division of labour is exercised in a particular marriage. What the Act requires is fair and equitable distribution of resources to alleviate the economic consequences of marriage breakdown for both spouses, regardless of gender. The reality, however, is that in many if not most marriages, the wife still remains the economically disadvantaged partner. There may be times where the reverse is true and the Act is equally able to accommodate this eventuality.7 (Emphasis added).

As well, the reference to concepts of community, fairness and equitable distribution certainly mirror the purposeful statements of Dickson C. J. in Oakes. Madam Justice L'Heureux-Dubé, in examining the concepts of self-sufficiency within the context of the objectives of the Divorce Act, stated that self-sufficiency is, in effect, only one of several objectives enumerated in the section. There was no intention to attach any priority to any particular objective as she noted, "it is important to realize that the objective of self-sufficiency is tempered by the caveat "insofar as practicable".8

Justice L'Heureux-Dubé relied in part on what she calls the feminization of poverty as an entrenched social phenomenon. "Between 1971 and 1986 the percentage of poor women found among all women in this country more than doubled. During the same period the percentage of poor among all men climbed by 24%. The results were such that by 1986, 16% of all women in this country were considered poor."9 Justice L'Heureux-Dubc relied upon a contextual approach in assessing the issue of whether or not the model proposed by Mr. Mogc in that case was correct or whether a broader contextual approach should he undertaken. She stated as follows:

Bused upon the studies, which I have cited earlier in these reasons, the general economic impact of divorce on women is a phenomenon on the existence of which cannot reasonably he questioned and should he amenable to Judicial Notice. More extensive social data are also appearing. Such studies are beginning to provide reasonable assessments of some of the disadvantages incurred and advantages conferred post-divorce. While quantification will remain difficult ...... Judicial Notice should be taken of such studies subject to other expert evidence, which may bear on them as background information at the very least."10

In quoting from one of her own reasons pre-dating her appointment to the Supreme Cotirt she stated, "1 feel that a Judge should not close his or her eyes to the daily realities of present day life." " The significance of Moge cannot be overstated. It introduced principles of the Charter and expanded strict judicial interpretation by delving into broader social analyses by use of statistical evidence and sociological examinations in order to resolve a particular problem. Although there is nothing particularly new in this approach, what is interesting is that the Divorce Act was used as a proxy to bring the principles articulated in the Charter to bear upon familial relationships. But did the Divorce Act meet the criteria and principles articulated in the Charter of Rights'?

That was left to the subsequent case of Young v. Young.12 Whereas Mogg dealt with concepts of spousal support, Young dealt with concepts basic to family law namely; custody, access and best interests of the child.

The decision in Young was extremely fractious. There were dissents from Madam Justice L'Heurcux-Duhc and various Justices consenting to various portions of the Judgment.

In the Young case, one of the issues that had arisen was whether or not section 16(8) and section 17(5) of the Divorce Act violated subsections 2(a), (b), (d) or section 15(1 ) of the Charter.

Justice L'Heureux-Dube's findings can be summarized as follows:

1. She stated that freedom of religion and expression are fundamental values protected by the Charter. The Divorce Act does not offend Charter values and is completely consonant with the underlying objectives of the Charter.

2. The Charter has no application to private disputes between parents in the family context.

3. It does not apply to Orders in the area of custody and access.13

This is a curious position to take given the fact that in Moge, she was quite willing to engage in an extensive sociological study in order to buttress her position to show the inequalities that permeate a marriage and a relationship. The Divorce Act, she now simply states, "is completely consonant with the underlying objectives of the Charter."14 Yet in this particular context, she is unwilling to engage in a Charter discussion. Her colleagues however, had no qualms in making a determination that the Charter applies or secondly, acknowledging the possibility of applicability of the Charter but not wishing to opine at this time.

Mr. Justice Sopinka writes:

While I agree with McLachlin J. that the ultimate determination in deciding issues of custody and access is the best interests of the child test, it must be reconciled with the Canadian Charter of Rights and Freedoms. General language in a statute, which in its breadth, potentially confers the power to overwrite Charter values, must be interpreted to respect those values. see Slaight Communications Inc. v. Davidson, 1989, 1 S.C.R 1038. It cannot be done the other way around and allow the best interest test in its broadest interpretation to read down Charter rights so as to accommodate this interpretation."13

He refines the test:

In my view, the test in section 16(10) of the Divorce Act, R.s.c. 1985, c.3 (2nd supp.) and the Charter right involved in this case, in which freedom of religious expression, can best be reconciled by interpreting the best interest test to allow the right to be overridden only if its exercise would occasion consequences that involve more than inconvenience, upset or disruption to the child and incidentally to the custodial parent. The long term value to a child of a meaningful relationship with both parents is a policy that is affirmed in the Divorce Act.16

Justices Cory and Iacobucci took a different position and perhaps waited for a heller set of circumstances when they stated:

We wish to refrain from expressing any opinion on Justice McLachlin's discussion of whether, if an infringement of the Charter were found, such an infringement would be so trivial as not to warrant Charier protection. We similarly wish to reserve our views on the question discussed by Justice L'Heureux-Dubé of whether or not the Charier applies to Judicial Orders made in custody or access proceedings.17

Justice McLachlin states thai in her view "thai a Court cannot make an Order limiting expression or religious freedom in that, the guarantees of religious freedom and freedom of expression in the Charier do not protect conduct, which violates the best interest of the child test."18 McLachlin J. found that the tests for the best interests of the child, under the Divorce Act do not violate the Charter and are constitutionally valid.19

The decision in Young was, as stated earlier, very fractious. The Court was wrestling with the formal applicability of the Charier within the family law context. It is submitted that the formality of recognition that the Divorce Act, even with the dissent of Justice L'Heureux-Dubé stating so, either complies or should comply with the principles of the Charter. The Courts are recognizing that there is applicability of the Charter either by way of legislation conforming to the standards of the Charter, as staled in the dissent of Justice L'Heureux-Dubé or that the Charter is an overriding legislation that is used as a corrective measure for any inequalities that may arise out of the interpretation or application of various components of the Divorce Act or other Acts.

The Court, in a subsequent decision, went further to flesh out the importance of the Charter within the context of the Divorce Act and showed its comfort at doing so in its further quest toward correcting old wrongs. In Willick v. Willick,20 we again see the tug-of-war between applicability of the Charter as an express tool for interpretation and its principles being used to define the applicability of particular legislation. In Willick, the Court dealt with the proper interpretation of section 17(4) and the extent of the powers of the Courts under the Divorce Act to vary child support, which has been agreed to by the parties in a Separation Agreement, which has subsequently been incorporated into a decree nisi. Although the entire Court agreed with the conclusion, they achieved this result by two very different roads. This is made clear in the approaches of Justice Sopinka and Madam Justice L'Heureux-Dubé. Justice Sopinka stated candidly:

No constitutional issue arises in this case. No attack was made on the section and neither party relied on the Canadian Charter of Rights and Freedoms as an interpretative tool. In any event, I have serious reservations about the use of the Charter as an interpretive tool, where, the other rules of construction make the intention of the legislature plain. Use of the Charter in this manner, means that the clear intention of Parliament is blunted by confining it within Charter values without resort to section 1. If this approach is legitimate, resort to section 1 of the Charter would be unnecessary. The Legislature's intention would be headed off by a benign interpretation. The result would be to prevent the Legislature from exercising the full extent of its powers as permitted by Section 1."21 (Emphasis added.)

In other words, Justice Sopinka was able to make a finding in this particular case, on a strict interpretation of the Divorce Act without the necessity of reverting to the Canadian Charter of Rights and Freedom as an interpretative tool. Justice L'Heureux-Dubé came to the same conclusion as Sopinka J. However, she, in conjunction with Justice Gonthier and Justice McLachlin came to it via a very different route. She, as she did in Moge, relied upon a contextual approach to her analysis. She states as follows that:

Even where a rule of law is not itself an issue, it has been recognized that social research can still aid a Court by illuminating the social framework in which the facts of the particular case are to be adjudicated. The pressing social authority component of such a framework recommends a jurisprudenlial approach that is in many respects similar to that, according to social authority.22

She continues by stating that:

Aspects of family law, because of its largely prospective nature and because of the profound impact upon both individuals and more generally public attitudes towards the institution of the family fall squarely within this rubric. In the course of Charter interpretations, discourse has often taken notice of reliable social research and social economic data in order to assist its contextual section I analysis of the Rights violation.23

Not to open the doors wide open, Justice L'Heureux-Dubé is conscious of the threat of allowing untrammelled data into the Court when she states:

I do not need to say that the Judge's power to take notice of social authority relevant to legal interpretation should be untrammelled. I share my colleague's concern that this power being exercised prudently by Judge's and that, where feasible, the parties should be accorded the opportunity to comment if the matter is susceptible to dispute. I do not feel that such precaution should preclude me in the present case, however, from taking note to two general facts, which are in my opinion totally beyond dispute. The significant level of poverty amongst children in single parent families and the failure of the Courts to contemplate hidden costs in their calculation of child support awards. Drawing upon these factors should not be taken to imply that the context itself determines the Court's decision as to the law. Rather, contemplation of these factors ensures that this Court's decision will address and interpret the law's place within its social context.24

Readers will note that this same approach was used in Moge. It is submitted that the Courts, when they wish to move in a certain direction, have shown a willingness to take corrective measures within a social context having recourse to social studies examinations and the like in order to make the policy argument to rationalize a position in law. This contextual analysis suggests that the Court is trying to create the context lrom which a corrective measure must he undertaken. The attempts at such contextual analyses are broad brush attempts to define and place society within the context of "free and democratic" as articulated in Oakes to provide a path towards such an ideal. Interestingly, Justice L'Heureux-Dubé takes an activist position concerning the Charter in these cases, which she was unwilling to take in Young.

In Willick, she states that:

Given the profound economic impact on the parties that may follow from differing interpretations of the Divorce Act support provisions, it falls in the present case as it did in Moage, supra, this court should seek to assure itself that its preferred intrepretation is consistent with the Charter values of substantive equality rather thatn eith values of formal equality, which preceded this Court's comments on Section 15 of the Charter in Andrews v. Law Society of British Columbia, 19R9, 1 S.C.R. 143." By this, I do not mean that family law support provisions should be interpreted so as to right single-handedly the systemic and structural inequalities that contribute to spousal economic difficulties following marital break up. I do stress however, that it is important that statutory provisions be interpreted in such a way as not to contribute to that inequality in a way that is contrary to the values of substantive equality in our Charter."25 (Emphasis added.)

Justice L'Heureux-Dubé stated further:

"An assessment of whether a particular interpretation of a statute is consistent with these Charter values necessitates a contextual approach, which contemplates the social framework in which the Act operates. Interpretation consistent with the values of substantive equality espoused by the Charter requires that both words and results be contemplated. Both under the Charter and in the interpretation of provincial human rights statutes, this Court has firmly pronounced that a finding of discrimination hinges upon the effect of a given action or policy"; Andrews supra; Ontario Human Rights Commission and O'Malley ½ Simpson Sears Limited, 1985 2 S.C.R. 536."26 (Emphasis added.)

Justice L'Heureux-Dubé clearly states that the context is all-important when there is a request to interpret ss. 15(5) and 17(5) of the Act ". . .(it is only) by looking to social context can this Court meaningfully interpret what is meant in ss. 15(5) and 17(5) of the Act by the openended reference to "condition, means, needs and other circumstances of each spouse and of any child of the marriage" and assess what is truly at stake by way of the best interests of the child as required by Section 17(5)."27

This passage highlights the contretemps of the decision of Justice L'Heureux-Dubé in Willick, as it pertains to the issue of best interests of the child. In Young, she had no difficulties in finding that the best interests of the child should be limited to merely the Divorce Act and only the Divorce Act. Justice McLachlin found that the Canadian Charter of Rights and Freedoms cannot be used to violate the concepts of the best interests of the child. Yet, what we find in this particular case is an evolution from Young; to state that under certain circumstances and, in order to truly assess what is truly at stake, it is important to look at the social context and have reference to the Charter. In other words, do not lake a narrow view of fundamental principles in the context of the family. To this end, Justice L'Heureux-Dubé's attack on Sopinka J. is worth reviewing:

Since drafting this opinion I have read the reasons of my colleague Justice Sopinka. With respect, for the reasons above, I cannot agree that the Sections of the Divorce Act at issue in the present appeal should be interpreted without regard to their social context, and without consideration of the indisputable social realities in which the act operates. Consequently, I prefer not to confine myself to 'ordinary' rules of statutory construction in seeking the proper interpretation and application of the legislation at issue. The capacity of 'ordinary' rules of statutory construction to bring us to the same conclusion, as did my colleague in this particular case is more fortuitous than probative of their actual worth, and certainly less reliable. Simply put the 'ordinary' rules rules of statutory interpretation favoured by my colleague do not give adequate consideration to the degree to which a particular interpretation is consistent with Charter values. Although the 'ordinary' rules of statutory interpretation are time tested and certainly worthy of respect we cannot allow them to lead us unquestioning, down a garden path which risks sidestepping or undermining the Charter.28

It is true that these jurists have taken somewhat different positions to the positions they took in Young. Whereas Sopinka recognized in Willick, the necessity for strict statutory interpretation if it can he done without extrinsic evidence for Charter analysis; L'Heureux-Dubé acknowledges the requirement for the Charter and the applicability of the Charter to cases within the Divorce Act. Although she implicitly agreed in Young, that the Divorce Act docs not violate the Charter she begins to examine as to whether or not certain components of the Divroce Act do indeed, fit into the criteria of the Charter. I would submit that in Young, Justice L'Heureux-Dubé may have spoken in haste when stating that the Divorce Act blindly complies to the requirements of the Charter of Rights of Freedoms.

The case of Miron v. Trudel29 dealt with the issue of equality rights pursuant to an automobile insurance policy and the definition of spouse, whether or not it violated Section 15(1) of the Charter as it did not include unmarried common law spouses. Although not directly on point, within the standard form of a family law case, it certain did help define the concept of "spouse" to include common law spouses in the context of family law on such third party contracts as insurance contracts.

Speaking for the majority, McLachlin underwent an extensive analysis of the equality guarantees of the Canadian Charter of Rights and Freedom. In the end, she did find that it did violate the Charter; McLachlin states:

First, discrimination on the basis of marital status touches the essential dignity and worth of the individual in the same way as other recognized grounds of discrimination violate fundamental human rights norms. Specifically, it touches the individual's freedom to live life with the mate of one's choice In the fashion of one's choice. This is a matter of defining importance to individuals. It is not a matter which should be excluded from Charter consideration on the grounds that the recognition would trivialize the equality guarantee."30 (Emphasis added.)

Given the findings of McLachlin, the case did not survive a Section 1 analysis.31

Clearly we see in Miron, the further development of the Charter as a corrective tool for discriminatory practices. After the onset of the initial decisions, starting with Moge, the Court has now become more comfortable in applying or boldly and explicitly calling upon Charter principles to various cases. Perhaps the difficulty that we have seen thus far, is the lack of consistency by the Court as to the weight that the Charter should be given and also the lack of consistency and applicability of Charter principles to various cases. To some extent, matters came to a head in Thibaudeau v. R.32

The Court found that Section 56(1)(b) of the Income Tax Act, does not infringe the equality of rights guaranteed by Section 15 of the Canadian Charter of Rights and Freedoms. In deciding the applicability of the Charter, Justice Gonthier stated as part of his analysis that the following would have to be done:

That being the case and as part of the analysis of the validity of the inclusion/ deduction system under Section 15(1) of Charter, I conclude that review of the legal context requires not only consideration of other relevant provisions of the Income Tax Act, but also principles of family law applicable to determining the amount of alimony towards the actual awarding of subsection 56(1)(b) and 60(b) refers directly.33

The Court went further to state:

"The purpose of the analysis under Section 15(1) of the Charter is solely to determine whether a provision is discriminatory on the count of a prejudicial distinction, based on a irrelevant personal characteristic, which it makes in respect of a group. In this regard, there must be a contextual analysis, which allows for some consideration of the legislation referred to by this provision and the rules of law, if any, to which it refers."34

Justice Gonthier went un to approve of the dissenting statement made previously by Justice L'Heureux-Dubé in Young v. Young, when she stated that:

As the fiscal impact resulting from the obligation of inclusion is one of the factors to he taken into account in computing the alimony, the very way in which it is distributed between the parents for the ultimate benefit of the child, must still he subject to the fundamental criterion of the latter's best interest in all decisions concerning it. Since it is governed by this criterion, its distribution is therefore, not open to challenge under the Charter. Expressing as it does a fundamental value of our society, which is incorporated into subsection 56(1)(b) and Section 60(b) of the Income Tax Act by reference.35

Justice Gonthier went on to quote with approval Madam Justice L'Heureux-Dubé's position in Young that "the legislative locus on the best interests of the child is completely consonant with articulated values and underlying concerns of the Charter, as it aims to protect the vulnerable segment of society by ensuring that the interests and needs of the child take precedence over any competing considerations in custody and access decisions."36

Hence, Justice Gonthier did the same sleight-of-hand as Justice L'Heureux-Dubé in Young. They obviate the necessity of making a Charter analysis explicitly in that they accept the Income Tax Act as being consonant with the Charter and therefore, there is no requirement to make a separate Charter analysis as it deals with the best interests of the child. More specifically, the best interests of the child are subsumed within the unchallenged provisions of the Income Tax Act, and therefore, does not require the necessity of Charter scrutiny.

In fact. Justice Gonthier appears to have felt to some extent uncomfortable in the position that he was articulating when he states:

In the course of this discussion, it has certainly been suggested that greater generosity by the treasury towards separated custodial parents would be desirable in order to take better account of their economic and social problems, such as exemption from maintenance for children; I note however, that it was not argued that this was a government obligation under the Charter, nor was there any suggestion of a disadvantage based on the difference between the present law and such a system."37 (Emphasis added.)

Justices Cory and Iacobucci perhaps finally answering the question being asked in Young, state:

. . .The Courts should he sensitive to the fact that intrinsic to taxation policy is the creation of the distinctions, which operate, as noted by Gonthier J. to generate fiscal revenue while equitably reconciling what are often divergent, if not competing interest. As might any other legislation, the Income Tax Act is subject to Charter scrutiny. The scope of the section 15 right is not dependent upon the nature of the legislation, which is being challenged. In the present case however, in determining whether the distinction has the effect of creating , a burden, it is necessary to examine the interaction between subsection 56(1)(b) and 60 (b) of the Income Tax Act and the family law regime.38 (Emphasis added.)

It should be noted that Cory and Iacobucci JJ. did not advocate going beyond the Section 15 test and then to a Section 1 test. As they stated, "We would observe we are not required in this appeal to address the question of whether spousal support subject to the same taxation regime would threaten the equality principles embedded in the Charter. It is only child support that is at issue."39

Madam Justice McLachlin, however, did find the necessity to have to undergo a Section 1 analysis in the present case in order to support her position in dissent.

In M v. H,40 the Charter of Rights came directly into the light when dealing with the issue of defining "spouse" under the Family Law Act. Here however, there was a direct attack upon the family law concept of definition of "spouse" and therefore, spousal support.

Justices Cory and Iacobucci writing for the majority of the Court, undertook a contextual analysis. As they stated: "it may also be the case that the discussion of context is appropriate at the onset of a Section 1 analysis, depending on the nature of the evidence at issue."41 However, the scope of the Section 15 analysis was to some extent broadened. This is evident in the comments that Justice Iacobucci makes:

In saying this, I wish to note my disagreement with my colleague, Bastarache J., who argues, at paragraph 354, that Section 29 of the Family Law Act, "must be respectful of the equality of status and opportunity of all persons" in order to be consistent with Charter values and therefore, pass this stage of the Section 1 analysis. While I agree that an objective must be consistent with the principles underlying the Charter in order to pass the first stage of the Section 1 analysis. I find that Justice Bastarache's approach unnecessarily narrow. It may be that a violation of Section 15(1) can he justified because, although not designed to promote equality, it is designed to promote other values and principles of a free and democratic society. This possibility must be left open, as the enquiry into Charter values under Section 1 is a broad enquiry into the values and principles that, as Dickson C. J. stated in Oakes, Supra at Page 136. "Are the genesis of the Rights and Freedoms guaranteed by the Charter. (Emphasis added).41a

Iacobucci's interpretation of the importance of Charier values and the Section 15 analysis clearly shows that Charter values are not to he relegated to a very narrow scope as suggested by Justice Bastarache. He appears receptive to the idea that other values and principles may be reflected in the scope of a "free and democratic society." It is, in other words, a broad enquiry. Although the decisions were corrective in nature, would the Court move forward and start laying down a more comprehensive theory for analysis in family law cases?

b) Moving Towards Responsibility

A change occurred with Walsh v. Bona42. The Court scrutinized equality rights provisions concerning matrimonial property and found the exclusion of unmarried cohabiting opposite-sex couples constitutional and survived scrutiny of the Charier of Rights and Freedoms.

Writing for the majority, Justice Bastarache set out the basis for analysis of the Court's decision by following Miron.43 It should also be noted that the Court also relied on the decision in Law v. Canada (Minister of Employment & Immigration), [1999] 1 S.C.R. 497, 1999 CarswellNat 359, 1999 CarswellNat 360 (S.C.C.). The Court then en- . gaged in an examination of the historical disadvantages suffered by unmarried cohabitaling couples,44 and quoted with approval the reasons of Justice L'Heureux-Dube where she noted:

To recapitulate the decision of whether or not to marry is most definitely capable of being a very fundamental and personal choice. The importance actually ascribed to the decision to marry, or alternatively, not to marry depends entirely on the individuals concerned.45

Justice Bastarache went further to say:

Where the legislation has the effect of dramatically altering the legal obligations of partners as between themselves, choice must be paramount the decision to marry or not is intensely personal in an engagement of complex social, political financial and considerations by the individual. While it remains true that unmarried spouses have suffered from historical disadvantage and stereotyping, it simultaneously cannot be ignored that many persons in circumstances similar to those of the parties, that is, opposite sex individuals in conjugal relationships of some permanence, have chosen to avoid the institution of marriage and the legal consequences that flow from it.46 (Emphasis added).

Clearly, the Court is stating that freedom of choice must exist for the parties to be able to enter into relationships. The Court is giving deference to the choice of union that individuals opt to enter into. As Bastarche J. states:

"To ignore these differences among cohabiting couples presumes a commonality of intention and understanding that simply does not exist. This effectively nullifies the individuals freedom to choose alternative family forms and to have that choice respected and legitimated by the state".47 (Emphasis added.)

He continues:

In my view, people who marry can be said to freely accept mutual rights and obligations. The decision not to marry should be respected because it also steins from a conscious choice of the parties. It is true that the benefits that one can be deprived of under section 15(1) analysis must not be read restrictively and can encompass the benefit of a process or procedure, as recognized in M. v. H. Supra. It has not been established, however, that whether there is a discriminatory denial of the benefit in this case because those who do not marry are free to take steps to deal with their personal property in such a way as to create an equal partnership between them. If there is need for a uniform and universal protective regime independent of choice of matrimonial status this is not a Section 15(1) issue. The MPA only protects persons who have demonstrated their intention to be bound by it and have exercised their right to choose.48 (Emphasis added).

He concludes:

Clearly it is important to note that the discriminatory aspect of the legislated distinction must be determined in light of Charter values. One of those essential values is liberty, basically defined as the absence of co-relation and the ability to make fundamental choices with regard to ones life: R v. Big M Drugmart Limited 1985 1 SCR 295 at page 336; Oakes Supra; New Brunswick (Ministry of Health and Community Services) v. G. (J) 1999 3 SCR 46 at paragraph 117. Limitations imposed by this Court that serve to restrict this freedom of choice among persons in conjugal relationships would be contrary to our notions of liberty.49

Bastarache's comments are of some interest. Effectively, he conveys that people have a right to contract or enter into relations of their choosing and that deference should he paid to such relations within the marital or cohabiting context. The governing principle in his discussion is the freedom to choose one's own life and one's own path in life. This is the first statement that we see from the Court within the Family Law context that the parties must take responsibility based upon their choices when entering into relationships. Of more interest is the obiter comment:

Limitations imposed by this Court that serve to restrict this freedom of choice among persons in conjugal relationships would be contrary to our notions of liberty.50 (Emphasis added.)

Whereas the discussion previously referred to an individual's freedom of choice prior to entering into a relationship Bastarache J. now seems to he opening the door to the suggestion that Courts should not make decisions that would serve to restrict a freedom of choice made amongst various individuals once they are in such conjugal relationships. The importance of Walsh is that it marks a turning point in the Court that a full eight member panel of the Court agreed with Bastarache's view. The lone and dissenting voice being Madam Justice L'Heureux-Dube's. Hence, Walsh marked the end of the corrective nature of the decisions of the Supreme Court of Canada in the Family Law context and the beginning of the theory of responsibility in the context of family law.

The first major test of this theory came in Miglin v. Miglin.51 The Miglin decision dealt in large part with the debate of whether or not, in the face of a release of spousal support in a separation agreement, the agreement could still be subsequently amended.

The Court had to deal with contract law comments and concurrently with an individual's responsibility for their own actions. It is submitted that Miglin followed the line of thinking in Walsh v. Bona. Although Walsh v. Bona was not referred to explicitly in the majority decision, the principle of choice and responsibility permeated the decision. The Court engaged in an exercise to reconcile individual rights with the freedom to contract. In other words, they stayed away from the more extreme position taken by Bastarache J. in Walsh respecting freedom of choice. They intended to "soften" the position of the ability to contract within the context of the conjugal relationship. Although they maintained the basic premise of being able to fully enter into a contract prior to cohabitation or marriage in terms of a choice to be made, this would be dealt with later, at greater length in Hartshorne.

In Miglin, the majority stated:

We are of the view that there is nevertheless a significant public interest in ensuring that the goal of negotiated settlements not be pursued, through judicial approbation of agreements, with such a vengeance that individual autonomy becomes a straight jacket. Therefore, assessment of the appropriate weight be accorded a pre-existing agreement requires a balancing of the parties' interest in determining their own affairs with an appreciation the particular aspects of separation agreements generally and spousal support in particular".52 (Emphasis added.)

He went further to add:

At the same time, the test must not undermine the parties right to decide for themselves what constitutes for them, in the circumstances of their marriage, mutually acceptable equitable sharing."53 (Emphasis added.)

However, the Court establishes the caveat that "The Court should set aside the wishes of the parties as expressed in a pre-existing agreement only where the applicant shows that the agreement fails to be in substantial compliance with the overall objectives of the Act. These include not only those apparent in Section 15.2 but also, as noted above, certainty, finality and antonomy."54

The Court was clearly alive in Miglin as to the vulnerabilities of the parties and the stresses placed upon the parties as well as for the need for balance. At Paragraph 82, Bastarache states the following:

Finally, we stress that the mere presence of vulnerabilities will not, in and of itself, justify the Court's intervention. The degree of professional assistance received by the parties will often overcome any systemic imbalances between the parties. Where vulnerabilities are not present, or are effectively compensated by the presence of counsel or other professionals or both, or have not been taken advantage of, the Court should consider the agreement as a genuine mutual desire to finalize the terms of the parties with a separation and as indicative of their substantive intentions. Accordingly, the Courts should be loathe to interfere. In contrast, where the power imbalance did vitiate the bargaining process, the agreement should not be read as expressing the parties notion of equitable sharing in their circumstances and the agreement will merit little weight.55

The Court was careful to slate that "the lest is not one of strict foresecability. A thorough review of case law leaves virtually no change is entirely unforeseeable. The question, rather, is to the extent to which the unimpeachably negotiated agreement can be said to have contemplated the situation before the Court at the lime of the application."56

Although the Court seems to have qualified the original statement in Walsh concerning the freedom of choice of individuals in conjugal relationships we see the statement reappear in Miglin wherein Bastarache states:

Although we recognize the unique nature of separation agreements and their differences from commercial contracts, they are contracts nonetheless. Parties must take responsibility for the contract they execute as well as for their own lives. It is only where the current circumstances represent a significant departure from the range of reasonable outcomes anticipated by the parties, in a manner that puts them at odds with the objectives of the Act, that the Court may be persuaded to give the agreement little weight."57 (Emphasis added.)

The Court therefore, is pointing out to parties that they have the ability to contract and that their choices shall be respected as per Walsh. Even if there are certain changes in their circumstances, the test will still be whether or not these unforeseen changes fall within the parameters of what the parties originally envisaged.

The most recent case to have come from the Supreme Court of Canada is that of Hartshorne v. Hartshorne58; again Mr. Justice Bastarache writing for a majority expounded on the principles of Walsh and Miglin and their applicability to the marriage contract.

Bastarache J. begins his investigation by stating the proposition set out in Walsh, "individuals may choose to structure their affairs in a number of different ways, and it is their prerogative to do so."59 He then accepts that Miglin is helpful on the issue, and in fact, quotes Miglin on the issue of deference. However he writes that Miglin should not be accepted without qualifications.60 Again we see the Court not wanting to overstep its boundaries in maintaining a balance between the individual's freedom to contract and the Court's right of intervention to prevent an inequitable result. But the Court in Miglin and now Hartshorne is more circumspect. They attempt to balance out these concepts in the following passage:

Thus, the termination that a marriage agreement operates fairly or unfairly at the time of distribution cannot be made without regard to the parties perspectives. A contract governing the distribution of property between spouses reflects what the parties believe to be fair at the time the contract was formed (presuming the absence of duress, coercion and undue influence)...If the parties lives unfold in precisely the manner they had contemplated at the time of contract formation, then a finding that the contract operates unfairly at the time of distribution constitutes, in essence, a substitution of the parties' notion of fairness with the Court's notion of fairness, providing that nothing else would suggest that the parties did not really consider the impact of their decision in a rational and comprehensive way."61

He continues:

Where, as in the present case, the parties have anticipated with accuracy their personal and financial circumstances at the time of distribution, and where they have truly considered the impact of their choices, then, without more, a finding that their agreement operates unfairly should not be made lightly...62

He extrapolated that a balance has to be struck:

This approach, in my view accords with the underlying principles of the FRA, striking an appropriate balance between deference to the parties' intention, on the one hand, and assurance of an equitable result on the other.63

Bastarache J. concludes by reiterating responsibility within the relationship:

Once an agreement has been reached, albeit a marriage agreement, the parties thereto are expected to fulfill the obligation that they have undertaken. A party cannot simply later state that he or she did not intend to live up to his or her end of the bargain. It is true, that, in some cases agreements that appear to be lair at the time of execution may become unfair at the time of the triggering event, depending on how the lives of the parties unfolded. It is also clear that the FRA permits a Court upon application, to find that an agreement or the statutory regime is unfair and to reapportion the assets. . ."

Fairness must first take into account what was within the realistic contemplation of the parties, what attention they gave to changes in circumstances or unrealized implications, then what are their true circumstances, and whether the discrepancy is such, given the section 65 factors, that a different apportionment should he made."64

Hartshorne refined the issue of responsibility from being an absolute to being balanced by principles of fairness and equity. Choice and deference thereto, however, is to he given a far larger role to play.

3. CONCLUSION

The introduction of the Charter of Rights and Freedom in 1982 heralded the beginning of a new society based on principles of law, that, although they were not unknown to us at the time, have propelled Canada in a direction that has redefined our society. It stands to reason, that all laws including those that govern the basic nucleus of our society namely, - the family - would have to conform to this new legislation. How to meet these criteria and rectify the inequities that have arisen from marriages and relationships that predated the Charter, which did not conform with these new principles, has been a task left in part to the legislatures as guided by the Supreme Court of Canada.

Just as with any new legislation, the Charter required new principles and interpretation as well as a period of transition. I have endeavoured to show, that the decisions rendered in the 1990s were of a "corrective" nature in that they sought to not only balance out the inequities that arose out of relationships that predated the Charter, but that the Court was struggling to find one voice, which would bring family principles in line with the vision of the Charter. I submit that, if this thread is to be followed to its logical conclusion, the next battleground will be the choices that individuals make within relationships and the degree to which they should be respected, no matter the consequences.
FOOTNOTE
1 119861 I S.C.R. 103, 1986CarswellOnt95, 1986 CarswcllOnt 1001 (S.C.C.).

2 Pelecli v. Pclecli. [1987] 1 S.C.R. 801, 1987CarswcMBC 147, 1987CarswellBC 703. 7 R.F.I.,. (3d) 225 (S.C.C.).

3 Caron v. Caron. [1987] 1 S.C.R. 892, 1987 CarswellYukon 8. 1987 CarswcllYukon 43, 7 R.F.L. (3d) 274 (S.C.C.).

4 Ricliunlxon v. Richardson, [1987] 1 S.C.R. 857, 1987 CarswellOnt 315. 1987 CarswcllOnt 963. 7 R.F.L. (3d) 304 (S.C.C.).

5 [1992]3S.C.R.813,1992CarswellMan 143, 1992CarswellMan222,43 R.F.L. (3d) 345 (S.C.C.).

6 See Paragraph 42, Moge, supra.

7 Moge, Paragraph 47, supra.

8 Ibid.

9 Moge, Paragraph 55, supra.

10 Moge, Paragraph 91. supra.

11 Moge, Paragraph 93, supra.

12 Young v. Young. [1993] 4 S.C.R. 3, 1993 CarswellBC 264. 1993 CarswellBC 1269, 49 R.F.L. (3d) 1 17 (S.C.C.).

13 Paragraph 157, Young v. Young.

14 Paragraph 157, Young v. Young.

15 Paragraph 177, Young v. Young.

16 Paragraph 178, Young v. Young.

17 Paragraph 184, Young v. Young.

18 Paragraph 213 and 214, Young v. Young.

19 Paragraph 224, Young v. Young.

20 [1994] 3 S.C.R. 670. 1994 CarswellSask 48, 1994 CarswcllSask 450, 6 R.F.L. (4th) 161 (S.C.C.).

21 Paragrah 2, Willick Note: Sopinka J.'s position highlights a very narrow approach to statutory interpretation.

22 Paragraph 47, Willick.

23 Paragraphs 47-48, Willick.

24 Paragraph 51.

25 Paragraph 52, Willick Note: In Moge, the Charter was not explicitly referred to, but in Willick, L'Heureux-Dube clearly admits to relying on Charter principles in her interpretation of Moge.

26 Paragraph 52, Willick.

27 Paragraph 54.

28 Paragraph 55.

29 [1995] 2 S.C.R. 418, 1995 CarswellOnt 93, 1995 CarswellOnt 526, 13 R.F.L. (4th) 1 (S.C.C.).

30 Paragraph 151.

31 Paragraph 175 of Miron v. Trudel.

32 [1995] 2 S.C.R. 627, 1995 CarswellNat 281, 1995 CarswellNat 704, 12 R.F.L. (4th) 1 (S.C.C.).

33 Paragraph 117.

34 Paragraph 19.

35 Paragraph 137 Thibaudau r. R.

36 Ibid.

37 Paragraph 148, Thibaudeau v. R.

38 Paragraph 159, supra.

39 Paragraph 163, supra.

40 [1999] 2S.C.R. 3, 1999 CarswellOnt 1348, 1999 CarswellOnt 1349.46R.F.L. (4th) 32 (S.C.C.).

41 Paragraph 80, M v. H.

41a Paragraph 207.

42 (sub nom. Nova Scotia (Attorney General) v. Walsh) [2002] 4 S.C.R. 325, 2002 CarswellNS 511, 2002 CarswellNS 512, 32 R.F.L. (5th) 81 (S.C.C.).

43 Paragraph 32, supra.

44 Paragraph 41. supra.

45 Paragraph 42, supra.

46 Paragraph 43.

47 Paragraph 43.

48 Paragraph 55.

49 Paragraph 63.'

50 Paragraph 63.

51 [2003] 1 S.C.R. 303. 2003 CarswellOnt 1374, 2003 CarswellOnt 1375, 34 R.F.L. (5th) 255 (S.C.C.).

52 Paragraph 67.

53 See Paragraph 73.

54 Paragraph 78.

55 Paragraph 82-83; It is interesting to note that the new Family Law Rules introduced in Ontario on July 1, 2004, and Rule 2(2) states that the primary objective of these Rules is to enable the Court to deal with cases justly; 2(3) dealing with case justly includes ensuring that the procedure is fair to all parties; 2(4) the Court is required to apply these rules to promote the primary objective that parties and their lawyers are required to help the Court to promote the primary objective. (Emphasis added.) I submit that in light of the change in direction of the Supreme Court, the concept of responsibility is being applied in Rules und Regulations to ensure that all parties are able to act responsibly in entering into these contracts whether they be achieved with the aid of a lawyer or through the Court system.

56 Paragraph 89, Miglin v. Miglin.

57 Paragraph 91

58 2004 SCC 22, 2004 CarswellBC 603, 2004 CarswellBC 604, 47 R.F.L. (5th) 5 (S.C.C.).

59 Paragraph 36.

60 See Paragraph 40.

61 Paragraph 44.

62 See Paragraph 46.

63 Paragraph 46.

64 See Paragraph 67.
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