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Résumé de l'article

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Couvrez cette communauté que je ne saurais voir : Equity and Fault in the Division of Quebec's Family Patrimony*

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ABSTRACT

An inquiry into the role of fault in divorce may be taken as an invitation, for the Quebec jurist, to evaluate the place of misconduct in petitions for unequal "partition" of the family patrimony. The author proposes an analysis of article 422 of the Civil Code of Québec *based on a comparison with the law of family property in common law Canada. He observes a disinclination, felt in Quebec legal circles, to explore the connections between recourses under Quebec law for unjust enrichment in marriage and parallel remedies in common law. Basing himself principally on a review of rules similar to article 422 in Ontario law, he contends that a court should not allow ordinary measures of spousal misconduct to influence petitions for the unequal division of the family patrimony. Connecting the family patrimony to the statutory remedies*

RÉSUMÉ

Une évaluation du rôle de la faute en matière de divorce invite le juriste québécois à mesurer la place du comportement blâmable dans les actions visant à obtenir le « partage » inégal du patrimoine familial. L'auteur propose une analyse de l'article 422 du Code civil du Québec *à partir d'une comparaison avec le droit patrimonial de la famille dans la tradition de la common law au Canada. Il cherche à mettre en évidence une réticence, au sein des milieux juridiques au Québec, à explorer les rapports entre l'enrichissement injustifié en droit matrimonial québécois et les recours parallèles dans les provinces de common law. Partant d'une étude des règles semblables à l'article 422 en droit ontarien, l'auteur prétend qu'un tribunal ne devrait pas invoquer les mesures traditionnelles de la faute matrimoniale dans le cadre des*

* This paper was submitted in part as the National Report for Canada at the XIV[th] Congress of the International Academy of Comparative Law in Athens in 1994 on the topic of "Property and Alimony in No-Fault Divorce". Thanks to Hélène Gagnon for research assistance, as well as to Jean-Maurice Brisson, Ernest Caparros, Richard Janda, Harry Krause, Roderick A. Macdonald and Timothy Youdan for their helpful contributions.

for unjust enrichment in Ontario matrimonial law reveals a narrow idea of economic fault that underlies the judicial discretion at article 422 C.C.Q.

demandes de division inégale du patrimoine familial. En reliant le patrimoine familial aux recours statutaires pour enrichissement injustifié en droit matrimonial ontarien, on constate qu'une idée limitée de la faute économique sous-tend la discrétion judiciaire sous l'article 422 C.c.Q.

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INTRODUCTION

1. As the society's model for the dissolution of marriage continues to shift from death towards divorce, law seeks out an appropriate basis for fixing support and dividing property between two persons once financially bound up together in family life and henceforth bent on remaking families and financial lives apart. In its modern incarnation, divorce law typically reaches for the high moral ground of spousal need and individual contribution to family wealth as the most dispassionate tools for the task. These are seen as more reliable than conduct and pre-nuptial promise as criteria enabling a judge — and the spouses themselves — to rise above the fray and divide matrimonial resources in a just manner.

2. Fault has indeed given way to more sober indicia for dispute resolution in Canadian family law, fractured as that law is — at least in appearance — between the civil law and common law traditions. Under a national divorce statute, need has displaced misbehaviour as a justification for alimentary awards, at least as an official concern.[1] And under the sway of trans-systemic federal jurisdiction and

1. See s. 15, esp. ss. 15(5) and (7) of the *Divorce Act, 1985*, R.S.C. 1985, c. D-3.4 and, for variation orders, s. 17, esp. ss. 17(4) and (7). Ss. 15(6) and 17(6) explicitly preclude courts from

a national divorce revolution, Quebec[2] and the so-called common law provinces[3] have adopted contribution (whether real or supposed) as the criterion for the division of the essentials of family assets. Promises and marriage contracts, however earnestly made, are relevant but suspect : freedom of contract has been specifically tied to economic inequality between spouses and is thus relegated to a second-order criterion for financial arrangements at divorce.[4] While misconduct retains a statistically small place in the rules establishing the breakdown of marriage,[5] in recent times federal and provincial legislatures have high-mindedly discounted adultery, cruelty and the other traditional measures of fault in sorting out the financial consequences of divorce.[6] Quebec itself certainly had a rich history of legal moralism in marriage, both as grounds for legal separation[7] and in respect of

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taking into consideration "any misconduct of a spouse during the marriage". For a criticism of this no-fault regime see M. D.-CASTELLI, *Le nouveau droit de la famille au Québec*, Quebec, P.U.L., 1993, pp. 360-1.

2. Arts 414-426 C.C.Q. establish, as a mandatory incident of marriage, a "family patrimony" composed of the spouses' homes, furniture, cars and pension plans. While this mass is established as of the date of marriage "regardless of which one of [the spouses] holds a right of ownership in that property" (art. 414), only the net value, calculated on what law deems to be direct and indirect contributions thereto, is divisible upon specified events, including divorce (see esp. arts 416-418 C.C.Q.).

3. See, *e.g.*, the *Family Law Act*, R.S.O. 1990, c. F.3 which provides, at s. 5, a claim to a share of value of the "net family property" calculated on presumed direct and indirect contributions (ss. 4 and 5). While pursuing the same objective of recognizing marriage as a joint economic endeavour, schemes differ considerably from province to province. Compare the *Family Relations Act*, R.S.B.C. 1979, c. 121 which establishes direct title to property rather than a mere claim.

4. While agreements between the spouses as to alimentary claims fare quite well in Canadian law, "domestic contracts" for property division are more typically treated with suspicion, although this suspicion is felt unevenly across Canada. In Quebec the provisions concerning equal division of the family patrimony at divorce cannot be altered by private agreement (art. 391, but see art. 423 C.C.Q.). In Ontario, Part IV of the *Family Law Act*, *ibid.*, allows spouses a discretion to vary the equal division of net family property at divorce. For a discussion of different policy approaches, see Law Reform Commission of British Columbia, *Report on Spousal Agreements*, Victoria, Min. Attorney General, 1986, esp. pp. 22 *et seq.*

5. See s. 8(2)(b), *Divorce Act, 1985*, *supra*, note 1, which recognizes adultery and cruelty, alongside a more frequently invoked one-year separation period, for establishing a breakdown of the marriage which, in turn, is the legal basis for a divorce judgment.

6. The position taken by the Minister of Justice in debates bearing on a new divorce act is typical of this generalized attitude : "retaining conduct as a criteria (*sic*) would encourage conflict between the spouses and run counter to our desire to reduce the adversarial nature of the proceedings" : Canada, *House of Commons Debates*, May 21, 1985, p. 4934 (*per* J.C. CROSBIE). Other parties in the House contemplated the abolition of fault altogether : see remarks of R. KAPLAN, *ibid.*, May 22, 1985, p. 4970 and S. ROBINSON, p. 4963.

7. Infamously, former article 188 C.C.L.C., repealed by S.Q. 1954-55, c. 48, consecrated different standards of fidelity for women and men in actions for separation from bed and board. While adultery committed by the wife was always actionable, the husband had to commit adultery in the family home for it to be a ground for separation. In early debates surrounding its repeal, in which the double standard and its specious justification were reviewed in detail, one member of the Legislative Assembly was reputed to have shouted across the floor "j'espère que l'abrogation n'aurait pas d'effet rétroactif" : *Le Devoir*, Montreal, 2 Feb., 1931.

the financial effects of breakdown,[8] but all this has faded out of sight — or nearly so[9] — in the modern law.

3. Mindful that family law-makers now frown on throwing stones from glass houses, what is the judge to make of article 422 of the *Civil Code of Québec* which directs, in part, that spousal "bad faith" is relevant to splitting the value of the "family patrimony"?[10] This provision of the Quebec Code and the parallel texts found in its common law statutory cousins[11] are at the centre of judicial and doctrinal debate — or at least separate centres of separate debates — as to the connection between bad behaviour and just desserts at divorce in Canada. The first cases decided under article 422 give a rather unclear picture of the extent to which misconduct affects the division of the family patrimony. But when the common origins of Quebec and Ontario exceptions are brought to the fore, it becomes clear that article 422 does not seek to punish the unfaithful spouse, the spouse who is physically or mentally cruel, the spouse who abandons the family, the drinker, the drug-abuser or others who have, under the legislative criteria of the past, been targets for financial punishment by law at divorce. Nor does it fix on need as the basis of a giving spouses claims in the value associated with key family assets. Instead, the Civil Code alludes to a conception of "economic fault" tied to ideas that Equity, in its statutory guise, has brought to the law of family property in common law Canada. Since 1989, Quebec's *droit commun* has renewed its faith in the moral postulate, consecrated elsewhere in Canada by way of the remedy of the constructive trust and the legislative schemes built thereupon, that marriage is a joint economic endeavour to which both spouses are bound to contribute as best they can. The spouse who has not made the contribution, in property or in services, called for by the very nature of marriage has violated the fundamental economic covenant upon which marriage itself is founded. Conduct is thus relevant at divorce but only insofar as it reveals this abuse of confidence in marriage whereby a spouse has failed to treat family life as a financial partnership. Accordingly, the Civil Code allows a judge — presiding over a veritable civilian court of conscience — to depart from equal "partition" of the net value of the family patrimony when a spouse comes to partition with unclean hands for having failed to contribute to the joint economic endeavour.

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8. In addition their relevance to alimentary claims, the "wrongs inflicted by one consort upon the other" — and special treatment was reserved for adultery — were a factor entitling a court to declare null certain advantages allowed by law or the marriage contract (see former arts 208, 209, 211 and 212 C.C.L.C., repealed by S.Q. 1980, c. 39). For a mordant critique of this legislative attitude see L. BAUDOUIN, "Le marchandage juridique de l'adultère de la femme au cours de la liquidation des intérêts pécuniaires des époux en cas de séparation de corps", (1962) 64 *R. du N.* 229, p. 293.

9. See, *e.g.*, art. 520 C.C.Q. which gives the court the discretion to declare gifts *inter vivos* made in consideration of marriage lapsed or reduced at divorce on the unstated premise that conduct is relevant to *animus donandi* in the law of liberalities. For a recent application where misconduct disqualified a donee see *Droit de la famille — 1480*, [1991] *R.D.F.* 630, pp. 636-7 (Sup. Ct. *per* GERVAIS J.).

10. Enacted by S.Q. 1989, c. 55 as art. 462.9 C.C.Q., and subsequently consolidated as art. 422 *Civil Code of Québec*, S.Q. 1991, c. 64. The text is reproduced in Schedule I to this paper.

11. See, *e.g.*, subs. 5(6) of the *Family Law Act*, R.S.O. 1990, c. F.3, the principal point of comparison here, reproduced in Schedule I.

4. The argument that the misconduct alluded to in article 422 is to be limited to the economic plane is premised, therefore, on a measure of trans-systemic common ground as between recent legislative initiatives in family property law in common law and civil law Canada. Yet the traditional view of the theory of sources of family law in Canada presents a stumbling block to this sort of reasoning. Equity and its conceptual machinery has no official place in the law of family property in Quebec. By the same token, the communitarian matrimonial regime, so essential to the civil law of matrimonial property, is technically absent in the family law of the other provinces. Indeed Quebec law, modelled on the French idea of an optional shared-property matrimonial regime, and the law of common law Canada, with a separate-property tradition tempered by the constructive trust, seem to come at the problem of dividing the spoils of marriage from opposite ends of the family property spectrum.

There are nevertheless important connections, both as to sources and as to ideas, between the Equity's remedy for unjust enrichment in family matters and modern Quebec matrimonial law that encourage a comparative law approach to the division of property at divorce. The idea that marriage is a joint economic endeavour founded on contributions — some direct, some indirect — by husband and wife to family wealth is today similar in the civil law and in the common law, the sameness muddied only by different conceptual language associated with the two traditions. Yet in spite of these connections, there is a rather widespread disinclination among Quebec judges and scholars to explore the links between the family patrimony and similar schemes found elsewhere in Canada. The constructive trust and its statutory cousins are seen as foreign institutions and this unwillingness may serve, in the end, to obscure the purpose of the family patrimony (I.). But it is not only a community of ideas that has been left unexplored. Courts have declined to connect the modern law to the traditional notion of community of property which would further serve to explain the policy basis on which the division of family property now proceeds. By closing their eyes to the community of ideas between Quebec and Ontario and to the community of property that the new laws have resurrected, judges have allowed their attention to be deflected from the narrow idea of economic fault that underlies the discretion to depart from equal partition of the family patrimony (II.).

I. EQUITY OBSCURED?

5. The family circumstances giving rise to the dispute in *Droit de la famille — 1395*,[12] the Court of Appeal's first substantive pronouncement on article 422, are the stuff of stereotype. After sixteen years of marriage life during which time property was accumulated individually by husband and wife, divorce brought a family fight over basic assets worth about $75,000. The spouses were separate as to property by virtue of a marriage contract agreed to in happier days. The husband had worked as a butcher; what riches the family did own were mostly held in his name. The wife had worked as a homemaker and as primary caregiver for their four children. She had virtually nothing at divorce except a strong conviction that half of her husband's property had been acquired by dint of her efforts at home.

12. [1993] R.J.Q. 1659.

6. It is precisely this kind of separate property arrangement that highlights the misfortunes matrimonial law can visit upon economically vulnerable spouses — most often women — working in the home. The property the husband acquires in his name may be considered by the spouses as "belonging to the marriage" in the salad days of the union, but Law is less sentimental. In one of positive law's most spectacular feats of imagination, the rules of separation as to property dictate that even if a husband's patrimony is swelled, in part, due to his wife's work in the home, his wealth is in no way family property. Law and society have conspired to see in his wife's work no economic value and it is only in the last generation that judges in Quebec and elsewhere have explored the resources of their respective "common laws" to redress what both traditions have begun to contemplate as an "unjust enrichment". With differing degrees of skill and enthusiasm, courts have experimented with what have aptly been called *des notions juridiques ésotériques* and *pirouettes juridiques*,[13] — trying out *de facto* partnerships, resulting and constructive trusts, quasi-contracts and more — in efforts to breathe some familial justice into Law.

7. A perception took hold of the law reform community in the early 1970s that the optional sharing of property as conventionally understood by the positive law of matrimonial regimes had not translated into a sharing of property in the lives of many Quebec spouses at divorce,[14] and this problem has continued to be the driving force for law reform down to the enactment of the family patrimony in 1989.[15] True, the legislative model for marriage in Quebec law is and always has been a shared-property regime; but the former community of property and its modern day successor, the partnership of acquests, have always bent under the weight of a more potent legislative commitment to freedom of contract in marriage. And until the advent of the so-called primary regime in 1980, at marriage's end property was divided on the basis of prior spousal agreement, either express or presumed. The *pacte de famille* may have contained devices that provided spouses such as the butcher's wife in *Droit de la famille — 1395* with some notional compensation for having renounced, in advance, the benefit of an otherwise applicable shared-property regime, although these gifts in the marriage contract were generally for a fixed amount of property and were not insulated from review at divorce. Whatever the actual consequences for women, in the 1980s, of the model for matrimonial law rooted in freedom of contract, the frailty of private justice as a means of securing economic equality in marriage has become increasingly accepted, both in the law reform community and beyond. Notwithstanding the coming into force of the partnership of acquests and early signs that spouses saw the deferred community of property it embodied as a means for substantive equality for married

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13. Expressions used by Beauregard and Nichols JJ.A., respectively, in *Droit de la famille — 67*, [1985] C.A. 135, pp. 141 and 146 to describe efforts of common law and Quebec courts to right perceived injustices created by the failure of separation as to property to recognize the economic value of housework and child-care.

14. For an early expression of the idea that freedom of contract in marriage is a source of economic inequality at divorce, see Civil Code Revision Office, *Report on the Family : Part One*, Montreal, C.C.R.O., 1974, esp. "Letter of Presentation" signed by C. L'HEUREUX-DUBÉ.

15. The effects of freedom of contract on sharing of property is the central preoccupation of the study paper that formed the basis of the family patrimony : see H. MARX (Minister of Justice) & M. GAGNON-TREMBLAY (Minister for the Status of Women), *Les droits économiques des conjoints*, Quebec, Ministère de la Justice, 1988, [unpub.].

women, law reformers continued to have, as their principal preoccupation, the real or imagined plight of women separate as to property.[16]

A. COMMUNITY AND DIFFERENCE AROUND UNJUST ENRICHMENT IN MARRIAGE

8. In the 1970s, the problem of the combined effect of separate property arrangements and unpaid economic activity in the home was perceived, in law reform circles, as no less pointed in Quebec than in common law Canada, at least for the many spouses not subject to the applicable legal matrimonial regime. The difficulty could be cast in the same language in both traditions, namely that of finding "solid ground in translating into money's worth a contribution of labour by one spouse to the acquisition of property taken in the name of the other".[17] But as Equity eventually came to rescue economically vulnerable spouses from the strict application of the common law in the rest of Canada,[18] the positive law of matrimonial regimes offered courts in Quebec no inherent power to revise marriage contracts or upset the operation of a freely chosen separate property matrimonial regime where it led to injustice.[19] The resources of Chancery — specifically the division between legal and equitable title to "family property" — were not, in theory, available to a Quebec judge whose conscience was shocked when contributions to marriage went unrecognized by law.

9. The promise of relief came in the guise of the compensatory allowance, enacted not, of course, as a measure of Equity but most certainly as one conceived

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16. See "Statistiques sur le mariage", (1991) 93 *R. du N.* 536 which indicate that, by the mid-1980s, the partnership of acquests had received substantial social acceptance at the expense of separation as to property, which in turn would mean that the single-mindedness of law reformers may be anachronistic.

17. This is the language used by Laskin J. (in dissent) to describe the difficulty posed by strict application of the separate property doctrine in common law Canada in *Murdoch* v. *Murdoch*, [1975] 1 S.C.R. 423, p. 451.

18. In Canada, the constructive trust has emerged gradually as a remedy for unjust enrichment in marriage, and in "relationships tantamount to spousal", building on Laskin J.'s dissent in *Murdoch*, *ibid.* Certainly one of the signal contributions by Canadian courts to modern common law thinking, the development of the remedy in family matters is largely to be credited to the imagination of Brian Dickson : see *Rathwell* v. *Rathwell*, [1978] 2 S.C.R. 436, esp. pp. 455-6 (*per* DICKSON J.); *Pettkus* v. *Becker*, [1980] 2 S.C.R. 834, esp. pp. 848-9 (*per* DICKSON J.); *Sorochan* v. *Sorochan*, [1986] 2 S.C.R. 38, esp. pp. 47-52 (*per* DICKSON C.J.); and, relying on previous Dickson judgments, *Peter* v. *Beblow*, [1993] 1 S.C.R. 980, esp. p. 997 (*per* MCLACHLIN J.) and p. 1020 (*per* CORY J.). For an excellent overview of these cases from the perspective of the last see K. FARQUHAR, "Unjust enrichment — special relationship — domestic services — remedial constructive trust : *Peter* v. *Beblow*", (1993) 72 *Can. Bar Rev.* 538.

19. *Lebrun* v. *Rodier*, [1978] C.A. 380, p. 381 (*per* MAYRAND J.A.) has often been cited to highlight this limit on discretion :

> Dans l'état actuel du droit, le labeur des époux peut n'enrichir que l'un d'eux sans récompense proportionnelle pour l'autre. C'est là le risque prévisible que les époux séparés de biens assument et que seul un amendement législatif ou convention entre époux pourrait faire disparaître.

in equity.[20] Brought forward by legislators who intimated that the device was allied with the sense of Justice Laskin's dissent in *Murdoch*,[21] the compensatory allowance empowered judges at divorce to remedy unjust enrichment that had resulted from the contribution, "in goods or services", by one spouse to another, in language that may betray its common law connections.[22] Several scholars rejoiced at the community of ideas they saw taking shape between the emergent remedy for unjust enrichment in marriage in Ontario and Quebec;[23] others noted the connection with a more guarded reaction.[24] But there seems little doubt that the injustice suffered by women separate as to property in both jurisdictions was being addressed in a similar fashion.

10. The precise connections between the compensatory allowance and experiments with various remedies for unjust enrichment by common law courts are difficult to discern, but it is surely true, as one leading Quebec scholar has put it, that the advent of the new recourse was "haunted" by the spectre of *Murdoch*.[25] Through these devices, both traditions sought to correct a perceived injustice — an "unjust enrichment" of one spouse at the expense of the other — arising out of the inability of the institutions of positive law to account for the manner in which spouses collaborate financially and the context in which they do it. The rules associated with separation of property in both the civil law and the common law, when viewed from the perspective of the unravelling of patrimonial interests at the end of marriage, are too closely allied with notions of autonomous behaviour and self-interest to adequately describe, in legal terms, ordinary financial attitudes of married people. A growing appreciation of this inadequacy elicited, at the end of the 1970s, a common sense of outrage and a similar response. Both the constructive trust and the compensatory allowance have sought to remedy the unjust enrichment that flows from positive law's disinclination to see marriage as a relationship of

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20. The device has often been rhetorically connected to an idea of *équité* by both law reformers and scholars. More rarely, an effort is made to explain the concept in its context : see, *e.g.*, R. COMTOIS, "La prestation compensatoire : une mesure d'équité", (1983) 85 *R. du N.* 367, pp. 370-1.

21. Various allusions were made by the Minister of Justice for Quebec in Parliamentary Commission in respect of the 1980 reform of Quebec family law as, for example, his remark that "ce n'est pas parce que c'est un système de common law qu'on peut pas [y] trouver des similitudes" : Quebec, Assemblée nationale, Commission permanente de la justice, "Étude du projet de loi 89" in *Journal des débats*, 11 December 1980, pp. B-298–B-299.

22. Under former art. 559 C.C.Q., S.Q. 1980, c. 39, the court had the discretion at divorce "to order either spouse to pay, as consideration for the latter's contribution, in goods or services, to the enrichment of the patrimony of the former, an allowance [...] taking into account the advantages of the matrimonial regime and the marriage contract". When the provision was revised by S.Q. 1989, c. 55, the words "consideration" and "goods" disappeared from the English version.

23. See, *e.g.*, S. MASSÉ, "L'interprétation jurisprudentielle de la prestation compensatoire depuis le 1er décembre 1982", (1984) 87 *R. du N.* 145, pp. 150 *et seq.*; A. COSSETTE, "Le régime de la séparation de biens est-il disparu avec la naissance de la prestation compensatoire?", (1985) 87 *R. du N.* 456, p. 468.

24. See J. PINEAU & D. BURMAN, *Effets du mariage et régimes matrimoniaux*, Montreal, Éd. Thémis Inc., 1984, esp. p. 90.

25. See E. CAPARROS, *Les régimes matrimoniaux au Québec*, 3rd ed., Montreal, Wilson & Lafleur Ltée, 1988, paras 67-8. In this important account of the connections of the compensatory allowance to the common law, Professor Caparros explained his own change of heart as to whether the Quebec innovation was a legal transplant (para. 68).

trust and economic collaboration by reimagining marriage as an economic partnership premised on these values. In a spirit of collaboration, both spouses may contribute to the joint economic endeavour in different ways, but where identifiable contributions, whatever their shape, result in the accumulation of wealth, that wealth may be thought of as "family property", irrespective of who may have legal title to it. The constructive trust and the compensatory allowance are, at least in theory, anchored in a common moral principle that "the court will not allow any man unjustly to appropriate to himself the value earned by the labour of others".[26]

Technically, the remedies are not dissimilar, both seeking to achieve this on the basis of the notional restitution of otherwise unrecognized contributions by one spouse to wealth held by the other. In respect of these sister institutions, judges took on the role of ensuring that marriage be lived as a partnership, and they would decide whether there was unjust enrichment on a case-by-case basis. In fact, the elements of the claim under the compensatory allowance and those of the common law remedy replicate one another in almost identical language,[27] further suggesting that they may be part of a single response to a perceived national problem of economic suffering of women in and by marriage. The connections between the institutions reflect a community of ideas and, at least at the level of perception, a community of experience, all of which invite comparison. But despite the natural alliance between notions of unjust enrichment as a "source" or a "category" of obligations as they have been described in the two traditions — an alliance signalled recently by the judge who has made perhaps the greatest contribution of the study of unjust enrichment in family relationships in common law Canada[28] — and despite the invitation, albeit inelegant, of the Quebec legislature to place the constructive trust and the compensatory allowance on the same plane, virtually no cross-pollination between the two remedies took place in the Quebec courts. Rather than seizing upon the opportunity to compare, Quebec courts took an active stance to cut off dialogue.

11. No doubt the most powerful and influential expression of this posture was the majority view of the Court of Appeal in *Droit de la famille — 67*.[29] Faced with a claim by a wife who sought an allowance for, among other things, contributions made in the home, the Court refused to look to the common law experience as an indication of how to overcome the effect of the applicable regime of separation of property. "Ce genre d'approche empruntée à la common law fait violence à nos traditions juridiques", said one judge who specifically stated that the compensatory allowance should not be interpreted based on an alliance with "un système juridique différent".[30] Another judge, while recognizing the "examen de con-

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26. *Rathwell* v. *Rathwell*, *supra*, note 18, p. 455 (*per* DICKSON J.).

27. Compare the three elements said to be necessary for making out a claim for unjust enrichment in the common law matrimonial cases ("an enrichment, a corresponding deprivation and the absence of any juristic reason — such as a contract or disposition of law — for the enrichment" : *Rathwell* v. *Rathwell*, *id.*, p. 455) with the same three elements alluded to at former art. 559 C.C.Q. (now art. 427) as explained in *Lacroix* v. *Valois*, [1990] 2 S.C.R. 1259, p. 1277.

28. See B. DICKSON, "Federalism, Civil Law and the Canadian Judiciary : An Integrated Vision", (1994) 28 *R.J.T.* 154, p. 171.

29. *Supra*, note 13.

30. *Id.*, p. 149 (*per* NICHOLS J.A.). His Lordship further noted that "[n]otre droit matrimonial, de façon générale, n'emprunte pas à la *common law*. Il est un produit strictement québécois qui nous vient principalement du droit français. La prestation compensatoire elle-même est une création portant l'étiquette "fait au Québec". Elle ne s'inspire pas de la *common law*, même si on peut la qualifier de règle d'équité" (p. 149).

science national" that followed *Murdoch*, declined to see in former article 559 anything but "civil law".[31] This perspective took hold and, with a remarkable consistency extending up to the top echelons of the Quebec judiciary, comparison between the considerations relevant to unjust enrichment in marriage in the two traditions was stopped. In terms that mix anger and frustration, a leading appellate court judge said in 1987 that "[i]l est grandement temps qu'on cesse de nous casser la tête avec le *Dower Act* d'Alberta ou l'*Ontario Married Women's Property Act*, considérés par la Cour suprême dans l'affaire *Murdock (sic)* v. *Murdock (sic)*, de même qu'avec le *Family Reform Act (sic)* d'Ontario [...] ou encore le *Constructive Trust*".[32] Even since the advent of the family patrimony, the Court of Appeal has not altered this mainstream position[33] which has been widely influential in shaping the attitude of courts at all levels.

12. The reasons for this strategy are complex. The first is ideological: many judges, led by the Court of Appeal in *Droit de la famille — 67*, held firm to the idea that private ordering in marriage was a viable source of social justice, and thus were hesitant to trump the freely chosen matrimonial regime with the new remedy, especially in respect of indirect contributions to wealth, notably economic activity in the home. The compensatory allowance was drastically read down, and freedom of contract thereby championed, on the pretext of staving off a "bouleversement fondamental du droit matrimonial".[34] Cheered on by a vocal and articulate segment of the scholarly community,[35] an official dissonance between the two legal traditions has been regularly invoked as a surrogate for this ideological distaste for the view of marriage as a mandatory joint economic endeavour.[36] If spouses had turned away from the choice of a shared-property regime, it was often said, and that avenue remained open to them, it would be not only illogical but also unjust to overturn their decision.

13. But beyond such libertarianism, a second factor has inhibited others from allying the compensatory allowance with the constructive trust, including

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31. *Id.*, p. 151 (*per* VALLERAND J.A.). His Lordship further explained his reasoning as "celui qu'à mon sens il faut faire pour *appliquer*, dans le respect de notre droit civil, cette *importation mal digérée du common law*" (p. 154, emphasis in original).

32. *Droit de la famille — 391*, [1987] R.J.Q. 1998, p. 2003 (*per* MONET J.A.). He turned away from dialogue by explaining "j'abandonne volontiers à d'autres l'enrichissement qu'apporte à la culture juridique l'étude du droit comparé mais qui n'entre pas dans le cadre des fonctions judiciaires effectives de notre Cour, contrairement peut-être à celles de la Cour suprême" (footnotes omitted).

33. See, *e.g.*, the comments of Baudouin J.A. in *Droit de la famille — 871*, [1990] R.J.Q. 2107, p. 2113 who said that common law cases and statutes dealing with unjust enrichment in marriage were "d'aucune utilité" since the compensatory allowance could only be understood against the "cadre général du *Code civil* et aux principes généraux de droit civil".

34. *Droit de la famille — 67*, *supra*, note 13, p. 146 (*per* NICHOLS J.A.).

35. See, *e.g.*, J. PINEAU & D. BURMAN, "La prestation compensatoire à la lumière de l'arrêt de la Cour d'appel dans l'affaire *Poirier* c. *Globensky*", (1985) 19 *R.J.T.* 281, p. 287.

36. These arguments are explored in detail in J.-M. BRISSON & N. KASIRER, "The Married Woman in Ascendance, The Mother Country in Retreat: From Legal Colonialism to Legal Nationalism in Quebec Matrimonial Law Reform (1866-1991)", in W. PUE & D. GUTH (eds.), *Canada's Legal Inheritances*, Winnipeg, U. Man. Pr., in press.

those less committed to freedom of contract in marriage.[37] A legitimate preoccupation with the specificity of the shared-property tradition, as against the separate property "regime" of the common law, has deterred many Quebec jurists from exploring the potential of the compensatory allowance as an equitable remedy. To be sure, the civil law's legal regimes have always encompassed the idea, discovered only recently by Equity jurisprudence via the remedy of the constructive trust, that marriage is an economic partnership. Shared-property regimes radically reduce the lost contributions that give rise to claims for unjust enrichment since the family's riches allied with the joint efforts of wife and husband are to be shared — immediately or on a deferred basis — as acquest property. The common law's monopoly on appeals to Equity does not extend to monopoly on equity, as one scholar has pointed out,[38] which sentiment is alive in the shared-property regimes that have always been at the core of Quebec matrimonial law. Mindful of the centrality of the communitarian tradition in the civil codes' exposition of matrimonial law, Quebec's leading experts have quite rightly debunked the idea that sharing in marriage, even in the guise of the compensatory allowance or the family patrimony, is a new legal idea.[39]

The uneasy relationship between the equitable remedy of the compensatory allowance and the equity already inherent in matrimonial law came to be thought of as an ambiguity that resulted from an inappropriate legal transplant, which ambiguity the text of the Code seemed to court.[40] This served to inhibit the usefulness of the allowance for spouses separate as to property. The problem was how far — and by what means — the remedy would outstrip the regime while nevertheless leaving it in place since, on the one hand, the Code purported to allow spouses to opt for separation while apparently threatening, on the other hand, to "impose" a partnership of acquests upon all marriages. This was more than a debate about freedom of contract in marriage. Instead, at the root of the problem is one of the most complex issues in civilian legal theory, that of the relationship between equity as one of the supereminent principles of the civil law and the rules of positive law.

14. As many scholars have pointed out, equity is a vital concept in the civil law, linked to many of the same ideals of fairness and good sense that animate

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37. Including the Supreme Court of Canada which, in *Lacroix* v. *Valois*, *supra*, note 27 and *M. (M.E.)* v. *L.(P.)*, [1992] 1 S.C.R. 183, demonstrated a patent suspicion of the marriage contract as a source of economic equality. The Court cited Quebec and French sources to explain to a wide concept of unjust enrichment and a generous interpretation of the compensatory allowance as against separation of property but — by design one suspects — cited no common law authorities.

38. D. BURMAN, "Politiques législatives québécoises dans l'aménagement des rapports pécuniaires entre époux : d'une justice bien pensée à un semblant de justice — un juste sujet de s'alarmer", (1988) 22 *R.J.T.* 149, p. 170.

39. D. BURMAN & J. PINEAU, *Le "patrimoine familial" (projet de loi 146)*, Montreal, Éd. Thémis Inc., 1991, paras 2 and 17.

40. Former art. 559 as well as the reformulated art. 427 C.C.Q. direct that the compensatory allowance is to be fixed "taking into account advantages of the matrimonial regime and the marriage contract". While this is, no doubt, a signal that where sharing occurs by virtue of the legal regime it need not be reordered as an allowance, there is no direction as to how much — if any — of the wealth of a spouse separate as to property should be clawed back.

Equity jurisprudence.[41] Inherent to the civil law is a body of ideas connected to notions of justice, *aequitas*, efficiency and more that, while quite unlike English law's Equity in its deployments, has some of Equity's subversive character.[42] Civilians are not at one as to whether equity can "produce" law that stands *contra legem*, although there is a long tradition of contemplating equity in opposition to positive law, in a manner not wholly unlike Chancery's mission of deciding cases by mitigating the rigour of the common law. There is no doubt that the moral sensibilities of the civil law are acute to the perversities of positive law and, within the framework provided by the resources of tradition, can respond not only to complete the law, but also to correct it.[43] Choosing from among those resources in order to correct the injustices of separation as to property may have been what the "equitable" device of the compensatory allowance invited courts to do.

But while the civil law has all the instincts of the Chancellor, it may lack some of his imagination. The path down which equity would take spouses separate as to property, after it saw that certain unrecognized contributions to family wealth could produce unjust enrichment, was uncharted in 1980 and essentially has remained so ever since. Certainly, Quebec's "common law" of the day, with its primitive trust for wills and gifts, did not have the machinery of Equity to allow a judge to "construct" a beneficial interest in family property held, at law, by the husband. But rather than seeking to transcend the strictures of positive law in another way, the courts remained transfixed by the effects of separation as to property. True, the "public order" mandate of the compensatory allowance enboldened even stingy courts to correct certain patent injustices. But beyond restitutionary awards for direct contributions to wealth — which may have qualified already as forms of unjust enrichment — the compensatory allowance fell flat, especially in respect of those indirect contributions, notably housekeeping and childcare, to which equity in the family context should have been most sensitive.

In fairness to courts, the blame for the apparent breakdown of the compensatory allowance may best be laid at the feet of the legislature. Under former article 559 C.C.Q., the "right" arising out of unjust enrichment in marriage seemed to come without a "writ", and if courts can be chided for not experimenting with

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41. See, *e.g.*, H. YNTEMA, "Equity in the Civil Law and the Common Law", (1967) 15 *Am. J. Comp. Law* 60, p. 85 for an understated account of the extent of the common ground. A more enthusiastic description of a trans-systemic notion of equity can be found in the work of a French lawyer who devoted much of his career to the study of anglo-american law : A. TUNC, "Aux frontières du droit et du non-droit : l'équité", *in Jalons, dits et écrits d'André Tunc*, Paris, Société de la législation comparée, 1991, pp. 402-4.

42. P. JESTAZ has written of "équité subversive", which corrects law, as opposed to "équité supplétive" which completes it : "V° Équité", *Rép. civ. Dalloz*, t. 14, Paris, Dalloz, (loose-leaf) 1972, para. 3. For an account of this mixed role of civilian equity nourished by a critical understanding of the apparent absence of an "Equity jurisprudence" in Quebec law, see J.E.C. BRIERLEY & R.A. MACDONALD (eds.), *Quebec Civil Law*, Toronto, Emond Montgomery, 1993, esp. paras. 104, 136 and 151.

43. An uncommon practical exposition of the relationship between equity and positive law, with insights drawn from the anglo-american legal tradition, can be found in J.E.C. BRIERLEY's study of the "equity clause" in arbitration : " 'Equity and Good Conscience' and amiable composition in Canadian Arbitration Law", (1991) 19 *Can. Bus. L.J.* 461, esp. pp. 463, 465-7, 479-81. For a depiction of the stand-off between equity and positive law in French law, in the family context, see A. CATHELINEAU, "L'indemnité exceptionnelle de l'article 280-1, alinéa 2, du Code civil", D.1994. Chron. 148, p. 149.

remedies, so too can the legislature be chided for not having shown the way. Ironically, by simultaneously recognizing that contributions to expenses of the marriage could be made in the home at the time of the enactment of the compensatory allowance in 1980, the legislature may have done a disservice to the very constituency it sought to help.[44] A wife's contribution at home was due as imperative effect of marriage and it had to be furnished "in proportion to [the spouses'] respective means". Judges were hard-pressed to see in such "ordinary" activity anything that justified the extraordinary order of a share in the value of property held by the partner. The 1980 Code was concocted so as to force courts to look for "overcontributions" to marriage as a basis for a compensatory allowance rather than joint contributions to the acquisition of assets, even if this latter phenomenon was probably what the "equitable" claim was designed to recognize.

The compensatory allowance may have been, in its original form, a false licence to import a "foreign" trust, but it might have been an invitation to act with that kind of uncommon genius. The attitude that the compensatory allowance had no natural place in the civilian world of matrimonial law is not just a reflection of a traditional suspicion of anglo-american legal ideas, although it may have been, in part, fuelled by this old reflex. It is also more than a problem of legal technique — although there is a technical aspect to it that persists today, despite efforts by the Supreme Court to soften the stand-off between separation of property and the allowance through a generous approach to rules of proof.[45] To make the compensatory allowance work, courts may have had to move property law into a dimension for which it was conceptually unprepared. Yet judges on their own have seemed disinclined to forge ahead into the realm of new remedies where the legislature apparently feared to tread.[46] The law moved almost nowhere, despite the frantic waving of the red flag of the constructive trust by the Supreme Court of Canada, despite the invitation to see this as a pan-Canadian legal issue, despite the juridical "opportunity" presented by the misfortunes created by separation as to property, and despite the recognition, at former article 445 paragraph 2 C.C.Q. (today article 396), of the economic value of housework. Rather than boldly shifting away from the cadre posed by positive law, courts remained too preoccupied with it and, given the dimension of the task, their caution is perhaps excusable. The compensatory allowance was not to be the locus for a major refinement in the theory of sources of Quebec private law. Moreover, this is unlikely to change under the *Civil Code of Québec* even if the trust now has a limited mission as a

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44. Art. 445 C.C.Q., enacted by S.Q. 1980, c. 39 provided as follows :

> The spouses contribute towards the expenses of the marriage in proportion to their respective means.
>
> Each spouse may make his contribution by his activity in the home.

Consolidated, in gender-neutral language, by art. 396 C.C.Q., S.Q. 1991, c. 64.

45. See *Lacroix* v. *Valois*, *supra*, note 27, pp. 1277-8 where Gonthier J. urged courts to be generous in their appreciation of the causal connection between one spouse's contribution and the enrichment of the partner, mindful of the relations of trust and collaboration that animate marriage.

46. For a rare example of an argument for bold judicial initiative in respect of the compensatory allowance on the basis of an analogy with the constructive trust see [Justice] R. LESAGE, "La compensation de l'appauvrissement de l'indû", (1985) 87 *R. du N.* 5, pp. 15-16. See also [Justice] C. L'HEUREUX-DUBÉ, "L'arrêt *Poirier* c. *Globensky* sous les feux du droit comparé", (1985) 87 *R. du N.* 435 who, in a short speech, did not close this avenue down.

judicial remedy.[47] The principal role for the compensatory allowance in legal history, it would seem, is to stand as a metaphor for the inhibiting force that positive law can have on the civil law's inherent creative energy.

15. Whether the compensatory allowance was done in by ideology or legal technique is not to be answered here. Nor is it crucial to determine whether Equity was, in any way, a source of the compensatory allowance. It is enough to observe that at the level of ideas, the two traditions were looking to solve a perceived problem of unjust enrichment in a similar way. Of equal importance is the observation that in the face of an opportunity to think trans-systematically about family property, Quebec courts chose not to make comparisons. The message was sent out by *Droit de la famille — 67* that there was no advantage, at least for the purposes of problem-solving, in sharing ideas on the manner in which marriage shapes the way two people relate as private law actors. Not only was this directive against proceeding by comparison influential in the interpretation of the compensatory allowance, but it also has set an inward-looking standard for the reading of the family patrimony.

B. THE FAMILY PATRIMONY AS EQUITABLE REDRESS

16. Ironically, despite their different paths, the common law and the civil law remedies met something of the same fate. The compensatory allowance had, in the period leading up to the enactment of the family patrimony, a record characterized as a failure by its proponents and even by the legislature. While it could be relied upon to correct certain patent instances of unjust enrichment, it did not bring a meaningful measure of substantive equality to married women.[48] Moreover, by forcing spouses into the courtroom to have marriage recognized as a joint economic endeavour, the compensatory allowance was an expensive means of redress. Judges were obliged to proceed on an *ad hoc* basis, evaluating spousal contribution to wealth with all the great difficulties this entailed. For spouses in Ontario, the constructive trust eventually proved itself to be the "solid ground" to which Laskin J. had alluded in *Murdoch*, but there was much unevenness in its application. Gripes against palm-tree justice came from those who saw Equity's new tool as too generous in respect of indirect contributions as well as from those who felt it not generous enough. The remedy was expensively obtained and not at all reliable, either as to the type of contribution that would justify a beneficial interest in property,[49] or as to the quantum of the award once the contribution was recognized.[50]

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47. Art. 1262 C.C.Q. does recognize that a trust may be established by judgment, but only "[w]here authorized by law". The Code offers one such example in the family context (see art. 591 in respect of the obligation of support) but provides no broad textual mandate for judges to construct a trust relationship for shared ownership of family property.

48. See P. RAYLE, "La prestation compensatoire et la Cour d'appel cinq ans plus tard", (1988) 48 *R. du B.* 225 where the disinclination to recognize indirect contributions to wealth, particularly those made by women working in the home, is explained.

49. Problems surrounding the elements of the claim for unjust enrichment, notably the relevance of indirect contributions such as housework, the causal connection between contribution and enrichment, and the role of the expectations of spouses — all critical in the uneven history of the Quebec remedy — have been experienced before common law courts : see generally M.M. LITMAN, "The Emergence of Unjust Enrichment as a Cause of Action and the Remedy of the Constructive Trust", (1988) 26 *Alta. L. Rev.* 407, esp. pp. 426-9, 437-441, 449-51.

50. For a recent review of the indeterminacy of quantum in Equity jurisprudence which raises many of the issues faced by Quebec courts in trying to fix the amount of the compensatory

17. The imperative of relieving courts of the responsibility for redressing unjust enrichment in marriage had become a common preoccupation for legislatures in common law and civil law Canada. This eventually moved Quebec to declare that all marriages are "partnerships",[51] as Ontario had already done,[52] in legislation designed to give spouses working in the home a formulaic claim to the riches amassed through work outside the home. For the Quebec jurist, a first lesson may easily be drawn from the community of legislative experience without in any way importing so much from Ontario family law as to upset the civilian apple-cart. The family patrimony is, in the same way as the Ontario *Family Law Reform Act* and *Family Law Act*, a non-discretionary scheme. Like its current Ontario counterpart, it opens a single avenue to litigation-hungry spouses bent on contesting the entitlement of their former partners.

This small observation is of signal importance in respect of the judicial attitude to be adopted under article 422, as it has proved to be in cases decided under sub-section 5(6) of the *Ontario Act*. Both provisions were expressly enacted to narrow discretionary redress because the legislatures felt that judging was neither healthy as a method for dispute resolution nor reliable as a guarantee for economic equality.[53] The Ontario regime has been described as having "codified judge-made trust law"[54] in which judging has a limited role. Similarly, the division of the net value of designated family property was imagined as an antidote to the more general discretionary remedy of the compensatory allowance for which, again, judging would not be a necessary element.[55] Judges should be as shy to depart from the general rule of equal "partition", as they have been under similar legislation in common law Canada, since a more active stance would render article 422 a licence for case-by-case review of the appropriateness of equal partition. It would mean, in effect, a return to the ad-hockery of the compensatory allowance which the legislature has so explicitly steered courts away from doing.

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allowance, see P. PARKINSON, "Beyond *Pettkus* v. *Becker*: Quantifying Relief for Unjust Enrichment", (1993) 43 *U.T.L.J.* 217, esp. pp. 224-235.

51. See "Explanatory Notes", *An Act to amend the Civil Code of Québec and other legislation in order to favour economic equality between spouses*, S.Q. c. 55, "[t]he object of this bill is to favour equality between spouses and to underline the character of marriage as a partnership".

52. The Ontario Law Reform Commission has characterized both the *Family Law Reform Act* (1978) and the *Family Law Act* (1986) as premissed on the recognition of marriage as an economic "partnership". See *Report on Family Property Law*, Toronto, O.L.R.C., 1993, pp. 7-12, *passim*. The language of subs 5(7) of the *Family Law Act* makes this very plain.

53. Law reformers typically point to discretion as a threat to economic equality: see, for example, in respect of the institution of the family patrimony in Quebec, supra, note 15, p. 16 and, for Ontario, Ontario Law Reform Commission, *Report on Family Law [:] Part IV: Family Property Law*, Toronto, O.L.R.C., 1974, p. 93 and same, *Report on Family Property Law*, *id.*, pp. 59-62.

54. ONTARIO LAW REFORM COMMISSION, *supra*, note 52, p. 8, referring to the 1978 Act. Similarly, Cory J. described the as a "statutory version of the constructive trust remedy" in *Rawluk* v. *Rawluk*, [1990] 1 S.C.R. 70, p. 86.

55. Ironically, the coexistence of "statutory" and "judge-enforced" partnerships has been the source of uneasiness, if not to say confusion, in the family law of both Quebec and Ontario. Compare the different perspectives on the coexistence of the constructive trust and statutory schemes of Cory J. and McLachlin J. in *Rawluk* v. *Rawluk*, *ibid.*, with the growing disagreement in Quebec on the manner in which the compensatory allowance and the family patrimony interact.

18. At the time of the enactment of Quebec's Bill 146, a bold invitation was issued, first in committee[56] and then, perhaps less boldly, by the National Assembly,[57] to look beyond local ideas to the common law in order to understand the family patrimony. It is possible to establish, at least at a technical level, common ground between the family patrimony and Ontario's legislative schemes of the 1970s and 1980s based on this enthusiastic and explicit borrowing by article 422. Indeed, as others have pointed out,[58] at a technical level there is much that distances the Ontario *Family Law Act* and its predecessor, the *Family Law Reform Act*, from articles 414 *et seq.* of the Civil Code.[59] Moreover, on its own, the vague invitation to compare offered by the legislature was given in such a way as to provide only a weak basis upon which to proceed.[60] But leaving aside technical differences and puffery in political speeches, it may be that the policies pursued by Quebec and Ontario are so closely allied as to mandate comparison on this basis alone. A single idea may be said to animate the Quebec and Ontario schemes — that of establishing a remedy for a presumed, rather than actual, unjust enrichment. For the whole of the family patrimony and notably the measure of conduct made relevant under article 422, the community of ideas between the common law and the civil law is even more compelling than it was before : both Quebec and Ontario law now portray marriage as a modern community of property which presents courts with a remarkable — and untried — opportunity to compare.

II. Fault Revealed?

19. Bearing in mind the common preoccupation with unjust enrichment and the parallel response to legislate schemes for sharing as an alternative to judicial discretion, we return to the case of the butcher and his wife in *Droit de la famille — 1395*. A Quebec court was asked by the wife to divide the value of the family patrimony — a house, furniture and two pension plans, all held by the husband — so that she be awarded the family residence, all the furniture, as well as a half-share in the pension plans. In short, she sought an unequal "partition" of the value of the family patrimony which, according to article 422, can only be granted in exceptional circumstances. On what basis was the court to decide if the otherwise equal division would result in an injustice? The Superior Court, like the Court of Appeal, might have been expected to look to Ontario for guidance in respect of such petitions, of which there have been many both under the *Family Law Reform Act* and its successor the *Family Law Act*. Indeed, such an effort might have been

56. See H. Marx and M. Gagnon-Tremblay, *op. cit.*, note 15, pp. 7-8.

57. See the speech of Hon. M. Gagnon-Tremblay, in Quebec, National Assembly, *Journal des débats*, 8 June, 1989, pp. 6986 and 6940.

58. D. Burman and J. Pineau have fixed on the technical dissonance between the Quebec and Ontario rules and accused the Quebec Parliament of unskilled plagiarism : *supra*, note 39, para. 2.

59. The two most significant differences are, first, that the *Family Law Act* applies to net family property, widely defined (see s. 4) whereas the family patrimony includes only designated property (see art. 414 C.C.Q.); and, second, that spouses can contract out of the Ontario scheme (see Part IV of the Act) while the Quebec rules are of public order (art. 391 C.C.Q.).

60. In reading the debates of the National Assembly, it is unclear whether the model for the family patrimony, insofar as it might be considered a legal transplant, was the 1978 *Family Law Reform Act* or its 1986 successor and what influence, if any, legislative schemes other than those of Ontario had on its make-up. See remarks of Hon. M. Gagnon-Tremblay, *supra*, note 57.

thought imperative given the common ground between the provincial schemes and the paucity of Quebec authorities considering the discretion to intervene.

Yet neither at trial nor on appeal did the judges look beyond local knowledge gathered since 1989, passing over — wilfully, one assumes — the opportunity to take counsel from the Ontario experience. The Superior Court granted the wife's petition, invoking, among others factors, need,[61] a criterion the Ontario courts have quite consistently dismissed. All judges on the Court of Appeal agreed to reestablish equal division. After complaining openly that the terms of article 422 are difficult to reconcile with the other provisions of the family patrimony, one judge went no further afield than the rules of grammatical construction in holding — remarkably — that a court may only derogate from equal partition by deciding that pension earnings are not to be divided.[62] While it no doubt reflects an acute sensibility to questionable legislative drafting,[63] Justice McCarthy's reasoning is out of step with the spirit of article 422 and defies the interpretation given to the exception, albeit as worded differently, in Ontario. Justice Moisan, writing for himself and another colleague, refused unequal division, basing himself only on the rules of statutory construction and his own (plainly vigorous) common sense — but no "common law", even if Ontario cases might have provided strong support for his conclusions.[64]

20. This apparent judicial disinterest in the Ontario connections of the family patrimony seems to be widely felt in the early stages of the institution's development. Reflecting, one suspects, the legacy of *Droit de la famille — 67*, few of the cases decided to date under article 422 — the principal basis for dispute before the courts apart from transitional law — have canvassed the niceties of Ontario "case law", although several judges have taken up fleeting comparisons drawn by learned authors,[65] and one or two have forged out tentatively on their own.[66] Courts are not unaware of the similarities between the Quebec scheme and those found in other provinces, particularly in Ontario. But thus far, most judges

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61. [1991] R.D.F. 319 (*per* FRÉCHETTE J.) who stated, at p. 315, that the wife should be awarded the house given her responsibilities as custodial parent, but who declined to make a counterbalancing compensatory award in favour of the husband.

62. *Supra*, note 12 at p. 1661 (*per* MCCARTHY J.A.). Others have suggested an alternative reading, based only on sentence structure (of the French version), whereby discretion is not limited to pension earnings: see, *e.g.*, J.J. ANCTIL, *Code civil du Québec: Le texte intégral en tableaux: De la famille*, Cowansville, Éd. Yvon Blais Inc., 1994, p. 27. Courts are divided on the matter, some adopting Justice McCarthy's position (see, *e.g.*, *Droit de la famille — 872*, [1990] R.J.Q. 2307 (Sup. Ct. *per* LANDRY J.)), with many others, discussed *infra*, deciding that the value of other property in the family patrimony can be divided unequally.

63. The emplacement of the first comma in the French version seems to focus the attention of the unequal partition on the pension gains, although this interpretation seems less definitive on a reading of the English text of art. 422. Interestingly, Justice McCarthy cited both in his French-language judgment : *id.*, p. 1661.

64. *Id.*, pp. 1663-4 (BROSSARD J.A. concurring).

65. Citing the point made in doctrinal sources, some have noted that the criterion of "injustice" under art. 422 is apparently gentler than the term "unconscionable" which appears in s. 5(6) of the *Family Law Act*, although no court has explored the texture that "unconscionability" would have in the Quebec legal order where Equity reputedly has no place : see, *e.g.*, *Droit de la famille — 995*, [1991] R.J.Q. 1417 (Sup. Ct. *per* FRÉCHETTE J.).

66. See, *e.g.*, *Droit de la famille — 1512*, [1992] R.J.Q. 432 (Sup. Ct.) in which PICHÉ J. cited *Leblanc* v. *Leblanc*, [1988] S.C.R. 217, where the Supreme Court held that judicial discretion to divide property unequally under the New-Brunswick legislation may be exercised in instances in which spouses had made disproportionate contributions to the marriage.

seem inclined to avert their eyes from the origins of the family patrimony given a perceived complexity of comparing apples and oranges. A view has developed that the statutory regimes in the common law provinces are built on ideas first developed by courts of Equity and the Quebec scheme, it is felt, must be understood against the French matrimonial law tradition built on the notion of the ubiquitous matrimonial regime.[67] This strategy has come at a price : the first cases decided under article 422 would suggest that courts are struggling to sort out the place of wrongful behaviour, need and contribution in increasingly common petitions for unequal division of the family patrimony at divorce. And judges are not the only ones to disagree. Leading doctrinal authorities have fallen out as to how far judges are now entitled inquire in deciding whether a spouse deserves a half-share of the family's essential riches. For some, the Code may authorize a return, not entirely misguided, to marital fault as a factor in dividing the family patrimony.[68] For others, discretion extends as far as a consideration of need in some circumstances.[69] Others still have denounced the text of the Code as inviting judicial speculation on matters branded as "inappropriate" given that the fundamental orientation of the law is to promote economic equality in marriage.[70] Perversely, it is not so much ignorance of its origins — there is wide acknowledgment of the family patrimony's connections to Ontario law — but rather *because* of its supposed origins that judges and others have turned away from the opportunity to expand the compass of divorce law in Canada by way of comparison.

A. COMMUNITY AND DIFFERENCE AROUND A NEW "COMMUNITY" OF PROPERTY

21. These connections between the family patrimony and Ontario family property legislation run deeper than common roots in unjust enrichment and a common legislative decision to divest the courts of the primary responsibility for enforcing marriage as an economic partnership. In order to understand the idea that the net value of the family patrimony must be divided equally at divorce one must acknowledge the postulate upon which it is founded : each spouse has a moral entitlement to one-half of certain property accumulated during the period they were living together and contributing to the marriage as a joint economic endeavour. If both spouses are bound in this way, a failure to contribute is necessarily viewed as unacceptable, as a corollary of the same moral view of marriage as an equal financial partnership. Such a failure upsets the premise that it is contributions, whether they

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67. Only rarely have courts given open expression to this inhibition to consider "foreign" authorities, as did Chevalier J. in *Droit de la famille — 1473*, [1991] R.D.F. 524 (Sup. Ct.), p. 545 :

> Sans nier le fait que l'énoncé, dans ces jugements ou arrêts étrangers, de certains principes peut être ici d'une quelconque utilité, j'hésite à m'y appuyer. Pour les utiliser, il faudrait au départ scruter la texture de chacune de ces lois qu'on y a appliquées et en faire une comparaison détaillée avec celle de la loi québécoise. L'ensemble de nos deux codes est également à considérer et à comparer avec les dispositions étrangères relativement aux divers régimes matrimoniaux [...].

68. See, *e.g.*, A. POPOVICI & M. PARIZEAU-POPOVICI, *Le patrimoine familial [:] La révolution dans votre mariage et vos biens*, Montreal, Wilson & Lafleur Ltée, 1989, pp. 64-5.

69. J.-P. SENÉCAL, *Le partage du patrimoine familial et les autres réformes du Projet de loi 146*, Montreal, Wilson Lafleur Ltée, 1989, pp. 96 *et seq.*

70. D. BURMAN & J. PINEAU, *supra*, note 39, para. 98.

be direct or indirect, to the acquisition of family property that justifies its equal split. But individual contributions as such do not provide the basis for dividing property. Rather it is presumed that marriage brings with it a mutually supportive partnership. The right to equal division turns neither on tracing of assets nor, as a general rule, on a case-by-case evaluation of the adequacy of a spouses contribution to the joint economic venture. Such inquiries would thrust the system — whether in Quebec or Ontario — back into the situation of palm-tree justice. What, then, is the normative basis upon which a judge can intervene to upset the equal division otherwise imposed by either the Quebec or the Ontario scheme?

22. While their provisions make it plain that they consecrate economic partnerships which depend on the contributions of both spouses, modern family property schemes typically do not require that the actual amount of the contribution be established. True, in the case of the family patrimony and the Ontario legislation, each includes provisions for the exclusion of that property not connected with the marriage as a joint economic endeavour. But beyond the calculation, for the one, of the "net value" of the family patrimony and, for the other, of the value of the "net family property" held by each spouse, contributions are presumed to have been made and to be of equal economic value. The technique in both cases is not at all that of their respective precursors, the compensatory allowance or the constructive trust, even if the statutory schemes are rooted in an idea that spouses must contribute to marriage. In respect of the latter remedies, not only is the model discretionary, but it is founded upon what one English scholar has described as an "individualist approach".[71] The restitutionary framework of unjust enrichment in both traditions obliges the court to establish actual contributions to wealth. In turn, this requires that courts stretch imagery of separate accounting and commercial self-interest to analyze the financial arrangement of the couple in such a way that may betray the true nature of the relationship of marriage, thereby explaining many of the growing pains of both the common law and the civil law remedies. Because the relationship within which the unjust enrichment arises is not characterized by autonomy and self-interest, even where the spouses are separate as to property, it is often inappropriate to call upon them to explain the manner and form of their respective contributions to marriage on a *quid pro quo* accounting basis.

Rather than relying on contributions that must be individualized to determine whether there has been an unjust enrichment, the "statutory" schemes in both Quebec and Ontario create a presumption that the contributions have been made — subject to the equitable considerations in article 422 C.C.Q. or subsection 5(6) of the *Family Law Act*, as the case may be. Recognizing that love, trust and collaboration are at the core of the joint economic endeavour that marriage represents, rather than autonomy and responsibility, the non-discretionary regimes are founded on what Professor Gardiner has called "communality". "The thrust of communality", he has written, "is that the parties do not regard their affairs in terms of a gain to the one being matched by a loss to the other, which might or might not need to be reallocated. They do not keep separate accounts in this way, but trust and collaborate with one another for the good of both. In a nutshell, restitution is about 'mine or yours'; communality is about 'ours'".[72] This

71. S. GARDINER, "Rethinking Family Property", (1993) 109 *Law Q. Rev.* 263, pp. 282 *et seq.*

72. *Id.*, p. 287.

explains the choice made by the legislatures : like the old community of property, contributions to the value of both the family patrimony and to net family properties are presumed to be of equal importance given that trust and collaboration animate marriage as a partnership.

23. It is indeed the old morality of community of property that explains the presumption that spouses have an equal entitlement to the value of designated property. This is no true community : the family patrimony harbours no indivision, organized or otherwise, just as the Ontario legislature has balked at going down that route. Moreover, gains are deferred until the end of marriage in both cases and neither scheme proposes rights *in rem* as a remedy. But just as spouses do not have to account for their contribution to the common mass in order to justify taking their share in community of property at marriage's end, so too can spouses claim their share under the modern schemes without bringing specific proof of contribution. Certain property, such as specified successoral and premarital assets, is excluded from division because, like in the partnership of acquests or community of property, that property is notionally private. Property susceptible of inclusion under section 4 of the *Family Law Act* or article 415 C.C.Q. is notionally "acquest" property as it is allied presumptively with marriage as a joint economic endeavour.[73] One further measure confirming that the family patrimony consecrates marriage as a partnership is the relevance of the period of *vie commune* to the amount subject to partition. By allowing spouses to petition for valuation at the date of the break-up, article 417 confirms that the joint economic endeavour is both the source of wealth and the justification for claiming a share in the net value of family patrimony.[74] Indeed the absence of *vie commune* as justification for unequal division amounts to a finding that the economic partnership never existed between the spouses.[75]

Ironically, it is in Ontario, more than in Quebec, that the connections between the morality of community of property and the new legislation have been most explicitly made.[76] Common law family property legislation has been tied to the idea, to use the language of the civil law, that the *vie commune* in marriage gen-

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73. For a criticism of the Quebec scheme for being insufficiently precise in its appreciation of "family property" see D. BURMAN & J. PINEAU, *supra*, note 39, paras. 42 *et seq.* In 1990 the Quebec rules were amended in order to ensure that the net value of property conformed more precisely the notion of property acquired as part of a joint economic endeavour : *An Act to amend the Civil Code of Québec concerning the partition of the family patrimony and the Code of Civil Procedure*, S.Q. 1990, c. 18, ss. 2 and 3.

74. For a petition under art. 417 which resulted in an otherwise unequal division, see *Droit de la famille — 1909*, [1994] R.D.F. 55 (Sup. Ct. *per* BEAUDOIN J.).

75. See, *e.g.*, *Droit de la famille — 983*, [1991] R.D.F. 229 (Sup. Ct. *per* DE BLOIS J.); *Droit de la famille — 1373*, [1991] R.D.F. 74 (Sup. Ct. *per* ROULEAU J.); and *Droit de la famille — 1552*, [1992] R.D.F. 175 (Sup. Ct. *per* MARQUIS J.) in which an absence or virtual absence of *vie commune* was invoked to justify unequal division. Compare *Droit de la famille — 1504*, [1992] R.J.Q. 457 (Sup. Ct. *per* MERCURE J.).

76. In a famous but fleeting moment of dialogue with Quebec, the Ontario Law Reform Commission cited the partnership of acquests as a source of its proposal to recognize the "matrimonial partnership", noting that "[b]oth the Commission and its Research Team, on a number of occasions, had the privilege and great benefit of discussing these [Quebec] provisions in detail with the representative of the Office of the Revision of the Civil Code" : O.L.R.C., *Report on Family Law [:] Part IV, Family Property Law*, *supra*, note 53, p. 51n 9b.

erates a common mass of property for which justice mandates equal division at the end of marriage.[77] This is not to say that the logic of shared-property regimes is at the fore of the interpretation of the Ontario statutes. Ontario jurists, no doubt for different reasons, are no more adept at trans-systemic dialogue than their Quebec counterparts. Moreover, while some Quebec jurists have connected modern Ontario law to the communitarian tradition in the civil law, fewer have noted the alliance between the family patrimony and community of property signalling— accurately, of course — that the shape and obligatory tenor of the new rules preclude them from being thought of as a "regime" in any way.[78] But leaving aside this important objection to focus on policy, it is possible to see the family patrimony as a mass of presumptively acquest property, the division of which is deferred until marriage ends. The community of ideas now centered around this new-fangled expression of community of property thereby presents Quebec courts with an opportunity at one and the same time to look back to tradition and next door to Ontario to better understand article 422. Two corollaries flowing from the alliance with the old logic of community are most useful for petitions under article 422 and sub-section 5(6). First, like in community of property, a mere unbalance in contributions to wealth does not in itself undermine equal division. Second, like in community of property, factors unrelated to the pursuit of the joint economic endeavour should have no bearing on the right to an equal share.

B. COMING TO "PARTITION" WITH CLEAN HANDS

24. Since the family patrimony rests on the idea of economic partnership based on presumed contributions, marital misconduct — adultery, cruelty and the like — cannot, on its own, justify a finding under article 422 that a "partition into equal shares [...] would result in an injustice". Misconduct has no *prima facie* connection to contribution. Thus, those charged with the invention of the Ontario scheme have, from its inception, warned against using fault as a basis for varying the equalization of shareable property.[79] Courts charged with the interpretation of

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77. Scholars have allied the common law schemes with the policy of shared-property regimes in the civil law tradition : see, *e.g.*, for Canada, W. HOLLAND, "Reform of Matrimonial Property Law in Ontario", (1978) 1 *Can. J. Fam. L.* 1, pp. 10-11; and, for a wider common law perspective which encompasses Canada, J. EEKELAAR, *Family Law and Social Policy*, 2nd ed., London, Weidenfeld & Nicolson, 1984, pp. 104 *et seq.* For an excellent comparison between the Ontario *Family Law Reform Act* and the partnership of acquests, from the twin perspectives of policy and technique, see J. BEAULNE, "Critères de qualification des acquêts et du *family assets* en droit québécois et ontarien", (1984) 15 *R.G.D.* 537 and "Regards sur les systèmes de partage de biens en droit matrimonial québécois et ontarien", (1985) 16 *R.G.D.* 591.

78. See D. BURMAN & J. PINEAU, *supra*, note 39, paras 31-4 who did note that the family patrimony, like shared-property regimes, is based on the idea that "l'union des personnes entraîne une association d'intérêts" (para. 31).

79. See ONTARIO LAW REFORM COMMISSION, *supra*, note 53, p. 193 where, referring to the basis upon which courts would be entitled to vary equalizing claims, the Commission suggested courts proceed "without regard to matrimonial fault". Noting that this recommendation had been followed in both the *Family Law Reform Act* and the *Family Law Act*, the Commission said that the "explicit stricture against the consideration of matrimonial fault" be maintained given the policy basis of the *Family Law Act* : see *Report on Family Property Law*, *supra*, note 52, p. 61.

the common law regimes have been generally respectful of this imperative, focussing not so much on the conduct but on its consequences in deciding whether they can intervene to vary equal division of assets.[80] Even acknowledging this for what it often is — moralistic sleight of hand — the distinction between conduct and consequences is rooted in principle. The reference to "bad faith" at article 422 must mean bad faith in respect of the existence or pursuit of marriage as a partnership, just as the other examples given by the Code ("brevity of the marriage", "the waste of certain property by one of the spouses") are only meaningful sources of injustice when held up to the overall policy of marriage as a partnership.[81]

25. Without the benefit of dialogue with ideas from Ontario, Quebec courts have, understandably perhaps, amplified the importance of fault in some of the early cases decided under article 422. In some isolated instances, article 422 has been misused as a stick to punish misconduct. In one such example, a woman who had made life "a living hell" for her husband during marriage — she was often drunk, mentally cruel, she refused to have sexual relations after an early point in a twenty-year marriage — was deprived of her whole share in the family patrimony, at least in part on this basis.[82] In another surprising case, a husband's failure to contribute to the upkeep of the children *after* the break-up was "punished" by an unequal division of pension money.[83] On occasion, what a judge perceives to be misconduct is coupled with other factors in a jumble that together makes up the injustice under article 422.[84] Fault took on a reverse but no less misguided relevance in another case in which a rogue husband was punished by a judges's refusal to entertain his petition for unequal division. In an arranged marriage that lasted only a short time, the husband's treatment of his wife — described as "cruel, even

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80. For a clear statement of the idea that conduct *per se* is irrelevant but that the effects of conduct on the pursuit of marriage as a partnership are germane see *Spinelli* v. *Spinelli*, (1992) 42 R.F.L. (3d) 380, pp. 384 *et seq.* (B.C. S.C. *per* TYSOE J.). See also *Ford* v. *Ford*, (1986) 5 R.F.L. (3d) 82, p. 88 (B.C. C.A. *per* CARROTHERS J.A.) and *F. (T.R.)* v. *S.(P.K.)*, (1994) 1 R.F.L. (4th) 134, p. 140 (Alta Q.B. *per* ANDREKSON J.).

81. "Brevity of marriage" is not, of course, founded on economic fault but speaks to an injustice flowing from a disproportionate contribution to the partnership not discounted for by the rules for the calculation of net value. Various commentators have given the colourful example, for paragraph 5(6)(e) of the Ontario *Family Law Act*, of a sports figure who suddenly earns a great deal of money. Since the windfall reflects years of training rather than earnings associated with a brief marriage, it is said to escape division.

82. "Pour justifier cette décision, qu'il nous suffise de mentionner, notamment, la brève durée du mariage, [...] et la conduite générale de la défenderesse qui [...] a fait preuve [...] d'une entière mauvaise foi tant par son attitude envers le demandeur qu'envers les enfants de ce dernier" : *Droit de la famille — 1480*, *supra*, note 9, p. 637. Ironically, the divorce itself was not founded on fault, but rather on the statutory separation period, based on a separate bedroom arrangement.

83. "[Il serait] inéquitable sinon contraire à la justice naturelle d'ordonner le partage égal des fonds accumulés au régime de rentes" : *Droit de la famille — 1482*, [1991] R.D.F. 639, p. 646 (Sup. Ct. *per* FRÉCHETTE J.).

84. See, *e.g.*, *Droit de la famille — 1664*, [1992] R.D.F. 2508, p. 2514 (Sup. Ct.) where Hébert J. spoke disapprovingly of a wife's sudden decision to leave her husband obliging him to confront "une solitude imprévue et imprévisible" which, combined with unequal contribution to the value of the patrimony, constituted an injustice mandating unequal partition.

brutal, and in bad faith" — was cited as the basis for enforcing equal division [...] as if to make him pay for his bad behaviour![85]

26. It is in another way that the notion of misconduct can be said to explain article 422. The spouse who is stripped of his or her right to an equal share of the value of the family patrimony by the court will be the one who has committed a "fault" in the sense of having breached the fundamental covenant of marriage as a joint economic endeavour. Where a spouse has failed to participate in marriage as a partnership, it would be unjust to allow the equal partition that applies by operation of law to proceed. It is in this sense that Justice Moisan's indication of the relevance of "des conduites préjudiciables et répréhensibles" in *Droit de la famille — 1395* is most accurate, as he himself intimated,[86] and it was the absence of any such economic fault on the facts of the case that justified his refusal to divide the family patrimony unevenly.[87] Elsewhere in Canada, this connection between misbehaviour and failure to treat marriage as a partnership has been a central theme in the delineation of judicial discretion under statute.[88] Thus, in *LeBlanc* v. *LeBlanc*, the Supreme Court of Canada explained that the discretion under the New Brunswick *Marital Property Act* to depart from the general principle of equal division could not be exercised simply because the husband was an alcoholic and drank heavily on a daily basis. However, given his problem, he had failed to contribute to child care, household management and financial provision of his partner and this did justify unequal division.[89] In Ontario, courts have developed the notion of "*male fides* failure to contribute" in order to connect conduct to the policy orientation of the statute and courts have, on this limited basis, considered spousal behaviour relevant to petitions made under sub-section 5(6).[90]

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85. "[L]e Tribunal, étant d'avis que la conduite du mari vis-à-vis de l'épouse a été non seulement cruelle et brutale, mais même de mauvaise foi, il n'y a pas lieu, de l'avis du Tribunal, d'appliquer l'exception prévue à l'article [422] du *Code civil du Québec* et, en conséquence, les dispositions sur le patrimoine s'appliqueront dans toute leur rigueur" : *Droit de la famille — 869*, [1990] R.J.Q. 2242, p. 2247 (Sup. Ct. *per* TRUDEAU J.).

86. In explaining the common denominator of the factors set forth by art. 422 as contribution and misconduct, he went on to say that in both cases "l'accent est mis sur le patrimoine lui-même et s'articule autour des contributions qui l'ont augmenté ou des retraits frauduleux qui l'ont amoindri" : *supra*, note 12, p. 1664.

87. The majority found that both spouses had devoted the 16 years of *vie commune* to the welfare of the children and to the accumulation of property so that the wife was not entitled to take the family residence for herself : *Id.*, p. 1664.

88. There is considerable variation in discretionary exceptions found in different provincial statutes across Canada, although the policy basis — that of treating the non-contributing spouse as unworthy of a remedy originally fashioned in Equity — is uniform. For an excellent account of different schemes against the background of how family property law has been shaped by Equity jurisprudence, see B. HOVIUS & T. YOUDAN, *The Law of Family Property*, Scarborough, Carswell, 1991, chaps 7 and 9. A tribute to the influence of this latter work is the extent to which the Ontario Law Reform Commission relied upon it in its recent review of the *Family Law Act*, *supra*, note 52.

89. [1988] 1 S.C.R. 217, esp. at p. 222. The case was decided under the *Marital Property Act*, S.N.B. 1980, c. M-1.1 which, at ss. 2 and 7, is most explicit about the policy orientation of the statutory scheme.

90. See, *e.g.*, *Berdette* v. *Berdette*, (1988), 14 R.F.L. (3d) 398, p. 413 (H. Ct. *per* GRANGER J.), conf'd (1991) 33 R.F.L. (3d) 113 (C.A.). The same standard was invoked in *Balloch* v. *Balloch*, (1991) 35 R.F.L. (3d) 189, p. 198 (H. Ct. *per* GREER J.).

Even without study of the Ontario experience, many Quebec courts have fixed on this limited mission for article 422. For example, in *Droit de la famille — 994*, there was much to reproach the husband — he was chronically out of work, had drinking problems, and perhaps more. For this husband, a "parasite de la société tout autant que de son épouse", it was the fact that he had never contributed to the accumulation of property in the family patrimony and that his wife had provided "un apport substantiel et hors du commun" thereto that meant equal division would have produced an injustice.[91] Where one spouse contributes the lion's share of riches to the marriage and where the same spouses takes primary responsibility for contributions made in the home, the other has "misbehaved" in such a way as to lose all or part of his share in the family patrimony.[92] By the same token, where there is no patent over-contribution or under-contribution to the accumulation of the family patrimony, equal partition is not unjust no matter how disagreeably one spouse may have behaved towards the other.[93] This is true too when economic misconduct of one spouse appears to offset that of the other.[94] Ironically, in some of the cases where courts have sought to punish misbehaving spouses by imposing an unequal division of the family patrimony, they might well have extended their reasoning further to inquire whether such misconduct could also be viewed as an "economic fault".[95] Sometimes the reader is left to infer economic fault from judges who use language that only hints at such behaviour when faced with facts that suggest it strongly.[96] But even the full payment by one partner of an asset in the family patrimony does not necessarily constitute an injustice under article 422, absent any other evidence of under-contribution, in property or services, by the other.[97]

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91. [1991] R.J.Q. 1427, p. 1428 (Sup. Ct. *per* GALIPEAU J.). See also *Droit de la famille — 2077*, J.E. 94-1299 (Sup. Ct. *per* CHABOT J.) where a failure to contribute, rather than the mental cruelty and drug consumption that ended the marriage, justified unequal partition.

92. See *Droit de la famille — 1853*, [1993] R.D.F. 461 (Sup. Ct. *per* BAUDOIN J.) where a division was ordered in favour of a wife whose husband "n'a ni contribué financièrement ni autrement, soit en s'occupant de l'éducation de sa fille, soit en partageant les tâches ménagères avec sa conjointe" (p. 463). See also *Droit de la famille — 1652*, [1992] R.D.F. 472, p. 475 (Sup. Ct. *per* BERGERON J.) and *Droit de la famille — 1799*, [1993] R.D.F. 255, p. 256 (Sup. Ct. *per* CRÉPEAU J.).

93. This was explained by Jolin J. in *Droit de la famille — 1806*, [1993] R.D.F. 269, pp. 272-3 (Sup. Ct.) in a dispute over profits made from lottery winnings.

94. Flynn J. noted in *Droit de la famille — 1729*, [1993] R.D.F. 79, p. 80 (Sup. Ct.) that "monsieur dépensait autant en boisson que madame en 'bingo'" which ordinarily would give neither of them right to an unequal division, although other facts complicated this case.

95. See, *e.g.*, *Droit de la famille — 1480*, *supra*, note 9, in which alcoholism and mental cruelty were invoked under art. 422, but where the judge had also noted that alcohol abuse meant that "elle n'a jamais accompli la totalité ni même partie des tâches qui relevaient de son nouveau statut d'épouse" (p. 633). Similarly it was not mental cruelty but a disinterest in fully contributing to marriage as a partnership that would have been the best and only justification for unequal division in *Droit de la famille — 1664*, *supra*, note 84 (see esp. p. 2514).

96. See, *e.g.*, *Droit de la famille — 995*, *supra*, note 65, p. 1419, in which Fréchette J. noted that an equal division would not correspond to the "réalité économique de la vie commune des époux" where the wife had agreed to change the matrimonial regime from community to separation without taking her share and had overcontributed to paying the husband's debts.

97. See, *e.g.*, *Droit de la famille — 1396*, [1991] R.D.F. 206, pp. 208-9 (Sup. Ct.) where Fréchette J. allowed each spouse to take their own cars, thus constituting an unequal partition of minor consequence, without feeling the necessity of further substantiating an injustice.

27. In principle, where misbehaviour has no economic impact, it cannot be a factor giving rise to an injustice under article 422. A spouse may be cruel or loveless, but if he or she has respected the obligation to contribute to the expenses of the marriage to the extent of the value of the family patrimony, this misconduct is irrelevant. There is, of course, a fine line between misconduct *per se* and an economic fault that makes equal partition an injustice.[98] Where, for example, a spouse's extra-marital amorous alliance brings with it a disinterest in contributing financially to marriage, a court may have grounds to intervene under article 422. The bad faith displayed by the adulterous spouse does not affect rights in the family patrimony, but the failure to continue treating marriage as a joint economic enterprise does. Common law courts have experienced particular difficulty in deciding whether alcoholic spouses have committed an economic fault, no doubt based on misgivings as to whether this should be thought of as a innocent sickness or as potential source of economic "misconduct".[99] The instinct to seek out blame is a powerful one, as one case which deprived a manic-depressive husband of an equal share of family assets plainly attests.[100] But where the focus is on the consequence of behaviour rather than on the behaviour itself, the blameworthiness that one may or may not associate with the non-contributing spouse's conduct becomes of secondary importance.[101]

Just as judicial consideration of the exception in Ontario may be instructive, Quebec judges can look to the notional connection between the morality of community of property and that of the family patrimony for direction under article 422. The old argument, thrust upon Quebec law by the *ancien droit*, as to whether the married woman guilty of adultery forfeited her share in the community was discounted — eventually — by a body of opinion which saw the issue as immaterial to the logic of a shared-property regime.[102] Where conduct is relevant it emphatically carries with it an "economic" stamp : under the community of moveables and acquests as well as the partnership of acquests, intermeddling, abstracting or concealing acquest property are all treated as bad faith behaviour in

98. See J. LEON & K. HIGGINSON, "The Developing Concept of Net Family Property", (1986) 1 *Can. Fam. L.Q.* 249, p. 260 who, after noting that marital fault is irrelevant under the Ontario *Family Law Act*, argue that factors relevant to unconscionability "should relate exclusively to economic misconduct".

99. For cases in which evidence was led that a spouse's drinking problem affected contribution but where the court refused to intervene, see, *e.g.*, *Fraser* v. *Fraser*, (1991) 34 R.F.L. (3d) 284, pp. 251-2 (Sask. Q.B. *per* MALONE J.); *Forslund* v. *Forslund*, (1991) 36 R.F.L. (3d) 20, pp. 25-30 (B.C. S.C. *per* SCARTH J.). Compare *LeBlanc* v. *LeBlanc*, *supra*, note 89.

100. See *Hauck* v. *Hauck*, (1991) 37 R.F.L. (3d) 397, p. 399 (Alta C.A. *per* KERANS J.A.) where the Court noted that the husband had not taken steps to deal with his condition in justifying its decision to order an unequal division of assets.

101. For a strong statement to this effect, see *Davies* v. *Davies*, (1988) 13 R.F.L. (3d) 278, p. 285 (Ont. Sup. Ct. *per* MCKAY L.J.S.C.).

102. Art. 209 C.C.L.C., repealed by S.Q. 1969, c. 74, was said by many to have carried forward the rule from old French law that an adulterous wife could be stripped of her rights in community, although a majority view developed arguing that her rights in the community should not be linked to conduct : see A. BOHEMIER, "Commentaire sur l'article 209 du Code civil", (1965) 25 *R. du B.* 137, p. 142.

respect of marriage as a partnership[103] and, in the same spirit, the family patrimony also punishes wrongful economic behaviour.[104]

28. Quebec scholars and courts do seem to agree on one thing — the list of factors to consider as to whether equal partition results in an injustice ("the brevity of the marriage, the waste of certain property by one of the spouses, or the bad faith of one of them") is not limitative.[105] But this observation, most certainly correct, may be the source of more mischief. Few courts have sought out the inner logic of the list given at article 422, putting Quebec in a situation, unlike that of Ontario, of potentially ever-expanding grounds for injustice, and a widening opportunity for palm-tree justice. Sensibly, the majority of the Court of Appeal in *Droit de la famille — 1395* moved to open door on the strength of the *ejusdem generis* rule of interpretation. Justice Moisan noted that the three examples given by the legislature in article 422 have a common denominator : "d'une part, l'importance de la contribution de chacun des époux à la formation du patrimoine commun et, d'autre part, la sanction des conduites préjudiciables et répréhensibles".[106] But however useful these observations, at first blush this description appears to separate contribution and conduct as two possible sources of the injustice which entitles the court to intervene. The better view is that misconduct, where it is relevant, must provoke a failed contribution to be relevant under article 422 given the overall policy of the family patrimony as embodying an economic partnership.

29. Given the connections to the policy that marriage is a partnership, it is plainly in this same spirit that the "waste of certain property by one of the spouses", to which article 422 alludes, can bring about an injustice at partition. The reckless depletion of property, spoken to more explicitly in the Ontario Act,[107] gravitates around a similar idea of breach of trust in respect of prospectively family property. Where one spouse, in the exercise of property rights during the marriage otherwise confirmed by both statutory schemes, depletes the property of the family patrimony, he or she may do so at the expense of the partnership in a manner relevant at division.[108] The legislatures in both jurisdictions do not to seek to punish for unsuccessful investments or unwise expenditures as such, but rather those undertaken with the design of supplanting the partnership. So where a husband

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103. See, *e.g.*, arts 1339 and 1364 C.C.L.C. for community of property and arts 468 para. 2 and 471 C.C.Q. for partnership of acquests.

104. See art. 421 C.C.Q. which "punishes" a spouse who transacts with property in the family patrimony where, *inter alia*, such transaction would affect the share of his or her spouse in the mass.

105. Many courts have agreed with scholarly opinions that the term "notamment" ("in particular") authorizes the court to look farther afield : see, *e.g.*, *Droit de la famille — 1652*, *supra*, note 92, p. 475 (Sup. Ct. *per* BERGERON J.); *Droit de la famille — 1487*, [1991] R.J.Q. 2920, p. 2927 (Sup. Ct. *per* FRÉCHETTE J.); *Droit de la famille — 980*, [1991] R.J.Q. 1104, p. 1111 (Sup. Ct. *per* BERGERON J.); *Droit de la famille — 872*, *supra*, note 62.

106. *Supra*, note 12, p. 1663. See also, to the same effect, *Droit de la famille — 1868*, [1993] R.D.F. 609 (Sup. Ct. *per* HÉBERT J.).

107. See paras 5(6)(b) and 5(6)(d) of the *Family Law Act* which deals with debts that are incurred recklessly and with intentional and reckless depletion of property, analyzed concurrently by B. HOVIUS & T. YOUDAN, *op. cit.*, note 88, pp. 400-411, who suggest that bad faith towards the partnership is relevant to both.

108. It has been suggested that the deliberate contracting of debt to reduce the value of the family patrimony would justify unequal division : D.M. HENDY & R.B. ISSENMAN, "The Implications of Quebec's Family Law Reform on Business Planning", (1990) 6 *Can. Fam. L.Q.* 321, p. 327.

spent family assets held in his name in great amounts and without his wife's knowledge, an Ontario court saw in his behaviour a recklessness that meant his wife was entitled to unequal division at divorce.[109] In another case, where a husband was unable to account for money or debts that would have been family property, the court inferred from the circumstances that he was either hiding assets or depleting family property.[110] Again the notion of *male fides* failure to contribute is what judges look for before deciding that an equal division of assets will be unconscionable. In Quebec, article 421, which expands this rule with two specific examples, may serve to obscure the meaning of "waste" in article 422,[111] but it would seem that insofar as courts are empowered to intervene by the two articles, the court should ask itself if the behaviour of the spendthrift spouse amounted to a *male fides* failure to contribute to the marriage as a partnership, specifically to the value of the family patrimony.

30. While the idea that failure to contribute to the acquisition of property in the family patrimony is an economic fault is key to explaining the basis for judicial intervention under article 422, it also carries with it the seeds of the undoing of the family patrimony as a non-discretionary remedy. If the family patrimony was enacted, like the Ontario statutes, with a view to dispensing with judicial discretion as a means of assuring economic equality, why allow judges to re-open the question of individual assessment of contribution that was at the root of the inadequacy of both the compensatory allowance and the constructive trust? Unless courts take a stand against recalculating contributions on a case-by-case basis, article 422 will become a standard basis for reviewing the question of the partition of the family patrimony in every divorce.[112] The problem is substantial : while not all divorces are unfriendly, very few of the marriages which preceded them were based on contributions to wealth that one might easily agree to have been identical. This is especially true given the inherent difficulty of comparing direct and indirect contributions to family wealth. Moreover, as the Supreme Court of Canada observed, the difficulty of making precise calculations where the cement of the joint economic endeavour is love and trust makes the feat almost not worth undertaking.[113] This same point was in fact underlined by one of the Court's 'civil law' judges who was called on to explain discretion under British Columbia Act.[114]

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109. *Filipponi* v. *Filipponi*, (1992) 40 R.F.L. (3d) 296, p. 306 (Gen Div. *per* CHARRON J.). Compare, for Quebec, *Droit de la famille — 1831*, [1993] R.D.F. 387 (Sup. Ct. *per* MARQUIS J.).

110. *Jukosky* v. *Jukosky*, (1990) 31 R.F.L. (3d) 117, p. 146 (Gen Div. *per* MACDONALD J.).

111. D. Burman & J. Pineau have justly criticized art. 421 for insufficient direction as to the ambit of judicial discretion : *supra*, note 39, paras 54 and 55.

112. Some Ontario decisions, such as *Sullivan* v. *Sullivan* (1986) 5 R.F.L. (3d) 28 (Unif. Fam. Ct. *per* GOODEARLE U.F.C.J.) have been criticized as eroding the principle of equal sharing based on a too rigorous review of contributions : see K. HIGGINSON, "Unequal Sharing of Net Family Properties in Ontario : Will the Exception Swallow up the Rule?", (1987) 2 *Can. Fam. L.Q.* 283, p. 286.

113. In respect of a petition made for an unequal division under the Saskatchewan Act, Estey J. decried the "wasteful and hopeless process of assessment of spousal contributions" in *Donkin* v. *Bugoy*, [1985] 2 S.C.R. 85, p. 91.

114. See *Elsom* v. *Elsom*, [1989] 2 S.C.R. 1367, pp. 1376-7 in which Gonthier J. noted that the parallel rule to art. 422 in B.C. "does not require the court to effect a division of property that it feels is proportionate to the contribution each spouse has made to the particular assets or group of assets".

With this in mind, it becomes apparent that a judge should not feel entitled to intervene and divide the "statutory community" simply where he or she sees an accounting imbalance in the contributions made by the spouses during the marriage. Before deciding that the equal division of the family patrimony would result in an injustice, the court should pause and reflect on how the communality model makes a strict comparison of accounts inappropriate. A court is not barred, or course, from intervention, but as a leading Ontario expert recently observed, the court does not have a general power to redistribute property under the Ontario exception that stands parallel to article 422.[115] There is a high threshold to be crossed before a court is entitled to see equal treatment of the spouses as unjust or unconscionable, described by one prominent Ontario judge as follows : "circumstances [are required] such as to shock the conscience of the court, whereby the party seeking redress has been placed in a position so unfair as to cry out for relief".[116] Citing the Ontario rule in a wide review of different regimes applicable in England, Australia, New Zealand and Canada, Gardiner noted that a precise score is not to be kept of the parties' contributions to the marriage : "there is a generous area of tolerance" to be observed before a court can order a variation from equal division, "but [...] there may come a point when collaboration has failed to such an extent that there is also a lapse in trust, so that communality becomes inappropriate".[117]

31. Feeling their own way, many Quebec judges have done rather well in trying to strike a balance between, on the one hand, a shyness to intervene and the imperative to act where an equal partition would shock the conscience of the court. While perhaps overstated, this may well be the spirit adopted by the trial judge in *Droit de la famille — 1395* who explained that "[c]omme le droit au partage du patrimoine familial naît du seul fait du mariage, [...] il est immatériel pour les fins de ce partage, de considérer les apports respectifs des époux".[118] Some Quebec courts have expressed the same idea differently in saying that the mere application of the rules of the family patrimony that cannot constitute the injustice.[119] The key point, well explained by the Ontario courts, is that a judge should not recalculate the actual contributions to the family patrimony as the basis for departure from equal division if he or she finds an imbalance. The conscience of the court may not, in fact, be shocked by an imbalance in certain circumstances. On the contrary, the relationship of love and trust is presumed to accompany the economic partnership in marriage is a forgiving one : a spouse may encounter personal difficulties making it impossible to contribute as is ordinarily required and, during this period, is entitled to have his or her partner "overcontribute" while the difficult period is traversed. Here again is a further reason for judges to tread cautiously before

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115. J. McLeod, "Annotation : *Arndt v. Arndt*", (1992) 37 R.F.L. (3d) 424.

116. *Zabiegalowski* v. *Zabiegalowski*, (1992), 40 R.F.L. (3d) 321, p. 340 (Unif. F.Ct. *per* Mendes da Costa J.).

117. *Supra*, note 71, p. 293.

118. *Supra*, note 61, p. 313. Fréchette J. did, in fact, consider the "réalité économique de la vie commune", including their respective participation in the accumulation of wealth, before deciding the petition (p. 314).

119. See, *e.g.*, *Droit de la famille — 980*, *supra*, note 105, p. 1111 (Sup. Ct. *per* Bergeron J.); *Droit de la famille — 1825*, [1993] R.D.F. 440, p. 443 (Sup. Ct. *per* Durocher J.); *Droit de la famille — 1891*, [1993] R.D.F. 587, p. 550 (Sup. Ct. *per* Boily J.); and *Droit de la famille — 1965*, [1994] R.D.F. 293, p. 295 (Sup. Ct. *per* Boudreault J.) in which equal division was maintained on that basis.

assigning blame to one partner upon the division of the family patrimony. The case reports are full of examples where courts in other provinces have explicitly refused to make precise calculations of contributions to family property in order to determine whether equal division would be unconscionable or unfair.[120] This is precisely the attitude Quebec courts should adopt if they want to respect the "communality" upon which the joint economic endeavour of articles 414 *et seq.* is founded.[121] To proceed otherwise is to guarantee that the courts will be clogged with hard-nose divorce fights about who paid for more quarts of milk and necessarily maladroit judicial accounting that loses sight of the cooperation that characterizes marriage as a partnership in the first place.

The danger, of course, in appealing to the conscience of the court, is the appreciation of "injustice" is a necessarily subjective affair. Just as a sense of outrage might move a judge to see misconduct as a source of injustice in an even split of the family patrimony, so too have other factors unconnected to the unwinding of the joint economic endeavour been given credence in petitions under article 422. Need is, of course, an appropriate concern for a court at divorce, but the family patrimony has, in principle, no alimentary function. Some Quebec courts have rightly discounted need by fixing on the compensatory role of the family patrimony,[122] but others have allowed noble sentiment to overcome them.[123] Issues relating to support, particularly future earning potential, have been cited in a number of cases as justification for unequal division in favour of the needy spouse, notably in respect of pension benefits.[124] But even if pension benefits have a prospective feel to them, their inclusion in the family patrimony proceeds on the same basis as other property : it is presumed that spouses have both contributed to the partnership in a manner as to justify a share in benefits even where the plan is registered in the name of only one of them. Like the *Family Law Act*,[125] the family patrimony is best thought of as a deferred community of acquest property which may incidentally satisfy future needs but exists independently of them. Courts should shy away

120. Explained colourfully by Galligan J. in *Skrlj* v. *Skrlj*, (1986) 2 R.F.L. (3d) 305, p. 309 (Ont. H. Ct.) who said that the judge, stripped of discretion, must let the "chips [...] fall where they may".

121. The Quebec Court of Appeal has said that the family patrimony is based on the "participation de chacun des époux à l'acquisition de ces biens [...] [qui est] réputée égale" which participation need not be recalculated at division : *Droit de la famille — 1893*, [1993] R.J.Q. 2806, p. 2809 (*per* LEBEL J.A.).

122. See, *e.g.*, *Droit de la famille — 973*, [1991] R.D.F. 223 (Sup. Ct. *per* CROTEAU J.) in which unequal division was refused despite the circumstances of debt and illness that motivated the petition. See also *Droit de la famille — 1473*, *supra*, note 67, p. 546 in which future earning potential was rightly discounted on the same basis.

123. In some instances, means and circumstances have been cited as relevant without further explanation : see, *e.g.*, *Droit de la famille — 1636*, [1994] R.J.Q. 9, p. 16 (C.A.).

124. See, *e.g.*, *Droit de la famille — 2016*, J.E. 94-1131 (Sup. Ct. *per* HALPERIN J.) where pension benefits were divided unevenly "de façon à aider la demanderesse à rencontrer ses besoins alimentaires" (p. 14). See also *Droit de la famille — 1731*, [1993] R.D.F. 156, p. 167 (Sup. Ct. *per* PIDGEON J.) and *Droit de la famille — 1787*, [1993] R.D.F. 191, p. 195 (Sup. Ct. *per* MAYRAND J.). Pension benefits may not all have the same juridical quality for these purposes : see, *e.g.*, *Droit de la famille — 993*, [1991] R.J.Q. 1423, p. 1425 (Sup. Ct. *per* DOWNS J.).

125. See B. HOVIUS & T. YOUDAN, *op. cit.*, note 88, pp. 396 and 434. In some other provinces, legislatures have tested the outer limits of their constitutional jurisdiction by explicitly including need as a criterion : see, *e.g.*, *Matrimonial Property Act*, R.S.A. 1980, c. M-9, s. 8(d).

from seeing the claim in the mass as having the potential to vary according to need.[126]

32. When should a court feel that the equal partition would be an injustice? It is all well and good to shift to a new terminology, but "shocking the conscience of the court" is no less clear as a measure than is "unconscionability", "unfairness" or "injustice". There will of course be some who are shy to accept this "foreign" language as a measure, noting that unconscionability and injustice are not necessarily the same, and, perhaps, extending basing an interventionist approach on the argument that in its original proposed form, article 422 had set an apparently higher standard.[127] The meaning of unconscionability probably escapes precise measure, and this is no doubt salutary, as long as courts uniformly pause before intervening. On the tenth anniversary of the initial proposal, the Ontario Law Reform Commission still hesitates over the right word to use — in a sense no one word will dispel the reality that some appearance of palm-tree justice is unavoidable if judges are given any discretion at all.[128]

Whether the measure is unconscionability, injustice, gross injustice, unfairness, or any of the other tags that legislatures may dream up, it is essential that courts take the position that they can only intervene when presented with an economic fault of such a dimension as to have undermined the existence of the marriage as a joint economic endeavour. While the model of community of property should allow spouses to make contributions without keeping accounts, this should not mean that the tenor of the contribution made is beyond review.[129] Courts should do so when they find that a spouse has abused the confidence of the other in the economic partnership. Equal participation can bring about such an injustice where, for example, a spouse has abdicated his or her role in the joint economic endeavour or where a great disparity in contribution is not adequately explained by the partnership principle. Courts should tread carefully before upsetting the community model established by the legislature and are well to remind themselves of the communality principle which animates the scheme in question, as did Justice La Forest of the Supreme Court of Canada in *LeBlanc* v. *LeBlanc*.[130] Nonetheless, noted Justice La Forest, where the property has been acquired exclu-

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126. Seeing the mix as a possible source of advantage to clients, some advocates have suggested that spouses agree to unequal partition in favour of the alimentary creditor as an alternative to lump sum support : see, *e.g.*, P. RAYLE, "Le patrimoine familial la lumière du nouveau Code civil et comme outil de règlement", *in Colloque : Les finances de la famille lors d'un divorce*, Montreal, Wilson & Lafleur Ltée, 1994, fasc. 5, p. 15.

127. See the text of the initial proposal tabled by the Minister of Justice in 1988 which would have limited judicial intervention to instances where equal partition produced an "injustice flagrante" : *supra*, note 15, p. 22.

128. The solemn consideration by the Ontario Law Reform Commission as to how "high" the threshold is under "unconscionability" as opposed to "injustice" would suggest otherwise : *supra*, note 52, p. 64.

129. In *Droit de la famille — 1572*, [1992] R.D.F. 199, p. 201 (Sup. Ct.), Arsenault J. astutely saw that the "visée même" of the family patrimony meant that identical contributions are not necessary noting that "un apport plus grand ou même exclusif[...]ne peut à lui seul donner ouverture à un partage inégal".

130. The fact that a court has the power to vary the equal division brought by the scheme, he said, is not an open licence : "This does not [...] mean that a court should put itself in the position of making fine distinctions regarding the respective contributions of the spouses during marriage" : *supra*, note 89, p. 222.

sively or almost wholly through the efforts of one spouse and there has been no, or a negligible contribution to child-care, household management or financial provision by the other, then the court should be able to intervene.

CONCLUSION

33. It is no doubt ungenerous to suggest, as does the title to this essay, that there is a bit of *tartufferie* involved in burying the connections between unjust enrichment in the common law and the compensatory allowance, on the one hand, and Ontario matrimonial property legislation and the family patrimony on the other. One cannot say, for example, that the new devices for sharing in marriage are precise technical equivalents of their common law counterparts. There is no serious argument to the effect that the compensatory allowance is a constructive trust which would allow the court to award a proprietary remedy to a non-owner spouse based on the distinction between legal and beneficial title. Moreover, the differences between the family patrimony and the *Family Law Reform Act* were vital and these differences have, if anything, been amplified since the advent in 1986 of the *Family Law Act*. The Quebec scheme is of public order unlike the Ontario statutes; the Quebec rules apply to a narrow category of defined "family assets" which is no longer the case in Ontario; finally, the family patrimony must be understood as forming part of a body of matrimonial law where the preferred legislative model for marriage is not separation as to property but instead a partnership of acquests that, ironically, resembles in many respects the now defunct *Family Law Reform Act*.

However if one leaves aside these important technical differences and focuses on the law in Quebec and Ontario as two systems of ideas, the depth of common experience is very striking. Unjust enrichment in the common law and in the civil law, when cast against the background of the relations between husband and wife, has given rise to very similar problems : how to recognize the indirect contribution to wealth that one spouse makes to the patrimony or another? is there a causal connection between work in the home by one spouse and growing wealth of the partner in the work force? how can this enrichment be properly quantified? In addition to common problems, a common perception existed that women separate as to property were mistreated by positive law, and deserved redress that their husbands and their marriage contracts were disinclined to give them at the end of marriage. In both traditions judges were to have the power, acting on a view that marriage is a joint economic endeavour, to recognize individual contributions to wealth by way of a claim against "family property" held by the husband.

Striking too is the common experience between Quebec and Ontario in respect of the discretionary remedies for unjust enrichment. Both legislatures found that judging to be an inefficient way to promote substantive equality in marriage and have found that, as often as not, judges had difficulty in perceiving indirect contributions to wealth, particularly child-care and house work, as constituting a meaningful contribution to marriage as a partnership. Both provinces sought to remove the discretion from the judges and create a new, litigation-avoidance scheme whereby contributions to family property were presumed to be of equal value even if they were of different market price. While, as we have seen, the family patrimony is not, no more than was the compensatory allowance before it, a true legal transplant, the policy basis for the Ontario legislation has, with all its roots in Equity, influenced the shape of the new law of family property in Quebec.

Yet despite the community of ideas around a modern community of property, courts in Quebec have not taken up the opportunity to see developments in matrimonial law as having a trans-systemic quality. Much in the same manner as with the interpretation of the compensatory allowance, the attitude of Quebec courts has been, in a word, hostile to the idea of dialogue with Ontario. Fully aware of the connections, judges have preferred to shield their eyes from the community of ideas between the common law and the civil law in respect of marriage as a joint economic endeavour. The consequences of this attitude, while not catastrophic, have been to obscure the purpose of the family patrimony and, in the case of article 422, to detract attention from the limited notion of economic fault which is at its very core.

With the benefit of hindsight, it is plain that the family patrimony has brought, like the *Family Law Act*, a statutory "partnership" to Quebec matrimonial law. Mirroring the idea that marriage is a relationship of trust and collaboration, article 396 C.C.Q. continues to require that spouses contribute to the expenses of the marriage "in proportion to their respective means" and to provide that such contribution may be made in the home. But this rule, which ended up contributing to the downfall of the restitutionary compensatory allowance, now sits on firmer ground with the family patrimony. The contribution of spouses to expenses of the marriage, whatever the form it may take, has crystallized into a share of the net value of specified property without any need of proving actual contribution to the acquisition thereof. The advent of the family patrimony has, at one and the same time, consecrated article 396 as the fundamental economic covenant of marriage and has relieved spouses from making proof that this covenant has been respected, save the exceptional recourse of article 422. It is thus all the more important that courts strive not to undo the work of Equity — and equity — by amplifying the basis for ordering unequal division of the family patrimony.

34. There is a wide open exchange of ideas between courts, law reform commissions, and scholars in the various common law provinces in respect of the exceptions for judicial intervention in family property legislation in other provinces. What good reason can there be for Quebec to refuse to participate in this effort or, for that matter, for jurists from other provinces not to look to Quebec for guidance? The noble instinct, expressed by many, that Quebec must protect the coherence of its civilian system for matrimonial law fails to justify what appears to be a widespread refusal to engage in dialogue with the common law about modern family property. While the judgment of the Court of Appeal in *Droit de la famille — 67* goes a long way to explain the subsequent attitude of insularity adopted by courts regarding the family patrimony, the legal community has been largely supportive and complicitous in this approach to what are typically styled "foreign sources". In many respects it is scholars, rather more than beleaguered judges beset with scores of angry applications for unequal division of the family patrimony, who should lay the groundwork for the exchange of ideas. Surely *Murdoch*, *Pettkus* and *Peter* should be taught in courses on Quebec matrimonial law as a means of illuminating the compensatory allowance and the historical forces leading up to the enactment of the family patrimony.[131] Some have gone further,

131. For an uncommon example of this healthy approach to classroom study see P. LAQUERRE (ed.), *Droit de la famille (les régimes matrimoniaux) : Recueil de textes (3e partie)*, mimeo., Faculté de droit, Université Laval (1990).

suggesting that comparison is both possible and useful beyond the academic or teaching context.[132] Moreover, if the Quebec legal community deserves chiding for passing up the opportunity to compare, what can be said of Ontario judges and scholars who, in turn, might greatly profit from dialogue with Quebec?[133]

35. The emergence of the family patrimony as one of a group of family property schemes across Canada may reflect a good deal more than shared technique. The family patrimony may be evidence of common legal understanding that has sprung from widely shared cultural attitudes to property and divorce in Canada. Do increasingly pan-Canadian patterns of spousal behaviour associated with dividing property at divorce mean that legal ideas, too, should be less contingent on the geography of the common law and the civil law? There are signs, to be further explored, that spousal attitudes to property are similar inside and outside of Quebec or, that if differences exist, they are not explained by the boundaries drawn by legal traditions.[134] One example may be the practice, remarked upon for the first time in a meaningful way in the mid-1960s,[135] of Quebec spouses massively adopting separation as to property in marriage contracts. The practice may have expressed, in part, a social perception that finances in marriage were best organized on a North American separate property model rather than that of the French civil law's so-called communitarian tradition.[136] Through the 1970s and 1980s, Quebec spouses continued to adopt separation of property in very significant numbers. It has been as if spouses sought, via the marriage contract, to built a bridge between Quebec and Ontario conceptions of marriage even if the legislature was slow to do so. Even the enactment of the partnership of acquests may be part of a tide towards a North American, as opposed to a French communitarian, model for marriage. The new legal regime is, undoubtedly, of the shared-property variety. But by allowing spouses to remain, for all intents and purposes, separate as to property during marriage and then establishing sharing on a deferred basis at marriage's end, the partnership of acquests and the Ontario legislation have lined up together.

Is divorce the social agent cementing these apparently pan-Canadian attitudes to family property? It is possible that the presence and accessibility of

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132. See, *e.g.*, the cautiously expert work of Jacques BEAULNE drawing comparison between Ontario and Quebec for problem solving, including "Chronique de législation. Le droit au patrimoine familial et le droit à la succession : droits irréconciliables?", (1989) 20 *R.G.D.* 669, including his *caveat* at p. 678.

133. For a similar call to arms, see E. CAPARROS, "Book Review : Julien Payne, Spousal Property Rights under the Ontario Family Law Act (1987)", (1988) 19 *R.G.D.* 511, p. 511.

134. For a bold analysis of apparently harmonizing attitudes to property rights in marriage and the law that has resulted therefrom, see D. GUAY-ARCHAMBAULT, "Regards sur le nouveau droit de la famille au Canada anglais et au Québec", (1981) 22 *C. de D.* 723, esp. pp. 725, 763, 784. More recently, and equally bold, is A. COSSETTE's "L'absence de régime matrimonial de biens dans un pays de droit civil ou la rencontre de deux cultures juridiques", (1984) 87 *R. du N.* 107 in which the author makes specific allusion to parallels between family property legislation in Ontario and modern Quebec matrimonial law.

135. See R. COMTOIS, *Traité théorique et pratique de la communauté de biens*, Montreal, Rec. dr. jurisp., 1964, paras 371-7.

136. French jurist J. CARBONNIER commented on the Quebec practice as a "séparation de biens à l'anglaise" : *Sociologie juridique*, Paris, P.U.F. 1978, p. 239. For an historical review of the influence of this trend on the emergence of the partnership of acquests, see J.-M. BRISSON & N. KASIRER, "La femme mariée et le Code civil du Bas-Canada : Une commune émancipation?", in H.P. GLENN (ed.), *Droit québécois et droit français : communauté, autonomie, concordance*, Montreal, Éd. Yvon Blais Inc., 1993, pp. 238 *et seq.*

divorce in Quebec and the other provinces have had a harmonizing effect on legal ideas.[137] Law reformers may only be following the lead of spouses who are inclined to acknowledge and even plan for divorce as much as death as the triggering event for the end of marriage. A national family law may be emerging around the shared social reality of divorce which has provoked, across Canada, a coming together of legal attitudes to family property.

Schedule I

Article 422 of the *Civil Code of Québec*, S.Q. 1991, c. 64 provides as follows :

The court may, on an application, make an exception to the rule of partition into equal shares, and decide that there will be no partition of earnings registered pursuant to the Act respecting the Québec Pension Plan or to similar plans where it would result in an injustice considering, in particular, the brevity of the marriage, the waste of certain property by one of the spouses, or the bad faith of one of them.

Le tribunal peut, sur demande, déroger au principe du partage inégal et, quant aux gains inscrits en vertu de la Loi sur les régimes de rentes du Québec ou de programmes équivalents, décider qu'il n'y aura aucun partage de ces gains, lorsqu'il en résulterait une injustice compte tenu, notamment, de la brève durée du mariage, de la dilapidation de certains biens par l'un des époux ou encore de la mauvaise foi de l'un d'eux.

Section 5 (6) of the *Family Law Act*, R.S.O. 1990, c. F.3 provides as follows :

The court may award a spouse an amount that is more or less than half the difference between the net family properties if the court is of the opinion that equalizing the net family properties would be unconscionable, having regard to,

(a) a spouse's failure to disclose to the other spouse debts or other liabilities existing at the date of the marriage;

(b) the fact that debts or other liabilities claimed in reduction of a spouse's net family property were incurred recklessly or in bad faith;

(c) the part of a spouse's net family property that consists of gifts made by the other spouse;

(d) a spouse's intentional or reckless depletion of his or her net family property;

Le tribunal peut accorder à un conjoint un montant qui est inférieur ou supérieur à la moitié de la différence entre les biens familiaux nets qui appartiennent à chacun des conjoints si le tribunal est d'avis que l'égalisation des biens familiaux nets serait inadmissible, compte tenu des facteurs suivants :

a) le défaut d'un conjoint de révéler à l'autre des dettes ou d'autres éléments de passif qui existaient à la date du mariage;

b) le fait que des dettes ou d'autres éléments de passif réclamés en faveur de la réduction des biens familiaux nets d'un conjoint ont été contractés de façon inconséquente ou de mauvaise foi;

c) la partie des biens familiaux nets d'un conjoint qui se compose de dons faits par l'autre conjoint;

d) la dilapidation volontaire ou inconséquente par un conjoint de ses biens familiaux nets;

137. The Law Reform Commission of Canada fleetingly considered the phenomenon in the 1970's and even suggested a model for division of family property that would be the same for common law and civil law Canada : see L.R.C.C., *Divorce* : Working Paper 13, Ottawa, 1975, pp. 62-66.

(e) the fact that the amount that a spouse would otherwise receive under subsection (1), (2) or (3) is disproportionately large in relation to the period of cohabitation that is less than five years;

(f) the fact that one spouse has incurred a disproportionately larger amount of debts or other liabilities than the other spouse for the support of the family;

(g) a written agreement between the spouses that is not a domestic contract; or

(h) any other circumstance relating to the acquisition, disposition, preservation, maintenance or improvement of property.

e) le fait que le montant qu'un conjoint recevrait autrement en vertu du paragraphe (1), (2) ou (3) est excessivement considérable par rapport à une période de cohabitation qui est inférieure à cinq ans;

f) le fait qu'un conjoint a contracté des dettes ou d'autres éléments de passif excessivement considérables par rapport à ceux de l'autre conjoint pour subvenir aux besoins de la famille;

g) un accord écrit entre les conjoints qui n'est pas un contrat familial

h) n'importe quelle autre circonstance concernant l'acquisition, l'aliénation, la conservation, l'entretien ou l'amélioration des biens.