
*Liberty, Equality, Fraternity:
The Forgotten Leg of the Trilogy,
or
Fraternity: The Unspoken Third Pillar of
Democracy*

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This paper explores the historical and theoretical foundations of the concept of fraternity, advancing the thesis that this third forgotten element of the French Revolution is integral to the proper functioning of a democracy. The principal concerns of fraternity—community, inclusion, equity and trust, and cooperation—are examined in their historical and present context. The role of fraternity in Canadian law is then examined, particularly in the areas of: constitutional law, taxation law, Good Samaritan laws, professional responsibility, fiduciary duties, the law of contracts, the law of trusts, and in family law.

Cet article examine les fondements historiques et théoriques du concept de fraternité, en mettant de l'avant l'idée selon laquelle ce dernier élément, souvent oublié, de la trilogie issue de la Révolution française constitue une partie intégrante des principes qui permettent le bon fonctionnement d'une démocratie. Ainsi, les principaux enjeux reliés à la fraternité — la communauté, l'inclusion, l'équité et la confiance, ainsi que la coopération — sont analysés dans leur contexte autant historique que contemporain. Finalement, le rôle que la fraternité est appelée à jouer en droit canadien est décrit à travers l'examen de plusieurs domaines, dont le droit constitutionnel, le droit fiscal, les lois relatives à l'aide apportée à autrui, la responsabilité professionnelle, les devoirs fiduciaires, le droit des contrats, les fiducies et le droit de la famille.

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Introduction

The constitutions of Canada and the United States are founded on precepts of individuality—the guaranteed rights to life, liberty, and security of the person in Canada, and life, liberty, and the pursuit of happiness in the United States. By contrast, in France, India, and elsewhere, the motto of the French Revolution, “liberté, égalité, fraternité” shapes the legal structures in those countries. Fraternity is intertwined with liberty and equality in the very first article of the *Universal Declaration of Human Rights* which proclaims:

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood. [In French, “esprit de fraternité”.]¹

What happened to the concept of fraternity in North America? Greek philosophers feared the concepts of liberty and equality because of their potential damaging effect on fraternity. Was this the same reason why fraternity has been largely ignored in the philosophical writings of North Americans? Was the omission of fraternity from our constitutions the triumph of individualism over communalism?

In my view, fraternity is simply the forgotten² element of democracy which, although rarely identified, is nevertheless present throughout our legal system. It is the glue that binds liberty and equality to a civil society. It is intuitive. It is the forging element of a community. It advances goals of fairness and equity, trust and security, and brings an element of compassion and dedication to the goals of liberty and equality. It bonds individuals who share similar values and goals not only to their current neighbours, but also provides a sense of continuity with the past and the future. I believe that the American philosopher Ralph Barton Perry may have explained it best in *Puritanism and Democracy*:

The full spirit of fraternity acknowledges the just pride of others, and gives in advance that which the other's self-respect demands. It is the only possible relation between two self-respecting persons. It does not imply intimacy or friendship, for these must depend upon the accidents of propinquity and temperament; but it implies courtesy, fair-mindedness, and the admission of one's own limitations. It must underlie the closer relations of family, neighborhood, or vocation; but it must be extended to the broader and less personal relations of fellow citizenship and fellow humanity. It is the essential spirit of that finer companionship which even kings have coveted; but in a diffused and rarefied form it is the atmosphere which is vital to a democratic community.³

¹ *Universal Declaration of Human Rights*, GA Res. 217(III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71 at 72.

² W.C. McWilliams goes further, saying that fraternity is a doctrine that has been almost completely misunderstood by American theorists (see W.C. McWilliams, *The Idea of Fraternity in America* (Berkeley: University of California Press, 1973) at 5).

³ R.B. Perry, *Puritanism and Democracy* (New York: Vanguard Press, 1944) at 580-81.

Liberty and equality are, in a way, antithetical to fraternity. Whereas liberty and equality emphasize the rights of the individual, fraternity emphasizes the rights of the community. Whereas liberty protects the right to live free from interference, fraternity advances the goals of commitment and responsibility, of making positive steps in the community. Greek philosophers challenged notions of liberty because of this subversive effect on fraternity and civic identity.⁴ However, at the same time, fraternity is essential to the well-being of liberty and equality, because only with shared trust and civic commitment can one advance these goals of liberty and equality. Further, the goal of fraternity is to work together to achieve the highest quality of individual existence. In short, liberty and equality depend on fraternity to flourish. At the same time, fraternity may be seen to be dependent upon liberty and equality for the fullness of its expression.

I invite you to explore with me the expression of fraternity in the North American legal order. We all know how liberty and equality interests have been advanced in constitutional law and elsewhere, but what of fraternity? To answer this question, I begin with a historical overview, outlining the birth of this concept and its development through the French Revolution and beyond. I then provide a conceptual framework for the concept of fraternity, reviewing not only the content of fraternity, but understanding the boundaries of fraternity. I then touch upon the areas of Canadian law that have advanced the notion of fraternity.

I. Historical Overview

La célèbre devise de la Révolution française — Liberté, Égalité, Fraternité — vient spontanément à l'esprit lorsque le concept de fraternité est évoqué. Toutefois, ce concept n'est pas né avec la Révolution de 1789. En effet, on retrouve déjà la notion de fraternité dans les écrits des philosophes grecs, plus particulièrement Platon et Aristote. Pour eux, la fraternité constituait une composante essentielle de la vie politique. Ils voyaient la démocratie d'un mauvais œil, car ils croyaient que la notion de liberté supplanterait le concept de fraternité si elle devenait le principe premier. Ils pensaient également que la fraternité était une nécessité de la vie, laquelle pouvait être considérée comme étant une hiérarchie de fraternités: la fraternité du sang devant céder à celle de l'association, et la fraternité de l'association devant céder à la fraternité de la cité⁵.

La notion de fraternité telle que comprise par les philosophes grecs n'a pas survécu à la période des Lumières. La prémisse selon laquelle l'homme est un animal politique qui a besoin d'une identité civique pour se parfaire a été rejetée par la tradition libérale. Contrairement aux philosophes grecs, les penseurs de la période des Lumières voyaient la fraternité comme étant un objectif lointain de l'action politique plutôt

⁴ S. London, "On Fraternity, Social Capital, and the American Community" (1997), online: Scott London's Homepage <<http://www.west.net/~insight/london/wcm.htm>> (date accessed: 7 March 2000).

⁵ McWilliams, *supra* note 2 à la p. 28.

que son point de départ ; la liberté et l'égalité représentaient des moyens d'atteindre l'idéal de fraternité plutôt que l'inverse.

L'idée derrière le concept de fraternité a parfois été désignée par d'autres mots, notamment le mot «humanité». D'ailleurs, l'*Encyclopédie* de Diderot évoque pour l'essentiel le sentiment de fraternité dans son article «Humanité», mais préfère, pour cause de désaffection du mot de fraternité, s'en tenir à l'appellation d'humanité⁶. Dans la société française, le concept d'humanité a suivi le déclin des valeurs chrétiennes pour devenir, au début du 18^e siècle, la vertu d'un nouveau type d'humanité incarné par le philosophe, et prendre une coloration politique. Paul Vernière écrit dans son article intitulé «L'idée d'humanité au XVIII^e siècle»⁷:

Alors qu'elle était, au début du siècle des Lumières, le substitut de la charité chrétienne que le rationalisme opposait à une théologie réputée obscure et contestable, l'idée d'humanité devenait peu à peu une idée force. Elle n'était plus seulement le sentiment d'une communauté et l'exigence d'une communion: elle postulait un ordre fondé sur l'égalité des hommes.

Puis le terme d'humanité a de nouveau côtoyé celui de fraternité dont l'emploi s'est fait plus fréquent après 1789. Pendant la Révolution française, la devise «Liberté, Égalité, Fraternité» représentait le rejet de l'ancien régime et, pour certains des protagonistes, le rejet de la culture chrétienne dominante. L'opinion couramment admise parmi les historiens est que «la fraternité ne serait devenue composante de la triade républicaine que sous la Seconde république»⁸. Cependant, le terme de fraternité a été forgé et occasionnellement utilisé antérieurement à l'adoption officielle de la devise par la Constitution de 1848. Par exemple, Robespierre a demandé que soit inscrit le mot de Fraternité auprès de ceux de Liberté et d'Égalité sur les drapeaux des gardes nationales au mois de décembre 1790.

Le concept de fraternité marque une étape défensive dans l'évolution de l'idée d'humanité: il s'agit de faire front contre ceux qui menacent la cité des hommes qui vient de s'établir. «La fraternité connote l'amour de la patrie, la patrie politique immédiate» ainsi qu'une patrie symbolique qui englobe toutes les personnes qui partagent le même ethos⁹. Comme l'écrit Josiane Boulad-Ayoub dans son ouvrage *Contre nous de la tyrannie* :

On fera appel aux hommes comme citoyens pour défendre, au nom de l'humanité, et jusqu'à la mort, la communauté qui se trouve menacée et les valeurs sur lesquelles celle-ci s'est fondée: la liberté et l'égalité. On sera ainsi, selon les variations des enjeux idéologiques, tantôt frères parce que l'on est

⁶ *Ibid.* à la p. 21.

⁷ P. Vernière, «L'idée d'humanité au XVIII^e siècle» dans *Lumières ou clair-obscur?*, Paris, Presses universitaires de France, 1987, 186 aux pp. 187-88.

⁸ M. David, *Fraternité et Révolution française*, Paris, Aubier, 1987 aux pp. 10-11.

⁹ J. Boulad-Ayoub, *Contre nous de la tyrannie...: Des relations idéologiques entre Lumières et Révolution*, Lasalle (Qc.), Hurtubise HMH, 1989 à la p. 58.

tous enfants de Dieu, tantôt parce que l'on est tous les enfants de la Raison, tantôt parce que l'on est tous enfants de la Patrie¹⁰.

La fraternité était donc jugée nécessaire pour la défense des concepts de liberté et d'égalité. Les Fêtes nationales instituées par Robespierre visaient d'ailleurs expressément à ressouder les citoyens dans une même foi civile et à resserrer «les doux nœuds de la fraternité»¹¹.

Sans sombrer complètement dans l'oubli, le concept de fraternité n'a toutefois jamais retrouvé l'éclat ou la visibilité qu'il a connu pendant la Révolution française. À mon avis, cependant, ce concept est toujours bien vivant et présent dans notre droit. Je me propose de discuter de certaines illustrations juridiques de la notion de fraternité un peu plus tard. Mais avant de ce faire, je crois qu'il est important d'aborder la question du cadre conceptuel de la fraternité.

II. Conceptual Framework

A. Overview

As I have mentioned, the battle cry of “liberté, égalité, fraternité” represented for the French revolutionaries a break from the existing political order. For some of the revolutionaries, the words represented a complete rejection of the existing Christian-dominated culture. For still others, the word “fraternity” was simply a means of expressing solidarity. Over time, fraternity has meant many things to many people. Some have thought fraternity to be subsumed into concepts of communalism or socialism. Others have interpreted fraternity to represent an expression of Christian values—to love one's neighbour.¹² Rawls thought fraternity to encompass the “difference principle” that one should not have greater advantages unless this is to the benefit of the less advantaged.¹³ Still others find fraternity to be subsumed within the concepts of liberty and equality.¹⁴

In this section, I wish to join this chorus by suggesting that fraternity advances a number of core values in pursuit of forming a community. These values include: empathy, cooperation, commitment, responsibility, fairness, trust, and equity. These are not so much independent elements of fraternity as they are interrelated threads weaving the cloth of fraternity. As I show in the final part of this lecture, these threads have similarly woven their way into the Canadian legal order. From these threads, I then consider the “boundaries” of fraternity—when we say “love thy neighbour”, ulti-

¹⁰ *Ibid.*

¹¹ *Ibid.* à la p. 234.

¹² Leviticus (19:18).

¹³ J. Rawls, *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1971) at 105.

¹⁴ Judge G. Calabresi, “Liberty, Equality, Fraternity” (Cambridge Lectures, Queen's College, University of Cambridge, 7 July 1997) [unpublished].

mately one must ask "who then, is my neighbour?" Understanding the boundary lines is critical for understanding the boundaries of fraternity in the Canadian legal regime.

B. Fraternity and Community

Fraternity is the necessary adjunct of liberty and equality that imports these values into a community. To be free amongst equals means nothing outside of a community.¹⁵ The concepts of community and fraternity are interrelated. Communities are not simply the result of individuals pursuing rational self-interest. Nor are they just a means of providing collective goods. Communities exist, in no small part, because of a desire to belong to a family. Fraternity is an expression of brotherhood and sisterhood—of shared interests and beliefs.

Shared values are not the only element of fraternity which help to form a community. In addition, as Professor Kymlicka points out, communities depend upon *shared identities*. In *Multicultural Citizenship*, he argues:

People decide who they want to share a country with by asking who they identify with, who they feel solidarity with. What holds Americans together, despite their lack of common values, is the fact that they share an identity as Americans. Conversely, what keeps Swedes and Norwegians apart, despite the presence of shared values, is the lack of a shared identity.¹⁶

Fraternity and community are linked in other ways. Part of belonging to a community is to recognize a shared past. Brothers and sisters have common parents and grandparents. The concept of diachronic fraternity finds life in the desire of people to forge a relationship between the generations.¹⁷ When we consider environmental measures, we act not in rational self-interest, for we as individuals often would not see the fruits of our sacrifice. Instead, we take these steps so as not to harm future inhabitants of this Earth—in essence, we are protecting the next generation. Forging a relationship between generations in a community is not rooted in liberty or equality, but rather, fraternity.

C. Values of Fraternity

Fraternity stands at the same level as liberty and equality in the pursuit of happiness in a community. The constituent elements of fraternity are a number of values which, like liberty and equality, are fundamentally moral values, values to which we

¹⁵ J.R. Pennock, *Liberal Democracy: Its Merits and Prospects* (New York: Rinehart & Company, 1950) at 95: "[A] society in which insistence upon rights is not accompanied by a consideration for the rights of others, and also by a willingness to be accommodating in making those mutual adjustments without which social life is impossible, is ... surely headed for speedy disintegration."

¹⁶ W. Kymlicka, *Multicultural Citizenship* (Oxford: Clarendon Press, 1995) at 188.

¹⁷ Archbishop Jean-Marie Cardinal Lustiger, "Liberty, Equality, Fraternity" (adapted from Erasmus Lecture, Institute on Religion and Public Life, New York City [undated]), online: My Right Page <<http://adasboro.tripod.com/lustiger.html>> (date accessed: 7 March 2000).

aspire but seldom attain. Each of the values interacts with liberty and equality while also interacting with the other fraternal values. The result of this process, or the result to which we aspire, is a better community.

The first value of fraternity recognizes that there are certain people within this community who require special protection and to whom we have a commitment. Certain vulnerable groups need extra measures to play a meaningful role in the community. In one respect, this imports to a liberal democracy a notion of **empathy**. In another respect, this aspect of fraternity informs our understanding of equality—the State may be discriminating against individuals by failing to accommodate their special needs. But strictly speaking, from an Aristotelian perspective, the right to equality would not recognize such inaction as discrimination. This aspect of fraternity—that of **inclusion**—is essential for the proper functioning of a polyethnic state such as Canada.¹⁸ As a result, the law is replete with examples of duties imposed on individuals to take positive steps to assist persons who are disadvantaged or in need of care or protection.

Further, some relations are such that the law demands a degree of **commitment** and **responsibility**. The concept of fraternity informs the law by acknowledging that some individuals have special relationships with others, and concordant with that relationship are certain responsibilities. Whether this is the Crown and Aboriginal people, two spouses, or parent and child, special obligations will exist in a community that may not be completely congruent with individualistic notions of liberty or equality.

Fraternity also recognizes that in certain interactions with other people, one must do more than just treat them equally or in a manner that respects their liberty and freedoms. Rather, in certain circumstances, one cannot abuse their position in an unfair manner. Fraternity informs the notion that we as a community cannot rest solely on our “liberty” rights in a manner that is unfair to others. The backbone of civil society rests on treating each of our neighbours in a **fair** manner and with a degree of **trust**. Coupled with the concept of inclusion, this aspect of fraternity results in harsh penalties against those who hold positions of trust and yet abuse that trust. Justice, equity, fairness, and trust operate simultaneously to guarantee the smooth functioning of a community in a way that is in accordance with the community’s conscience.

Another aspect of fraternity is that of **cooperation**. The difference between liberty and equality, on the one hand, and fraternity on the other, is that the former values promote the free *association* of individuals, whereas the latter promotes the *cooperation* of individuals in the community. Cooperation is inspired by the commonality of interests and gives rise to the pooling of resources in pursuit of a common goal. Association *per se* connotes a simple fact: people are connected with one another. Cooperation connotes something more: people who are connected can work together to advance common interests. However, fraternity connotes cognizance of the common

¹⁸ See Kymlicka, *supra* note 16 at 176-81.

good sought by the cooperation, and a desire to arrive at that common good. Professor Ziniewicz makes the point that individuals on an assembly line may not know the final outcome of the product when they attach a widget; they may not even care or desire the end product (instead caring only about getting paid, for example).¹⁹ The point of fraternity is not just that people work together, but people know that they are working together for a common goal.

All of these values—inclusion, fairness and trust, cooperation, empathy, commitment, and responsibility—can be seen interacting with liberty and equality throughout Canadian law. In some instances, additional duties are imposed on individuals in pursuit of these goals. In others, the legal framework provides incentives to those who pursue such goals. And in still others, the law prescribes penalties against those who fail to act in a manner that accords with these principles.

D. The Boundaries of Fraternity

The extent to which these principles of fraternity inform the Canadian legal system is the subject of the following sections. In a way, the question “who then, is my neighbour?” is as relevant for the concept of fraternity as it is for the law of negligence. Although fraternity is sometimes expressed as “universality” or “humanité”, it is often expressed within defined parameters. W.C. McWilliams said that fraternity “is limited in the number of persons and in the social space to which it can be extended”.²⁰ To the extent that fraternity is based on shared values and goals, the class of people with whom one shares a fraternal relationship may be limited. On the other hand, fraternity may be universal in its object. Many of the goals advanced by international organizations involve fraternal concepts.

The question remains: who then, is my neighbour? How does one define the extent of the fraternal relation? The answer to this question depends in no small part on the nature of the interest in question. For example, duties imposed on parents to advance the best interests of the child necessarily involve a notion of limited fraternity. There is no general obligation on all individuals to treat this individual child in the manner expected by or of the parents, although at a wider level, children are given special protection against *all* people. In other words, the concept or value underlying the duty may be widely shared, but as applied in law, the duty itself may be imposed on a limited class of people. It is important to differentiate between the source of the obligation, *i.e.*, fraternity, and the obligation itself as prescribed by law.

¹⁹ G.L. Ziniewicz, *Democracy and Imagination: The Practical Idealism of John Dewey* (Ph.D. Thesis, 1992), c. 7, online: Ziniewicz on the Web <<http://www.fred.net/tzaka/seven.html>> (last modified: 17 November 1999).

²⁰ *Supra* note 2 at 7.

III. Fraternity in Canadian Law

A. Introduction

Let me now explore how some of the conceptual imperatives of fraternity have breathed life into various obligations imposed on individuals to take positive steps for the benefit of other people. In so doing, I draw a fairly broad distinction between fraternity in public law (as between the State and the individual) and fraternity in private law (as between two private individuals). In the former, I will refer to the *Canadian Charter of Rights and Freedoms*,²¹ and taxation law. In the latter part, I seek to explore how the Quebec *Charter of Human Rights and Freedoms*,²² the law of professional obligations, fiduciary duties, the law of contract, the law of trusts, and family law all provide a regime in which private individuals operate in a manner consistent with the community-based values advanced by the concept of fraternity.

B. Fraternity in Public Law

1. The Canadian Charter of Rights and Freedoms

In a very real way, the *Charter* in Canada and the *Bill of Rights*²³ in the United States are expressions of community-held values. Often expressed in general terms, the enumerated rights contained in the *Charter* reflect seven values that the Spicer Commission has identified as being "core values" held by most, if not all, Canadians:²⁴

- a belief in equality and fairness in a democratic society
- belief in consultation and dialogue
- importance of accommodation and tolerance
- support for diversity
- compassion and generosity
- attachment to Canada's environment
- commitment to freedom, peace, and non-violent change

As a vehicle for advancing shared values and fostering a shared identity, the mere existence of the *Charter* itself advances fraternal interests.

²¹ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

²² R.S.Q. c. C-12 [hereinafter *Quebec Charter*].

²³ U.S. Const. amend. I-XXVI.

²⁴ Canada, *Citizens' Forum on Canada's Future: Report to the People and Government of Canada* (Ottawa: Supply and Services Canada, 1991) (Chairman: K. Spicer) at 34-45.

However, also contained within the *Charter* are numerous examples of fraternity-based rights. Section 23 contains minority language educational rights, which seek to ensure that “each [official] language flourishes, as far as possible, in provinces where it is not spoken by the majority of the population.”²⁵ Again, we are not speaking of rights informed by strict equality, but rather, of positive rights designed to promote individuals who may be in a vulnerable position. Further, section 27 contains an interpretive provision dictating that the *Charter* is to be read in a manner that is consistent with “the preservation and enhancement of the multicultural heritage of Canadians.” The “enhancement” of the multicultural heritage is not just a protection of the equality rights of ethnic groups in Canada—it is something more. Finally, section 35 of the *Charter* recognizes and affirms the existing Aboriginal and treaty rights of Canada’s First Nations.

Even those rights contained in the *Charter* that seem, at first sight, to be liberty or equality rights are often interpreted in a manner consistent with fraternity. Section 15 provides the basic equality protections in Canada, to be free from discrimination based on race, national or ethnic origin, colour, religion, sex, age, and disability. In a series of cases starting with *Andrews v. Law Society of British Columbia*²⁶ and continuing with *Law v. Canada*,²⁷ the Supreme Court has been engaged in a process of crafting a workable test for achieving “substantive” equality. In this process, deaf individuals who were treated similarly to all other people were given access to interpreters in hospitals,²⁸ and homosexuals who were not included in a human rights code stated to be comprehensive were read into the document.²⁹ While one can simply say that these cases demonstrate a desire to pursue *substantive* equality, there are at least threads of fraternity running through them. Again, in order for the deaf appellants in *Eldridge* to meaningfully participate in the community (by receiving the benefits available to all others), the hospitals had to provide additional services specific to their disability. Where a human rights code purports to remedy all forms of discrimination in the province, it will not be acceptable to leave out one disadvantaged group in the process. One can see the elements of fraternity—community, inclusion, fairness, and cooperation—running through these judgments.

Perhaps most importantly, the *Charter* imports notions of fraternity through the use of section 1. Section 1 permits limitations on liberty and equality rights in a manner that is demonstrably justified in a free and democratic society. Our constitutional rights are not absolute. On occasion, the government may well be justified in placing reasonable limits on some forms of liberty in order to advance a community goal, or what Chief Justice Dickson described in *R. v. Oakes* as “the realization of collective

²⁵ *Mahe v. Alberta (A.G.)*, [1990] 1 S.C.R. 342, 68 D.L.R. (4th) 69.

²⁶ [1989] 1 S.C.R. 143, 27 D.L.R. (4th) 600.

²⁷ [1999] 1 S.C.R. 497, 170 D.L.R. (4th) 1.

²⁸ *Eldridge v. British Columbia (A.G.)*, [1997] 3 S.C.R. 624, 151 D.L.R. (4th) 577 [hereinafter *Eldridge*].

²⁹ *Vriend v. Alberta*, [1998] 1 S.C.R. 493, 156 D.L.R. (4th) 385.

goals of fundamental importance.”³⁰ Those collective goals, and fundamental values, were described by the Chief Justice as being “respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.”³¹

Here we find fraternity. All of the elements of fraternity outlined in the contextual framework can be located in this one, brief passage of *Oakes*. Fraternity involves the advancement of shared values and identities to form a community—what the Chief Justice labelled as “accommodation” and “respect” for a wide variety of beliefs and group identities. Fraternity involves commitment, responsibility, and inclusion—what the Chief Justice labels here as a commitment to social justice and equality. Fraternity recognizes that, on occasion, certain additional steps may be necessary to allow all members of the group to meaningfully play a role in the community. As the Chief Justice explained, this involves a respect for the inherent dignity of the human person, and a commitment to taking measures that will “enhance the participation of individuals and groups in society.” Section 1 opens the door wide to the definition and implementation of specific rights and duties that are the expression and embodiment of fraternity in our communities.

2. Law of Taxation

Another aspect of public law in which the values of fraternity are encouraged and promoted is the Canadian tax regime. The *Income Tax Act* exempts or reduces the tax burden of those who are in a position to advance community interests, notably by conferring upon registered charities a tax-exempt status³² and providing tax credits and deductions for charitable donations³³, various other credits and deductions, such as those for volunteers³⁴, physical or mental impairment³⁵ and support of spouses and dependents³⁶, to name but a few.

³⁰ *R. v. Oakes*, [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200 [hereinafter *Oakes* cited to S.C.R.].

³¹ *Ibid.* at 136.

³² *Income Tax Act*, R.S.C. 1985 (5th Supp.), c. 9, s. 149.1.

³³ *Ibid.*, s. 110.1(1).

³⁴ *Ibid.*, s. 8.(1).

³⁵ *Ibid.*, s. 118.3.

³⁶ *Ibid.*, s. 118.

C. Fraternity in Private Law

1. The Quebec *Charter of Human Rights and Freedoms*—Good Samaritan Laws

The Quebec *Charter of Human Rights and Freedoms*³⁷ contains provisions similar to the *Canadian Charter of Rights and Freedoms* that are applicable in the private law context. It also contains a Good Samaritan provision that is unique in Canadian law. Section 2 of the *Quebec Charter* reads:

Every human being whose life is in peril has a right to assistance.

Every person must come to the aid of anyone whose life is in peril, either personally or calling for aid, by giving him the necessary and immediate physical assistance, unless it involves danger to himself or a third person, or he has another valid reason.

In 1994, the National Assembly of Quebec also included in the new *Civil Code of Québec* a provision exempting a person who comes to the assistance of another person from all liability for injury that may result from his or her altruistic actions, unless the injury is due to his or her intentional or gross fault.³⁸ Arguably, the inclusion of the obligation to give assistance in the *Charter* was unnecessary given that the failure to come to the assistance of another person whose life is in peril may constitute a fault covered by article 1457 of the *Civil Code of Québec*, the general civil liability provision.³⁹ This argument amounts to saying that a reasonable person must act in a fraternal manner. In any event, the adoption of section 2 of the *Quebec Charter* shows the government's increasing awareness that solidarity between individuals belonging to a community is essential to the common well-being. According to one author, indifferent and blind individualism is not fashionable anymore given the *Quebec Charter's* preamble and the obligation to give assistance.⁴⁰ In my view, section 2 of the *Quebec Charter* is another manifestation of fraternity values that exist in Canadian law. It encompasses many of the themes of fraternity that I have outlined earlier, that is, community, inclusion, fairness, and cooperation.

2. Professional Ethics and Obligations

The responsibilities that professionals owe to their clients and other third parties may exist by way of contract, fiduciary duty, or tort liability.⁴¹ However the duty is imposed, it is clear that there are certain obligations imposed on professionals that

³⁷ *Supra* note 22.

³⁸ Art. 1471 C.C.Q.

³⁹ See the analysis of this position in A. Klotz, "Le droit au secours dans la province du Québec" (1991) 21 R.D.U.S. 479 at 504.

⁴⁰ *Ibid.* at 516.

⁴¹ *Tracy v. Atkins* (1977), 83 D.L.R. (3d) 46 at 52 (B.C. S.C.), *aff'd* (1979) 105 D.L.R. (3d) 632 (C.A.).

recognize both their duty to serve and the vulnerable position held by their clients. Codes of ethics represent a transfer into the legal sphere of an element of moral obligation rooted in fraternity. They reflect that the function of professionals is to provide personal *service* to their clients.

The codes of professional conduct for lawyers state clearly that the fundamental duty of lawyers is to provide competent service in a conscientious, diligent, and efficient manner while, as officers of the court, having a special commitment and responsibility to the administration of justice and society at large.⁴² Duties are imposed on lawyers to ensure that they are not counsel for both parties and that they do not have a personal interest in the file.⁴³ Lawyers are also under strict controls when handling their clients' money, and can face severe disciplinary measures for not preserving their clients property and money in trust.⁴⁴ Here, it is clear that the maxim *caveat emptor* simply does not work—the clients are simply at the mercy of their lawyer, and if the lawyer does not act in a manner that advances the clients' interest, even if strictly legal and proper from an individualistic perspective, the client may be powerless to prevent it.

Lawyers are not the only professionals who owe fiduciary-type duties to their clients. When a patient enters into a relationship with a doctor, several duties are imposed on the doctor flowing from the personal service nature of the relationship and to ensure that the vulnerable position of the patient is protected.⁴⁵ The doctor is under a duty to attend to the patient; failure to comply results in damages for negligence.⁴⁶ If the doctor is unfamiliar with the patient's condition or has some remaining doubt, he or she is under a duty to consult others or refer the patient elsewhere.⁴⁷ The doctor owes a duty to diagnose the patient's illness, and must exercise reasonable care in so doing. The doctor owes a duty to inform the patient of all of the circumstances and possible risks of the treatment. Possessed of this knowledge of the patient, the doctor is under a duty to keep this information confidential.

Obligations are also imposed upon stockbrokers entrusted with the savings of their clients. These include the duty to give advice carefully and completely, to perform their obligations with integrity, honesty, good faith and in the best interest of the

⁴² Law Society of Upper Canada, *Professional Conduct Handbook*, 2d ed. (Toronto: Law Society of Upper Canada, 1998), Rule 2.

⁴³ *Ibid.*, Rule 5; *Macdonald Estate v. Martin*, [1990] 3 S.C.R. 1235, 77 D.L.R. (4th) 249.

⁴⁴ Law Society of Upper Canada, By-Law No. 19, *Handling of Money and Other Property* (28 January 1999, as amended to 28 May 1999), online: Law Society of Upper Canada <http://www.isuc.on.ca/services/services_bylaws_en.shtml> (last modified: 24 September 1999).

⁴⁵ *Kenny v. Lockwood*, [1932] O.R. 141 at 155 (C.A.), 1 D.L.R. 507 (C.A.); *Henderson v. Johnston* (1956), 5 D.L.R. (2d) 524 (Ont. H.C.J.), aff'd (1957), 11 D.L.R. (2d) 19 (C.A.), aff'd [1959] S.C.R. 655.

⁴⁶ A.J. Meagher, P.J. Marr & R.A. Meagher, *Doctors and Hospitals: Legal Duties* (Toronto: Butterworths, 1991) at 26-27.

⁴⁷ *Fraser v. Vancouver General Hospital*, [1952] 2 S.C.R. 36, 3 D.L.R. 785; *Jarvis v. International Nickel Co.*, [1929] 2 D.L.R. 842 at 845 (Ont. H.C.J.).

client, and to avoid any conflict of interest. The broker must also adequately inform his client of the risks, which involves making the appropriate enquiries to know the needs of his client and appreciate his level of understanding.⁴⁸ The greater the degree of inequality in information, knowledge, and power between the parties, the greater the obligation to inform.⁴⁹ Further, in negotiating contracts, the professional must not pursue blindly his or her objectives but must always turn an eye to the interests of the clients who have placed their trust in him or her. This may even force upon the professional broker courses of action which may run against his or her own best interest, but which serve those of the client.⁵⁰

All of these duties do not arise out of freedom to contract; nor do they rest on the shoulders of liberty or equality. Rather, it is a simple recognition of this service relationship and that in society some people hold positions of power, and have the ability to abuse the trust inherent to those positions. Society demands that there be a check on liberty in these circumstances to ensure the proper functioning of the community. The service relationship reflects a degree of commitment and responsibility that professionals have toward their clients. It is true not only for lawyers, doctors, and stockbrokers, but for an ever-growing body of professionals subject to similar controls.⁵¹

3. Fiduciary Duties

One of the most rapidly developing areas of commercial law in Canada relates to fiduciary relationships. In *Lac Minerals v. International Corona Resources*, Justice La Forest said that “[t]here are few legal concepts more frequently invoked but less conceptually certain than that of the fiduciary relationship.”⁵² In my view, the conceptual basis of fiduciary relationships lies, in part, with fraternity.

Fiduciary duties in the commercial context often promote an ethic of service. At the same time, they also exist to give effect to the moral outrage of society against violations toward vulnerable people. Vulnerability was described by La Forest J. in *Hodgkinson v. Simms*,⁵³ as an “important indicium” of a fiduciary relationship. Where one person has some scope for the exercise of some discretion or power over the vul-

⁴⁸ *Securities Act*, R.S.Q. c. V-1.1, s. 161.

⁴⁹ L.J. Beaudoin, *Le contrat de gestion de portefeuille de valeurs mobilières*, (Cowansville, Qc.: Yvon Blais, 1994) at 89.

⁵⁰ *Ibid.* at 88 and authors cited at n. 203.

⁵¹ Architects: *District of Surrey v. Carroll-Hatch & Associates Ltd.* (1979), 101 D.L.R. (3d) 218, 6 W.W.R. 289 (B.C. C.A.); Insurance agents and brokers: see W. D. Lilly, “The Expanding Duty to Keep Informed: The Professional Liability of Insurance Agents and Brokers,” in *Meredith Memorial Lectures 1983-1984* (Don Mills, Ont.: De Boo, 1983-84) 147 at 147; Real Estate Brokers: *S.E. Lyons Ltd. v. Arthur J. Lennox Contractors Ltd.*, [1956] O.W.N. 624 (H.C.); Directors and shareholders: *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, s. 122.

⁵² [1989] 2 S.C.R. 574 at 643-44, 61 D.L.R. (4th) 14 [hereinafter *Lac Minerals* cited to S.C.R.].

⁵³ [1994] 3 S.C.R. 377 at 405, (1995), 117 D.L.R. (4th) 161 [hereinafter *Hodgkinson* cited to S.C.R.].

nerable person, and can use this power unilaterally to the detriment of the vulnerable person, then a fiduciary duty will often be identified.⁵⁴

Fiduciary duties have been found in a myriad of relationships, ranging from the relationship between the Crown officials and Aboriginals, to parents and their children, to government officials and youth under their care.

Fiduciary duties transcend mere liberty interests that inform duties of care in tort law. Whereas in tort law, one is protected from an invasion into one's sphere of physical or mental integrity or one's property, in fiduciary relationships, one is protected from an abuse of loyalty and an abuse of power.⁵⁵ Sanctions for breaches of fiduciary duties represent equity's outrage at those who attain an individual's trust, only then to abuse that position of trust. For this reason, the law imposes a higher standard than in other areas of law: we care not about the motive in the breach, but rather, it is the fact of departure from the beneficiary's best interests that attracts the law's sanction.⁵⁶

The key elements of a fiduciary relationship have little to do with liberty or equality and everything to do with fraternity. The fiduciary relationship does not simply arise by virtue of a contract; rather it arises through an acknowledgment of the fraternal concepts of commitment and responsibility. The fiduciary relationship does not seek to confer equality to the beneficiaries, but rather it seeks to protect them from unfair abuses of power. Sanctions for breach of fiduciary duty do not seek to simply effect restitution; rather, they seek to condemn the wrongful party for his abuse of trust. In these ways, the two threads of fraternity—inclusion and protection of vulnerable groups, and concerns over equity and trust—work together to form an emerging area of law that remains conceptually distinct from others.

4. Law of Contract

One might think that the one area of law free from fraternity concepts would be the law of contract. Governing a myriad of business relationships, individualism and liberty interests should be paramount in the law of contract. However, even this area of law is not immune from fraternity's influence. Although fraternity can be seen throughout the law governing private business relations,⁵⁷ I propose to discuss three particular areas of contract law—the doctrine of unconscionability, good faith in contracts, and the duty to mitigate—where concepts underlying the fraternity principle emerge and govern.

⁵⁴ *Frame v. Smith*, [1987] 2 S.C.R. 99 at 136-38, 42 D.L.R. (4th) 81, Wilson J.; *Lac Minerals*, *supra* note 52, Sopinka J. at 599, La Forest J. at 646.

⁵⁵ *Hodgkinson*, *supra* note 53 at 406.

⁵⁶ M.V. Ellis, *Fiduciary Duties in Canada*, looseleaf (Scarborough, Ont.: Carswell, 1999) at 1-3.

⁵⁷ Antitrust law, for example.

a. Doctrine of Unconscionability

The doctrine of unconscionability operates to allow one party to avoid his or her contractual obligations where to do otherwise would be manifestly unjust. The full scope of the doctrine has yet to be explored by Canadian courts, but the doctrine's seeds have been planted.⁵⁸ Currently, Canadian courts have set aside contracts where there are two conditions present: where there is an improvident or unconscientious bargain and where there is an inequality in the positions of the parties.⁵⁹ In *Harry v. Kreutziger*, Lambert J.A. said that the sole question when analysing an allegedly unconscionable transaction is whether "the transaction, seen as a whole, is sufficiently divergent from community standards of commercial morality that it should be rescinded ..."⁶⁰ Commercial morality? It is difficult to place commercial morality within a framework of liberty and equality.⁶¹ Professor Waddams has noted this tension:

Freedom of contract emphasizes the need for stability, certainty, and predictability. But important as these values are, they are not absolute, and there comes a point where they "face a serious challenge." Against them must be set the value of protecting the weak, the foolish, and the thoughtless from imposition and oppression ... [I]t is not a coincidence that the decline of the highly individualistic view of society that prevailed in the late nineteenth century has been accompanied by a greater willingness of courts and legislatures to grant relief from disadvantageous contracts.⁶²

Again, the relevant aspects of fraternity contained within this aspect of the law of contract are the concepts of inclusion, fairness, equity, and trust.

b. Good Faith in Contracts

The notion of fraternity is also reflected in one of the fundamental principles relating to contracts in Civil Law, and to a lesser extent in the Common Law tradition⁶³—the duty to act in good faith. This duty, first recognized by our Court,⁶⁴ has been codified in article 6 of the *Civil Code of Québec* which provides that "every person is bound to exercise his civil rights in good faith". In the contractual context, it

⁵⁸ *Hunter Engineering Co. v. Syncrude Canada Ltd.*, [1989] 1 S.C.R. 426, 57 D.L.R. (4th) 321 [hereinafter *Hunter*].

⁵⁹ *Morrison v. Coast Finance Ltd.* (1965), 55 D.L.R. (2d) 710, 54 W.W.R. 257 (B.C. C.A.); *Harry v. Kreutziger* (1978), 95 D.L.R. (3d) 231, 9 B.C.L.R. 166 (B.C. C.A.) [cited to D.L.R.]; *Hunter, ibid.*

⁶⁰ *Ibid.* at 241.

⁶¹ Leading, in several cases, to a strong disinclination against the doctrine of unconscionability: see e.g., *Miller v. Lavoie* (1966), 63 W.W.R. 359 at 365, Wilson C.J., 60 D.L.R. (2d) 495 (B.C. S.C.).

⁶² S.M. Waddams, *The Law of Contracts*, 4th ed. (Toronto: Canada Law Book, 1999) at 319-21.

⁶³ G.H.L. Fridman, *The Law of Contract in Canada*, 3d ed. (Scarborough, Ont.: Carswell, 1994) at 78.

⁶⁴ *National Bank v. Soucisse*, [1981] 2 S.C.R. 339, 43 N.R. 283 [hereinafter *Soucisse*]; *Banque de Montréal v. Kuet Leong Ng*, [1989] 2 S.C.R. 429, 62 D.L.R. (4th) 1; *Houle v. Canadian National Bank*, [1990] 3 S.C.R. 122, 74 D.L.R. (4th) 577 [hereinafter cited to S.C.R.]; *Bank of Montreal v. Bail Ltée*, [1992] 2 S.C.R. 554, 93 D.L.R. (4th) 490.

imposes upon the parties the obligation to act with loyalty and sincerity, with a minimal level of concern for the well-being of others and in the spirit of cooperation.

The notion of good faith relates not only to the execution of a concluded contract, but also to its formation. It applies to all parties to the contract, irrespective of their relative power, whether it is a bank who must disclose relevant information to the personal guarantor⁶⁵ or a client in an insurance contract who must declare, with the utmost good faith, those facts which are material to the insurer's appraisal of the risk.⁶⁶

In the execution of contractual obligations, the requirements of good faith protect against an abusive exercise of individualistic rights, however lawful the exercise of those rights may be in themselves.⁶⁷ What constitutes abuse of power is intimately tied to those values that our society covets. As noted by my colleague L'Heureux-Dubé J. in *Houle v. Canadian National Bank*, this principle serves to "sanction marked departure from the general norm of behaviour acceptable in our society".⁶⁸

This ties in to the core values of fraternity. The concept of good faith, *bona fides*, finds its source in Roman law and the notion of *fides*, at the heart of which lies the fraternal value of trust.⁶⁹ In the words of Jean Imbert, "la *fides* est donc une notion morale, sociale et religieuse tout à la fois, qui traduit l'abandon total et confiant d'une personne à une autre".⁷⁰ According to another author, the codification of this obligation in the new *Civil Code of Québec* reflects a modernization of our societal values by seeking to restore equilibrium in contractual relationships and to reduce inequalities in these relationships.⁷¹ In the words of Edward Belobaba, the focus of good faith "is on community standards, on commercial decency, and fairness and reasonableness."⁷² Bad faith violates these values that form the basis of harmonious and mutually beneficial relationships in our society and runs counter to the spirit and core values of fraternity.

⁶⁵ *Soucisse, ibid.*

⁶⁶ Art. 2408 C.C.Q.

⁶⁷ Art. 7 C.C.Q.

⁶⁸ *Supra* note 64 at 145-46.

⁶⁹ G. Freyburger, *Fides: Étude sémantique et religieuse depuis les origines jusqu'à l'époque augustéenne* (Paris: Les Belles Lettres, 1986) at 230-32; E. Charpentier, "Le rôle de la bonne foi dans l'élaboration de la théorie du contrat" (1996) 26 R.D.U.S. 299 at 304-05.

⁷⁰ J. Imbert, "De la sociologie du droit: la '*fides*' romaine" in *Droit de l'antiquité et sociologie juridique: Mélanges Henri Lévy-Bruhl* (Paris: Sirey, 1959) 407 at 411.

⁷¹ B. Lefebvre, *La bonne foi dans la formation du contrat* (Cowansville, Qc.: Yvon Blais, 1998) at 34.

⁷² E.P. Belobaba, "Good Faith in Canadian Contract Law" in Law Society of Upper Canada, *Special Lectures* (Don Mills, Ont.: De Boo, 1985) at 78.

c. Duty to Mitigate

The duty to mitigate has two bases in theory.⁷³ The first is causation. When one party continues to accrue losses that could be avoided by reasonable steps, then it is not entirely accurate to say that the wrongful party has "caused" the loss. The second theoretical basis is more relevant for the concept of fraternity—that the law is concerned with avoiding economic waste. Strictly speaking, there is no individualistic liberty rationale for the duty to mitigate losses. A strictly libertarian perspective would simply protect the individual rights against harm by others. If anyone is to stop the damage from occurring, it should be the wrongdoer, not the victim.

The concern over economic waste is tangentially related to three interrelated elements of fraternity: equity, fairness, and community. In *Red Deer College v. Michaels*,⁷⁴ Laskin C.J.C. explained that an inquiry into mitigation asks whether the aggrieved party took reasonable steps to avoid the "unreasonable accumulation" of losses. Elsewhere, the courts have said that one must consider whether the victim has done what "they ought to have done as reasonable men".⁷⁵ When the courts look for unreasonableness and what people "ought to do" as reasonable people, these are normative concepts rooted in fraternity. In some circumstances, it is unacceptable to rest on individualistic legal rights in a manner which is not productive for the community. As a whole, the community does not gain by having needless economic waste.

4. Charitable Trusts

The charitable trust embodies the values of fraternity in a different way by encouraging persons of wealth to come to the assistance of those less fortunate. According to Professor Waters, the charitable trust "is a vehicle of major significance for the dedication of property to the service of the community".⁷⁶ This notion of community and its betterment to which charitable trusts and the broader concept of charity attach, are at the core of the concept of fraternity.

Reflecting the importance our society and governments attach to charity, Canadian courts and the legislatures have developed rules favouring charitable trusts, such as greater flexibility as to the certainty of their object, a benign construction in case of ambiguity⁷⁷ and exemptions from the rule against perpetuities.⁷⁸ Legislatures have also conferred considerable tax advantages to charitable activities, as noted previously.

As I suggested recently in *Vancouver Society v. M.N.R.*, what constitutes charity is intimately tied to the values inherent in our communities such that the definition it-

⁷³ Waddams, *supra* note 62 at 553.

⁷⁴ [1976] 2 S.C.R. 324 at 331, 57 D.L.R. (3d) 386.

⁷⁵ *British Westinghouse Electric & Manufacturing Co. v. Underground Electric Railways Co. of London*, [1912] A.C. 673 at 689 (H.L.).

⁷⁶ D.W.M. Waters, *Law of Trusts in Canada*, 2d ed. (Toronto: Carswell, 1984) at 502.

⁷⁷ See e.g. *Jones v. T. Eaton Co.*, [1973] S.C.R. 635, 35 D.L.R. (3d) 97.

⁷⁸ See Waters, *supra* note 76 at 516-31.

self of "charity" must "evolve with social developments" and be accorded a progressive interpretation recognizing "changing social needs".⁷⁹ These societal values include those defining the concept of fraternity.

5. Family Law

The Canadian legal regime recognizes that the family is the fundamental unit of society.⁸⁰ This role in the community results in a recognition of the distinctive features of a family. Upon entering a spousal relationship, certain obligations arise. The law lends preference to those who support one another in a spousal relationship. The obligation to provide support continues to exist even if the relationship breaks down. When children are involved, the law steps in to ensure that the best interest of the child is paramount. In all of these ways, family law can be seen as fostering societal relations in a manner which recognizes the distinctive role and needs of each member of the family.

a. Spousal Support

Although it may not be semantically correct to describe marriage as a "fraternal" relationship, it is clear that certain obligations assumed by marriage take on some of the *concepts* underlying the fraternity principle. In particular, it is apparent that the law of spousal obligations represents a positive obligation imposed on one person to help another. Fraternal concepts of commitment, responsibility, inclusion, and fairness all inform the law of spousal support. It is not just a contractual obligation; nor is it simply "compensatory" in an individualistic sense.

Article 392 of the *Civil Code of Québec* states that spouses "owe each other respect, fidelity, succour, and assistance." Further, the Civil Code directs that spouses are "bound to live together"—an aspirational clause recognizing the emotional and intellectual bond between spouses.⁸¹ The obligation of support transcends a simple monetary obligation during marriage, and numerous provisions in pension law and tax law help to foster the development of these obligations.

These obligations also exist after the spousal relationship breaks down. It was thought, at one time, that spousal support was the simple consequence of terminating a quasi-contractual relationship. In *Moge v. Moge*,⁸² the Supreme Court explained that spousal support was not concerned with just contractual duties or the reasonable expectation of the parties to the marriage, but rather, that spousal support was also com-

⁷⁹ [1999] 1 S.C.R. 10 at 43, 169 D.L.R. (4th) 34.

⁸⁰ *M. v. H.*, [1999] 2 S.C.R. 3 at 104, Gonthier J., 171 D.L.R. (4th) 577; *Egan v. Canada*, [1995] 2 S.C.R. 513 at 539, La Forest J., 124 D.L.R. (4th) 609.

⁸¹ On this point, see N. Kasirer, "What is *vie commune*? Qu'est-ce que *living together*?" in *Mélanges Paul-André Crépeau* (Cowansville, Qc.: Yvon Blais, 1997) 487.

⁸² [1992] 3 S.C.R. 813, 99 D.L.R. (4th) 456.

pensatory in nature. It was imposed to acknowledge the economic consequences of marriage or marriage breakdown.

In *Bracklow v. Bracklow*,⁸³ the Court explicitly acknowledged a third prong of spousal support, based on *non-compensatory* factors. This case involved a couple who were happily married for three years after living together for four years. While together, they lived independently and the trial judge found that Mrs. Bracklow suffered no disadvantage as a result of the marriage or its breakdown. At the time of the hearing, Mrs. Bracklow suffered from numerous disabilities. The Court held that, notwithstanding the absence of a compensatory or contractual foundation for the obligation, a spousal support order could nonetheless be made. A few of the comments by McLachlin J. (as she then was) are interesting in this context. First, she said that such an order “is but to acknowledge the goal of *equitably* dealing with the economic consequences of marital breakdown ...”⁸⁴ Further, “it also may well accord, in my belief, with society’s sense of what is *just*.”⁸⁵ Finally, in upholding a non-compensatory support order, McLachlin J. concluded that “[j]ustice and considerations of *fairness* may demand no less.”⁸⁶

As I have explained, these concerns—fairness, equity, justice—are pivotal concerns for the fraternity principle. The law of spousal support, employing these normative concerns, involves the law imposing an obligation on one person to assist another, even when there is no need to *compensate* that person. In this sense, the law of spousal support can be seen as leaning more toward fraternity concepts than liberty or equality concepts in some cases.

b. Child Support and in Loco Parentis

The obligation to provide support to one’s children is obviously a duty incurred as a result of a parental relationship. However, it can be seen that many elements of the law relating to child support obligations rest squarely on fraternal concepts. The first and most obvious fraternal aspect is that children form an integral part of the basic unit of society: the family. Child support obligations are imposed as well because children are quite obviously incapable of fending for themselves. While a family may break down, the obligation to take affirmative steps to assist the children remains. The objectives of child support are, as Justice Bastarache said in *Chartier v. Chartier*,⁸⁷ and in *Francis v. Baker*,⁸⁸ to ensure that children are affected by divorce as little as possible, or in other words, “to put children first”.

⁸³ [1999] 1 S.C.R. 420, 169 D.L.R. (4th) 577 [hereinafter cited to S.C.R.].

⁸⁴ *Ibid.* at 447 [emphasis added].

⁸⁵ *Ibid.* [emphasis added].

⁸⁶ *Ibid.* at 448 [emphasis added].

⁸⁷ [1999] 1 S.C.R. 242 at 257, 168 D.L.R. (4th) 540 [hereinafter *Chartier*].

⁸⁸ [1999] 3 S.C.R. 250 at 269, 177 D.L.R. (4th) 1.

The second aspect of the child support obligation that rests on fraternity is the special form of equality advanced by child support. For example, child support legislation in Canada dictates that as the non-custodial parent's income rises, so does the level of child support. Whereas in other jurisdictions, there is a cap for maximum income to be calculated in child support payments, no such cap exists in Canada. Instead, our law dictates that children are entitled to share in the wealth of their parents, no matter what the current relationship between the parent and child. While there are limits to this principle, it is generally true that concerns of fairness, equity, and trust inform the child support legislation and obligations.

Finally, it is important to note that this child support obligation may exist even if the payor is not the biological parent, but rather, is standing in the place of a parent. In *Chartier*,⁸⁹ the Supreme Court unanimously held that a person cannot "unilaterally withdraw" from a relationship with a child where someone has been acting in a parental relationship with that child. Again, this takes us a step away from a libertarian understanding of child support law, which some might describe as being a simple adjunct of making an individualistic choice to have a child. The duties imposed on people upon whom others are dependent transcend mere biology. In this way, child support might be seen to have certain parallels with fiduciary duties.

c. Child Custody

The final aspect of family law that I wish to touch upon is that of child custody. When a family breaks down, multiple interests are engaged in the resolution of the breakdown. On the one hand, one must take into account the interests of both parents in a manner which both respects their rights and treats them with equality and respect. On the other hand, the resolution of a marriage breakdown is often a zero-sum game: either the husband gets the piano, or the wife does. What is interesting for our purposes in a discussion of fraternity is how, when it comes to child custody, the interests of the parents are almost wholly subsumed into a discussion about the best interests of the child.

Subsection 16(8) of the federal *Divorce Act* explains that in making an order for custody, the reviewing court is to consider "*only the best interests of the child of the marriage as determined by reference to the condition, means, needs and other circumstances of the child.*"⁹⁰ This section has been interpreted purposively. In *Gordon v. Goertz*,⁹¹ Justice McLachlin (as she then was) said that the child's welfare is the "ultimate and only issue when it comes to custody and access." For example, subsection 16(9) of the *Divorce Act* specifically directs that the courts are to ignore the past conduct of either of the parties, unless that somehow relates to what is in the best interests of the child—removing one of the last vestiges of a fault-based divorce system.

⁸⁹ *Supra* note 87.

⁹⁰ R.S.C. 1985 (2d Supp.), c. 3, s. 16(8) [emphasis added].

⁹¹ [1996] 2 S.C.R. 27 at 47, 134 D.L.R. (4th) 321 [hereinafter *Gordon* cited to S.C.R.].

Again, contrast the rights of the child as compared to the rights of the parents in this circumstance. In *Gordon*, McLachlin J. said quite bluntly: "The rights and interests of the parents, except as they impact on the best interests of the child, *are irrelevant*."⁹² Parliament knew, and the courts have so interpreted, that when there is a contest between the rights of an adult and a vulnerable child, the rights of the child will be the exclusive consideration. This is a form of fraternity.

Conclusion

I have sought to develop the concept of fraternity in the Canadian legal order to expose an unspoken if not forgotten but subsumed concept which is, in my mind, fundamental to the proper functioning of a democratic society. Fraternity stands as a distinct legal concept, but is intertwined with our notions of liberty and equality. The latter are informed by the former, and on occasion, are rendered subservient to it. When our current society comes across seemingly unsolvable problems, such as youth violence in schools, or hate crimes against vulnerable groups, it may be that part of the solution should involve an understanding of the balance between liberty, equality, and fraternity. Liberty can only be enjoyed in its fullest form in a community that respects and cares for one another. Equality means nothing if it is not informed by the actual differences between people, which may require those in positions of power or advantage to take additional steps to assist those less advantaged. This is substantive equality. It is democratic liberalism. It is community. It is fraternity.

Fraternity is many-splendoured. It is essential to the flourishing of communities at every level from the humblest family to the greatest nation and the world community itself, as well as the flourishing of each individual. It brings fruition to the law and its rule in every field. I have mentioned a few but there are many others. For instance, good faith is the ruling principle of negotiation which is at the heart of our labour laws, as it is for the amendment of our Constitution. I invite you to look at and examine law and laws through the lens of fraternity. You may find it to be a catalyst and source of inspiration for making our society more human.

⁹² *Ibid.* at 54 [emphasis added].