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CONTRACTS IN CLOSE PERSONAL RELATIONSHIPS

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SUMMARY

When considering the ways in which the law organizes exchanges between people in close relationships involving considerable economic and emotional interdependence, contracts do not immediately come to mind. The contractual model, as classical legal theory conceptualizes it, hardly seems compatible with the intimacy and trust that such relationships generally involve.

However, new conceptions of contract, based on contemporary theories, can be proposed. A contract is more than an instrument of legal coercion used to threaten a party into performing his or her obligations. Beyond the dominant paradigms and pre-conceived notions, it can also be helpful in organizing and planning a long-lasting and beneficial relationship that responds to the partners' various needs for ordering, regardless of the level of normativity involved. Within a clearly defined legal environment, contracts can help build a framework that is adjusted to the contours of each relationship while respecting the values of equality, justice and liberty upon which Canadian society is based.

BIOGRAPHICAL NOTES

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Introduction

The close relationships that we develop and nurture in the course of our lives shape our identity and generally reinforce our sense of belonging to the community.¹ Owing to their intimacy and emotional significance, these relationships are usually a source of fulfilment, happiness and comfort.

While some relationships are characterized by complete spontaneity and involve no formal organization or support, other kinds of relationships involve some degree of ordering and structure. Relationships based on a true dynamic of emotional and economic interdependence fall within this category. They generally involve some form of cohabitation.

Marriages, and other types of consensual union, are the quintessential illustration of this category. However, they are not the only relationships involving cohabitation and considerable interdependence. Consider the case of two sisters who live together, or an adult child who lives with and cares for an elderly mother. Although they are not bound together by conjugal love, they may nonetheless be called upon to fulfil each other's needs in a true dynamic of interdependence.

Marriage has been raised to the level of a status, even an institution, and has long been subject to very tight government regulation.² While consensual unions have not been placed on the same socio-legal footing, lawmakers are giving them increased importance and impact. Most provincial and federal legislation of a social nature treats heterosexual or same-sex consensual

¹ Law Commission of Canada, *Recognizing and Supporting Close Personal Relationships Between Adults: Discussion Paper* (Ottawa: 2000) at 7. (Also available from the Commission's web site at <http://www.cdc.gc.ca/en/themes/pr/cpra/paper.html>).

² For a general overview of the legal rules governing marriage at the federal, provincial and territorial levels, see Appendix A of an excellent study by Martha Bailey, "Marriage and Marriage-Like Relationships" available from the Law Commission of Canada web site at <http://www.cdc.gc.ca/en/themes/pr/cpra/bailey/index.html>.

unions as though they were marriages, and some provincial statutes grant them certain prerogatives traditionally associated with marriage.³ Recently, Nova Scotia followed the example of certain foreign jurisdictions and established a domestic partnership registration system that gives partners access to a legal status that is practically equivalent to that of married couples.⁴

Despite what they have in common, not all highly interdependent relationships enjoy the same legal recognition. The state focuses its attention on conjugal relationships and neglects the others.

The law has always marginalized non-conjugal relationships. The state pays little attention to the interdependence between sisters who share a residence, or adults who live with their elderly parents. In other words, lawmakers have yet to provide a solid framework or support for the interdependent relations between people in close non-conjugal relationships: They have not yet created meaningful social policies or programs for them, and they have not yet extended them rights similar to those enjoyed by spouses in relation to each other.⁵

Last fall, the Law Commission of Canada launched a broad public consultation concerning the role of the state in close personal relationships between adults, and in particular, the values that should guide any legislative reform on the subject.⁶

³ For a general overview of the federal, provincial and territorial laws governing opposite-sex and same-sex cohabitation, see *ibid.*, Appendices B and C.

⁴ *Law Reform (2000) Act*, S.N.S. 2000, c. 29.

⁵ For an overview of the federal, provincial and territorial laws governing non-conjugal relationships, see Martha Bailey, "Marriage and Marriage-Like Relationships" Appendix D, available from the Law Commission of Canada web site at <http://www.cdc.gc.ca/en/themes/pr/cpra/bailey/index.html>.

⁶ Here is how the Commission's discussion paper articulates the principles that will guide the research: "This Discussion Paper is concerned with close personal relationships between adults. The Law Commission notes that adults have a wide variety of reasons for forming close personal relationships and that these relationships themselves are quite diverse. It explores the assumptions and goals that lie behind legislative programmes today and considers the rationales for Parliamentary involvement in regulating close personal relationships between adults. Parliament's current approaches to recognizing and supporting close adult personal relationships do not always line up with society's expectations." Law Commission of Canada, *Recognizing and Supporting Close Personal Relationships Between Adults: Discussion Paper* (Ottawa: 2000) at iii.

This paper is about contracts in close or intimate personal relationships and is part of this general review. If a jurisdiction wishes to reform its laws, it must review its social policies and programs based on the priorities and trends it has identified. But it must also consider the methods that the law uses to structure private exchanges within close personal relationships.⁷

The contractual model has some very interesting potential in this regard. As an instrument of private normativity, contracts offer a means to establish a framework of rules adjusted to the particularities of every relationship. When delineated by a well-defined legal environment, it can provide adequate recognition and support to personal relationships of any kind, while preserving the values of equality and autonomy that form the basis of such relationships.

In Part 1, I will set out the theoretical framework of the contractual model I advocate. The purposes of the model are described in Part 2, and the normative perspectives of the model are discussed in Part 3. The role of legal professionals in deploying this model, and the legislative environment in which it can be developed successfully, will be the subjects of Parts 4 and 5 respectively.

I. Theoretical framework

In the collective imagination, contracts are synonymous with cold rationality. They are perceived as a defensive instrument, a protective shield that each contracting party may raise whenever it is opportune to do so. Essentially, contracts are portrayed as a solemn, rigid and inflexible

⁷ Naturally, this is a matter for the provinces, since property and civil rights fall within provincial jurisdiction pursuant to s. 92(13) of the *Constitution Act, 1867*, 30 & 31 Vict., U.K., c. 3.

document under the threat of which a party will ultimately agree to respect his or her commitments.

This conception of contracts is rooted in the classical legal theory⁸ that holds that a contract is a meeting of the minds with a view to creating legally binding effects.⁹ In other words, a contract is equivalent to a set of legal and lawful promises, the non-performance for which the law provides a remedy in the courts. Conceptualized this way, a contract takes on its real meaning when it has been breached,¹⁰ whereupon it is removed from the vault (to which it was committed immediately after being signed) and sent to the lawyer, whose mission is to ensure that the rights of the party that he or she represents, as they crystallized upon the exchange of consents, will prevail.

Naturally, such a concept of contract is not appropriate for people in a close relationship who seek the benefit of a legal framework. How can spouses, or two sisters who share their daily lives, lock themselves into a rigid structure when their relationship must evolve as events occur and time goes by? How can they perceive themselves as adversaries and agree to a pact in which judicial sanction is the primary consideration? Clearly, the bonds of love, brotherhood, sisterhood, family or friendship between people involved in a close relationship cannot accommodate the climate of suspicion and mistrust that such a limited conception of concept assumes.

⁸ My reference to classic contract theory is a reference to doctrine in general use among lawyers and judges and reflected in major French and Quebec treatises on the law of obligations: Louise Rolland, "Les figures contemporaines du contrat" (1999) 44 McGill L.J. 903 at 909, note 12.

⁹ Jean Pineau & Danielle Burman, *Théorie des obligations*, 2d ed. (Montréal: Thémis, 1988) at 28; Didier Lluelles (in association with Benoit Moore), *Droit québécois des obligations*, vol. 1 (Montréal: Thémis, 1998) at 57; Henri, Léon & Jean Mazeaud, *Leçons de droit civil – Les obligations – Théorie générale*, 8th ed. (Paris: Montchrestien, 1991) at 49.

¹⁰ "The state law of contract is a law of precaution, a law in which people take their distance, a law of war guided by the logic of disputes. The state law of contract, taught in law schools, is a particularly abstract law built on the logic of adversarial debate and trials." Translated from Jean-Guy Belley, "L'entreprise, l'approvisionnement et le droit: Vers une théorie pluraliste du contrat" (1991) 32 C. de D. 253 at 299.

No definition of contracts can stem from a single paradigm, however rich in meaning it may be. We must not allow the coercive function of contracts, on which classical theory focuses, to divert our attention from their other functions, including functions that the contractual practices of socio-economic actors reveal. Empirical research performed over the last few decades is particularly interesting in this regard.

It would seem that socio-economic actors treat contracts not as instruments of sanction, but as instruments for communicating and for organizing and planning their relationships.¹¹ Far from languishing in the back of a drawer, contracts act as a referential platform, or relationship guide, to which the parties refer to orient their actions based on the expectations and aspirations that each of them has expressed. In short, contracting parties do not view their contract through the same lens that lawyers use. The coercive function is relegated to a secondary role. Several scholars have, in fact, recognized this reality. For example, Professor Marjorie Maguire Shultz writes:

Given their academic training, lawyers naturally emphasise dispute resolution and contract enforcement by courts. By contrast, the parties to a contract do not focus on enforcement but on the goals, plans, relationships, exchanges.¹²

Similarly, Professor Ian R. Macneil states:

[Performance planning] is, after all, the way most participants view most contract planning — only lawyers and other trouble-oriented folk look to contracts primarily as a source of trouble and disputation, rather than as a way of getting things done.¹³

¹¹ Stewart Macaulay, "Non-Contractual Relations in Business: A Preliminary Study" (1963) 28 *Amer. Sociol. Rev.* 55; "Elegant Models, Empirical Pictures, and the Complexities of Contract" (1977) 11 *L. & Soc. Rev.* 507 and "An Empirical View of Contract" (1985) 3 *Wisconsin L. Rev.* 465. In Québec, see especially Jean-Guy Belley, "L'entreprise, l'approvisionnement et le droit: Vers une théorie pluraliste du contrat" (1991) 32 *C. de D.* 253.

¹² Marjorie Maguire Shultz, "Contractual Ordering of Marriage: A New Model for State Policy" (1982) 70 *Cal. L. Rev.* 204 at 306.

¹³ Ian R. Macneil, *Contracts: Exchange Transactions and Relations*, 2d ed. (Mineola, N.Y.: Foundation Press, 1978) cited in Marjorie Maguire Shultz, "Contractual Ordering of Marriage: A New Model for State Policy" (1982) 70 *Cal. L. Rev.* 204 at 306, note 387.

Closer to home, Professor Jean-Guy Belley made the following comments about the culture of Quebec notaries:

[TRANSLATION] The notarial profession is not easily parted from its propensity to address contracts solely from the viewpoint of the legal system, instead of addressing them from the perspective of social actors who seek a method of ordering that is adapted to their transactions or relationships.¹⁴

This “reality gap” between classical theory and contractual practice favoured the emergence of a new theory that is more consistent with observable facts. Developed by American professor Ian R. Macneil, this “relational contract theory” offers a conception of contracts that is better adapted to today’s exchanges and better suited to the special dynamic of close relationships.¹⁵

Macneil identifies two categories of contractual exchange. The first, the discrete transaction, is a one-time transactional exchange. In theory, a discrete transaction involves no significant relationship between the parties beyond the exchange of consents. A contract of sale is a good example of this type of exchange: it merely memorializes the transfer of ownership and payment of the price.

The second category consists of “relational” exchanges. This type of exchange is a project in which the parties intend to cooperate over the long-term. Relational exchanges are longer lasting than transactional exchanges. Examples include relationships between members of a partnership, working relationships between an employer and an employee, or relationships between franchisers and franchisees.

¹⁴ Jean-Guy Belley, “Réflexion critique sur la culture notariale du contrat” (1996) 1 C.P. du N. 105 at 108. Speaking more generally, Professor Belley writes: “[...] the classical conception of contracts offers a very impoverished representation of sociological reality.” Translated from Jean-Guy Belley, “L’entreprise, l’approvisionnement et le droit: Vers une théorie pluraliste du contrat” (1991) 32 C. de D. 253 at 287.

¹⁵ See especially Ian R. Macneil, *The New Social Contract* (London: Yale University Press, 1980).

Macneil's view is that classical theory, and the arcane dogmas on which it is based, remain centered on transactional contracts and exclude or marginalize relational exchanges, and that a new conceptualization of contracts might be able to accommodate all the subtleties, and ultimately all different expressions, of contractual rationality. In sum, Macneil argues that there is no reasonable way to deal with relational contracts through the lens of popular ideas that are strongly influenced by classical theory.

Thus, unlike a transactional contract, through which the parties carry out a one-time, decontextualized exchange without considering their respective identities, a relational contract is a way to structure a relationship that people, who have subjectively chosen each other, intentionally maintain and pursue in order to carry out a collaborative project. Instead of being a way to compensate for a lack of trust by providing for a sanction in the event of non-performance, the contract is a way to establish, adjust and express the normative framework in which the relationship can articulate itself. Relational contracts are not destined mechanically to program the end of the exchange, but rather, to support the relationship by enabling the parties to preserve it into the future and harmonize it with norms that emerge from the surroundings.

In this kind of theoretical perspective, the contractual process is centered on entirely different values. Unlike classical contracts, which are based on individualism, domination and antagonism, relational contracts are based on interdependence, cooperation and solidarity. Professor Louise Rolland has commented on these values, which empirical studies have proven to exist:

The parties, sharing a common economic destiny and desiring to preserve their business ties, set aside the conflictual transaction mindset and agree to work

together. Consequently, the dominant values of integrity and solidarity are incorporated into the joint enterprise.¹⁶

Macneil explains that only way these values can fully be realized is if can evolve within a mutable framework. Unlike the classical model, which is characterized by immutability, relational contracts are part of a temporal continuum. Flexible in nature, they are called upon to evolve with the passage of time and the occurrence of events. The parties to a relational contract are not fettering themselves. Rather, they are equipping themselves with an open framework that they will eventually be called upon to renegotiate based on the way their respective expectations have evolved.

Professor Belley explains the scope of this reality as follows: [TRANSLATION] “[G]iven the requirements of contractual and social solidarity, it is futile, and perhaps even dangerous, to attempt to lock the ordering of the future into any kind of conceptual and logical framework that is fixed on a one-time basis.¹⁷ Essentially, then, the flexibility of the contract is part of the bond of interdependence that encourages necessary adaptation to prevail over stubborn adherence to original agreements and plans.¹⁸

Although relational theory was primarily conceived to account for business relationships, its general framework is just as well suited to close personal relationships between adults.¹⁹

Although he does not dwell on the point, Professor Macneil himself recognizes that marriage is a type of relational exchange.²⁰

¹⁶ Louise Rolland, “Les figures contemporaines du contrat” (1999) McGill L.J. 903 at 926. Professor Rolland correctly adds that these values are not adopted out of virtue, but rather, as part of a contractual mindset based on greater economic efficiency.

¹⁷ Jean-Guy Belley, “Deux journées dans la vie du droit: Georges Gurvitch et Ian R. Macneil” (1988) 3 Can. J. L. & Soc. 27 at 34.

¹⁸ Jean-Guy Belley, *Résumé de la théorie du contrat relationnel de Ian R. Macneil* (Québec: 1995) at 5 [unpublished.]

¹⁹ For an application to marriage, see Marjorie Maguire Shultz, “Contractual Ordering of Marriage: A New Model for State Policy” (1982) 70 Cal. L. Rev. 204, especially at 301 *et seq.* See also Elizabeth S. Scott & Robert E. Scott, “Marriage as Relational Contract” (1998) 84 Va. L. Rev. 1225.

²⁰ Ian R. Macneil, “The Many Futures of Contracts” (1974) 47 S. Cal. L. Rev. 691 at 721, 725, 746-7 and 751.

Indeed, it is in the interest of persons in close relationships — business and personal alike — to equip themselves with a platform on which to organize and plan their relationships. To preserve this relationship and the benefits that each hopes to derive from it, they must be motivated by the primary relational values of cooperation, integrity and solidarity. Since their relationship is likely to evolve, they will need constantly to adjust, adapt and renegotiate the framework for their dealings, based on the changes that any uncertain future has in store.

Thus, unlike the principles of classical theory, the theoretical framework that Macneil proposes is compatible with the reality of close relationships. Instead of conflicting with the fundamental values on which such relationships are based, it recognizes their normative value fully.²¹ As *contracting parties*, people in intimate relationships cannot be approached like enemies trying to protect themselves from each other. They must be treated like true partners who are concerned about preserving the stability of their relationship.

Having considered the general theoretical framework, we now fall to consider the purposes of relational contracts in close personal relationships. As I hope to demonstrate, a close relationship marked by a dynamic of interdependence warrants a level of organization that goes well beyond the challenges around which contractual ordering has traditionally been limited.

²¹ In fact, Macneil recognizes the existence of ten contract norms, whose intensity varies depending on whether the contractual exchange is transactional or relational: (1) role integrity, (2) reciprocity, (3) implementation of planning, (4) effectuation of consent, (5) flexibility, (6) contractual solidarity, (7) the restitution, reliance and expectation interests, (8) creation and restraint of power, (9) propriety of means and (10) harmonization with the social matrix: Ian R. Macneil, "Values in Contract: Internal and External" (1983) 78 Nw. U. L. Rev. 340, 341.

II. Purposes

As a general rule, contracts are solely concerned with the patrimonial (i.e. economic) dimensions of the relationships they are intended to regulate. This comes as no surprise in civil and commercial matters, where the stakes of the exchange are often limited to the economic. Partnership or franchise contracts are not designed to govern the social ties between the partners, except perhaps incidentally. Rather, they concern themselves with the financial objectives that each of them is pursuing.

But close relationships between adults cannot be approached from the same perspective as business relationships. They evolve in an environment that is both patrimonial and extra patrimonial. The exchanges between the partners, which generally take place in a shared residence, generate an interdependence that is not only economic, but relational and even emotional as well. In short, their joint project amounts to more than dollars and cents. Quite the contrary, the patrimonial aspects of their relationship are almost always subordinated to the extra patrimonial aspects, and the economic interdependence simply stems from the relational or emotional interdependence.

Despite these fundamental distinctions, legal scholars and professionals still seem to conceptualize close personal relationships and business relationships from within the same framework. Quebec scholarly writing on marriage and consensual union contracts offers convincing evidence of this. One can assume that the information contained in such instruments is a good reflection of the generally prevailing perspectives on the subject, even though it is not empirical data from scientific studies.

Quebec marriage contracts are uniformly portrayed as the legal instruments by which spouses adopt a “contractual” matrimonial regime when they wish to opt out of the general “legal” regime.²² It is generally understood that marriage contracts are exclusively about property and leave the relational aspects of marriage aside.²³ Domestic partnership contracts have a similar purpose. In theory, they merely establish a legal framework for patrimonial relations between the *de facto* spouses to the extent that the state has not intervened directly or indirectly.²⁴ In sum, the contracts available to *de jure* and *de facto* spouses are not at all concerned with the establishment of a normative framework for all dimensions of the relationship. Rather, they are limited to major economic issues.

The contractual avenues in the other Canadian provinces are similarly paved. In British Columbia, the law expressly enables spouses to sign a “marriage agreement.” That province’s *Family Relations Act* provides:²⁵

61. (2) A marriage agreement is an agreement entered into by a man and a woman before or during their marriage to each other to take effect on the date of their marriage or on the execution of the agreement, whichever is later, for

- (a) management of family assets or other property during marriage; or
- (b) ownership in, or division of, family assets or other property during marriage, or the making of an order for dissolution of marriage, judicial separation or a declaration of a nullity of marriage.²⁶

²² Arts. 431 *et seq.* C.C.Q. Note that the spouses remain subject to the mandatory primary regime regardless of their marriage contract. See *infra* at 25.

²³ The *Private Law Dictionary of the Family and Bilingual Lexicons*, edited by the Quebec Research Centre of Private & Comparative Law (headed by Nicholas Kasirer), defines a marriage contract as a “[s]olemn contract by which two spouses or future spouses determine the patrimonial relationships associated to their marriage.” *Private Law Dictionary of the Family and Bilingual Lexicons* (Cowansville: Yvon Blais, 1999) at 77. See also Serge Binette, “Régimes matrimoniaux et contrat de mariage”, in Chambre des Notaires du Québec, *Répertoire de droit, Famille, Doctrine*, doc. 2 (Montréal: 1991) and Alain Roy, “L’intervention du notaire dans les relations matrimoniales: du contrat de mariage au contrat conjugal” in Pierre Ciotola (dir.), *Le notariat de l’an 2000: Défis et perspectives* (Montréal: Thémis, 1997) at 189.

²⁴ Benoit Moore, “L’union homosexuelle et le Code civil du Québec: de l’ignorance à la reconnaissance?” forthcoming in the *Can. Bar Rev.*; Denis Lapierre, “Les contrats de la vie commune” in Barreau du Québec, Service de la formation permanente, *Développements récents sur l’union de fait* (Cowansville: Yvon Blais, 2000) at 31; and Serge Allard et al., “Le concubinage” in Chambre des Notaires du Québec, *Répertoire de droit, Famille, Doctrine*, doc. 3, (Montréal: 1993) at 34.

²⁵ R.S.B.C. 1996, c. 128.

Notwithstanding this, the immense potential of contracts, as reconceptualized in light of the developments discussed above, should not be overlooked. A relational contract is designed to define every dimension of the joint project based on the partners' values. In short, the contractual process gives the partners an opportunity to set out all their mutual expectations from the relationship (economic and otherwise) in the form of reciprocal commitments. What is the objective of the relationship? What form will it take? What role will each partner play in it? What are their fundamental values? And beyond these abstract considerations, how will these values be operationalized on a day-to-day basis?

Initially, one might doubt whether such a process of articulation is particularly useful or appropriate for close personal relationships. What is the point of clarifying, formalizing and contractualizing a relational project if the people involved are already on intimate terms? Doesn't their love alone guarantee that they understand each other's visions? For example, it could be argued that the two sisters who share a residence have a common past that is likely to elucidate their respective expectations, both now and in the future. Won't a natural framework for their relational exchanges ultimately build itself, without the need to contemplate the development of any formal organizational structure?

The partners' past dealings, and eventually their cohabitation, will certainly encourage them to disclose certain expectations. Time and interactions undoubtedly have a way of revealing things to people about each other.²⁷ However, a joint project cannot be measured solely by reference

²⁶ Absent such an arrangement, the spouses must share the family assets equally in accordance with the rules set out in ss. 56.1 to 60 of the Act.

²⁷ See Ralph Underwager & Hollida Wakefield, "Psychological Considerations in Negotiating Premarital Contracts" in Edward Winer & Lewis Becker, eds., *Premarital and Marital Contracts* (Chicago: American Bar Association, 1993) 217 at 222.

to expectations that emerge in ordinary dealings as toothbrushes intermingle.²⁸ Other expectations will remain unconscious, untold or ambiguous and will only become clear in time. By then, the climate could be adversarial and less than propitious to continued exchanges. At that point the partners, as certain marital relations specialists will attest, will discover the rift between them. Dr. Clifford Sager and his colleagues have the following to say about couples' expectations:

While each spouse is usually at least partially aware of the terms of his contract, and the needs from which these terms are derived, he may be only remotely aware, if at all, of the implicit expectation of his spouse.²⁹

Similarly, American sociologist Calfred Broderick states:

Each person enters marriage with his or her own vision of what the reciprocal obligations are. Sometimes, there are conscious expectations; sometimes, they may surface only indirectly through the outrage produced when they are not met.³⁰

This reality is undoubtedly exacerbated when the relational framework undergoes a normative backwash. Backwashes do not wipe away everything as they recede. They leave traces. For example, a couple might very well enter into a close relationship with semi-conscious expectations based on old sociocultural models that are not longer universal reference norms. Once again, the case of marriages seems quite revealing and should to be cited as an example.³¹

²⁸ To translate an expression used by Dean Claude Fabien.

²⁹ Clifford Sager et al., "The Marriage Contract" (1971) 10 *Family Process* 311 at 312. The writers say that these are "conscious but not verbalized expectations and beyond awareness expectations." In addition, see Clifford Sager, *Marriage Contracts and Couple Therapy* (New York: Brunner/Mazel, 1976); J.D. Ball & Lawrence H. Henning, "Rational Suggestions for Premarital Counseling" (1981) 7 *Journal of Marital and Family Therapy* 69; Lynn Buckner & Connie J. Salts, "A Premarital Assessment Program" (1985) 34 *Family Relations* 513; and Luc Granger, *La communication dans le couple* (Montréal: Éditions de l'Homme, 1980) at 19.

³⁰ Calfred B. Broderick, *Marriage and the Family*, 3d ed., (New Jersey: Prentice Hall, 1988) at 184-185.

³¹ See generally Françoise Hecq, "La famille et quelques-uns de ses paradoxes" in Jacques Lemaire, Madeleine Moulin & Marthe van de Meulebroeke, eds., *Les nouvelles familles* (Brussels: Éditions de l'Université de Bruxelles, 1996) 59 at 68; Jean-Claude Kaufmann, *La trame conjugale: analyse du couple par son linge* (Paris: Nathan, 1992) at 170-172; and Keith Melville & Suzanne Keller, *Marriage and Family Today*, 4th ed. (New York: Random House, 1988) at 174.

Perhaps at one time, community, family and faith were powerful normative sources that established a quasi-uniform model for conjugal life and tended in some way to regulate behaviour. This is no longer so. The values of a relationship are no longer dictated by social or religious imperatives. Everything is now negotiable between the spouses. In theory, nothing can be taken for granted anymore.³²

For example, procreation is no longer the exclusive basis for marriage. The spouses' roles are no longer systematically distributed based on gender. Today, each spouse continues to function as an individual and expects to have an independent life. Marriage is no longer considered as permanent as it once was.³³ In short, the monolithic, traditional model that most couples once accepted has given way to a plurality of models whose contents the spouses must define based on their particular expectations. As the President of the Conseil de la famille et de l'enfance du Québec has said:

[TRANSLATION] The values that emerge from surveys reflect a society that is individualistic and pluralistic above all else – a society in search of new models. In their pursuit of happiness, individuals in society once shared clearly defined reference points. Based on the survey results, these reference points are now lacking. ... Self-affirmation has taken the lead over major institutions in defining reference points and codes of meaning.³⁴

In short, since the issues in close relationships are no longer determined by external sources but rather by the partners alone, it would seem both legitimate and suitable to advocate the idea of a

³² See notably Quebec, Conseil de la famille et de l'enfance, *Et si on parlait des familles et des enfants... de leur évolution, de leurs préoccupations et de leurs besoins!*, Rapport 1999-2000 sur la situation et les besoins des familles et des enfants (Québec: Conseil de la famille et de l'enfance, 2000); Nicole Boily, "Monde en mutation, changement de valeurs? Les repères des Québécoises et des Québécois à l'aube de l'an 2000" in Marie Simard & Jacques Alary, eds., *Comprendre la famille – Actes du 5^e symposium québécois de recherche sur la famille* (Trois-Rivières: Presses de l'Université du Québec, 2000) at 377; Jacques Grand'maison, "Les différents types de famille et leurs enjeux" in Bernard Lacroix, ed., *Vive la Famille* (Montréal: Fides, 1993) at 17 *et seq.* and Claude Michaud, "Le mariage et la famille: des réalités dessoudées" in Québec, Conseil de la Famille, *Recueil de réflexion sur la stabilité des couples-parents* (Québec: 1996) at 195 *et seq.*

³³ *Ibid.*

³⁴ Nicole Boily, "Monde en mutation, changement de valeurs? Les repères des Québécoises et des Québécois à l'aube de l'an 2000" in Marie Simard & Jacques Alary, eds., *Comprendre la famille – Actes du 5^e symposium québécois de recherche sur la famille* (Trois-Rivières: Presses de l'Université du Québec, 2000) 377 at 385.

platform for communication and organization leading to the establishment of a relational plan tailored to the contours of the relationship and built with reference to the specific expectations of the people concerned. Conceived in this manner, contacts for close relationships are more than a revised and updated version of economically oriented contracts favoured by classical doctrine. Rather, they would be charters for shared lives with the potential to become a multidimensional normative framework for relationships.

Having said this, it is important to examine the normative perspective of contractual provisions in contracts for close personal relationships. Here again, we will see that the proposed model does not square with prevailing paradigms.

III. Normative perspectives

As a general rule, the State sanctions private arrangements between contractual partners by recognizing them as enforceable in the courts. The creditor (promisee) of any contractual obligation is entitled to the execution (performance) of a duly contracted obligation. If the debtor (promisor) refuses or is unable to perform as agreed, the creditor may sue in court for specific performance or at least for damages.³⁵

A contract to establish a framework for patrimonial relations between people in close personal relationships will generally be enforceable. This is why courts can give effect to legal rules set out in marriage contracts.³⁶ Patrimonial provisions in any consensual union or cohabitation

³⁵ Jean-Louis Baudouin & Pierre-Gabriel Jobin, *Les obligations*, 5th ed. (Cowansville: Yvon Blais, 1998) at 493.

³⁶ However, the courts may well hesitate to recognize such provisions during the cohabitation, out of fear of disrupting the harmonious evolution of the spousal relationship. See Alain Roy, *La régulation contractuelle du mariage: approche socio-juridique pour une réforme* (Doctoral Thesis, Université Laval, Faculté des études supérieures 2000) (Ste-Foy: Université Laval, 2000) at 262 *et seq.*

contract will be enforceable as well.³⁷ In theory, based on the general principles of the law of obligations, courts will readily give full effect to those provisions.

As I have attempted to show in the preceding section, it could be beneficial for a close personal relationship contract to contain extra patrimonial provisions specifying the relational aspects of the joint living project. It is legitimate to doubt whether such agreements would be sanctionable. If one partner does something that is inconsistent with the other's expectations as expressed in the contract, a court faced with the dispute cannot be counted on to compel that partner to perform his or her obligation.³⁸ Given the particularly intimate issues involved, the non-economic organization of close relationships is not traditionally regarded as something that is legally enforceable. To cite Bruno Oppetit:

[TRANSLATION] ... certain human relations, by their very nature or by the types of protagonists or the bonds between them, seem as though they should be completely outside the law, which would explain why the commitments made as part of those relations are unenforceable duties of conscience.³⁹

In my opinion, the issue of whether extra patrimonial provisions in close personal relationship contracts will be enforceable is beside the point. The provisions in which the partners define the relational dimensions of their joint project would not be intended for judicial sanction. In reality, this component of the contract would be designed to establish a framework for private ordering that can guide the interactions between the partners and ultimately consolidate the stability of their relationship. If one of the partners sought to enforce this framework in court in the context of a dispute suggesting that the exchanges will cease,⁴⁰ his actions would be confirming that the

³⁷ See *Droit de la famille-2760*, [1997] R.D.F. 720 (C.S.); *Dion v. Bédard*, J.E. 2000-494 (C.S.) and *Boisvert v. Duguay*, B.E. 2000BE-597 (C.S.).

³⁸ Naturally, the award could only consist of something equivalent. Given the special nature of extra patrimonial obligations, it would seem particularly unrealistic to expect a court to order a partner to perform in kind, hence the maxim *nemo praecise potest cogi ad factum*. See Jean-Louis Baudouin & Pierre-Gabriel Jobin, *Les obligations*, 5th ed. (Cowansville: Yvon Blais, 1998) at 635-42.

³⁹ Bruno Oppetit, "L'engagement d'honneur", D. 1979 Chron. 17 at 107-108. See also André Chapelle, "Les pactes de famille en matière extra-patrimoniale" (1984) 83 R.T.D. Civ. 411.

⁴⁰ In fact, Pierre Julien writes as follows about matrimonial relationships: "If one spouse must argue against another in court to resolve a dispute between them, the marriage is suffering from a weakness that is likely to lead to its

objective of the relational component has not been achieved. In fact, the normativity of the relational component would unfold in a sphere apart from state law and would not partake of the internal logic of state law.

Admittedly, such a perspective would require us to broaden the generally held conception of law and contractual normativity. Classical doctrine might limit the law to state-enacted rules and bodies created to ensure that those rules are respected, but another doctrine conceives of law as a social phenomenon over which the state has no monopoly. Professor Pierre Noreau writes:

[TRANSLATION] Normally [law] is limited to norms created by legislatures, and does not encompass arrangements and models of conduct even though we are constantly creating them in our relations with others. This is obviously a more sociological than legal conception of law. But we should recognize that the spaces of individual living have grown and that our behaviour is largely defined in the context of behavioural guideposts that we establish ourselves in our day-to-day dealings.⁴¹

This statement implicitly refers to legal pluralism,⁴² a theoretical conception that law is not a homogeneous whole and that, in addition to the state system, it encompasses various subsidiary orders, including contracts that are independent normative instruments. In other words, a contract can be seen as a true source of law, regardless of whether its provisions are enforceable. It is not state law — and indeed the state will probably not take notice of it — rather, is the law of the parties.

termination sooner or later.” Translated from Pierre Julien, *Les contrats entre époux* (Paris: L.G.D.J., 1962) at 35. In my opinion, this observation applies to all close relationships.

⁴¹ Pierre Noreau, “Le droit et la famille: perspective sur l’amour, la contrainte et l’engagement” in Québec, Conseil de la famille, *Recueil de réflexion sur la stabilité des couples-parents* (Québec: 1996) 55 at 64. Austrian legal scholar Ehrlich uses the expression “living law” to describe the law spontaneously generated by human interactions: Eugene Ehrlich, *Fundamental Principles of the Sociology of Law* (Cambridge: Harvard University Press, 1936) at 493.

⁴² For a discussion of legal pluralism, see especially Jean-Guy Belley, “L’État et la régulation juridique des sociétés globales: Pour une problématique du pluralisme juridique” (1986) 18 *Sociologie et Société* 22; Guy Rocher, “Pour une sociologie des ordres juridiques” (1988) 29 *C. de D.* 91 and Andrée Lajoie, “Contribution à l’émergence du droit: Le droit, l’État, la société civile, le public, le privé: de quelques définitions interreliées” (1991) 25 *R.J.T.* 103. For a discussion of the various doctrines and diverse phenomena of legal pluralism, see Jean Carbonnier, *Sociologie juridique*, Coll. Thémis, (Paris: P.U.F., 1978) at 208 *et seq.*

As we have seen, the relational and patrimonial components of close personal relationship do not have a common normative perspective. The relational component lies within the sphere of moral obligations and is binding only on the conscience.⁴³ Essentially, the partners will live up to the expectations set out in the relational component because they want to preserve their relationship, not because they fear court intervention.⁴⁴

Admittedly, some people may derive little comfort from moral obligations, especially where intentionally short-lived contractual relations are involved. Logically, however, moral obligations should hold more weight in close personal relationships of indefinite duration.⁴⁵

In fact, Professor Macneil's contract theory acknowledges the importance of contractual solidarity, a norm that causes parties to a relational exchange naturally to adopt behaviour that helps maintain their relationship.⁴⁶ Professors E.S. and R.E. Scott write that this norm is present in spousal relationships:

The intimate character of the relationship and the iterated nature of the interactions will influence the spouses to develop reciprocal patterns of cooperation over time. The pervasive social norm of reciprocity is particularly relevant to long-term interactions, offering a particularly stable foundation for an evolving pattern of conditional cooperation.⁴⁷

Moreover, certain scholars believe that contractual formalism tends to consolidate the regulating scope of moral obligations. Since the obligation is committed to writing in a document

⁴³ For a discussion of the regulating force of moral obligations and the consequences of failing to comply with them, see the theory of John Stuart Mill ("The ultimate sanction of all morality is a subjective feeling in our minds.") as discussed Peter Michael Stephen Hacker, "Sanction Theories of Duty" in Alfred William Brian Simpson, ed., *Oxford Essays in Jurisprudence, 2d Series* (Oxford: Clarendon Press, 1973) 131 at 148 *et seq.*, especially at 150.

⁴⁴ Since their primary goal is to orient behaviour, contracts for close personal relationships, as normative systems, articulate themselves within what Pierre Noreau calls "preventive law": Pierre Noreau, *Droit préventif: Le droit au-delà de la loi* (Montréal: Thémis, 1993) at 84 *et seq.*

⁴⁵ See Ejan Mackaay, "L'ordre spontané comme fondement du droit: un survol des modèles d'émergence des règles dans une communauté civile" (1988) 22 R.J.T. 349 at 364-5.

⁴⁶ In contrast, the contractual solidarity norm is not very present in transactional exchanges: Ian R. Macneil, *The New Social Contract* (London: Yale University Press, 1980) at 52.

⁴⁷ Elizabeth S. Scott & Robert E. Scott, "Marriage as Relational Contract" (1998) 84 Va. L. Rev. 1225 at 1285.

symbolically associated with the notion of *pacta sunt servanda*, contractual debtors will tend more clearly to express their intent to be bound formally and honour their word and their signature.⁴⁸

This is one of the functions of contractual formalism discussed by American legal scholar Lon L. Fuller. In Fuller's view, formalism renders agreements in the appropriate terms ("channelling function") and provides evidence of the existence of the agreement if it is in doubt ("evidentiary function."), but it also focuses the partners' minds on the solemnity of their agreement and therefore crystallizes their feeling that they are obligated by it ("cautionary function.")⁴⁹

As we have seen, contracts in close personal relationships are a convergence point for two different normative perspectives. They do not serve state normativity alone; rather, they unfold in an internormative space. They are not designed to respond to the legislator's concerns alone; rather, they are designed to respond to all needs for ordering that the partners will potentially express, regardless of the normative level of those needs.

⁴⁸ In fact, writes Professor Guy Raymond, "a person's word often needs to be formalized to take on a dimension of promise." Translated from Guy Raymond, *Ombres et lumières sur la famille* (Paris: Bayard, 1999) at 73.

⁴⁹ Lon L. Fuller, "Consideration and Form" (1941) 41 Colum. L. Rev. 799. Similarly, Alain Chirez writes: "[the mandatory force of contracts – and I feel it is essential to utilize this concept of mandatory force – is based not only on the possibility of legal compulsion in the event of non-performance, but also, and mainly, on a psychological constraint associated with the feeling of being obliged. Contracts are more like instruments of psychological constraint than instruments of legal constraint." Translated from Alain Chirez, *De la confiance en droit contractuel* (Doctoral Thesis, Université de Nice, Faculté de droit et des sciences économiques 1977) [unpublished] at 82. For more on this subject, see Jean-Guy Belley, "Réflexion sur la culture notariale du contrat" (1996) 1 C.P. du N. 106 at 108-109 and Roderick A. Macdonald, "Images du notariat et imagination du notaire" (1994) 1 C.P. du N. 1 at 28.

IV. The professional's role

The preceding sections have provided insight into the nature and scope of contracts in close personal relationships. We now turn to the professionals' role in deploying this theoretical model. When partners in a close relationship ask legal practitioners to prepare and draft contracts defining their patrimonial (economic) relationship, the practitioners are generally well equipped to so do within the parameters of state law.⁵⁰ However, some people may question whether they would be able to integrate extra patrimonial (non-economic) stipulations specifying the relational aspect of their life project in the contract. They may reasonably suppose that such "unenforceable" stipulations are of little use and ultimately dismiss them as irrelevant.⁵¹

Classically trained legal professionals adhere to a monist definition of the law. Their practice is generally limited to state law. They see themselves as messengers of the law, responsible for channelling the parties' intentions into legal categories prescribed by the legislator. As Professor Belley states, the contracts and other instruments they handle are so rigidly regulated by the law that they can, for all intents and purposes, be considered an individual extension of general law.⁵² And while the patrimonial component of a contract in close personal relationships falls within one of the categories prescribed by the legislator, the relational component does not. The obligations contained in that component are unenforceable cannot be understood through the logic of a statute.

⁵⁰ See the references in notes 23 and 24.

⁵¹ There is some openness toward introducing unenforceable clauses into marriage contracts. The *Répertoire de droit de la Chambre des notaires du Québec*, which provides forms for use by professionals in their practice, proposes a clause whereby the spouses undertake to voluntarily participate in family mediation to resolve disputes that could end up in litigation. The spouses also undertake to consult a lawyer periodically to prevent disputes from developing: *Chambre des notaires du Québec, Répertoire de droit, Famille*, Formulaire – Document 1.1 (Montréal, 1996) at 3-4, clauses 7 and 8.

⁵² Jean-Guy Belley, "Réflexion critique sur la culture notariale du contrat" (1996) 1 C.P. du N. 105 at 110, 113, 117. See also "La pratique professionnelle comme prudence politique" by the same author, in Claude Nélisse & Ricardo Zuniga, sup., *L'intervention: les savoirs en action* (Sherbrooke: G.G.C., 1997) 45 at 48.

Thus, to develop the relational component, professionals must reconsider their position. They will only be able to integrate this contractual rationality if they adopt a pluralist approach to law and normativity. They should offer their services as “specialists in the interface of normative orders, or brokers of legal pluralism”⁵³ instead of simply as state law experts.

Naturally, practitioners will remain legal experts who can provide the partners with all relevant legal information and satisfy their legal needs. It is not a question of denying them this ability or devaluing it, but rather, of enlarging its scope. Legal professionals who are sensitive to internormative⁵⁴ phenomena will view the partners’ situation as a true source of investigation and problem solving. The answers to the problems with which they are faced will no longer be found solely in the law and official doctrine; they will also be drawn from the partners’ experiences, customs, values and surroundings.⁵⁵

Practitioners who are able to adopt and integrate a pluralist approach to law will undeniably contribute to the renewal of their role and their function in the process by which legal norms are created. Instead of just applying the law in a servile manner, they will become true “architects of the private social order” (to use Professor Roderick Macdonald’s expression)⁵⁶ or, as Professor André-Jean Arnaud would put it, creators of law.⁵⁷

⁵³ Jean-Guy Belley, “La pratique professionnelle comme prudence politique”, *ibid*, at 58. See also Claude Nélisse, “Le règlement déjudiciarisé: entre flexibilité technique et pluralité juridique” (1992) 23 R.D.U.S. 270. For a brief illustration of a law practice with a pluralist outlook, see André-Jean Arnaud, “Droit et société: du constat à la construction d’un champ commun” (1992) 20-21 *Droit et Société* 17 at 29.

⁵⁴ For the different meanings attributable to “internormativity”, see Guy Rocher, “Les phénomènes d’internormativité: faits et obstacles” in Jean-Guy Belley, sup., *Le droit soluble. Contributions québécoises à l’étude de l’internormativité* (Paris: L.G.D.J., 1996) 25 at 27-28.

⁵⁵ Law professor Robert Ashford, in a text comparing the socio-economic methodology to the practice of law, wrote: “[g]ood lawyers are sensitive to the effect of values, morality, emotions, beliefs, expectations and irrationality on the economic behavior of clients, adversaries, third parties, lawyer and judges.” Robert Ashford, “Socio-Economics: What is its Place in Law Practice?” (1997) *Wisconsin L. Rev.* 611 at 617, 620.

⁵⁶ Roderick A. MacDonal, “Images du notariat et imagination du notaire” (1994) 1 C.P. du N. 1 at 13, 59 *et seq.*

⁵⁷ André-Jean Arnaud, “Droit et société: du constat à la construction d’un champ commun” (1992) 20-21 *Droit et Société* 17 at 36.

I should note in passing that practitioners who memorialize the relational component must be open to the other social sciences in the practice of their profession. Legal professionals will not only be responsible for ensuring that the formal and technical legal requirements are satisfied, but also for assisting the partners to develop a charter for their life together by helping them identify their mutual expectations. In this regard, their role will be to encourage the partners to communicate so they can express perceptions and expectations that would otherwise remain unspoken. Obviously, this requires a certain degree of psychological and social insight.

The approach I advocate is not an unprecedented approach born of pure intellectual fantasy. Lawyers and notaries already intervene professionally in areas requiring such skills. Family mediation is just one example. Lawyers and notaries are authorized to act as mediators under certain conditions. Strictly speaking, mediation is not a legal act; rather, it is a process that favours communication between spouses who would like to come to a settlement about the consequences of their separation.⁵⁸ Legal professionals acting as family mediators must exercise certain aptitudes that are more closely identified with psychology and couples therapy than with the practice of law.⁵⁹ They must encourage exchanges in a highly charged atmosphere, be able to listen actively and demonstrate considerable insight into the attitudes expressed.⁶⁰ In short, professionals engaging in family mediation are required to intervene in way that extends well beyond the usual practice of law. As social worker Linda Bérubé has observed:

[TRANSLATION] Mediation is not a profession, nor is it a new therapy or way of practicing law. It is a new practice defined by precise rules, and while it draws on the

⁵⁸ For a more complete definition, see André Murray, "La médiation familiale: une progression rapide" (1986) R.D.F. 319.

⁵⁹ Suzanne Clairmont, "L'avocat et la médiation" in Lisette Laurent-Boyer, sup., *La médiation familiale*, rev. ed. (Cowansville: Yvon Blais, 1998) 129 at 135 and François Crete, "Le notaire et la médiation familiale" in Lisette Laurent-Boyer, sup., *La médiation familiale*, rev. ed. (Cowansville: Yvon Blais, 1998) 145 at 146.

⁶⁰ Linda Bérubé, "La médiation familiale en matière de séparation et de divorce: une nouvelle pratique à l'intersection de la relation d'aide et du droit" in Lisette Laurent-Boyer, sup., *ibid.* 105 at 121.

knowledge and experience of its practitioners, it modifies substantially the way in which these skills are applied and requires the development of a complementary set of skills not usually required in their practice.⁶¹

Similarly, legal professionals called upon to help the partners develop the relational component of their contract must not disregard the psychological and emotional nature of their close relationship if they are to carry out their mandate successfully.⁶² This is the only way they can satisfy the partners' need for ordering as fully as possible.

Law faculties naturally have an important role to play in promoting this renewed approach to the practice of the profession. As Professor Belley has remarked, law professors [TRANSLATION] "must recognize that they have a major responsibility to emphasize the evolving nature of the legal paradigm and the way its potential effects are addressed."⁶³ Their privileged position as practitioner trainers allows them to help redefine law and its practice. In addition to conducting research, as teachers they can guide future professionals into assuming a social role that extends beyond the strict limits of legal positivism.⁶⁴

V. The legislative environment

Encouraging the use of contracts as a means of organizing close relationships between adults is by no means tantamount to rejecting all forms of legislative intervention or control, or to defending a return to classical liberal values in the name of some kind of absolute liberty. Three main areas of intervention by the legislator must be envisaged if the State is to recognize both

⁶¹ *Ibid.* at 113.

⁶² For an approach encouraging each professional to develop a "multidisciplinary" ("multidisciplinarité") outlook, see Danielle Bellemare, *L'exercice des professions en multdisciplinarité au Québec: opportunité et recherche d'un modèle* (Master's Thesis, Université de Montréal, Faculté des études supérieures 1984) (Montréal: Université de Montréal, 1984) at 36-38, 73-74. In the legal field, see Jean-Guy Belley, "Réflexion critique sur la culture notariale du contrat" (1996) 1 C.P. du N. 105 at 111.

⁶³ Jean-Guy Belley, "Paradigmes et innovation: les professeurs de droit et l'avenir des professions juridiques" (1994) 9 Can. J. L. & Soc. 163 at 176.

⁶⁴ For a more global discussion on the subject, see Jean-Guy Belley, "La théorie générale des contrats. Pour sortir du dogmatisme" (1985) 26 C. de D. 1045.

the interest and legitimacy of contracts for close personal relationships as conceptualized above. This is as much to encourage the dissemination of such contracts as it is to provide a framework for their formation and performance. The State should (A) design or redesign a zone of contractual freedom for the partners; (B) provide a framework for exercising that freedom by establishing relational guidelines; and (C) establish a suppletive (i.e. “default”) legal regime that respects prevailing values.

A. Designing or redesigning a zone of contractual freedom

Naturally, the theoretical model I propose involves the creation of a zone of contractual freedom that allows the partners sufficient room to manoeuvre. The purpose of a contract in a close personal relationship is to establish the obligations in the relationship based on the partners’ mutual aspirations. The State should therefore avoid substituting itself for the partners, which it would be doing if it subjected them to different patrimonial or extra patrimonial obligations. In other words, to the full extent that public policy permits, the State must preserve the partners’ contractual freedom and recognize their right to choose the terms that suit them.

Presently, the State does not generally dictate the “obligational content” of non-conjugal relationships and consensual unions.⁶⁵ The same cannot be said of marriage, at least in the province of Quebec.

Under the Civil Code, Quebec spouses owe each other succour and assistance. This obligation requires them to support each other economically for as long as the marriage lasts, and they

⁶⁵ See, “Marriage and Marriage-Like Relationships” Appendices B, C and D, available from the Law Commission of Canada web site at <http://www.cdc.gc.ca/en/themes/pr/cpra/bailey/index.html>.

cannot contract out of it.⁶⁶ The spouses must also contribute toward the expenses of the marriage in proportion to their respective means or by their activities within the home, and it is illegal for them to enter into a contract stipulating otherwise.⁶⁷ Lastly, the legislator requires them to split equally the value of certain family property as assessed on the date of separation, regardless of the terms of their marriage contract.⁶⁸

When the state subjects the spouses to such obligations, it is unilaterally imposing its economic view of marriage on Quebec spouses. In a way, it is also conflicting with the diversity upon which Canadian society is based.⁶⁹ Beyond equality, freedom, tolerance and respect (the non-negotiable values upon which all human relationships are unalterably founded) marriage does not mean the same thing to everyone.⁷⁰ For some, it is a multifaceted relationship by which individuals and interests are inexorably connected. For others, marriage is no more and no less than a union of individuals.

Young spouses who marry without money may tend to see themselves as true partners in a common, multi-dimensional undertaking. By contrast, older spouses who marry for the second or third time often perceive themselves as simple life companions whose relationship will be limited, as much as possible, to interpersonal exchanges. Blended families also have their own particular dynamic. It is difficult to imagine a marriage that brings together two families (at least

⁶⁶ Arts. 392, 585 and 391 C.C.Q. For an overview of the rules in force in the other Canadian provinces governing the support obligation between spouses, see *ibid.* Appendix A.

⁶⁷ Arts. 396 and 391 C.C.Q.

⁶⁸ Arts. 414 to 426 and 391 C.C.Q. For an overview of the rules in force in the other Canadian provinces governing the distribution of property between spouses, see Martha Bailey, *supra* note 65, Appendix A.

⁶⁹ For a more thorough discussion of the subject, see Alain Roy, "L'encadrement législatif des rapports pécuniaires entre époux: un grand ménage s'impose pour les nouveaux ménages" (2000) 41 C. de D. 657.

⁷⁰ "[V]alues (except for equality, individual liberty, and tolerance) are a matter of subjective taste or preference.": Mary Ann Glendon, *The Transformation of Family Law-State and Family in the United States and Western Europe* (Chicago: University of Chicago, 1989) at 297.

to some extent) in the same fashion as we conceptualize more traditional conjugal relationships.⁷¹

Quebec spouses are free to arrange the extra patrimonial aspects of their relationship as they see fit. Thankfully, subject to their formal recognition as equals, the law does not force them into any given lifestyle.⁷² The law does infiltrate the relational component to some extent, however. The spouses owe each other fidelity under the Civil Code.⁷³ Even though conjugal fidelity is a natural obligation for most married couples, one can legitimately question whether it is still a matter for state law today.⁷⁴ If it is not, it should be removed from the Civil Code⁷⁵ so that the spouses themselves can address this moral duty according to their personal convictions.⁷⁶

In short, the partners should determine the central issues of their close personal relationship, not the State. As Jane Rule has said: “Human rights are the core responsibility of the government. The regulation of adult human relationships is not.”⁷⁷

B. Establishing relational guidelines

⁷¹ On the specific dynamic of blended families, see Marie-Thérèse Meulders-Klein & Irène Théry, *Quels repères pour les familles recomposées?* (Paris: L.G.D.J., 1995).

⁷² Art. 392 C.C.Q.

⁷³ *Ibid.*

⁷⁴ “[I]t is no longer of concern to society when this duty [fidelity] is transgressed; it is only of concern to the wronged spouse.” Translated from Ève Mattei, “L’état matrimonial” in Jacqueline Rubellin-Devichi, sup., *Droit de la famille* (Paris: Dalloz, 1996) 75 at 84. See also Xavier Labbé, *Les rapports juridiques dans le couple sont-ils contractuels?* (Paris: Presses Universitaires du Septentrion, 1996) 71, 81, and Guy Raymond, *Ombres et lumières sur la famille* (Paris: Bayard, 1999) 122.

⁷⁵ Moreover, Quebec doctrine has long considered that a breach of this duty can only be punished by divorce or separation. Therefore, a spouse cannot claim compensation for moral damages from the adulterous spouse. See Jean Pineau, *La famille* (Montréal: P.U.M., 1972) at 279.

⁷⁶ See Lenore J. Weitzman, *The Marriage Contract: Spouses, Lovers and the Law* (New York: Free Press, 1981) at 273-274, 436. Karl Fleishmann, “Marriage by Contract: Defining the Terms of Relationship” (1974) 8 Fam. L.Q. 27 at 31; Evita M. Roche, “The Content of Marriage Contracts: A Range of Options” in Evita M. Roche & David C. Simmons, eds., *Marriage Contracts* (Toronto: Carswell, 1988) 81 at 123-124 and Ralph Underwager and Hollida Wakefield, “Psychological Considerations in Negotiating Premarital Contracts” in Edward Winer & Lewis Becker, sup., *Premarital and Marital Contracts* (Chicago: American Bar Association, 1993) 217 at 222.

⁷⁷ From a column published in *B.C. BookWorld* (Spring 2001).

Some people will express a diametrically opposed position. They insist that legal boundaries be introduced to curtail the contractual liberty of partners whose relationships are presently ignored by the law, and to tighten the restrictions governing relationships that are already regulated by the State. They vigorously denounce what they perceive as an unbridled contractual liberty—a liberty that often has devastating effects on the socially and economically vulnerable. As a matter of justice, they demand that the state intervene more assertively, at least with respect to the patrimonial aspect of close relationships.

And yet, contracts are not necessarily unjust. It is too often forgotten that today's contracts have their own intrinsic limits.⁷⁸ Many obstacles imposed by current law prevent one contracting party from economically exploiting the other. The general principles of good faith, fairness, and abuse of rights, recognized by both civil and common law, are examples.

Naturally, the legislator will have to define more precisely the scope of the limits placed on close relationships, so that courts will be better equipped to redress socially or legally unacceptable situations. By so doing, the legislator would expressly be recognizing and entrenching the values of cooperation, integrity and solidarity that characterize relational exchanges (according to the typology proposed by Professor Macneil).⁷⁹ For Quebec, this would not be novel.

Indeed, as Professor Louise Rolland⁸⁰ has brilliantly demonstrated, the new *Civil Code of Québec*, which has been in force since 1994, embraces the relational notion of a contract by elevating the values of cooperation and solidarity, present in the contractual relationship

⁷⁸ Danielle Burman, "Le déclin de la liberté au nom de l'égalité" (1990) 24 R.J.T. 461 at 463.

⁷⁹ See *supra* pp. 6-7.

⁸⁰ Louise Rolland, "Les figures contemporaines du contrat" (1999) 44 McGill L.J. 903.

between partners, between mandators and mandataries, between businesspeople and customers, and between employers and employees, to the status of formal legal norms.⁸¹

Lawmakers could therefore adopt a similar attitude to close relationships. This would make it abundantly clear that they disapprove of contracts that, when one scratches beneath the surface, enable one partner unduly to exploit the other for strictly personal benefit. As we have seen, from a relational perspective, the instrument of contract is never intended solely to defend the individual interests of one party.

Lawmakers could also include lesion as a cause for nullity in close personal relationship contracts.⁸² This would guarantee an even greater degree of contractual justice between individuals, who might (even though they are capable adults) be vulnerable to exploitation because of their health, their age, their socio-economic status or the emotional state of their relationship. Punishing exploitation is no more and no less than punishing the abusive exercise of liberty.⁸³

These mechanisms, when combined, provide a framework for the partners' liberty without casting them all in a single mould reminiscent of tutorship. This is what Professor Rolland means when she states that [TRANSLATION] "[g]ood faith, fairness, and reasonableness are the bricks and mortar upon which potential abuses resulting from an unbridled liberty are kept in check."⁸⁴

⁸¹ Art. 2228 C.C.Q. (partnership); arts. 2178-2181 C.C.Q. (mandate); arts. 2126-2129 C.C.Q. (contract for services) and art. 2091 C.C.Q. (employment). Similarly, the UNIDROIT principles (on international commerce) expressly state that the contracting parties have a duty to cooperate so as to facilitate exchanges: International Institute for the Unification of Private Law, *Principles of International Commercial Contracts* (Rome: UNIDROIT, 1994), art. 5.3.

⁸² According to art. 1406 C.C.Q., "[l]esion results from the exploitation of one of the parties by the other, which creates a serious disproportion between the prestations of the parties; the fact that there is a serious disproportion creates a presumption of exploitation." Lesion vitiates consent only in respect of minors and persons of full age under protective supervision: art. 1405 C.C.Q. Lesion may exceptionally be a cause for annulment where there has been renunciation of the family patrimony or the partnership of acquests: arts. 424 and 472 C.C.Q.

⁸³ Danielle Burman, "Le déclin de la liberté au nom de l'égalité" (1990) 24 R.J.T. 461 at 465.

⁸⁴ Louise Rolland, "Les figures contemporaines du contrat" (1999) 44 McGill L.J. 903 at 919.

In sum, contractual liberty comes equipped with different legal safeguards, which simply need a bit of maintenance from time to time.

If the legislator introduced a system in which legal assistance is provided before the litigation stage, many defects capable of invalidating contracts in close personal relationships could be prevented. Some provinces already recognize the value of such consultation in preparing marriage contracts. In Quebec, marriage contracts must be notarial acts;⁸⁵ Albertans are required to consult with a lawyer.⁸⁶ This guarantees that the partners get legal advice about the scope and consequences of their respective decisions.

Obviously, no professional filter can eradicate injustice and abuses altogether. The most sceptical among us will see this process as a mere a smokescreen. They will denounce the heavy burden placed on the partner seeking legal redress. They will criticize the fact that it is up to the injured party to seek justice in the courts, for this burden, in the worst cases, could put justice outside that party's reach.⁸⁷ Instead, they will argue that the fairer, more efficient choice would be to establish specific legal regimes that impose economic equality under all circumstances based on a purely category-driven approach. This would guarantee that the desirable balance is struck before any need for litigation arises.

What about freedom of choice? As Professor Burman writes, does not equality at any cost risk bringing about the death of liberty and the denial of all diversity?⁸⁸ It seems to me that liberty and diversity are worthy of being preserved. Our society is founded on these values and they cannot be sacrificed on the altar of an economic ideal.

⁸⁵ Art. 440 C.C.Q.

⁸⁶ *Alberta Matrimonial Property Act*, R.S.A. 1980, c. M-9, s. 38(2).

⁸⁷ See, by analogy, Penelope Eileen Bryant, "Women's Freedom to Contract at Divorce: A Mask for Contextual Coercion" (1999) 47 *Buffalo L. Rev.* 1153 at 1171, 1239.

⁸⁸ Danielle Burman, "Le déclin de la liberté au nom de l'égalité" (1990) 24 *R.J.T.* 461 at 463.

No legislative or judicial mechanism can presume to be perfect. None is fully watertight. What matters most is to seek out and select the one that strikes the best balance between these diverse but equally fundamental values.

C. Establishing a suppletive legal regime

Lawmakers cannot reasonably assume that all partners in close relationships will enter into a contract. The contract must be voluntary, not compulsory. Having defended the basic principles of liberty and diversity that should form the basis of such a contract, it would be paradoxical, at the very least, to seek to impose one in the same breath.

Consequently, lawmakers who support the idea of a contract for close personal relationships will still have to create a suppletive legal regime for those who prefer for some reason not to enter into a contract, but seek the benefit of some legal framework nonetheless.

The Quebec law of matrimonial regimes could serve as a model here. Under Quebec law, spouses are allowed to choose their matrimonial regime by entering into a marriage contract before or during the marriage, subject to certain mandatory provisions in the Civil Code. At the same time, a suppletive legal regime exists for those who choose not to sign a marriage contract.⁸⁹ Thus, the spouses need only enter into a contract if they are dissatisfied with the suppletive legal regime or wish to make changes to it.⁹⁰

⁸⁹ The current legal matrimonial regime is the partnership of acquests: arts. 432 and 448 C.C.Q. *et seq.* See also arts. 391 and 423.

⁹⁰ In sum, a similar logic underlies all provincial statutes governing the division of property owned by the spouses on the day of separation. These statutes govern the partition of specific property as of the day of separation, but entitle the spouses to contract out of this partition, subject to certain formalities. See, for example, *Alberta Matrimonial Property Act*, R.S.A. 1980, c. M-9, s. 37(1); *British Columbia Family Relations Act*, R.S.B.C. 1996, c. 128, s. 61;

This suppletive structure, while perfectly suitable for marriage, requires major changes if it is to be extended to other close relationships. There are two reasons for this.

First of all, a suppletive legal regime must be circumscribed in time. It must begin on a precise date and terminate on another precise date. It must be a legal situation capable of being objectively delimited. The legal matrimonial regime takes effect on the day of the marriage.⁹¹ The point at which it starts and is dissolved is established in a completely objective manner.⁹² How can the legal regime applicable to consensual unions and non-conjugal relationships be validly circumscribed when the start date depends, for all intents and purposes, on a particular combination of facts that can vary from person to person? Secondly, the application of a legal regime must at least be based on an implied desire for one. By marrying, couples are expressly accepting a legal status. If they do not sign a marriage contract, they are deemed to subscribe to the principles and values underlying the legal matrimonial regime.

It would be inappropriate, at the very least, to impose a legal regime on consensual spouses or partners in a non-conjugal close relationship without their acquiescence, be it direct, indirect, express or tacit.⁹³ It is difficult to understand how the State could establish a legal framework

Manitoba Marital Property Act, R.S.M. 1987, c. M45, s. 5(1) and *Ontario Family Law Act*, R.S.O. 1990, c. F-3, ss. 52-54.

⁹¹ Art. 433 C.C.Q.

⁹² Art. 465 C.C.Q.

⁹³ In an analysis of the different legal options regarding the recognition of the rights of unmarried couples, Thomas G. Anderson writes: "[...] there is at least one important distinction between a marriage and a marriage-like relationship. The distinction is that persons who marry expressly confer on each other various rights, and undertake various obligations. Persons who live together without marriage may very well have a personal commitment every bit as binding, but this is not always the case." Thomas G. Anderson, "Models of Registered Partnership and their Rationale: The Institute's Proposed Domestic Partner Act" (2000) 17 Can. J. Fam. L. 89 at 97. See also at 113. Note, however, that certain countries have adopted this approach. Consensual relationships give rise to varying legal consequences, notably with respect to the partition of assets as of the day of separation. The consensual spouses are allowed to contract out of such consequences. For an overview of the issue, see Caroline Forder, "European Models of Domestic Partnership Laws: The Field of Choice" (2000) 17 Can. J. Fam. L. 371 at 376 *et seq.* and 449-51.

governing the partners' patrimonial,⁹⁴ and to a certain extent, extra patrimonial relations,⁹⁵ based on criteria respecting the length of cohabitation, the nature of the relationship, the existence of children or any other distinctive element, without the knowledge of the principal parties concerned.

One way to solve this problem could be to confer a true legal status on the other relationships. The *de facto* status would be replaced by a legal status. For guidance in this respect, provincial lawmakers could look to the domestic partner registration systems in various foreign jurisdictions.⁹⁶ In general, couples under such a system may register their relationship in a government register.⁹⁷ In addition to achieving a form of social and legal recognition,⁹⁸ a registered couple automatically benefits from certain rights and obligations traditionally associated with marriage. Generally, the partners may contract out of the legal regime in whole or in part.

In my view, such a system might offer a solution to these concerns. To begin with, it would grant an objective status to close consensual relationships other than marriage. As with marriage, its legal existence would be sanctioned once it is registered publicly. The legal regime would be

⁹⁴ Obviously, this only refers to the relationships between the partners themselves, and not those that they maintain, or may have to maintain, with the State. I am in no way questioning the rights and obligations to which consensual spouses in a close relationship may be subjected under different social or tax laws without their express or implied consent.

⁹⁵ One example is the imposition, on the partners, of a mutual obligation of moral support, or of a duty of fidelity for *de facto* spouses similar to one legally owed by married spouses in Quebec.

⁹⁶ The provinces' constitutional jurisdiction over property and civil rights entitles them to create such a system: *Constitution Act, 1867*, 30 & 31 Vict. (U.K.), c. 3, s. 92(13).

⁹⁷ France, Belgium, The Netherlands, the Scandinavian countries, Hawaii and Vermont have civil registration systems. Nova Scotia has followed suit and set up its own registration system. For a brief overview of the systems introduced in various western countries during the last decades, see Frédérique Granet, "Pacte civil de solidarité (PACS): Aspects comparés et internationaux", J.C.P. ed. N. 2000.I.371 and Martha Bailey, "Marriage and Marriage-Like Relationships", available from the Law Commission of Canada web site at <http://www.cdc.gc.ca/en/themes/pr/cpra/bailey/index.html>

⁹⁸ When some of these countries introduced these registration systems, the primary objective of their lawmakers was to ensure that same-sex couples gained social and legal recognition. In fact, the Netherlands is the only one of these countries that recognizes same-sex marriages. Registration, aside from its legal implications, has a symbolic function of social legitimation. See Jean-Louis Renchon, "Mariage, cohabitation légale et union libre" in Jacqueline Pousson-Petit, sup., *Liber Amicorum Marie-Thérèse Meulders-Klein – Droit comparé des personnes et de la famille* (Brussels: Bruylant, 1998) 549 at 556-557.

specifically defined in time upon registration. The suppletive regime would come into force on the day that partners without a contract registered, and would terminate if and when the contract is lawfully stricken from the register. Only partners who chose formally to register their relationship would be subjected to the legal regime, thereby preserving its voluntary nature. Consequently, consent could be legitimately implied.

Having said this, I feel it is important to devote special attention to three basic principles that should guide any legislative initiative in this area.

Firstly, the system should be available to all partners in a close relationship whose cohabitation involves a certain degree of economic, sentimental or emotional interdependence.⁹⁹ Obviously, heterosexual and same-sex spouses fall within this definition,¹⁰⁰ as do two sisters who share a residence or an adult son living and caring for his mother.¹⁰¹ It would be inopportune, in my view, to exclude these types of close relationship on the pretext that they are not equivalent to a true conjugal relationship. The partners' general economic and relational interdependence is what matters. In my opinion, whether the relational interdependence is sexual has no bearing at all and cannot be the sole basis for eligibility.

⁹⁹ I refer here to two, not several, partners. Some people will undoubtedly question whether several brothers or sisters who live together and are economically and relationally interdependent should be allowed to register their multiparty relationship. While the question is undoubtedly relevant and worth discussing, I feel that the system should be tested first without introducing too many complications, then subsequently improved. To this effect, see Thomas G. Anderson, "Models of Registered Partnership and their Rationale: The Institute's Proposed Domestic Partner Act" (2000) 17 Can. J. Fam. L. 89 at 101. On the subject, see also Pascal Baurain, "La cohabitation légale: Mariage ou mirage législatif" (1998) 120 R. du N. Belge 618 at 620.

¹⁰⁰ In some countries, the system is only available to homosexual couples. This is the case in most Scandinavian countries. Generally, heterosexual couples are excluded because marriage has always been available to them as a means of acquiring social and legal recognition as well as a legal framework: Martha Bailey, "Foreword: Domestic Partnerships (2000) 17 Can. J. Fam. L. 11 at 15-16.

¹⁰¹ The States of Hawaii and Catalonia, as well as Belgium, have adopted this attitude: Hawaii Revised Statutes 1999, c. 572C-1; Mutual Assistance Act 19-1998 and the Belgian Civil Code, art. 1475 § 1^{er}. See also Pascal Baurain, "La cohabitation légale: Mariage ou mirage législatif" (1998) 120 R. du N. Belge 618 at 619. British Columbia is considering similar legislation drafted by the British Columbia Law Institute: Thomas G. Anderson, *supra*, note 99.

Secondly, the legal regime applicable to duly registered couples should be *entirely* optional. For the reasons mentioned, it is not the State's role to dictate the obligations involved in a close relationship, even in part. It does not seem appropriate to create and forcibly subject the registered partners to a mini mandatory regime;¹⁰² they should be able to contract out of the legal regime provided they respect clearly established criteria of validity.¹⁰³

Lastly, the content of the legal regime should respond to the aspirations of as many partners as possible. The model that lawmakers offer should not be taken from either end of the spectrum. Rather, the legal regime must be a middle ground that can reconcile different social trends and thereby gain the support of a majority of individuals.¹⁰⁴

Having said this, a legal regime is not a product of legal deduction, fashioned only by legal experts. It would be difficult, even presumptuous, to theorize about any potential obligations without empirical data or input from social scientists and demographers.

I should mention, however, that a single legal regime might not be suitable for every type of close relationship. Conjugal relationships may not necessarily have the same degree of interdependence as non-conjugal relationships. This factor alone may warrant certain adjustments. A consensual union might benefit from a specific legal regime. Non-conjugal close relationships might be subject to another specific regime. In my opinion, it is better to create several specifically adapted legal regimes than to establish a universal regime that is reduced to

¹⁰² Registered partners in France owe each other mutual economic support. They cannot contract out of this duty: French Civil Code, art. 515-4. In Belgium they must contribute to the household expenses according to their respective means: Belgian Civil Code, art. 1477 § 3.

¹⁰³ See *supra*, pp.29-32.

¹⁰⁴ In 1968, the Matrimonial Regimes Committee of the Civil Code Revision Office had the following to say about the suppletive matrimonial regime in Quebec civil law: "As a matter of sound legislative policy, the legal regime must not only represent a certain ideal, it must also suit the majority." Quebec, Civil Code Revision Office, *Report on Matrimonial Regimes* (Montreal: Civil Code Revision Office, 1968) at 4, cited in *Notary's Handbook*, vol. 1 (Montréal: Chambre des notaires du Québec, 1970) at 6 in the explanatory notes on the *Act respecting matrimonial regimes*. See also Camille Charron, "La séparation de biens comme régime légal: un essai de bilan" (1972) 74 R. du N. 307 at 310-311.

a common denominator and constitutes a rather diluted portrait of the relationships for which it is intended.

Conclusion

When observed from beneath the veil of classical theory, the contract is but partially revealed. Not all its dimensions are visible when it cannot be observed directly. Threatening shadows appear to lurk within it. It stands like a monolith in the middle of a cold, inanimate room.

Lift the veil and the contract is fully revealed from every angle, each subtlety uncovered in the light of day. Unexpectedly, a closer inspection shows that the contract is surrounded by a buzz of activity.

This illustration aptly summarizes the thoughts expressed in this document. When considering the ways in which the law organizes exchanges between people in close relationships, contracts do not immediately come to mind. Images and symbols traditionally associated with the contract hardly seem compatible with the closeness that generally characterizes this type of relationship.

However, no serious evaluation can be based on perceptions and preconceived ideas alone. Once we move beyond the dominant paradigms and classical notions, we can appreciate the contract from a new angle through other theories, such as relational theory and legal pluralism. If we observe the contract through a different lens, we see something other than a “pact between enemies” or a “compromise between bitterly defended opposing interests.”¹⁰⁵ Instead, the contract becomes an organizational and planning tool for long-term relationships, symbolizing the handshake that brings partners closer together and consolidates their relationship.

¹⁰⁵ See Jean-Guy Belley, “Max Weber et la théorie du droit des contrats” (1988) 9 *Droit et société* 281 at 287 and Jacques Mestre, “L’évolution du contrat en droit privé français”, in *L’évolution contemporaine du Droit des Contrats* (Paris: P.U.F. 1986) 41 at 45.

Lawmakers, like any other observers, can only stand to benefit when they diversify their selection of lenses. They can then take advantage of the great potential of the contractual model and ensure that the environment in which it is deployed is respectful of the values upon which Canadian society is based: justice, liberty and diversity.

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