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Spousal Support Agreements and the Legacy of Miglin

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1. INTRODUCTION

It has now been almost nine years since the Supreme Court of Canada released its decision in *Miglin v. Miglin*[1], putting in place a new framework for dealing with the effect of prior agreements on determinations of spousal support under the *Divorce Act*. Family lawyers and judges have now accustomed themselves to using its cumbersome, multi-part test, each stage of which involves the balancing of many factors. The so-called *Miglin* test for overriding spousal support agreements is notoriously difficult to summarize. Even nine years later, no convenient, short-form summary has emerged and judges, at loss for how to put the test in their own words, typically resort to extensive quotations from the original judgment. Assuming familiarity with the test, I will spare my readers those quotations and simply provide my own shorthand summary of the stages in a *Miglin* analysis, framed from the perspective of what someone attempting to have an agreement overridden must establish: *Miglin* 1.1 (unfairness of the negotiations); *Miglin* 1.2 (substantive unfairness at the time of execution); and *Miglin* 2 (substantive unfairness in light of unforeseen changed circumstances at the time of application).

As I noted in a case comment written shortly after the decision was released,[2] the *Miglin* test — with its many stages and its commitment to a methodology of contextual balancing of many factors — could be interpreted and applied in many different ways. The majority spoke of *balance* — not only of the value of respecting agreements, but also of the need to balance that with considerations of fairness. The former *Pelech* test[3] was rejected as overly stringent and unduly weighted toward spousal self-sufficiency. While the Court insisted that spousal support agreements be treated as binding legal contracts, it also emphasized the unique context in

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1 2003 SCC 24, 2003 CarswellOnt 1374, 2003 CarswellOnt 1375, [2003] 1 S.C.R. 303, 34 R.F.L. (5th) 255 (S.C.C.). The decision was released April 17, 2003 [hereinafter *Miglin*].

2 Carol Rogerson, "They are Agreements Nonetheless," Case Comment on *Miglin v. Miglin*, 2003 SCC 24, (2003), 20 Can. J. Fam. Law 197.

3 From *Pelech v. Pelech*, 1987 CarswellBC 147, 1987 CarswellBC 703, [1987] 1 S.C.R. 801, 7 R.F.L. (3d) 225 (S.C.C.).

which spousal support agreements are negotiated and their differences from commercial agreements. It was unclear how these competing values would be balanced. What, I asked, was the dominant message that would be taken from *Miglin* — the overriding importance of finality or the need for a careful, contextual balancing of finality with fairness? Would the majority decision to uphold the agreement in *Miglin* be taken as a strong statement of legal principle in favour of finality or instead be seen as a hard decision on a borderline set of facts which could easily be distinguished in subsequent cases? How high would the threshold for intervention be set?

Surprisingly, nine years later, we do not have clear answers to these questions. In the first few years after the release of *Miglin* there were several reviews of the on-going jurisprudence. I myself reviewed the post-*Miglin* case law at both the one year[4] and three year marks[5] (i.e., in early 2004 and early 2006 respectively.) However, since then, there has been no systematic attempt to track the on-going case law and discern the larger patterns in the interpretation and application of *Miglin.*

My early case comment[6] predicted that the strongest message taken from *Miglin* would be that agreements should be upheld — that courts should be reluctant to intervene and that parties should be made to live with the terms of the agreements that they had signed. The first year of trial decisions after the release of *Miglin* by and large proved the accuracy of that prediction.[7] In the immediate aftermath of *Miglin* the test for overriding spousal support agreements was generally interpreted as a very strict one. For the most part, the only agreements that courts were willing to override were those that involved such blatant flaws in the negotiation process (*i.e.*, serious vulnerabilities and power imbalances) that the agreements would have been set aside even without *Miglin* on the basis of common law doctrines of duress, undue influence or unconscionability. Absent extremely flawed negotiations, even agreements that departed significantly from statutory entitlements were upheld. And *Miglin* stage 2 seemed to have become effectively a dead letter, with courts emphasizing the passage from the majority ruling to the effect that parties should be presumed to be aware that the future is uncertain and to have taken into account the kinds of challenges and changes that can reasonably be anticipated after divorce.[8]

4 See my review of the first year of post-*Miglin* decisions in Carol Rogerson, "*Miglin* One Year Later", paper prepared for the County of Carleton Law Association, 13th Annual Institute of Family Law Conference 2004, Ottawa, June 18, 2004, on file with the author.

5 See Carol Rogerson, "The Legacy of *Miglin*: Are Spousal Support Agreements Final?" in Law Society of Upper Canada, *Special Lectures 2006: Family Law* (Toronto: Irwin Law, 2007) at 119 [hereinafter Rogerson 2006.] For other reviews at the three year mark see H. Hunter Phillips, "The Legacy of *Miglin*: A Practitioner's Response" also in the LSUC Special Lectures 2006 at 135, Patrick Schmidt and George Karahotzitis, "*Miglin v. Tierny-Hines*: Conflict or Consistency" paper presented at the OBA 2006 Institute, Toronto, Jan. 13, 2006 and reprinted in Vol. 17(3), April 2006, *Matrimonial Affairs* at 7, and Jennifer Cooper, "*Miglin* Revisited", paper presented at the 2006 National Family Law Program, Kananaskis, Alberta, July 10–13, 2006.

6 Above note 2.

7 Above note 4.

8 *Miglin*, at para. 89.

The Supreme Court of Canada's subsequent decision in *Hartshorne v. Hartshorne*[9], released a year after *Miglin*, suggested to many that this strict approach was exactly what the Court intended. In *Hartshorne* the Court applied *Miglin* principles in determining whether to override a property agreement on the grounds of unfairness as provided for under B.C.'s *Family Relations Act.*[10] If there was any doubt after *Miglin*, *Hartshorne* seemed to graphically illustrate the strength of the Court's commitment to the value of upholding spousal agreements, extending *Miglin* principles into a different statutory context where the legislature arguably intended to grant judges a broad power to set aside or override agreements that were substantively unfair when judged against statutory norms.[11] In endorsing an interpretation of *Miglin* as imposing serious restraints on judges' ability to intervene in agreements on fairness grounds, *Hartshorne* served to reinforce the early tendencies toward stringency in the post-*Miglin* case law.

These developments led me to make the following comments on the post-*Miglin* case-law at the one-year mark:

> For some amongst you this overwhelming respect for agreements may be a welcome development; but for others, myself included, it is a troubling one. It is not that I believe that all agreements should be discounted. The case law offers examples of cases where litigious parties continually try to reopen fairly negotiated agreements as they replay the on-going acrimony of the divorce . . .. There are also cases where former spouses come back to court asking for support many years after the divorce in response to unfortunate events in their post-divorce lives that have no connection to the marriage. Or cases where a spouse might have gotten slightly more from a court, if they had been lucky enough to get the right judge, but the agreement is clearly within the range of reasonable outcomes. Courts are right to uphold agreements in these cases.
>
> However, many very unfair agreements are being upheld — agreements which preclude or severely limit spousal support in cases where it would clearly have been available under the *Divorce Act* absent the agreement. Because of the strict way they are applying the *Miglin* tests, courts are missing the very factors that *Miglin* arguably identified as contributing to unfairness — flawed negotiations as a result of pressure and lack of information, and subsequent circumstances that were not what the parties (or at least the claimant) reasonably anticipated at the time the agreement was entered into.
>
> It is, of course, still early days. Patterns in the law may change over time and we may see some softening of the *Miglin* test as a result of experience and familiarity, just as we did with *Pelech.* The language of the *Miglin* decision certainly creates openings for that. And there are exceptions to the gen-

9 2004 SCC 22, 2004 CarswellBC 603, 2004 CarswellBC 604, [2004] 1 S.C.R. 550, 47 R.F.L. (5th) 5 (S.C.C.).

10 *Family Relations Act*, R.S.B.C. 1979, c. 121.

11 Section 65 of the FRA allows for judicial reapportionment of property in cases where the division of property provided for under a marriage agreement would be unfair. In *Hartshorne* the S.C.C. drew on ideas from *Miglin* to constrain this broad discretion to intervene in unfair property agreements, restricting that power to cases where, absent flawed negotiations, there had been a significant change in circumstances from what the parties had anticipated at the time the agreement was entered into.

> eral pattern — cases where courts have taken a more balanced approach to the *Miglin* test. Only time will tell whether these are isolated cases or harbingers of a potential shift. At this point, despite a rough beginning, I remain hopeful that with creative lawyering and thoughtful judging a more balanced approach will develop.[12]

At the three-year mark, a substantial body of case-law had emerged at both the trial and appellate levels.[13] While the majority of *Miglin* challenges to spousal support agreements still failed, there had been a number of successful challenges to agreements, particularly at the appellate level. There were signs of some interesting developments: the emergence of a somewhat more balanced approach to *Miglin*, and, most notably, a few examples of judicial willingness to use *Miglin* stage 2 to override agreements on the basis of unfairness resulting from unforeseen changed circumstances. Some courts were willing to depart from the strict reading of *Miglin* that deemed almost all changes in circumstances to have been reasonably foreseeable and hence taken into account in the initial agreement, and instead to take a more subjective approach to the reasonable expectations of the parties. At year three there were indications that courts were becoming more reluctant to uphold outcomes that departed significantly from the statutory norms under the *Divorce Act*, at least without clear evidence that both parties had consciously turned their minds to this outcome and had made a fully informed decision to accept it.

That was the year three mark. What has happened since? Have courts become even more willing to override spousal support agreements? Has the pendulum swung further in the direction of fairness and away from finality? This article, which was begun in 2010, is an attempt to answer those questions and to provide a much needed systematic analysis of the on-going judicial interpretation and application of *Miglin* since 2006.[14] More specifically, this article was prompted by my reflections on some of the major developments in both the law of spousal support and the law of domestic contracts over the past several years and my curiosity about the impact of these developments on the application of *Miglin*.

First there has been growing acceptance and use of the Spousal Support Advisory Guidelines, which provide clearer benchmarks than in the past for assessing the substantive fairness of spousal support outcomes.[15] In three provinces in particular, strong appellate endorsement of the SSAG resulted almost immediately in the

12 Above note 4.

13 See the reviews of the post-*Miglin* case law cited in note 5, above.

14 The research on which the main findings of this article are based was completed in May, 2011. In the course of final revisions, references have been included to significant cases decided since May 2011 where relevant. The most important of these is obviously the Supreme Court of Canada's December 2011 decision in *Droit de la famille — 091889*, 2011 SCC 64, 2011 CarswellQue 13698, 2011 CarswellQue 13699 (S.C.C.) [hereinafter referred to as *L.M.P.* or *L.M.P. v. L.M.*] which is dealt with in a postscript.

15 A draft version of the SSAG was released in January 2005: see Carol Rogerson and Rollie Thompson, "Spousal Support Advisory Guidelines: A Draft Proposal" (January 2005) available online at http://www.law.utoronto.ca/documents/rogerson/spousal_draftreport_en.pdf. The final version was released in July, 2008: Carol Rogerson and Rollie Thompson, "Spousal Support Advisory Guidelines" (July 2008) available online at http://www.justice.gc.ca/eng/pi/fcy-fea/spo-epo/g-ld/spag/index.html. All of the documents related to the project may also be found on the Spousal Support Advisory Guidelines (SSAG) web site at the Faculty of Law, University of Toronto: http://www.law.utoronto.ca/faculty/rogerson/ssag.html

SSAG becoming a standard part of a spousal support analysis — first in B.C. (August 2005)[16], then New Brunswick (April 2006)[17] and most recently Ontario (January 2008)[18]. And even outside of these three provinces, the SSAG are widely used by lawyers and judges.[19] Does the widespread use of the SSAG, I wondered, promote greater judicial willingness to intervene in spousal support agreements on grounds of substantive unfairness at either *Miglin* stage 1.2 or stage 2? Or have the SSAG had the opposite effect — with clearer benchmarks as a backdrop for negotiation, will departures from the statutory entitlements be treated as conscious choices entitled to judicial deference rather than the product of misinformed speculation about the nature of the spousal support obligation?

Then there was *LeVan v. LeVan*, an Ontario trial judgment from 2006 upheld by the Ontario Court of Appeal in its ruling in May 2008,[20] which set aside a marriage contract under s. 56(4) of the Ontario *Family Law Act*.[21] That provision not only recognizes the power of courts to set aside domestic contracts on the basis of common law doctrines, but also goes beyond the common law in granting Ontario courts additional statutory powers to set aside domestic contracts if there has not been disclosure of significant assets or debts or if one or both of the parties failed to understand the nature and consequences of the agreement.[22] Although those addi-

16 *Yemchuk v. Yemchuk*, 2005 BCCA 406, 2005 CarswellBC 1881, [2005] B.C.J. No. 1748 (B.C. C.A.); additional reasons at 2005 CarswellBC 2540 (B.C. C.A.).

17 *C. (J.D.E.) v. C. (S.M.)*, 2006 NBCA 46, 2006 CarswellNB 242, 2006 CarswellNB 243, [2006] N.B.J. No. 186 (N.B. C.A.); leave to appeal refused 2006 CarswellNB 579, 2006 CarswellNB 580 (S.C.C.).

18 *Fisher v. Fisher*, 2008 ONCA 11, 2008 CarswellOnt 43, [2008] O.J. No. 38, 47 R.F.L. (6th) 235 (Ont. C.A.).

19 With the exception of Quebec, although this may now be changing as a result of the August 2011 decision of the Quebec Court of Appeal in which it rules that it would not be inappropriate for judges to use the SSAG: see *Droit de la famille — 112606*, 2011 QCCA 1554, 2011 CarswellQue 8981, 2011 CarswellQue 15234 (Que. C.A.).

20 2008 ONCA 388, 2008 CarswellOnt 2738, 51 R.F.L. (6th) 237 (Ont. C.A.); additional reasons at 2008 CarswellOnt 3713 (Ont. C.A.); leave to appeal refused 2008 CarswellOnt 6207, 2008 CarswellOnt 6208 (S.C.C.); upholding 2006 CarswellOnt 5393, 82 O.R. (3d) 1 (Ont. S.C.J.); additional reasons at 2006 CarswellOnt 7334 (Ont. S.C.J.); affirmed 2008 CarswellOnt 2738 (Ont. C.A.); additional reasons at 2008 CarswellOnt 3713 (Ont. C.A.); leave to appeal refused 2008 CarswellOnt 6207, 2008 CarswellOnt 6208 (S.C.C.).

21 R.S.O. 1990, c. F.3.

22 Section 56(4) reads as follows:

> (4) A court may, on application, set aside a domestic contract or a provision in it,
>
> (a) if a party failed to disclose to the other significant assets, or significant debts or other liabilities, existing when the domestic contract was made;

tional statutory powers have existed in Ontario since 1986, they did not have significant effect until *LeVan*, in which they were used to invalidate a marriage contract because of both the husband's inadequate disclosure and the wife's lack of effective, independent legal advice. Although the agreement in *LeVan* dealt only with property rights, I wondered whether the high standards for disclosure and effective legal advice that were seemingly being set in *Le Van* suggested that a more aggressive approach to judicial review of domestic contracts was taking hold, a development that could influence the application of *Miglin* as well.

And finally there was the Supreme Court of Canada's decision in *Rick v. Brandsema*,[23] released in February of 2009, in which the Court drew on ideas from the *Miglin* stage one analysis to shape the common law of unconscionability, imposing (with interesting echoes of *LeVan*), a duty of full and honest disclosure in the negotiation of separation agreements. On the facts of *Rick*, the husband's failure to satisfy this duty, combined with the wife's mental instability, resulted in a finding of unconscionability and hence invalidity. I will discuss in more detail below the ways in which *Rick* has thrown the law of domestic contracts into a state of conceptual confusion by treating *Miglin* as applicable to all separation agreements, including property agreements, and as giving courts the power to determine the validity of those agreements and set them aside. However the aspect of *Rick* that I wish to emphasize here is the way in which the Supreme Court of Canada read *Miglin* and described the principles that it was importing into the common law of unconscionability.

This was not a reading of *Miglin* that emphasized the overriding value of finality of agreements, but rather one that focused on the unique context of separation agreements as compared to commercial agreements, the "inherent vulnerabilities" of the parties,[24] and the high standards of both procedural and substantive fairness that *Miglin* imposed before contractual finality could be assured. Thus Justice Abella wrote:

> [42] Based on these realities [the social and economic realities that shape parties' roles in spousal relationships and have the potential to negatively impact settlement negotiations upon marriage breakdown] the Court in *Miglin* stated that *judicial intervention would be justified where agreements were found to be procedurally and substantively flawed.* [emphasis added]

Although *Rick* obviously focused on those aspects of the *Miglin* test concerned with the integrity of the bargaining process and problems of informational asymmetry (i.e. *Miglin* stage 1.1), the Court also went out of its way to emphasize *Miglin's* concern with substantive fairness and significant departures from statutory norms:

> [49] Whether a court will, in fact, intervene [when there has not been full and honest disclosure] will clearly depend on the circumstances of each case, including the extent of the disclosure and the degree to which it is found to have been deliberately generated. *It will also depend on the extent to which the resulting negotiated agreement complies with the statutory objectives. As Miglin confirmed, the more an agreement complies with the statutory objectives, the less risk it will be interfered with.* Imposing a duty on separating spouses to provide full and honest disclosure of all assets, therefore, helps ensure that each spouse is able to assess the extent to which his or her bargain is consistent with the equitable goals in modern matrimonial legislation, as well as the extent to which he or she may be genuinely prepared to deviate from them.
>
> [50] In other words, *the best way to protect the finality of any negotiated agreement in family law, is to ensure both its procedural and substantive integrity in accordance with the relevant legislative scheme.* [emphasis added]

Going forward, *Rick* clearly had implications for *Miglin* stage 1.1, raising the standards for "unimpeachable negotiations" by recognizing a duty of full and honest disclosure. But did it also suggest, I wondered, increased willingness to intervene in substantively unfair spousal support agreements at stages 1.2 and 2? Even if there were no procedural flaws?[25]

In an attempt to answer these questions, this article examines all *Miglin* cases from across the country decided in the five and a half year period between January 2006 and the end of May 2011.[26] The focus is on applications of *Miglin* to spousal support agreements in the context of applications for spousal support under the *Divorce Act*. As will be discussed in more detail below, *Miglin* casts a large shadow and has begun to be applied in many contexts other than the determination of spousal support under the *Divorce Act* and to many kinds of domestic contracts in addition to spousal support agreements. However, the focus here is on "core" *Miglin* cases — cases dealing with spousal support agreements under the *Divorce Act*.

Thus, this article is not a general survey of the current law relating to domestic contracts. It does not focus on property agreements, which have always generated a fair amount of litigation in B.C. because of s. 65 of the *Family Relations Act* and have recently started to generate a fair amount of litigation in Ontario, particularly after *LeVan*. It is not a comprehensive review of cases applying s. 56(4) of the Ontario *Family Law Act* or general doctrines of contract law (such as unconscionability, undue influence and duress) which confer on courts the power to set aside a wide range of spousal agreements as invalid or unenforceable. It does not provide a systematic review of the aftermath of *LeVan* and *Rick* with respect to the on-going elaboration of the parameters of the duty to disclose. The focus of this article is on spousal support determinations under the *Divorce Act* and ultimately on the extent to which courts will intervene in spousal support agreements on *substantive* fairness grounds (i.e., in particular under *Miglin* 1.2 and 2) to achieve results more

(b) if a party did not understand the nature or consequences of the domestic contract; or

(c) otherwise in accordance with the law of contract.

23 2009 SCC 10, 2009 CarswellBC 342, 2009 CarswellBC 343, [2009] 1 S.C.R. 295, 62 R.F.L. (6th) 239 (S.C.C.) [hereinafter *Rick*].

24 At para. 41.

25 The December 2011 decision of the S.C.C. in *L.M.P.*, above note 14, which on one reading has reduced or even eliminated the applicability of *Miglin* in the context of variation of consent orders under s. 17 of the *Divorce Act*, might be seen as a continuation of an increasing concern with the substantive fairness of spousal support agreements signalled in *Rick*. *L.M.P.* is discussed further in the postscript to this article.

26 See note 14, above. A detailed discussion of the selection criteria for a "*Miglin*" case will be found below.

consistent with the statutory norms and objectives under the *Divorce Act*.

All domestic contracts — be they separation agreements or marriage contracts, agreements about property division or about support obligations — raise unique and complex issues of vulnerability and power imbalances in the negotiation process that distinguish them from commercial agreements. However, as was emphasized in the academic writing and legal argument leading up to *Miglin*, spousal support agreements raise additional concerns. Chief among these is the prospective nature of spousal support, as compared to property division.[27] The economic impact of the marriage will often only reveal itself fully over time, and the extent of the obligation is contingent on the spouses' shifting economic circumstances after divorce. As well, spousal support law, unlike the law of matrimonial property, is highly discretionary, uncertain and contentious (although somewhat less so now than in the past as a result of the SSAG). This exacerbates the informational deficiencies and allows differential degrees of risk aversion to influence the bargaining process. More broadly, the law of spousal support continues to evolve, stimulated by the introduction of the SSAG. An important part of understanding this on-going evolution is the role of agreements, given that the majority of spousal support cases are settled by the parties and not by courts. Thus, this is in the end as much an article about spousal support as it is about domestic contracts.

The article begins with a summary of its main findings, followed by a more detailed elaboration of each. Two of the main themes that emerge are the complex and confused nature of this area of law and the fact that the underlying norms are unstable and in flux. Both of these make it very difficult to precisely pin down the current meaning of *Miglin*.

The most that can be said is that the threshold for intervention with spousal support agreements under *Miglin* has been lowered to some degree; the patterns that were emerging in the three year reviews of *Miglin* have become clearer and the courts are attempting to achieve a reasonable balance between the values of finality and fairness. There is clearly more aggressive scrutiny for procedural fairness. With respect to substantive fairness, courts are also showing increasing willingness to override agreements that depart *significantly* from the substantive norms of fairness under the *Divorce Act*. At year one the main message that was taken from *Miglin* was that courts should respect final agreements or, put another way, that people should be held to the bargains that they make. Now, at year nine, the message is often slightly modified: that courts should uphold *fairly negotiated* agreements[28] or that courts should uphold *reasonable* agreements.[29] The new understanding of *Miglin* is perhaps best captured by Nolan J. in *Gammon v. Gammon*.[30] She begins at

27 See Carol Rogerson and Martha Shaffer, "Contracting Spousal Support: Thinking Through *Miglin*" (2003), 21 Can. Fam. L. Q. 49.

28 See *Tailor v. Tailor*, 2008 CarswellOnt 5866, [2008] O.J. No. 3900, 59 R.F.L. (6th) 316 (Ont. S.C.J.).

29 See *M. (A.A.) v. K. (R.P.)*, 2010 ONSC 930, 2010 CarswellOnt 1139, [2010] O.J. No. 807 (Ont. S.C.J.), where Pazaratz J., after a review of the *Miglin* test, stated "As a general rule, courts will uphold reasonable agreements." [para 161]

30 2008 CarswellOnt 802, [2008] O.J. No. 603 (Ont. S.C.J.); additional reasons at 2008 CarswellOnt 6319 (Ont. S.C.J.)

para 24 by confirming the general respect for agreements:

> It is also clear that the recurring theme woven throughout the majority decision in *Miglin* is that written agreements between spouses should generally be upheld. . . .

But then goes on at para 25 to add:

> In many respects, *Miglin* has changed the rules with respect to the negotiation of domestic contracts, especially separation agreements. It is my view that the onus to consider the provisions of an agreement and how it is negotiated in terms of the *Miglin* test is an obligation that rests with both parties and their counsel. It is no longer sufficient to get the best deal one can for one's own client without considering the terms of the agreement and how they measure up to the principles set out in *Miglin*.

Or in other words, "you can't make too good a deal."

Highlighting the on-going flux and instability in this area of law and the ever-shifting understandings of *Miglin*, the article ends with a postscript discussing the December 2011 decision of the Supreme Court of Canada in *L.M.P. v. L.S.*[29a] and its implications for the application of *Miglin* in the specific context of applications for variation of consent orders under s. 17 of the *Divorce Act*.

2. SUMMARY OF FINDINGS

Given the complexity of this area of law, it will be helpful to provide here an overview and summary of the main findings of this article:

1. *Pervasive conceptual confusion.* The most striking feature of the post-*Miglin* case law is a dispiriting one. The current law relating to domestic contracts is characterized by pervasive conceptual confusion and the blurring of doctrinal boundaries — to a degree that was not anticipated and is, quite frankly, embarrassing in a legal system. There is much confusion and misunderstanding about when *Miglin* is applicable and how *Miglin* interacts with the other bodies of law that are applicable to challenge and modify domestic contracts. This pervasive confusion makes coherent analysis of this body of law very difficult. Beyond that, it points to a pressing need for more careful and thoughtful analysis to prevent serious misapplications of the law.
2. *Miglin and contractual invalidity.* There is pervasive doctrinal blurring between *Miglin* stage 1 and common law and statutory doctrines related to contractual invalidity, a major source of conceptual confusion in this area of law.
3. *Miglin and final agreements.* The understanding that *Miglin* is applicable only to *final* agreements is frequently lost, with no analysis of this requirement before the Miglin test is applied.
4. *Miglin and the material change test.* There is pervasive blurring of doctrinal boundaries between the *Miglin* stage 2 test and the material change test.

29a See note 14, above.

5. *Agreements with material change clauses.* One specific source of on-going uncertainty and confusion about the application of *Miglin* is the treatment of agreements that include material change clauses or that provide for a review. Some courts apply *Miglin* in these cases, often concluding that intervention is justified under *Miglin* stage 2. This contributes to the confusing merger of the material change test and the *Miglin* stage 2 test for unforeseen change. The answer should be clear: *Miglin* is not applicable in these cases; they involve the issue of the interpretation and application of the agreement rather than that of overriding the agreement.

6. *Agreements that provide for on-going support. Miglin* is being applied differently in the context of agreements that provide for *indefinite, on-going* spousal support as compared to agreements that waive or terminate spousal support. Some courts do not even apply *Miglin* in these cases, others struggle to do so. These should be recognized as a distinct category of cases where a stringent application of the *Miglin* stage 2 test is often inappropriate. In these cases, despite the absence of an express material change clause, the agreement is often best understood, absent clear indications to the contrary in the language of the agreement, as resting on an implicit assumption of a court power to vary to deal with changing circumstances over time, i.e., in response to a material change. This is particularly true when the agreement has been incorporated into a consent order.

7. *Consent orders and s. 17 of the Divorce Act.* There is on-going confusion and uncertainty about the application of *Miglin* in the context of variation applications under s. 17 of the *Divorce Act*. It is unclear which parts of the *Miglin* test, if any, are applicable and there is also pervasive confusion about the relationship between the material change test and the *Miglin* stage 2 test.[31]

8. *Small number of "core" Miglin cases.* The number of "core" *Miglin* cases over the past five and a half years is surprisingly small. While *Miglin* is frequently cited in a wide variety of cases involving domestic agreements, the number of cases where the *Miglin* test is actually applied to the circumstances contemplated in the original decision, *i.e.* to determine whether a court should exercise its statutory discretion to award support under the *Divorce Act* contrary to the terms of a *final* agreement, is relatively low. The courts are not filled with cases in which spouses are seeking to override their spousal support agreements.

9. *High rate of successful Miglin challenges.* Within the relatively small pool of "core" *Miglin* cases there is fairly high rate of successful *Miglin* challenges. This need not be interpreted as evidence of a relatively low threshold for intervention; in light of the relatively small number of cases, it could also suggest that with the passage of time only those cases involving quite seriously unfair agreements are being brought. As well,

31 As I argue in the postscript, this continues to remain true, even after the recent S.C.C. decision in *L.M.P.*

some number of agreements for indefinite, on-going support were included within the sample. As indicated in finding 6, above, although courts purport to apply the *Miglin* stage 2 test in these cases, they conflate it with the a lower threshold material change test.

10. *Most successful Miglin challenges include a finding of flawed negotiations.* The largest number of successful *Miglin* challenges involve findings of flawed negotiations at *Miglin* stage 1.1, strikingly so in Ontario. Although a significant proportion of the successful challenges, particularly outside of Ontario, do involve agreements that have been found to be fairly negotiated and the ruling in favour of overriding the agreement is based solely on substantive unfairness at *Miglin* stage 1.2 or 2, a careful reading of many of these cases reveals facts that suggest the presence of procedural flaws, although that was not the basis of the legal ruling.

11. *Shifting norms of fair bargaining.* The norms of fair bargaining are the subject of increasing attention in the area of domestic contracts generally, not just spousal support agreements. Under the influence of *LeVan* and *Rick*, the standard for flawed negotiations at *Miglin* stage 1 has been shifting. Higher standards of procedural fairness are being set, or conversely, the threshold for intervention is becoming lower. Some of the earlier cases in which courts found no procedural flaws might generate a different result today.

12. *Relatively high threshold for intervention on the basis of substantive unfairness: "unconscionable circumstances" or "patently unfair".* If one eliminates cases that are not final agreements (see findings **5** and 6 above), the threshold for intervention with fairly negotiated agreements *solely* on the basis of substantive unfairness at *Miglin* stage 1.2 or 2 is high. Courts are not easily overriding spousal agreements simply because a spouse might have done better had he or she gone to court. The SSAG have not led to an overly interventionist approach to spousal support agreements. However, courts are willing to override spousal support agreements that depart *significantly* from the statutory norms (now reflected in the SSAG), particularly if they leave a former spouse in a state of financial hardship. The SSAG have likely contributed to a clarification of what constitutes a significant departure from the statutory norms. In cases involving final agreements with no flaws in the negotiation process, the operative, emerging standard for intervention under *Miglin* would appear to be similar to that found in s. 33(4) of the Ontario *Family Law Act*, i.e. that the agreement "results in unconscionable circumstances" or alternatively circumstances that are "patently unfair."[32] The application of the foreseeability test under *Miglin* stage 2 is often shaped by substantive norms: courts will often find that the parties could not have reasonably contemplated a result dramatically at odds with the spousal support objectives under the *Divorce Act*.

32 See *Turpin v. Clark*, 2009 BCCA 530, 2009 CarswellBC 3149, ¶64 (B.C. C.A.); leave to appeal refused 2010 CarswellBC 1055, 2010 CarswellBC 1056 (S.C.C.).

3. CONCEPTUAL CONFUSION ABOUT MIGLIN

The most striking feature of the post-*Miglin* case law over the past five and a half years is its increasing conceptual confusion and the pervasive blurring of doctrinal categories and boundaries. There are many misunderstandings about when the *Miglin* test is applicable and how it relates to other bodies of law applicable to determine the legal effect of a domestic contract. Some of this conceptual confusion stems from *Miglin* itself, but some is the product of sloppy and careless analysis by lawyers and judges alike. There is an increasing tendency to automatically and unthinkingly resort to *Miglin* any time a case involves a domestic contract. Because this backdrop of confusion posed so many challenges to even identifying the pool of "*Miglin*" cases that this article would focus on, it is most appropriately addressed at the beginning.

It is important to start with a clear understanding of the legal context for which the *Miglin* test was created. The *Miglin* test, as originally articulated, relates to the exercise of a specific *statutory* power — the power under to make and vary awards of spousal support under the *Divorce Act*. A spousal support agreement is, by the express terms of the statute, not binding on courts but rather a factor to be considered. Courts under the *Divorce Act* may disregard or override an agreement and make an order for spousal support that is contrary to the terms of a prior agreement. *Miglin* provides a set of guidelines to structure the exercise of the court's discretionary power, specifically to determine the weight to be accorded to a *final* agreement when awarding spousal support under the *Divorce Act*.

Unfortunately this clear conception of when *Miglin* is applicable is often forgotten, leading to many misapplications of *Miglin* and a confused merger of the *Miglin* test with other legal doctrines. Below, I discuss three of the main points of confusion and misapplication the case law reveals: (a) confusion between *Miglin* and doctrines related to the invalidity or setting aside of agreements, (b) the extension of *Miglin* to other statutory contexts beyond that of spousal support under the *Divorce Act*; (c) the lack of clarity on what constitutes a *final* support agreement resulting in a confused merger of *Miglin* and the material change test for variation of spousal support agreements.

(a) The relationship between Miglin and doctrines related to the invalidity or setting aside of spousal agreements

Miglin, as initially — and I would argue correctly — understood, confers no power to set aside or invalidate agreements, despite the almost universal and misleading use of the language of "setting aside" agreements that is found in *Miglin* analyses. Nor does *Miglin* confer any independent power to "vary" or modify an agreement, although again misleading language of variation is often found when courts are applying *Miglin*.[33] The legal power that *Miglin* involves is the statutory power to award spousal support under s. 15.2 of the *Divorce Act* and the power to vary prior spousal support orders (which can include consent orders) under s. 17(1) of the *Divorce Act*. Conceptual clarity would be furthered by avoiding the language

33 The B.C. Court of Appeal clearly and correctly ruled on this issue in *Zimmerman v. Shannon*, 2006 BCCA 499, 2006 CarswellBC 2715, 34 R.F.L. (6th) 32 (B.C. C.A.).

of "setting aside" agreements in the context of applications of the *Miglin* test and by speaking instead of overriding or disregarding the agreement — but current linguistic patterns are likely too deeply entrenched and resistant to calls for change and have, moreover, been encouraged by *Rick*.

Miglin must be seen in the broader context of the law relating to domestic contracts. *Miglin* operates alongside other legal doctrines that determine the validity and enforceability of domestic contracts, including spousal support agreements. Included here would be common law contract doctrines such as unconscionability, undue influence and duress, as well as specific statutory provisions in provincial legislation that impose additional procedural or substantive requirements on domestic contracts beyond the requirements of the common law. My focus here will be on s. 56(4) of the Ontario *F.L.A*, but similar legislation also exists in Nova Scotia,[34] New Brunswick[35] and Newfoundland.[36] In Ontario s. 56(4) incorporates the common law in subsection (c), but also gives courts additional powers to set aside domestic contracts under subs. (a) if there has been a failure to disclose significant assets or debts and under subs. (b) if a party did not understand the nature or consequences of the domestic contract. Both the common law and s. 56(4) of the *F.L.A.* are applicable to all domestic contracts, including property agreements; they are not specific to spousal support agreements. And both the common law and s. 56(4) of the *F.L.A.* clearly do give courts the power to set aside or invalidate agreements.

When dealing with challenges to a spousal support agreement, issues of the validity and enforceability of an agreement (under the common law, and in Ontario under s. 56 of the *F.L.A.*) should logically be dealt with first, followed by a *Miglin* analysis if there is a valid and enforceable agreement. *Miglin* should be used to determine whether *an otherwise valid agreement* should nonetheless be overridden

34 Section 29 of the *Matrimonial Property Act* which provides:

> 29. Upon an application by a party to a marriage contract or separation agreement, the court may, where it is satisfied that any term of the contract or agreement is unconscionable, unduly harsh on one party or fraudulent, make an order varying the terms of the contract or agreement as the court sees fit.

35 Section 41 of the *Marital Property Act* which provides:

> 41. The Court may disregard any provision of a domestic contract
>
> (a) if the domestic contract was made before the coming into force of this Part and was not made in contemplation of the coming into force of this Part; or
>
> (b) if the spouse who challenges the provision entered into the domestic contract without receiving legal advice from a person independent of any legal advisor of the other spouse;
>
> where the Court is of the opinion that to apply the provision would be inequitable in all the circumstances of the case.

36 Section 66(4) of the Newfoundland *Family Law Act*, which is identical to s. 56(4) of the Ontario *F.L.A.*

or disregarded in an application for spousal support under the *Divorce Act*.[37]

Such clear distinctions between the validity analysis and the *Miglin* analysis are rarely found in practice however.[38] In practice, if the challenge to the spousal support agreement is being made in the context of an application for spousal support under the *Divorce Act* courts begin with *Miglin*. The *Miglin* stage one analysis, particularly *Miglin* stage 1.1 (flawed negotiations), then seems to absorb the factors that would be considered in an analysis under the common law of unconscionability or in Ontario under s. 56(4) of the *F.L.A.*[39] In cases where the agreement in issue deals both with property and spousal support, in Ontario the challenge to the property provisions is often analyzed under s. 56(4) and the spousal support provisions are analyzed under *Miglin*.[40] One judgment refers to "two streams of legal reasoning".[41] Courts will often note the similarity and overlap between the *Miglin* stage 1 analysis and the preceding analysis of s. 56(4) with respect to the property agreement and the same factors will be considered in each "stream of legal reasoning". For example, *LeVan* is now often cited in the *Miglin* stage 1 analysis as the courts consider issues of disclosure and independent legal advice. As a result of this merging and overlap of doctrines in *Miglin* stage 1, courts often assume that *Miglin* grants them the power to set aside or invalidate agreements.[42] In Nova Scotia, *Miglin* stage 1 is routinely understood as incorporating the analysis of validity and enforceability under the common law.[43]

Some of this overlap is the inevitable result of the inclusion of a consideration of the fairness of the bargaining process in the *Miglin* test.[44] In *Miglin* the court described the standard for fair negotiations at stage 1.1 as more demanding than the common law standard of unconscionability. While this might suggest a two-stage analysis, first of unconscionability and then of the higher *Miglin* test for procedural fairness, the other reading — that *Miglin* stage one both incorporates the considerations that would go into a finding of unconscionability and goes beyond them — has typically been adopted in practice. In practice it is difficult and analytically cumbersome to apply two separate standards for procedural fairness and to draw sharp lines between those aspects of the bargaining process that violate common law standards and those that violate whatever additional standards are imposed by *Miglin*. And in Ontario, the fact that s. 56(4) imposes standards that go beyond the common law makes that body of law even less distinct from the *Miglin* test for fair negotiations than the common law doctrine of unconscionability.

While some blurring of doctrinal lines between unconscionability, s. 56(4) of the *F.L.A.* and *Miglin* stage one was inherent in the *Miglin* test itself, it was exacerbated by the Supreme Court of Canada's 2009 decision in *Rick v. Brandsema*. *Rick* reinterpreted *Miglin*. No longer was *Miglin* stage one seen as adding requirements of procedural fairness beyond those imposed by the common law of unconscionability. Instead, *Miglin* was seen as a direct ruling on and a *reformulation* of the

37 Certainly in *Pelech*, the Supreme Court of Canada's earlier attempt to structure the court's discretion to disregard an agreement when awarding spousal support under the *Divorce Act*, it was assumed that the power the Court was dealing with was *in addition to* general legal doctrines that would render agreements invalid. Justice Wilson stated:

> The central issue in this case concerns the effect of *a valid and enforceable antecedent settlement* agreement on the court's discretionary power under s. 11(2) to vary maintenance orders. [emphasis added]

and

> 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. [emphasis added]

For an excellent treatment of these two distinct analytic steps in dealing with a spouse's challenge to a spousal support agreement see Justice Aston's decision in *Ayoub v. Osman*, 2006 CarswellOnt 1808, [2006] O.J. No. 1176 (Ont. S.C.J.); additional reasons at 2006 CarswellOnt 5456 (Ont. S.C.J.).

38 My search did turn up two cases where a spousal support agreement was struck down under s. 56(4) of the *F.L.A.* and therefore the analysis did not proceed to *Miglin*. *Gilliland v. Gilliland*, 2009 CarswellOnt 3895, [2009] O.J. No. 2782, 72 R.F.L. (6th) 88 (Ont. S.C.J.) and *Tailor v. Tailor*, 2008 CarswellOnt 5866, [2008] O.J. No. 3900, 59 R.F.L. (6th) 316 (Ont. S.C.J.) and these have been included in the pool of "*Miglin*" cases.

39 Although it is commonly assumed that it is *Miglin* stage 1.1 (fair negotiations) that overlaps with unconscionability, the common law doctrine of unconscionability requires a *combination* of both procedural flaws (one party taking advantage of the other) and substantive unfairness (an extremely one-sided bargain), suggesting overlap with *Miglin* stage 1.2 as well.

40 See *M. (A.A.) v. K. (R.P.)*, 2010 ONSC 930, 2010 CarswellOnt 1139, [2010] O.J. No. 807 (Ont. S.C.J.), *Covriga v. Covriga*, 2009 CarswellOnt 4718, [2009] O.J. No. 3359 (Ont. S.C.J.); additional reasons at 2010 CarswellOnt 3602 (Ont. S.C.J.); affirmed 2011 CarswellOnt 13682 (Ont. C.A.), and *Studerus v. Studerus*, 2009 CarswellOnt 3035, 69 R.F.L. (6th) 394, [2009] O.J. No. 548 (Ont. S.C.J.). In *Studerus* Harper J. refers to "two streams of legal reasoning" in determining the status and impact of the separation agreement: *Miglin* for the spousal support provisions and s. 56(4) of the *F.L.A.* for the property provisions. The two streams become very blurred as Harper J. struggles with where to deal with unconscionability and *Rick v. Brandsema*.

41 *Studerus*, *ibid.*

42 See *Pollard v. Pollard*, 2009 CarswellOnt 2279, 68 R.F.L. (6th) 387, [2009] O.J. No. 1744 (Ont. S.C.J.) at para. 42 where the *Miglin* stage I analysis is seen as determining the validity of the separation agreement.

43 See *MacLean v. MacLean*, 2009 NSSC 216, 2009 CarswellNS 408, [2009] N.S.J. No. 328 (N.S. S.C.), *Vanderlinden v. Vanderlinden*, 2007 NSSC 80, 2007 CarswellNS 117, [2007] N.S.J. No. 107 (N.S. S.C.), and *Day v. Day*, 2006 NSSC 111, 2006 CarswellNS 138, [2006] N.S.J. No. 135, 25 R.F.L. (6th) 356 (N.S. S.C.). This was true even before the S.C.C. decision in *Rick*.

44 These considerations were not part of the *Pelech* test which focused only on changed circumstances, and left consideration of the fairness of the bargaining process to the common law doctrines such as unconscionability.

common law test for unconscionability.[45] Thus Justice Abella states:

> [42] *Miglin* represented a reformulation and tailoring of the common law test for unconscionability to reflect the uniqueness of matrimonial bargains.

As a result of *Rick*, the boundary between unconscionability and *Miglin* stage one has collapsed completely. They seem to be no longer distinguishable in the family law context. As well, having incorporated a requirement of full and honest disclosure in the context of domestic contracts, the common law doctrine of unconscionability has also became difficult to distinguish from the statutory power to set aside agreements under s. 56(4) of the Ontario *F.L.A.* It is no wonder that judicial decisions dealing with challenges to spousal support agreements indiscriminately merge and jump back and forth between *Miglin*, unconscionability, and in Ontario, *LeVan*.[46]

When the context is solely an application for spousal support under the *Divorce Act* — the kinds of cases that are the focus of this article — it is perhaps not so important at the end of the day (except for doctrinal purists) if the *Miglin* stage 1 analysis incorporates the doctrines of unconscionability and the requirements of disclosure and understanding of the nature of the agreement from s. 56(4) of the *F.L.A.* or if those doctrines are treated as a prior step in the legal analysis before reaching *Miglin* stage 1.[47] All of these bodies of law are moving in the same direction with respect to the requirements of fair bargaining in the domestic context and the result under the *Divorce Act* will be the same. As I discuss in the next section below, the more problematic consequences of this conceptual confusion and doctrinal blurring arise when the agreements in issue deal with matters other than spousal support and it becomes more important to distinguish between legal doctrines and their effects.[48]

(b) The application of Miglin in contexts other than spousal support determinations under the Divorce Act

The second aspect of doctrinal confusion that plagues the post-*Miglin* law is the application of *Miglin* outside the context of spousal support agreements and determinations of spousal support under the *Divorce Act*. The most common extension of *Miglin* principles is to property agreements, but some lawyers and judges are also applying *Miglin* to agreements for child support and custody and access. Some of these applications are contentious and others are clearly erroneous. These extensions of *Miglin* — or what I call the "shadow" of *Miglin* — are not the focus of my article.[49] However, they do warrant a brief discussion first because they constitute a significant portion of the cases citing *Miglin*, and second because they are reflective of the pervasive conceptual confusion that seems to surround *Miglin* and the unreflective resort to *Miglin* in any case involving a domestic contract.

The Supreme Court of Canada has in fact encouraged the extension of *Miglin* principles to other contexts. First, in *Hartshorne*[50] it drew on ideas from *Miglin* to structure another area of statutory discretion, the discretion given to courts under s. 65 of the B.C. *Family Relations Act* to reapportion property if the provisions in a spousal agreement are unfair (essentially a power to override an unfair property agreement and make a fair distribution of property under the statute.) There the Supreme Court of Canada used ideas from *Miglin*, and in particular the ideas of respect for autonomous choice, to constrain the courts' discretion to override property agreements simply because they departed from the statutory norms. While drawing on ideas from *Miglin*, Bastarache J. was also careful to note, at para. 42, that "adopting *Miglin* without qualification would distort the analytic structure already provided in the British Columbia legislation."

Hartshorne was thus, on its proper reading, a relatively limited extension of *Miglin* principles to property agreements, confined to B.C. where there was a specific statutory power to override unfair agreements. *Miglin* principles were used to constrain an existing statutory discretion to override agreements, as under the *Divorce Act*, rather than to expand judicial powers to review or set aside agreements.[51] However in some cases *Hartshorne* was misread as a direct application of *Miglin* to set aside a property agreement. Thus, even before *Rick*, the idea had taken hold in some quarters that *Miglin*, rather than providing a framework for the interpretation of specific statutory powers, conferred a new set of general powers on courts for setting aside all domestic contracts, including property agreements. In *Butty v. Butty*, for example, a 2008 Ontario decision, the trial judge described *Miglin* as "the leading Supreme Court of Canada case on *setting aside domestic contracts*."[52]

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45 For a critical commentary on *Rick*, in particular the decision's blurring of the lines between *Miglin* and unconscionability, see Robert Leckey, "A Common Law of the Family? Reflections on Rick v. Brandsema" (2009) 25 Canadian Journal of Family Law 257-96.

46 See *Studerus*, above note 40 and *Loy v. Loy*, 2007 CarswellOnt 7123, [2007] O.J. No. 4274, 45 R.F.L. (6th) 296 (Ont. S.C.J.).

47 The main consequence for this article is that I took a somewhat over-inclusive approach to identifying *Miglin* cases, and included those where *Miglin* was referred to but the spousal support agreement was invalidated under the common law or s.56(4) of the *F.L.A.* without reaching the *Miglin* test. Clearly the same result would have been achieved under *Miglin* and other courts might simply have started with *Miglin*.

48 Distinctions between *Miglin* and the common law and s. 56(4) will have to be drawn in cases where a spouse is simply requesting that a spousal support agreement be set aside, (typically a payor) without any concurrent application for spousal support under the *Divorce Act*.

49 Interestingly, a significant portion of the cases that cite *Miglin* fall into this "shadow" realm. As will be discussed further below, the number of "core" *Miglin* cases is surprisingly low.

50 Above note 9.

51 Following this reasoning, *Miglin* was found not applicable to test the substantive fairness of property agreements in Alberta: see *Mastalerz v. Mastalerz*, 2007 ABQB 416, 2007 CarswellAlta 873 (Alta. Q.B.) and *R. (B.A.) v. S. (C.J.)*, 2006 ABQB 400, 2006 CarswellAlta 752 (Alta. Q.B.).

52 2008 CarswellOnt 2918, [2008] O.J. No. 2017, ¶212 (Ont. S.C.J.); additional reasons at 2009 CarswellOnt 2528 (Ont. S.C.J.); reversed 2009 CarswellOnt 7612 (Ont. C.A.). *Butty* involved a marriage contract that dealt only with property and that raised the issue of whether there had been material non-disclosure. The trial judge applied *Miglin* and ran together the *Miglin* analysis and the s. 56(4) *F.L.A.* analysis. The Court of Appeal, which reversed the trial judge's finding of material non-disclosure, made no

This misreading of *Miglin* has now, of course, been reinforced by the Supreme Court of Canada's 2009 decision in *Rick v. Brandesma.* In *Rick* the court reformulated the common law test for unconscionability in the family law context to incorporate the higher standards for fair negotiations that are part of the *Miglin* stage one analysis, specifically a requirement of full and honest disclosure, and then used that reformulated conception of unconscionability to set aside a property agreement. The most surprising part of the decision, as discussed above, was that this expanded conception of unconscionability was not presented as a novel extension of the common law, influenced by ideas from *Miglin.* Instead the original *Miglin* decision, which clearly involved the interpretation of a statutory power, was simply read, or more accurately misread, as a reformulation of the law of unconscionability.

As a result of *Rick*, *Miglin* is increasingly being relied upon in applications to set aside property agreements.[53] However, much confusion and uncertainty remains about what parts of the *Miglin* framework *Rick* has made applicable to property agreements and, more generally, how *Miglin* is to be incorporated into the existing legal framework for property agreements. *Rick* can be read in many ways.[54] Some

reference to *Miglin* and correctly relied only upon s. 56(4); see *Butty v. Butty*, 2009 ONCA 852, 2009 CarswellOnt 7612, [2009] O.J. No. 5176, 75 R.F.L. (6th) 16 (Ont. C.A.). In *Pollard v. Pollard*, 2009 CarswellOnt 2279, 68 R.F.L. (6th) 387, [2009] O.J. No. 1744 (Ont. S.C.J.) the entire separation agreement, which dealt with both property and spousal support, was subjected to a *Miglin* stage one analysis to determine "validity" as was a separation agreement which involved a single lump sum payment in respect of both property and spousal support in *Gammon v. Gammon*, 2008 CarswellOnt 802, [2008] O.J. No. 603 (Ont. S.C.J.); additional reasons at 2008 CarswellOnt 6319 (Ont. S.C.J.). In *Gammon* Nolan J. referred in turn to *R. (N.) v. B. (B.)*, 2006 CarswellBC 934, 26 R.F.L. (6th) 293 (B.C. S.C.); additional reasons at 2006 CarswellBC 1768 (B.C. S.C.), a B.C. decision that pre-dated *Rick* and that merged unconscionability, *Miglin* and s. 65 of the B.C. *Family Relations Act* in dealing with a property agreement. A series of Nova Scotia decisions beginning with *Day v. Day*, 2006 NSSC 111, 2006 CarswellNS 138, 25 R.F.L. (6th) 356 (N.S. S.C.) have also run together *Miglin*, unconscionability and s. 29 of the *M.P.A.*, above note 34; subsequent cases include *Vanderlinden*, above note 43, *Maclean*, above note 43, *Robar v. Arseneau*, 2010 NSSC 175, 2010 CarswellNS 314 (N.S. S.C.); additional reasons at 2010 CarswellNS 738 (N.S. S.C.), and *Andrist v. Andrist*, 2010 NSSC 285, 2010 CarswellNS 442 (N.S. S.C.); additional reasons at 2011 CarswellNS 158 (N.S. S.C.); additional reasons at 2011 CarswellNS 317 (N.S. S.C.).

53 For Ontario cases see *Butty*, above note 52, *Verkaik v. Verkaik*, 2010 ONCA 23, 2010 CarswellOnt 139, [2010] O.J. No. 120 (Ont. C.A.). *Ruscinski v. Ruscinski*, 2006 CarswellOnt 1957, [2006] O.J. No. 1274 (Ont. S.C.J.); additional reasons at 2006 CarswellOnt 3496 (Ont. S.C.J.); *Dyck v. Boshold*, 2009 CarswellOnt 7351, [2009] O.J. No. 4999 (Ont. S.C.J.); additional reasons at 2009 CarswellOnt 8089 (Ont. S.C.J.); *Rempel v. Smith*, 2010 ONSC 6740, 2010 CarswellOnt 9349 (Ont. S.C.J.), *Rider v. Rider*, 2010 ONSC 4721, 2010 CarswellOnt 6511 (Ont. S.C.J.) and *Connell v. Connell*, 2011 ONSC 4868, 2011 CarswellOnt 8589 (Ont. S.C.J.); additional reasons at 2011 CarswellOnt 10840 (Ont. S.C.J.).

54 The narrowest reading of *Rick* is as a decision related to the specific statutory context of the *Family Relations Act* in B.C. which gives courts a broad power to override unfair property agreements, and thus as a decision that has no applicability to other statutory

courts have been cautious, reading *Rick* narrowly as a case that has, at most, extended the existing doctrine of unconscionability by adding a specific duty of full and fair disclosure. On this approach, *Rick* would have little practical effect in a jurisdiction like Ontario which has already legislated a requirement of disclosure.[55] Others read *Rick* more broadly, as essentially replacing the existing law of unconscionability, as applied to domestic contracts, with a *Miglin* analysis. A number of decisions have applied the full *Miglin* stage one analysis to property agreements, including not only the higher *Miglin* stage 1.1 standards of procedural fairness, but also considerations of the degree to which the agreement complies with the statutory objectives for property division (*Miglin* stage 1.2).[56] Some have even gone further and applied *Miglin* stage 2, assuming that a property agreement can now be set aside if there are significant changes in circumstances since the execution of the agreement that subsequently render it unfair.[57] In some of these cases there are no

contexts. This is the reading preferred by Leckey, above note 45, and that adopted by Yard J. in *Melnyk v. Melnyk*, 2010 MBQB 121, 2010 CarswellMan 247, [2010] M.J. No. 176 (Man. Q.B.) However, the explicit language in *Rick* is at odds with this reading and suggests that *Miglin* does have implications for the common law doctrine of unconscionability.

55 See *Rider*, above note 53, where Belobaba J. found that a marriage contract dealing with property could not be challenged using a *Miglin* stage 2 argument based upon unfairness as a result of unanticipated changes. *Miglin* was found to be applicable only to a limited range of cases involving claims for spousal support under the *Divorce Act*; it was the established common law principles of unconscionability that were available to set aside property agreements.

56 See the comment on *Studerus*, above note 40, in Epstein and Madsen's weekly Family Law Newsletter: July 14, 2009, Westlaw Canada, [Fam.L.Nws. 2009-28]: "It is now clear that the stage I *Miglin* test applies to the determination of whether a property agreement can be set aside." In *Baker v. Baker*, 2011 NSSC 272, 2011 CarswellNS 456 (N.S. S.C.); reversed 2012 CarswellNS 139 (N.S. C.A.), which involved an application to set aside a cohabitation agreement dealing with property division, Williams J. assumes that, following *Rick*, *Miglin* is now the test for the unconscionability of all separation agreements, requiring an analysis of both the circumstances of execution and the substance of the agreement, i.e., its fit with the legislative scheme. In *Brown v. Silvera*, 2009 ABQB 523, 2009 CarswellAlta 1436 (Alta. Q.B.); additional reasons at 2010 CarswellAlta 624 (Alta. Q.B.); varied 2011 CarswellAlta 518 (Alta. C.A.) Moen J. assumes that as a result of *Rick*, *Miglin* must be applied to determine both the procedural and substantive fairness of property agreements.

57 In *Ehrlich v. Lerson*, 2007 CarswellOnt 2727, [2007] O.J. No. 1696 (Ont. S.C.J.) Wood J. applied all stages of the *Miglin* analysis, including stage 2, to a separation agreement dealing with custody, child support and property, but concluded on the facts that there was no reason to "set aside" the agreement. In *Verkaik*, above note 53, where the agreement in issue was a marriage contract that dealt only with property, one of the issues raised on appeal to challenge the agreement, in addition to arguments based on s. 56(4), was whether the husband's actions after marriage constituted such a different state of affairs that "the marriage contract should be set aside pursuant to the test applied by the Supreme Court of Canada in *Miglin v. Miglin*". Rather than dismissing the argument as legally erroneous, the Court of Appeal gave it legitimacy by finding no factual basis to support it. More recently see *Connell v. Connell*, 2011 ONSC 4868, 2011 CarswellOnt

references at all to the common law doctrine of unconscionability or the statutory regime governing property agreements; *Miglin* itself is seen as a direct source of authority.

I would argue that the best way to read *Rick*, consistent with a concern for maintaining the integrity of the analytic structure of the current legal framework applicable to domestic contracts, is as a decision that has *taken ideas from Miglin* to shape the doctrine of unconscionability, just as the S.C.C. in *Hartshorne took ideas from Miglin* to inform the proper application of s. 65 of the *Family Relations Act*. On this reading of *Rick*, it is not *Miglin* that is directly applicable to property agreements, but instead an expanded concept of unconscionability, influenced by *Miglin*, that incorporates a requirement of disclosure. By reading *Rick* too broadly and applying *Miglin* directly to property agreements, courts are at risk of illegitimately creating a free-standing power to set aside property agreements that is potentially disconnected from any statutory power under provincial legislation or from the common law.

It is one thing to use certain ideas from *Miglin* to shape and inform other existing bodies of law, consistent with the analytic structure of those bodies of law, whether common law or statutory. This is to be expected; it is the way the law develops. Many of the themes sounded in *Miglin* — the complex dynamics of spousal bargaining and the difficult balancing of autonomy and fairness — do have resonance beyond the context of spousal support agreements under the *Divorce Act*. However, when ideas from *Miglin* are drawn into other bodies of law, they have to be incorporated in a way that meshes with the analytic structure of those areas of law. It is quite another matter to directly use *Miglin*, a test crafted specifically to structure the statutory power to award spousal support — a prospective obligation and one with a strong dimension of social responsibility — to authorize new judicial powers to set aside all domestic contracts, unconnected to any existing common law or statutory powers. Recent case law shows that this distinction is sometimes being ignored — the unfortunate result of the doctrinal confusion that *Miglin*, combined with *Hartshorne* and *Rick*, has generated. If the general direction of the law of contract is to recognize broader judicial powers to review and *set aside* domestic contracts, the more appropriate route is to use ideas from *Miglin* to build on existing common law concepts — such as unconscionability and perhaps good faith[58] — rather than to directly adopt a test that was developed specifically to deal

8589 (Ont. S.C.J.); additional reasons at 2011 CarswellOnt 10840 (Ont. S.C.J.) where it was assumed by Eberhardt J. that the full *Miglin* analysis, including stage 2, was relevant to a decision about setting aside a property agreement. In Nova Scotia courts have ruled that Miglin stage 2 is not applicable to property agreements: see *Day*, above note 52.

58 See *Leopold v. Leopold*, 2000 CarswellOnt 4707, 51 O.R. (3d) 275, 12 R.F.L. (5th) 118 (Ont. S.C.J.), for some sense of where the common law of domestic contracts might go over time. In that unfairly over-looked decision, (although it was referred to in passing in both *Miglin* and *Rick*) Wilson J. drew on common law principles to suggest that domestic contracts be held to a standard of good faith. See also *D'Andrade v. Schrage*, 2011 ONSC 1174, 2011 CarswellOnt 1292 (Ont. S.C.J.); additional reasons at 2011 CarswellOnt 5124 (Ont. S.C.J.) for a discussion of what the standard of good faith requires.

with spousal support determinations.

It is not only property agreements that are now being analyzed, I would argue incorrectly, under the *Miglin* framework. Some courts continue to apply *Miglin* to child support agreements,[59] despite clear appellate authority confirming that this is an error.[60] The *Divorce Act* has specific provisions determining the weight to be given to child support agreements (ss. 15.1(5) to (8)); that framework is very different from spousal support, giving much less weight to agreements that depart from the statutory norms embodied in the Child Support Guidelines. In *D.B.S.*[61] the Supreme Court of Canada did loosely draw on some ideas from *Miglin* in structuring the court's discretion to award retroactive child support based on the increases in the payor's income. Relying on *Miglin*, Bastarche J. commented that child support agreements "should be given considerable weight" and that courts should not be too hasty to *retroactively* "disrupt the equilibrium achieved by the parents".[62] However, it is both a misreading of this passage and clearly inconsistent with the child support provisions of the *Divorce Act* to apply *Miglin* to prospective determinations of child support.

And finally, some courts have tried to apply *Miglin* to child custody and access decisions under the *Divorce Act* to determine the weight to be given to prior agreement. In *Blois v. Gleason*, for example, which involved an originating application by the mother for custody in the face of a separation that provided for joint custody, Blishen J. stated:

> [114] In an application which seeks to vary a custody order between the parties, the court must have reference to the Supreme Court of Canada decision in *Miglin* . . .: see *Hearn v. Hearn*, [2004] A.J. No. 105 (Q.B.) and *Carrière v. Giroux*, [2006] O.J. No. 1532 (S.C.J.). The court must examine the separation agreement to see if it is consistent with the overall objectives and values of the *Divorce Act*. Therefore, the court must consider the best interests of the child, while considering the importance of the parent's autonomy in reaching their own agreement.[63]

59 See *Kudoba v. Kudoba*, 2007 CarswellOnt 6260, [2007] O.J. No. 3765, 43 R.F.L. (6th) 98 (Ont. S.C.J.); *Erlich v. Lerson*, above note 57, *Benmergui v. Bitton*, 2008 CarswellOnt 1490, 52 R.F.L. (6th) 69, [2008] O.J. No. 1059 (Ont. S.C.J.) and *Hwang v. Hwang*, 2011 BCSC 60, 2011 CarswellBC 77 (B.C. S.C.). Although *Miglin* is relied upon, *Benmurgi* really seems to be a case of setting aside an agreement under s. 56(4) of the *F.L.A.* or the common law for failure of consent.

60 See the decision of the Manitoba Court of Appeal in *Gobeil v. Gobeil*, 2007 MBCA 4, 2007 CarswellMan 23 (Man. C.A.). *Gobeil* was recently relied upon in *Sinclair v. Sinclair*, 2011 SKQB 166, 2011 CarswellSask 273 (Sask. Q.B.) for its ruling that *Miglin* is not applicable to child support. Child support agreements can, of course, be set aside on common law grounds of unconscionability, etc. or on statutory grounds such as s. 56(4) of the Ontario *F.L.A.*

61 *S. (D.B.) v. G. (S.R.)*, 2006 CarswellAlta 976, 2006 CarswellAlta 977, [2006] 2 S.C.R. 231 (S.C.C.).

62 At para. 78. In fact, however, Barstarche J. found that child support agreements that had not been endorsed by a court warranted less weight than court orders.

63 *Blois v. Gleason*, 2009 CarswellOnt 2527, [2009] O.J. No. 1884 (Ont. S.C.J.). See also *Erlich v. Lerson*, above note 56.

It is unclear why it is *necessary* to refer to *Miglin* in a case dealing with a custody and access agreement. The balance of considerations may be quite different in this context, where the interests of the child, a third party, are at stake, than in the context of spousal support agreements.

(c) Miglin, final agreements, variation and the material change test

A third major source of confusion in the case law relates to the kinds of spousal support agreements to which the *Miglin* test is applicable. Spousal support is by its nature a prospective, on-going obligation. The default assumption is that, spousal support is open to modification in response to changing circumstances. Thus spousal support orders made by courts are subject to variation and often include conditions for review; similarly, when parties negotiate their own settlement of spousal support, their agreements often make provision for variation or review.

The *Miglin* test, as originally articulated, was designed to deal with cases involving *final* agreements, i.e. agreements that purport to be a final resolution of the support obligation and which, in contrast to the prevailing default assumptions, exclude the possibility of future variation or modification. The *Miglin* test, specifically stage 2, allows courts to override that attempt to achieve finality, but only if a fairly stringent test of change is satisfied — i.e. an unforeseen change outside the reasonable contemplation of the parties. As originally articulated, the *Miglin* stage 2 test was understood to be a distinctive test crafted for final agreements — more stringent than the ordinary material change test applied in a variation context.[64]

Before this more stringent *Miglin* stage 2 test is applied, there must be a determination of whether or not the agreement in issue is a final agreement. What counts as a final agreement? The most obvious kinds of "final" agreements are those that provide for a waiver or time-limit of support, or a single lump sum payment. However a fact specific analysis is required in each case, taking into account the terms of the particular agreement to determine if finality was intended. In some cases finality is obvious from the terms of the agreement; in other cases the meaning of the agreement is open to competing interpretations which a court must ultimately resolve.[65] It is possible that some parts of a spousal support agreement may be

64 I cannot deal here with the confusion that surrounds the test for material change, stemming in particular from decision of the Supreme Court of Canada in *Willick v. Willick*, 1994 CarswellSask 48, 1994 CarswellSask 450, [1994] 3 S.C.R. 670, 6 R.F.L. (4th) 161 (S.C.C.), which incorporated the concept of foreseeability into the test for material change. For an excellent discussion of the law of variation see Rollie Thompson, "To Vary, To Review, Perchance to Change: Changing Spousal Support," paper presented at the Law Society of Upper Canada, 5th Ontario Family Law Summit (Toronto, June 16-17, 2011).

65 For a nice example of a case analyzing whether an agreement was final see *Ward v. Ward*, 2011 ONSC 6066, 2011 CarswellOnt 11867 (Ont. S.C.J.). The case involved a consent order which provided for 5 years of step-down support. The order provided that after 5 years, spousal support was to terminate "without review or appeal." The husband's income decreased, the wife's had increased, and the husband applied for a termination of support. The court concluded that this was a final agreement that would remain non-variable despite changes in income. Thus a stringent *Miglin* stage 2 test was applied to find no grounds for variation under s. 17 of the *Divorce Act*.

final, while others will be open to variation or modification.[66]

While stage 1 of *Miglin* tends to blur with common law and statutory doctrines that provide for the setting aside or invalidation of spousal agreements, stage 2 of *Miglin*, which incorporates a "change" test as the basis for overriding a final spousal support agreement, has tended over time to blur doctrinally with the law relating to variation of spousal support, resulting in a confused merger of the material change test and the *Miglin* stage 2 test.[67] One source of this doctrinal blurring is a failure to think seriously about the requirement of a "final" agreement, as an initial step in the analysis, before resorting to *Miglin*. As a result *Miglin* is often misapplied to agreements that expressly provide for review or variation or that provide for indefinite support where a power to vary might be reasonably implied. In these cases the Miglin stage 2 test is often applied as if it were no different than the material change test — a move that generates sensible results but produces doctrinal confusion. A second source of doctrinal blurring is the on-going confusion about how to apply *Miglin* to consent orders given the statutory context of s. 17 of the *Divorce Act* which explicitly includes the material change test. The failure to think clearly about the relationship between the material change threshold and the *Miglin* stage 2 test has contributed to the confused merger of the two tests.[68] Each of these problems will be dealt with in turn.

(i) Agreements with material change or review clauses

Some agreements, in particular those providing for long-term support, contain clauses allowing for variation on the basis of material change[69] or providing for review. There is much confusion about whether *Miglin* is at all relevant in such cases when one of the parties comes to court seeking a modification of support based upon the material change clause or the review clause. The simple and straight-forward answer is no. These cases raise questions about the interpretation

66 See *Sullivan v. Sullivan*, 2010 BCSC 1461, 2010 CarswellBC 2811, [2010] B.C.J. No. 2035 (B.C. S.C. [In Chambers]) (agreement provided for reduction of spousal support if husband's income decreased but specified no variation if wife's income increased); *Palombo v. Palombo*, 2011 ONSC 1796, 2011 CarswellOnt 2873, [2011] O.J. No. 1986 (Ont. S.C.J.) (material change clause applicable to amount but fixed period of entitlement expressly not subject to variation).

67 For an example of the confused merger of the two tests see *P. (S.) v. P. (R.)*, 2011 ONCA 336, 2011 CarswellOnt 2839 (Ont. C.A.).

68 A third factor, which I will not discuss here, are the problematic formulations and applications of the material change test as a result of *Willick*. Interpretations of *Willick* that adopt an objective notion of foreseeability bring the test very close to that in *Miglin*. Thompson, above note 63, argues that properly interpreted the *Willick* test entails a *backward* conception of foreseeability, asking what was taken into account or considered when making the order. *Miglin* stage 2, on the other hand, embodies a *prospective* notion of forseeablity, asking what did the parties forsee as the range of reasonable outcomes going forward.

69 In some cases, of course, variation clauses may be more specific. In other cases, there may be a clause providing "until further order of the court." (see *Campbell v. Campbell*, 2007 ABQB 637, 2007 CarswellAlta 1862, [2007] A.J. No. 1485 (Alta. Q.B.)) For the sake of simplicity, I will only refer to material change clauses.

and application of the agreement, not about overriding the agreement. If the requested change is consistent with the agreement, there is no issue about whether support should be awarded other than as provided under the agreement, and hence the *Miglin* tests are inapplicable. Put another way, an agreement providing for variation or review is not a "final" agreement.

There are certainly cases, including appellate level decisions, that clearly recognize the inapplicability of *Miglin* when the requested change in spousal support is covered by a material change or review clause.[70] However, the number of cases in which this is not the clear starting point is surprising. In many cases one finds a very convoluted *Miglin* analysis of the agreement before the courts get to the real issue of whether there has been a material change within the terms of the agreement, if they get to it at all.[71] Often the *Miglin* stage 2 analysis is simply conflated with the analysis under the material change clause, contributing to the general doctrinal blurring of these two tests.

A *Miglin* analysis is unnecessary in cases where the agreement has a material change or variation clause. Furthermore the *Miglin* stage 2 test, which deals with the effect of changed circumstances, is far too stringent for agreements which have an ordinary, "garden variety" material change clause. Applying *Miglin* can lead to results at odds with what the parties intended; alternatively, to reach reasonable results consistent with the parties' intention, courts have effectively lowered the threshold under *Miglin* stage 2 and treated it as a material change threshold.

For the purposes of this study, cases involving material change, variation, or review clauses were excluded from the pool of "core" *Miglin* cases. There are of course complicated agreements, where some provisions in the agreement are final

70 *Katz v. Katz*, 2004 CarswellMan 226, [2004] M.J. No. 206 (Man. C.A.), *Henteleff v. Henteleff*, 2005 MBCA 50, 2005 CarswellMan 112 (Man. C.A.), *Gobeil v. Gobeil*, 2007 MBCA 4, 2007 CarswellMan 23 (Man. C.A.), *McEachern v. McEachern*, 2006 BCCA 508, 33 R.F.L. (6th) 315, 2006 CarswellBC 2750 (B.C. C.A.), *M. (J.W.J.) v. R. (T.E.)*, 2007 BCSC 252, 2007 CarswellBC 382, [2007] B.C.J. No. 358 (B.C. S.C.), *Pollitt v. Pollitt*, 2010 ONSC 1617, 2010 CarswellOnt 10527 (Ont. S.C.J.); additional reasons at 2011 CarswellOnt 1219 (Ont. S.C.J.); additional reasons at 2011 CarswellOnt 2286 (Ont. S.C.J.); additional reasons at 2011 CarswellOnt 5873 (Ont. S.C.J.); additional reasons at 2011 CarswellOnt 5873 (Ont. S.C.J.), *Poitras v. Poitras*, 2006 SKQB 96, 2006 CarswellSask 99, [2006] S.J. No. 113 (Sask. Q.B.), *D. (B.M.) v. D. (C.N.)*, 2010 BCSC 1785, 2010 CarswellBC 3459, [2010] B.C.J. No. 2507 (B.C. S.C.); *Loughlin v. Loughlin*, 2007 ABQB 10, 2006 CarswellAlta 1834, [2007] A.J. No. 74 (Alta. Q.B.), *Neate v. Neate*, 2009 ABQB 475, 2009 CarswellAlta 1213 (Alta. Q.B.), *Druhan v. Druhan*, 2010 ONSC 3430, 2010 CarswellOnt 5268 (Ont. S.C.J.).

71 See for example *Crawford v. Crawford*, 2006 BCSC 1664, 2006 CarswellBC 2754, [2006] B.C.J. No. 2921 (B.C. S.C.), *H. (C.E.) v. S. (D.W.)*, 2007 NSFC 1, 2007 CarswellNS 5, [2007] N.S.J. No. 7 (N.S. Fam. Ct.), *Napper v. Napper*, 2007 SKQB 212, 2007 CarswellSask 363, 40 R.F.L. (6th) 78, [2007] S.J. No. 350 (Sask. Q.B.), *Hodgson v. Hodgson*, 2011 CarswellAlta 567, [2011] A.J. No. 406, 2011 ABQB 233 (Alta. Q.B.), *B. (P.M.) v. B. (M.L.)*, 2011 NBQB 92, 2011 CarswellNB 149, [2011] N.B.J. No 101 (N.B. Q.B.); varied 2012 CarswellNB 71, 2012 CarswellNB 72 (N.B. C.A.), *Palombo v. Palombo*, 2011 ONSC 1796, 2011 CarswellOnt 2873, [2011] O.J. No. 1986 (Ont. S.C.J.); *Campbell v. Campbell*, 2007 ABQB 781, 2007 CarswellAlta 1800, [2007] A.J. No. 1485 (Alta. Q.B.).

and some are subject to variation, and these have been included in the sample.[72]

(ii) Agreements for on-going support without an explicit variation clause

A more difficult issue related to contractual interpretation and the application of *Miglin* arises in the case of agreements that provide for indefinite, on-going spousal support, but that contain no explicit material change clause. Does the absence of an express variation clause mean that these are final agreements, with the result that any requested change must be analyzed under the *Miglin* framework? Or should the possibility of variation in response to a material change in circumstances be implied in the absence of express language to the contrary, with the result that these are not final agreements and *Miglin* is therefore not relevant?

I would argue that the latter is the more reasonable interpretation, and especially so when the agreement takes the form of a consent order and is thus incorporated into a statutory framework that allows for variation if there has been a material change of circumstances. However, for the most part, the post-*Miglin* case law has failed to address this question clearly and one finds a variety of responses, often reached with little analysis. When consent orders are involved, a large number of these cases are resolved as straightforward variation applications with no reference to *Miglin*. These cases do not even appear in any search of *Miglin* cases.[73] However, unpredictably, some courts will treat any agreement or consent order without an express variation clause as a final agreement requiring a *Miglin* analysis — even those involving indefinite, on-going support. The inclusion of these cases in the "*Miglin*" pool of cases complicates any assessment of the way in which the *Miglin* stage 2 test is being applied.[74]

As I will describe in more detail below, an analysis of these cases shows somewhat distinctive patterns. Some courts do apply a strict *Miglin* stage 2 test, finding that the changed circumstances were objectively forseeable and thereby rejecting reasonable requests for variation based on factors such as a significant decline in the payor's income.[75] In other cases however, after much confused *Miglin* analysis, the end result is a less stringent application of the *Miglin* stage 2 test that

72 See cases cited above, note 56.

73 For an excellent review of the case law on variation of consent orders under s. 17 of the *Divorce Act* see Nicole Tellier and Alex Finlayson, "The Meaning of *Miglin*", paper presented at the Federation of Law Societies of Canada, National Family Law Program, Victoria B.C., July 11–15, 2010. Two cases where the court explicitly addressed the issue of whether *Miglin* was applicable and correctly concluded that it was not are: *Danby v. Danby*, 2008 CarswellOnt 5512, [2008] O.J. No. 3659 (Ont. S.C.J.) and *Ferguson v. Ferguson*, 2008 CarswellOnt 1676, [2008] O.J. No. 1140, 50 R.F.L. (6th) 363 (Ont. S.C.J.),

74 As I argue in the postscript, it is the failure to distinguish between final agreements and agreements providing for on-going support that confused the Supreme Court of Canada's analysis in *L.M.P.* with respect to the issue of the application of *Miglin* to variation of consent orders under s. 17 of the *Divorce Act*.

75 See *Bishop v. Bishop*, 2008 BCSC 1216, 2008 CarswellBC 1880 (B.C. S.C.), *Roy v. Roy*, 2007 NBQB 234, 2007 CarswellNB 324, [2007] N.B.J. No. 247 (N.B. Q.B.), and *Leedahl v. Leedahl*, 2006 SKQB 14, 2006 CarswellSask 8, [2006] S.J. No. 15 (Sask. Q.B.).

resembles the application of a simple material change test. Although these cases have been included in the pool of "*Miglin*" cases analyzed in this study, they are best recognized as a distinctive category of cases where a *Miglin* analysis is not appropriate.

(iii) Miglin and variation applications under s. 17 of the Divorce Act

Much of the confused blurring of the doctrinal line between *Miglin* stage 2 and the material change test for variation has occurred in the context of consent orders (i.e., agreements incorporated into court orders) and variation applications under s. 17 of the *Divorce Act*, which are governed by a threshold statutory test of changed circumstances.

The application of *Miglin* to consent orders in the context of variation applications under s. 17 of the *Divorce Act* involved an originating application under s. 15.2. Although it is not my purpose here to engage in a comprehensive analysis of the application of *Miglin* in applications under s. 17, some brief discussion is warranted to provide some context for understanding the cases included in this study.

The on-going issues in this area begin with the question of whether *Miglin* has any application at all in the context of s. 17 variation applications or whether the applicable test is simply the statutory standard of material change. And if *Miglin* is understood to be applicable, two further issues arise. First, is the entire *Miglin* test applicable or only the *Miglin* stage 2? And second, how do the the threshhold test for material change and the Miglin stage 2 test relate? Does *Miglin* stage 2 replace the material change test or should the tests be addressed in sequence?

At the time the primary research for this article was conducted, there were no clear answers to any of these questions. A number of variation cases involving consent orders were resolved with no reference to *Miglin*, although it might be possible to explain many of these cases as not involving final agreements/orders. On the other hand, in a significant number of s. 17 cases courts did engage in a *Miglin* analysis and these cases have been included in this study. Where *Miglin* was applied, its application was often fraught with confusion, but the most thoughtful analyses suggested: (i) that *Miglin* stage 1 is not applicable, although the validity of the underlying agreement can be challenged on the basis of the common law;[76] and (ii) that while s. 17 imposes a threshold test of material change, the *Miglin* stage 2 test goes on to impose a more stringent test for variation of consent orders.[77]

Since the completion of the primary research for this study, the Supreme Court of Canada has, of course, had the opportunity to further address the application of *Miglin* in the context of s. 17 of the *Divorce Act* in its December 2011 decision in *L.M.P.* As I argue in the post-script to this article, the analysis in *L.M.P.* is highly unsatisfactory and the meaning of the decision very unclear. However, one possible reading is that *Miglin* is no longer applicable in variation applications under s. 17 and that the standard for judicial intervention with respect to consent orders, even final orders, is material change rather than *Miglin* stage 2. To the extent that reading prevails, this study includes a number of cases that in the future would not be analyzed as *Miglin* cases.

4. THE SAMPLE OF "CORE" MIGLIN CASES: SMALL NUMBERS

This article deals with all reported "*Miglin*" cases between January 2006 and May 2011 from appellate and trial courts across the country[78]. An initial search gathered all reported cases in the relevant period which included a reference to *Miglin.* That initial pool was then narrowed down to identify the "core" *Miglin* cases. As has been discussed above, *Miglin* casts a large shadow and is referred to in a wide variety of contexts, sometimes appropriately and sometimes incorrectly. "Core" *Miglin* cases, as I have defined them, are cases where the *Miglin* tests are applied to determine whether courts will override or disregard prior agreements as they exercise their discretionary, statutory powers to award spousal support under the *Divorce Act*.

The search for "core" *Miglin* cases thus meant eliminating:

- cases that simply referred to *Miglin* for general principles of spousal support, together with *Moge* and *Bracklow*;
- cases that referred to *Miglin* as a set of general ideas about how to approach domestic contracts in contexts other than spousal support determinations under *Divorce Act*. Thus cases involving applications to set aside property agreements under the common law or provincial legislation such as s. 56(4) of the Ontario *F.L.A.* were excluded. Also excluded were cases that involved spousal support applications under provincial legislation, which will often involve different statutory tests to determine the

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76 The reason for rejecting the application of *Miglin* stage 1 is that the trial judge had approved the fairness of the agreement at the time it was incorporated. However, it is also established law that consent orders are only as valid as the agreement on which they are based and can be rescinded if the underlying agreement is invalid. In light of the almost complete merger between *Miglin* stage 1 and doctrines of contractual invalidity, discussed above, it would appear that *Miglin* stage 1 considerations are, *de facto*, applicable. In a number of s. 17 cases courts have assumed that both stages of the *Miglin* analysis are applicable: see *Santoro v. Santoro*, 2006 BCSC 331, 2006 CarswellBC 490, 28 R.F.L. (6th) 172, [2006] B.C.J. No. 453 (B.C. S.C.), *Turpin v. Clark*, 2009 BCCA 530, 2009 CarswellBC 3149, [2009] B.C.J. No. 2328 (B.C. C.A.); leave to appeal refused 2010 CarswellBC 1055, 2010 CarswellBC 1056 (S.C.C.); *Jackson v. Honey*, 2009 CarswellBC 643 (B.C. C.A.); and *Stening-Riding v. Riding*, 2006 NSSC 221, 2006 CarswellNS 309, [2006] N.S.J. No. 295 (N.S. S.C.).

77 See *Kehler v. Kehler*, 2003 CarswellMan 270, [2003] M.J. No. 217, 39 R.F.L. (5th) 299 (Man. C.A.), *Dolson v. Dolson*, 2004 CarswellOnt 4164, [2004] O.J. No. 4197, 7 R.F.L. (6th) 25 (Ont. S.C.J.); *Kemp v. Kemp*, 2007 CarswellOnt 1774, [2007] O.J. No. 1131 (Ont. S.C.J.), *Ghahrai v. Mohammad*, 2006 CarswellOnt 7325, [2006] O.J. No. 4651 (Ont. S.C.J.); and *Loit v. Gove*, 2006 CarswellOnt 488, [2006] O.J. No. 347 (Ont. S.C.J.) For a nice review of the Ontario cases on this issue, before the S.C.C.'s decision in *L.M.P.* was released, see *Patton-Casse v. Casse*, 2011 ONSC 4424, 2011 CarswellOnt 7090 (Ont. S.C.J.); additional reasons at 2011 CarswellOnt 11047 (Ont. S.C.J.); additional reasons at 2011 CarswellOnt 11048 (Ont. S.C.J.). The cases divide on whether *Miglin* stage 2 replaces the material change test or whether the tests are done in sequence.

78 Excluding, for reasons of language, Quebec. Reported cases are those found in the two major electronic databases in Canada, Quicklaw and Westlaw Canada.

weight to be given to prior spousal support agreement, for example s. 33(4) of the Ontario *F.L.A.* (power to set aside spousal support agreement that results in unconscionable circumstances);[79]

- cases involving spousal support agreements with "material change" clauses or which provide for a review. Although, as discussed above, some courts mistakenly treat these as cases which require an application of the *Miglin* test; for the most part they are more appropriately seen as cases involving the interpretation and application of the agreement. In these cases courts are typically not being asked to override or disregard the agreement, but rather to make an order consistent with the agreement; and[80]
- cases involving interim applications for spousal support.[81]

Having clarified what cases have been excluded from my sample, I should also note that I have included some cases that are not always thought of as "core" *Miglin* cases, and in this respect, my sample may be somewhat overinclusive. Some of this overinclusiveness was necessitated by the confused state of the law and the blurring of doctrinal boundaries between *Miglin* and other bodies of law. Thus my pool of "core" *Miglin* cases includes:

- cases involving variation applications under s. 17 of the *Divorce Act* where the order in issue is a consent order which has incorporated minutes of settlement or a prior separation agreement;
- spousal support agreements for indefinite, on-going support which do not contain a material change or review clause where courts have treated these as final agreements requiring a *Miglin* analysis;
- cases where spousal support agreements have been set aside under common law contract doctrines or provincial legislation such as s. 56(4) of the Ontario *F.L.A.*, followed by a determination of spousal support under the *Divorce Act*. This inclusion was required by the increasing doctrinal overlap between the *Miglin* stage 1.1 analysis of flawed negotiations and other legal doctrines that may be used to set aside spousal support agreements on the basis of procedural unfairness; whether a court will begin the analysis of a spousal support agreement using *Miglin* stage 1 or the common law/provincial legislation seems somewhat arbitrary and the same factors are often considered under either analysis); and[82]
- cases involving pre-nuptial and marriage contracts that contain provisions dealing with spousal support, although these cases can raise somewhat different issues than separation agreements[83]

Whether or not to include interim applications for spousal support in the face of final agreement was a difficult question. My initial inclination was to exclude them. In the majority of cases no interim spousal support is awarded and the determination of whether or not to override the agreement is left until trial. Because the main objective of the study was to determine how the *Miglin* tests are being applied, and whether the threshold for intervention is relatively high or relatively low, the interim cases would not typically provide that information. However, it also seemed important to include interim decisions to provide an accurate representation of the number of *Miglin* challenges being brought to spousal support agreements. And the successful *Miglin* challenges in interim applications would clearly yield important information about the application of the *Miglin* tests. The result — interim applications were excluded for some parts of the analysis and included for others.

Based on the reviews of the post-*Miglin* law that I conducted in 2004 and 2006, I expected that I would be dealing with a relatively large number of cases over the five and a half year period under study. However, while the initial search generated a fairly large sample of cases that cited *Miglin*, the whittled down pool of "core" *Miglin* cases was surprisingly small. As shown in Table 1, below, which does not include interim applications, my search identified only a total of 80 "core" *Miglin* cases, an average of approximately 15 cases per year.[84] A list of the cases is found in the appendix to this article. And even this number may be high given the inclusion of some "borderline" cases in the sample that are better viewed as variation cases.

79 Excluded, for example, were *Barton v. Sauvé*, 2010 ONSC 1072, 2010 CarswellOnt 1509, [2010] O.J. No. 1008 (Ont. S.C.J.); additional reasons at 2010 CarswellOnt 5973 (Ont. S.C.J.), *Fitzsimmons v. Boulter*, 2010 ABQB 614, 2010 CarswellAlta 1955, [2010] A.J. No. 1122 (Alta. Q.B.), *Rosenstock v. Karakeeva*, 2010 MBQB 176, 2010 CarswellMan 398, [2010] M.J. No. 237 (Man. Q.B.), *Harrington v. Coombs*, 2011 NSSC 34, 2011 CarswellNS 49, [2011] N.S.J. No. 47 (N.S. S.C.); additional reasons at 2011 CarswellNS 215 (N.S. S.C.); additional reasons at 2012 CarswellNS 81 (N.S. S.C.).

80 I have not, however, excluded *Austin v. Austin*, 2007 CarswellOnt 7130, [2007] O.J. No. 4283, 45 R.F.L. (6th) 401 (Ont. S.C.J.) (confused *Miglin* analysis of agreement with material change clause; wife's change in re-training plans found to be a material change and also to engage *Miglin* stage 2), because the decision involved not just a ruling on material change, but also a ruling on the flawed bargaining process.

81 I have included the interim applications where relevant to provide an accurate representation of the number of *Miglin* challenges being brought.

82 Thus I have included two cases where a spousal support agreement was struck down under s. 56(4) of the *F.L.A.* and therefore the analysis did not proceed to *Miglin*. *Gilliland v. Gilliland*, 2009 CarswellOnt 3895, [2009] O.J. No. 2782, 72 R.F.L. (6th) 88 (Ont. S.C.J.) and *Tailor v. Tailor*, 2008 CarswellOnt 5866, [2008] O.J. No. 3900, 59 R.F.L. (6th) 316 (Ont. S.C.J.)

83 Unfortunately, I have not been able to include in this article a comprehensive analysis of whether there are distinctive patterns in the treatment of marriage contracts as compared to separation agreements. However I will comment below on the fact that several of the successful *Miglin* stage 2 challenges have involved marriage contracts.

84 As table 2, below, will show the total number of *Miglin* cases increases to 94 if interim applications are included.

Table 1: "Core" Miglin Cases, Jan 2006–May 2011*

	2006	2007	2008	2009	2010	2011 (Jan–May)	total cases (Jan 2006–May 2011)	no. of successful Miglin challenges	% success rate
Appeals	2	2	2	1	1	1	9	5	56% (5/9)
Alta Trial	2	2	1	0	1	1	7	0	0% (0/7)
B.C. Trial	6	2	4	3	3	0	18	8	44% (8/18)
Man. Trial	0	0	1	0	2	0	3	2	66% (2/3)
N.B. Trial	0	1	1	2	1	0	5	2	40% (2/5)
Nfld & L Trial	0	1	1	1	0	0	3	2	67% (2/3)
N.S. Trial	2	2	2	2	0	2	10	4	40% (4/10)
Ont. Trial	3	6	3	4	6	2	24	14	58% (14/24)
Sask Trial	1	0	0	0	0	0	1	0	0% (0/1)
Trial Total	14	14	13	12	13	5	71	32	45% (32/71)
CANADA TOTAL (trial and appeal)	16	17	15	14	10	8	80	37	46% (37/80)

Notes:

* excludes interim applications; trial decisions do not include decisions that were appealed

At the provincial appellate court level there were 9 *Miglin* cases between January 2006 and May 2011.[85] Three of the *Miglin* appeals were from B.C., three were from Ontario and Alberta, New Brunswick and Newfoundland and Labrador each generated one appeal decision[86] The Supreme Court of Canada denied leave to appeal in *Turpin v. Clark*, one of the B.C.C.A. *Miglin* decisions, and the most significant of the provincial appellate decisions. The Ontario Court of Appeal has decided several domestic contracts cases over the past five and a half years, but these have involved applications to set aside property agreements and have not involved spousal support or *Miglin*.[87]

The two provinces that have generated the most *Miglin* cases are Ontario (not surprising because of its population) and B.C. (smaller in population but it generates a lot of family law litigation in proportion to its population), but even here the numbers are relatively low considering the vast number of reported spousal support decisions in each jurisdiction. In Ontario at the trial level, there were 24 "core" *Miglin* cases in the five and a half year period between January 2006 and May 2011, and in B.C., 18.

Table 2 below shows adjusted numbers if interim applications are taken into account. There were 14 interim cases, which would raise the total number of cases over the study period to 94, not a significant difference. The numbers in Ontario rise to 28 and in B.C. to 21. One of the interim applications from Saskatchewan, *Evashenko v. Evashenko*,[88] led to an appellate level decision, raising the total number of appellate level *Miglin* decisions to 10.

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85 Plus one appeal on an interim application, for a total of 10; see *Evashenko v. Evashenko*, 2011 SKCA 22, 2011 CarswellSask 162, [2011] S.J. No. 152 (Sask. C.A.).

86 The three B.C. appeal cases are: *Frazer v. van Rootselaar*, 2006 BCCA 198, 2006 CarswellBC 955 (B.C. C.A.); *M. (R.S.) v. M. (M.S.)*, 2006 BCCA 362, 2006 CarswellBC 1899 (B.C. C.A.); additional reasons at 2007 CarswellBC 313 (B.C. C.A.); and *Turpin v. Clark*, 2009 BCCA 530, 2009 CarswellBC 3149, [2009] B.C.J. No. 2328 (B.C. C.A.); leave to appeal refused 2010 CarswellBC 1055, 2010 CarswellBC 1056 (S.C.C.). The three Ontario appeal cases are: *Rosati v. Reggimenti*, 2007 ONCA 705, 2007 CarswellOnt 6712, [2007] O.J. No. 4009 (Ont. C.A.); *P. (S.) v. P. (R.)*, 2011 ONCA 336, 2011 CarswellOnt 2839, [2011] O.J. No. 1968 (Ont. C.A.); and *van Rythoven v. van Rythoven* (2010), 2010 ONSC 5923, 2010 CarswellOnt 10590, 99 R.F.L. (6th) 152, [2011] O.J. No. 6151 (Ont. Div. Ct.); additional reasons at 2011 CarswellOnt 1688 (Ont. Div. Ct.). *Rosati* is simply a brief endorsement of an unreported trial decision relying upon *Miglin* to uphold an agreement. The other three appeals are *Liboiron v. Liboiron*, 2008 ABCA 367, 2008 CarswellAlta 1674, [2008] A.J. No. 1185, 59 R.F.L. (6th) 265 (Alta. C.A.), *Carrier c. Carrier*, 2007 NBCA 23, 2007 CarswellNB 155, 2007 CarswellNB 156 (N.B. C.A.); and *Vanderlans v. Vanderlans*, 2008 NLCA 37, 2008 CarswellNfld 190 (N.L. C.A.). *Liboiron* is not technically a *Miglin* decision and instead applied *Pelech*, but was included because there are so few Alberta decisions varying contractual support arrangements. Two other decisions of the B.C. Court of Appeal dealt with the application of *Miglin*: *Zimmerman v. Shannon*, 2006 BCCA 499, 2006 CarswellBC 2715, 34 R.F.L. (6th) 32 (B.C. C.A.) (no jurisdiction under *Divorce Act* to vary an agreement) and *McEachern v. McEachern*, 2006 BCCA 508, 33 R.F.L. (6th) 315, 2006 CarswellBC 2750 (B.C. C.A.) (involving interpretation/enforcement of agreement: *Miglin* distinguished). The Manitoba Court of Appeal dealt with an agreement involving a material change clause in *Gobeil v. Gobeil*, 2007 MBCA 4, 2007 CarswellMan 23 (Man. C.A.), refusing to decide whether or not this was a case where *Miglin* was applicable.

87 See *Dougherty v. Dougherty*, 2008 ONCA 302, 2008 CarswellOnt 2203, [2008] O.J. No. 1502 (Ont. C.A.); *Quinn v. Epstein Cole LLP*, 2008 ONCA 662, 2008 CarswellOnt 5760, [2008] O.J. No. 3788 (Ont. C.A.); *Butty v. Butty*, 2009 ONCA 852, 2009 CarswellOnt 7612, [2009] O.J. No. 5176, 75 R.F.L. (6th) 16 (Ont. C.A.), *Verkaik v. Verkaik*, 2010 ONCA 23, 2010 CarswellOnt 139, [2010] O.J. No. 120 (Ont. C.A.).

88 Above note 85.

Table 2: "Core" Miglin Cases, Jan 2006–May 2011, including interim applications

	total cases excluding interim	successful Miglin challenges excluding interim	% success rate excluding interim	total interim cases#	successful interim cases	total cases including interim	% success rate if include interim cases
Appeals	9	5	56% (5/9)	1	1	10	60% (6/10)
Alta Trial	7	0	0% (0/7)	0	0	7	0% (0/7)
B.C. Trial	18	8	44% (8/18)	3	1	21	43% (9/21)
Man. Trial	3	2	66% (2/3)	0	0	3	66% (2/3)
N.B. Trial	5	2	40% (2/5)	0	0	5	40% (2/5)
Nfld & L Trial	3	2	67% (2/3)	0	0	3	67% (2/3)
N.S. Trial	10	4	40% (4/10)	0	0	10	40% (4/10)
Ont. Trial	24	14	58% (14/24)	4	1	28	54% (15/28)
Sask Trial	1	0	0% (0/1)	5	1	6	17% (1/6)
Trial Total	71	32	45% (32/71)	13	23% (3/13)	84	42% (35/84)
CANADA TOTAL (trial and appeal)	80	37	46% (37/80)	14	29% (4/14)	94	44% (41/94)

What explains the relatively low number of *Miglin* cases challenging spousal support agreements? Three possibilities come to mind:

- There are more cases involving challenges to spousal support agreements than are caught by my sample, but they involve only the application of the common law (for eg. unconscionability) or provincial legislation such as s. 56(4) of the Ontario *F.L.A.* to set aside the agreement. If these cases contain no reference to *Miglin* they would not have been caught in my search.
- The law has settled into place after a few initial years of uncertainty after the release of *Miglin*. It is generally known that it will be difficult to challenge an agreement under *Miglin* and thus only cases involving fairly serious procedural or substantive unfairness are being litigated.
- Fairer spousal support agreements are being made now than in the past as a result of the combined effect of *Miglin* and the SSAG. The SSAG give spousal support recipients stronger bargaining chips and spousal support is not so quickly being taken off the bargaining table as it was in the past. Post-*Miglin*, lawyers may also be doing a better job of addressing the implications of changed circumstances in the process of negotiating and drafting separation agreements and, more generally, of ensuring that agreements are based on the fully informed consent of the parties.

5. HIGH SUCCESS RATE OF MIGLIN CHALLENGES

The number of "core" *Miglin* challenges to spousal support agreements is relatively small, but the success rate of those challenges that have been brought is fairly high. As Table 2, above, shows, if interim cases are excluded, 37 out of the 80 *Miglin* challenges to spousal support agreements were successful, an overall success rate of 46%. The success rate on appeals was very high — 56%.

Table 2 shows, not surprisingly, a much lower success rate on interim applications; only 4 of the 14 interim applications relying on *Miglin* were successful, a 29% success rate.[89] If interim applications are included in the pool the overall success rate drops to 44%, but even this is relatively high.

As Table 3 (below) shows, there are significant regional variations in rates of successful *Miglin* challenges, with relatively low rates of successful challenges in Alberta and Saskatchewan and relatively high rates in Manitoba and Newfoundland & Labrador (although the sample numbers are admittedly small). In both Ontario and B.C., where sample sizes are larger, there was a 58% success rate at the trial level in Ontario, and a 44% success rate in B.C. (excluding interior applications)

Table 3: "Core" Miglin Cases By Province, Jan 2006–May 2011

	% success rate at trial excluding interim	% success rate at trial including interim	# of appeal cases by province	# of successful appeals by province	% success rate by province trial and appeal, including interim
Alta	0% (0/7)	0% (0/7)	1	1/1	12.5% (1/8)
B.C.	44% (8/18)	43% (9/21)	3	2/3	46% (11/24)
Man.	66% (2/3)	66% (2/3)	0	0	66% (2/3)
N.B.	40% (2/5)	40% (2/5)	1	1/1	50% (3/6)
Nfld & L	67% (2/3)	67% (2/3)	1	0/1	50% (2/4)
N.S.	40% (4/10)	40% (4/10)	0	0	40% (4/10)
Ont.	58% (14/24)	54% (15/28)	3	1/3	52% (16/31)
Sask	0% (0/1)	17% (1/6)	1	1/1	29% (2/7)
TOTAL	45% (32/71)	42% (35/84)	10	60% (6/10)	44% (41/94)

The relatively high success rate of *Miglin* challenges does not, in itself, tell us

89 The four successful interim challenges were *Evashenko*, above note 85, a decision of the Sask. C.A. (*Miglin* stages 1.1 and 1.2); *K. (S.) v. K. (L.)*, 2009 BCSC 69, 2009 CarswellBC 125 (B.C. S.C.) (*Miglin* stage 1.2); *Baudanza v. Nicoletti*, 2011 ONSC 352, 2011 CarswellOnt 8927 (Ont. S.C.J.) (*Miglin* 1.1 and invalidity), and *Rempel v. Androsoff*, 2010 SKQB 248, 2010 CarswellSask 434 (Sask. Q.B.) (*Miglin* stage 1.1).

much about how the *Miglin* test is being applied, or whether the standard for intervention under it remains stringent or is becoming more relaxed over time. It might simply support the hypothesis that only cases with a relatively high chance of success are being brought. More analysis of both the data and the facts of the individual cases is required. Table 4 (below) begins this process by analyzing the successful *Miglin* challenges, and breaking those down by the stage of the *Miglin* test under which the court found the agreement flawed.

Table 4: Basis of Successful Miglin Challenges, Jan 2006–May 2011

	# of successful Miglin challenges*	# with finding of flawed negotiations**	# based on Miglin stage 1.2 only (unfairness at time of execution)#	# based on Miglin stage 2 only (change and unfairness at time of application)##
Appeals	6	2		4
Alta Trial	0	0		
B.C. Trial	9	2	5	2
Man. Trial	2	1		1
N.B. Trial	2			2
Nfld & L. Trial	2	1		1
N.S. Trial	4	2	1	1
Ont. Trial	15	11	2	2
Sask Trial	1	1		
CANADA TOTAL	41	20 (49%)	8 (20%)	13 (31%)

Notes:

* Includes successful interim challenges

** Includes cases where courts may have gone on to also find flaws at *Miglin* 1.2 and/or *Miglin* 2.

The facts of some of these cases may suggest flawed negotiations, but that was not the basis of the ruling

Includes cases where the facts suggest flawed negotiations, but that was not the basis of the ruling; also includes some variation applications under s. 17 in respect of consent orders where it is unclear if the court is applying *Miglin* stage 2 test or only the test of material change.

Almost half of the successful *Miglin* challenges, and in Ontario the vast majority, involved flaws in the negotiation process, *i.e.*, a failure at *Miglin* stage 1.1 that then opened the door to greater scrutiny of the substantive unfairness of the agreement at *Miglin* 1.2 or 2. Ontario courts have been more willing to make rulings of flawed negotiations than courts in other provinces, perhaps as a result of the presence of additional requirements of procedural fairness for domestic contracts found in s. 56(4) of the *F.L.A.*

As Table 4 shows, however, there are also a significant number of cases — the other half of the successful challenges — where it appears that fairly negotiated agreements have failed the *Miglin* test on grounds of substantive unfairness *alone*, either at the time of execution (stage 1.2) or subsequently (stage 2). This would seem to suggest a significant shift in the application of *Miglin*, one that places increasing weight on conformity to the norms of substantive fairness embodied in the *Divorce Act* and now the SSAG. However, as I will go on to show below, in some of these cases the facts strongly suggest flaws in the negotiation process, although these were not relied upon as the legal basis for overriding the agreement. And another subset of these cases are more appropriately viewed as variations of ongoing support governed by a material change test. This leaves a somewhat smaller set of cases in which what are fairly negotiated *final* agreements have been indeed overridden on grounds of substantive unfairness alone. The standards for intervention under *Miglin* do seem to be shifting, but at this point in time the shifts are more pronounced with respect to the standards of procedural fairness as compared to the standards for substantive fairness.

6. MIGLIN STAGE 1.1: FLAWED NEGOTIATIONS

The majority of successful *Miglin* challenges involve a finding of flawed negotiations at stage 1.1., which then leads to increased scrutiny of the substantive fairness of the agreement at *Miglin* stage 1.2 or 2.[90] This was the case in the early years post-*Miglin* and remains a consistent pattern even in more recent case law. What has changed, however, is the way in which courts are interpreting flawed negotiations. Norms of procedural fairness are clearly shifting and some of the earlier cases in which courts found no procedural flaws might generate a different result today.[91]

In *Miglin* the Court used the term "unimpeachable" to describe the standard for fair negotiations — the kind of negotiations that would generate agreements entitled to considerable judicial deference. The Court stated that its test for flawed negotiations would extend beyond the common law tests for unconscionability, capturing a wider range of circumstances of vulnerability and coercion. However, in the early years post-*Miglin* the threshold for flawed negotiations was set very high. The agreements that failed *Miglin* because of flawed negotiations generally involved very serious vulnerabilities and power imbalances that would in most

90 I say "majority" because of my conclusion that even a number of the cases that were coded as involving no failure of *Miglin* stage 1.1 actually involved flawed negotiations and that factor influenced the reasoning on substantive unfairness.

91 A good example is *Camp v. Camp*, 2006 BCSC 608, 2006 CarswellBC 958, 26 R.F.L. (6th) 347, [2006] B.C.J. No. 879 (B.C. S.C.) in which there was a complete absence of disclosure, but nonetheless the justification for overriding the agreement was not flawed negotiations but rather the substantive unfairness of the agreement at *Miglin* 1.2.

cases have resulted in invalidation at common law. The lessons most often taken from *Miglin* were that vulnerabilities were not to be presumed and that professional assistance would compensate for vulnerabilities.

Since 2006, the test for flawed negations has clearly softened to some degree, with courts willing to take into account a wider range of factors that contribute to vulnerability, power imbalances and a lack of understanding of the consequences of the agreement. There has been an increasing focus on and rethinking of what constitutes fair negotiations in the family law context. Now, the main message of *Miglin* is often taken to be that *fairly negotiated* agreements are entitled to respect, rather than the simpler message that courts should be reluctant to interfere with spousal agreements.

This softening of the threshold for flawed negotiations began in Ontario with the trial judgment in *LeVan*, subsequently confirmed by the Court of Appeal in 2008, that breathed new life into sections 56(4) (a) and (b) of the *F.L.A.* and heightened scrutiny of the bargaining process around all domestic contracts for inadequate disclosure and the absence of effective legal advice. In Ontario, *LeVan* inevitably spilled over into the *Miglin* test for flawed negotiations. The Supreme Court of Canada's 2009 decision in *Rick v. Brandesema* was an even more explicit signal that the test for flawed negotiations has changed. In *Rick*, the Court made clear that given the unique circumstances in which separation agreements are negotiated, the *Miglin* standard for fair negotiations imposed requirements of procedural fairness beyond what the common law has conventionally required. In *Rick* the court specifically added a duty of full and honest disclosure to the requirements for fair negotiations. More generally, *Rick* sent the message that respect for contractual autonomy rests upon the fully informed consent of both parties, suggesting heightened scrutiny for factors that would indicate the absence of such consent. *Rick* also showed that legal advice would not always compensate for vulnerabilities.

Appellate decisions overturning trial rulings are often an important marker of shifting norms and this is true of the two appellate level decisions since 2006 that have dealt with the *Miglin* test for flawed negotiations in the spousal support context: *Carrier c. Carrier*,[92] a 2007 decision of the New Brunswick Court of Appeal, and *Evashenko v. Evashenko*,[93] a 2011 decision of the Saskatchewan Court of Appeal. *Carrier* involved a 21 year marriage in which the wife, who had few work skills, had been subjected to physical and psychological abuse. The separation agreement, signed three years after the separation, the wife renounced her right to spousal support. The agreement was drawn up by husband's lawyer and the wife consulted another lawyer who had been chosen and paid for by the husband. The lawyer advised the wife not to sign the agreement, telling her she was entitled to more disclosure and to spousal support. The wife signed the agreement because she thought it was the best way to end the relationship. The trial judge found no flaw in the circumstances at the time of execution, but did go on to find that the agreement was substantively unfair and was not in compliance with the objectives of the *Divorce Act* at the next stage, *Miglin* 1.2. The Court of Appeal found the trial judge's reasoning on the first step of *Miglin* "seriously flawed." The Court of Appeal

92 2007 NBCA 23, 2007 CarswellNB 155, 2007 CarswellNB 156 (N.B. C.A.).

93 Above note 85.

viewed the wife as emotionally and economically vulnerable, with no ability to hire her own lawyer and willing to do anything to end an abusive relationship. These vulnerabilities were not overcome by the limited legal advice to which she had access.

Evashenko was an application for interim support in the face of a reconciliation agreement in which the wife waived spousal support in the event of another separation. The facts involved a 14 year marriage with 3 children; the children remained with the husband. The wife suffered from mental health issues and had problems with alcohol. At the time the reconciliation agreement was signed she was on social assistance, living with her parents and trying to overcome her alcohol and mental health issues. She had only a very brief (20 minute) meeting with independent counsel and attempted suicide four months after the agreement. The chambers judge found that there was not enough evidence to overcome the dispositive effect of agreement. The Court of Appeal overturned this ruling. The focus of the decision was on the threshold test to be on interim application, with the Court of Appeal ruling that the chambers judge overstated the threshold to be met and that the appropriate threshold is a "reasonable prospect of success" that agreement can be impeached at trial. However, the Court of Appeal also read the facts very differently from the chambers judge with respect to the issue of whether they presented a strong *prima facie* case of flawed negotiations at *Miglin* 1.1., stressing that the wife's vulnerability, her desperate desire to reconcile with family, the relative lack of negotiation, the absence of legal advice during negotiation and the perfunctory legal advice at signing all pointed to a significant power imbalance.

A recent Manitoba trial decision, *Hardt v. Hardt*,[94] also shows the effect of *Rick*: a 2006 separation agreement signed six weeks after the separation in which a wife with no income waived spousal support after a 23 year marriage was found to fail the *Miglin* stage 1.1 test for fair negotiations even though the wife was represented by a lawyer. The wife was depressed and the court found that her vulnerability was not compensated for by professional assistance. In addition, the husband did not provide disclosure. Outside of Ontario, which has a statutory requirement of disclosure, it is not clear that this would have been the result in 2006.

Although the standard for flawed negotiations has been relaxed, many of the cases since 2006 where spousal support agreements have failed the *Miglin* stage 1 test for flawed negotiations nonetheless involve very obvious departures from a norm of fair and fully informed bargaining, combined with provisions that are substantively very unfair (*Miglin* 1.2). Some involve classic scenarios of unconscionability; many others involve parties making their own "kitchen table" or, as is more often the case, "Grand and Toy" bargains without the assistance of lawyers:

- *Peraud v. Peraud*, [2011] N.S.J. No. 7, 2011 NSSC 1, 2011 CarswellNS 7 (N.S. S.C.) "(kitchen table" separation agreement, no legal advice; financially dependent wife left with no spousal support after 17 year marriage)
- *M. (A.A.) v. K. (R.P.)*, [2010] O.J. No. 807, 2010 ONSC 930, 2010 CarswellOnt 1139 (Ont. S.C.J.) (separation agreement from Grand and Toy with spousal support release, no actual discussion of that part of agree-

94 2010 MBQB 38, 2010 CarswellMan 59, [2010] M.J. No. 51 (Man. Q.B.).

ment, focus was on property provisions)

- *Gilliland v. Gilliland*, [2009] O.J. No. 2782, 72 R.F.L. (6th) 88, 2009 CarswellOnt 3895 (Ont. S.C.J.) (marriage contract intended to protect assets of wife's parents also contained release of spousal; agreement drawn up by wife's friend in another country who was a commercial and insurance lawyer as a starting point for discussion with expectation that parties would seek their own ILA; but they did not; under s. 56(4)(b) of the *F.L.A.* parties found not to have understand the nature and scope of the agreement, no legal advice re support, same result would be reached under *Divorce Act* and *Miglin*.)
- *Studerus v. Studerus*, [2009] O.J. No. 548, 69 R.F.L. (6th) 394, 2009 CarswellOnt 3035 (Ont. S.C.J.) (18 year marriage with 2 children; agreement with release of spousal support drafted by husband's lawyer; wife no legal advice, totally dependent financially and emotionally devastated because husband having affair with her best friend; agreement unconscionable.)
- *MacLean v. MacLean*, [2009] N.S.J. No. 328, 2009 NSSC 216, 2009 CarswellNS 408 (N.S. S.C.) (homemade separation agreement prepared by wife and signed by husband without legal advice; very one-sided in favour of wife; agreement set aside; fundamentally flawed negotiations; parties did not understand what they were signing.)
- *Singleton v. Singleton*, 2008 CarswellBC 2287, 2008 BCSC 1446 (B.C. S.C.) (agreement prepared by mediator; agreement based on husband income of $60,000; income actually four times higher; non-disclosure constituting flaw in negotiations.)
- *Leaman v. Leaman*, [2008] N.J. No. 96, 2008 NLTD 54, 50 R.F.L.(6th) 331, 2008 CarswellNfld 87 (N.L. T.D.) (2001 separation agreement for no spousal support after 15 year marriage with 3 children plus husband given 70% of assets; wife no separate legal representation, thought husband's lawyer represented her; agreement set aside under s. 66(4) *F.L.A.* and unconscionability, also draws on *Miglin*.)
- *Austin v. Austin*, [2007] O.J. No. 4283, 45 R.F.L. (6th) 401, 2007 CarswellOnt 7130 (Ont. S.C.J.) (agreement with time-limited spousal support prepared by mediator; parties had no independent legal advice; wife's plans for self-sufficiency change before separation agreement signed because proved to be unrealistic, but separation agreement not changed; agreement based on flawed negotiations under *Miglin* 1.1 and unfair under *Miglin* 1.2; agreement did have material change clause and wife's changed plans found to be material change under agreement and *Miglin* stage 2.)
- *Martin v. Blanchard*, 2007 CarswellOnt 4561, [2007] O.J. No. 2713 (Ont. S.C.J.); additional reasons at 2007 CarswellOnt 4562 (Ont. S.C.J.) (22 year marriage with 3 children; Grand and Toy separation agreement; nominal spousal support of $5 per month; fails *Miglin* stage 1; not unconscionable but not "unimpeachable".)
- *Hance v. Carbone*, 2006 CarswellOnt 7063, [2006] O.J. No. 4542 (Ont. S.C.J.) (agreement prepared by paralegal; clause that spousal support to end when child support ends; wife objected and told it was standard; may fail *Miglin* 1.1; clearly fails *Miglin* 1.2.)
- *Hofsteede v. Hofsteede*, [2006] O.J. No. 304, 24 R.F.L. (6th) 406, 2006 CarswellOnt 428 (Ont. S.C.J.) (14 year relationship with 2 children, separation agreement for 3 months spousal support and unequal property division; husband threatening wife and her new boyfriend; husband dictated terms of agreement which was prepared by paralegal; wife some legal advice but no lawyer negotiating agreement; agreement fails *Miglin* stage 1; obvious inequality of bargaining power and grossly unfair agreement.)

However, as the failed *Miglin* challenges based on procedural flaws show, the absence of lawyers and legal advice is not fatal to an agreement if the evidence suggests that the parties understood what they were agreeing to. Nor is an exacting standard of full disclosure applied if one of the parties failed to exercise due diligence in requesting more information or if the level of disclosure was such that the parties knew what they were agreeing to. In several cases *LeVan and Rick* have been distinguished on their facts as extreme cases of misrepresentation and vulnerability. See:

- *B. (P.D.) v. B. (J.A.)*, 2010 CarswellAlta 875, [2010] A.J. No. 524, 2010 ABQB 286 (Alta. Q.B.) (19 year traditional marriage with 3 children; comprehensive separation agreement negotiated 9 months after separation, generous spousal support for lengthy duration; husband temporarily unemployed applies to set aside on grounds that he did not understand full nature of the agreement and did not receive ILA; and that the provisions re property sharing and spousal support were unreasonable; no flaw in negotiations; husband entered agreement voluntarily and it reflected the intention of the parties; re spousal support, provisions not unreasonable; duration was on the long side but it was not unacceptable.)
- *Dewling v. Dewling*, [2009] N.J. No. 188, 2009 NLUFC 24, 72 R.F.L. (6th) 405, 2009 CarswellNfld 183 (N.L. U.F.C.) (3 year marriage without children; separation agreement gave wife matrimonial home and spousal support of for 18 months; wife had legal assistance but husband chose not to; husband brings application to set aside agreement because of failure to disclose and failure to understand nature of agreement; application dismissed; on issue of disclosure *Rick* distinguished on the facts as case of deliberate non-disclosure; re substantive unfairness of spousal support, agreement not unconscionable even though court would have ordered somewhat lower and shorter; may be some inequity in spousal support but not of a magnitude that would perpetrate an injustice.)
- *Covrigra v. Covrigra*, 2009 CarswellOnt 4718, [2009] O.J. No. 3359 (Ont. S.C.J.); additional reasons at 2010 CarswellOnt 3602 (Ont. S.C.J.); affirmed 2011 CarswellOnt 13682 (Ont. C.A.) (separation agreement for no spousal support; parties decided not to hire lawyer because they have resolved their custody and property issues; used "ezDivorce" online service to get draft agreement; no grounds to set aside under s. 56(4) of the *F.L.A.* and no flawed negotiations under *Miglin*; ILA not a prerequisite

for a valid domestic contract; wife willingly negotiated terms of the agreement, understood what she was doing, and made a conscious and informed decision not to obtain ILA. Also, waiver of spousal support consistent with objectives of the *Divorce Act* because parties earned similar incomes; accurate SSAG calculations show reasonableness of agreement.)

- *Loy v. Loy*, [2007] O.J. No. 4274, 45 R.F.L. (6th) 296, 2007 CarswellOnt 7123 (Ont. S.C.J.) (second marriage; wife successful business person in South Africa; husband insists on marriage contract with waiver of spousal support; agreement signed several months before wedding; wife chooses not to get ILA or disclosure; no grounds to set agreement aside under s. 56(4) of *F.L.A.* on grounds on non-disclosure or absence of ILA and no flaw in negotiations under *Miglin*; wife knew what she was doing; agreement not unfair either at time of execution or at separation; wife's unemployment was the result of her choices.)
- *Fraser v. van Rootselaar*, 2006 CarswellBC 955, 2006 BCCA 198 (B.C. C.A.) (marriage contract waiving spousal support entered into at wife's insistence; wife self-employed realtor/broker; no ILA; wife in poor health at end of marriage; agreement upheld; no flaw in negotiations despite lack of ILA; no unforeseeable change under *Miglin* stage 2.)
- *Newman v. La Porta*, 2008 CarswellBC 944 (B.C. S.C.) (agreement for on-going generous spousal support; agreement signed when husband hoping for reconciliation; no legal advice; no flaw in negotiations; husband's vulnerability did not lead to substantial unfairness; husband was an intelligent and well-educated individual who knew the importance of getting legal advice and chose not to; but changed circumstances at *Miglin* stage 2 — significant changes in parties' financial situation including significant increase in wife's income meant agreement should be given little weight; order for significantly reduced spousal support.)

7. SUCCESSFUL MIGLIN CHALLENGES WITHOUT FLAWED NEGOTIATIONS

The most interesting part of the post-*Miglin* case law is the cases where spousal support agreements that are found to pass the stage 1.1 test of fair negotiations are nonetheless overridden because of substantive unfairness at the time of execution (*Miglin* stage 1.2) or the time of application (*Miglin* stage 2). It is in these cases that one most clearly sees the effect of the substantive norms of spousal support in the *Divorce Act* determining the effect of the agreement.

Twenty one of the successful *Miglin* challenges (just over half) fall were initially identified as falling into this category. As I noted earlier in the article, these cases tend to involve one or more of the following three factors:

- The facts suggest flaws in the negotiation process, although these were not relied upon as the legal basis for overriding the agreement (this was a factor in 13 of the cases).
- The agreements in issue provide for on-going spousal support rather than waiving or imposing time-limit on spousal support, but do not include an express material change clause. Courts use *Miglin* to adjust on-going support to deal with changed circumstances (this was factor in six of the cases)
- The agreement results in circumstances that are such a *significant* departure from what a court would have ordered under the *Divorce Act* absent the agreement that the results are substantively unconscionable — or to use the language of *Miglin*, the agreement has resulted in circumstances that the court "cannot condone". Often these cases involve spouses who are left in circumstances of extreme financial hardship.

While these cases, taken together, indicate that there is increasing judicial willingness to scrutinize the substantive fairness of agreements under *Miglin*, it remains clear that courts are not easily overriding spousal agreements simply because a spouse might have done better had he or she gone to court. The SSAG have not led to an overly interventionist approach to spousal support agreements. Fairly negotiated agreements remain difficult to override and it is not sufficient for a spouse to come to court and argue that the support provided for in the agreement is not consistent with the SSAG. However, leaving to one side the cases involving adjustment of agreements that provide for on-going support, what the decisions do show is that courts will override spousal support agreements that depart *significantly* from the statutory norms (now reflected in the SSAG), particularly if they leave a former spouse in a state of extreme hardship. The application of the foreseeability test under *Miglin* stage 2 is often shaped by substantive norms: courts will often find that the parties could not have reasonably contemplated a result dramatically at odds with the spousal support objectives under the *Divorce Act*. The most likely effect of the SSAG is that they have contributed to a clarification of what constitutes a significant departure from the statutory norms, rendering these determinations less subjective and contentious.

In cases involving final agreements with no flaws in the negotiation process, the operative, emerging standard for intervention under *Miglin* would appear to be similar to that found in s. 33(4) of the Ontario *Family Law Act*, i.e. that the agreement "results in *unconscionable circumstances* [emphasis added]." (There is some irony here, given that this standard for intervention was actually rejected by the majority of the Supreme Court of Canada in *Miglin* on the grounds that it gave too little weight to the intentions of the parties.) An alternative formulation, taken from the decision of the B.C. Court of Appeal in *Turpin v. Clark*, would be that the agreement results in circumstances that are *"patently unfair* [emphasis added]."[95] In a few decisions the test has been formulated in the language of *"reasonableness"*. Mirroring the language of the dissent in *Miglin*, a few courts have suggested that they will intervene when the agreement is outside the bounds of reasonableness.[96]

In *Gammon v. Gammon*.[97] Justice Nolan effectively captures the way in which the *Miglin* test has come to embody some fundamental norms of substantive fair-

95 Above note 86 at para. 64.

96 See *A.A.M. v. R.P.K.*, discussed at note 29, above.

97 Above note 30.

ness that establish parameters for negotiation:

> [85] In many respects, *Miglin* has changed the rules with respect to the negotiation of domestic contracts, especially separation agreements. . . .. *It is no longer sufficient to get the best deal one can for one's own client* without considering the terms of the agreement and how they measure up to the principles set out in *Miglin*. [emphasis added]

It might be suggested that we are seeing the beginnings of an emerging standard of good faith, not only with respect to spousal support agreements, but perhaps a broader range of domestic contracts as well, but we are not there yet.[98]

The remainder of the article will examine in somewhat more detail the successful *Miglin* challenges that have been determined solely on the basis of substantive unfairness of the agreement, looking first at those cases involving a finding of substantive unfairness at the time of execution and second at those cases where the agreement has failed at *Miglin* stage 2 because of substantive unfairness as a result of changed circumstances since the signing of the agreement.

(a) Substantive Unfairness at the Time of Execution (Miglin 1.2)

A small number of cases (eight) have found agreements to fail on the grounds of substantive unfairness at the time of negotiation/execution despite a finding that the negotiations process was fair, *i.e.* on the grounds that agreement is simply not in substantial compliance with the support objectives of the *Divorce Act*. In thinking about this category of cases, the question arises of why a spouse would sign an egregiously bad agreement if the negotiations really were unimpeachable and based on the *Rick* standard of the fully informed consent of both parties? Variants of the "informed but unwise choice" scenario come to mind — the spouse who ignores the lawyer's advice simply to reach a quick resolution of the issues; the spouse motivated by guilt or the hopes of a reconciliation; the spouse who make a conscious choice not to seek legal assistance; the spouse who a few years after the separation agreement is signed that they could have done better.

Do these cases suggest that courts are now willing to relieve spouses of their unwise but fully informed bargains? The answer is no. A careful reading of the facts in all of these cases reveals the presence of significant flaws in the negotiation process that would certainly fail the post-*Le Van* and post-*Rick* standards for fair negotiations. The substantive unfairness of the agreements in each of these cases was significant, and furthermore, could be linked to flaws in the negotiation process. Cases where a spouse simply realizes a few years after the initial separation agreement was signed that they could have done better or has come to regret an earlier decision do not succeed under *Miglin* stage 1.2.[99]

Two Ontario decisions fall in this category of agreements found to fail solely

98 See *Leopold*, discussed at note 58, above, and *D'Andrade v. Schrage*, 2011 ONSC 1174, 2011 CarswellOnt 1292 (Ont. S.C.J.); additional reasons at 2011 CarswellOnt 5124 (Ont. S.C.J.).

99 See *B. (P.D.) v. B. (J.A.)*, 2010 ABQB 286, 2010 CarswellAlta 875, [2010] A.J. No. 524 (Alta. Q.B.), *M. (V.L.) v. M. (R.D.)*, 2010 NBQB 412, 2010 CarswellNB 622, [2010] N.B.J. No. 401 (N.B. Q.B.), *Haughn v. Haughn*, 2008 NSSC 256, 2008 CarswellNS 450, 58 R.F.L. (6th) 50, [2008] N.S.J. No. 363 (N.S. S.C.), and *Dewling v. Dewling*, 2009 NLUFC 24, 2009 CarswellNfld 183, [2009] N.J. No. 188, 72 R.F.L. (6th) 405 (N.L. U.F.C.).

on the basis of Miglin stage 1.2, and in each the flaws in the negotiation process were striking.

- *Gammon v. Gammon*, 2008 CarswellOnt 802, [2008] O.J. No. 603 (Ont. S.C.J.); additional reasons at 2008 CarswellOnt 6319 (Ont. S.C.J.) (agreement providing for lump sum payment in lieu of all property and support claims that covered little more than equalization payment after 18 relationship not in compliance with *Divorce Act*; wife had low skills and emotional problems and lost her job shortly after separation while husband's income was $100,000; however some flaws in the negotiation process were identified; (parties had lawyers but wife was in a very fragile emotional state and had recently attempted suicide); while these flaws were not sufficient on their own to warrant "setting aside the agreement" they were when combined with considerations of substantive unfairness;
- *Pollard v. Pollard*, [2009] O.J. No. 1744, 68 R.F.L. (6th) 387, 2009 CarswellOnt 2279 (Ont. S.C.J.) (waiver of spousal support after 18 year marriage not in compliance with *Divorce Act*; no flaw in negotiations found even though even though parties made their own agreement and wife under pressure because husband refused to move out of the house unless she signed agreement; standard for flawed negotiations assumed to be that under conventional unconscionability, perhaps because the *Miglin* framework was incorrectly being applied to both the property and spousal support provisions of the agreement.).

Interestingly, five of the cases in this category come from B.C., perhaps because of fewer grounds for finding procedural flaws than in Ontario, at least prior to *Rick*:

- *Camp v. Camp*, 2006 CarswellBC 958, 26 R.F.L. (6th) 347 (B.C. S.C.) (27 year marriage with 3 children; separation agreement negotiated by lawyers which provided for decreasing time-limited support did not comply with objectives of *Divorce Act* despite absence of flaws in negotiation; however there was no financial disclosure)
- *K. (S.) v. K.(L.)*, 2009 CarswellBC 125, 2009 BCSC 69 (B.C. S.C.) (1997 agreement providing disabled wife with only 2 years of support after 20 year marriage unfair despite no flaw in negotiations; interim spousal support awarded; however strong suggestion that wife suffering from serious psychiatric as well as physical problems when agreement negotiated)
- *M. (K.A.) v. M. (P.K.)*, 2008 CarswellBC 135, 2008 BCSC 93 (B.C. S.C.) (waiver of spousal support after 20 year marriage because wife had repartnered unfair despite fair negotiations; but the agreement was made only with the assistance of a single lawyer mediator)
- *Siliphant v. Drever*, [2007] B.C.J. No. 186, 2007 BCSC 153, 2007 CarswellBC 189 (B.C. S.C.) (agreement for 1 year of spousal support after 21 year marriage; no flaw but agreement drafted without lawyers and

with assistance of Family Justice Counsellor)

- *Chepil v. Chepil*, [2006] B.C.J. No. 15, 2006 BCSC 15, 2006 CarswellBC 14 (B.C. S.C.) (24 year marriage; waiver of spousal support; finding of no flawed negotiations but involved a do-it-yourself agreement prepared by the wife with no legal advice).

In the final decision in this category from Nova Scotia, *Vanderlinden v. Vanderlinden*,[100] there was an explicit recognition that the agreement was in a "grey" area with respect to a fair negotiation process.

(b) Successful Miglin Stage 2 Challenges: Changed Circumstances

Almost one third of the successful *Miglin* challenges (13 out of 41) were initially identified as based solely on *Miglin* stage 2, including four appellate decisions. The cases in this category involve agreements that were fairly negotiated and substantively fair at the time of execution, but which were overridden on the basis of unfairness as a result of changed circumstances. Taken at face value, this would seem to suggest a fairly dramatic shift from the early years post-*Miglin* when it was assumed that *Miglin* stage 2 was an almost impossible test to satisfy because almost all changes were, following the admonitions of the majority in *Miglin*, presumed to be foreseeable. However, the *Miglin* stage 2 cases are complicated because of the doctrinal blurring between the material change test and the *Miglin* stage 2 test that was discussed in the earlier part of this article, generated in part because many of the *Miglin* stage 2 cases involve consent orders and variation applications under s.17 of the *Divorce Act*. Almost half of the cases that are identified as successful *Miglin* stage 2 challenges are better thought of as ordinary variation cases involving non-final agreements where the appropriate threshold for modification is the less stringent material change test. When these cases are eliminated, there still remains a pool of cases involving successful stage 2 challenges to final agreement that reveal some important shifts in the law, but that pool of cases is not as large as the raw data might suggest.

(i) Miglin stage 2 and agreements for on-going spousal support

Six of the successful *Miglin* stage 2 challenges (almost half) involved agreements for on-going support (i.e. without any specified time limit) which were final only in the sense that they did not include an express review provision or a material change clause. In these cases courts have very easily found that changes in the parties circumstances — the cessation of child support and changes in their respective incomes — satisfy the stage 2 test. A number of these cases are variations of consent orders under s. 17 of the *Divorce Act*. See:

- *Newman v. La Porta*, 2008 CarswellBC 944 (B.C. S.C.) (originating application; agreement for on-going, generous spousal support until wife

100 2007 NSSC 80, 2007 CarswellNS 117, [2007] N.S.J. No. 107 (N.S. S.C.) (parties made own separation agreement; wife had consulted lawyer and gathered some information on the SSAG; court finds that agreement requires husband to pay much more spousal support than he should).

turns 65; agreement signed when husband hoping for reconciliation; no legal advice; no flaw in negotiations; husband's vulnerability did not lead to substantive unfairness; husband was an intelligent and well-educated individual who knew the importance of getting legal advice and chose not to; but changed circumstances at *Miglin* stage 2 — significant changes in parties financial situation including significant increase in wife's income meant agreement should be given little weight; order for significantly reduced spousal support)

- *M. (R.S.) v. M. (M.S.)*, 2006 CarswellBC 1899, 2006 BCCA 362 (B.C. C.A.); additional reasons at 2007 CarswellBC 313 (B.C. C.A.) (originating application; 30 year marriage; agreement provided for on-going spousal support of $700 per month; husband unemployed when agreement negotiated but subsequently employed; agreement fails under *Miglin* stage 2 because did not anticipate husband's later employment; order for increased spousal support)
- *Ferguson v. Ferguson*, [2008] O.J. No. 1140, 50 R.F.L. (6th) 363, 2008 CarswellOnt 1676 (Ont. S.C.J.) (consent order, s. 17 variation; increase in spousal support to deal with serious decline in wife's health and cessation of child support)
- *Fishlock v. Fishlock*, [2007] O.J. No. 1458, 46 R.F.L. (6th) 254, 2007 CarswellOnt 2235 (Ont. S.C.J.) (consent order; successful s. 17 application to reduce spousal support because of husband's retirement)
- *Roy v. Roy*, [2007] N.B.J. No. 247, 2007 NBQB 234, 2007 CarswellNB 324 (N.B. Q.B.) (consent order for on-going support; successful s. 17 variation based on husband's loss of employment and bankruptcy)
- *Foster v. Foster*, [2008] N.S.J. No. 542, 2008 NSSC 371, 2008 CarswellNS 674 (N.S. S.C.) (consent order under provincial legislation for on-going spousal support; originating application under *Divorce Act*; should be some "variation" based on changed circumstances given husband's reduced ability to pay)

In these cases the *Miglin* stage 2 test seems little different from a run of the mill material change test in a variation application; indeed in some of the cases it is not completely clear whether it is *Miglin* or the material change test that the court is purporting to apply or some combination of the two. These cases should be seen as a special category of their own and not reflective of the general way in which *Miglin* stage 2 is applied in cases involving a release on time limit of spousal support. As I argued in my one year review of the post-*Miglin* cases:

> The stringent *Miglin* stage two test for overriding an agreement based on changed circumstances was explicitly justified by the Supreme Court of Canada as appropriate in a context where parties had chosen the path of financial independence by terminating or releasing support rights under their agreement. One can question whether it is appropriate to extend *Miglin*, or to apply the test in the same way, to long-term support agreements where the parties have remained financially interconnected. Such agreements, particularly those entered into many years ago and in a different legal context, may not have comprehensively addressed the issue of future

variation.[101]

Particularly where minutes of settlement providing for on-going spousal support have been incorporated into a consent order, it would be reasonable to assume, absent language in the agreement to the contrary, that the parties intended the order to varied on the same terms as a court order.

(ii) Miglin stage 2 and agreements waiving or terminating spousal support

One of the significant developments at year three were a handful of striking decisions in which courts, on the basis of the *Miglin* stage 2 alone, had extended spousal support in the face of agreements terminating support.[102] These cases indicated a new, less strict application of *Miglin*, one more attuned to fairness than finality. Thus in *Santoro v. Santoro*, a 2006 trial decision from B.C., the court overrode a 1994 agreement that had provided for a lump sum payment of $20,000 and a release of spousal support after an 18 year traditional marriage with three children. The Court reasoned that the agreement was premised on an assumption of the wife's ability to become self-sufficient, as expectation that was not realized in part because of a dramatic change in the wife's health, but also because of the wife's role in the marriage.[103] *Santoro* also illustrated the potential malleability of the test of foreseeability. Instead of reasoning that the parties should be presumed to have known that self-sufficiency might be difficult to achieve, the court presumed that the parties did not intend an unreasonable result and so inferred that the agreement was premised on an assumption that the wife would be able to become self-sufficient. Thus the application of the forseeability test was shaped by the norms of substantive fairness in the *Divorce Act*.

A slow trickle of these decisions has continued, but nothing approaching a floodgates. They remain relatively rare and are very fact based. In some of these cases agreements are read as resting on an assumption that the wife would achieve self-sufficiency and the failed expectation is found to constitute a significant change from the parties' intention. Alternatively, in cases where one spouse has been left in a state of extreme financial hardship courts have ruled that the parties could not have reasonably intended that one of them would be left in a state of economic hardship after a long marriage or found that the agreement has resulted in circumstances that are so inconsistent with the *Divorce Act* objectives that they cannot be condoned. The successful *Miglin* stage 2 challenges in cases where spousal support has been waived or terminated have generally involved very significant departures from the outcomes that would have prevailed under the *Divorce Act*, and in most cases the spouse claiming spousal support was in a state of extreme financial hardship. There are also regional variations in perceptions of what constitutes a significant departure from the *Divorce Act* objectives.

101 Above note 4.

102 See *Ambler v. Ambler*, 2004 BCCA 492, 2004 CarswellBC 2255, [2004] B.C.J. No. 2076 (B.C. C.A.) and *Santoro v. Santoro*, 2006 CarswellBC 490, 28 R.F.L. (6th) 172 (B.C. S.C.). As it was decided in 2006, *Santoro* is included within the pool of cases for this study.

103 *Ibid.* The facts of *Santoro* also suggest potentially unfair negotiations (although there were lawyers the wife suffered from depression and alcoholism) and the court also concluded that the agreement only was only marginally consistent with the *Divorce Act* at the time of execution.

The most significant Court of Appeal decision applying *Miglin* since 2006 is *Turpin v. Clark*[104] which involved a successful stage 2 challenge. In *Turpin* the parties separated in 2004 after a 20 year marriage with 2 children. Minutes of settlement, which had been incorporated into a consent order in 2005, provided for gradually declining spousal support to terminate in 2012. The wife subsequently sought a variation of the order under s. 17 of the *Divorce Act*, based on her deteriorating health. The Court of Appeal found, like the trial judge, that the significant deterioration in the wife's health and her lack of income had not been anticipated by the parties and satisfied the *Miglin* stage 2 test for a significant change in circumstances. The cumulative effect of the wife's health problems which clearly impeded her ability to become self-sufficient, made the parties' agreement "patently unfair" at the time of her application. The trial judge had increased the amount of support dramatically, to be more consistent with the SSAG, while retaining the time limit. However the Court of Appeal found this to constitute an unwarranted degree of intervention in the agreement. Reading the agreement as clearly precluding any change in quantum, the Court of Appeal extended the duration of spousal support by three years to respond to the unanticipated delay in the wife achieving self-sufficiency within a reasonable period of time.

In Ontario, the only successful stand-alone *Miglin* stage 2 challenge to an agreement terminating spousal support is *van Rythoven v. van Rythoven*, a 2009 trial decision that was confirmed on an appeal to the Ontario Divisional Court,[105] and even this is not a clear cut stage 2 case. The stated basis for overriding an agreement that provided for minimal time-limited support after a 13 year marriage, was the decline in the wife's health and her inability to become self-sufficient as contemplated when the agreement was negotiated. However, there were also serious flaws in the negotiation process (the wife was suffering from physical and mental health problems at the time of separation and was only represented by duty counsel) which the trial judge acknowledged might mean that the agreement also failed *Miglin* stage 1. Consistent with the typical pattern in *Miglin* stage 2 cases, the wife was experiencing serious economic hardship at the time of the application, which was 12 years after the separation — her medical condition had deteriorated further and she was receiving ODSP.

There are also a few trial level decisions from other parts of the country, all of

104 Above note 86. Leave to appeal to the Supreme Court of Canada was denied.

105 Above note 86. *Van Rythoven* involved an originating application for spousal support under s. 15.2 of the *Divorce Act* in the face of minutes of settlement that had been incorporated into an order under provincial legislation. Since the completion of this study there has been another successful, free-standing *Miglin* stage 2 challenge in Ontario: see *Patton-Casse v. Casse*, 2011 ONSC 4424, 2011 CarswellOnt 7090 (Ont. S.C.J.); additional reasons at 2011 CarswellOnt 11047 (Ont. S.C.J.); additional reasons at 2011 CarswellOnt 11048 (Ont. S.C.J.) ("final" consent order providing for time-limited support; successful s. 17 variation; *Miglin* stage 2 test satisfied by diagnosis of youngest child with Asperger Syndrome; spousal support extended for a further 4 years because of mother's increased child-rearing responsibilities delaying her re-entry into workforce).

which notably involved marriage contracts and spouses left in a position of extreme financial hardship at the end of the marriage:[106]

- *Varney v. Varney*, [2008] N.B.J. No 465, 2008 CarswellNB 596, 2008 NBQB 389 (N.B. Q.B.) (15 year relationship; pre-nuptial agreement at husband's insistence providing for separate property and releases of spousal support; no failure at *Miglin* stage 1, wife had some legal advice; however failure at *Miglin* stage 2; wife had become permanently disabled and in receipt of CPP disability of $7,500 a year; husband's income was $92,000; such circumstances found not to be within contemplation of parties and not in compliance with *Divorce Act* objectives.)
- *Jenkins v. Jenkins*, [2008] M.J. No. 467, 2008 MBQB 271, 2008 CarswellMan 688 (Man. Q.B.); additional reasons at 2009 CarswellMan 365 (Man. Q.B.) (16 year marriage; second marriage for both parties; wife had limited education and work skills, ceased employment after marriage; husband insisted upon marriage contract which provided for limited property sharing and no spousal support except for limited $10,000 lump sum; court finds no flaws in negotiation, wife had legal advice and negotiated certain terms for her benefit and no unfairness at time of execution; however, on somewhat questionable reasoning, the agreement was found to fail at *Miglin* stage 2; releases of spousal support were found to be based on an assumption that the parties would be self-sufficient when the relationship ended or capable of achieving self-sufficiency within a reasonable period of time; as well, the terms of the agreement were no longer in compliance with the *Divorce Act*)
- *M. (L.) v. M. (I.)*, [2007] N.J. No. 379, 2007 NLUFC 29, 44 R.F.L. (6th) 198, 2007 CarswellNfld 333 (N.L. U.F.C.) (11 year relationship with 2 children; cohabitation agreement that became marriage contract provided for separate property and no spousal support; agreement failed *Miglin* stage 2; agreement did not contemplate birth of children (parties planned not to have children) and substantial financial inequity between parties that resulted from that)

A successful *Miglin* stage 2 challenge in the face of a termination of spousal support that succeeds is still the exception rather than the rule; the majority of *Miglin* stage 2 challenges to waivers or terminations of spousal support fail. The unsuccessful stage 2 challenges all rest, of course, on a conclusion that the changed circumstances were not unforeseeable. Looking further into the details of these cases one finds some common themes — suggestions that the changed circumstances were the result of choices made by the spouse now seeking to challenge the agreement (e.g. bad investment decisions, a failure to make reasonable effort toward

106 The other case that has been classified as a successful *Miglin* stage 2 challenge is *Liboiron*, above note 86, an unusual, brief oral decision of the Alberta Court of Appeal that allowed a variation of a consent order for time-limited support. The variation terminated spousal support based upon the husband's serious illness, loss of employment, and reduction of his income to CPP disability benefits. The Court applied the *Pelech* test of a radical change in circumstances.

self-sufficiency) or that the spouse challenging the agreement was not experiencing circumstances of serious hardship.[107]

8. POSTSCRIPT: THE SUPREME COURT OF CANADA DECISION IN *L.M.P. V. L.S.*

Two of the main themes that this study of the evolution and application of the *Miglin* test has revealed are (i) the instability of this area of law, where the balance between fairness and contractual fairness is continually being re-negotiated with fairness concerns slowly gaining more ground, and (ii) the doctrinal confusion that pervades this area of law. Both of these themes are illustrated by *L.M.P. v. L.S*, a major decision released by the Supreme Court of Canada in December of 2011 while this article was in the revision stage.[108] It is not my aim to provide a comprehensive analysis of that decision, but some brief comments are in order to point out that decision's relevance to the patterns in the law relating to spousal support agreements identified by this study:[109] the slow chipping away at the absolute respect for final agreements; the confused doctrinal blurring between the *Miglin* stage 2 test and the material change test; the failure to distinguish between final and non-final agreements, and the on-going uncertainty about the application of *Miglin* in the context of variation applications under s. 17 of the *Divorce Act*.

On its facts, *L.M.P. v. L.S.* involved a 2003 consent order for indefinite spousal support. The parties had been married for 14 years and shared custody of their two children. The wife suffered from a chronic illness and received modest disability benefits. The husband, a lawyer, brought a variation application to reduce or terminate spousal support on the basis that the wife had the ability to work and had failed to make sufficient efforts to become self-sufficient, essentially questioning the credibility of the wife's claim that she was disabled. Surprisingly, given the

107 *Vanderlans v. Vanderlans*, 2008 NLCA 37, 2008 CarswellNfld 190 (N.L. C.A.) (loss in value of wifes's share of husband's pension because of risky investments); *Frazer v. van Rootselaar*, 2006 BCCA 198, 2006 CarswellBC 955 (B.C. C.A.) (change in wife's health); *L. (L.L.) v. L. (B.A.)*, 2010 BCSC 301, 2010 CarswellBC 539 (B.C. S.C.) (longer time needed to become self-sufficient); *B. (A.M.) v. T. (M.A.)*, 2009 BCSC 1281, 2009 CarswellBC 2526 (B.C. S.C.) (changes in health); *T. (J.L.) v. T. (J.D.N.)*, 2009 BCSC 780, 2009 CarswellBC 1564 (B.C. S.C.) (wife's economic difficulties), *Bishop v. Bishop*, 2008 BCSC 1216, 2008 CarswellBC 1880 (B.C. S.C.) (drop in husband's income); *Rapley v. Rapley*, 2006 BCSC 1854, 2006 CarswellBC 3068, [2006] B.C.J. No. 3213, 33 R.F.L. (6th) 430 (B.C. S.C.) (wife's difficulties in becoming self-sufficient); *Grady v. Grady*, 2009 NSSC 364, 2009 CarswellNS 690, [2009] N.S.J. No. 593 (N.S. S.C.); additional reasons at 2010 CarswellNS 262 (N.S. S.C.) (the economic crisis and decrease in husband's income); *Cooper v. Cooper*, 2007 NSSC 239, 2007 CarswellNS 345, [2007] N.S.J No. 332 (N.S. S.C.) (wife's failure to become self-sufficient.). For an unsuccessful Miglin stage 2 case released after the completion of this study in May 2011 see *G. (R.E.) v. G. (T.W.J.)*, 2011 SKQB 269, 2011 CarswellSask 469, [2011] S.J. No. 434 (Sask. Q.B.); additional reasons at 2011 CarswellSask 535 (Sask. Q.B.).

108 See note 14, above.

109 See Rollie Thompson's excellent case annotation on *L.M.P.* forthcoming at (2012), 6 R.F.L. (7th) on which I have drawn extensively.

absence of any material change and the fairly obvious attempt by the husband to relitigate the basis of the original order, he was successful. The trial judge, in a ruling largely upheld by Quebec Court of Appeal, found that the wife was able to work and ordered that spousal support be terminated after a further 14 months.

The Supreme Court of Canada allowed the appeal and the husband's variation application was dismissed on the grounds that there had not been a sufficient change in circumstances since the making of the consent order. All seven judges hearing the appeal agreed on the result but were divided in their reasons, and the split involved issues that on first glance seemed to have little relevance to the case. In the courts below, *Miglin* was never raised, and rightly so. The case, involving a non-final agreement for indefinite spousal support that had been incorporated into a consent order was treated as a straightforward variation application governed by the threshold test of a material change in circumstances. However, reflecting the pervasive doctrinal confusion about when the *Miglin* test is applicable, *L.M.P.* was transformed into a potential *Miglin* case before the Supreme Court of Canada. And it was thus in a case in which *Miglin* arguably had no relevance that the Court attempted to deal with, and divided on, the general issue of the applicability of *Miglin* in the context of variation applications under s. 17 of the *Divorce Act*.

In their majority reasons Justices Abella and Rothstein draw a sharp distinction between s. 15.2 originating applications and s. 17 variation applications in terms of the effect of an agreement. They find that the *Miglin* two-step analysis clearly applies in s. 15.2 context, but once the agreement is incorporated into a court order, s. 17 of the *Divorce Act* guides the variation, not the *Miglin* two-step analysis. Thus under s. 17, the applicable test is "material change" as interpreted by *Willick*; the same test applies to court orders and to incorporated agreements. The additional factor of the agreement is not irrelevant:

> [38] The agreement may address future circumstances and predetermine who will bear the risk of any changes that might occur. And it may well specifically provide that a contemplated future event will or will not amount to a material change.

The majority reasons indicate that the "specific" terms of agreements can provide guidance as to what is or is not a "material change", but suggest that "general" terms expressing or implying finality may not provide much guidance and may be given very little weight depending on the context:

> [41] . . . A provision indicating that the order is final merely states the obvious: the order of the court is final *subject to* s. 17 of the *Divorce Act*. Courts will always apply the *Willick* inquiry to determine if a material change of circumstances exists.
>
> [42] . . . when the order is general, or simply purports to be final, these less specific terms provide less assistance to courts in answering the *Willick* inquiry. Sometimes, in such cases, the circumstances of the parties may be such that courts will give little weight to a general statement of finality and conclude that a material change exists. However, at other times, in such cases, the circumstances of the parties may also be such that the courts will give effect to a general statement of finality and conclude that a material change does not exist.
>
> [43] An example is the simple case of a young couple who were only married a few months and who ended their marriage on essentially equal terms. A general statement of finality in an agreement incorporated into an order, coupled with these circumstances, should be given weight by a court conducting the *Willick* inquiry.

Applying the material change test to the agreement in *L.M.P.* the majority find, quite correctly, that here had been no material change.

The minority reasons, authored by Justice Cromwell and concurred in by Chief Justice McLachlin, take a starkly different position on the application of *Miglin* in the context of s. 17 variation applications. In their view the mere fact of incorporation should not affect treatment of final agreements given that many factors determine whether or not agreements are incorporated. They find support for their position from statements in *Miglin* insisting on the need to maintain consistent treatment of final agreements under s. 15.2 and s. 17. On the minority view, "comprehensive and final" agreements "must be accorded significant weight" in a variation application under s. 17 and the majority approach is criticized for potentially giving too little weight to final agreements. Noting that many prior cases have applied *Miglin* to consent orders in s. 17 variations, the minority reasons conclude that for variation of final agreements, the *Miglin* stage 2 analysis should inform the application of *Willick* test of material change:[110]

> [92] A comprehensive and final agreement which contains no review or variation mechanism must be taken to have been entered into in contemplation of the matters expressly dealt with as well as of the sorts of changes in circumstances that were or must have been in the parties' contemplation at the time of the order.

On the facts, the minority conclude that the agreement in *L.M.P.* was a "final and comprehensive agreement" warranting the more stringent *Miglin* stage 2 test for change, which the husband had not satisfied. It is here, in its treatment of what is a "final" agreement, that the minority reasons, which for most part provide the sounder analysis of the application of *Miglin* to consent orders, flounder. As this article has shown, there has been much confusion in the post-*Miglin* case-law about what constitutes a final agreement, and the minority reasons are a further addition to the collection of cases in which this issue is not carefully analyzed. *L.M.P.* was a case involving an agreement for *indefinite* support; it was not a "final" agreement in the *Miglin* sense of entailing a waiver or time-limit of support. The mere absence of an explicit review or variation clause in an incorporated agreement for indefinite support should not automatically mean that it is a "final" order. It would be inappropriate to apply the stringent *Miglin* stage 2 test for change to this kind of agreement for indefinite support in response, for example, to a significant drop in the husband's income or his retirement.

L.M.P. leaves many questions unanswered about the role of *Miglin* and the treatment of final agreements under s. 17. On the more "radical" reading of the decision, the majority reasons have completely eliminated the *Miglin* test from the analytic framework that is to be applied when dealing with variation applications in respect of consent orders under s. 17, replacing *Miglin* with the test of material

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110 The assumption is that Miglin stage 1 is not generally applicable unless an argument is being made to rescind the agreement. See discussion of this issue in the earlier section of this article dealing with the application of *Miglin* in the context of s. 17.

change. On this view the threshold for modifying incorporated agreements, even final agreements terminating spousal support, has been lowered, perhaps significantly lowered. As a result, the fact of whether or not an agreement is incorporated, often the result of local practice, will carry great significance. This broad reading of the majority reasons would be consistent with Abella J.'s reasons in *Miglin* at the Ontario Court of Appeal in which she was of the view that the appropriate threshold for intervention in agreements, whether under s. 15.2 or s. 17, should be material change. On this reading, *L.M.P.* further confirms some of the general shift of the pendulum over time in this area of law that this article has highlighted, with less weight being given to final agreements and more weight to concerns of fairness, both procedural and substantive.

A more modest reading of *L.M.P.* would confine the decision to its facts, emphasizing that the case did not involve the kind of "final" agreement for which the stringent *Miglin* test was intended and that the majority appropriately applied the material change test. The case was not argued as a *Miglin* case in the courts below and there is no comprehensive analysis in the majority reasons of the long list of prior cases, including court of appeal decisions, which have applied the *Miglin* analysis in the context of s. 17. On this view, the case reflects much of the on-going doctrinal confusion about the applicability of *Migin* that this article has highlighted, and leaves unresolved the issue of how to deal with "real" final agreements in the *Miglin* sense of the term under s. 17.

Appendix "Miglin" Cases, Jan. 2006–May 2011

Appeal Cases

1. Successful Miglin Challenges

Evashenko v. Evashenko, 2011 SKCA 22, 2011 CarswellSask 162, [2011] S.J. No. 152 (Sask. C.A.) (interim, stages 1.1, 1.2, and 2)

van Rythoven v. van Rythoven, 2010 ONSC 5923, 2010 CarswellOnt 10590, 99 R.F.L. (6th) 152, [2011] O.J. No. 6151 (Ont. Div. Ct.); additional reasons at 2011 CarswellOnt 1688 (Ont. Div. Ct.). (stage 2)

Turpin v. Clark, 2009 BCCA 530, 2009 CarswellBC 3149, [2009] B.C.J. No. 2328 (B.C. C.A.); leave to appeal refused 2010 CarswellBC 1055, 2010 CarswellBC 1056 (S.C.C.) (stage 2)

Liboiron v. Liboiron, 2008 ABCA 367, 2008 CarswellAlta 1674, [2008] A.J. No. 1185, 59 R.F.L. (6th) 265 (Alta. C.A.) (*Pelech*, stage 2?)

Carrier c. Carrier, 2007 NBCA 23, 2007 CarswellNB 155, 2007 CarswellNB 156 (N.B. C.A.) (stages 1.1, 1.2 and 2)

M. (R.S.) v. M. (M.S.), 2006 BCCA 362, 2006 CarswellBC 1899 (B.C. C.A.); additional reasons at 2007 CarswellBC 313 (B.C. C.A.) (stage 2)

2. Unsuccessful Miglin Challenges

P. (S.) v. P. (R.), 2011 ONCA 336, 2011 CarswellOnt 2839, [2011] O.J. No. 1968 (Ont. C.A.) (stage 20)

Vanderlans v. Vanderlans, 2008 NLCA 37, 2008 CarswellNfld 190 (N.L. C.A.) (stage 2)

Rosati v. Reggimenti, 2007 ONCA 705, 2007 CarswellOnt 6712, [2007] O.J. No. 4009 (Ont. C.A.) (stage 1.1)

Frazer v. van Rootselaar, 2006 BCCA 198, 2006 CarswellBC 955 (B.C. C.A.) (stages 1.1 and 2)

Alberta Trial Decisions

1. Successful Miglin challenges (none)

2. Unsuccessful Miglin challenges

Dickieson v. Dickieson, 2011 ABQB 202, 2011 CarswellAlta 511, [2011] A.J. No. 365 (Alta. Q.B.) (stage 1.1 and1.2)

B. (P.D.) v. B. (J.A.), 2010 ABQB 286, 2010 CarswellAlta 875, [2010] A.J. No. 524 (Alta. Q.B.) (stages 1.1, 1.2 and 2)

Hollingshead v. Hollingshead, 2008 ABQB 659, 2008 CarswellAlta 2050, [2008] A.J. No. 1424 (Alta. Q.B.) (stages 1.1 and 1.2)

Mastalerz v. Mastalerz, 2007 ABQB 416, 2007 CarswellAlta 873, [2007] A.J. No. 702 (Alta. Q.B.) (stage 1.1)

Orcheski v. Hynes, 2007 ABQB 194, 2007 CarswellAlta 379, [2007] A.J. No. 341 (Alta. Q.B.) (stage 1.1)

Higgins v. Higgins, 2006 ABQB 849, 2006 CarswellAlta 1641, [2006] A.J. No. 1550 (Alta. Q.B.) (stage 2)

R. (B.A.) v. S. (C.J.), 2006 ABQB 400, 2006 CarswellAlta 752, [2006] A.J.

No. 715 (Alta. Q.B.) (stage 1.2)

B.C. Trial Decisions

1. Successful Miglin Challenges

Singleton v. Singleton, 2008 BCSC 1446, 2008 CarswellBC 2287 (B.C. S.C.) (stages 1.1, 1.2)

Newman v. La Porta, 2008 BCSC 522, 2008 CarswellBC 944 (B.C. S.C.) (stage 2)

M. (K.A.) v. M. (P.K.), 2008 BCSC 93, 2008 CarswellBC 135 (B.C. S.C.) (stage 1.2)

Silliphant v. Drever, 2007 BCSC 153, 2007 CarswellBC 189, [2007] B.C.J. No. 186 (B.C. S.C.) (stage 1.2)

Camp v. Camp, 2006 BCSC 608, 2006 CarswellBC 958, 26 R.F.L. (6th) 347, [2006] B.C.J. No. 879 (B.C. S.C.) (stage 1.2)

Routley v. Paget, 2006 BCSC 419, 2006 CarswellBC 585, [2006] B.C.J. No. 554 (B.C. S.C.); additional reasons at 2006 CarswellBC 1678 (B.C. S.C.) (stages 1.1, 1.2, and 2)

Santoro v. Santoro, 2006 BCSC 331, 2006 CarswellBC 490, 28 R.F.L. (6th) 172, [2006] B.C.J. No. 453 (B.C. S.C.) (stage 2)

Chepil v. Chepil, 2006 BCSC 15, 2006 CarswellBC 14, [2006] B.C.J. No. 15 (B.C. S.C.) (stage 1.2)

2. Unsuccessful Miglin Challenges

Sullivan v. Sullivan, 2010 BCSC 1461, 2010 CarswellBC 2811, [2010] B.C.J. No. 2035 (B.C. S.C. [In Chambers]) (stage 2)

L. (L.L.) v. L. (B.A.), 2010 BCSC 301, 2010 CarswellBC 539 (B.C. S.C.) (stage 2)

McArthur v. Besier, 2010 BCSC 265, 2010 CarswellBC 454 (B.C. S.C.) (stage 2)

S. (J.M.) v. S. (G.L.), 2009 BCSC 1803, 2009 CarswellBC 3575 (B.C. S.C. [In Chambers]) (stages 1.1, 1.2 and 2)

B. (A.M.) v. T. (M.A.), 2009 BCSC 1281, 2009 CarswellBC 2526 (B.C. S.C.) (stages 1.1, 1.2 and 2)

T. (J.L.) v. T. (J.D.N.), 2009 BCSC 780, 2009 CarswellBC 1564 (B.C. S.C.) (stage 2)

Bishop v. Bishop, 2008 BCSC 1216, 2008 CarswellBC 1880 (B.C. S.C.) (stage 2)

Hawboldt v. Hawboldt, 2007 BCSC 1613, 2007 CarswellBC 2646, 45 R.F.L. (6th) 368, [2007] B.C.J. No. 2387 (B.C. S.C.) (stage 1.2)

Rapley v. Rapley, 2006 BCSC 1854, 2006 CarswellBC 3068, [2006] B.C.J. No. 3213, 33 R.F.L. (6th) 430 (B.C. S.C.) (stage 2)

Borrett v. Borrett, 2006 BCSC 711, 2006 CarswellBC 1086, 28 R.F.L. (6th) 141, [2006] B.C.J. No. 1012 (B.C. S.C.); additional reasons at 2007 CarswellBC 337 (B.C. S.C.) (stage 2).

3. Interim applications

K. (S.) v. K. (L.), 2009 BCSC 69, 2009 CarswellBC 125 (B.C. S.C.) (successful) (stages 1.2 and 2)

Dobie v. Rautenberg, 2008 BCSC 826, 2008 CarswellBC 1390 (B.C. S.C.) (unsuccessful)

Chee v. Smith, 2007 BCSC 850, 2007 CarswellBC 1360, [2007] B.C.J. No. 1290 (B.C. Master) (unsuccessful)

Manitoba Trial Decisions

1. Successful Miglin Challenges

Hardt v. Hardt, 2010 MBQB 38, 2010 CarswellMan 59, [2010] M.J. No. 51 (Man. Q.B.) (stages 1.1 and 1.2)

Jenkins v. Jenkins, 2008 MBQB 271, 2008 CarswellMan 688, [2008] M.J. No. 467 (Man. Q.B.); additional reasons at 2009 CarswellMan 365 (Man. Q.B.) (stage 2)

2. Unsuccessful Miglin Challenges

Schachtay v. Schachtay, 2010 MBQB 183, 2010 CarswellMan 747 (Man. Master) (stage 2)

3. Interim Applications

Tomkewich v. Tomkewich, 2006 MBQB 150, 2006 CarswellMan 231, [2006] M.J. No. 285 (Man. Q.B.) (unsuccessful)

New Brunswick Trial Decisions

1. Successful Miglin challenges

Varney v. Varney, 2008 NBQB 389, 2008 CarswellNB 596, [2008] N.B.J. No. 465, 59 R.F.L. (6th) 331 (N.B. Q.B.) (stage 2)

Roy v. Roy, 2007 NBQB 234, 2007 CarswellNB 324, [2007] N.B.J. No. 247 (N.B. Q.B.) (stage 2)

2. Unsuccessful Miglin challenges

M. (V.L.) v. M. (R.D.), 2010 NBQB 412, 2010 CarswellNB 622, [2010] N.B.J. No. 401 (N.B. Q.B.) (stage 1.2)

Johnson v. Johnson, 2009 CarswellNB 643 (N.B. Q.B.) (stage 2)

Bradbury v. Bradbury, 2009 NBQB 78, 2009 CarswellNB 114, [2009] N.B.J. No. 84 (N.B. Q.B.) (stage 2)

Newfoundland and Labrador Trial Decisions

1. Successful Miglin challenges

Leaman v. Leaman, 2008 NLTD 54, 2008 CarswellNfld 87, [2008] N.J. No. 96, 50 R.F.L. (6th) 331 (N.L. T.D.) (stages 1.1 and 1.2)

M. (L.) v. M. (I.), 2007 NLUFC 29, 2007 CarswellNfld 333, [2007] N.J. No. 379, 44 R.F.L. (6th) 198 (N.L. U.F.C.) (stage 2)

2. Unsuccessful Miglin challenges

Dewling v. Dewling, 2009 NLUFC 24, 2009 CarswellNfld 183, [2009] N.J. No. 188, 72 R.F.L. (6th) 405 (N.L. U.F.C.) (stages 1.1. and 1.2)

Nova Scotia Trial Decisions

1. Successful Miglin challenges

Peraud v. Peraud, 2011 NSSC 1, 2011 CarswellNS 7, [2011] N.S.J. No. 7 (N.S. S.C.); additional reasons at 2011 CarswellNS 136 (N.S. S.C.) (stages 1.1 and 1.2)

MacLean v. MacLean, 2009 NSSC 216, 2009 CarswellNS 408, [2009] N.S.J. No. 328 (N.S. S.C.) (stage 1.1)

Foster v. Foster, 2008 NSSC 371, 2008 CarswellNS 674, [2008] N.S.J. No. 542 (N.S. S.C.) (stage 2)

Vanderlinden v. Vanderlinden, 2007 NSSC 80, 2007 CarswellNS 117, [2007] N.S.J. No. 107 (N.S. S.C.) (stage 1.2)

2. Unsuccessful Miglin challenges

Hanrahan-Cox v. Cox, 2011 NSSC 182, 2011 CarswellNS 303, [2011] N.S.J. No. 250 (N.S. S.C.); additional reasons at 2011 CarswellNS 450 (N.S. S.C.) (stage 1.1)

Grady v. Grady, 2009 NSSC 364, 2009 CarswellNS 690, [2009] N.S.J. No. 593 (N.S. S.C.); additional reasons at 2010 CarswellNS 262 (N.S. S.C.) (stage 2)

Haughn v. Haughn, 2008 NSSC 256, 2008 CarswellNS 450, 58 R.F.L. (6th) 50, [2008] N.S.J. No. 363 (N.S. S.C.) (stage 1.2 and 2)

Cooper v. Cooper, 2007 NSSC 239, 2007 CarswellNS 345, [2007] N.S.J No. 332 (N.S. S.C.) (stages 1.2 and 2)

Stening-Riding v. Riding, 2006 NSSC 221, 2006 CarswellNS 309, [2006] N.S.J. No. 295 (N.S. S.C.) (stage 2)

Day v. Day, 2006 NSSC 111, 2006 CarswellNS 138, [2006] N.S.J. No. 135, 25 R.F.L. (6th) 356 (N.S. S.C.) (stages 1.2 and 2)

Ontario Trial Decisions

1. Successful Miglin Challenges

Doudkina v. Doudkine, 2010 ONSC 6221, 2010 CarswellOnt 8761, [2010] O.J. No. 4976 (Ont. S.C.J.) (stage 1.1)

Northcott v. Northcott, 2010 ONSC 3285, 2010 CarswellOnt 4491, [2010] O.J. No. 2759 (Ont. S.C.J.) (stages 1.1 and 1.2)

M. (A.A.) v. K. (R.P.), 2010 ONSC 930, 2010 CarswellOnt 1139, [2010] O.J. No. 807 (Ont. S.C.J.) (stages 1.1 and 1.2.)

Gilliland v. Gilliland, 2009 CarswellOnt 3895, [2009] O.J. No. 2782, 72 R.F.L. (6th) 88 (Ont. S.C.J.) (stage 1.1)

Pollard v. Pollard, 2009 CarswellOnt 2279, 68 R.F.L. (6th) 387, [2009] O.J. No. 1744 (Ont. S.C.J.) (stage 1.2)

Studerus v. Studerus, 2009 CarswellOnt 3035, 69 R.F.L. (6th) 394, [2009] O.J. No. 548 (Ont. S.C.J.) (stages 1.1. and 1.2)

Tailor v. Tailor, 2008 CarswellOnt 5866, [2008] O.J. No. 3900, 59 R.F.L. (6th) 316 (Ont. S.C.J.) (stage1.1)

Ferguson v. Ferguson, 2008 CarswellOnt 1676, [2008] O.J. No. 1140, 50 R.F.L. (6th) 363 (Ont. S.C.J.) (stage 2.)

Gammon v. Gammon, 2008 CarswellOnt 802, [2008] O.J. No. 603 (Ont. S.C.J.); additional reasons at 2008 CarswellOnt 6319 (Ont. S.C.J.) (stage 1.2)

Austin v. Austin, 2007 CarswellOnt 7130, [2007] O.J. No. 4283, 45 R.F.L. (6th) 401 (Ont. S.C.J.) (stage 1.1, 1.2 and 2)

Martin v. Blanchard, 2007 CarswellOnt 4561, [2007] O.J. No. 2713 (Ont. S.C.J.); additional reasons at 2007 CarswellOnt 4562 (Ont. S.C.J.) (stage 1.1)

Fishlock v. Fishlock, 2007 CarswellOnt 2235, 46 R.F.L. (6th) 254, [2007] O.J. No. 1458 (Ont. S.C.J.) (stage 2)

Hance v. Carbone, 2006 CarswellOnt 7063, [2006] O.J. No. 4542 (Ont. S.C.J.) (stages 1.1 and 1.2)

Hofsteede v. Hofsteede, 2006 CarswellOnt 428, [2006] O.J. No. 304, 24 R.F.L. (6th) 406 (Ont. S.C.J.) (stages 1.1 and 1.2)

2. Unsuccessful Miglin Challenges

Palombo v. Palombo, 2011 ONSC 1796, 2011 CarswellOnt 2873, [2011] O.J. No. 1986 (Ont. S.C.J.) (stage 2)

Heubach v. Heubach, 2011 ONSC 1057, 2011 CarswellOnt 975, [2011] O.J. No. 715 (Ont. S.C.J.) (stage 1.1.)

Steine v. Steine, 2010 ONSC 4289, 2010 CarswellOnt 5739, [2010] O.J. No. 3331 (Ont. S.C.J.); additional reasons at 2010 CarswellOnt 6529 (Ont. S.C.J.) (stage 1.1)

James v. James, 2010 ONSC 3685, 2010 CarswellOnt 4775, [2010] O.J. No. 2869 (Ont. S.C.J.) (stage 1.1)

Covriga v. Covriga, 2009 CarswellOnt 4718, [2009] O.J. No. 3359 (Ont. S.C.J.); additional reasons at 2010 CarswellOnt 3602 (Ont. S.C.J.); affirmed 2011 CarswellOnt 13682 (Ont. C.A.) (stages 1.1 and 1.2)

Jeffrey v. Jeffrey, 2007 CarswellOnt 7401, [2007] O.J. No. 4412 (Ont. S.C.J.) (stage 2)

Loy v. Loy, 2007 CarswellOnt 7123, [2007] O.J. No. 4274, 45 R.F.L. (6th) 296 (Ont. S.C.J.) (stage 1.1.)

Stemmler v. May, 2007 CarswellOnt 6254, 43 R.F.L. (6th) 218, [2007] O.J. No. 3773 (Ont. S.C.J.); additional reasons at 2008 CarswellOnt 137 (Ont. S.C.J.)

Kemp v. Kemp, 2007 CarswellOnt 1774, [2007] O.J. No. 1131 (Ont. S.C.J.) (stage 2)

Ayoub v. Osman, 2006 CarswellOnt 1808, [2006] O.J. No. 1176 (Ont. S.C.J.); additional reasons at 2006 CarswellOnt 5456 (Ont. S.C.J.) (stage 2)

3. Interim applications

Baudanza v. Nicoletti, 2011 ONSC 352, 2011 CarswellOnt 8927, [2011] O.J. No. 457 (Ont. S.C.J.) (successful) (stage 1.1)

Harper v. Harper, 2010 ONSC 4845, 2010 CarswellOnt 6928, [2010] O.J. No. 3899 (Ont. S.C.J.) (unsuccessful)

Hill v. Hill, 2008 CarswellOnt 5128, [2008] O.J. No. 3423 (Ont. S.C.J.) (unsuccessful)

Paulsson v. Paulsson, 2008 CarswellOnt 9045, 72 R.F.L. (6th) 76, [2008] O.J.

No. 5846 (Ont. S.C.J.); additional reasons at 2008 CarswellOnt 9044 (Ont. S.C.J.); leave to appeal refused 2009 CarswellOnt 3202 (Ont. Div. Ct.) (unsuccessful)

Ghahrai v. Mohammad, 2006 CarswellOnt 7325, [2006] O.J. No. 4651 (Ont. S.C.J.) (unsuccessful)

Loit v. Gove, 2006 CarswellOnt 488, [2006] O.J. No. 347 (Ont. S.C.J.) (unsuccessful)

Saskatchewan Trial Decisions

1. Successful Miglin Challenges (none)

2. Unsuccessful Miglin Challenges

Leedahl v. Leedahl, 2006 SKQB 14, 2006 CarswellSask 8, [2006] S.J. No. 15 (Sask. Q.B.) (stage 2)

3 Interim Applications

Hannah v. Hannah, 2010 SKQB 369, 2010 CarswellSask 670, [2010] S.J. No. 609 (Sask. Q.B.); additional reasons at 2010 CarswellSask 718 (Sask. Q.B.) (unsuccessful)

Rempel v. Androsoff, 2010 SKQB 248, 2010 CarswellSask 434, [2010] S.J. No. 396 (Sask. Q.B.) (successful) (stage 1.1)

Dykstra v. Dykstra, 2008 SKQB 197, 2008 CarswellSask 283, [2008] S.J. No. 284 (Sask. Q.B.) (unsuccessful)

Hill v. Hill, 2008 SKQB 11, 2008 CarswellSask 3, [2008] S.J. No. 3 (Sask. Q.B.) (McMurtrey J.) (unsuccessful)

Dietrich v. Dietrich, 2006 SKQB 440, 2006 CarswellSask 657, [2006] S.J. No. 656 (Sask. Q.B.) (unsuccessful)