

THE CHANGING FAMILY, RIGHTS DISCOURSE AND THE SUPREME COURT OF CANADA

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In the past few decades, family law has changed significantly while it has risen dramatically in profile. Recent Supreme Court cases on family law have attracted great public interest. The author argues that the increased profile of family law is tied to the monumental impact of the Charter and the rise of rights discourse in Canada and that, driven by this rights culture, the Supreme Court has increasingly become a leader in the reform process.

*The author canvasses Supreme Court family law jurisprudence, following its development from the relatively uneventful 1960s, through the watershed verdict in *Murdoch v. Murdoch*, to the turn of the twentieth century. The growth of a rights culture is traced through cases concerning family property, divorce, custody, support, reproductive autonomy and child protection issues. By the 1990s, the Supreme Court is suggested by the author to have taken on a central role in the formation and development of family law that it did not play before.*

The author suggests that family law increasingly reflects in microcosm the most fundamental social issues and tensions facing Canadian society. It is further suggested that the Charter has influenced the development of family law in fundamental ways, giving family law has an increasingly public aspect. The author argues, therefore, that family law can no longer be characterized as an area of law simply falling within the domain of private law.

Au cours des quelques dernières décennies, le droit de la famille a changé de façon importante et en même temps il s'est mis à occuper une place de plus en plus grande dans l'univers juridique. Des décisions récentes de la Cour suprême dans ce domaine ont beaucoup attiré l'attention du public. L'auteure soutient que la visibilité plus grande du droit familial est liée au développement monumental du droit de la Charte et du discours sur les droits au Canada; entraînée par cette culture de droits, la Cour suprême est de plus en plus devenu un leader dans le processus de réforme.

*L'auteure fait un relevé de la jurisprudence de la Cour suprême en droit de la famille, en suivant son développement depuis les années 1960, sans histoire, en passant par l'arrêt définitif de *Murdoch c. Murdoch*, jusqu'au tournant du XXe siècle. Elle trace le développement d'une culture de droits à travers les décisions sur des questions de droit des biens en matière familiale, de divorce, de garde d'enfant, de soutien alimentaire, d'autonomie de la reproduction, et de protection des enfants. L'auteure suggère que, depuis le début des années 1990, la Cour suprême assume un rôle central dans la formation et le développement du droit de la famille, comme elle n'en avait jamais eu auparavant.*

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L'auteure est d'avis que, dans un microcosme, le droit de la famille reflète de plus en plus les questions et les tensions sociales les plus fondamentales auxquelles la société canadienne doit faire face. Elle émet l'opinion que la Charte a influencé le développement du droit de la famille de manière fondamentale, contribuant ainsi à conférer à ce droit un caractère de plus en plus public. En conséquence l'auteure soutient que le droit de la famille ne peut plus être simplement qualifié de domaine du droit faisant partie du droit privé.

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I. Introduction

Thinking about the role of the Supreme Court with respect to family law has been - and continues to be - a daunting prospect. It is like aiming for a moving target, one which is constantly shifting and dynamic in nature. Family law is a wonderful microcosm for the relationship between law and society in a more general sense. The complexity of the changes in family law over the last few decades, and the role that the Court has been playing reveal a convergence of social, legal, cultural and constitutional forces that have affected not only social attitudes and legislative reforms (or lack thereof) but also the role of judges and our courts. No thread stands alone; all is part of a tapestry, a work in progress. There can be no doubt, however, that family law and its role in the Supreme Court of Canada has changed dramatically in recent years.

A review of the Supreme Court indexes reveals some of the changes. "Family Law" does not appear as a subject heading until 1983. Until the 1950s, there are few cases from the Court on the subject of custody, divorce, and support. Although this

may partly reflect the fact that there were fewer separations and divorces, a more complete explanation must acknowledge that family law was simply not seen as important or worthy of the attention of the highest court of the land. Matters relating to family law appear under other headings, such as "husband and wife", "insurance", "wills and estates".¹ The *Supreme Court Law Review* was first published in 1980, but did not include a review of family law until the 1993-1994 term.

In the last few decades, family law has risen remarkably in profile. The Supreme Court cases on family law, such as *M. v. H.*, *Moge v. Moge*, *Morgentaler* or *Daigle v. Tremblay* have attracted great public interest. The family has become a great subject of public discourse whose very nature, function and definition are seen as very important issues, and the Supreme Court has played a central role in this debate. This is partly symptomatic of the discrediting of the public-private divide that rendered the private sphere both less worthy of consideration and less interesting in any event. While the notion of the family unit as one which deserves respect remains vital, the family is also seen increasingly as a social unit upon which the state depends, and which it therefore should play a role in supporting.² In addition, legislation has played an increasing role in family law, from child protection to family property. In this sense, it has a public aspect.

Family law has moved from a central preoccupation with preserving marriages to a concern with preserving parent-child relationships and the concern with protecting the vulnerable members of family units. In 1994 Rosalie Abella wrote that "[t]he present function of family law has shifted from the need to preserve marriages to the need to preserve families- serially if necessary".³ Most recently, as *M. v. H.* indicates, the Court has (through differing views) manifested a concern with a more functional approach to family; the family is understood more in terms of a basic relationship of interdependency which may or may not involve marriage, children, heterosexual partners or even sexual affiliation at all.⁴

¹ "Family Law" was first indexed in the Supreme Court Reports in 1983, *Novic v. Novic*, [1983] 1 S.C.R. 700. Until the 1950s, most "husband and wife" cases dealt with property issues and contract capacity. See, for example: *Klock v. Chamberlain* (1888), 15 S.C.R. 325; *Michaels v. Michaels* (1900), 30 S.C.R. 547; *Elford v. Elford* (1922), 64 S.C.R. 125; and *Johnston v. Channell*, [1937] S.C.R. 275.

² M. Fineman, *The Neutered Mother, the Sexual Family, and Other Twentieth Century Tragedies* (New York: Routledge, 1994) [hereinafter *The Neutered Mother*].

³ R.S. Abella, "The Law of the Family in the Year of the Family" (1994) 26 *Ott. L. Rev.* 533 at 535 [hereinafter Abella, *The Law of the Family*].

⁴ See Fineman, *The Neutered Mother*, *supra* note 2 at 27, 113, 150-57 & 234-35. See also N. Bala, "The Evolving Canadian Definition of the Family: Toward a Pluralistic and Functional Approach" (1994) 8 *Int. J. L.&F.* 293.

The increased profile of family law as an important aspect of the Court's docket cannot be separated from the influence of the *Charter* and the rise of rights discourse in Canada. In this respect, family law serves as a fascinating microcosm of the effect that this constitutional change has had and is having on our law and social fabric. While it would be wrong to understate the impact that the *Charter* has had on family law and its place in the Supreme Court, overstating its impact would also lead one to ignore the fact that significant changes were underway before the *Charter* came into effect. As we review the evolution - and sometimes even revolutionary evolution- of family law over the last number of years we will see that the *Charter* has played a crucial and profound role in directly changing certain aspects of the law. This has been particularly true with respect to the definition of the family, where certain principles, and especially equality, have played an even broader and pervasive role beyond the direct reach of the *Charter* in areas such as spousal support, domestic abuse, and reproductive rights. In fact, the Supreme Court has been cautious about the application of an individualistic rights discourse in family law and, apart from the "family definition" cases,⁵ few *Charter* challenges have been ultimately successful.⁶

Perhaps the most major change, in the addition to the new importance and visibility of family law at the Supreme Court over the last few decades is the role that the Court has played with reform. This role has changed dramatically since *Murdoch*, when, as I will discuss below, public opinion was far ahead of the Court, to more recently when the Court has become more of a leader in the reform process. This changing role has been driven to some extent by the *Charter* and the rising culture of rights, equality in particular. It is also, and properly, fuelled by the addition of women to the Supreme Court, whose perspectives have added to the discourse of the Court even when they have been in dissent. As I have argued elsewhere, this is a very positive and important change for the Court that has been evident in other areas such as administrative law.⁷ It has, however, been especially important in the area of family law, something especially evident in cases such as *Young v. Young*,⁸ *Gordon v. Goertz*,⁹ *Moge v. Moge*¹⁰ and *Winnipeg Child and Family Services v. G.(D.F.)*.¹¹ This does not mean to suggest that there is "a female perspective";

⁵ *Miron v. Trudel* (1995), 13 R.F.L. (4th) 1 (S.C.C.) and *M. v. H.*, [1999] 2 S.C.R. 3.

⁶ See, for example *Young v. Young*, [1993] 4 S.C.R. 3; *P.(D.) v. S.* [1993] 4 S.C.R. 141; *The Queen v. Thibaudeau*, [1995] 2 S.C.R. 627; *Symes v. The Queen*, [1993] 4 S.C.R. 695; and *B.(R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315.

⁷ A. Harvison Young, "Feminism, Pluralism and Administrative Law" in M. Taggart, ed., *The Province of Administrative Law* (Oxford: Hart Publishing, 1997) at 350-51.

⁸ *Supra* note 6.

⁹ *Gordon v. Goertz*, [1996] 2 S.C.R. 27.

¹⁰ *Moge v. Moge*, [1992] 3 S.C.R. 813.

¹¹ *Winnipeg Child and Family Services*, [1997] 3 S.C.R. 925.

indeed, in a number of family law cases before the Court, McLachlin C.J. and L'Heureux-Dubé J. have taken very different views.¹² But as I wrote elsewhere:

The very presence of "different voices" at the judgment table is an important component of a vision of justice that places high value on the wide participation of members of society and a continuous wrestling with different perspectives, even if they do not prevail in particular circumstances.¹³

If this is true generally with views of law and justice, it is especially true in family law. The notion that one's starting perspectives and realities concerning the family are especially conditioned by our gender has to be a fundamental truism.

This paper, then, will attempt to consider the major changes with respect to family law and its role in the Supreme Court of Canada in the last few decades. Particular attention will be paid to the relationship between the changing nature of judicial decision-making, the rise of a rights discourse, and the *Charter*. The following section will address the changes which were underway prior to the *Charter*.

II. *The Changing Role of the Supreme Court of Canada*

A. *Before the 1960s*

Until the 1960s, family law was a sleepy area of law indeed. Little had changed in the course of a century that had brought so much great social change. Family law was understood largely as a device for maintaining marriage and the family, and "if the family would not be maintained, as a means of retributive reconstruction".¹⁴ Abella notes the remarkable lack of change compellingly:

It is staggering to realize that with the exception of some changes in custody, the law of the family - and therefore the expectations of members of a family - were essentially constant until 1968. We went through two world wars, two conscription crises, votes for women, prohibition, a Depression, a quiet Revolution in Québec, the establishment of human rights commissions, the promulgation of a Canadian Bill of Rights, waves of immigration, the introduction of radio, movies, and television, and a declaration made by the Privy Council that women were persons, and yet hardly a single change was made to the law of the family. Nor is there any indication, despite seismic social changes, that in the hundred years between Confederation and the introduction of the 1968 *Divorce Act* there was any real *demand* for any reform of any aspect of the law of the family.¹⁵

¹² This has been particularly true in custody/access cases such as *Young v. Young*, *supra* note 6 and *Gordon v. Goertz*, *supra* note 9.

¹³ Abella, *The Law of the Family*, *supra* note 3 at 351.

¹⁴ *Ibid.* at 535.

¹⁵ *Ibid.* at 535.

As mentioned previously, “family law” was not conceptualized as a discrete area of law in the Supreme Court Reports until the 1980s. Until then, cases dealing with family law issues appeared under more fragmented headings such as “husband & wife,” “property,” “wills,” “insurance,” and “infants”. Lower courts were, however, hearing many family law cases.¹⁶

It is not surprising, therefore, that the Supreme Court docket before 1960 did not include many family law cases.¹⁷ These were issues that did not seem to be of national importance. The issues were seen as largely domestic, private matters that did not warrant the attention of the highest court in the land, and when they did, it was because they related to matters of property and definition of status.¹⁸ This absence was fuelled, of course, by the fact that the public/private distinction had not yet been blurred by large numbers of women in the workforce (much less on the Supreme Court).

B. *The Turning Point: From the Divorce Act 1968 to Murdoch v. Murdoch and Beyond*

From a social perspective, the *Divorce Act 1968* was controversial and of great interest to Canadians in general. Interestingly, however, it was not the interpretation of the *Divorce Act 1968 per se* that recast family law as a matter of national and public importance. Relatively few cases went to the Supreme Court of Canada concerning the interpretation of the grounds for divorce, for example, and those that did were generally neither of great public interest nor of great controversy on the Court itself. Rather, the real catalyst for the changing role was the matter of division of property and the situation of the untitled spouse (usually wife) following the breakdown of a long marriage. The famous case of *Murdoch v. Murdoch* marked the beginning of a changing position of

¹⁶ The greatest single area of activity in the lower courts during the 1950s and 1960s was divorce (296 indexed issues). However, courts were hearing other matrimonial causes cases such as custody and maintenance as corollary relief (73 indexed issues), separation agreements (36 indexed issues), alimony (73 indexed issues) and annulment (60 indexed issues). Cases dealing with “infants and children” (custody, adoption and neglected children) constituted the second largest area of lower court activity. In addition, issues regarding conflicts of laws also came before the lower courts (56 indexed cases). **Note:** Lower court activity was gauged by looking at the number of cases reported under each heading in *Carswell’s Family Law Digests Vol 1-III 1824-1976*. Some cases are cross-referenced under different headings and issues. Therefore, the numbers listed more accurately reflect the number of indexed issues before the courts.

¹⁷ However, it is worth noting that during the 1950s there were nine Supreme Court cases concerning custody, access and adoption, reflecting a growth in legislation affecting families in the 1930s and 1940s (*Infants Act*, R.S.O. 1937, c. 215 and the *Adoption Act*, R.S.O. 1937 c. 18).

¹⁸ For example, there are 22 indexed cases concerning cruelty as a ground for divorce in the late 1960s at the lower court levels, triggered by a statutory definition in s. 3(d) of the *Divorce Act*, S.C. 1968, c. 24. This issue does not reach the Supreme Court until *Retzer v. Retzer*, [1975] 2 S.C.R. 881.

family law to a very central concern in public discourse and of the end of the law as a very reluctant partner in social change. In the Supreme Court, the majority dismissed Mrs. Murdoch's appeal in which she sought a share of the farm property acquired during the couples' long marriage. Public reaction was strong and swift, and virtually unanimous. Mrs. Murdoch had been treated egregiously by the legal system. "Not all Slaves Have Been Freed," read one editorial headline.¹⁹

In retrospect, *Murdoch* and its aftermath is striking for a number of reasons. First of all, it illustrates a dynamic in which the law and the Courts lagged considerably behind social change and public opinion. Second, it reflects a time in which the courts were slow to change and in which the legislature lead the way (pushed by public pressure) in reform. Within a few short years after *Murdoch*, all of the provinces had enacted family property legislative reforms. During this period, the Courts were also developing the notion of resulting and constructive trust which Laskin, J. (as he then was) had advanced in dissent in *Murdoch*.

Murdoch v. Murdoch is a very useful family law benchmark in another sense. Although the central principles of the dispute (as reflected by the media coverage) were those of equality, fairness and justice in the family law context, the entire judgment – including the dissent – is devoid of any discussion of such principles or values. Rather, the decision is framed entirely in narrow technical and doctrinal terms.

While this should not be surprising in the majority reasons of Martland, J., it is more surprising in Laskin, J.'s dissent. While he was clearly willing to extend the notion of trust creatively to cover this situation, he did not expressly do so for the reasons of equality or fairness between the parties. This is important because, as in recent years, as I will discuss below, a significant change in recent years has been the increasing willingness of judges, and of the Supreme Court in particular, to frame such decisions in very principled terms, even in non-*Charter* cases.

Considering that the *Divorce Act* came into force in 1968²⁰ and that by the end of the 1970s most of the provinces had enacted family property legislation in response to the Supreme Court's narrow approach in *Murdoch*, it seems surprising that there was little activity in the Supreme Court on these issues for some time. There were, of course, many cases involving interpretation of aspects of the *Divorce Act*²¹ as well as issues relating to support (whether as corollary relief under the *Divorce Act* or under provincial legislation) and division of property under provincial legislation,²² but no cases involving the

¹⁹ [1975] 1 S.C.R. 423; *The Globe and Mail*, October 12, 1975.

²⁰ *Divorce Act S.C.* 1968, c. 24.

²¹ For example, "one issue related to the meaning of 'resumption of cohabitation'". See *Rogler v. Rogler* (1977), 1 R.F.L. (2d) 398 (Ont. H.C.).

²² Some of these cases grew to be widely cited and influential, such as *Paras v. Paras* (1970), [1971] 1 O.R. 130 (C.A.), which formulated a guideline for determining support awards.

fundamentals of the new legislation went to the Supreme Court until the eighties. Provincial case law is replete with fascinating cases from the seventies and early eighties reflecting the early unease with “easier” divorce and some tension over how strictly to interpret certain provisions related to the grounds. In retrospect, one would think that these issues were significant enough to go to the Supreme Court. But there are, in my view, a few reasons that this was not the case. First of all, in spite of the controversy surrounding divorce itself, family law was still thought of as a private matter, and so generally not something likely to be considered of such “national importance” as to warrant hearing in the Supreme Court of Canada. Second, the fact that the interpretation of family law legislation evoked significant policy issues was not sufficient because, in the pre-*Charter* era, policy was not the concern of the Court. Third, the full impact and complexity of the issues triggered by divorce, issues of support and ultimately questions of the nature of the basic family unit, took some time to unfold. The tension between the notion that divorce should provide a clean break and allow the spouses to go on with their lives, and the notion that support might be necessary indefinitely for a spouse who was unable to re-enter the workforce or fully support herself, then, came to a head in the mid-eighties.

The fact that these were important social issues and that the legislation could be interpreted in conflicting ways does not, however, adequately explain the ascendancy of family law on the docket of the Court in the early 1980s. The full explanation must also include the fact that the *Charter* came into effect in 1982, surrounded by an increased consciousness of rights, and especially of a concern about equality of women.²³ By the mid-eighties, the social concern about the inequality of women had come to the forefront as discussed above. The statutory reforms legitimated and reinforced the notion of equal sharing that has developed so much since then and to which Laskin J. had alluded as a social principle though not as a legal one in *Murdoch*²⁴ By 1980, family property legislation was in effect in most provinces.²⁵ In the context of family law then, equality discourse was developing rapidly. *Murdoch* sparked public recognition of the gaps in the law that failed to treat marriage as a partnership, but also

²³ Even though s. 15(1) did not take effect until 1985.

²⁴ *Murdoch v. Murdoch*, *supra* note 19.

²⁵ Reform of marital property laws was first seriously considered in the Ontario Law Reform Commission's *The Study of Family Law Project* in 1967. In Québec the *Report on Matrimonial Regimes* (1968) led to legislative reform in 1970, *An Act Respecting Matrimonial Regimes*. The Ontario Law Reform Commission's *Report on Family Law*, published in 1974, was the basis for the limited legislative reform in the *Family Law Reform Act*, S.O. 1975, c. 41, which was repealed by the more comprehensive *Family Law Reform Act*, S.O. 1978, c. 2. Saskatchewan also reformed matrimonial property law in the mid-seventies with *An Act to Amend the Married Women's Property Act*, R.S.S. 1975, c. 29. By the early 1980s many of the provinces had introduced similar legislative measures: Manitoba passed *The Marital Property Act*, S.M. 1977, c. 48; Alberta introduced *The Matrimonial Property Act*, S.A. 1978, c. 22; New Brunswick, *Marital Property Act*, S.N.B. 1980, c. M-1.1; and P.E.I. introduced the *Family Law Reform Act*, S.P.E.I. 1978, c. 6 and *Family Law Reform Act*, R.S.P.E.I. 1981, c. 12.

outrage at the extent to which the wife was treated so unfairly. In addition, the advent of the *Charter* legitimated a role for the Court that went beyond mere statutory interpretation and required its members to consider policy considerations of interpretation. Although this role was explicitly mandated with respect to *Charter* interpretation, the approach to the process of judicial interpretation quickly expanded. This approach had begun to show itself even when *Messier v. Delage* was decided in 1983. Throughout the 1980s, the *Charter* was not a major player in any direct sense in family law at the Supreme Court.²⁶ Nevertheless, the rise of the discourse of equality and the impact of the *Charter* upon the nature of judicial decision-making catapulted family law into the public forum and the Supreme Court docket. By the end of the decade, the stage was set for the more direct role of the *Charter* in relation to family law.

C. *Messier v. Delage*

*Messier v. Delage*²⁷ was a case from the Court of Appeal of Québec. The facts illustrate a number of the points made above. The spouses had divorced in 1975 after a twelve year marriage. They had two children and the wife did not work outside the home. The order of corollary relief at divorce included alimentary support for the wife with no time limit. Following the divorce, the wife had obtained a Master's degree in translation and found work as a freelance translator. On the basis of her part-time income, the husband applied to have her support terminated on the basis that she was healthy, qualified and able to work and was likely to find work. She was 38 years old at that time. The Superior Court accordingly ordered that the spousal support be terminated as of six months later. The Court of Appeal allowed the wife's appeal, and the Supreme Court dismissed the husband's appeal, with McIntyre, Lamer and Wilson JJ. dissenting.

The narrow basis for the majority judgment was the fact that the superior court erred in allowing the application to vary the original order, not on the basis of *actual* changes but on the basis of *anticipated* changes, that is, the likelihood that she would obtain work down the road. What is interesting about the judgment, however, is that it marks a significant transition between a technical approach to family law interpretation that tends to avoid or at least understate the relevance of the policy context (such as *Murdoch*) and the subsequent *Pelech* trilogy by which time the Supreme Court was quite unabashed in its discussion of policy issues. In *Messier*, this willingness to tackle the policy issues directly was very evident in Lamer J.'s dissenting reasons, though less directly engaged in the majority judgment. In writing for the majority, Chouinard J., restricted his reasons to the narrow considerations as mentioned above, but he did

²⁶ S. Toope, "Riding the Fences: Courts, Charter Rights and Family Law" (1991) 9 Can. J. Fam. L. 55.

²⁷ *Messier v. Delage* (1983), 35 R.F.L. (2d) 337 (S.C.C.).

cite a list of law commission reports²⁸ and an article by Rosalie Abella²⁹ and addressed the larger issues relating to spousal support following divorce. The fact, however, that support had been suspended prematurely allowed the majority to avoid dealing with the central issue underlying the appeal (and for which reason it has presumably been brought up) which was whether a spouse following divorce was to be entitled to indefinite support. In stating that a subsequent change could be dealt with if and when it occurred, the closest Chouinard J. came to addressing the larger issue was the following cautious paragraph:

That does not mean that the obligation of support between ex-spouses should continue indefinitely when the marriage bond is dissolved, or that one spouse can continue to be a drag on the other indefinitely or acquire a lifetime pension as a result of the marriage, or to luxuriate in idleness at the expense of the other.... It also does not mean that a divorced person cannot remarry, or that his new obligations or new advantages as the case may be will not be taken into consideration.

With respect, none of the questions arises in the case at bar.³⁰

On the other hand, Lamer J.'s dissenting judgment tackled the policy issue head on. In his opening sentence, Lamer J. framed the issue as follows:

This appeal raises a question of importance at the present time in view of the current economic situation, the difficulty in finding work and the resulting high rate of unemployment. Should a divorced spouse who is working always bear the consequences of all this and provide for the needs of his unemployed former spouse, or is it for the government, if it cannot remedy, at least to alleviate the effects, and to what extent?³¹

The dissenting judgment marks the first time that members of the Court made an open attempt to grapple with fundamental policy issues in family law. Although Lamer J. relied extensively on quotations from lower court decisions to support his position that spousal support should be limited, he also quoted extensively from other non judicial sources, especially a 1975 Law Reform Commission Working Paper.³² This in itself marked a significant change from

²⁸ The list included: Law Commission of England, Scottish Law Commission, National Conference of Commissioners on Uniform State Laws, Manitoba Law Reform Commission, Institute of Law Research and Reform of Alberta, and the Civil Code Revision Office; *supra* note 27 at 346.

²⁹ Though the passage quoted simply observes that finding a "comprehensive philosophy" in the jurisprudence emerging from the family law legislation does not amount to much more than a "patchwork of often conflicting theories and approaches": "Economic Adjustment On Marriage Breakdown: Support" (1981) 4 Fam. Law Rev 1 at 1.

³⁰ *Messier*, *supra* note 27 at 353.

³¹ *Ibid.* at 353-54.

³² *Canada, Law Reform Commission of Canada, Maintenance on Divorce* (Ottawa: Information Canada, 1975) at 30. This report advocated spousal support as a temporary measure designed to effect the "economic rehabilitation" of the dependent spouse. It suggested that: "[t]he legal right to continue to benefit from the maintenance aspect of the partnership after its dissolution should be accompanied by a legal duty imposed on the person maintained to prepare to make his or her own way within a reasonable period of time, just as is required of every other unmarried person." The Report did acknowledge that permanent maintenance would be appropriate in some cases where financial independence may never be possible, giving as an example "a divorced woman in her sixties without any special training or skills who had been a dependent during a long married life".

traditional common law methodology which tended to restrict itself to cases as authority. By the early 1980s there were a number of such reports which had arisen in the period following *Murdoch*. These reports generally fit well into an era which was still optimistic about the ability of formal equality to end social disadvantage for women.³³ In conclusion, Lamer J. (along with McIntyre and Wilson JJ.) held that the superior court had properly considered the wife's potential earnings. In coming to that conclusion, he was expressly driven by his view -supported largely by reports rather than cases- that the social problem of spouses unable to fend for themselves despite "transitional" measures should be the responsibility of the government rather than the former husband.

Messier v. Delage illustrates a number of the evolutionary trends I spoke of at the beginning of this paper. First of all, it evidences a willingness of the Court to consider policy issues in family law more directly than it had previously. Even Laskin J., dissenting in *Murdoch*, framed his analysis quite strictly in terms of the resulting trust doctrine and the notion of common intention. There was no discussion of equality or fairness as a principle that might fuel this construction (as one suspects it did as far as he was concerned). Chouinard J., writing for the majority, demonstrated a much more classically common law style of judgment.

The second, and related, trend that *Messier* flagged was a frequently prophetic aspect to dissenting judgments in family law. Lamer J.'s view about the desirability of limiting support, and particularly the "clean break" notion and the notion that after divorce, the default obligation of support should fall to the state and not a former spouse, carried the day in the *Pelech* trilogy.³⁴

But there is a more significant role of the dissent in this case, and one which has lasted through various shifting views on the substance and policy goals of the law. The dissenting judgement seems more willing to address policy issues or issues not directly addressed and put them on the table. Although these views may not carry the day in a particular case, they influence the discourse and raise questions, issues and perspectives that may be relevant later. In this sense, a case like *Mossop*³⁵ is an illustration of this trend in full bloom. There, Madame

³³ A long similar lines, and fitting into a very traditionally liberal vision, the idea was also that divorce should foster the autonomy of the former spouses and allow them to get on with their lives. This of course also fed nicely into the "clean break" approach that is part of the context of *Messier v. Delage*.

³⁴ In addition, one cannot ignore the effect of the members of the Court themselves. This would be a topic for another paper, but it is at least arguable that from the late 1970s on, there was an attempt to appoint judges who would be equipped and interested in the more expansive sort of judgment that an entrenched Bill of Rights would require. See I. Bushnell, *The Captive Court: A Study of the Supreme Court of Canada*. (Montreal: McGill-Queen's Press, 1992) at 440-43. Bushnell argues that from the 1980s the conservatism of the court was curbed by Justice Lamer and the appointment of Justice Bertha Wilson, who replaced Justice Martland. Prime Minister Trudeau, Bushnell maintains, had the reputation of appointing judges "who had displayed some capacity for creative work such as Laskin, Jean Beetz, Antonio Lamer, and Bertha Wilson."

³⁵ *Canada (A.G.) v. Mossop*, [1993] 1 S.C.R. 554.

Justice L'Heureux-Dubé's *obiter dicta* on the nature of family became widely cited and formed part of the debate that fed into subsequent cases such as *Vriend*³⁶ and *M. v. H.*³⁷

A final point to make about *Messier* is that it was one of the first family law cases decided after the *Charter* came into effect. As I will argue later, the discourse and methodology of the *Charter* has had profound impact on the nature and style of judicial decision-making which, not surprisingly, have affected all areas of the law whether it is directly applicable or not. *Messier* was decided in the very early days of the *Charter*, before this effect had really developed, but it nevertheless serves as an interesting benchmark.

D. *The Pelech Trilogy*

By the time of the *Pelech* trilogy, the Court had been hearing and deciding *Charter* cases for a few years, though not yet section 15(1) cases.³⁸ A few factors were converging to set the stage for the Supreme Court of Canada to play a more central role in family law in Canada, and for family law in turn to be seen as an important area of law worthy of this attention. First of all, by the 1980s and especially the mid-eighties, the rights-consciousness in Canadian society in general which had been triggered by the *Charter* was at a high level. This naturally put the spotlight which was required to interpret its provisions. The Court, then, was already receiving more public attention than it had previously.³⁹ This was also a period of time when feminism and especially feminist legal studies were gaining momentum in Canada, and gender equality was very much part of this discourse. Family law legislation following *Murdoch* had been passed across the country by the end of the 1970s and by the 1980s and the dominant discourse of the day was one of formal equality. The idea was that sameness of treatment was all that was required to meet the principle of equality, and that if women were treated equally in a neutral sense, social equality would result. The *quid pro quo* of family law reform and the presumption of equal division of family property was that the dependent spouse should now make her own way, subject to some "economic rehabilitation", after a divorce. Cases such as *Messier* and *Pelech*, *Richardson* and *Caron* illustrate the fact that by the late 1970s on, this view of equality and support was a mainstream view. But as we now realize, the consequences for women in terms of the "feminization of

³⁶ *Vriend v. Alberta*, [1998] 1 S.C.R. 493.

³⁷ *M. v. H.*, *supra* note 5.

³⁸ For example, *Canada v. Southam Inc.*, [1984] 2 S.C.R. 145 (*sub nom. Hunter v. Southam Inc.*); *R. v. Oakes*, [1986] 1 S.C.R. 103; and *Reference re s. 94(2) of Motor Vehicle Act (British Columbia)*, [1985] 2 S.C.R. 486.

³⁹ This was, in addition, encouraged by a change in policy when Chief Justice Dickson took over from Chief Justice Laskin. Dickson C.J. encouraged judges to give speeches and discuss (in general) the role of the Court in this new era; Laskin C.J. had been very much of a contrary opinion.

poverty” were serious, and it seems that women (along with judges who made support orders) frequently were overly optimistic about employment and income earning potential. These were issues that attracted considerable public and media attention beyond the strictly legal arena, as books such as Lenore Weitzman’s *The Feminisation of Poverty*,⁴⁰ published in 1985, indicated. In short, the increased general profile of the Court, the rise of rights-consciousness related to the *Charter*, the influence of equality discourse in society generally, the renewed vigour of the feminist movement in Canada, and the legal reforms which had taken place in the 1970s combined to create a new profile of the Court in family law.

The controversial *Pelech* trilogy played a rôle similar to that of *Murdoch*, though in a different way. The Trilogy represents the high-water mark of a traditionally liberal approach to feminism and equality, though most observers saw it as damaging for women given the realities of divorce and its economic effects. The *Pelechs* had divorced in 1969 after a fifteen year marriage when Mrs *Pelech* was 37 years old. They entered into a maintenance agreement which had been incorporated into a court order. The agreement provided for the payment of a total amount of \$28,760 over thirteen months in complete satisfaction of all maintenance claims “she now has or may have in the future...”⁴¹ By 1982, these funds were depleted, pre-existing health problems had decreased, and Mrs *Pelech* was receiving welfare. In the meantime, her former husband’s financial circumstances had improved dramatically. Mrs *Pelech* asked for a variation of the original order pursuant to section 11 of the *Divorce Act*.⁴² The majority held that although the supervisory jurisdiction of the court cannot be extinguished by contract, this was not a case where the parties’ contract should be varied. The reasons given by Wilson J. (writing for Dickson C.J. and McIntyre, Lamer, Wilson and LeDain J.J.)⁴³ demonstrate a more expansive style of reasoning than had been evident in other majority family law decisions previously. Having quickly settled the narrow question of the court’s jurisdiction to intervene, she moved to consider the question of what was “fit and just” under section 11. Wilson J. succinctly reviewed the jurisprudential movement away from moral blameworthiness that had been triggered by the *Divorce Act* and other legislative reforms. As she noted, “[while the shift in focus away from moral blameworthiness is salutary, it renders the calculation of what is ‘fit and just’ under section 11 much more difficult and complex”.⁴⁴ Her analysis, quite properly, is a more broadly based consideration of factors that include but go beyond the narrow and often technical analysis of the jurisprudence and applicable law. Having noted the “wide range” of judicial views on the subject

⁴⁰ L. Weitzman, *The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America* (New York: Free Press, 1985).

⁴¹ *Pelech v. Pelech*, [1987] 1 S.C.R. 801 at 807.

⁴² R.S.O. 1970, c. D-8.

⁴³ La Forest J. wrote brief concurring reasons.

⁴⁴ *Pelech*, *supra* note 41 at 829.

of what would justify varying a valid maintenance agreement, Wilson J. went on to consider the policy arguments for and against the respective positions. The outcome was determined by her assessment of the applicability of certain principles to the case. She considered the need to compensate for systemic gender-based inequality,⁴⁵ but saw it as a counterpoint to the need for finality. She also observed astutely that this was essentially a tension between competing values of fairness, and concluded:

It seems to me that where the parties have negotiated their own agreement, freely and on the advice of independent legal counsel, as to how their financial affairs should be settled on the breakdown of their marriage, and the agreement is not unconscionable in the substantive law sense, it should be respected. *People should be encouraged to take responsibility for their own lives and their own decisions. This should be the overriding policy consideration.*⁴⁶

Wilson J. also expressed concern for the “paternalism” inherent in a willingness to intervene in an agreement.⁴⁷ In introducing the now famous (and now largely rejected) causal connection test, she held that the interests of finality should only be outweighed if the subsequent misfortune “has its genesis in the fact of marriage itself”.⁴⁸ In considering the policy issues, the Court also considered the argument that the primary obligation for family members falls on them, and not the State. Wilson J. rejected this view, partly because its consequences would conflict with the values of finality and autonomy of the spouses, but also, it seems, because the underlying rationale for this view was the notion that public funds should be conserved.⁴⁹ She concluded that:

...where an applicant seeking maintenance or an increase in the existing level of maintenance established that he or she has suffered a radical change in circumstances flowing from an economic pattern of dependency engendered by the marriage, the court may exercise its relieving power. Otherwise, the obligation to support the former spouse should be, as in the case of any other citizen, the communal responsibility of the state.⁵⁰

Her reasons in this respect imply a hostility to the notion that the state might not be fully responsible for its citizens, and to the notion that the state should be able to pin its costs for the basic sustenance of a citizen on a legal stranger (the former spouse). It is worth noting here that recent current concern for support and improved enforcement mechanisms exist in a social context which is characterized by a disappearing welfare state. As Brenda Cossman has recently argued, increased private obligations dovetail nicely with a shrinking social safety net.⁵¹

⁴⁵ Which had been advanced by Manitoba’s C.A. in *Ross v. Ross* (1984), 39 R.F.L. (2d) 51 (Man. C.A.).

⁴⁶ *Supra* note 41 at 850 [emphasis added].

⁴⁷ *Ibid.* at 832.

⁴⁸ *Ibid.* at 851.

⁴⁹ Wilson J. cited the *Scottish Law Commission Report*, *ibid.* at 842.

⁵⁰ *Ibid.* at 803.

⁵¹ B. Cossman, “Recent Developments in Family Law: The 1998-1999 Term” (2000) 11 Sup.Ct.L.R. (2d) 433 at 435.

As many authors have discussed,⁵² the *Pelech* majority decision is not driven by a lack of concern about women, but it is emblematic of liberal feminism and formal equality. By the 1970s and early 1980s, the emphasis on the pursuit of equality was on the notion that if women were treated ‘the same’ as men, social or systemic discrimination would disappear. The emphasis during this period was on access to the workplace or the public world. Recognition of domestic realities and their impact on women seeking a place in the workplace was growing by the mid-1980s when *Pelech* was decided. In retrospect, by the time the Trilogy came down, this formal equality tide was receding⁵³ - or its guiding forces reconsidered - in light of mounting evidence showing that the economic consequences of divorce on women were much more serious than had previously been recognized and that simply allowing them resources to retrain was not sufficient. This was so especially in light of the fact that most women became the sole custodians of the children of the marriage after divorce, which continues to constrain employment options for many years. *Pelech*, however, remains as a decision that looks back rather than forward, something that was evidenced by some judicial hesitation to follow it and confusion as to the ambit of its application. As Bailey and Bala point out, this was probably symptomatic of the concern that

...the values of sanctity of contract and a clean break after separation, which form the basis of the Trilogy, are not fully responsive to the realities of inequality of bargaining power between husband and wife, and the complex ways in which marriage is implicated in creating financial dependency.⁵⁴

Like *Murdoch*, it is a conservative decision in the sense that it was following change rather than leading it. This, as we shall see later, is another aspect of the role of the Court in the area of family law that has changed in recent years.

The issues in *Richardson*⁵⁵ were quite similar to those in *Pelech*, except that the pre-existing settlement agreement had been made pursuant to the

⁵² See for example M. Bailey, “*Pelech, Caron and Richardson*” (1989) 3 Can. J. Women & L. 615; and B. Cossman, “A Matter of Difference: Domestic Contracts and Gender Equality” (1990) 28 Osg. Hall C.J. 303.

⁵³ See for example L. Weitzman, *The Divorce Revolution*, *supra* note 40, which had been published two years earlier.

⁵⁴ M. Bailey & N. Bala, “Canada: Supreme Court Decisions and the Continuing Impact of the Charter of Rights” (1989-90) 28 J. Fam. L. 427 at 428.

⁵⁵ *Richardson v. Richardson*, [1987] 1 S.C.R. 857. The “Trilogy” cases, *Pelech, Richardson and Caron v. Caron* (1987), 7 R.F.L. (3d) 274, were heard together and the judgments were released on June 4, 1987. The issue in *Caron* was whether the Court should vary a separation agreement that provided that the husband make support payments to the wife until she remarried or cohabitated with a man for a time exceeding 90 days. After the divorce decree the husband stopped payments as the wife had been cohabiting with a man for more than ninety days. The wife applied to vary the divorce decree when cohabitation ceased in order to resume support payments when she was on social assistance. The separation agreement also provided for variation of quantum if there were changes in circumstances. The Court under Wilson J. dismissed the wife’s appeal reasoning that the wife had failed to meet the *Pelech* test.

Family Law Reform Act,⁵⁶ so it was an application for corollary relief on divorce section 11(1) rather than an application to vary under section 11 (2). Although the separation agreement had limited spousal support to one year following the marriage, Mrs. Richardson was on social assistance by the time of the divorce application and requested indefinite support. She was 46 years old at the time the case went to the Court in 1987 and had worked only sporadically since her second child had been born in 1974.

This judgment is even more principle and policy driven than *Pelech*. It would have been easy to distinguish this case from *Pelech* by limiting it to cases arising out of applications to vary previous *divorce* orders for support. But the majority, again written by Wilson J. for Dickson C.J., McIntyre, Lamer, and LeDain J.J., was strongly grounded in principle as the following passage illustrates:

I appreciate also that the wording of the two subsections is different. [...] Nevertheless, in my view, despite the difference in the statutory language, when a court is confronted with a settlement agreement reached by the parties the same criteria should be applied under both sections. *The underlying rationale is the same under both, namely 1) the importance of finality in the financial affairs of former spouses and 2) the principle of deference to the right and responsibility of individuals to make their own decisions.*⁵⁷

La Forest J. dissented on the basis that there was an important difference between sections 11(1) and 11(2):

When the trial judge exercises an original discretion in a divorce action to make an order of maintenance where the parties have entered into an agreement, it comes to the judge for the first time and he or she must review all the circumstances as a whole in exercising the discretion given by the *Divorce Act* to do what is fit and just. When variation of such an order is sought, however, the judge is dealing with an order by which it has already been judicially determined under the Act that the agreement was fit and just.⁵⁸

In addition, La Forest J. was of the view that the value of finality is of less weight at divorce than separation. But a recurring theme throughout his reasons is a concern about “those whom Parliament sought to protect by giving jurisdiction to a judge to order what he or she thinks is ‘fit and just’ having regard to the factors spelled out in the legislation”.⁵⁹ He continued:

Parliament’s policy...is one of “intentional flexibility” aimed at meeting the variegated situations a trial judge must face in divorce matters. [...] There is no flexibility in a judicially created policy that *requires* a judge to exercise his or her discretion to do what is fit and just in accordance with the provisions of a separation agreement unless radical circumstances have occurred[...] This, in my view, amounts to rewriting the Act. This we have no right to do.⁶⁰

⁵⁶ R.S.O. 1980, c. 152.

⁵⁷ *Richardson*, *supra* note 55 at 866. (para. 8)

⁵⁸ *Ibid.* at 881.

⁵⁹ *Ibid.* at 883.

⁶⁰ *Ibid.* at 883-84 [emphasis in original].

As we know now, the *Pelech* Trilogy has been superceded (if not overruled) by the line of Supreme Court cases beginning with *Moge*. In comparing the majority and dissenting reasons in *Richardson*, however, what is striking in retrospect is that while the substantive politics of the majority may not seem progressive, the style of reasoning does. While Wilson J.'s reasons are explicitly driven by principles and policies that are not explicit in the statute, La Forest J.'s reasons are more traditionally grounded in statutory analysis. The policy concerns are there, but the construction and role of the statutes in issue are more literally considered and analysed. In short, in terms of judicial role and methodology, the majority reasons are quite "activist", while those of La Forest J. are more restrained.⁶¹ This marks an important evolution in the role of the Court in family law and vice versa. By the time the *Pelech* trilogy was decided, the Court was deeply immersed in *Charter* cases. Analysis required of the Court on a daily basis had shifted dramatically to one more directly concerned with policy and principles. It should also be no surprise that a judicial facility with such a role made interpreting phrases such as "fit and just" less daunting. It may also have made the Court more receptive to family law leave applications. Moreover, having a woman on the court (and increasing numbers of female law clerks) may well have made a difference. In my view, the public importance of family law is something that women have generally be quicker to acknowledge than men have been. Finally, by this time, the Dickson C.J. and Wilson J. Court was in full swing. These were appointments that catalysed, early on, a more openly policy and principled approach to analysis.⁶² These have been welcome shifts, as they have often revealed fundamental and important policy issues and factors that were previously masked by more formalistic reasons.⁶³

The *Pelech* trilogy confirmed the trend of family law from the margins toward the core of Supreme Court jurisprudence. This was partly due to the increased relevance of matters like support for more Canadians since the rate of marriage breakdown had increased,⁶⁴ and partly, as I have suggested, because

⁶¹ It is interesting that while such judicial "activism" appeared to benefit men, it did not attract the media commentary and criticism that it has in more recent years.

⁶² This was true even in pre-*Charter* cases. In *Rathwell v. Rathwell*, [1978] 2 S.C.R. 436 and *Pettkus v. Becker*, [1980] 2 S.C.R. 834, for example, Dickson refers to principles of equality as context for the constructive trust analysis. Although this was a very implicit aspect of Laskin J.'s dissent in *Murdoch*, his reasons were expressed entirely in terms of the technical doctrine of resulting trust. This Court also took *Charter* values seriously in a broader sense as cases interpreting human rights legislation such as *Action Travail des Femmes* illustrated.

⁶³ The area of judicial review of administrative action has been notorious for this problem.

⁶⁴ Population Census 1976 and 1986, online: Statistics Canada <www.statscan.ca> Information from 1976 reveals that .018% of the population were divorced. By 1986 the Ontario divorce rate climbed to 2.5%. British Columbia had the highest divorce rate at 3.5%, and Newfoundland had the lowest divorce rate at 1.1%. The figures are a conservative estimate of marriage breakdown as separated couples were included in the "married" category until the 1991 census.

family law issues attract principled reasoning of the sort the Court was also immersed in during the early days of the *Charter*. Having said this, family law was still for the most part understood as law relating to marriage and divorce, and was still understood as generally a matter of private law.⁶⁵ While the discourse of rights had rapidly gained momentum in Canadian society in general, it was not yet finding expression in family law jurisprudence to a large extent and there was considerable debate about whether the *Charter* would apply or have any bearing on family law at all. Family law in the 1980s (before *Morgentaler*) was symptomatic of changes to the role of the Court and of changes to the notion of judging which cannot be separated from the advent of the *Charter* but which were not directly affected by it. This changed dramatically and permanently with the decision in *R. v. Morgentaler*.⁶⁶

E. *Morgentaler and After: Rights Discourse and Family Law*

While not seen as a traditional family law case, *Morgentaler* has been crucial to the evolving role of family law in a few senses. First of all, the section 7 analysis mandated close and serious examination of the practical reality and social context surrounding women choosing to seek abortions. This was a new approach in law, and one that has become central to more classically family law issues in both *Charter* and non-*Charter* contexts. In *Thibaudeau*, for example, the real life difficulties of women in setting aside and paying income tax when their incomes are typically low, was a significant issue.⁶⁷ *Moge* and the centrality of the real economic consequences of divorce for Mrs Moge and for women in general was a striking non-*Charter* example.⁶⁸ Second, and related, cases such as *Morgentaler* and the subsequent *Daigle v. Tremblay* decision⁶⁹ catapulted “women’s issues” into the forefront of the public eye and in doing so also helped transform the Court from an institution previously associated with dry legal arguments to one where human dramas were addressed and sometimes even played out.⁷⁰ While the

⁶⁵ The importance of contract as emphasized by Wilson J. is very consistent with family law as private law.

⁶⁶ *R. v. Morgentaler*, [1988] 1 S.C.R. 30.

⁶⁷ *Thibaudeau v. R.*, [1995] 2 S.C.R. 627. In the dissenting opinion of L’Heureux-Dubé J. see, for example, para. 45 at 658, and in the dissenting opinion of McLachlin J. see paras. 199-209 at 720-24.

⁶⁸ *Moge v. Moge*, *supra* note 10. See also R. Abella, “Economic Adjustment on Marriage Breakdown: Support” (1981) 4 Fam. Law Rev. 1; J. McLindon, “Separate but Unequal: The Economic Disaster of Divorce for Women and Children” (1987) 21 Fam. L.Q. 351.

⁶⁹ *Daigle v. Tremblay*, [1989] 2 S.C.R. 530.

⁷⁰ It would be hard to think of greater drama in the Court than the day that Chief Justice Dickson announced, partway through argument in *Daigle v. Tremblay*, he had just been advised that Chantale Daigle, more than 20 weeks pregnant by that time, had defied the outstanding injunction obtained by Tremblay and obtained an abortion in the United States. In addition, Pro-Life advocates had staged a protest on the front lawn of the Supreme Court in the form of a “baby shower”. See K. Makin & S. Delacourt, “Massive legal battle looms over Daigle abortion case” *The Globe and Mail* (2 Aug 1989) A1/A4.

Charter clearly facilitated this in *Morgentaler*, it helped legitimize the rising sense of importance of family law as well. Third, *Morgentaler* set the stage for the interpretation of section 15 that considered both difference and context, in other words, for substantive equality. This has had an enormous spill-over effect into non-*Charter* cases.⁷¹ Finally, *Morgentaler* helped push the envelope of issues thought to include “family law”.⁷² Family law for decades was thought to consist mostly of matters involving details of separation, support, property and the like.⁷³

Morgentaler, along with other cases such as *R. v. Lavallée*⁷⁴ and *Daigle v. Tremblay* decided shortly thereafter, stretched the boundaries of what the notion of family and family law includes. In this sense, it foreshadowed cases such as *Miron v. Trudel* and *M. v. H.* in which the court has grappled with the fundamentals of family definition. In short, *Morgentaler* was crucial in the ascendance of family law from something thought of as marginal to matters of important public policy to being seen as the basic unit of civilized democratic society and potentially of national importance. By 1988, then, the family, starting with the pregnant woman, was seen as the locus of important social and legal issues which involved issues of rights. The Supreme Court was no longer merely “settling a dispute”; it was the final arbiter in light of the fact that social and political consensus on the issue has been impossible leaving a legislative void. As Justice Wilson had said in a 1985 speech,

...the conclusion is inescapable that the scope of judicial review of legislative and executive acts has been vastly expanded under the *Charter* and [...] the courts have become the mediators between the state and the individual.⁷⁵

⁷¹ Space will not permit a discussion of all the cases that have been part of this evolution.

⁷² Even though the case appears under “constitutional” and “criminal” indexes in the S.C.R.

⁷³ In *Lavallée*, *infra* note 74, the defendant was charged with the murder of her partner. In the course of her cohabitation she had been hospitalized as a result of his repeated violence. The issue before the Court had been whether the legal concept of “imminence” in self-defence should be broad enough to include the situation where a battered spouse kills out of fear that he will return subsequently (*e.g.* later that evening) and fears for her life. In permitting this, Wilson J. also permitted the admission of expert evidence on the subject of battered women and the cycle of violence to explain the frequent patterns of behaviour that accompany abuse. In doing so, she painted a compelling portrait of a very dark side of family life. Domestic violence is now part of any basic family law course or text: see for example B. Hovius, *Family Law: Cases, Notes and Material*, 4th edition, (Toronto: Carswell, 1996). *Daigle v. Tremblay* concerned the question of whether a fetus was a person under the *Civil Code of Québec* and whether the father could enjoin the pregnant woman from having an abortion. The Supreme Court allowed the appeal from the Québec Court of Appeal which had upheld the injunction issued at first instance.

⁷⁴ [1990] 1 S.C.R. 852.

⁷⁵ B. Wilson, “Decision-Making in the Supreme Court” (1986) 36 U.T.L.J. 227 at 238-39.

While some critics, and frequently the *National Post*, have eschewed this role, there can be no doubt that it is one which was expressly mandated by the *Charter*. It has also, in my view, been inevitable and salutary that the habit of reading law against the backdrop of the principles articulated in the *Charter* would affect the methodology of judging more generally. This has certainly been the case in family law, and especially so in the Supreme Court. Having said this, it is also true that apart from equality, the Court has not been expansive in its applications of “rights” in family law generally.

F. *Family Law and The 1990s*

At this point then, it will be useful to step back for a moment and consider the role that the *Charter* was being predicted to play with respect to family law a decade ago, just after *Morgentaler*. At that point, there was some considerable discussion of this issue. Some lawyers were advocating for the greater use of the *Charter*, at least with respect to areas such as child protection.⁷⁶ There was, however, some unease with the prospect of applying a simple “rights analysis” to the family. As Rollie Thompson wrote,

I find the use of “rights” language within the family setting quite inapposite, given the complex interweaving of dependency, altruism and autonomy in family relationships.⁷⁷

Another view, articulated by Stephen Toope, expressed the concern that if a rights analysis were employed, it would be likely to reflect the “courts’ largely individualistic and antisocial conception of constitutional rights”.⁷⁸ But he also concluded that

Canadian courts demonstrate considerable reluctance to apply the *Charter* to aspects of life they consider to be private. [...] In any case, even if the *Charter* were to be applied in a broad range of family disputes, the effects would not likely be revolutionary. *Charter* arguments have most been most commonly invoked in situations where disputes involve children. In such disputes, an emphasis upon the “best interests of the child” is so intuitively attractive that it will not easily be displaced by alleged *Charter* rights of the parents. [...]

On balance, it would seem that the *Charter* is likely to have a relatively minor impact upon the large expanse of family law. [...]⁷⁹

Looking back over the past decade since this article was written, it is striking how true it is in the sense of “the bottom line”. With respect to cases involving children, the Court has been exceedingly reluctant to apply a rights discourse and especially reluctant to embrace a notion of “parent’s rights”. Nevertheless, it cannot be said that the *Charter* has had a minor effect, because of the effect

⁷⁶ R. Thompson, “Why Hasn’t the *Charter* Mattered in Child Protection?” (1989) 8 *Can. J. Fam. L.* 133.

⁷⁷ *Ibid.* at 154.

⁷⁸ Toope, *supra* note 26 at 96.

⁷⁹ *Ibid.* at 95.

it has had in leading the most fundamental reforms relating to the nature and meaning of the family itself and its role in society as in cases such as *Miron v. Trudel* and *M. v. H.*⁸⁰ Moreover, the discourse of equality has been indispensable to the significant changes that have taken place in the area of spousal support, and it would be difficult to argue plausibly that this is entirely independent of the section 15 litigation that has been taking place. The trend toward more principled decision-making in family law discussed above has been advanced and reinforced not only by the *Charter* but also by the passage of statutes that reinforce this broader role. For example, the 1986 *Ontario Family Law Act* requires judges to determine whether ordering an equal division of family property would be "unconscionable".⁸¹ The result is that, over time, the divergence of approach to family law as between *Charter* and non-*Charter* cases has dissipated to a large extent.

By the end of the last decade and the beginning of this new millennium, the notion of the family has changed dramatically and the Supreme Court has led the way in the most important of these changes. If one looks back even to the mid-eighties, this in itself is a significant change. For the first time, instead of lagging far behind social change, the Court has been more willing to lead the way. In different ways, and with somewhat different bases for the legitimacy of this role, this has been true in both *Charter* and non-*Charter* cases. At the end of the day (so far), and somewhat ironically, the impact of the principles developed pursuant to the *Charter* has been greatest in the non-*Charter* jurisprudence, and almost entirely relating to section 15 and the principle of equality. The great exception to this has taken place at the end of the decade - the *Charter* cases addressing the very nature and definition of the family itself, notably *Miron v. Trudel* and *M. v. H.* In the section which follows, I will discuss the cases which revealed the Court's reluctance to allow the *Charter* and particularly the assertion of parental rights to alter the structure of family law, especially by displacing the centrality of "the best interests of the child" doctrine. I will then discuss the significant indirect influence of *Charter* principles in the areas of support and the reproductive autonomy of women. Finally, I will discuss the role of the Court in pushing social changes through the application of the *Charter* in equality cases.

⁸⁰ *Miron v. Trudel* and *M. v. H.*, *supra* note 5. *Egan v. Canada* should also be mentioned here, even though Egan's claim in this case was not successful. A majority of the Court did find that the definition of spouse to exclude same-sex partner violated s. 15, and the arguments of that majority subsequently carried the day.

⁸¹ *Family Law Act*, R.S.O. 1990, c. F.3, as am., s. 5; see *Rawluk v. Rawluk*, [1990] 1 S.C.R. 70. Another example is the "best interests of the child" test in itself; *Children's Law Reform Act*, R.S.O. 1990, c. C.12, as am., s. 24.

III. *Rights discourse in the Supreme Court*

By the early 1990s, there was great interest in the potential impact of *Charter* rights in family law. On one hand, fathers' rights groups lobbied for joint custody and claimed that their parental rights were violated, particularly in custody and access matters.⁸² Would "parents' rights" affect custody/access issues such as relocation of a custodial spouse after divorce? What if the parents disagreed over religion? It should not be surprising that it is the cases touching on the direct application of the *Charter* to the family on which the members of the Court have been the most divided in recent years in the family law area.

A. *Custody, Access and the Charter: Best Interests of the Child v. Parental Rights?*

Young v. Young was a case that attracted a great deal of public attention and thereby contributed to the increasing profile of the Supreme Court among Canadians in general. In addition, because it was a family law case concerning the application of the *Charter*, it was an important case in raising the profile of family law as an important area of the law touching serious issues of public policy. Mrs. Young was the sole custodian of the children of the marriage. One of the contributing factors to the marriage breakdown had been Mr. Young's adoption of the Jehovah Witness faith. The trial judge had imposed significant limits on his access which included not speaking about his faith to the child, not taking them to Church and not involving them in canvassing and proselytizing activities. There was evidence that indicated that the children had disliked their father's religious instruction, that it was damaging their relationship with him and contributing to the stress they were experiencing in relation to their parents' separation. The central legal issue was whether sections 16(8) and 17(5) of the *Divorce Act* relating to custody and custody variation orders respectively violated sections 2(a), (b), (d) or 15(1) of the *Charter*. Both subsections state that in making an order, "...the court shall take into consideration only the best interest of the child".

This was a very complex case and the decision is one of the most difficult Supreme Court cases to decipher as there were six opinions which agreed and disagreed with various aspects of each others judgments. Of central importance to "Court watchers", however, was whether the *Charter* was to be allowed to "trump" the "best interests of the child" test. This touched a peculiarly Canadian nerve. One of the largely invisible backdrops to the *Young* case was the "father's rights" lobby and the rise of joint custody as a legal presumption in the United States. As I have argued elsewhere, this has been driven less by the interests of the child and more

⁸² References to the *Charter*, equality, and discrimination may be found throughout the testimony of the fathers' rights groups during hearings in 1985: see House of Commons, Standing Committee on Justice and Legal Affairs, *Minutes of Proceeding and Evidence*, Nos. 32-50 (11 June 1985 to 23 October 1985.)

by the notion of parental rights that in effect requires dividing the child equally.⁸³ The spectre of pitting children's interests against the hard "rights" of parents was largely unappealing to Canadian scholars, who advocated more "child-centred" approaches to decisions involving families and children was an unattractive one. It also raised the concerns expressed above about the inappropriateness of direct application of an individualistic rights model to the family.⁸⁴

Complex as the result in *Young* was, the bottom line was that none of the judges held that the best interests provisions violate the *Charter* and all of them held that the best interests test is the appropriate standard. None of the judgments express any enthusiasm for the direct application of the *Charter* to matters involving custody or access decisions. Having said this, a number of members of the Court expressed the view that when *Charter* principles such as freedom of religion are in issue, the best interests standard should reflect this and require evidence of harm before restricting access.⁸⁵

The Court heard and decided another very similar case, *P.(D.) v. S.(C.)*⁸⁶ at the same time as *Young*. There, the mother was Roman Catholic and was the custodial parent and the father a Jehovah Witness. The case differed from *Young* in two ways. First, the trial judge's order was less intrusive. While it specified that the father could not "indoctrinate" his daughter, it had also specified that he could teach his faith to her. Second, the Supreme Court (as well as the Québec Court of Appeal) emphasized the trial judge's observation that "the main problem results from the applicant's religious fanaticism" and that this was disturbing to the child.⁸⁷ As the parents had not married, this case did not invoke the *Divorce Act* but rather the best interests standard as articulated by the *Civil Code of Québec*.⁸⁸ Consideration may be given in particular to the child's age, religion, language, character and family surroundings, and the other circumstances in which he lives.

⁸³ A. Harvison Young, "Joint Custody as Norm: Solomon Revisited" (1994) 32 *Osg. Hall C.J.* 785.

⁸⁴ See Thompson, *supra* note 76 and Toope, *supra* note 26.

⁸⁵ McLachlin J. held that certain limitations to access, such as those involving religious expression, should be based on evidence of harm to the child. This is predicated on the premise that maximizing access is generally a good thing and in the interests of children, and that to rebut this one must establish harm. She was of the view that harm had not been established in this case [129]. Sopinka J. expressed general agreement with McLachlin J., but stated that while he agreed with her that the ultimate determination in deciding issues of custody and access is the "best interests of the child" test, he went on to say that it must be reconciled with the *Charter* and that it should be overridden "only if its exercise would occasion consequences that involve more than inconvenience, upset or disruption to the child and incidentally to the custodial parent"[107]. Gonthier and La Forest JJ. agreed with L'Heureux-Dubé J. who went furthest in holding that the trial judge's order was not subject to the *Charter*. Cory and Iacobucci JJ. refused to express a view on this issue as it was not necessary, in their view, to the case at bar.

⁸⁶ *P.(D.) v. S.(C.)*, [1993] 4 S.C.R. 141.

⁸⁷ *Ibid.* at 152.

⁸⁸ *Civil Code of Lower Canada*, article 30:

This case attracted a broader level of consensus than *Young* among the members of the Court. Only McLachlin and Sopinka JJ. would have allowed the appeal on the basis that there had not been sufficient evidence at trial to support a finding of “harm” justifying the access restrictions. In their view, the presence of parental conflict did not establish harm⁸⁹ sufficient to restrict access in this manner.

The Court, then, is ambivalent about the application of the *Charter* to matters involving the child. As I wrote in an earlier article in which I discussed these issues,

... the key point is that the judges all agreed that the ultimate standard was the best interests test. ...[T]he durability of the best interests test is at least a potent symbol of the idea that the child should remain at the centre of the debate. *Young* does not support the view that a discourse of parental rights should hijack custody and access issues.⁹⁰

Overall, these two cases are remarkable and prophetic in the sense that they illustrate the narrowing of the distinction between judicial style and approach in *Charter* and non-*Charter* cases, something that is especially apparent in the support cases such as *Moge*. Among the judges who were unwilling to say that the *Charter* did not apply, the standard applied might best be described as a “principled common law standard”. In other words, the tests are applied with reference to these principles as significant values,⁹¹ but are nevertheless woven into the process for determining custody and access issues pursuant to the best interests of the child. These cases, criticized at the time for their length, complexity and plurality of reasons, have settled more issues than one might have expected. There have been no subsequent cases arguing *Charter* rights to pre-empt the best interests at the time. It is particularly interesting to note that *Gordon v. Goertz*, a case which involved “relocation” of a custodial parent to Australia, decided in 1996, did not even raise the issue of “mobility rights”. This had been one of the issues discussed extensively in the academic literature in the early 1990s as potentially undermining the complex nature of families by applying unsophisticated and individualistic notions of rights.⁹² By the time *Goertz* was decided, the question of relocation was framed as an issue of parental rights. The analysis is very strongly a child-centred one. Although L’Heureux-Dubé J. does discuss “rights” in *P.(D.) v. S.(C.)*, she does so in her discussion of the Civil Law of Québec which applied in that case. The central division between McLachlin J. and L’Heureux-Dubé J. in *Young* and *Goertz* arose out of the concept of “custody”. For both, however, the driving concept is one of “the best interest of the child” rather than parental rights. At civil law,

In every decision concerning a child, the child’s interest and the respect of his rights must be the determining factors.

⁸⁹ *P. (D.) v. S.(C.)*, *supra* note 87 at 196.

⁹⁰ *Supra* note 84 at 807-08.

⁹¹ Though, of course, the problem of course is just how weighty the principles are and how they should be defined gives rise to much more disagreement.

⁹² See Toope, *supra* note 26.

as L'Heureux-Dubé J. outlines very clearly, parental rights exist to serve one's responsibilities. As article 647 *C.C.Q.* states, the father and the mother "have the rights and duties of custody, supervision and education of their children. They must maintain their children". In the final analysis, the Court as a whole refused to characterize the issue as one which pitted a parent's rights against the best interests of the child. The picture that emerges from the judgment as a whole is one that sees this as a false dichotomy and sees the family, including the post-divorce family, as a complex entity that requires a more nuanced approach than a merely individualistic rights discourse can satisfy.

The greatest disagreement in both cases exists between the decisions of L'Heureux-Dubé and McLachlin J.J. In retrospect, it seems that their disagreement concerning the application of the *Charter* has been less significant than their disagreement over the meaning and authority of "custody".⁹³ The latter will be discussed in relation to *Goertz* below, where the issue arises again.

With respect to the former, it is noteworthy that although L'Heureux-Dubé J.'s reasons in *Young* are adamant in rejecting the direct application of the *Charter*, she has been a champion of the application of equality principles beyond its direct scope.⁹⁴

The reticence about direct application of the *Charter* to family law matters which was evident in *Young* and *P.(D.)* was also evident in a less publicized case decided the same year. That case, *Catholic Children's Aid Society of Metropolitan Toronto v. M.(C.)*⁹⁵ concerned a dispute between a child protection agency and the biological mother of a seven-year-old girl. The child had been apprehended shortly after birth and taken from her care three times during the first two years of her life. At that time the mother was hospitalized for psychiatric problems and the child was made a temporary ward and placed into foster care. The agency sought to have the child made a permanent ward in 1989 with a view to adoption. The trial judge had ruled that the agency had not satisfied the court that the child continued to be "in need of protection" and ordered the return of the child to her mother. This was reversed by the Court of Appeal. The child had resided with the same foster family during this period and was seven years old by the time of the Supreme Court appeal. L'Heureux-Dubé J. wrote a unanimous opinion for the Court dismissing the appeal. Space does not permit a lengthy discussion of the case, but there are a few points which should be noted for their relevance to the developing role of the Court with respect to family law. First of all, it

⁹³ While L'Heureux-Dubé, J. holds the view that the notion of "custody" denotes a broad level of decision-making authority concerning the raising of children, while McLachlin, J., (as she then was) treats custody as a much narrower concept. (See *Gordon v. Goertz* (May 2, 1996), Doc. 24622 (S.C.C.).

⁹⁴ *Moge v. Moge*, *supra* note 10. Justice L'Heureux-Dubé has also spoken often and passionately on this subject: see "La marche vers l'égalité" (1995) 8 Can. J. Women & L. 275; "Making Equality Work in Family Law" (1997) 14 Can. J. Fam. Law 103; "Droit de la famille: à l'aube du 21^e siècle: la marche vers l'égalité" (1997-98) 28 R.D.U.S. 3.

⁹⁵ [1994] 2 S.C.R. 165.

manifests a strongly child-centred approach to the issue which recognizes the importance of the family unit. As she wrote:

Essentially...the Act has as one of its objectives the preservation of the autonomy and integrity of the family unit and that the child protection services should operate in the least restrictive and disruptive manner, while at the same time recognizing the paramount objective of protecting the best interests of children...⁹⁶

In discussing the best interests test in the case, she held that “perhaps the most important factor ...is regard to the psychological bonding of a child to her or his foster family”.⁹⁷ Simply put, there is little room for a notion of the “rights” of a biological parent. Second, and related, the Court disregarded the section 7 argument that had been raised in both the factums and oral argument and did not even mention it. As Bala says, somewhat prophetically,

It is perhaps ironic that in the “private” disputes in *Young* and *P.(D.)* the Court at least extensively discussed the Charter’s applicability, but it is not even mentioned in the “public” context of *M.(C.)*.⁹⁸

In sum, the Court greeted the first family law *Charter* cases with considerable caution. While there was significant disagreement, it was clear after *Young* and *P.(D.)*, and reinforced by *M.(C.)*, that the *Charter* and parental “rights” was not going to change the basic structure and approach to custody and access. In fact, as discussed above, the greatest disagreement in *Young* arose not out of the *Charter* issue but out of the meaning of “custody”.⁹⁹

B. *B.(R.) v. Children’s Aid Society of Metropolitan Toronto: Parental Liberty and State Intervention*

Although the *Charter* arguments were not addressed in the child protection context in *M.(C.)*, they were central in *B.(R.)*, a case decided the following year. In the facts of that case, the appellants were Jehovah’s Witness parents who had refused consent to a blood transfusion for their newborn daughter who had been born prematurely. Their refusal was on religious grounds, and the medical evidence indicated that transfusions would be necessary to protect the child’s life. The Children’s Aid Society obtained an order of temporary wardship pursuant to Ontario’s *Child Welfare Act*¹⁰⁰ and then consented to the medical

⁹⁶ *Ibid.* at 199. For an insightful discussion of this case, see N. Bala, “Developments in Family Law: The 1993-94 Term -The Best Interests of the Child” (1995) 6 Sup.Ct.L.R. (2d) 453 at 468 ff. Bala notes that “a consideration of the context and implications of this type of decision, which featured prominently ...[in her judgments] in *Young* and *P.(D.)* is lacking” in *M.(C.)*, particularly with respect to the disparate effects of the delay on the natural mother.

⁹⁷ *Supra* note 95 at 202.

⁹⁸ *Supra* note 96 at 473.

⁹⁹ *Goertz*, *supra* note 9.

¹⁰⁰ R.S.O., c.66, ss. 19(1)(b)(ix), 21, 27, 28(1), (10), (12), 30(1), 41. This legislation was repealed and replaced by the *Child and Family Services Act*, S.O. 1984, c. 55.

treatment recommended by the doctors, including a blood transfusion. After the medical treatment was concluded, the child was returned to parental custody, but the parents appealed the original decision on the grounds that it had violated their constitutional rights.

As in *Young and P.(D.)*, there is considerable divergence in the perspectives and reasons expressed, but the unanimous result was that the parents' were not ultimately successful in their sections 2 and 7 claims. A plurality of the Court (La Forest, L'Heureux-Dubé, Gonthier, and McLachlin JJ.) held that while their section 7 liberty rights had been infringed, the infringement was in keeping with the principles of fundamental justice. Lamer J. held that the liberty interest in section 7 did not include the right of parents to make medical decisions or to raise their children without undue state interference. Sopinka J. reserved decision on the scope of section 7 in light of his view that the standard of fundamental justice had been met. Cory, Iacobucci and Major JJ. held that an exercise of parental liberty which seriously endangers the survival of the child is, *ab initio*, beyond the scope of section 7. Although a majority of the Court (La Forest, L'Heureux-Dubé, Sopinka, Gonthier and McLachlin JJ.) held that the parents' rights to rear their children according to their religious beliefs was a fundamental part of freedom of religion and that accordingly their section 2(a) rights had been infringed, they went on to hold that the careful legislative scheme implemented by the state was saved by section 1.

Again, though the reasons are not easy to reconcile with one another, this case, read as a whole, does not champion the notion of parental rights in an individual and oppositional sense. In the context of section 7, the La Forest J. reasons (with which L'Heureux-Dubé, Gonthier, and McLachlin JJ. concurred) construe the notion of parental rights most expansively. But even in his reasons, it is impossible to separate the correlative duties from these rights:

While acknowledging that parents bear responsibilities towards their children, it seems to me that they must enjoy correlative rights to exercise them. The contrary view would not recognize the fundamental importance of choice and personal autonomy in our society. [...]he common law has always, in the absence of demonstrated neglect or unsuitability, presumed that parents should make all significant choices affecting their children, and has afforded them a general liberty to do as they choose. This liberty interest is not a parental right tantamount to a right of property in children. [...] This role translates into a protected sphere of parental decision-making which is rooted in the presumption that parents should make important decisions affecting their children both because parents are more likely to appreciate the best interests of their children and because the state is ill-equipped to make such decisions itself. [...] This is not to say that the state cannot intervene when it considers it necessary to safeguard the child's autonomy or health. But such intervention must be justified.¹⁰¹

Although La Forest J.'s reasons are clearly anchored in individual principles of autonomy and individuality, they are also strongly anchored in the notion that parents have fundamental duties and responsibilities associated with their

¹⁰¹ B.(R.), *supra* note 6 at 372.

children and must have correlative rights to exercise them. Although La Forest J. seemed to justify the “rights” as mandated by principles of autonomy, at common law it is doubtful that this link was as significant as the simple notion that in order to carry out responsibilities, one must have correlative powers.¹⁰² The correlative link between right and duty is even clearer in civil law and, as cited above, evident even in the Civil Code article that sets out the principle of parental authority. In other words, the right serves the duty and not the other way around. This, in my view, is clearer from L’Heureux-Dubé J.’s analysis in *P.(D.)* though her argument there was that the sole custodian needs and is entitled to be the ultimate decision maker in order to carry out these duties with which she is charged on a daily basis.

In addition, the apparent breadth of section 7 in the plurality opinion is significantly tamed by its readiness to find that it satisfies the standard of fundamental justice. The other members of the Court were unwilling to find that the liberty interest is broad enough to cover such decisions.¹⁰³ Similarly, while a majority of the Court found that freedom of religion under section 2 (a) includes the rights of parents to educate their children according to their religious beliefs, or put more positively, held that parents have rights to “rear their children according to their religious beliefs, including that of choosing medical and other treatments...”,¹⁰⁴ the same majority also found the infringement to be justified by section 1. Though the analysis was structured, the statutory scheme met the section 1 test easily.

A more recent *Charter* decision in the context of child protection is *J.G. v. Minister of Health and Community Services (New Brunswick)*.¹⁰⁵ There, the Minister was seeking an extension of a custody order of the appellant mother’s three children. The mother, who was receiving social assistance had lost her application for legal counsel because, at the time, custody applications were not covered under the legal aid guidelines. She then brought a motion for an order directing the Minister to provide her with sufficient funds to cover reasonable fees and disbursements for her representation, or that counsel be provided. She also sought a declaration that the rules and policies of Domestic Legal Aid violated section 7 of the *Charter*. Her motion was dismissed and that decision had been affirmed by the Court of Appeal. The Supreme Court was unanimous in holding that the appellant’s section 7 rights had been violated and that the appropriate section 24(1) in such circumstances is an order that the government

¹⁰² As Martha Bailey points out, on the common law analysis it is hard to see why the scope of constitutionally protected parental rights should extend beyond rights necessary to discharge parental duties and include a right to harm children; see “Developments in Family Law: The 1994-95 Term” (1996) 7 S.C.L.R. (2d) 327 at 353-54. See also J.F. MacQueen, *The Law of Marriage, Divorce and Legitimacy* (1860) at 153, cited by Bailey at 354, n. 97.

¹⁰³ As Bailey points out, *supra* note 102 at 349-56, the various opinions reveal fundamental differences with regard to the nature and extent of parental rights.

¹⁰⁴ Per La Forest J. at para. 105.

¹⁰⁵ [1999] 3 S.C.R. 46.

provide the parent with state-funded counsel. In some respects, this decision appears to be at odds with *B.(G.)*. The Court did not have any difficulty in reaching the conclusion (unanimously) that the mother's right to security of the person had been violated. Lamer C.J. held that this right extends beyond the criminal law and can be engaged in child protection proceedings. State removal of a child from parental custody pursuant to the state's *parens patriae* jurisdiction constitutes a serious interference with the psychological integrity of the parent. It is unclear from the majority reasons, however, why the interests at stake in *B.(G.)* constituted liberty rights which were therefore not triggered in the Chief Justice's view) while the interests in *J.G.* constituted security of the person rights, which were triggered in his view.

In other words, the essential difference between liberty and security of the person rights is not clear. L'Heureux-Dubé J. delivered concurring reasons (joined by Gonthier and McLachlin JJ.) in which she agreed with the majority reasons that the child protection hearing implicated the appellant's right to security of the person and that the procedure in the case that threatened to deprive her of that right would not have been in accordance with the principles of fundamental justice. She continued, however, to emphasize that the case also triggered equality interests and liberty interests. Equality interests were implicated because, as L'Heureux-Dubé J. stated, "women, and especially single mothers, are disproportionately and particularly affected by child protection proceedings"¹⁰⁶ In noting that liberty interests were also implicated, she cited La Forest J. from *B.(G.)* in support of this point.

Nevertheless, the results of the two cases are compatible and do add up to a more coherent picture. *B.(R.)* underlines the Court's reluctance to allow a doctrine of parent's rights to be set up in opposition to the interests or health of a child. But that does not mean that it is not willing to protect the procedural interests of parents, which is what was at issue in *J.(G.)*. This is consistent with the view of the family as a central social unit whose integrity should be encouraged and protected, as a general proposition.

The trend of Supreme Court conservatism in the application of *Charter* rights to family law issues is continued in the still more recent case of *K.L.W.*¹⁰⁷ In that case, a mother contested the apprehension of her youngest two children under the Manitoba *Child and Family Services Act*^{107a} section 21(1) as violative of her right to security of the person under Section 7 of the *Charter*. She was unsuccessful at both courts below. Her appeal was dismissed by a seven judge panel of the Supreme Court, with two justices dissenting. Madame Justice L'Heureux-Dubé wrote for the majority. The dissent was authored by Madame Justice Louise Arbour with Chief Justice Beverly MacLachlin concurring in dissent.

¹⁰⁶ *Ibid.* at para. 112.

¹⁰⁷ *Winnipeg Child and Family Services v. K.L.W.* 2000 S.C.C. 48. File No: 2677.

^{107a} S.M. 1985-86, c. 8.

In keeping with *J.G.* and *B.R.*, the majority judgment stressed the need for conservatism regarding the use of rights discourse to prevent state intervention in the complex, interdependent relationships within the family unit. L'Heureux-Dubé, J., at para. 98, notes that "the interests at stake in the child protection context dictate somewhat different balancing analysis from that undertaken with respect to the accused's Section 7 and Section 8 rights in the Criminal context, thus "reaffirming that rights discourse will be treated differently in family, as opposed to other areas of, law. In this judgment, rights discourse is again precluded from being used as a sword by one family member against another.

As noted, dissents in *Charter* cases have often been prophetic. A look at the dissent in *K.L.W.* is warranted particularly as it is written by a rising junior Supreme Court justice and concurred with by the Chief Justice herself.

The dissent in *K.L.W.* accords broadly with the conservatism with which rights discourse is applied to family law cases. The divergence between the two judgements arises from a minor procedural point. The dissent does not question whether the children ought to have been ultimately apprehended. The only issue is the process by which this apprehension is carried out. (The dissent would not have allowed all aspects of the appeal, but rather amended the impugned section to require a pre-apprehension hearing in cases of non-emergency.) Arbour, J. expresses similar reluctance about allowing state intervention into family relationships in the form of rights discourse to that found in the majority judgment. Interestingly, the Section 7 right seen to be breached is that of the *child's* security of the person, or of the parent and child together. Both judgments, then, are strongly protective of interdependency of the family unit and the best interests of the child. Both are broadly consistent with the conservatism heretofore employed in *Charter* cases concerning family law. Neither judgment permits the use by family members of rights discourse as a "sword" *vis a vis* one another. All that differs is the "spin" put on what constitutes the path of least intervention in family relations. We can draw a few conclusions about the application of rights discourse to family law from the cases so far, then. First, neither the law of custody/access nor the laws of child protection has been fundamentally affected by the direct application of the *Charter* in the way that other areas such as criminal law have. In *Young and P.(D.)*, the Court was unwilling to apply the *Charter* directly to the best interest standard. Though the *Charter* does directly apply to child protection, *B.(R.)*, *J.(G.)* and *K.L.W.* indicate that it is not likely to change the *substance* of the sorts of decisions made concerning the protection of children by child protection agencies and courts. The change brought by the *Charter* is the clear requirement for the state to justify its intervention and the mechanisms such as fundamental justice or s.1 to effect this when parental rights are affected.

C. *Equality in the Supreme Court*

The rise of the discourse of equality in the family law area in the Supreme Court of Canada over the last decade has been remarkable. It is also one that

has crystallized the developments I have been discussing in this paper. First of all, it is one not concerned with rights in an individualistic or formalistic sense, but with social justice and human dignity. Second, its constitutional force has been used beyond areas traditionally of concern to family law judges, that is, with respect to the definition of family. As in cases such as *M. v. H.* and *Miron v. Trudel*, the effect has been not only to render the family a more inclusive social unit, but to place the Court in an important role as a leader or catalyst of social change, given that the legislators had previously been unable (or unwilling) to achieve the level of consensus necessary for such changes.¹⁰⁸ This is, in my view, not only legitimate but expressly part of the new legal order brought in by the *Charter*. Third, the principle of equality, combined with the style of more principled styles of judging,¹⁰⁹ has had a profound effect within the traditional area of support where the *Charter* has not been directly applied. The Court has also demonstrated a willingness to lead in this area as well, as cases such as *Moge* demonstrate. These cases take us full circle, as it were, from the cases such as *Murdoch* when the Court saw its role in much more circumscribed terms.

D. The Support Cases

If the *Pelech* Trilogy was emblematic of the prevalence of formal equality at that time, *Moge* and the subsequent support cases play a parallel role with respect to substantive equality in the 1990s and beyond. The facts of *Moge* are familiar to us all by now. The couple had married in the mid-50s, separated in 1973 and divorced in 1980. The wife had a very limited education and had worked as a cleaner during the marriage and intermittently after. At divorce, the court had ordered the husband to pay \$150 per month in spousal support. In the intervening years, the husband, also of modest means, remarried and his new wife also worked outside the home. Mrs. Moge's fortunes declined and she experienced great difficulty in finding continuing cleaning work. Her husband was granted an order terminating support in 1989 on the basis that she had enjoyed sufficient time to become self sufficient. The Court of Appeal set aside

¹⁰⁸ It is interesting to note that in *Morgentaler*, the lack of social consensus on a new abortion bill has resulted in the absence of any criminal legislation on the subject since 1988.

¹⁰⁹ Although the common law style of the narrow interpretation of statutes which pervaded judgment styles in all areas, such as the *Canadian Bill of Rights*, S.C. 1960, c. 44. (see also R.S.O. 1985, App. III), the legislator had, via interpretation acts, tried to encourage judges to employ larger and more principle-based interpretation of legislation before the *Charter* came into effect. In her dissent in *Symes*, L'Heureux-Dubé J. quoted from Dickson J.'s judgment in *Action Travail des Femmes*, [1987] 1 S.C.R. 1114 at 1134:

Although it may seem commonplace, it may be wise to remind ourselves of the statutory guidance given by the federal *Interpretation Act*, which asserts that statutes are deemed to be remedial and are thus to be given such fair, large and liberal interpretation as will best ensure that their objects are attained.

Although she had originally cited this in her dissent in *Mossop*, [1993] 1 S.C.R. 554, she cited it in the income tax deduction case of *Symes* as "equally apposite".

the judgment and ordered spousal support in the amount of \$150 for an indefinite period, and the Supreme Court dismissed Mr Moge's appeal.

For the purposes of this paper, the most interesting aspect of this important judgment is the extent to which the *Charter*, and the equality principles in section 15(1) in particular, forms a strong backdrop to the case. Indeed, the principle of equality drives the decision. This is particularly evident from Madam Justice L'Heureux-Dubé's decision, but is also very evident from the concurring reasons of Mr. Justice Gonthier and Madam Justice McLachlin. Having said this, the judgment reveals an interesting irony in the sense that while the majority reasons are progressive in substance and in methodology with respect to the position taken on judicial notice of social reality, it is conservative in methodology with respect to the lengths at which it goes to avoid overruling the *Pelech* Trilogy. In addition, the discourse of equality is more implicit (though central) than explicit in the judgment itself, which is very grounded in case law and statutory interpretation. On their face, the reasons of the majority are strictly "legal" in the traditional sense of the term: first of all, the support obligations should be determined by the 1985 *Divorce Act* rather than the 1970 Act, and second, the principles of the *Pelech* Trilogy should not be extended beyond consensual situations. The objective of substantive equality for women is not, as such, articulated anywhere in the judgment itself, though a number of the authors cited had written on the subject of support and gender equality.¹¹⁰

A closer look at the reasons, however, indicate that it is based on the fundamental principle of substantive equality. This is, of course, why social reality and the approach to be taken to the issue of causation, proof and judicial notice is so important. L'Heureux-Dubé J. articulated¹¹¹ the reality of the feminisations of poverty and the social forces disadvantaging women following divorce in very clear and thorough terms, especially through her references to Whiteman's work and the following now-famous quotation:

For most women and children, divorce means precipitous downward mobility C both economically and socially. The reduction in income brings residential moves and inferior housing, drastically diminished or nonexistent funds for recreation and leisure, and intense pressures due to inadequate time and money. Financial hardships in turn cause social dislocation and a loss of familiar networks for emotional support and social services, and intensify the psychological stress for women and children alike. On a societal level, divorce increases female and child poverty and creates an ever-widening gap between the economic well-being of divorced men, on the one hand, and their children and former wives on the other.¹¹²

Without the principle or value of substantive equality, there would be no need to consider the real and consequential effects of divorce and support policies

¹¹⁰ See e.g. *Report of the Florida Supreme Court Gender Bias Study Commission* (March, 1990); J. McLindon, "Separate But Unequal: The Economic Disaster of Divorce for Women and Children" (1987) 21 *Fam.L.Q.* 351.

¹¹¹ As she had also done in her dissenting judgment in *Symes*, *supra* note 6.

¹¹² Weitzman, *supra* note 40 at 323, cited in *Moge*, *supra* note 10 at 854.

upon women. This issue raised, in turn, the issue of judicial notice, as the social reality for women is key in establishing the inequality. Here, it is interesting that L'Heureux-Dubé J. tackled the doctrine of judicial notice directly. While McLachlin J.'s brief concurring reasons do not expressly disagree with that approach, she commented that "one must look at the actual social and personal reality of the situation...", implying that a court must be careful not to infer the particular facts from the general trends.

In form, however, *Moge* is just another family law case based on the interpretation of the statute and the relevant case law, something that McLachlin J. emphasized in her concurring reasons. The Court declined to directly overrule the *Pelech* Trilogy, though on the view of many academics, it was a stretch to avoid doing so. Rather, it applied classical common law methodology in restricting its application. The first basis for doing so was the fact that the 1985 legislation articulates four objectives: to recognize any economic advantages/disadvantages arising from the marriage or its breakdown; to apportion any financial consequences arising from the care of children of the marriage; relieve any economic hardship arising from the breakdown of the marriage; and to "in so far as practicable", promote the economic self-sufficiency of each former spouse within a reasonable period of time. The second basis upon which the trilogy was distinguished was the fact that in *Moge*, the initial terms of support had arisen by court order rather than the parties' own agreement. Neither of these bases is convincing in themselves. As far as the 1968 Act is concerned, it was arguably *broader* than the 1985 Act. Rather than mentioning the four objectives, section 11(1) set a very schematic criteria for corollary relief, including lump-sum or periodic support, custody and access:

...if it thinks it fit and just to do so having regard to the conduct of the parties and the condition, means and other circumstance of each of them, [the court may] make one or more of the following orders...¹¹³

Section 11(2) of the same Act provided for variation of orders

...if it thinks it fit and just to do so having regard to the conduct of the parties since the making of the order or any change in the condition, means or other circumstances of either of them.¹¹⁴

While it is true that under the 1985 Act the self-sufficiency objective is merely one among others, it is totally absent from the 1970 Act. It is true that the enactment of the 1985 Act provided an opportunity to distinguish cases decided under the earlier legislation, but it is not clear why the Court should have been so careful to preserve (at least in form) the authority of the Trilogy with respect to consensual orders, as the statutory framework had changed with respect to them as well. In short, the Court was remarkably deferent to the principle and methodology of *stare decisis*; it seems to have gone to some lengths to avoid

¹¹³ *Divorce Act*, R.S.O. 1970, c. D-8, s. 11(1).

¹¹⁴ *Ibid.* s. 11(2).

overruling the Trilogy. In spite of that, the general view since *Moge*, and especially since *G.(B) v. G.(L.)*¹¹⁵ and most recently, *Bracklow v. Bracklow*,¹¹⁶ has been that it has marked a “gradual erosion of the Trilogy standard”.¹¹⁷

It is the backdrop of the principle of substantive equality, however, that really explains the difference between the *Pelech* Trilogy and *Moge*. As I have noted above, this is implicit in the decision itself just as the principles of formal equality were implicit in the Trilogy. But the *Charter’s* indirect impact would be hard to overstate, as the following quotation from one of L’Heureux-Dubé J.’s speeches illustrates:

...equality [is]...the ultimate objective to ensure that the interpretation and application of the law in the sphere of family matters mirror our ideal of justice. In Canada, this ideal is unequivocally enshrined in section 15 of the *Canadian Charter of Rights and Freedoms*, which constitutionalizes the right of every person to be treated without discrimination.

Although family law has not traditionally been regarded as dealing with equality rights, I think that the notion of equality underlies the modern trend in family law. To deny the existence of the equality rights component in family law is to trivialize the very real inequalities suffered largely by women and children as a result of interpretations and applications of the law which, until recently, were largely androcentric. [...]

The relationship between equality and family law has matured somewhat in Canada in the ten years since section 15 came into force.¹¹⁸

In this interesting article, Justice L’Heureux-Dubé goes on to argue for the “pivotal importance of the social context in family law and the implications of judicial notice as a means to make equality work in this field”.¹¹⁹ In discussing the importance of context and social reality, she makes the point that in the absence of such an approach, it may be too easy to rely on notions of “objective truths” which may only be the reality of one social group or perspective.¹²⁰ She continued:

¹¹⁵ *B.(G). v. G.(L.)* (1995), 15 R.F.L. (4th) 201 (S.C.C.).

¹¹⁶ *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420.

¹¹⁷ M. Shaffer & D. Melamed, “Separation Agreements Post-*Moge*, *Willick*, and *L.G. v. G.B.*: A New Trilogy?” (1999) 16 Can J. Fam. L. 51 at 60.

¹¹⁸ C. L’Heureux-Dubé, “Making Equality Work in Family Law” (1997) 14 Can. J. Fam. L. 103 at 105-06.

¹¹⁹ *Ibid.* at 110.

¹²⁰ *Ibid.* at 111; for an exploration of these issues, see the Supreme Court of Canada decision of *R. v. R.D.S.*, [1997] 3 S.C.R. 484, in which the Crown argued that Judge Sparks, a female black judge in Nova Scotia, had been biased in acquitting a young black man appearing before her. In particular, the Crown argued that she had improperly taken judicial notice of the social context of racial tension between the police and the black community in Halifax. LaForest, L’Heureux-Dubé, McLachlin, and Goutier JJ. held that Sparks’s application of conceptualized judging was proper and that there was a recognition of the facts in evidence [489]. Cory and Iacobucci JJ. concurred that, given the high threshold for the test, there was no reasonable apprehension of bias, though they thought Sparks’ comments were worrisome [490]. Lamer, Sopinka and Major JJ. in dissent held that there was a reasonable apprehension of bias as Sparks had substituted her own experience for evidence [440].

There is no doubt in my mind that the intellectual honesty underlying this contextual approach is consistent, not only with our justice system's aspirations for truth and equality, but also with the important law and policy-making role of the judiciary. In Canada, since the advent of the *Charter*, it is no longer possible to deny that, in deciding questions of law or policy, judges essentially perform an active law and policy-making role rather than passively recognizing or discovering law that is dictated by precedent or principle. [...]¹²¹

One might think, on first glance, that this is merely stating the obvious until one realizes that L'Heureux-Dubé J. is not talking about matters such as criminal law, to which the *Charter* directly applies, but to matters such as spousal support which are traditionally considered as "private" law beyond its ambit. Her point, however, is more significant in that it articulates the profound impact of the principles articulated in the *Charter* in forming a framework to guide the development of non-*Charter* family law issues. While critics of this approach would suggest that this view facilitates inappropriate judicial "law-making", there are two responses. First, it has been expressly mandated by the *Charter* itself, and second, the articulation of the *Charter*'s principles such as section 15(1) and substantive equality in cases such as *M. v. H.*, *Miron v. Trudel* arguably now form a more transparent framework of principle than that which existed, for example, when *Murdoch* or even *Pelech* was decided.¹²²

In summary then, although the form and methodology of *Moge*, as well as subsequent family law decisions, has continued to follow a carefully common-law approach, the influence of the *Charter* both with respect to the overt and transparent role of principle and with respect to the now-recognized role of the judiciary in policy development has been profound. The other non-*Charter* area which demonstrates this point has been illustrated by cases involving pregnant women: *Daigle*, *D.F.G.*, and *Dobson*.¹²³

E. Reproductive Autonomy

The Supreme Court has, from at least *Morgentaler* on, been strongly and consistently of the view that women control their own bodies and that the fetus is not a legal person until birth. In the context of the cases in which these issues have been raised, it has been clear that although the discourse has been legal and formal, the driving principle has been one of women's rights to autonomy and particularly to control their reproductive selves. In *Daigle*, the formal issues were whether a fetus was a legal person pursuant to the *Civil Code of Lower Canada* and whether the father and former partner of the mother had standing

¹²¹ *Ibid.* at 112.

¹²² The importance of a backdrop of principle as one which can guide and channel judicial-decision making has been argued most famously by R. Dworkin; see R. Dworkin, *Law's Empire* (Cambridge: Harv. University Press, 1986).

¹²³ *Dobson v. Dobson*, [1999] 2 S.C.R. 753; *Winnipeg Child and Family Services (Northwest Area) v. D.F.G.*, [1997] 3 S.C.R. 925; and *Daigle*, *supra* note 69.

to enjoin the mother from obtaining an abortion.¹²⁴ In *D.F.G.* the issues were whether the *parens patriae* or jurisdiction of the courts should be extended to the unborn. In *Dobson* the issue was whether a pregnant woman who negligently caused an accident following which her son was born alive but seriously injured could be liable for those injuries. In all these cases but especially in the latter two, the Court discussed the policy implications at great length. Among these, the extent to which imposition of liability, or extending the notion of personhood to the fetus, would constitute serious intrusions into the lives of women was clearly very important. These cases, especially *Daigle* and *D.F.G.*, were highly publicized cases that attracted great public attention and heated, emotional debate. The public lines of debate were very clearly rights-based and framed, in each case, as the rights of a woman on one hand and the rights of a fetus (or a state or father acting on its behalf) on the other, and it is easy to forget that none was a *Charter* case. Nevertheless, these cases are excellent demonstrations of the extent to which the *Charter* has provided a principled framework to guide the development of the common law tradition. They are also examples of judicial restraint rather than the activism of which the Court is so often accused of that in each case the Court refused to extend the law to the fetus, saying that this was properly left to the legislature.

The Court in *Daigle v. Tremblay* took the rare step of issuing a single decision that was not only unanimous but attributed to “the Court”. In allowing Ms Daigle’s appeal, it held (i) that the fetus is not a human being within the meaning of the *Charter of Human Rights and Freedoms*;¹²⁵ (ii) that the fetus is not a “person” within the meaning of the *Civil Code of Lower Canada*;¹²⁶ and that (iii) accordingly no basis existed under which to issue an injunction restraining Ms Daigle from obtaining an abortion. The Court noted that a merely linguistic exegesis of the legislation could not resolve the issue of whether a fetus was a “person” or a “human being”:

What is required are substantive legal reasons which support a conclusion that the term “human being” has such and such a meaning. If the answer were as simple as the respondent contends, the question would not be before the Court nor would it be the subject of such intense debate in our society generally.¹²⁷

The Court relied on the time-honoured, interpretive law device of “legislative intent” to resolve this issue:

In our view the Québec *Charter*, considered as a whole, does not display any clear intention on part of its framers to consider the status of a foetus. This is most evident in the fact that the *Charter* lacks any definition of “human being” or “person”. For her

¹²⁴ Both lower courts in Québec had held that the fetus was a legal person and that the father had such standing. See *Daigle v. Tremblay*, [1989] R.J.Q. 1980 (Q.S.C.) and [1989] R.J.Q. 1735 (Q.C.A.).

¹²⁵ R.S.Q., c. C-12, article 1: “Every human being has a right to life, and to personal security, inviolability and freedom”.

¹²⁶ Article 18: “Every human being possesses juridical personality.”

¹²⁷ *Daigle*, *supra* note 69 at 553.

part, the appellant argues that this lack of an intention to deal with a foetus' status is, in itself, a strong reason for not finding foetal rights under the *Charter*. There is force in this argument. [...] If the legislature had wished to grant foetuses the right to life, then it seems unlikely that it would have left the protection of this right to such happenstance.¹²⁸

The Court concluded:

The task of properly classifying a foetus in law and in science are different pursuits. Ascribing personhood to a foetus in law is a fundamentally normative task. It results in the recognition of rights and duties a matter which falls outside the concerns of scientific classification. In short, this Court's task is a legal one. Decisions based upon broad social, political, moral and economic choices are more appropriately left to the legislature.¹²⁹

The result of this case clearly vindicated women's rights to control their bodies, but the decision itself was very restrained about this and based its decision on the previous law and the notion that such significant changes should be left to the legislature.

The decision in *D.F.G.* may be seen as a common law analogue to *Daigle*. There the issue was whether tort jurisdiction or *parens patriae* jurisdiction could apply to an unborn child by grounding an order compelling the pregnant mother to undergo drug treatment. In this case, decided eight years after *Daigle*, the Court was more somewhat more divided with a 7-2 decision. The majority, however, was also much more willing to base its decision upon the substantive rights of women.

The starting point of the majority decision is the general proposition that the law of Canada does not recognize the unborn child as a legal person. For present purposes the interesting issue concerned the question of whether the law of tort should be extended to allow the order sought to protect the foetus from the mother's drug abuse. McLachlin J., writing for the majority, stated as follows:

The proposed changes to the law of tort are major, affecting the rights and remedies available in many other areas of tort law. They involve moral choices and would create conflicts between fundamental interests and rights. They would have an immediate and drastic impact on the lives of women as well as men who might find themselves incarcerated and treated against their will for conduct alleged to harm others. And, they possess complex ramifications impossible for this Court to fully assess, giving rise to the danger that the proposed order might impede the goal of healthy infants more than it would promote it. In short, these are not the sort of changes which common law courts can or should make. These are the sort of changes which should be left to the legislature.¹³⁰

The majority also expressed unwillingness to treat the interests of the foetus separately from those of the mother and noted that this would risk creating "a conflict between the pregnant woman as an autonomous decision-maker and her

¹²⁸ *Ibid.* at 555.

¹²⁹ *Ibid.* at 553 [this is cited in *D.F.G.*].

¹³⁰ *Supra* note 122 at 941.

fetus".¹³¹ The concern for the rights of women is captured by the following passage which McLachlin J. cited from the Royal Commission On New Reproductive Technologies report:

From the woman's perspective,...considering the interests of her foetus separately from her own has the potential to create adversary situations with negative consequences for her autonomy and bodily integrity, for her relationship with her partner, and for her relationship with her physician. Judicial intervention is bound to precipitate crisis and conflict, instead of preventing them through support and care. It also ignores the basic components of women's fundamental human rights C the right to bodily integrity, and the right to equality, privacy and dignity.¹³²

The concern with the rights of the pregnant woman was also crucial in the consideration of whether the *paren patriae* jurisdiction could be applied to protect a foetus. Exercising this jurisdiction would necessarily infringe the mother's own personal and physical rights and liberties, the majority noted, commenting that "[i]f anything is to be done, the legislature is in a much better position to weight the competing interests and arrive at a solution that is principled and minimally intrusive to pregnant women".¹³³

The increasing willingness of the Court to anchor decisions about doctrines of legal personality in the substantive principles of the mothers' rights, then, is more explicit in *D.F.G.* than in *Daigle*, and supports the argument that the presence of the *Charter* has exerted a growing effect over time on the application of its concepts and principles in cases that are not actually *Charter* cases. This development is most clear in the 1999 decision in *Dobson*. In some ways, this was a more difficult case than the earlier two. It is clear that a child born alive and viable may sue in tort for injuries sustained prior to birth. The only issue here arose out of the fact that the tortfeasor was the mother herself. The majority of the full court (Major and Bastarache JJ. dissenting) held that the public policy concerns raised were of such a nature and magnitude that no legal duty of care could or should be imposed by courts upon a pregnant woman towards her foetus or subsequently born child. It also held that the legislature could enact legislation in the field though it would be subject to the limits imposed by the *Charter*. In writing for the majority, Cory J. cited two major policy concerns militating against the imposition of such a duty: (1) the privacy and autonomy of women, and (2) the difficulty in articulating a judicial standard of conduct for pregnant women. Although the reasons of the majority do emphasize the privacy and autonomy rights of women, however, Cory J.'s reasons do not mention the *Charter*. McLachlin J. (as she then was) wrote concurring reasons on behalf of herself and L'Heureux-Dubé J. in which she emphasized "the constitutional values underpinning the autonomy interest of pregnant women and the difficulty with using tort principles to restrict that interest".¹³⁴ She wrote:

¹³¹ *Ibid.* at para. 37.

¹³² *Ibid.* at para. 37.

¹³³ *Ibid.* at para. 56.

¹³⁴ *Supra* note 122 at para. 83.

In my view, to apply common law liability for negligence generally to pregnant women in relation to the unborn is to trench unacceptably on the liberty and equality interests of pregnant women. The common law must reflect the values enshrined in the *Canadian Charter of Rights and Freedoms*. Liability for foetal injury by pregnant women would run contrary to two of the most fundamental of these values C liberty and equality.¹³⁵

McLachlin J.'s reasons also point out that the modest goal of allowing children born with injuries sustained before birth due to their mothers' negligence to recover under their liability insurance can be best accomplished by legislative action. Unlike an expansion of the common law, legislative change can be tailored so that it will not have the effect of trenching liberty and rights to equal treatment.

There are two significant differences between the majority reasons and those of McLachlin J. in *Dobson*. First, it seems that here, as in other cases such as *Moge*, the Court is increasingly willing to draw explicitly on *Charter* values and to help form principled frameworks in non-*Charter* cases. Second, McLachlin J.'s reasons may also serve as a caution for the legislator to recognize the existence of constitutional rights in considering legislative change.

In these cases, the Court has not been at all "activist" in the sense in which its critics frequently accuse it (or at least some members of the Court). Rather, it has refused to extend the law. This refusal has been supported not only by traditional common law methodology and steadfast refusal to consider the unborn as legal persons, but increasingly by interpretations of substantive principles and rights, such as equality and liberty, which are in keeping with the sorts of meanings given to these principles within constitutional settings. It seems, then, that the *Charter* in this sense has served to constrain or at least to channel judicial decision-making generally.

F. *Extending the Meaning of Family: Applying s.15(1)*

As I have discussed, the structure of family law as we have thought of it in Canada has been changed little by the *Charter* and rights discourse. In matters involving custody and access, for example, the Court has refused to allow rights-discourse, and particularly a parental rights-discourse, to hijack the child-centred standard of the best interests of the child. At the same time, however, the *Charter* and its developing jurisprudence has provided a principled framework of values which has guided and influenced the Court in issues involving the interpretation or extension of common law, the interpretation of statutes and the exercise of judicial discretion. The cases discussed above, *Moge* as well as *D.F.G.* and *Dobson*, are excellent illustrations of this. The developing Supreme Court jurisprudence which has applied and emphasized equality as a fundamental principle of family law may in turn be seen as having helped set the groundwork for the constitutional application of equality principles in *Miron v. Trudel*, *Egan*, and *M. v. H.*

¹³⁵ *Ibid.* at para. 84.

These cases are remarkable from many perspectives. For the purposes of this paper, they provide a wonderful comparison with our starting point, *Murdoch*. *Murdoch* illustrated both a highly doctrinal approach to family law, and a very conservative approach with respect to the role of the Court. As I noted there, even Laskin J. in dissent framed his analysis in entirely doctrinal terms without any explicit reference to principles of equality, while the majority decision perpetrated a legal regime that was already outdated and considerably behind social change. By *M. v. H.*, we have a Court which, mandated by the *Charter* and its effect on the judicial role, is willing to lead controversial social change,¹³⁶ especially, it seems, in the face of legislative recalcitrance when *Charter* violations have been established.

These recent cases are also remarkable because while they have not changed the operational or even structural aspects of family law, such as the way in which support, custody or access decisions are made, they are revolutionary in a more basic sense as they have legally redrawn and expanded the legal vision of family itself. As *Murdoch* illustrated, the Supreme Court historically lagged behind social change and tended to avoid open discussions concerning family and social policy. Obviously, the *Charter* has thrust the judiciary into a much broader role and this has clearly influenced family law. As I have discussed above, there has been a constitutionalization of family law in a broad, principled sense which has affected the substance and principles of family law. This view, and the ascendancy of family law as an area which has developed a high profile both within the Court and in the public eye, has contributed to a vision of the family as an important personal and social resource and advantage whose existence should be fostered and protected. While, as cases such as *Lavallée* show, the modern version is a far cry from the patriarchal impenetrable private fortress, it is a constellation to be respected. It is also a fundamental benefit to which access is crucial, and this of course is where the Court has shown an increasing willingness to apply the *Charter* in a manner which is forcing legislative change where it had been very slow in coming.

The Court, of course, does not form or even lead public policy. But it has played a facilitative and principled role with respect to the changing definition and role of the family. In applying the *Charter* and section 15 in particular in *Miron v. Trudel* and *M. v. H.*, as well as the reasoning of other cases such as *Egan* and L'Heureux-Dubé's J. discussion of the meaning of family in *Mossop*,¹³⁷ the Court has broken the legislative gridlock which had seemed for so long to have gripped parliaments across the country on these issues.

¹³⁶ The Court is not unanimous in thinking of the family as a functional unit as opposed to a unit defined by heterosexual marriage premised on the general potential for procreation. Goutier J. expressed this view in dissent in *M. v. H.* (as well as earlier cases) but now appears to be alone on the issue. For a discussion of the gradual extension of the legal definition of the family since the 1960s, see N. Bala, "The Evolving Canadian Definition of the Family: Towards a Pluralistic and Functional Approach" (1994) 8 Int. J. Law & Fam. 293.

¹³⁷ In dissent, though these comments have been widely cited and the *Charter* was not argued there.

How can we understand the distinction between the Court's strong support for the application of the Charter in these cases and its reticence to apply the discourse of rights in cases such as *Young* as discussed above? First of all, the Court has been reluctant to encourage the development of an individual rights discourse that might tend to foster discord among members of a family, whether the context has been a pregnant woman's decision about drug treatment, or a dispute over custody or relocation between parents. The Court has, as cases such as *Dobson* illustrate, applied the values and principles articulated in the *Charter* even in non-*Charter* cases but its application has not provided a "sword" for one family member against another.

The Court has applied the *Charter* to support the institution of the family in this more functional way. As I have written elsewhere, family law has been preoccupied with constructing boundaries traditionally which see all but very few players or relationships as legally relevant.¹³⁸ While social practices had been challenging this norm of exclusivity, family law has been slow to respond. In expanding the notion of family, the Court has been recognizing and affirming the importance of recognizing the plurality of social units which are likely to provide the support human beings generally need in order to be full participating members of society. The family has taken on a much more (though not exclusively) public dimension as the issues frequently have related to public matters, such as access to statutory insurance benefits in *Miron v. Trudel*, pension benefits as in *Egan*, leave policies as in *Mossop* and so on. Family law can no longer be seen as being centrally concerned with the protection of the institution of marriage.¹³⁹ Rather, it is increasingly concerned about that basic social unit within which our closest and most intimate human relationships exist, and this may include single parents with children, gay or lesbian partners, or unmarried couples. Increasingly, the definition of the family is understood in functional terms as that basic unit of emotional and financial interdependency, whether it includes children, more than one adult, or even relationships of sexual affiliation.¹⁴⁰ Cases such as *Miron v. Trudel* and *M. v. H.* reflect the recognition of this.¹⁴¹

¹³⁸ *Infra.* note 140.

¹³⁹ Though the matter of access to the institution of marriage itself as opposed to a parallel form of "domestic partnership" is a controversial issue at present. See K. Lahey, *Are We 'Persons' Yet: Law and Sexuality in Canada* (Toronto: University of Toronto Press, 1999).

¹⁴⁰ Fineman, *supra* note 2; see also A. Harvison Young, "Reconceiving the Family" (1998) 6 J. Gender L. 505.

¹⁴¹ The dissenting reasons of L'Heureux-Dubé J. in *Mossop*, *supra* note 35, in which she discusses the nature of family in very inclusive terms may be seen as a harbinger of these subsequent cases. Her reasons may also illustrate the important role that obiter or dissenting judgements may have in initiating discussions, and introducing approaches that may take some time to develop.

The tendency toward a more inclusive vision of the family is also reflected in non-*Charter* jurisprudence with *Chartier v. Chartier*¹⁴² providing an excellent example. There, a mother was claiming child support from her estranged husband who was the natural father of one of the children but not the other. The dispute concerned the question of whether the stepfather stood “in the place of a parent” within the meaning of the *Divorce Act*.¹⁴³ The Court held that once having established a parent-child relationship, the stepfather could not unilaterally terminate it when his relationship with the child’s mother ended, and that such a relationship had been established in this case. While the law has traditionally treated step-fathers as legal strangers, and parenthood as an “all or nothing” concept, this decision:

recognizes the reality of multiple parents and the centrality of the child’s interest in maintaining relationships with those who have played significant roles in their lives. Moreover, the imposition of support obligations on the stepfather in Canada does not hinge on the absence of the natural father from the scene, creating a very real possibility of multiple debtors of the child support obligations.¹⁴⁴

It is difficult to consider the *Charter* and the meaning of “spouse” or family without becoming mired in questions such as whether a “public benefit” case such as *Egan* would now reach the same result and whether the change in membership of the Court has made a major effect on this. But I nevertheless propose to do so, and very briefly. This is made easier as my concern has more to do with the underlying view of family and the role of family law than with the precise holdings in the case, and for this reason I will refer primarily to *M. v. H.*

Although we could argue about the precise holdings of the family law cases dealing with section 15 of the *Charter*, it is clear that, read together, they manifest a growing consensus with respect to the underlying vision and purpose of family. Increasingly, the family unit is understood in terms of “interdependence” and “partnerships”, in terms of nurturing, companionship and possibly the raising of children. The economic partnerships of marriage or analogous relationships are also of public interest in the sense that they may provide for the efficient exchanges of labour for financial support and security, thus decreasing the demand on the public purse.¹⁴⁵ In *M. v. H.*, the holding that the exclusion of same-sex couples from entitlement to support pursuant to s. 29 of the *Family Law Act*¹⁴⁶ was discriminatory and contrary to Section 15(1) reflected somewhat broader views about the family. First of all, exclusion from this socially and legally sanctioned state is seen to violate human dignity. In *Egan*, the Court unanimously held that sexual orientation is an analogous ground to those enumerated in Section 15(1), describing it as “a deeply personal characteristic that is either unchangeable or

¹⁴² [1999] 1 S.C.R. 242. See Comment “This Child Does Have 2 (Or More) Fathers...: Step-parents and Support Obligations” (2000) 45 McGill C.J. 107.

¹⁴³ R.S.O. 1985 (2d Supp.), c. 3, s. 2(1).

¹⁴⁴ *Supra* note 140 at 112.

¹⁴⁵ See Crossman, *supra* note 51.

¹⁴⁶ R.S.O. 1990.

changeable at unacceptable personal costs.”¹⁴⁷ A majority of the Court also expressly recognized that gays, lesbians and bisexuals, “whether as individuals or couples, form an identifiable minority who have suffered and continue to suffer serious social, political and economic disadvantage.”¹⁴⁸ On the subject of whether section 29 was discriminatory in *M. v. H.*, Cory, J. wrote as follows:

The relevant inquiry is whether the differential treatment imposes a burden upon or withholds a benefit from the claimant in a manner that reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuation or promoting the view that the individual is less capable or worthy of recognition as a human being or as a member of Canadian society, equally deserving of concern, respect and consideration.¹⁴⁹

Although *Egan*, *M. v. H.*, and *Miron v. Trudel* have all involved access to special benefits, it is increasingly clear that respect for human dignity is central to section 15(1). In discussing the contextual factors that may be referred to by a section 15 claimant in order to demonstrate that legislation demeans his or her dignity, Cory J. included the nature of the interest affected by the impugned legislation:

Drawing upon the reasons of L’Heureux-Dubé J. In *Egan*, *supra*, Iacobucci J. stated that the discriminatory calibre of differential treatment cannot be fully appreciated without considering whether the distinction in question restricts access to a fundamental social institution, or affects a basic aspect of full membership in Canadian society...¹⁵⁰

At first glance, the exclusion from access to the support scheme of the *FLA* was the issue here rather than access to the institutions of marriage or social recognition as a family. But Cory J. also continues and states that:

The societal significance of the benefit conferred by the statute cannot be overemphasised. The exclusion of same-sex partners from the benefits of section 29 of the *FLA* promotes the view that M., and individuals in same-sex relationships generally, are less worthy of recognition and protection. It implies that they are judged to be incapable of forming intimate relationships of economic interdependence as compared to opposite-sex couples, without regard to their actual circumstances.¹⁵¹

This quotation acknowledges at least implicitly that such recognition is a fundamental aspect of human dignity and that the notions of family and marriage-like relationships must therefore be much wider and inclusive than they have traditionally been.¹⁵²

¹⁴⁷ *Egan v. Canada*, [1995] 2 S.C.R. 513 at para. 5.

¹⁴⁸ *Ibid.* at para. 175 per Cory, J.; at para. 89 per L’Heureux-Dubé, J.; also cited by Cory, J. in *M. v. H.* at para. 64.

¹⁴⁹ *Supra* note 5 at para. 65, referring to *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497.

¹⁵⁰ *Ibid.* at para. 72, referring to Iacobucci J. in *Law*, *supra* note 5 at para. 74.

¹⁵¹ *Ibid.* at para. 73.

¹⁵² In concurring reasons, Bastarache J. also saw the exclusion as one “that puts the [into question] the dignity of the person affected [...] This exclusion suggests that their union is not worthy of recognition or protection. There is therefore a denial or equality within the meaning of s. 15”. *Ibid.* at para. 291.

IV. Conclusion

In the years since *Murdoch* was decided in 1975, family law and the Supreme Court have undergone great changes. Family law has gone from being a sleepy backwater of the law that was frequently seen as an unfortunate necessity, to an area of law that is increasingly seen as a microcosm of the most fundamental social issues and tensions facing us. A modern family law course must be at least as concerned with crucial threshold issues such as “what is a family, and what does/should the law have to say about this?” as with the traditional issues such as marriage, separation and divorce, and family property. Family law, and family law cases, are of great public interest and often controversy, as cases such as *Daigle* and *M. v. H.* have illustrated. At the same time, family law can no longer be characterized simply as an area of law falling within the domain of private law. The *Charter* has reinforced this trend in two crucial ways. First, it has articulated values such as equality that form a framework or backdrop of principle, in turn creating an overall degree of integrity or coherence. It has achieved this in certain areas, such as support and custody, while retaining the underlying structure of the law. Second, it has legitimated a methodology of decision-making that encourages the open articulation of policy considerations. These factors have converged to make family law an important aspect of the Supreme Court docket, and at the same time, to make the Supreme Court a central player in the formation and development of family law and policy in this country in a way that was not true before.