1. INTRODUCTION

The Ontario Court of Appeal decision in *Miglin v. Miglin*1 has been the topic of much discussion, at least among Ontario lawyers. In *Miglin*, Justice Abella, writing for a three-member panel of the court, determined that the *Pelech*2 trilogy decided by the Supreme Court of Canada in 1987 did not apply to separation agreements entered into under the 1985 *Divorce Act.*3 Instead of requiring a “radical change in circumstances causally connected to the marriage” as the basis upon which a court could override the spousal support terms of a valid separation agreement, the Ontario Court of Appeal substituted a much lower test. Drawing upon the test for variation of support orders found in section 17 of the *Divorce Act*, the court held that courts could override separation agreements where there had been a material change in circumstances. Once that threshold was met, courts would then determine “what amount of spousal support, if any, is justified under the statutory principles set out

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3 R.S.C. 1985, c. 3 (2nd Supp.).
in s. 15 of the Divorce Act and refined in leading cases from the Supreme Court of Canada.”

Many lawyers have expressed dismay over Miglin, arguing that by expanding the court’s power to intervene in settlements it has undermined certainty and finality, the very basis for contracting in family law. The Supreme Court of Canada has granted leave to appeal and the appeal is set down to be heard in October of the 2002-2003 term.

In this article, we seek to “think through” the Miglin issue, namely the threshold upon which courts should override the spousal support provisions of valid separation agreements. In our view, a departure from the stringent trilogy standard is not the disaster it is frequently made out to be. While the trilogy offered certainty and predictability, in our view, it did so at the expense of fairness. Most frequently, the unfairness of the trilogy standard was felt by women who entered into agreements that gave them inadequate levels of spousal support, but payors of support—who are usually men—also found themselves bound by the trilogy standard to agreements that due to changed circumstances produced unfair results.

The central difficulty, in our view, of abandoning the trilogy standard is determining what should replace it. This is not an easy task. Parties who negotiate a settlement rather than litigate should be able to organize their post-separation lives knowing that their settlement holds some weight. At the same time, courts should not hold people to what are clearly unfair agreements. The scope of the court’s authority to override agreements must reflect a balance between substantive principles of fairness on the one hand and certainty and predictability on the other. Striking this balance is, to quote the off-cited aphorism, “easier said than done.”

We begin our discussion of the Miglin issue with an overview of the Miglin case itself. We then attempt to unravel some of the strands of the complex debate that Miglin has generated. More specifically, we attempt to identify three important strands of the debate. The first strand is the issue of why departing from the Pelech trilogy elicits such strong responses. Here we suggest that the arguments of contractual certainty relied upon are to a large extent grounded in unarticulated concerns about the legitimacy and nature of the spousal support obligation itself. The second strand is the particular difficulties that arise in contracting about spousal support, given the nature of the obligation—its contin-

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4 Miglin, above, note 1 at para. 95.
gency and lack of clarity—and the context in which such agreements are being negotiated. We see these difficulties as posing risks to the achievement of fair agreements that support arguments in favour of a greater scope for judicial intervention. The third strand is identifying some difficult issues that further complicate the task of crafting an override standard, specifically the problems of shifting norms and inconsistent statutory standards. In the final part of the article, we turn to the difficult challenge, in light of the complexities of the debate as we have identified them, of crafting an appropriate override standard. We critically assess the Pelech standard for overriding spousal support agreements and then canvas a number of options for replacing it. In our view, a standard that assesses the substantive fairness of the agreement, either at the time it was entered into or at the time at which the application to override is brought, represents the most promising approach.

2. A CLOSER LOOK AT MIGLIN V. MIGLIN

In many respects, Miglin was an unlikely case for overruling the trilogy given the contractual arrangements between the parties. Miglin involved a 14-year marriage that ended in separation in 1993. During the marriage, the spouses ran a successful resort in the Muskoka region of Ontario and were equal shareholders in the corporation that owned the business. The spouses also had four children who ranged in age from 8 to 2 at the time of separation. The spouses entered into three agreements: a separation agreement, a parenting agreement, and a consulting agreement between Mrs. Miglin and the resort. According to these agreements, the children’s primary residence was to be with Mrs. Miglin but the parents were to have “shared responsibility” for raising the children, and Mrs. Miglin was to receive $60,000 per year in child support. Mr. Miglin conveyed his share of the matrimonial home to Mrs. Miglin and she, in return, gave him her shares in the family business. Both Mr. Miglin’s share of the matrimonial home and Mrs. Miglin’s shares in the business were worth approximately $250,000.

5 We prefer to use the term “override” rather than vary. Under the Divorce Act, courts have no power to vary agreements; the power at issue is the power to award support other than as provided for in the agreement, in other words, a power to disregard the agreement. However, if the agreement has been incorporated in a court order, then the request to depart from the agreement must be brought as an application to vary the prior order under s. 17(1) of the Divorce Act.
Mrs. Miglin also waived her right to spousal support. However, according to the consulting agreement, Mrs. Miglin was to receive $15,000 in consulting fees annually for five years payable by the resort. The consulting agreement could be renewed "from time to time" on mutual consent and that the payments were subject to an annual cost of living increase. The trial judge, Tobias J., found that this consulting agreement was "nothing more than thinly veiled spousal support" and a "convenient vehicle" for the husband "to pay support to his wife without paying it out of his own pocket."6 Tobias J. also noted that this arrangement improved the "incidence of taxation" of both Mr. Miglin and his corporation.7

The Miglins divorced in 1997 and the judgment contained no provisions for corollary relief. In June 1998, before the expiry of the consulting agreement, Mrs. Miglin brought proceedings for spousal support under section 15 of the Divorce Act. When the agreement expired in December 1998, Mr. Miglin declined to renew the agreement.

At trial, Tobias J. held that the trilogy test requiring a radical and unforeseen change in circumstances did not apply to applications for spousal support under section 15 (now section 15.2) of the Divorce Act. He noted that under section 15(5) (now section 15.2(4)) an arrangement or agreement is a factor that a court must take into consideration in making an order for spousal support. Without mentioning the conflict between his interpretation and the trilogy, Tobias J. held that section 15(5)(c) (now section 15.2(4)(c)) provides the court "with authority to scrutinize a separation agreement without any requirement to find radical and unforeseen changes in circumstances . . . " [emphasis added]. Instead, "[i]n deciding whether the provisions of an informed separation agreement bind the parties at the time of [an] application under Section 15, the court must decide whether the separation agreement provides support to a spouse in a fashion consistent with the societal objectives set out in Section 15(7)"8 (now section 15.2(6)). Tobias J. also held that in an originating application for spousal support there is no requirement to show any change in circumstances. Thus, according to Tobias J.:

...the releases and waiver contained in the separation agreement are not a bar to the relief herein claimed under Section 15(5) of the Divorce Act. Section

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7 Ibid.
8 Miglin, above, note 6 at para. 24.
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15(5)(c) provides the court with the authority to scrutinize the separation agreement and to decide whether its provisions conform to the policies enunciated in Section 15(7). If the separation agreement fails to provide for either spouse in a fashion consistent with these objectives, it is the obligation of this court to undertake a review under Section 15(5) of the conditions, means, needs, and other circumstances of each spouse, and any child of the marriage including the length of time the spouses cohabited, the functions performed by the spouses during cohabitation, and, as well, any order, agreement, or arrangement relating to the support of the spouse or child.

Applying this test, Tobias J. found that the separation agreement treated Mrs. Miglin unfairly because it replaced the annual salary of $80,200 she had received from the resort business with the annual sum of $15,000 for consulting fees, and because it provided her with an non-income producing asset (the home) while giving Mr. Miglin full control over the business. According to Tobias J. this arrangement resulted in "...a fundamental inequality of matrimonial asset distribution." Tobias J. also noted that Mr. Miglin was aware when negotiating the agreement that Mrs. Miglin would be involved in the full-time care of the children and there was little likelihood that she would be economically self-supporting until the children matured. With no additional reasoning, he awarded Mrs. Miglin spousal support of $4,400 per month for a period of five years.

The Ontario Court of Appeal agreed with Tobias J. that the trilogy did not apply but disagreed with the override test he proposed, as well as with his decision to impose a time limit on Mrs. Miglin’s spousal support. Instead, Abella J.A., speaking for herself, McMurtry C.J.O. and Moldaver J.A., adopted a two-step test for variation of “a subsisting support agreement in an application for corollary relief under s. 15.2. . ." The first part of the test would require the applicant to show that there had been a material change in circumstances since the making of the agreement. Once the material change threshold was met, the second stage would require the court to determine the amount of spousal support, if any, to award in accordance with the principles of section 15 of the Divorce Act as “refined” by leading decisions of the Supreme Court of Canada. According to Abella J.A., in the second stage of the inquiry courts should consider the following factors:

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9  Miglin, above, note 6 at para. 28.
10  Miglin, above, note 6 at para. 27.
11  Miglin, above, note 1 at para. 94.
...the extent, source and impact of the change in circumstances; whether the agreement reflects a clear and unequivocal intention to insulate it from review or variation; the extent to which the agreement satisfies the objectives of the Act; and, where there is an agreement to waive support or limit its duration to a fixed event or time, how lengthy a period has elapsed since the waiver, event or expiration of the time limit.12

These factors were not to be taken as exhaustive, but were to reflect the view that the terms of a valid agreement, "while clearly not determinative, ought to be given significant weight."13

Applying this test to the facts, Abella J.A. found that the material change threshold had been met through a combination of two factors: Mrs. Miglin had taken on more of the childcare responsibilities than the parenting agreement had contemplated, and the support provided to Mrs. Miglin through the consulting agreement had been terminated. In terms of the second inquiry, whether support should be awarded, Abella J.A. held that Mrs. Miglin continued to experience economic disadvantage due to the roles she had performed during the marriage. She also held that the consulting agreement "fell short of the Act's objectives in s.15.2(6), since it took insufficient account, both in quantum and duration, of how fundamentally Ms. M.'s role during the 15 year marriage had created a financial dependency on Mr. M. and impaired her capacity to become economically self-sufficient."14 Abella J.A. held that the quantum of support ordered by the trial judge, $4,400 per month was "not unreasonable,"15 but set aside the five-year term on the basis that in light of the children's ages, any time limit on support was "unhelpfully speculative."16 As she put it, "[i]t is not easy to anticipate at this time when and to what extent those disadvantages [created by the marriage] will be attenuated."17

Several aspects of Abella J.A.'s decision merit further discussion. First, given the trial judge's interpretation of the "real nature" of the consulting contract—an interpretation that the Court of Appeal also adopted—there was no need to reconsider the trilogy at all. As Professor Rollie Thomson has pointed out, "[m]ost post-Moge courts have narrowed the application of Pelech to only really, really 'final' agreements

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12 Miglin, above, note 1 at para. 96.
13 Ibid.
14 Miglin, above, note 1 at para. 100.
15 Miglin, above, note 1 at para. 101.
16 Miglin, above, note 1 at para. 102.
17 Ibid.
and it would have been easy to read the Miglin arrangements as ‘not final.’” The decision to read the agreements as constituting a full and final settlement of spousal support can only be read as an indication of the court’s willingness to take on the trilogy.

A second, and more important feature of the judgment, is the way in which Abella J.A. justified adopting a lower standard than the trilogy. Abella J.A. reasoned that the trilogy no longer applied in large part because it was decided under the 1968 Divorce Act, whose provisions she described as reflecting a “linguistic and conceptual minimalism...” Those provisions were in stark contrast to section 15 of the 1985 Divorce Act, which sets out a comprehensive scheme for spousal support, as well as a broader philosophy of spousal support. Despite its greater specificity, however, the 1995 Act does not provide clear direction as to the standard upon which courts should override final spousal support terms in separation agreements, leaving us, in her view, “in the position of drawing inferences from the linguistic tea leaves in the statute.”

The inferences Abella J.A. drew from the linguistic tea leaves are these. First, according to section 15.2(4), agreements are one factor to be taken into account in a spousal support application, but they are not given any primacy over other factors. Second, the fact that orders and agreements are referred to together in section 15.2(4)(c) signals “a legislative intent that they be similarly treated unless their differences call for a different threshold.” Third, the absence of statutory direction on the treatment of agreements makes it necessary to seek guidance from the “overall scheme of the support provisions in the Act” where “economic equity [is] the overriding objective.” According to Abella J.A. this philosophy of spousal support is mandated by the goals and objectives set out in section 15 and buttressed by the Supreme Court of Canada’s jurisprudence, particularly Moge v. Moge, Bracklow v.

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19 Miglin, above, note 1 at para. 60.
20 Miglin, above, note 1 at para. 75.
21 Miglin, above, note 1 at para. 72.
22 Miglin, above, note 1 at para. 75.
Bracklow,24 and Justice L’Heureux-Dubé’s minority judgment in B. (G.) c. G. (L.).25 As Abella J.A. put it:

This jurisprudence reinforces the conclusion reached on even a plain reading of s. 15, that there has been so significant a change in the legislative directions for awarding spousal support in the 1985 Divorce Act, that judicial interpretations founded on the old language cannot survive, let alone prevail.26

Essentially, Abella J.A.’s reasoning is that section 15 of the 1985 Divorce Act embraces a broader philosophy of spousal support than its predecessor, the 1968 Divorce Act, in which “clean break” and self-sufficiency were overriding goals. Under section 15, in contrast, self-sufficiency is only one goal and a modified one at that. Thus, under the 1985 Divorce Act there should be a reduced emphasis on bringing about a clean break between the parties and a rejection of the view that the state is the “ultimate provider,” a view that figured prominently in the trilogy. Instead, consistent with Moge and Bracklow, there should be increased emphasis on principles of compensation and equitable sharing as well as on the principle that marriage itself creates an obligation to pay support if one spouse has need and the other has the financial resources to alleviate that need. These factors led Abella J.A. to conclude not only that “there is...no basis in the current Act for imposing a threshold as stringent as the trilogy,”27 but also that “any threshold of material change justifying a review of a support agreement need not be causally connected to the marriage.”28

The third interesting facet of Abella J.A.’s analysis lies in her suggestion that there might be reasons for showing less deference to agreements than to court-ordered spousal support. The basis of Abella J.A.’s argument on this point is that court orders can be presumed to conform to the principles of spousal support whereas the same presumption does not apply to agreements:

Moreover, imposed orders can, I think, be presumed to be in reasonable compliance with the objectives of the Act by virtue of their having received judicial screening or scrutiny. Agreements, on the other hand, can be deemed to be in reasonable compliance only with the negotiated wishes of the parties regardless

26 Miglin, above, note 1 at para. 76.
27 Miglin, above, note 1 at para. 72.
28 Miglin, above, note 1 at para. 87 [emphasis added].
of such compliance, negotiated, moreover, on the tense faultline of a relationship. If it is possible to vary a binding order which presumptively meets the objectives of the Act by meeting the threshold of a material change in circumstance, why would the legislature have intended to make it more difficult to vary an agreement which, while similarly binding, does not enjoy a similar presumption.\(^{29}\)

Abella J.A. was not, however, prepared to adopt the full implications of this argument, concluding that she would not “assume... a lower threshold was intended for agreements...”\(^{30}\) Nonetheless, the insight that separation agreements do not necessarily heed the support objectives of the Divorce Act is an important one to which we will return.

The final aspect of the judgment to note—Abella J.A.’s comments on the variation threshold found in section 17(10)—also implicate the relationship between agreements and orders. Although section 17(10) provides that where an order provides support for a definite period or until the happening of a specific event, a court may not make an order resuming support unless there has been material change in circumstances related to the marriage, Abella J.A. hints that this standard may not be appropriate. She holds:

For the purposes of this appeal, it is unnecessary to decide whether, in the interests of consistency, the higher threshold for varying expired spousal supports orders found in s.17(10) of the Act should also apply to expired agreements, or whether this is an area where the different route to agreements and orders argues for leaving the variation threshold for agreements as being a material change.\(^{31}\)

Abella J.A. appears to be suggesting, again, that there are reasons for treating agreements less strictly than orders. She does, however, note that:

...the length of time which has elapsed since the parties last expected to receive or provide support under their agreement, and the extent to which they have reasonably relied in the interim on its absence in organizing their subsequent financial arrangements, is relevant in determining whether a variation should be ordered and, if so, to what extent.\(^{32}\)

Where, then, does the Ontario Court of Appeal decision in Miglin leave us? Essentially, the standard for overriding the terms of a separation agreement in an originating application for spousal support under

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\(^{29}\) Miglin, above, note 1 at para. 73.

\(^{30}\) Ibid.

\(^{31}\) Miglin, above, note 1 at para. 97.

\(^{32}\) Ibid.
section 15 of the *Divorce Act* is substantially the same as the test for varying court-ordered spousal support found in section 17(4). The trilogy’s requirement for a “radical and unforeseen” change in circumstances has been replaced by the less onerous requirement that there simply be a “material change.” The trilogy’s requirement that the change in circumstances be “causally connected to the marriage” is gone all together. Agreements may still be entitled to some weight—and possibly in some cases significant weight—but how the agreement is to be taken into account is somewhat unclear. We are simply told that in deciding whether to award support the court is required to consider the nature of the change, whether the agreement was intended to be immune from court review, and the extent to which the agreement conformed to the objectives of the *Divorce Act*, as well as other, non-enumerated factors. The *Miglin* test appears to be a modified material change test with the parties’ separation agreement receiving special—albeit vague—weight. Like L’Heureux-Dubé J. in *B. (G.) c. G. (L.)*, Abella J.A. suggests that the more agreements take the objectives of the *Divorce Act* into account, the less likely courts will be to override them.

3. THE *MIGLIN* UPROAR: WHAT MAKES PEOPLE SO ANGRY?

In “thinking through” *Miglin* it is helpful to begin by asking why the issue of departing from the *Pelech* trilogy elicits such strong responses. One answer—the most obvious answer—is that by reducing the override standard, *Miglin* undermines the very basis for resolving spousal support disputes by way of contract. Indeed, the *Miglin* debate is typically framed in general terms as a choice between competing values of contractual certainty and fairness. Any reduction in contractual certainty, it is argued, will diminish the incentive to settle disputes by way of contract, and this will have disastrous consequences for the current system of family dispute resolution.

While this is the way the debate is typically framed, we wish to suggest that the *Miglin* debate is not simply a contest between contractual certainty and fairness and that the vociferous reaction to *Miglin* reflects,

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33 Above, note 25.
34 *Miglin*, above, note 1 at para. 93.
in part, often unarticulated concerns about the spousal support obligation itself. In our view, the issue of the appropriate standard for overriding the spousal support terms of an agreement is as much a debate about spousal support as it is about the general role of contract in family law. Some of the most fervent criticism of Miglin seems to be driven by a deep suspicion of expansive spousal support obligations and a desire to return to the "clean-break" model of spousal support endorsed by the Pelech trilogy. The concern here is that Miglin signals a return to illegitimate, life-long spousal support obligations, or at least makes it unclear whether spousal support obligations will ever end.

Other criticisms derive from concerns regarding the uncertainty of the general principles that are currently driving spousal support. Since the Supreme Court decision in Bracklow, the principles underlying the modern spousal support obligation have become increasingly unclear and judicial spousal support awards have become increasingly unpredictable. In this context, lowering the threshold for overriding support agreements may be seen as negative development as it not only renders agreements vulnerable to increased judicial intervention, but it does so at a time when judicial intervention is unpredictable.

Our analysis of the Miglin issue thus begins by examining each of these criticisms. In addressing each of these concerns we attempt to show how none of them justifies retaining a high override threshold.

(a) Undermining the Rules of Contract

On the most overt level, the negative reaction to Miglin can be explained as a concern that the Ontario Court of Appeal has eviscerated the very basis of contracting about spousal support. Since the Pelech trilogy was rendered in 1987, it has become virtually an article of faith that a high override threshold is essential to the success of domestic contracting, and that without this threshold the incentive to contract about spousal support vanishes. Thus, opponents of Miglin argue that a high override threshold for spousal support contracts is essential for family law as the near-certainty that their contracts are final and binding creates the incentive for people to settle their disputes rather than go to court. The knowledge that their contracts will be respected also lets people get on with their lives, as it allows them to structure their post-
marriage breakdown lives in reliance on their agreements. On a more abstract level, a stringent override standard respects the value of individual autonomy, since it gives former spouses the contractual freedom to tailor their economic arrangements according to their own values, rather than requiring them to submit to the norms and objectives contained in the Divorce Act.

The Miglin decision is deeply threatening because it pulls the rug out from under these ideas. It fundamentally alters views about contracting, which for at least a generation of lawyers, have become sacrosanct. It also means that lawyers can no longer advise their clients that “final” agreements are in fact final in the sense that courts will respect their vision as to how their affairs should be resolved. It is no wonder, then, that the reaction to Miglin has been fierce.

For us, the most interesting facet of this line of argument is the strength of the conviction that the practice of contracting about spousal support depends on contractual certainty. In fact, even a cursory examination of the override thresholds that exist in other areas of family law reveals this argument to be deeply flawed. Lower thresholds for overriding contractual agreements exist elsewhere in family law, and these standards have not generated the same sort of fears of ushering in the demise of contracting as a practice, nor have they generated the dire consequences predicted of Miglin. The ability of the court to override the provisions of a separation agreement concerning child support is well established. Prior to the Guidelines, child support agreements could be overridden based on a material change in circumstances, a standard much lower than the trilogy threshold. Now, under the Child Support Guidelines, there is even less ability to insulate agreements from court scrutiny to determine their conformity with the outcomes dictated by the Guidelines. Similarly, although valid contracts dealing with matri-

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37 In the case of originating applications for child support where there has been a prior arrangement in a separation agreement, s. 15.1(5) of the Divorce Act provides that a court must order child support in accordance with the Guidelines unless there are special provisions in the agreement that benefit the child rendering application of the Guidelines inequitable. In cases where parties wish to consent to an order that departs from the Guidelines, ss. 15.1(7) and (8) of the Divorce Act state that a court may only approve such an arrangement if satisfied that it is reasonable in light of the Guidelines. Once an agreement for child support has been incorporated into a court order, it can be varied
monial property cannot be overridden in most provinces, the British Columbia Family Relations Act provides that courts may re-appoint the spouses’ share of property if the division the spouses have agreed to in a marriage agreement is “unfair.”

In neither of these contexts is there any evidence of a negative impact upon settlement. The lower variation threshold for the child support terms of separation agreements has not dissuaded people from contracting about child support. Similarly, as far as we have been able to discern, the ability of the B.C. courts to override property agreements on fairness principles does not appear to have diminished the incentive to enter into property agreements in that province. In our view, these results are not surprising. There are many incentives within the family law system to enter into agreements even if there is not absolute certainty that the agreement will be upheld. The financial and psychological costs of litigation themselves provide a powerful incentive for many people to settle. People do not need virtual certainty that their agreements will not be overridden in order to be able to get on with their lives. Former spouses structure their lives around child support agreements even though these terms can be varied on a material change standard. Similarly, people structure their lives around court orders dealing with spousal and child support even though these too can be varied on a more liberal standard than the trilogy.

The experience in other areas of family law suggests that the possibility of judicial scrutiny of agreements on grounds of fairness does not put an end to contracting as a practice, but rather, influences how agreements are structured. Put simply, it is likely that statutory norms shape contractual outcomes as people entering into agreements know that arrangements departing significantly from what a court would order will likely not be upheld in the absence of good reasons to justify the departure. Thus the values of fairness and contractual certainty need not be opposed; to the contrary, both can work together.

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based on a material change in circumstances: see s. 17(4) of the Divorce Act and s. 14(b) of the Child Support Guidelines.


39 Similarly, there are strong disincentives to opening up agreements once they have been reached, even if the law allows such. For example, the expected flood of applications to change old child support orders and agreements after the introduction of the Child Support Guidelines never materialized.
If lower variation standards are accepted elsewhere in family law, why is the suggestion that the law should also adopt a lower standard for spousal support seen as undermining individual autonomy and ushering in the demise of freedom of contract? Why do critics see fairness and certainty as necessarily opposed? Is there something unique about the spousal support obligation whereby adopting a lower variation standard would affect people’s settlement behaviour in a way that the lower standard used for child support terms (and in B.C. for property) does not? Or is there something else about the spousal support context that makes the issue of overriding agreements so highly charged? As we will discuss in more detail below, we believe that there are features of the spousal support obligation that make contracting about it different from contracting about either child support or property. We also suggest, however, there is in fact “something else” going on. The “something else” includes a deep suspicion of the spousal support obligation, which unlike the obligation to pay child support or to apportion property, remains a highly controversial obligation.40

(b) The Illegitimacy of the Spousal Support Obligation

One of the themes animating the response to Miglin is the view that Miglin heralds a return to an overly expansive—and illegitimate—view of the spousal support obligation. Unlike both child support and property division, which are generally both accepted as “legitimate” legal obligations, there is little social consensus on the obligation to support a former spouse—whether a spouse should be entitled to support simply by virtue of marriage, how long the entitlement lasts, or what living standard support should provide. Spousal support raises fundamental

40 One major difference between child support, where there is a long history of judicial scrutiny of agreements, and spousal support is related to the social consensus—or lack thereof—underlying each legal obligation. There is a social consensus that parents (though not necessarily step-parents) owe an obligation to support their children, although people may disagree whether this obligation extends to children over the age of majority. Further, there is a social consensus that this obligation exists, regardless of whether the relationship in which those children were born remains intact or has broken down. People can divorce their spouses, but they cannot divorce their children. There is also a relatively high degree of social consensus about the obligation to divide matrimonial property between married spouses, although there remains debate as to whether this obligation should extend to common-law and same-sex couples.
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questions about the nature of modern marriage and the kinds of obligations that attach to it. These are contentious issues with which family law has been struggling since the liberalization of divorce laws that ushered in the era of modern family law. Under the traditional regime of family law, which understood marriage to be a lifelong obligation, the basis of spousal support was clear—a husband owed a lifelong duty to his wife, so long as she did not commit a matrimonial offence. The new view of marriage as a potentially transient relationship pulled the rug out from under this traditional understanding of spousal support, and precipitated on-going debate about how the role of spousal support should be re-conceptualized. At the heart of this issue is the question of what obligations marriage—and increasingly marriage-like unions—create. If marriage is no longer expected to be life long, what kind of economic obligations can it legitimately be expected to give rise to? Not only is there no social consensus on this question, but prevailing opinions have shifted over time.

The shifts and swings in the law of spousal support—from the clean break model of the trilogy, through to the compensatory approach in Moge,\(^1\) to the even more expansive and eclectic approach of Bracklow, which has endorsed the idea of spousal support as a basic social obligation\(^2\)—document the Supreme Court’s attempt to sort out the legal obligations of modern marriage and the conceptual underpinnings of modern spousal support. As a result of this legal evolution, our current law of spousal support law now reflects a view of marriage as giving rise to significant obligations due to the economic merger of lives that takes place in marriage, particularly marriages of significant duration and where there have been children. However, many people continue to disagree with the values reflected by our current law. They continue to believe that people should very quickly be able to put failed marriages behind them, and that in all but perhaps the most traditional long-term marriages, obligations to former spouses should cease. Spousal self-sufficiency, clean break, and finality remain important corollaries of the idea that marriage is not necessarily a lifelong commitment, though not in the hyperbolic form they took in the trilogy days. To many people, then, current court-imposed support outcomes may, in particular cases, appear unfair and illegitimate.

\(^1\) Above, note 23.
\(^2\) Above, note 24.
These views are being played out in the Miglin debate itself. Part of the outrage that is being expressed over expanding the court's power to override spousal support agreements is the perceived unfairness of continuing the spousal support obligation in cases where critics believe the parties should have been allowed to cut the ties and get on with their lives. It is significant that the intense criticism that is expressed when courts interfere with spousal support agreements tends to be reserved for cases where courts have re-instated or extended spousal support in the face of a waiver or time-limit; we do not see it in cases where courts have departed from agreements by terminating or reducing support obligations. It is often not contractual finality and certainty per se that are in issue in the Miglin debate, but rather the finality (in the sense of limitation and termination) of the spousal support obligation.

Answering the concern that Miglin signals a return to (illegitimate) lifelong spousal support obligations is tricky. In our view, allowing courts the authority to prolong spousal support is not necessarily a negative development. Where parties have agreed to spousal support that ends up being inadequate in the sense of failing in a significant way to effect an equitable sharing of the economic advantages and disadvantages of the marriage, ordering additional spousal support should not be seen as problematic. As well, extending the duration of spousal support does not necessarily mean that spousal support will be life long. Some of the concerns about the end of finality are exaggerated. There are many marriages in which lifelong spousal support is not appropriate, even if some extension of support beyond what the parties had agreed to is.

The complicating feature of this argument lies, however, in the fact that there may well be legitimate grounds to question some of the more expansive interpretations of the spousal support obligation that one finds in particular judicial decisions. The concern that spousal support may be prolonged indefinitely is a legitimate one to the extent that courts can override the terms of contracts and order spousal support without a clear sense of support objectives—in some cases based on nothing more than the fact that the parties were once married to each other and one spouse is experiencing what a court is willing to interpret as “need.” This is the situation that prevails in the post-Bracklow world, and is part of a larger problem of on-going uncertainty about the basic principles of spousal support, which we will discuss further below. In our view, however, the

unsatisfactory state of spousal support, and some of its underlying norms, should not drive the law of contract. The problems in the law of spousal support should be tackled directly rather than indirectly, and a solution found in honing the principles of spousal support, rather than in distorting the law relating to the effect of spousal agreements.

(c) Unpredictability of Judicial Intervention

The on-going controversy about the nature of the spousal support obligation ties into another critique of Miglin, this one based on the impact of uncertainty surrounding the basic principles of spousal support. The controversy over the nature of spousal support has resulted in an inability to achieve consensus on the basic principles that should structure the obligation. Although one can discern a general pattern of expansion of the spousal support obligation since the Pelech trilogy, in the course of this expansion the law has become increasingly confused and uncertain. This is especially true since the release of the Supreme Court of Canada’s decision in Bracklow.

Under the clean break model of spousal support (a model with which we have little sympathy) the general ground rules were at least clear—marriage, no matter how long, gave rise to short-term, transitional support. Under Moge’s compensatory model, the ground rules may have been a little less clear, but at least there was a general understanding that spousal support was awarded to compensate for economic disadvantages caused by the marriage. Under Bracklow, however, there is no attempt to offer an understanding of the modern support obligation; support may sometimes be about compensation, sometimes about income security, and sometimes about promoting self-sufficiency to allow people to move on and form new relationships. The Divorce Act is understood as offering a multiplicity of objectives that are to be balanced and applied according to the discretion of individual trial judges. The effect of this is that case law has become increasingly unclear as to the basis on which a spouse becomes entitled to support, and therefore increasingly confused on questions of quantum and duration. Spousal support has become increasingly uncertain and unpredictable. Unlike recent developments in child support that have had the effect of structuring the child support obligation, recent developments in spousal support have had the opposite effect.

This uncertainty over the basis of the spousal support obligation makes spousal support a difficult area to resolve by way of contract.
Since bargaining takes place "in the shadow of the law," the clearer the law, the easier it will be to negotiate contracts. Indeed, many lawyers and judges are now decrying the uncertain and unpredictable state of spousal support law because of its negative impact on settlement and the incentives it creates for litigation. This is not to say, however, that people will avoid entering into separation agreements because the law of spousal support is unclear. As we noted earlier, people settle rather than litigate for a multitude of reasons, one of the main ones being cost. What must be asked, however, is how this lack of clarity in background norms influences the agreements that are reached and what it suggests about the degree to which judges should defer to such agreements.

For many lawyers the uncertainty surrounding spousal support strengthens the claim that agreements, to the extent that they can be reached, ought to be respected. First, it can be argued that if spouses manage to agree on spousal support and thereby create a sense of certainty for themselves in an otherwise confusing and unpredictable area, courts should be reluctant to override that agreement. Contracts are thus seen as a way of bringing some structure and predictability into this area of law. Second, many lawyers are concerned about the implications of allowing courts greater power to override agreements on fairness grounds in situations in which the law lacks clear norms. In short, the fear is that the absence of clear norms also makes judicial intervention unpredictable. Recognition of this fact may be contributing to the strong reaction against the Miglin decision. Lawyers may legitimately worry that they will be unable to advise their clients whether the contracts they sign are likely to be varied. Even if they attempt to structure their agreements in light of statutory standards of fairness, it is often hard to know exactly what these norms are. In many cases they are going to be dependent on an individual judge’s perceptions of fairness.

It is, however, essential to recognize, once again, that the problems here stem from the substantive law of spousal support, rather than from the threshold for contract. In our view, the unsatisfactory state of the law of spousal support should not dictate the law with respect to the weight given to domestic contracts. Instead, the standard for overriding contracts should be based on normative considerations having regard to the objectives of spousal support, the objectives of corollary relief more generally, and public policy considerations. As we explain in more detail later, we believe there are strong normative reasons for adopting an override standard of contract that is lower than the trilogy standard and which is based upon an assessment of the fairness of the agreement in
light of the statutory norms in the *Divorce Act*. We also believe it is possible to draft a standard that is capable of taking the uncertainty surrounding spousal support into account by allowing intervention only where an agreement falls outside a range of reasonable alternatives.

4. CONTRACTING SPOUSAL SUPPORT: WHAT MAKES THIS AREA SO COMPLICATED?

Although we find the arguments mustered against *Miglin* unconvincing as reasons to retain the high override threshold set out in the *Pelech* trilogy, we also find the question of what the override standard should be a difficult one. In our view, this issue is complicated in part by features specific to the spousal support obligation and in part by a statutory complication created by the *Divorce Act*. There are certain features of the spousal support obligation that, in our view, pose unique problems for contracting and that strengthen the case for judicial supervision. In addition, the fact that spousal support has been subject to shifting norms raises the question of whether the override test should be framed in such a way as to allow agreements concluded under one set of background norms to be re-opened on fairness grounds if the ground rules shift. A final issue that complicates the crafting of an override threshold is that the *Divorce Act* appears to require agreements that have been incorporated into court orders to satisfy at least the material change test set out in section 17 before courts can override them. This raises the possibility of inconsistent override standards depending on whether an agreement has been incorporated into a consent order.

(a) The Nature of the Spousal Support Obligation: Fairness Concerns

There are three aspects of the spousal support obligation that complicate the process of contracting spousal support because they pose a high risk of unfairness: the fact that spousal support is a prospective obligation, the problem of unclear norms, and the effect of bargaining disparities. We examine each in turn.
Certain features of the spousal support obligation pose problems for contracting because they raise serious doubts about the prospects of achieving agreements that fairly apportion the economic consequences of the marriage and its breakdown. Foremost among these are problems of foreseeability. At the point separation agreements are being negotiated it is difficult to know what post-divorce life will be like and how it will unfold. These problems of foreseeability are especially acute with respect to spousal support because of its prospective nature. Unlike property division, which is a retrospective obligation based on past events, the spousal support obligation is to a large extent determined by future circumstances and is often difficult to fix with precision at the point of separation.

Current understandings of the purpose of the spousal support obligation have involved a significant departure from the clean-break model under which spousal support could be set with some certainty at the point of separation or divorce because the obligation was understood to be transitional—often for an arbitrarily set period of time. Now, under the non-compensatory model of spousal support, the extent of the support obligation may be affected by the shifting needs and means of the parties. Under the compensatory model, spousal support is intended to share equitably the economic advantages and disadvantages of the marriage. These economic advantages and disadvantages are often difficult to predict in advance; rather the full impact of the marriage and its breakdown is something that only becomes apparent over time. In our view one of the main problems with contracting spousal support is that spouses routinely underestimate the time it will take a formerly dependent spouse to overcome the economic disadvantages of the marriage and become self-sufficient. But foreseeability problems can also affect pay-

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45 There will, of course, continue to be some cases in which spousal support will be provided to offer a transitional period for disentangling the parties’ lives and allowing a lower-income spouse some time to reorganize his or her life in response to the marriage breakdown. In these cases the support obligation will not be highly dependent upon future events.
ors who may experience unexpected decreases in their income. In our view, there is a real difficulty attempting to predict with any degree of certainty at the time spousal support contracts are being negotiated how the economic disadvantages created by the marriage will unfold. This difficulty suggests to us that there should be an increased ability to examine contracts to ensure that in fact they have succeeded in redressing the economic consequences of the marriage and its breakdown.

In our view, the changing form of judicial support orders reflects a growing recognition of the foreseeability problems posed by the prospective nature of the support obligation. We have witnessed a significant decline in time-limited orders and an increasing prevalence of review orders or indefinite orders open to variation. In our view, foreseeability problems also support arguments in favour of a greater judicial power to override spousal support provisions in contracts to ensure that support objectives of the Divorce Act are actually met as the parties' post-divorce lives unfold.

(ii) Problems of Unclear Norms

We noted earlier how the uncertain nature of the spousal support obligation can lead some lawyers to argue that contracts, once reached, should be respected. There is, however, a flip side to this argument. If the law is uncertain and entitlements unclear, there may be a heightened concern over whether agreements are fair. There is reason to be concerned if “certainty” is being achieved at the cost of “fairness.” In this context it is significant to note that waivers and time-limits on spousal support continue to remain common in spousal support agreements despite expansive statutory entitlements to spousal support.

Where people do not have a firm sense of their legal entitlements, agreements may be shaped by the power dynamics between the spouses, or by the views of spousal support held by the parties' lawyers. This suggests that in a context of uncertainty courts ought to have more expansive power to override agreements to ensure that contracts do not

47 For an excellent and thorough analysis of the ways in which the current highly discretionary structure of spousal support law disadvantages claimants (i.e., women) in negotiations see Craig Martin, “Unequal Shadows: Negotiation Theory and Spousal Support Under Canadian Divorce Law” (1998), 52 U.T. Fac. L. Rev. 135.
depart substantially from the substantive norms animating spousal support. In fact, the problem of unclear norms may be seen to exacerbate the problems created by the foreseeability issues we have just discussed. When the future is uncertain (as it always is) and entitlements are unclear the potential for unfairness is increased.

(iii) Bargaining Disparities

The problems of foreseeability and uncertain norms are compounded by a further problem—the non-ideal conditions, in terms of a setting for rational and fair bargaining, in which separation agreements are negotiated. This concern was in fact identified by Justice La Forest in the trilogy itself, in his dissenting opinion in Richardson, where after referring to marriage breakdown as “one of the most stressful periods of [people’s] lives,” he notes, “many people in these circumstances do very unwise things, things that are anything but mature and sensible, even when they do consult legal counsel.” In addition to the emotional vulnerability of spouses at the time of separation, others have raised concerns about inequalities of bargaining power stemming from the prior relationship between the parties or created by women’s economic vulnerabilities at the time of marriage breakdown and their inability to withstand the costs of protracted litigation. As Wilson J. of the Ontario Court of Justice said in the recent decision in Leopold v. Leopold, a case that we will discuss in greater detail below:

[F]or parties negotiating a separation agreement, one party may have power and dominance financially, or may possess power through influence over the children. . . . [However], . . . [t]he reality is that often both contracting parties are vulnerable emotionally, with their judgment and ability to plan diminished, without the other spouse preying upon or influencing the other. The complex

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48 Richardson, above, note 2 at 883.
49 This could include anything from the fear and intimidation generated by a prior history of abuse and control to the willingness of one spouse to trust and rely upon the other as he or she did during the marriage.
marital relation is full of potential power imbalance. In a sense, vulnerability is implicit in the difficult emotional process of separation.51

Contractual doctrines of unconscionability as conventionally understood have tended to respond to only the most egregious and overt cases of inequality of bargaining power, thus creating a need for additional legal powers to enable judges to review the fairness of separation agreements.52

The continuing prevalence of waivers and time-limits in spousal support agreements, even in “core” spousal support cases involving marriages of significant duration with children, suggests that there may be something in the structure of bargaining around spousal support that allows the obligation to be whittled down. It also suggests that there are serious concerns about how free and fully informed some of the contractual choices about bringing finality to the spousal support obligation really are, thus undermining arguments in favour of contractual freedom and autonomy.

(iv) Fairness Concerns

In our view, these concerns—foreseeability problems, unclear norms, and bargaining disparities—strengthen the case for judicial supervision and suggest that a lower override standard is appropriate. These concerns demonstrate that there is a significant risk that spousal support contracts negotiated at the time of separation will not end up being “fair” agreements in the sense of equitably sharing the economic consequences of the marriage.

(b) Problems of Shifting Norms

A further complication in contracting about spousal support is the problem of shifting norms. When spousal support norms are constantly shifting, as they have been, what happens to agreements that were fair under the norms at the time they were negotiated but appear unfair as a

52 Leopold, ibid., is an interesting exception. In Leopold, drawing upon a recognition of the spousal relationship as one of “good faith,” the court attempted to re-craft the common law, contractual doctrine of unconscionability in the context of spousal agreements so as to allow greater scope for judicial review of spousal agreements on fairness grounds. Leopold is discussed further below.
result of a change in the underlying norms? If the only thing that has changed is the law, should courts be able to override what was a fair contract at the time of negotiation? This problem is particularly acute for pre-\textit{Moge} contracts that placed enormous emphasis on self-sufficiency. A good number of the harsh spousal support agreements from which former spouses are now seeking to be relieved were negotiated prior to \textit{Moge}, when the clean-break philosophy was dominant and time-limited support was standard. This was not the case in \textit{Miglin}, which involved a post-\textit{Moge} agreement, but was true of other leading cases, such as \textit{Bailey v. Plaxton}\textsuperscript{53} and \textit{Santosuosso v. Santosuosso}.\textsuperscript{54}

The pre-\textit{Moge} agreements raise difficult issues. On the one hand, these are the agreements that will likely depart most substantially from current standards of fairness. On the other hand, these are the cases where the unfairness of intervening is often felt the most strongly, given that the agreements were arguably fair when assessed against the norms in play at the time they were negotiated. There may have been no change in the parties’ circumstances; the only real change may have been in the law. Lowering the threshold for overriding agreements raises particular concerns in these cases about undermining settled legal arrangements and generates fears that agreements will continually be at risk of being re-opened in response to the ever-shifting norms of fairness in spousal support.


\textsuperscript{54} \textit{Santosuosso v. Santosuosso} (1997), 27 R.F.L. (4th) 234, 1997 CarswellOnt 369 (Ont. Div. Ct.) [hereinafter cited to R.F.L.]. The impact of shifting norms on agreements negotiated under a previous set of backdrop norms is an issue that should be addressed directly. It has often been avoided by analyses that assume that any agreements negotiated under the 1985 \textit{Divorce Act} were negotiated against a statutory backdrop that made generous provision for spousal support and which present what was in reality a change in the law as a change in the circumstances of the parties. In \textit{Santosuosso}, for example, which involved a pre-\textit{Moge} agreement imposing a time limit on spousal support, the court viewed the agreement as one based on an expectation that the wife would attain self-sufficiency within the time period and thus justified intervention on the basis that her failure to do so was a change in circumstances. It is highly plausible, however, that the agreement was not negotiated with an expectation that the wife would achieve self-sufficiency within the time-period, but rather with an understanding that time-limited support was all that the wife was entitled to under the existing state of the law. The issue of the impact of \textit{Moge}, and the new lens it provided for assessing the fairness of the agreement, was completely avoided.
Under the child support guidelines, an explicit choice was made to subject old agreements to scrutiny under the new norms of the guidelines.\(^{55}\) In our view, subjecting spousal support agreements to variation in light of shifting concepts of fairness may also be justified if we take seriously the prospective nature of the obligation. Just as the child support obligation is understood to continue until the child becomes an adult, the spousal support obligation can be viewed as one that is not fixed in time at the point of divorce but continues so long as the consequences of the marriage and its breakdown continue to unfold in the parties’ post-divorce lives.\(^{56}\) However, there may be legitimate concerns about reliance on the prior agreement that the standard for intervention should address. Justice Abella hinted at such in *Miglin* in her suggestion that the length of time that has passed since a release of support or the expiry of a time limit, and the extent to which one of the spouses may have reasonably relied on the absence of a support obligation in organizing their subsequent financial arrangements, are factors that should be considered by a court in determining the weight to be given to the agreement.

(c) A Final Complication: Different Statutory Thresholds for Originating Applications and Variations

A final complicating factor in devising a test for overriding spousal support agreements arises as a result of the different statutory standards for awarding support based on whether or not an agreement has been incorporated into a court order. Where the agreement has been incorporated into an order, the application for support must be brought as a variation application under section 17 of the *Divorce Act*. Section 17(4.1) provides that before varying a spousal support order, the court must be

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55. Under s. 14(c) of the Guidelines, the introduction of the Guidelines was recognized as a material change in circumstances justifying variation of a prior order (which may have incorporated an “old” agreement). In addition, s. 15.1 of the *Divorce Act*, which essentially requires that a court dealing with an originating application for child support disregard any agreement making provision for an outcome inconsistent with the Guidelines unless the agreement contains special provisions rendering the application of the Guidelines inequitable, applies to all agreements, including those which pre-date the Guidelines.

56. This is in contrast to property division, which is retrospective in nature. Significantly, shifts in matrimonial property regimes have not allowed for the reopening of property settlements reached under previous regimes.
satisfied that there has been a change in the condition means, needs, or other circumstances of either spouse since the making of the previous order, a standard which has been interpreted as requiring a material change. Under section 17(10), which deals with the situation where a time limit in a spousal support order has expired, the standard is even higher, requiring in addition a causal connection between the changed circumstances and the marriage. Where the agreement has not been incorporated into a court order, the application for support is brought under section 15.2, which directs a court to consider “any order, agreement or arrangement relating to support of either spouse” (section 15.2(4)(c)), but does not require there to have been any change since the agreement was made.

Under Pelech, these different thresholds did not pose a problem since Pelech imposed a uniform standard for both originating applications for support and variation applications that was higher than the material change standard. Problems may be created, however, if Pelech is replaced with a test that focuses on assessing the fairness of the agreement rather than on whether there has been a change since the agreement was made. As we discuss in more detail below, tests focusing on fairness offer promising alternatives to the Pelech standard. There is no statutory impediment to applying fairness tests to applications for support brought under section 15.2. The clear wording of section 17 of the Divorce Act, however, implies that a fairness test alone would not be available where an agreement has been incorporated into a court order. This gives rise to the potential for inconsistent override tests based on what may in many cases be the “accident” of incorporation. In provinces where courts assess the fairness of the initial agreement before incorporating the agreement into an order, the differential standards may not pose a significant problem. In provinces such as Ontario, where there is no systematic judicial oversight, the problem of differential standards will likely lead to inconsistent results.

57 In Richardson, above, note 2, one of the trilogy cases, La Forest J., writing in dissent, found different thresholds for originating applications and variations justifiable for this reason. He assumed that in the case of an incorporated agreement, a court had already determined the fairness of the agreement at the time of incorporation.
5. CHOOSING AN APPROPRIATE STANDARD: THINKING THROUGH THE TESTS

Having set out the issues that render contracting spousal support so complicated, we now turn to a more detailed examination of different standards for overriding spousal support agreements—the range of choices that will confront the Supreme Court of Canada as it attempts to “think through” Miglin. What becomes apparent as one surveys the options is that the tests hinge on two concepts: “fairness” and “change.” Each of these concepts can be formulated into tests that embody different thresholds. For example, a test based on change can require that change be “radical” or simply “material”; fairness-based tests can range from a high standard of unfairness bordering on “unconscionability” to a much lower standard of “unfairness.” Some override tests may constitute a combination of both fairness and change. To further complicate matters, fairness tests raise the question of the point in time at which the fairness of the agreement should be assessed—the time the agreement was negotiated or the time the claim for spousal support is being brought.

We have identified five tests, which, although not exhaustive of the possibilities, represent the main options before the Supreme Court of Canada. Two of the five tests rely on a change threshold as the lynchpin for their override standard. Two others focus on the fairness of the agreement, but differ in terms of the standard they use to assess fairness and in terms of the time the assessment takes place. The final test is a hybrid test that combines a change standard and a fairness review. To allow for easier comparison of the five options, we discuss the advantages and disadvantages of each. As we discuss in more detail below, we are drawn to tests that assess the fairness of the agreement against the statutory norms of the Divorce Act.

(a) Change Tests

As their name suggests, change-based tests permit courts to override an agreement only where a change of a specific magnitude has occurred since the agreement was made. The threshold change required can be a high one—a radical change—or one that merely requires a material change. Regardless of where the threshold is set, change tests offer agreements a degree of protection from judicial intervention in that courts can not override agreements unless a change of the requisite degree has occurred. Thus, change tests give a certain amount of weight
to contractual certainty, depending upon how high the change threshold is set. Since the change requirement shields agreements until a change occurs, change tests do not allow courts to assess the fairness of the initial agreement if no change has taken place. We discuss two change-based tests, the Pelech test and the Miglin test, which differ primarily in terms of the change threshold they adopt and nature of the change they require.

(i) The Pelech Trilogy Test

One option for the court would be to uphold the test it articulated in the Pelech trilogy. The Pelech test is a change-based test, allowing the court to override a final agreement on spousal support only when there has been a change of a particular magnitude since the agreement was made. Aside from the proviso that the test applies only to agreements that are valid according to the substantive rules of contract law (which ensures that contracts are not unconscionable, in the sense that one party has preyed upon the other or exerted undue influence and the resulting bargain is grossly one-sided), the test does not consider the fairness of the initial agreement. Instead, it defers to individuals to decide how best to organize their post-divorce lives. The threshold test for change—that there be a radical and unforeseen change in circumstances that is causally connected to the marriage—is a very stringent one with the result that applications to override are rarely successful.

The stringency of the Pelech test arises in large part because of the interpretation the Supreme Court gave to the requirement that the change in circumstances be “radical” and “unforeseen.” The Court interpreted this standard to mean that the change relied upon must have been objectively “unforeseeable” at the time the parties entered into their agreement, rather than one that was outside the subjective contemplation of the parties. In other words, any event that was objectively foreseeable at the time the parties signed the agreement could not count as a radical or unforeseen change, even if that event had not been considered by the parties.

This objective approach to foreseeability is exemplified in Richardson v. Richardson, one of the cases comprising the Pelech trilogy.58 In Richardson, the spouses had signed a separation agreement providing Mrs. Richardson with one year of spousal support following a 12-year

58 Above, note 2.
the last five years of which she had spent out of the workforce raising the couple’s two children. The court was clear that there had been no change at all, let alone a radical change, when Mrs. Richardson’s plans for self-sufficiency failed to materialize. The fact that Mrs. Richardson was unemployed when she brought the application was held not to be a change in circumstances because she had also been unemployed when she signed the agreement and the possibility that she would be unemployed was “not unforeseeable.” The court reached this conclusion despite Mr. Richardson’s testimony that “it was my understanding that during the one year period my wife was to seek and obtain employment.” Since most events can be said to be objectively foreseeable, the _Pelech_ radical and unforeseen change test is very difficult to meet.

A. Advantages.

In principle, _Pelech_ is a clear test and therefore an easy test for lawyers to work with and for courts to apply. If it is applied strictly, its high-change threshold gives almost complete weight to contractual certainty, as few changes will satisfy the threshold test. Lawyers can, therefore, advise clients with considerable confidence that their contracts will be respected and will not be opened up some years down the road. For those who view certainty as a key virtue of matrimonial contracts, the trilogy’s emphasis on contractual certainty provides a significant advantage over other override tests, as it allows parties to rely on their agreements in structuring their post-divorce lives.

It is important to stress that these advantages are most pronounced if the trilogy is applied strictly. However, as we explain in more detail below, in recent years some courts have manipulated the trilogy test to permit judicial intervention into unfair agreements where on a strict application the override standard has not been met. This _de facto_ reduction in the trilogy standard has rendered the test less clear and weakened the goal of contractual certainty.

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59 _Richardson_, above, note 2 at 872.

60 Despite this testimony, the Supreme Court took the position that a common expectation that Mrs. Richardson would be self-sufficient upon the expiry of spousal support could not be established. _Ibid_. at 871.
B. Disadvantages.

The disadvantages of the trilogy standard have been catalogued in a vast body of academic literature, much of which is cited by the Court of Appeal in the *Miglin* decision.\(^{61}\) This literature suggests that the trilogy’s emphasis on finality and on sanctity of contract comes at the expense of fairness between the spouses. The high standard for variation means that spouses have been forced to live with bargains that turned out to be “bad” ones as the spouses’ post-marriage breakdown lives unfolded. Women, as support recipients, have been most frequently disadvantaged by the trilogy standard, especially where they waived spousal support or agreed to only short-term support as they often did under the “clean-break” model of spousal support the trilogy appeared to endorse. In these cases, women agreed to spousal support awards that would be seen as grossly inadequate under today’s standards and were left without spousal support long before the economic disadvantages of the marriage could be said to have been redressed. This problem may be less pronounced today than it was at the height of the “clean-break” model of spousal support. However, as the agreement in *Miglin* shows, women continue to enter into agreements that do not address the financial costs of the marriage, often due to unrealistic expectations on both spouses’ parts as to how long it will take them to become economically self-sufficient.

Women, however, are not alone in experiencing hardship as a result of the trilogy. Men, as payors of spousal support, also find themselves stuck to bad bargains because the trilogy holds them to agreements even if their financial positions take a dramatic, even radical, turn for the worse. The culprit for support payors is usually the “causal connection” requirement of the *Pelech* standard, which from its inception, seems to have had no relevance to applications brought by payors.\(^{62}\) The kinds of changes that might lead a payor to seek to reduce the amount of spousal

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\(^{61}\) See para. 54, above, note 1.

support agreed to in a contract—for example, a sudden accident or illness that results in permanent unemployability—are seldom, if ever, causally connected to the marriage. The very fact that the causal connection requirement lacks any conceptual coherence as applied to payors suggests that as a generally applicable test for overriding spousal support agreements, the Pelech test is deeply flawed.

In our view, the trilogy should be abandoned in part because it produces these harsh results but, even more fundamentally, because the premises on which it is founded are unsound. One of the central themes animating Wilson J.’s judgment was the importance of crafting a rule for judicial intervention that encourages settlement. She addressed the advantages of settlement over litigation in the context of discussing the 1983 decision in Farquar v. Farquar in which the Ontario Court of Appeal adopted a narrow override standard precisely because it would encourage settlement:

Zuber J.A. started with the proposition that it is preferable for parties to settle their own affairs. He gave a number of reasons for this including that (1) the parties are more likely to accept and live with an arrangement they have made themselves as opposed to one imposed upon them; (2) the administrative burden of the courts is relieved by respecting the parties’ freedom of contract; and (3) treating the agreement reached by the parties as final allows them to plan their separate futures with relative peace of mind. In this last regard Zuber J.A. quoted from Anderson J.’s decision in Dal Santo v. Dal Santo [(1975), 21 R.F.L. 117] at p. 120:

It is of great importance not only to the parties but to the community as a whole that contracts of this kind should not be lightly disturbed. Lawyers must be able to advise their clients in respect of their future rights and obligations with some degree of certainty. Clients must be able to rely on these agreements and know with some degree of assurance that once a separation agreement is executed their affairs have been settled on a permanent basis. The courts must encourage parties to settle their differences without recourse to litigation. The modern approach in family law is to mediate and conciliate so as to enable the parties to make a fresh start in life on a secure basis. If separation agreements can be varied at will, it will become much more difficult to persuade the parties to enter into such agreements.

In her concluding remarks, Wilson J. adopted these assumptions, saying that “the overriding policy consideration” is that “[p]eople should be encouraged to take responsibility for their own lives and their own

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64 Pelech, above, note 2 at pp. 833-834.
decisions.” This means “...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.”

Wilson J.’s view of the importance of encouraging settlement also led her to reject a competing standard for overriding contract, one that would allow courts to examine the fairness of the agreement and to override the agreement where its terms were unfair. The Manitoba Court of Appeal had adopted this standard in its own trilogy of cases: *Newman v. Newman*,66 *Katz v. Katz*,67 and *Ross v. Ross*.68 Wilson J. categorically rejected a fairness-based test, primarily because of her view that this approach would undermine settlement:69

...I believe that every encouragement should be given to ex-spouses to settle their financial affairs in a final way so that they can put their mistakes behind them and get on with their lives. I would, with all due respect, reject the Manitoba Court of Appeal’s broad and unrestricted interpretation of the court’s jurisdiction in maintenance matters. It seems to me that it goes against the main stream of recent authority, both legislative and judicial, which emphasizes mediation, conciliation and negotiation as the appropriate means of settling the affairs of the spouses when the marriage relationship dissolves.

Two main points emerge from Wilson J.’s analysis. The first is that she viewed settlement as a substantive “good” in itself, for reasons that have to do with the satisfaction of individual litigants and with the benefits conferred on the legal system as a whole. The second point is that for Wilson J. the goal of encouraging settlement involved taking the parties at their word and refraining from examining the fairness of the settlement. In our view, neither of these assumptions is sustainable.

The core weakness of Wilson J.’s analysis lies with her assumption that settlement *per se* is the objective of the family law regime, or as she put it, the “overriding policy consideration.” We do not challenge the

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65 *Pelech*, above, note 2 at 851 [emphasis added].
69 *Pelech*, above, note 2 at 849. Wilson J. also expressed concern that allowing the courts to override agreements on gender related concerns would only serve to reinforce gender bias.
importance of settlement as a practice. However, in our view, it is not settlement itself that family law ought to promote, but fair settlement—settlements reflecting public norms regarding the entitlements to which spousal roles give rise. These norms, which are found in the objectives set out in the Divorce Act and refined by the jurisprudence of the Supreme Court of Canada, understand marriage to be an economic partnership. Under this partnership model of marriage, the goal of spousal support—as well as other forms of economic relief—is to ensure that the economic consequences of the marriage and its breakdown are distributed equitably between the spouses. In our view, society has a legitimate interest in ensuring that these public norms are reflected in the agreements spouses reach in settling their affairs upon marriage breakdown. Just as courts are expected to fashion their orders to conform to the objectives of the Divorce Act, so too should spouses be expected to craft agreements that equitably distribute the economic consequences of the marriage. In other words, in our view, it is not settlement per se that the law should seek to encourage, but fair settlements that seek to redress the economic consequences of the marriage and its breakdown.

The obvious implication of this argument—that it is fair settlement rather than settlement per se that should be the “overriding policy consideration” in family law—is that Wilson J.’s assumption that fairness review is incommensurate with settlement cannot stand. In fact, arguably the goal of encouraging fair settlement can be best achieved by adopting an override standard that ensures that fair contracts will be upheld while unfair contracts will not. In our view, an override standard that does not require the courts to examine the fairness of the contract will fail to achieve the objective of promoting fair settlement because it will allow contracts to be upheld even when they are patently unfair.

Both the radical change test and the causal connection test are profoundly unresponsive to the kinds of factors courts should consider in deciding whether contracts should be upheld. The high standard of the radical change test exacerbates what we have termed problems of foreseeability, adding to the potential for unfairness. As we have argued earlier, the impact of the marriage on the economically dependent spouse is often very difficult to predict accurately at the time separation agreements are usually signed. The economic impact of the marriage on the spouses cannot be fully known at the time of separation, but becomes clearer as the spouses disentangle their lives and as their post-separation lives take shape. The radical and unforeseen change standard sets the change threshold so high that it is incapable of dealing with these fore-
seeability problems, particularly when it incorporates an objective standard of foreseeability. Instead, by holding people to agreements made when they can only guess at the economic impact of the marriage, the trilogy test produces results that are unfair in the sense that they do not come close to redressing the economic impact of the marriage. This problem was most pronounced in the pre-Moge days when short-term spousal support was the norm. However, it still remains a problem today as people entering into contracts often underestimate the long-term impact that absences from the labour force, or the decision to cut back on labour force participation through part-time work have on the economically dependent spouse. Similarly, the problems of bargaining power disparities and vulnerability at the time of contracting discussed above persist and these may also result in people signing unfair agreements. By holding people to contracts that fail to fairly apportion the economic consequences of the marriage, the radical change perpetuates a kind of systemic unfairness.

The causal connection component of the trilogy test is untenable as a criterion for deciding whether to override contracts and to a certain degree has always been so. As we mentioned earlier, the causal connection test has always lacked conceptual coherence in applications brought by payors. As a result of changes in the law of spousal support, it has now also become problematic in applications brought by support recipients. The “causal connection” aspect of Pelech can be best understood as aligned with the clean-break model of spousal support, rather than as a general principle for determining whether contracts should be respected. In light of the more expansive norms of spousal support articulated in both Moge and Bracklow, the causal connection requirement no longer makes sense in applications brought by support recipients.

Neither the radical and unforeseen change test nor the causal connection test permit courts to consider the fairness of contracts in deciding whether to uphold them. In practice, this inability of the trilogy to admit fairness considerations has prompted some courts to manipulate the standard and to find “radical” changes on facts where on a strict application of the trilogy no change, let alone radical change, would be said to exist. An example of this occurred in the 1997 Ontario Divisional Court decision in Santosuosso v. Santosuosso.70

In 1988, following the breakdown of their 23-year traditional marriage, the Santosuosso entered into a separation agreement in which

70 Above, note 54.
Mr. Santosuosso was to pay Mrs. Santosuosso spousal support for 24 months. Thereafter, Mrs. Santosuosso was to be responsible for her own support "regardless of any change in circumstances, no matter how catastrophic such change might be." In 1991, after the spousal support provided by the contract had been exhausted, Mrs. Santosuosso brought an application for support under section 15 of the Divorce Act. At the time of the application, Mrs. Santosuosso was working almost 60 hours per week to earn a monthly income of $1,700. She argued that this constituted a radical and unforeseen change in circumstances because both she and Mr. Santosuosso contemplated that she would have upgraded her education and attained economic self-sufficiency by the time the spousal support elapsed.

The Divisional Court accepted the argument that Mrs. Santosuosso’s failure to attain self-sufficiency constituted a radical change in circumstances, holding that "it was not within the contemplation or expectation or reasonable anticipation of the both parties...that [Mrs. Santosuosso] would be working almost 60 hours a week at low-level wages to earn $1,700.00 a month in 1996." This understanding of radical change is a decidedly different, and much more subjective, understanding of foreseeability than the standard the Supreme Court of Canada employed in Richardson v. Richardson. As the possibility that Mrs. Santosuosso might not succeed in securing adequate employment was objectively foreseeable, it would not have constituted a radical and unforeseen change on a strict application of the Pelech test. The Divisional Court’s decision to adopt a more subjective approach to foreseeability can only be explained as a way of permitting the court to override what it perceived to be an unfair agreement.

The tendency of some courts to manipulate the radical change standard as a way of intervening in unfair agreements suggests to us an additional disadvantage of the trilogy standard. The need to distort the law to allow courts to consider fairness illustrates the unresponsiveness of the trilogy standard. In our view, it is better to fashion a test that deals with fairness issues directly, rather than through indirect manipulation of legal standards.

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71 Above, note 54 at 248.
72 Above, note 2.
C. Conclusion.

It seems to us that the trilogy standard should be abandoned because neither the radical change test nor the causal connection test permits consideration of the fairness of the spouses' agreement. Instead the trilogy assumes that so long as the agreement is not unconscionable in the substantive law sense (the result of inequality of bargaining power) it ought to be respected, whether or not it promotes the objectives of economic fairness between the spouses. This would remain true even if the causal connection aspect of the trilogy were abandoned and the radical change test retained. To the extent that fairness concerns are entering into the foreseeability component of the radical change test in practice, it is better to address these concerns directly, rather than by distorting the law.

(ii) Miglin

A second option for the Supreme Court would be to adopt the test articulated by the Ontario Court of Appeal in Miglin. Although we have classified Miglin as a change test, it is in fact a hybrid test, embodying criteria of change as well as fairness. Like the trilogy, it is change-driven in that it requires a change in circumstances as the initial step in considering the agreement. The Miglin standard is, however, lower than that of the trilogy, requiring a “material” rather than a radical change and explicitly rejecting any requirement that the change be causally connected to the marriage. Once the change threshold is established, the second stage of the Miglin test explicitly allows for fairness concerns to enter the analysis, as it requires courts to consider the extent to which the agreement satisfies the objectives of the Divorce Act.

A. Advantages.

In our view, one of the main advantages of the Miglin test is that it recognizes the need to depart from the overly stringent Pelech standard. By reducing the change standard from a radical change to a material change and therefore potentially subjecting more agreements to review, it deals better with foreseeability problems than the trilogy. It does not, however, open up all contracts to review. Its material change requirement imposes a threshold that must be met before a court will consider the fairness of the agreement. This has the effect of placing continuing value
on certainty of contract, as parties can rely on their agreements in the absence of a material change. The material change requirement also ensures the application of a consistent standard whether the application for support is brought under section 15.1 and section 17 of the Divorce Act. Since section 17 of the Act requires a material change for agreements that have been incorporated into court orders, consistent treatment of agreements would appear to require an override standard to include the existence of a material change.

B. Disadvantages.

The material change threshold that we have referred to as one of the strengths of the Miglin test as compared to the trilogy is also one of its weaknesses. Supporters of the trilogy standard will find the material change threshold to be too low, permitting too much judicial intervention into spousal contracts. Even more than the radical change standard discussed above, the material change threshold is subject to manipulation, allowing courts to find a material change in almost any circumstances. This potentially allows for too much fine-tuning of agreements based on the court’s sense of fairness between the parties and correspondingly for too little weight to be placed on contractual certainty.

Conversely, the material change standard may be too high in some cases, as it precludes courts from considering the fairness of the initial agreement unless the court can find a material change. In the post-Miglin case of Champagne v. Champagne,73 for example, the Ontario Superior Court dismissed Mrs. Champagne’s request for interim spousal support on the basis that there had been no material change of circumstances since the separation agreement was signed. The parties had been married for 20 years, during part of which Mrs. Champagne stayed at home to raise the couple’s three children. After their marriage breakdown, the parties entered into an agreement in which the three teenage children were to reside with Mr. Champagne. Mr. Champagne waived child support and Mrs. Champagne waived spousal support. The spouses left the marriage in disparate financial positions, with Mr. Champagne earning $70,000 per year and Mrs. Champagne earning only $14,677 per year. Within three years of the signing of the agreement, Mrs. Champagne’s income had fallen slightly and she had accumulated a significant

debt. Despite finding that "the disparity of incomes alone, after a married cohabitation of 20 years" suggests that the agreement did not promote the objectives of spousal support as defined in the Divorce Act, the court held that it could not override the agreement because there had been no change in circumstances. The court held that it was bound by Miglin to find a material change and there was none on the facts.

The problem that Champagne illustrates is that Miglin's material change threshold will insulate unfair agreements from review in cases where there has been no change in circumstances. In effect, the material change requirement either assumes that the initial agreement was fair in the circumstances as they existed at the time of negotiation (which is why courts cannot consider the agreement's fairness unless there has been a change in circumstances) or it assumes that people should be held to their agreements—whether or not they are fair—unless their circumstances change. Either way, the material change requirement seems to undermine much of the analysis in Miglin that focuses on ensuring that courts uphold fair agreements, agreements that advance the objectives of the Divorce Act.

Under Miglin, courts confronted with an application to override an unfair agreement in cases where there has been no clear change in circumstances will be faced with an unpalatable choice: uphold a substantively unfair agreement or manipulate the material change standard to find such a change. In our view, both of these options are undesirable. If the impetus underlying Miglin is to place increased emphasis on fairness in fashioning an override standard, in our view it is better to allow courts to consider fairness directly, rather than at the second stage of the analysis. The Miglin test will either fail to ensure that only fair agreements are enforced or it will invite manipulation of the material change standard.

A final problem with Miglin is that the test as articulated by the Court of Appeal suffers from a lack of clarity in terms of the factors the court is to consider once a material change has been established. Specifically, it is not clear from the judgment whether an agreement is to be treated just like a court order or whether the court is to give the agreement significant weight and to depart from it only when it is substantially unfair. If it is the former, then agreements will effectively have no more weight than court orders. For those who believe that people are motivated to settle rather than litigate because of the increased reliance on the agreements they reach, this will constitute a serious disadvantage as it will not place sufficient weight on people's intentions to
resolve their affairs by way of contract. It is also unclear whether a change in the substantive law of spousal support would constitute a material change under the Miglin standard.

C. Conclusion.

While the Miglin test is informed by a laudable attempt to reset the balance between contractual certainty and fairness, its material change threshold compromises its ability to meet this objective by precluding consideration of fairness issues directly.

(b) Fairness Tests

Fairness tests are tests in which the decision as to whether to override the contract is made on the basis of an assessment of the contract's fairness according to some substantive norm. The substantive norm for assessing fairness would be the objectives of spousal support found in the Divorce Act and in judgments of the Supreme Court of Canada. While fairness of an agreement can be assessed either at the time the agreement was negotiated or at the time the application to override, the fairness tests we discuss assess fairness at the time the application is brought. Our final test, a Hybrid Fairness/Change test, evaluates fairness at the time of negotiation.

The main concern with fairness tests is that, as compared with change tests, they may place insufficient weight on the parties' agreement because they do not require the existence of changed circumstances before overriding the agreement. Instead, fairness based tests will allow courts to override an agreement where unfairness results from several sources: 1) unfairness of the initial agreement; 2) foreseeability problems (the economic consequences of the marriage unfolded differently than the parties initially predicted); 3) changes in the parties' circumstances; and 4) changes in the legal norms underlying the spousal support obligation. An additional concern with fairness tests is that the standard for judging unfairness may be subject to manipulation, but as we have argued above, the problem of malleable standards also applies to change-based tests. We address both of these concerns in more detail below.

We examine two fairness tests, an Unconscionable Results test and an Objective Fairness test. The only difference between these tests is the standard for judging unfairness, as the Unconscionable Results test would require a greater departure from the norms of the Divorce Act.
than the Objective Fairness test. Consequently, there is a considerable
degree of overlap between the tests. Despite this overlap, we have chosen
to discuss these tests separately because we believe a fairness-based test
holds out the most promise for a constructive override standard and
therefore both options should be fully canvassed. In our view, fairness-
based tests are superior to change-based tests because they advance the
*Divorce Act*’s objective of equitable sharing and because they are ca-
pable of responding to unfairness arising from problems of foreseeabil-
ity. On balance, we favour the Objective Fairness test because it is most
consistent with the goal of encouraging fair spousal support settlements.
The American Law Institute in its *Principles of the Law of Family Dissolution*
has also endorsed a fairness-based test for overriding agree-
ments, which is similar in some respects to our Objective Fairness
model.\(^7^4\)

A key aspect of the fairness tests we contemplate is that they both
require the fairness of spousal support agreements to be evaluated in the
overall context of the economic arrangements between the spouses as a
whole. Thus, the tests we contemplate would not preclude flexible ar-
rangements where, for example, one spouse received a greater share of
property in exchange for less spousal support, so long as the agreement
as a whole conformed to the objective of equitably sharing the economic
consequences of the marriage.

(i) *Unconscionable Results Test*

Under the Unconscionable Results test, contracts would be consid-
ered unfair and subject to being overridden where the contract produced
“unconscionable” results at the time of the application for spousal sup-
port. This test is similar to provisions that exist within various provincial
family law statutes permitting contracts to be overridden based on “un-

\(^7^4\) See American Law Institute, *Principles of the Law of Family Dissolution: Analysis and Recommendations* (2000), c. 7, which deals with agreements. Under the *Principles* a court would be allowed to refuse to enforce settlement agreements that differ *substantially* from the law that governs spousal support (or property disposition) and that *substantially* impairs the well-being of a party who has primary or dual residential responsibility for the children or has substantially fewer economic resources than the other party [emphasis ours]. Although we have interpreted this standard as similar to our Objective Fairness test, it is also possible that the ALI test could be interpreted as imposing a higher threshold more consistent with what we describe as the Unconscionable Results approach.
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conscionable circumstances.” Section 33(4) of the Ontario *Family Law Act*, for example, permits the court to set aside a provision for support or a waiver of the right to support in a domestic contract in three circumstances:

(a) if the provision for support or the waiver of the right to support results in unconscionable circumstances;

(b) if the provision for support is in favour of or the waiver is by or on behalf of a dependant who qualifies for an allowance for support out of public money; or

(c) if there is default in the payment of support under the contract or agreement at the time the application is made.

Unlike section 33(4) however, the Unconscionable Results test would not permit courts to override a contract simply because the applicant was in dire or unconscionable circumstances or was eligible to receive public funds. Instead, the Unconscionable Results test would allow courts to override agreements where the spousal support terms of the agreement departed significantly from provisions that would fairly apportion the economic consequences of the marriage.

On the Unconscionable Results test, the norm for assessing the fairness of the contract is a high one. The results of the contract must be “unconscionable,” which is a more rigorous standard than one that examines whether the contract is simply “unfair.” The standard is, however, lower than the standard employed in the contract law doctrine of unconscionability, which has both a procedural fairness component (the stronger party must have preyed upon or taken advantage of the weaker one) as well as a requirement that the agreement be improvident or grossly unfair (a substantive fairness component). The Unconscionable

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

76 We do not propose a test akin to s. 33(4) as such a test is foreign to the language and concepts of the *Divorce Act*. If a test of this sort were to be adopted, in our view, it should be legislated by Parliament rather than fashioned by for the courts.

77 See, for example, the classic statement of unconscionability by the Ontario Court of Appeal in *Mundinger v. Mundinger* (1968), [1969] 1 O.R. 606 (Ont. C.A.). For an excellent discussion of unconscionability in the family law context, see Thompson, above, note 18. Some cases, like *Leopold v. Leopold*, above, note 51, have suggested significant modifications of the contract doctrine of unconscionability for spousal agreements, but these modifications have not yet been widely accepted.
Results test would focus only on substantive fairness and would measure the results of the contract against the objectives of equitably sharing the economic advantages and disadvantages of the marriage set out in the *Divorce Act*. It would require a *very substantial* departure from the range of reasonable outcomes that would effect equitably sharing the economic costs of the marriage and its breakdown. Since this override threshold is high, this test would continue to place considerable weight on parties’ agreements.

It bears repeating that in determining whether the contract produced unconscionable results courts would have to look at parties’ *financial agreements as a whole*, and not merely at the spousal support provisions. In deciding whether the spousal support arrangements have brought about an equitable sharing of the advantages and disadvantages of the marriage, the entire package of economic relief must be examined. This will also be the case for the Objective Fairness test.

A. Advantages.

The primary advantage of this test—which it also shares with the Objective Fairness test—is that it focuses on the fairness of the agreement. It therefore allows contractual outcomes to be judged against public policy as expressed through statutory norms. In our view, this is precisely the kind of analysis in which courts should engage when deciding whether or not to override a contract. As we have argued earlier, upholding settlement agreements is not in itself a desirable goal. There is no value in upholding agreements at all cost, regardless of their substantive fairness. The objective of contract law in the family context should be to encourage people to enter into “good” agreements—agreements that conform to the standards of fairness enunciated in the *Divorce Act*. This objective can be attained by ensuring that “good” agreements are enforced, not simply any agreement.

By addressing the issue of fairness directly, the Unconscionable Results test eliminates the need to find a change in circumstances before dealing with an unfair agreement. It therefore avoids the need to manipulate change standards, a problem we have identified with both the trilogy and the *Miglin* tests. In addition, because it considers fairness at the time of the application, it is capable of dealing with different causes of unfairness (unfairness of the original agreement and unfairness arising from changes either in the parties’ circumstances or in the norms of spousal support). Finally, by focusing on the results that exist at the time
of the application, the Unconscionable Results test is able to respond to foreseeability problems in a far better fashion than either the trilogy or Miglin. As we will discuss in greater detail below, it is also able to address foreseeability problems better than the Hybrid Fairness/Change test because it takes into account how the disadvantages caused by the marriage have actually unfolded since marriage breakdown.

B. Disadvantages.

The main concern with fairness tests is that by not requiring the existence of a change at all, they do not place sufficient weight on the contract. This concern is less of a problem for the Unconscionable Results test than for the Objective Fairness test because the standard for judging fairness is such a high one. In fact, the main drawback of the Unconscionable Results test is that its standard for assessing the fairness of the agreement may be too high.

The term “unconscionable” is likely to trigger an association with the common law doctrine of unconscionability which embodies a very stringent test. Leaving aside its procedural fairness component, the contract law doctrine of unconscionability is made out only where an agreement is found to be “improvident” or “grossly unfair.” This has been understood to mean “something which is shocking, oppressive, not in keeping with a caring society”\(^78\) or “where the disparity is so gross... as to be heard of with uplifted hands and exclamations of astonishments.”\(^79\) Claims that a contract is unconscionable are rarely successful in large part because of this high standard of substantive unfairness.\(^80\) If this understanding of unconscionability is imported into the Unconscionable Results test, the test may not go far enough in achieving the objective of encouraging “good” agreements because it would permit very substantial departures from the public norms of fairness embodied in the Divorce Act. A lower standard of “unconscionability” would, however, begin to merge with the standard for measuring unfairness in the Objective Fairness test.

\(^79\) Waters v. Donnelly (1884), 9 O.R. 391 (Ont. Div. Ct.) at 397.
\(^80\) See Thompson, above, note 18 at 415. Unconscionability claims under common law may also fail because the procedural aspect of the test, requiring the stronger spouse to have taken advantage of the weaker, has not been established.
A high standard of unconscionability may, alternatively, invite judicial manipulation of the standard to avoid upholding agreements that depart substantially from fairness norms. The concern here is that, as we have seen with some courts' treatment of the “radical and unforeseen” change test of the trilogy, courts will apply inconsistent approaches to the unconscionability threshold, thereby introducing conceptual confusion into the law.

The Unconscionable Results test, like the Objective Fairness test, makes agreements vulnerable to changes in the law of spousal support. This will occur when the law of spousal support changes dramatically with the result that agreements that were negotiated under one set of support principles are no longer fair under the new norms. Since the Unconscionable Results test assesses the fairness of the agreement at the time of the support application, agreements that were fair when the parties entered into them can be rendered unfair simply because of a change in the substantive law of spousal support. This may seem unfair as it undermines agreements that were negotiated based on a completely different sense of background entitlements. This problem will also arise under the Objective Fairness test. To the extent that the Unconscionable Results test permits intervention only in cases of egregious departures from norms of fairness, changes in the underlying norms of spousal support may have less of an effect under the Unconscionable Results test than under the Objective Fairness test.

A final problem with the Unconscionable Results test is that it cannot be applied to agreements that have been incorporated into court orders unless the threshold of material change is also met. This will give rise to inconsistent override tests based on what may in many cases be the “accident” of incorporation. The differential standards will not pose a significant problem in provinces where courts assess the fairness of the initial agreement before incorporating the agreement into an order. In provinces such as Ontario, where there is no systematic judicial oversight, the problem of differential standards will likely lead to inconsistent results.

C. Conclusion.

To the extent that it focuses on fairness, we find the Unconscionable Results test appealing. We believe, however, that the threshold for assessing fairness under this test is too high and therefore would permit significant departures from the Divorce Act's norms of equitably sharing
the economic consequences of the marriage and its breakdown. For this reason, we prefer our next option, the Objective Fairness Test.

(ii) *Objective Fairness Test*

The Objective Fairness test is similar to the Unconscionable Results test in that it focuses on the fairness of results at the time of application. Its sole difference from the Unconscionable Results test is that it uses a *lower* threshold for overriding an agreement. Whereas the Unconscionable Results test would permit courts to override agreements only where they departed very substantially from the range of reasonable outcomes that would give effect to the principle of equitable sharing, the Objective Fairness test would permit intervention in cases where the departure from the norm would be less substantial. The standard for fairness here is essentially that which the Ontario Superior Court sketched out in *Leopold v. Leopold*, allowing intervention where the agreement falls "outside the parameters of the generous ambit within which reasonable disagreement is possible."

In *Leopold*, the husband brought an application to override the terms of a final agreement that granted him limited-term spousal support after a seven-year marriage. Wilson J. of the Ontario Superior Court rejected Mr. Leopold’s claim that the override standard set out in the *Pelech* trilogy was no longer good law, but held that the application of that standard had always been subject to the “caveat of unconscionability.” While traditionally the doctrine of unconscionability has required exploitative behaviour on the part of one spouse, which results in an improvident agreement, Wilson J. held that in the family law context the doctrine no longer required an element of exploitation, as this requirement was “...a stereotypical and unrealistic test given the emotional climate in which [separation] contracts are negotiated.” Instead, Wilson J. held that parties negotiating a separation agreement are subject to a duty of good faith negotiation, which imposes certain obligations upon them. Not only do these obligations include the requirement to make full financial disclosure, they also require the spouses “...to be governed by principles of objective fairness in reaching an agreement.” Accordingly, Wilson J. held that agreements will be unconscionable

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81 Above, note 51.
82 This test is similar to that proposed by Bala and Chapman, above, note 44.
83 *Leopold*, above, note 51 at para. 112.
84 *Leopold*, above, note 51 at para. 133.
where they are “...clearly outside the range of what is objectively fair...taking into account the facts and circumstances of the parties.”85 Thus, Wilson J. held:

...When considering unconscionability, the court should not intervene unless the applicant has met the onus of proving that the settlement reached falls outside the parameters of the “generous ambit within which reasonable disagreement is possible”. The court must consider the facts and circumstances of the parties at the time of the agreement, and the applicable law in force at the time the agreement was made. All aspects of the settlement should be considered, including division of property and support. The court should intervene only in clear cases of objective unfairness or improvidence determined at the time the agreement was reached, having regard to the facts and circumstances of the case considered in light of the statutory factors enunciated in the 1985 Divorce Act.86

Although the fairness standard of the Objective Fairness test derives from the Leopold decision, our Objective Fairness test is not the same as the test employed in that case. In Leopold itself the court attempted to broaden the common law doctrine of unconscionability in the spousal support context by eliminating the requirement that one party must have preyed upon the other and by reducing the threshold of substantive unfairness from improvidence to objective unfairness. Like the standard doctrine of unconscionability, the Leopold unconscionability/objective fairness test would be applied to contracts at the time of settlement. In contrast, our Objective Fairness test would leave the doctrine of unconscionability as is, and would assess the fairness of the agreement at the time of the application for spousal support rather than at the settlement.87 As with the Unconscionable Results test, in assessing the fairness of the support provisions of the agreement, the Objective Fairness test would take all of the financial provisions between the spouses into consideration. Under our Objective Fairness test, courts would be allowed to override an agreement only where, looking at the financial arrangements between the parties as a whole, the spousal support pro-

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85 Leopold, above, note 51 at para. 144.
87 It would also be possible to create an Objective Fairness test that assesses the fairness of agreements at the point of negotiation as in Leopold, but such a test would only work if it also included a second part that considered unfairness or changes arising after settlement. Our fifth test, the Hybrid Fairness/Change test, discussed below, is example of a test of this sort.
visions fell outside the "generous ambit within which reasonable disagreement is possible."

A. Advantages.

Due to its similarity with the Unconscionable Results test, the Objective Fairness test shares many of its advantages. Like the Unconscionable Results test, the primary advantage of the Objective Fairness test is that it allows contractual outcomes to be judged against public policy as expressed through statutory norms. By addressing the issue of fairness directly, the Objective Fairness test, like the Unconscionable Results test, avoids manipulation of change standards and degrees of change. Since it examines fairness at the time of the application for support, it can take into account both unfairness at the time of negotiation and unfairness that arises as a result of changes without the need for a two-part test. It also deals well with foreseeability problems because, by focusing on the positions of the spouses at the time of the application, it considers how the disadvantages of the marriage have actually unfolded over time.

In our view, the Objective Fairness test has an important advantage over the Unconscionable Results test that stems from its lower standard for assessing contractual fairness. The standard of objective fairness gives more weight to public norms of fairness than the higher Unconscionable Results standard. Although it permits some leeway for contracting within the parameters of the range economic arrangements that would be reasonable in the circumstances, the Objective Fairness test ensures that contracts do not depart too far from the statutory norms of equitable sharing. In our view, this test comes closest to ensuring that the objective of encouraging fair settlements—which we have argued should be the overriding policy objective in this area—will be achieved.

The Objective Fairness test also has an advantage over the Miglin test in that it avoids the possibility of judges fine-tuning agreements upon the mere finding of a material change. The Objective Fairness test will not open up agreements to every change over time. Instead, by focusing on broad conformity with norms of Divorce Act, the test will ensure that judges intervene only where agreements clearly and unreasonably depart from the objectives of the Act.
B. Disadvantages.

The primary concern raised by the Objective Fairness Test is whether due to its lower standard for assessing fairness it will permit too much judicial fine-tuning of agreements and thereby place too little weight on certainty of contract. The extent to which this is a problem will depend on whether the courts take seriously their role in applying this standard. As we envision it, the standard of review under this test involves a reasonableness standard, not a correctness standard. The standard of objective fairness would have to be interpreted as being sufficiently stringent to give scope to the premise that a range of options can reasonably satisfy the equitable sharing objectives of the Divorce Act. If not, the Objective Fairness test may end up permitting judges to simply substitute their individual views of what would be fair in the circumstances for the reasonable views of the parties.

A potential disadvantage of the Objective Fairness test is that it may be somewhat difficult to apply given the current state of the law on spousal support. All fairness tests require the outcome of the spouses’ contract to be measured against a normative standard that sets the baseline for fair outcomes. The normative standard for assessing spousal support contracts will be the norms of spousal support articulated by the Divorce Act and in Supreme Court of Canada judgments. In other words, the fairness of contractual spousal support terms can only be assessed by judging them against what a court applying the principles of spousal support would award. The clearer the principles of spousal support, the easier it will be to make the comparison. Where the norms of spousal support are unclear it becomes difficult to predict what a court would order and therefore difficult to determine whether a spousal support contract is fair. To the extent that the Supreme Court decision in Bracklow has rendered the norms of spousal support less certain, fairness-based tests may be somewhat difficult to apply, at least until a more coherent vision of spousal support emerges.

Since the need for comparison with spousal support norms is inherent in any fairness-based test, this problem will affect both the Unconscionable Results test as well as the Objective Fairness test. We discuss it here, however, because we believe the issue of normative uncertainty may be a bigger problem for the Objective Fairness Test than it is for the Unconscionable Results test. The high threshold employed by the Unconscionable Results test reduces the impact of normative uncertainty because it ensures that courts override contracts only where there is a
gross deviation from prevailing norms. Even when the norms are unclear, the magnitude of the departure required for intervention means that the threshold will only be met rarely. In contrast, the lower fairness threshold of the Objective Fairness test makes the uncertainty surrounding spousal support a larger problem.

The extent of the problem should not, however, be exaggerated. Even under the current state of the law, there are certain support outcomes that are clearly outside the range of what a court would likely order. Furthermore, the Objective Fairness test is responsive to some degree to the lack of certainty in the law, as it protects agreements so long as they fall within a range of reasonable outcomes. We also see the problem of unclear norms as a temporary problem. In the long run, we are hopeful that the law of spousal support will evolve in such a way as to become more structured and predictable, thus providing a clearer backdrop for negotiation and clearer benchmarks for assessing the fairness of agreements.

The Objective Fairness test shares other disadvantages with the Unconscionable Results test. Like the Unconscionable Results test, the Objective Fairness test cannot be applied to incorporated agreements unless the material change threshold is also met. Like the Unconscionable Results test, the Objective Fairness test will leave agreements open to the influence of shifting norms of spousal support, making agreements that were fair under one regime subject to judicial intervention under another. The problem of shifting norms is greater here than under the Unconscionable Results test because the lower threshold of the Objective Fairness test means that contracts can be rendered unfair by smaller shifts in the law. Although we acknowledge that some may find it troubling that agreements concluded under one set of spousal support principles can be re-opened under another, in our view this result can be justified on the basis that spousal support is a prospective obligation, the content of which is not fixed at the point of marriage breakdown. We also think this result may be justified by the “public” dimension of spousal support, taking the view that the principles of spousal support reflect public norms of fairness. Nonetheless, we also think that reliance interests would be a legitimate factor to be considered under the Objective Fairness test. In deciding whether to override a contact on fairness grounds, courts could consider factors similar to those Abella J.A. identified in Miglin, including the length of time that the parties have relied upon the agreement.
C. Conclusion.

In our view, the emphasis the Objective Fairness tests places on fairness is appealing as it ensures that contracts, just like court orders, reflect the norms of the Divorce Act. We see this test as most consistent with the policy objective of encouraging fair settlements as it ensures that fair contracts are upheld and unfair ones are not. While we recognize that the Objective Fairness test has an element of uncertainty given the current state of spousal support law, we do not see this as an insurmountable problem but as one that will recede in importance as the Supreme Court hones the principles underlying the modern spousal support obligation. We also do not see this problem as a reason for rejecting what we believe is the most promising test. The answer to the problem of uncertain norms of spousal support is to attempt to clarify those norms. It does not make sense to respond to problems of the spousal support obligation by distorting the contract principles that would seem to offer the best approach to overriding spousal agreements.

(iii) Hybrid Fairness/Change Test

As its name implies, the Hybrid Fairness/Change Test would be a two-part test, which would begin by assessing the fairness of the agreement. Unlike the Unconscionable Results test and the Objective Fairness test, this test would assess fairness at the point of settlement rather than when the application for spousal support was brought. This first part would, therefore, be similar to the Leopold test and would adopt the same standard for assessing fairness. Contracts would be considered unfair if, at the time of settlement, they fall outside the "generous ambit within which reasonable people can disagree" as to whether the statutory objectives of the Divorce Act have been met.

If a contract were found to be unfair at the first stage, a court would be able to override it without proceeding to the second part of the test. If however, the contract were found to be fair at the point of negotiation, the court would proceed to the second stage of the test, which would determine whether there had been a change of circumstances since the making of the agreement. The degree of change required here could either be a material change, or it could be the more onerous radical change. Once the change threshold was met, the court would then consider whether to override the contract. The court would base this decision on the following test: whether in light of the change in circumstances,
the agreement would no longer achieve the objectives of the *Divorce Act*. On this test, an agreement that was fair at the time of negotiation would receive greater weight than it would under the Objective Fairness test, as the court would intervene only when intervening *changes* rendered the outcome unfair.

A. Advantages.

An advantage of this test as compared with the change-based tests is that it assesses the fairness of the initial agreement. As compared with the fairness-based tests, an advantage of the hybrid test is that it gives more protection to agreements that were fair at the time of negotiation by requiring the existence of a change before the court can intervene. It also insulates agreements from shifts in the norms of spousal support, assuming that changes in legal norms would not amount to a change in circumstances.

B. Disadvantages.

The primary disadvantage of the Hybrid test is that it does not adequately grapple with problems of foreseeability. If, as we have argued, the fairness of the agreement can only be assessed as the impact of the marriage unfolds over time, assessing the fairness of the agreement at the time it is concluded is a limited and somewhat artificial exercise. Agreements that appeared fair at the time they were negotiated, but after a few years fail to adequately redress the economic disadvantages of the marriage, will be upheld on this test *unless* there has been a change in circumstances. If there has been no change, courts will have to uphold agreements that are unfair at the time of the application, or will have to resort to manipulation of the change standard. This is similar to the problem we identified with the *Miglin* approach.

Although we have previously referred to the fact that the Hybrid test insulates agreements from intervention based on changing legal norms as an advantage of the test, it may also be viewed as a disadvantage. For those who view spousal support as a prospective obligation the content of which is not “fixed” at the point of separation, shielding agreements from any change in legal norms will be a disadvantage rather than an advantage. For example, the Hybrid test would have protected pre-*Moge* agreements based on a “clean-break” model of spousal support from review after the *Moge* decision. These agreements would have been
“fair” at the time they were negotiated, though they would likely be regarded as unfair post- *Moge*.

Like the tests based on fairness, the Hybrid Fairness/Change test cannot be applied to incorporated agreements. Although the Hybrid test contains a change component, the change test is not reached until the initial agreement is determined to be fair. Section 17 of the *Divorce Act* would seem, however, to preclude an assessment of the fairness of the initial agreement once that agreement had been incorporated into a court order.

C. Conclusion.

This test may initially appear appealing because it offers protection to fair agreements. In the end, however, it cannot provide a sufficient basis for judging the fairness of agreements. Although assessing the fairness of the agreement at the point of negotiation is better than not assessing it at all, examining the contract’s fairness at this point does not allow this test to deal with problems of foreseeability. It is actually very difficult (if not impossible) to fully assess the fairness of a spousal support agreement at the time of negotiation without taking into account future events. Since one of the major difficulties in contracting about spousal support lies in predicting how the economic consequences of the marriage will unfold, a test that lacks the ability to assess whether the agreement in fact conforms to the objectives of the *Divorce Act* is not, in our view, a desirable test.

6. CONCLUSION

We believe the arguments for abandoning the trilogy standard for overriding spousal support agreements are compelling and that many of the *Miglin* critics are in fact challenging the legitimacy of the prevailing norms of spousal support rather than defending the practice of settlement. Even accepting, as we do, that the *Pelech* standard is not an appropriate one, the above review has shown the challenge of crafting an alternative standard. We gravitate to standards that emphasize fairness rather than change because we believe that agreements should reflect the norms of fairness articulated in the *Divorce Act* and because we recognize that change standards are often manipulated to deal with what are essentially fairness concerns. We acknowledge, however, that crafting an appropriate threshold for intervention on the grounds of fairness
is a difficult task, given the uncertainty that currently pervades the law of spousal support. We also recognize that abandoning a change requirement runs counter to the words of the Divorce Act where agreements have been incorporated into court orders. Nonetheless, we are optimistic that neither of these problems is intractable. We believe the uncertainty surrounding spousal support will work itself over time, providing clearer norms by which to judge the fairness of agreements. It may be that a legislative response is required to deal with the problem of inconsistency created by section 17, one that might involve creating a separate regime specific to agreements.