

DOMESTIC CONTRACTS AND FAMILY LAW EXCEPTIONALISM: AN HISTORICAL PERSPECTIVE

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Since at least the late 1980s, the enforceability of domestic contracts in Canadian common law has tended to be analyzed in terms of a formal equality/substantive fairness dichotomy. This paper suggests that our understanding of the common law of domestic contracts in Canada can be enriched by adding an historical lens to existing analyses. Specifically, the paper argues that the Supreme Court of Canada's decision in the *Pelech v. Pelech* trilogy was not only an attempt to inject the ideology of contract into family law, but also amounted to a continuation of long-standing approaches to separation agreements in English and Canadian law—an approach that rendered the treatment of separation agreements and the result in *Pelech* historical outliers when considered against broader exceptionalizing trends in judicial and scholarly approaches to agreements touching upon the family. From this perspective, the retreat from *Pelech* in the subsequent Supreme Court of Canada cases of *Miglin v. Miglin*, *Hartshorne v. Hartshorne*, and *Rick v. Brandsema* was, therefore, also a move away from the historically distinctive approach to separation agreements, and the continuation of much older processes of exceptionalism within family law.

Depuis au moins la fin des années 1980, le caractère exécutoire des contrats familiaux dans la common law canadienne a eu tendance à être analysé sous l'angle d'une dichotomie égalité formelle/équité matérielle. Cet article suggère que notre compréhension de la common law des contrats familiaux au Canada peut être enrichie par l'ajout d'une perspective historique aux analyses existantes. Plus précisément, le document soutient que la décision de la Cour suprême du Canada dans la trilogie *Pelech c. Pelech* n'était pas seulement une tentative d'introduire l'idéologie contractuelle dans le droit de la famille, mais aussi une continuation des approches suivies de longue date en matière de conventions de séparation en droit anglais et canadien — une approche qui a rendu le traitement des conventions de séparation et la décision dans *Pelech* historiquement aberrants lorsqu'on les considère par rapport aux tendances générales plus larges des approches judiciaires et universitaires des conventions dans le domaine familial. De ce point de vue, le recul par rapport à *Pelech* dans les affaires subséquentes de la Cour suprême du Canada *Miglin c. Miglin*, *Hartshorne c. Hartshorne* et *Rick c. Brandsema* a donc également constitué un éloignement de l'approche historique distinctive des conventions de séparation et la poursuite de processus d'exceptionnalisme beaucoup plus anciens au sein du droit de la famille.

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