

**UNJUSTIFIED ENRICHMENT BETWEEN *DE*
FACTO SPOUSES:**

**A RENEWAL OF THE LAW, OR HISTORY
BEING RE-WRITTEN?**



BY: ME ANNE-FRANCE GOLDWATER, ATTORNEY

Imagine no possessions,
I wonder if you can.
No need for greed or hunger,
A brotherhood of man.
Imagine all the people
Sharing all the world.

– *John Lennon*

Woman is the nigger of the world.

– *John Lennon*

INTRODUCTION

This article will take a look at the evolution of the jurisprudence on unjustified enrichment as a viable recourse for *de facto* couples, who are otherwise completely deprived of any recourse to resolve the consequences of the economic inter-dependency that may have grown during their unions, to the detriment of one of the partners at the time of relationship breakdown. The union may in fact be «libre» in some abstract romantic sense, but judging by the number of women in economic distress I have received in my office over 27 years of the practice of family law in Québec, I also wonder if «libre» is not the descriptor that reflects just how terrific these unions are for men.

Certainly the Québec legislator has been obstinate in refusing to recognize *de facto* unions as legal entities meritworthy of consideration and protection in the *corpus* of our civil law. Although the legislator generally prohibits public institutions (government agencies, companies) and private individuals (landlords, seizing creditors, as two examples) from treating *de facto* couples as different than married couples, the legislator remains proud to confirm as a sound political doctrine that *as between themselves*, *de facto* partners are strangers in the law. And we jurists in Québec keep repeating this dictum between ourselves, despite the Supreme Court's frequent reminders that *de facto* couples *should* attract the same respect and dignity as married couples.

This credo is philosophically justified under the banner of “free choice,” a doctrine rejected in many other domains of civil life in Québec. We do not permit women in Québec to act as surrogate mothers, nor do we permit Québec women to take their husband's surname upon marriage. We do not permit landlords to contract with tenants *freely*, any more than we permit merchants to contract with consumers *freely*; the legal constraints are considerable, just as they are for salaried workers who also benefit from a myriad of legal protections against their employers. In these various domains of social justice, “freedom” and “choice” are viewed as antithetical to the protection of fundamental social values which we cherish, yet we do not

consider the withdrawal of a degree of “freedom” and “choice” as inconsistent with the dignity of the individuals so protected (certainly residential tenants and consumers and salaried workers do not think of themselves as “victims” when they exercise the public order recourses that the law affords them, that cannot be derogated from *freely*).

Conjurally, this philosophical freedom, generally experienced at the time of relationship breakdown as favourable for the *de facto* partner who has been enriched, is generally experienced as a disaster for the *de facto* partner who has been economically impoverished. Given the perpetuation of systemic inequalities between men and women in society at large – as in the recent statistical analysis that in the province of Québec, women on average earn 70 cents for every dollar earned by men, for the same work – and given the choices that women tend to make favouring caretaking responsibilities over career advancement, it is no surprise that the grand majority of successful claims for unjust enrichment are presented by women. It is women in general who suffer the most economically at the end of a *de facto* union, especially considering the absence of any recourse to spousal support or the family patrimony or the partnership of acquests for these women, and the bitter reality of Child Support Guidelines in Québec that are the lowest in Canada, thereby exacerbating the poverty into which many of these women are thrust for the *mistake* of having failed to insist upon wedding vows before entering into a union and founding a family.

It is worth noting the adverse effects of the Québec Child Support Guidelines for children and mothers of *de facto* unions. All the other provinces have to all intents and purposes accepted to apply the Federal Child Support Guidelines mandated by Ottawa under the *aegis* of the *Divorce Act*, and jurisprudence has then extended the application of these Federal Guidelines to the children of *de facto* couples. The result is that all children in Canada who have *at least one parent residing in any province but Québec*, have access to child support that is often well in excess of the level mandated in Québec. It is only the poorest fathers who are required by the Québec Child Support Guidelines to pay support that is somewhat higher than the federal level; for the middle class and up, for families where the mother works, for families where there is joint custody, in all these scenarios, women receive less child support in Québec than anywhere else in Canada. For well-to-do families, the child support is twice as high elsewhere in Canada as within Québec; if there is joint custody to boot, the child support may be *four times* as high elsewhere in Canada as within Québec.

It is already bad enough that women in Québec do not complain about this, doubtless because they are simply unaware of this legal reality. What is more striking is that *the overwhelming majority of the demands for derogation from the strict application of the Québec Child Support Guidelines are presented by men, notwithstanding their highly advantaged status in Québec.*¹ *This should be taken as*

¹*Les barèmes fixant les pensions alimentaires pour enfants: Dixième anniversaire* (Cowansville, Qc: Yvon Blais, 2008).

a striking lesson that men are more combative to assert their rights and more inclined to protect themselves economically than women, even when children are concerned. It should not be surprising then that so many women find themselves at the end of their conjugal relationships in dire economic straits.

This has led at least some impoverished *de facto* spouses to heed the siren call of the civil law's petition of last resort, the claim for compensation by reason of the unjust enrichment of the other partner, borrowed from the general rules of the civil law, and set out in article 1493 C.C.Q.:

Art. 1493. Celui qui s'enrichit aux dépens d'autrui doit, jusqu'à concurrence de son enrichissement, indemniser ce dernier de son appauvrissement corrélatif s'il n'existe aucune justification à l'enrichissement ou à l'appauvrissement.

As this article will discuss, *de facto* partners have had some success recently in invoking this doctrine, benefiting mightily from years of evolution of the jurisprudence on unjust enrichment, followed by the jurisprudence which then evolved with respect to the compensatory allowance, back in the era when married spouses had to resort to this doctrine to obtain compensation which the contractual matrimonial regime did not provide.

Nonetheless, recourse to the doctrine of unjust enrichment remains hazardous; the appreciation of the quantum of a petitioner's claim is often quite subjective; and the appellate courts seem remarkably willing to intervene to reduce lower court awards, not because such awards were really all that generous to begin with, but because of an almost instinctual fear of not being perceived to undermine the sacrosanct "freedom of choice," with the result that justice for impoverished women may be forgotten.

Philosophically, it is almost as if the choice to strive for equality in society has required that women accept the loss of protection from society. This is not a sound equation conceptually, nor a wise trade-off practically for women.

Equality means that men and women are entitled to *equality of opportunity* in society – in the workplace as in the home – but *equality of opportunity* does not entail *equal outcome*, and this is where society's role of protection comes to bear, indeed for either sex (although the beneficiaries of such protection will continue overwhelmingly to be women). Society is able to maintain its commitment to equality between the sexes by offering the same scope of protection to both sexes within conjugal relationships, and indeed the panoply of legal benefits which exist for married spouses of both sexes has maintained a reasonable equilibrium that does not affront social peace, while in fact providing

economic benefits generally for women.²

Would it not then at last be time to grant *de facto* spouses the same recognition and protection that the *Loi favorisant l'égalité économique des époux* provides to married couples, and, in this fashion, create a legally recognized family patrimony to the benefit of *de facto* families, who, it is embarrassing to admit, continue to be treated in the law in Québec as second class citizens.

CHAPTER I – THE CONTEXT

1 – The Timeframe

The critical years when family law evolved most dramatically in Québec, and that we should therefore keep in mind, are:

- **1970**, when in an 18 month period, civil marriage was born; civil divorce came to Québec via the federal *Divorce Act*; abortions were decriminalized, as was homosexuality; and, to top it all off, the default legal matrimonial regime changed from community of property to partnership of acquests;

- **1981**, when the antiquated rules of the *Civil Code of Lower Canada* were abolished in the domain of family law, and the first chapter of the *Civil Code of Québec* was born, bringing us the legal equality of spouses in marriage, eliminating the power and authority of the husband over the wife, or the father alone over the children, mandating that women keep their birth surname in marriage, and:

Pour éviter que la nouvelle loi, sous prétexte d'égalité, n'ait pour effet d'appauvrir les femmes à la rupture du mariage...
le législateur a prévu une prestation compensatoire; ainsi, par cette mesure, un conjoint peut réclamer une compensation pour son apport à l'enrichissement de l'autre conjoint.³

- **1989**, when the *Loi favorisant l'égalité économique des époux* became law in Québec, on a mandatory basis for all married couples, regardless of the choice of matrimonial regime. Married couples had a limited period to opt out of the new rules, but other than this, the rules governing the constitution of a family patrimony, and the right to its eventual partition in value, became – and remain – the only ones of their kind throughout Canada. The guiding principles for this new law were:

² Which is not to say that the standard of living of women and their children does not continue to plunge dramatically after divorce, as statistics continue to show us. Worse yet, the standard of living of men post-divorce *improves*, which means the systemic impoverishment of women post-divorce indirectly subsidizes the systemic enrichment of men post-divorce. So much for substantive equality between the sexes.

³ Collectif Clio, *L'histoire des femmes au Québec depuis quatre siècles*, (Montréal: Le Jour, 1992) at 529.

Cette loi s'appuie sur le principe suivant:

Consacrer le mariage comme une véritable institution de partenariat servant de base à l'organisation de la famille sous l'enseigne de l'égalité des époux.

Elle vise à concrétiser, sur le plan économique, les principes d'égalité juridique des époux.

Elle permet que le seul fait du mariage entraîne comme conséquence la constitution d'un patrimoine familial, formé de certains biens des époux, sans égard à celui des deux qui détient un droit de propriété sur ces biens.

• **1992-1993**, when the Supreme Court took a large step forward and approved the recognition of domestic contributions as a foundation for a claim of compensatory allowance for a married spouse in *M. (M.E.) v. L. (P.)*,⁴ or for a claim of constructive trust by reason of unjust enrichment for a common law spouse in *Peter v. Beblow*,⁵ at the same time as it established the guiding principles on compensatory spousal support in *Moge v. Moge*.⁶

• **2002**, the Québec Court of Appeal took a large step forward in *Lussier v. Pigeon*,⁷ in one broad stroke declaring unjustified enrichment for common law spouses to be the twin to the compensatory allowance for married spouses, and then the Supreme Court took a large and quite unexpected step backward and reprobated the request for equal recognition of marital property rights in *Nova Scotia (Attorney General) v. Walsh*,⁸

and • **2003**, when the Québec Court of Appeal was forced to retreat from its avant-garde approach to unjustified enrichment between common law spouses in *Lussier v. Pigeon*, in *M.B. v. L.L.*⁹ because of the undue impact of the Supreme Court judgment in *Nova Scotia (Attorney General) v. Walsh*.

2. Definitions of Linguistic Terms

As responsible jurists, let us attempt to define some terms, look briefly at the social and historical context, and then see what sense can be made of the law and jurisprudence.

First, we note that in French, there is considerable ambiguity in the use of terms evoking conjugality, particularly when common usage in the province is taken into account. Evidently there is *mariage*, and the partners are *époux* and

⁴ [1992] 1 S.C.R. 183, 1992 CanLII 113 (SCC).

⁵ [1993] 1 S.C.R. 980, 1993 CanLII 126 (SCC).

⁶ [1992] 3 S.C.R. 813, 1992 CanLII 25 (SCC).

⁷ [2002] R.J.Q. 359, 2002 CanLII 32959 (QCCA).

⁸ [2002] 4 S.C.R. 325, 2002 SCC 83.

⁹ (2003) 231 D.L.R. (4th) 665, 2003 CanLII 47977 (QCCA).

*épouse*¹⁰, however, interestingly, even married couples in Québec eschew the use of these words to refer to each other. Sociological evidence demonstrates that couples in Québec will most commonly refer to each other with the more ambiguous terms *conjoint* and *conjointe*¹¹ in infrequent formal situations (at the notary's office, at the bank), and with the surprisingly informal terms *chum*¹² and *blonde*¹³ in day-to-day social situations.¹⁴ The ubiquity of the use of status-neutral terms such as *chum* and *blonde*, and the legal prohibition applicable only to women prohibiting them from using their husband's names, has essentially completely eliminated all social cues in Québec permitting one to judge a person's social status in ordinary social discourse. This cannot be emphasized enough: linguistically, whether a couple has been dating a few months, living together for a few years, or married for a lifetime, the propensity to use the words *chum* and *blonde* re-privatizes the commitment between the spouses by taking it out of the public sphere entirely.

In English, there is far less ambiguity about certain basic terms. There is one institution, *marriage*, and the partners in this institution are *husband* and *wife*. Without entering into a lengthy explanation that would be beyond the scope of this article, suffice it to say that *common law marriage* refers to unions that were at many points in history recognized as "marriage," purely and simply. Indeed, the historical English definition of marriage that was until recently applicable in the other provinces of Canada, arose from the House of Lords decision in *Hyde v. Hyde and Woodmansee*,¹⁵ stating that marriage is "the voluntary union for life of one man and one woman, to the exclusion of all others."

For the greater part of the history of Christendom, both in Catholic France and in Protestant England, solemnization was *not* required for marriage to be recognized; marriage required the consent of the spouses and their cohabitation, and was essentially their private business. The absence of requirement of a third party celebrant or a public declaration should be reflected against the equivalent modern practice, at least within the borders of the province of Québec (although an argument may be made that the rest of Canada is following closely on the heels of the Québec example, demonstrating yet again that Québec is on the cutting edge of a general social liberalism).

¹⁰ Husband and wife.

¹¹ Spouse.

¹² Literally *friend*, but when used in an intimate context, *boyfriend*.

¹³ Literally, *blond*, but when used in an intimate context, *girlfriend*. Transliteration is clearly risky, because calling a woman a *blond* in English would carry a significant risk of giving offence.

¹⁴ Diane Vincent, sociolinguistic report submitted to the Superior Court in *R.M. v. G.L.*, 500-04-028504-026, October 30 2007.

¹⁵ (1866), L.R. & P.D. 130 (Ch).

3. Definition of the Legal Terms – “Spouses” and Their Families

We begin with **Book Two of the Civil Code of Québec, “The Family”**, and note that only married spouses are afforded the range of legal protections that are considered appropriate and essential by society to govern the partners in a conjugal relationship. Of essence then is the simple observation that **in Québec, *de facto* partners are.... not family**. This would probably come as quite a surprise to most Quebeckers.

LIVRE DEUXIÈME: DE LA FAMILLE TITRE PREMIER: DU MARIAGE

Art. 365. *Le mariage doit être contracté publiquement devant un célébrant compétent et en présence de deux témoins.*

Art. 373. *Avant de procéder au mariage, le célébrant s'assure de l'identité des futurs époux, ainsi que du respect des conditions de formation du mariage et de l'accomplissement des formalités prescrites par la loi. Il s'assure en particulier qu'ils sont libres de tout lien de mariage ou d'union civile antérieur, sauf, en ce dernier cas, s'il s'agit des mêmes conjoints et, s'ils sont mineurs, que le titulaire de l'autorité parentale ou, le cas échéant, le tuteur a consenti au mariage.*

Art. 374. *Le célébrant fait lecture aux futurs époux, en présence des témoins, des dispositions des articles 392 à 396.*

Il demande à chacun des futurs époux et reçoit d'eux personnellement la déclaration qu'ils veulent se prendre pour époux. Il les déclare alors unis par le mariage.

Art. 375. *Le célébrant établit la déclaration de mariage et la transmet sans délai au directeur de l'état civil.*

This formulation raises interesting questions. The chapter heading begs the question: **marriage is *one* thing, and the solemnization of marriage is *another* thing. Should we not treat them as distinct?** In other words, marriage is what happens between the spouses, and solemnization is a secondary element, which may or may not impugn the validity of the union. Perhaps *de facto* spouses are married, and have simply not respected the requirements on solemnization.

The next question is: **what is the point of having a requirement of solemnization, deathly important to our very observant Catholic forefathers in 1867, but beyond irrelevant to the Catholic majority of today, who have completely**

thrown off the yoke of religious domination?¹⁶

There is also some historical evidence that prior to Confederation (and notably prior to the *Civil Code of Lower Canada* of 1866), the “marriage contract” signed by the spouses before their notary was in fact their marriage, and the celebration in the Church which followed was simply the respect of the religious requirements to make the union sacramental.¹⁷

Then, we look at the difference between articles 365 and 373 *C.C.Q.*, and note that *marriage is that which the spouses contract with each other*, and the formalities set out in the subsequent articles address not the validity of the union, but the effort of secular Québec to obscure the religious origin of a collection of obsolete rules: publication of the banns is now called *publication*, and the officiant, who had to be a religious official up until 1969, can now be the local notary, or a civil servant at the court house, or even the mailman, if the request is made.

The watering down of the traditional rules to “de-Catholicize” them – while retaining them for no particular reason – does not detract from the focus of article 374(2) *C.C.Q.* that *it is the consensual decision of the partners to unite that actually forms the union*.¹⁸

As the brand new federal *Civil Marriage Act*¹⁹ notes:

Section 2. Marriage, for civil purposes, is the *lawful* union of two persons to the exclusion of all others.

Section 2. Le mariage est, sur le plan civil, l’union *légitime* de deux personnes, à l’exclusion de toute autre personne.

[italics added]

To clarify further what a *lawful union* would be federally, reference is necessarily made to the two related federal statutes, first the *Federal Law-Civil Law Harmonization Act, No. 1*²⁰ which codifies the prohibition against bigamy, sets the age of consent, and makes consent the mandatory requirement:

¹⁶ The Constitution also guarantees confessional school boards, but Québec has declared this a *de facto* anachronism, and has eliminated both the Protestant and Catholic school boards, in favour of linguistic school boards throughout the province.

¹⁷ André Duval, “La dialectique juridique du mariage” (2000) 34 R.J.T. 873.

¹⁸ It cannot be otherwise; the power over solemnization which devolves to the provinces cannot change the *de jure* power that vests with the federal government as to the substantive conditions and nature of the institution of marriage.

¹⁹ S.C. 2005, c. 33.

²⁰ 2001, c. 4, amended by 2005, c. 33.

MARIAGE

Application	4. Les articles 5 à 7, qui s'appliquent uniquement dans la province de Québec, s'interprètent comme s'ils faisaient partie intégrante du <i>Code civil du Québec</i> .
Nécessité du consentement	5. Le mariage requiert le consentement libre et éclairé de deux personnes à se prendre mutuellement pour époux. 2001, ch. 4, art. 5; 2005, ch. 33, art. 9.
Âge minimal	6. Nul ne peut contracter mariage avant d'avoir atteint l'âge de seize ans..
Monogamie	7. Nul ne peut contracter un nouveau mariage avant que tout mariage antérieur ait été dissous par le décès ou le divorce ou frappé de nullité.
and second, the Marriage (Prohibited Degrees) Act , ²¹ which sets out the modern “short list” of prohibitions to marriage by reason of consanguinity:	
Absence d'empêchement	2. (1) Sous réserve du paragraphe (2), les liens de parenté par consanguinité, alliance ou adoption ne constituent pas en eux-mêmes des empêchements au mariage.
Prohibition	(2) Est prohibé le mariage entre personnes ayant des liens de parenté, notamment par adoption, en ligne directe ou en ligne collatérale s'il s'agit du frère et de la soeur ou du demi-frère et de la demi-soeur. 1990, ch. 46, art. 2; 2005, ch. 33, art. 13.
Validité du mariage	3. (1) Sous réserve du paragraphe (2), un mariage entre personnes apparentées par consanguinité, alliance ou adoption n'est pas invalide du seul fait du lien de parenté.
Marriage void	(2) Le mariage entre personnes apparentées prohibé par le paragraphe 2(2) est nul. 1990, ch. 46, art. 3; 2005, ch. 33, art. 14.

Since marriage is simply a “lawful union,” and since the officiant need only ascertain the wish of the two partners to enter into it,²² then surely *de facto* spouses are... spouses. It must not be forgotten that only the federal government can set down the substantive requirements of the institution, and the provincial competence is entirely secondary and subsidiary.

Also, although Quebeckers may have an allergy to the word *marriage*

²¹ 1990, c. 46, amended by 2005, c. 33.

²² As long as the two partners are of the age of consent, are unrelated to each other, and are not otherwise married to anyone else...

that was for too long indissociable from the Catholic Church, this does not mean that *de facto* spouses do not consider themselves to be in a lawful union.²³ Rejection of the Catholic Church in the Quiet Revolution may have entailed rejecting baptism, confirmation, communion, marriage and last rites, but in no way have Quebecers rejected falling in love, forming a union, founding a family, and, unfortunately, from time to time, breaking up those families and needing legal guidance to structure this process with safeguard and fairness to the partners and their children.

The very fact that Quebecers, married and unmarried, prefer referring to their significant others as *chum* and *blonde* underscores the prime importance in this culture to the romantic nature and deeply committed emotions underscoring intimate relationships.²⁴

In the next articles, we note that although the act of marriage must be prepared by the officiant (demoted from religious celebrant to random third party), the law has long recognized possession of status as a reasonable substitute:

CHAPITRE DEUXIÈME: DE LA PREUVE DU MARIAGE

Art. 378. Le mariage se prouve par l'acte de mariage, sauf les cas où la loi autorise un autre mode de preuve.

Art. 379. La possession d'état d'époux supplée aux défauts de forme de l'acte de mariage.

Do *de facto* partners not satisfy the requirement of “possession of the status of spouses” given, notably, the imposition upon them of laws governing their relationships with third parties which mandate treating them as spouses? It is paradoxical indeed, since the very essence of the concept of “possession of status” (as we think of it more often in the context of filiation) specifically refers to the public perception of one’s status! Since married women can no longer call themselves “Mrs. John Smith,” then a *de facto* wife can be forgiven for not calling herself that either. And since long married Québec couples are as likely to call each other *blonde* and *chum* instead of the actual dictionary words, *de facto* spouses give the public appearance of being “spouses” as much as married spouses.

And what of the situation where there has been no solemnization at all, which, of course, is the case for *de facto* unions? The *Civil Code of Québec* has a solution for this as well:

CHAPITRE TROISIÈME: DES NULLITÉS DE MARIAGE

Art. 380. Le mariage qui n'est pas célébré suivant les

²³ Historically, the opposite of a lawful union was the *unlawful* union of concubinage.

²⁴ Hélène Belleau, sociological reports submitted to the Superior Court in *R.M. v. G.L.*, 500-04-028504-026, March 10 2008.

prescriptions du présent titre et suivant les conditions nécessaires à sa formation peut être frappé de nullité à la demande de toute personne intéressée, sauf au tribunal à juger suivant les circonstances.

L'action est irrecevable s'il s'est écoulé trois ans depuis la célébration, sauf si l'ordre public est en cause.

[italics added]

Perhaps laymen are far more clever than we imagine, when they state, “But aren’t we married after three years of cohabitation?” It would seem that article 380 *C.C.Q.* could support such an observation, because after three years of cohabitation, (1) there could not be a doubt about the voluntariness of the union; (2) there would certainly be possession of status; (3) the sociological evidence demonstrates time and time again that married and *de facto* spouses are functionally similar; and (4) after three years of such cohabitation without solemnization, it is no longer permissible to impugn the legitimacy of the union!

Are *de facto* spouses not then legally married at that point?

This is an important place to note the protection the legislator wishes to afford children of *married* parents, even if the marriage is null:

Art. 381. *La nullité du mariage, pour quelque cause que ce soit, ne prive pas les enfants des avantages qui leur sont assurés par la loi ou par le contrat de mariage.*

Elle laisse subsister les droits et les devoirs des pères et mères à l’égard de leurs enfants.

[italics added]

This article must be read in juxtaposition with article 522 *C.C.Q.*:²⁵

TITRE DEUXIÈME: DE LA FILIATION DISPOSITION GÉNÉRALE

Art. 522. Tous les enfants dont la filiation est établie ont les mêmes droits et les mêmes obligations, quelles que soient les circonstances de leur naissance.

The intention of the legislator is clear that *all children must have the same rights, without regard to the marital status of their parents.* Yet, it is quite explicit in article 381 *C.C.Q.* that the legislator recognizes that “the law” and “the

²⁵Jocelyn Verdon & Mireille Pélissier-Simard, “Le maintien ou non du niveau de vie des enfants” in *Les barèmes fixant les pensions alimentaires pour enfants: Dixième anniversaire, supra* note 1 at 60.

marriage contract” secure advantages for the children. This of course is only common sense. It is certainly not by means of the notably modest sums of child support mandated by the Québec Child Support Guidelines that children post-split are assured a similar standard of living with their mothers as that enjoyed when the family was intact. The absence of the protection of the family residence, the absence of the security of the family patrimony, the absence of spousal support for the possibly financially disadvantaged mother, are all factors that point clearly to an even more dramatic increase in impoverishment of children post-split of *de facto* unions than the increased impoverishment already well-documented post-divorce for the luckier *legitimate*²⁶ children.

Surely, then, the legislator is not *deliberately* excluding *de facto* unions from legitimacy and recognition within the law, considering the legislator’s awareness of the importance of safeguarding “the advantages secured to [children] by law [and] by the marriage contract.” Indeed, the juxtaposition of the expressions “law” and “the marriage contract” would lead one to infer that the legislator *wants* to conserve for children the advantages of the family patrimony (an effect of marriage by operation of law) and the partnership of acquests (the matrimonial regime; certainly, the regime of separation as to property confers no benefits upon children).

Indeed, the legislator appears to be even more clear, as we can see from section 61.1 of the *Interpretation Act*:²⁷

Conjoints.

61.1. Sont des conjoints les personnes liées par un mariage ou une union civile.

Conjoints de fait.

Sont assimilés à des conjoints, à moins que le contexte ne s'y oppose, les conjoints de fait. Sont des conjoints de fait deux personnes, de sexe différent ou de même sexe, qui font vie commune et se présentent publiquement comme un couple, sans égard, sauf disposition contraire, à la durée de leur vie commune. Si, en l'absence de critère légal de reconnaissance de l'union de fait, une controverse survient relativement à l'existence de la communauté de vie, celle-ci est présumée dès lors que les

²⁶ Although a provocative word to use when referring to children of married couples, the preferential treatment they are afforded by the law brings us back to this distinction.

²⁷ R.S.Q. c. I-16; the amendment bringing section 61.1 into being was 2002, c. 6, s. 143. The legislative purpose of this section was to “eliminate confusion” being engendered by the provincial statutes that referred to the “spouse” without a definition of who was encompassed. The list of statutes which treat *de facto* spouses as spouses is impressive: as noted in the introduction, *de facto* spouses are spouses to everybody in society, *except each other*.

personnes cohabitent depuis au moins un an ou dès le moment où elles deviennent parents d'un même enfant.

Let us recall that in 1966, 96.2% of men and 88.7% of women in Québec would eventually marry at least once in their lifetimes. Marriage then was certainly the universal norm for entering into a union and founding a family. By 2006, the last year for which statistics are available for Québec, this level had plummeted to 27.7% for men and 30.3% for women.²⁸ Since this is a synthetic index calculated by demographers to extrapolate current trends, this means that if the current *trend* continues, fewer than one in three Quebeckers will ever legally marry.

Book Two of the *Civil Code of Québec*, “The Family” will certainly be quite a joke as it will continue to refer to fewer and fewer people, and thus fail to meet the legislator’s purpose of protecting the family:

CONSIDÉRANT que la famille est le premier milieu de vie, d'apprentissage et de socialisation **et que le bien-être de la famille et des individus qui la composent est la base du bien-être de la société;**²⁹

As for children, in 1976, 90.2% of children were born to married spouses in Québec, but by 2005, only 40.7% of children were born to married spouses.³⁰ Moreover, since 2002, we know that more than half of all children born in the province are born to common law couples. In some regions the number of children born out of wedlock runs from over 70% (Québec City, Lanaudière), to over 80% (Gaspésie, Îles-de-la-Madeleine).³¹ Since the average figure for children born to mothers without partners is about 8%, that nonetheless leaves about two-thirds to three-quarters of these children (respectively) are born to *de facto* spouses, whose mothers have no economic protection in law, to the ultimate detriment of the standard of living and well-being of these children.

In addition, in Québec, we should not use the expression *common law unions*, because such unions would in fact be *marriages*, for historical reasons related to the evolution of marriage in English law. The expressions that are more appropriate also beg the question: «union libre» for instance. This is intended to mean what precisely? That the union is “free” of all duties and obligations? Is this a fair way to look at *de facto* spouses? Or does this perpetuate a derogatory attitude toward such couples as being somehow “less” engaged or committed than married couples? This could imply, for instance, that *de facto* spouses are less committed to

²⁸ Institut de la statistique du Québec, *Le bilan démographique du Québec, édition 2007* by Chantal Girard (Québec, 2007) at 64 [Girard].

²⁹ Preamble, *An Act Respecting the Conseil de la famille et de l'enfance*, R.S.Q. c. C-56.2.

³⁰ Girard, *supra* note 28 at 64.

³¹ Institut de la statistique du Québec, “Proportion des naissances hors-mariage par région administrative, Québec, 1976-2005” by Louis Duchesne in *La situation démographique au Québec, bilan 2006* (Québec, 2006) at 277.

building a home and future for their children, or are less committed to engaging with each other to provide guidance and structure for their children.

As for reference to the term “spouse” for people in civil unions, this creates little more than a statistical artifact, of little worth noting in the discourse about conjugal rights and claims. The notion of the civil union was born on the first day of the trial in *Hendricks and Leboeuf v. Attorney General of Canada et al.*,³² when then Minister of Justice Paul Bégin announced the province would create a “new” institution to grant same-sex couples the conjugal rights Ottawa was refusing to recognize. Thereafter, to avoid this new institution being considered discriminatory to heterosexuals, it was expanded to apply to any couple who wished to avail themselves of it. There have been only 447 opposite sex unions and 618 same sex unions from 2002 through 2006 inclusively. And despite an initial burst of popularity of civil unions for same sex couples in 2002 and 2003, by 2006, there were only 54 civil unions formed.³³

4. De Facto and De Jure Spouses

It is interesting that there is social consensus in Québec that there are rules governing *marital* relationships that are so important, so fundamental to the functioning of society and the protection of women and children, that they are declared to be mandatory, as can be seen in Chapter IV of Book II, on the Effects of Marriage:

CHAPITRE QUATRIÈME: DES EFFETS DU MARIAGE

Art. 391. Les époux ne peuvent déroger aux dispositions du présent chapitre, quel que soit leur régime matrimonial.

SECTION I: DES DROITS ET DES DEVOIRS DES ÉPOUX

Art. 392. Les époux ont, en mariage, les mêmes droits et les mêmes obligations.

Ils se doivent mutuellement respect, fidélité, secours et assistance.

Ils sont tenus de faire vie commune.

Art. 393. Chacun des époux conserve, en mariage, son nom; il exerce ses droits civils sous ce nom.

Art. 394. Ensemble, les époux assurent la direction morale

³² [2002] R.J.Q. 2506 (QCSC).

³³ Girard, *supra* note 28 at 61.

et matérielle de la famille, exercent l'autorité parentale et assument les tâches qui en découlent.

Art. 395. Les époux choisissent de concert la résidence familiale.

En l'absence de choix exprès, la résidence familiale est présumée être celle où les membres de la famille habitent lorsqu'ils exercent leurs principales activités.

Art. 396. Les époux contribuent aux charges du mariage à proportion de leurs facultés respectives.

Chaque époux peut s'acquitter de sa contribution par son activité au foyer.

Now, when *de facto* spouses are living together, it can be presumed that they have chosen their family residence together by the mere fact of their consensual cohabitation. And if they have children, we take for granted they exercise their parental authority together. Would it not be reasonable to assume that *de facto* spouses *do* consider they owe each other “respect, fidelity, succour and assistance”? Would it not be reasonable to assume that they *do* “take in hand the moral and material direction of their family” together?

In fact, if we say that married couples do not have the right to *choose* to contract out of the application of these articles, why is it not an affront to the dignity of married spouses to be deprived of this *choice*? Conversely, if we say that these articles do not apply to *de facto* spouses because *de facto* spouses have not *chosen* to marry, why as a society would we want *de facto* spouses *not* to contribute to their unions in proportion to their respective means, or *not* to treat each other with respect? Are we not permitting couples “to do indirectly what the law prohibits them from doing directly,” a maxim of law that prohibits “end runs” around public order provisions of law.

Needless to say, the sociological data do not support differentiating married couples and *de facto* couples, in that the mode of functioning, quality of commitment and dedication to raising children are pretty much equal, to all intents and purposes (notably in Québec). This being said, the financial interdependence and engagement in building a family can lead to situations of economic injustice, just as was the case historically for married couples.

However, married couples have always had access to the alimentary recourse that permits a natural compensation or support to flow from the economically advantaged spouse to the spouse whose contribution to the relationship has entailed economic sacrifice (let us say *impoverishment*) by reason of career sacrifice, domestic tasks, childrearing responsibilities, unremunerated participation in the spouse’s business or asset accumulation, or even direct financial

contribution to that spouse without compensation. Despite the clear functional similarities in the conjugal relationship between married and *de facto* spouses, no alimentary recourse is afforded *de facto* spouses, Québec being the **sole** province in Canada to fail to do so,³⁴ despite the highest rate of *de facto* unions nationally.

CHAPTER II – THE JOURNEY TO ESTABLISH ECONOMIC EQUALITY

1. First Attempts Toward Economic Equality – Unjust Enrichment

De facto spouses also do not have any patrimonial rights between each other, but in this regard, in the past, some married couples have found themselves in such a position, notably in the days prior to the existence of the rules governing the family patrimony.

Married couples whose economic situation engendered an injustice for one of the spouses upon separation or divorce, first resorted to the civil law rules on unjustified enrichment to find an equitable remedy, based on the authority of the Supreme Court judgment in *Cie Immobilière Viger v. L. Giguère Inc.*,³⁵ recognizing the doctrine. Beetz J., writing for the Court, noted that could be “viewed as based on an innominate quasi-contract or on law or custom,” and:

...Le *Code civil* ne contient pas tout le droit civil. Il est fondé sur des principes qui n’y sont pas tous exprimés et dont il appartient à la jurisprudence et à la doctrine d’assurer la fécondité...³⁶

Although there was absolutely no past authority of the Supreme Court, nor of the Privy Council, and no articles in the *Civil Code of Lower Canada*, Beetz J. was nonetheless prepared to declare the theory of unjustified enrichment “undeniably incorporated into the civil law,” and this, based on the Roman maxim of Pomponius that *Jure naturae aequum est neminem cum alterius detrimento et injuria fieri locupletiores*.³⁷ Needless to say, this is precisely the same Roman maxim upon which common law jurists based themselves to provide the remedy of the constructive trust, for both married and *de facto* spouses, as we shall later see.

³⁴ Alberta was the last province to “hold out” on granting common law partners alimentary rights, until the Alberta Court of Appeal, an unusually bold and forthright appellate court, rendered a unanimous judgment in *Rossu v. Taylor*, (1998) 161 D.L.R. (4th) 266, 1998 ABCA 193 (CanLII), on a *Charter* challenge, accepted to “read in” the words “common law spouse” into the relevant provisions of the *Domestic Relations Act*, to permit spousal support to be granted to unmarried spouses. It is interesting to note that the Attorney General of Alberta did *not* contest this *Charter* challenge, whereas in Québec, the Attorney General of Québec *is* vigorously contesting the *Charter* challenge to grant such rights to women in this province, in the case of *R.M. v. G.L.*, S.C.M. 500-04-028504-026.

³⁵ [1977] 2 S.C.R. 67.

³⁶ *Ibid.* at 76.

³⁷ By natural law, it is just that no one should be enriched by the suffering of another.

This bears repeating: in both civil and common law, the maxim that “none shall be enriched unfairly at the expense of another” is ancient enough to have inspired both legal systems. Neither system had any codified or statutory rule; the concept evolved through jurisprudence and doctrine. The need for a remedy in justice was patent in both systems. At common law, it did not offend to “craft” a remedy to achieve *justice*. At civil law, at least in the days of Beetz J., the absence of a strict codification was also not viewed as a barrier to providing an effective remedy. There should therefore be no offence for either system to borrow from or be inspired by the other, and certainly over the years, the jurisprudence in each system has cited authorities of the other system for inspiration. Yet we will see by the end of this article that in today’s world, *les civilistes*³⁸ have imposed upon themselves limitations to the creativity and inventiveness which are often necessary to achieve *justice*.

Beetz J. set out the classical conditions for this uncodified recourse of unjust enrichment:³⁹

1. un enrichissement;
2. un appauvrissement;
3. une corrélation entre l’enrichissement et l’appauvrissement;
4. l’absence de justification;
5. l’absence de fraude à la loi;
6. l’absence d’autre recours.

Since then, we have been blessed with a new *Civil Code of Québec*, which has brought us the concepts of patrimonies by affectation, *inter vivos* trusts, and, of course, the codification of the doctrine of unjust enrichment, as the recourse of last resort (which, for *de facto* spouses who have *no* rights, becomes essentially the recourse of “only” resort):

**LIVRE CINQUIÈME: DES OBLIGATIONS
CHAPITRE QUATRIÈME: DE CERTAINES AUTRES SOURCES
DE L’OBLIGATION**

SECTION III: DE L’ENRICHISSEMENT INJUSTIFIÉ

Art. 1493. Celui qui s'enrichit aux dépens d'autrui doit, jusqu'à concurrence de son enrichissement, indemniser ce dernier de son appauvrissement corrélatif s'il n'existe aucune justification à l'enrichissement ou à l'appauvrissement.

Art. 1494. Il y a justification à l'enrichissement ou à l'appauvrissement lorsqu'il résulte de l'exécution d'une obligation, du défaut, par l'appauvri, d'exercer un droit qu'il peut ou aurait pu faire valoir contre l'enrichi ou d'un acte accompli par l'appauvri

³⁸ Quebec civil law jurists.

³⁹ *Supra* note 35 at 77.

dans son intérêt personnel et exclusif ou à ses risques et périls ou, encore, dans une intention libérale constante.

Art. 1495. L'indemnité n'est due que si l'enrichissement subsiste au jour de la demande.

Tant l'enrichissement que l'appauvrissement s'apprécie au jour de la demande; toutefois, si les circonstances indiquent la mauvaise foi de l'enrichi, l'enrichissement peut s'apprécier au temps où il en a bénéficié.

Art. 1496. Lorsque l'enrichi a disposé gratuitement de ce dont il s'est enrichi sans intention de frauder l'appauvri, l'action de ce dernier peut s'exercer contre le tiers bénéficiaire, si celui-ci était en mesure de connaître l'appauvrissement.

Married spouses were the first to make use of this “recourse of last resort” in the 1980s. The claim for unjust enrichment was particularly useful for spouses who had chosen the conventional regime of separation as to property at the outset of their marriages, only to discover, ten or twenty or thirty years down the road, that the way in which marital and family life unfolded, one spouse, generally the husband, ended up with the bulk of the assets accumulated over a lifetime, while the other spouse, generally the wife, ended up without a career, without an income and with few, if any, assets in her name.

In that same period, initial efforts to “boost” the utility of spousal support awards under the *Divorce Act* by claiming lump sum alimony (for instance, to fund retirement), were met with considerable resistance within the province of Québec, where for many long years, “lump sum” support was considered an “exceptional” recourse, rarely granted.

This left unjust enrichment. However, the courts swiftly dismissed this option on the basis that providing domestic services and other indirect contributions could not found a claim for unjust enrichment because there was no *direct enrichment*. Moreover, such contributions are not exceptional, and are justified by the marital duty of a wife to furnish such services and contributions to her husband. Finally, and most damning, the courts unanimously held that a claim for unjust enrichment cannot be invoked to palliate the inequities caused by the regime of separation as to property.⁴⁰

⁴⁰ *Lévesque v. Faguy*, [1978] C.A. 376, *Lebrun v. Rodier*, [1978] C.A. 380, *Richard v. Beaudoin-Daigneault*, [1982] C.A. 66 with respect to the doctrine of unjustified enrichment (the subsequent judgment of the Supreme Court reported at [1984] 1 S.C.R. 2, dealt solely with the wife’s action *pro socio*), *Sabourin v. Charlebois*, [1982] C.A. 361, and *Droit de la famille 895*, J.E. 90-1506 (QCCA).

2. Second Attempts Toward Economic Equality – The Compensatory Allowance

Fortunately, the legislator leapt in to the rescue of married spouses, and introduced the compensatory allowance, to defeat the jurisprudence of the Québec Court of Appeal which had been preventing the doctrine of unjust enrichment from being invoked to achieve its remedial and equitable purpose.

The contemporary provisions on the compensatory allowance are:

SECTION IV: DE LA PRESTATION COMPENSATOIRE

Art. 427. Au moment où il prononce la séparation de corps, le divorce ou la nullité du mariage, le tribunal peut ordonner à l'un des époux de verser à l'autre, en compensation de l'apport de ce dernier, en biens ou en services, à l'enrichissement du patrimoine de son conjoint, une prestation payable au comptant ou par versements, en tenant compte, notamment, des avantages que procurent le régime matrimonial et le contrat de mariage. Il en est de même en cas de décès; il est alors, en outre, tenu compte des avantages que procure au conjoint survivant la succession.

Lorsque le droit à la prestation compensatoire est fondé sur la collaboration régulière de l'époux à une entreprise, que cette entreprise ait trait à un bien ou à un service et qu'elle soit ou non à caractère commercial, la demande peut en être faite dès la fin de la collaboration si celle-ci est causée par l'aliénation, la dissolution ou la liquidation volontaire ou forcée de l'entreprise.

Art. 428. L'époux collaborateur peut prouver son apport à l'enrichissement du patrimoine de son conjoint par tous moyens.

Art. 429. Lorsqu'il y a lieu au paiement d'une prestation compensatoire, le tribunal en fixe la valeur, à défaut d'accord entre les parties. Celui-ci peut également déterminer, le cas échéant, les modalités du paiement et ordonner que la prestation soit payée au comptant ou par versements ou qu'elle soit payée par l'attribution de droits dans certains biens.

Si le tribunal attribue à l'un des époux ou au conjoint survivant un droit sur la résidence familiale, sur les meubles qui servent à l'usage du ménage ou des droits accumulés au titre d'un régime de retraite, les dispositions des sections II et III sont applicables.

Art. 430. L'un des époux peut, pendant le mariage, convenir avec son conjoint d'acquitter en partie la prestation compensatoire. Le paiement reçu doit être déduit lorsqu'il y a lieu de fixer la valeur de la prestation compensatoire.

Lest we forget, the first reaction of the Court of Appeal to this new legislation⁴¹ was promptly to find *fresh* reasons to justify inequitable interpretations of the now codified equitable remedy. To interpret an equitable and remedial piece of legislation narrowly and strictly is tantamount to undoing the legislator's intent to cure the mischief engendered by the prior line of jurisprudence.

The first pivotal case was *Droit de la famille 67*,⁴² in which the compensatory allowance was interpreted in a dizzyingly narrow fashion: a spouse would have to prove a direct contribution, the contribution would have to be patrimonial, there would have to be a causal link between the impoverishment and the enrichment, the proof would have to be direct and not indirect, no presumptions could be invoked, and best of all, the Court warned against trying to undo the mischief caused by the choice of a matrimonial regime of separation as to property by causing a kind of post facto right to partition to be created:

Dire que la prestation compensatoire a pour effet de faire renaître le droit au partage, c'est prononcer l'abolition du principe de la liberté des conventions, c'est instaurer à posteriori la société d'acquêts comme régime obligatoire.

Si le législateur avait voulu qu'il en soit ainsi, il lui incombait de le dire et non pas qu'on lui fasse dire.⁴³

It was as if the Court was refusing to recognize that the very existence of the recourse was founded upon the need to undo precisely that mischief.

Beauregard J.C.A., in a strong dissent, observed, at page 142:

Ce faisant, le juge exige-t-il un apport direct, peu commun entre époux, ou un apport, comme on en voit tous les jours dans les ménages, "diffus, imprécis et général, bien que réel"? Le code ne le précise pas. Pourquoi faire une distinction là où le législateur ne l'a pas fait, surtout lorsque la disposition est remédiate? Il est difficile de penser que le législateur ait voulu rétribuer le conjoint dont le salaire paye l'hypothèque mais non celui dont le salaire paye le chauffage. Je ne serais pas moins libéral que ne l'a été la Cour suprême dans *Leatherdale c. Leatherdale*.

⁴¹ Which in turn was expressly designed to *remedy* the Court of Appeal's past inequitable interpretations of the doctrine of unjust enrichment. In turn, the doctrine of unjust enrichment had been invoked to *remedy* the past inequitable denials of a dependent wife's claim for lump sum alimony (*inter alia*).

⁴² [1985] C.A. 135, majority judgments rendered by Vallerand and Nichols J.J.C.A.

⁴³ *Ibid.* at 150.

By the time *Droit de la famille 271*⁴⁴ rolled around, Beaugard J.C.A. had rallied to the majority view that domestic contributions cannot justify a compensatory allowance claim: when a wife takes care of the home, raises four children, receives government allowances which are spent on the household, and also uses her work income to contribute to the household and renovations on the husband's property, *she is only doing what the law requires of her, and hence there is nothing exceptional justifying compensation*. Perhaps not surprisingly, L'Heureux-Dubé J.C.A. (as she then was) dissented strongly, and argued the trial judge's attribution of a \$ 12,500 compensatory allowance was justified based on the direct economic contribution by the wife to the husband's property.

The Court of Appeal then decided in *Droit de la famille 391*⁴⁵ to overturn a \$ 40,000 compensatory allowance granted in first instance to the wife (who had claimed \$ 75,000). The parties were married in separation as to property, the husband being a plumber, and the wife having become a schoolteacher. Tyndale J.C.A. would have maintained the trial judge's ruling, noting that the two spouses had had similar incomes throughout the marriage, but since the wife's salary was used to acquit household expenses, children's education and the family's clothing, by the end of the marriage, *the husband had \$ 125,000 in assets in his name, and the wife, \$ 19,000, a clearly inequitable outcome after a 23 year marriage, that cried out for compensatory relief*.

The majority, however, prevailed with the view that this would be tantamount to "re-writing" the matrimonial regime, in the following terms:

[Quoting *Droit de la famille 201*] Two remarks are to be made. First, this is recent law and litigants are naturally tempted to seek adjudication on this sort of claim. However, it is clearly not the intention of the Legislator to retroactively create obligations on parties who have, during their married life, consciously created a situation of fact the consequences of which were well known to them. **It is not because at a certain point and time the marriage breaks down that all of a sudden, an in depth re-appraisal of the respective economic situation of each party is to be automatically entered into.** The Court is under no obligation to review the decades of the marriage in order to vary, so to speak, the rights and obligations of the marriage contract and the other arrangements which the parties freely and voluntarily have created into.

Secondly, **Section 559 creates no obligation on right by the mere fact that one party has contributed to the household expenses or that the other party has provided services as a house wife for a number of years. If this were so, the Court**

⁴⁴ [1986] R.J.Q. 689 (C.A.), majority judgments rendered by Beaugard and Paré JJ.C.A.

⁴⁵ [1987] R.J.Q. 1998 (QCCA), majority judgment by Monet and Gendreau JJ.C.A.

would be deluged with claims in every petition in divorce to obtain a compensatory allowance for a portion of the equity of the family dwelling. The Court cannot conceive that this was the intention of the Legislator. Rather, taking into account all of the other provisions of the law, as they stand, it would seem that the intention of the Legislator is to permit as the wording of the section provides, that the partner who has contributed either by goods or by services to the increase of the patrimony of the other, to receive a compensation which otherwise (he or) she could not receive.

The majority judges then balked at the evidence of the profoundly better situation in law for *married* spouses in the common law provinces, in the following terms:

Il est grandement temps qu'on cesse de nous casser la tête avec le *Dower Act d'Alberta* ou l'*Ontario Married Women's Act*, considérés par la Cour suprême dans l'affaire *Murdock c. Murdock*, de même qu'avec le *Family Reform Act d'Ontario*, considéré dans l'affaire *Leatherdale c. Leatherdale*, ou encore avec le Constructive Trust* dans l'affaire *Rathwell c. Rathwell*, émanant de la Saskatchewan ou dans l'affaire *Pettkus c. Becker*, émanant de l'Ontario ou dans l'affaire *Sarochan c. Sarochan*, émanant d'Alberta, que ce soit ou non sous l'éclairage du *Matrimonial Causes Act* (adopté par le Parlement anglais). Pour ma part, 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.

It is not inspirational to note judges at the appellate level proudly declaring their will to “abandon” with vigour the study of comparative law, acknowledging the Supreme Court has validated the comparative law approach, and indeed, many of the best judgments of our highest court have been rendered after study and analysis of comparative solutions found to thorny legal problems in other civilized jurisdictions. Moreover, the Court of Appeal's statement is a dubious affirmation, considering that the stream of Supreme Court judgments referred to could easily be considered entirely relevant to a certain degree in Québec, given the common law and civil law doctrines of unjust enrichment share the same juridical and doctrinal origins (only the details of the remedy itself, namely the constructive or resulting trust, are ostensibly out of reach in Québec).

Eventually, with difficulty, the Court of Appeal was persuaded to accept that a marriage contract putting the spouses into the regime of separation as to property could no longer be considered an obstacle to a claim for compensatory

allowance.⁴⁶

3. De Facto Spouses Join the Battle for Economic Equality

In the meantime, in 1986, there was a first unreported judgment of the Court of Appeal in *Riel v. Beaudet*,⁴⁷ in which a recourse in unjust enrichment was granted between *de facto* spouses, albeit within the context of the then narrow interpretations of the 1980s: it took a tangible contribution to the acquisition of the family residence, coupled with contributions to the mortgage and other charges.

Then in 1990, the Court of Appeal again accepted a claim for unjust enrichment between *de facto* spouses in a 24-year relationship, but reduced the trial judge's award of \$ 100,000 to \$ 66,666, noting in particular that the last 8 years of the relationship in which there was a veritable concubinage, the trial judge should not have granted any sum. All the domestic and work services provided by during this period by the *de facto* wife were the "normal" result of a concubinage, and did not merit compensation. During the preceding 16 years, when she was providing domestic and work services as a mistress, her claim was considered well-founded. This was the judgment in *Droit de la famille 359*,⁴⁸ where the *de facto* wife claimed \$ 500,000 (the *de facto*'s husband's fortune being worth well over \$ 1,000,000), and the trial judge awarded her the \$ 100,000 then reduced to \$ 66,666.

The dissent of Mailhot J.C.A. is instructive: she notes that upon the parties meeting when the *de facto* wife was 20 and the *de facto* husband was 40 years of age, she was hired to take care of his 5 children because his legal wife was hospitalized. She was then essentially obliged to fulfill that "other" role, namely sexual substitute to the hospitalized wife. As the relationship progressed, when the legal wife was not in the hospital, the *de facto* wife worked in the defendant's business, a drapery store, and when the wife again fell ill, she had to work in the store all day, go home thereafter to cook, clean and care for the defendant and his children. She became pregnant by him, and he obliged her to have an abortion. Pregnant a second time, she refused an abortion, but he refused to let her bring a child home with her, and she had to give the infant up for adoption. When he later purchased a chalet, she assumed new household tasks there too.

Au risque de sauter des étapes, qu'il est toujours possible de vérifier dans la preuve, on peut dire qu'à part de dormir, et encore le faisait-elle la plupart du temps avec le défendeur, la demanderesse se consacrait corps et coeur au défendeur, à son

⁴⁶ *Droit de la famille 144*, [1987] R.J.Q. 253 (QCCA), *Droit de la famille 519*, [1988] R.D.F. 349, 1988 CanLII 696 (QCCA), *Droit de la famille 629*, [1989] R.J.Q. 804, 1989 CanLII 519 (QCCA).

⁴⁷ C.A. 500-09-001041-813, judgment of May 16 1986.

⁴⁸ [1990] R.D.F. 331 (QCCA).

bien-être et au bien-être de son entreprise du réveil au coucher et ce, à des salaires plus que dérisoires compte tenu du travail accompli.

It is worthwhile to keep in mind the modern discourse, where men who are well off economically, argue that their *de facto* wives should be thankful for the years of cohabitation with a good standard of living, to which said women could never have hoped to aspire on their own. This of course reflects a pernicious point of view that only the tasks a man typically does (in the workplace, in the business world) are meritworthy of recognition, and that the tasks a woman typically does (putting caretaking roles in priority, and hence, having fewer remunerated work hours outside the home, which are also less well remunerated), are not meritworthy of equal recognition.

As Mailhot J.C.A. notes:

L'appelant plaide qu'il n'y a pas eu d'appauvrissement et qu'il y a une justification: l'amour et l'espoir d'une vie commune prolongée et heureuse.

Accepter que les prestations de service ici apportées soient des prestations normales et habituelles de tout couple non marié (i.e. sans régime matrimonial ou sans contrat de mariage), sans espoir de rétribution autre que l'affection et la tendresse, c'est accepter qu'une personne puisse ici s'enrichir au détriment d'une autre et utiliser toutes les énergies de celle-ci gratuitement à son profit pendant 24 ans.

Je ne dis pas que chaque fois qu'une personne qui en aime une autre et qui lui consacre sa vie en lui manifestant des attentions et en lui consacrant temps et énergie, cela doit déboucher sur une compensation financière quelconque.

Mais je dis, qu'ici, accepter que les circonstances de l'espèce soient normales et qu'elles n'ont pas à être compensées, ce serait accepter une justification, à mon avis, inacceptable. Les heures et énergies ici travaillées et consacrées sortent de l'ordinaire et ne peuvent se justifier si l'on considère qu'elles doivent être purement à titre gratuit, sans ouverture à l'action de in rem verso dont c'est le fondement même.

Que la situation soit décrite comme celle d'amant-maîtresse ou de concubins ne change rien ici à la situation de 24 années consacrées en exclusivité au service d'une autre personne et sans juste rémunération. Certes, certaines heures furent rémunérées mais ce ne sont pas celles-là qui sont en cause mais les autres, celles consacrées les soirs, les fins de semaine, les dimanches.

Si l'on accepte que la justification plaidée, c'est-à-dire l'amour, est en soi une justification, cela constitue en l'espèce l'acceptation d'une forme d'exploitation.

At the end of the day, an indemnity worth barely more than \$ 4,000 per year of devotion and effort in a “quasi-matrimonial” relationship, is not a strong indication of merit or respect accorded to that devotion and effort.

4. The Common Law Judgments – A Breath of Fresh Air

By the end of the 1980s, in Québec, the remedy of compensatory allowance had spent its first decade of life narrowly construed. But at common law, a different path had been taken, both in the jurisprudence and in the provincial statutes, as was alluded to in *Droit de la famille 391, supra*.

The evolution began with the Supreme Court's judgment in *Rathwell v. Rathwell*, in which, after a 23 year marriage, a wife found herself penniless after a lifetime of hard labour side by side with her husband on the farm registered in his name, as he built the business and acquired further farmland properties. She sought an undivided one-half ownership of these properties. Having lost at trial, but having won an order of co-ownership of some, but not all, of these properties in appeal, the Supreme Court maintained the Court of Appeal's decision, on quite a divided basis. The case is known for the strong opinion of only three of the nine judges in favour of the doctrine of constructive trust to permit the attribution of these property rights to a deserving wife in the context of an unjust enrichment, but the reality is that the other six judges (four of whom were dissenting on the outcome), did *not* consider the doctrine of constructive trust should be extended. Fortunately, two of the nine judges were satisfied there was at least a resulting trust created in favour of the wife when the husband bought the properties while the couple were “working as a team” with “joint effort.”

Let us read the words of Dickson J. (as he then was) in *Rathwell*,⁴⁹ and contemplate their applicability in today's world to young couples in «unions libres»:

Dans l'ensemble, les litiges sur les biens matrimoniaux se ressemblent beaucoup et diffèrent seulement dans les détails. Les biens matrimoniaux, c'est-à-dire les biens acquis durant le mariage (j'évite l'expression «avoirs familiaux» à cause de ses connotations doctrinales), en sont habituellement l'objet. **L'un ou l'autre des conjoints, ou les deux, peuvent avoir contribué financièrement à leur achat. L'un ou l'autre peut y avoir contribué par un travail non rémunéré.** Il peut s'agir d'une contribution directe ou indirecte, dans le sens qu'elle a permis

⁴⁹ *Rathwell v. Rathwell*, [1978] 2 S.C.R. 436 at 447-448.

l'acquisition d'un actif qui, autrement, n'aurait pas pu l'être. Une contribution indi-recte peut être pécuniaire ou prendre d'autres formes comme, par exemple, les soins du foyer et de la famille. Les biens sont acquis pendant une période d'entente conjugale mais quand celle-ci cède le pas à la discorde, des problèmes surgissent au sujet du partage des biens. **Il y a rarement une entente expresse préalable ou une entente ou une intention commune implicite, sauf l'intention générale de vivre ensemble. Il n'est pas normal pour de jeunes mariés d'envisager la rupture de leur union et le partage, dans cette éventualité, des avoirs acquis par leur effort commun pendant le mariage.**

At least we can be proud that Québec has always had a default matrimonial regime that provides for equal sharing of assets (community of property prior to 1970, and partnership of acquests thereafter), which was *not* the case in the common law provinces, as Dickson J. noted at page 449:

Au Canada, la *common law* ne reconnaît pas le concept de la communauté de biens résultant du seul fait du mariage. En l'absence de dispositions législatives à cet effet, un tribunal ne doit pas troubler la pratique courante en matière de biens matrimoniaux en agissant comme si une telle institution existait.

In all fairness to the common law provinces, their vigour in searching for and discovering solutions for the inequities that were often the outcome for spouses where at the end of a marriage, the wife was profoundly economically disadvantaged, reflected the fact their legal culture was separation of property as the rule, and partition the exception. In Québec, the rule was at all times partition, and the exception was separation of property, which could only be contracted before a notary to ensure that spouses had proper explanations about the differences between the regimes. In this fashion, the legislator was then respecting the freedom of choice of the marital partners.

It was after this judgment that the province of Ontario first promulgated the comprehensive *Family Law Reform Act (1978)*, with a view, amongst other things, to create a set of family assets which would, by default, be partitioned by the spouses upon marriage breakdown. What is important to retain of this statute is that it became the inspiration for our family patrimony legislation a decade later (by which point the Ontarians were working on their new *Family Law Act of 1990* that expanded the list of partitionable assets). What is also important to retain is that in these statutes, of 1978 and 1990, as well as in all the similar marital property statutes across the country, there are provisions permitting a couple to "opt out" of the default property sharing regimes, unlike our family patrimony rules.

Once the *Family Law Reform Act (1978)* and its sister statutes in the other provinces became law, all in a space of a few years, there was for the most

part simply no more need for married spouses to invoke equitable doctrines to obtain relief. The concept of equitable sharing was now “codified” (so to speak!), thereby shifting the balance. The general rule now works in favour of the economically disadvantaged spouse, who does not have to engage in expensive legal proceedings to assert a claim, and in the event the economically more powerful spouse considers an equal sharing would be unfair, it is then up to him to seek to rebut the presumption, and to incur the cost of doing so.

This means that the evolution of the case law in the 1980s in common law provinces dealt with common law spouses, while in Québec, we were still spending judicial resources battling for fair rights for married spouses via the compensatory allowance.

In 1980, in *Pettkus v. Becker*,⁵⁰ the Supreme Court extended the doctrine of unjust enrichment and constructive trust to common law relationships, in a case from Ontario involving a *de facto* union of over 19 years duration, 16 years of which were in the province of Québec. The *de facto* wife had supported her husband while he developed his successful beekeeping business, and acquired immovable properties (including property in Québec). The trial judge awarded her 40 beehives, but no bees; the Court of Appeal awarded her a one-half interest in the business and immovable properties.

It is instructive to note that Martland and Beetz JJ. opposed the extension of the doctrine of constructive trust because it is based on the “nebulous” notion of unjust enrichment, which could lead to subjective and highly variable judgments based on the personal opinions of trial judges. This is an extremely valid observation, and underscores the need for fixed legislation that would apply a reasonable social norm to *all* marital relationships, as now exists in the province of Québec with the mandatory rules governing the family patrimony and the default but not compulsory rules governing the partnership of acquests.

The other seven judges found foursquare in favour of application of the doctrine of constructive trust. Dickson J., as he then was, writing on behalf of the majority, had this to say about common law relationships:⁵¹

La relation de «fait»

Il faut se demander si nous pouvons établir la fiducie par interprétation dans le contexte de ce que l'on appelle souvent et par euphémisme une relation «de fait». La fiducie par interprétation vise à rectifier des situations qui autrement entraîneraient un enrichissement sans cause. En principe, rien ne s'oppose à l'application de la doctrine aux relations de fait. Il convient de souligner qu'avec raison à mon avis, l'avocat de M.

⁵⁰ [1980] 2 S.C.R. 834.

⁵¹ *Ibid.* at 850-851.

Pettkus n'a pas opposé, devant cette Cour, la relation de fait en défense à la réclamation de M^{lle} Becker, sauf par la référence à *La Loi de 1978 sur la réforme du droit familial*, 1978 (Ont.) chap. 2.

Les tribunaux d'autres pays n'ont pas considéré que l'absence de lien matrimonial créait des problèmes. Voir *Cooke v. Head*; *Eves v. Eves*; *Spears v. Levy*, précité; et, aux États-Unis, *Marvin v. Marvin* et un commentaire de cet arrêt (1977), 90 Harv. L.R. 1708. Dans *Marvin*, la Cour suprême de la Californie a déclaré que l'on pouvait appliquer la fiducie par interprétation pour répondre aux attentes raisonnables des parties et pour appuyer le concept que des personnes qui cohabitent sans être mariées ont l'intention d'être équitables l'une envers l'autre.

Rien ne justifie que l'on fasse une distinction, lors du partage des biens et de l'actif, entre les personnes mariées et les personnes liées par une relation moins formelle qui dure depuis longtemps. Il ne s'agissait pas d'une association économique, ni d'une simple relation d'affaire ni d'une rencontre fortuite. M. Pettkus et M^{lle} Becker ont vécu comme mari et femme pendant vingt ans. Leur vie et leur bien-être économique étaient entièrement intégrés. Le principe d'*equity* sur lequel repose le recours à la fiducie par interprétation est large et général; son but est d'empêcher l'enrichissement sans cause dans toutes les circonstances où il se présente.

Au cours des dernières années, le droit de la famille et des biens matrimoniaux a fait l'objet de nombreuses réformes législatives. L'avocat de M. Pettkus a correctement fait remarquer que la ***Loi de 1978 sur la réforme du droit familial*, de l'Ontario, adoptée après l'introduction du présent litige, n'assujettit pas les conjoints de fait à la présomption de partage égal, qui s'applique maintenant aux personnes mariées. Il prétend que les cours ne doivent pas élaborer de recours en *equity* qui sont [TRADUCTION] «contraires à l'intention législative actuelle».** La réplique est qu'il n'était pas nécessaire de légiférer à cet égard, puisqu'il existe toujours un recours en *equity* pour le partage des biens entre des personnes non mariées qui ont contribué à l'acquisition de l'actif. L'effet de cette loi est de partager également, d'office, l'«actif de famille» sans tenir compte de la contribution. La Cour ne crée pas ici une présomption de parts égales. Il y a une grande différence entre ordonner le partage égal pour des conjoints de fait, et accorder à M^{lle} Becker une part équivalente à la contribution qu'elle a apportée, en argent ou en valeur monétaire, pendant environ dix-neuf ans. **L'absence d'un régime légal prescrivant le partage égal de l'actif acquis par les conjoints de fait ne s'oppose pas à l'utilisation d'un recours en *equity* dans les présentes circonstances.**

It is perhaps worthwhile to note why the parties were not married, given facts that reflect what often happens in the present day:

Peu après le début de leur cohabitation, M^{lle} Becker a exprimé le désir qu'ils se marient. M. Pettkus a répondu qu'il envisagerait peut-être le mariage lorsqu'ils se connaîtraient mieux. La question du mariage ne s'est plus posée par la suite bien que, dans les années qui ont suivi, M. Pettkus ait commencé à présenter M^{lle} Becker comme son épouse et qu'il ait demandé une exemption à son égard aux fins de l'impôt sur le revenu.⁵²

The next Supreme Court case, *Leatherdale v. Leatherdale*,⁵³ dealt with the possibility of a wife claiming an equitable share of non-family assets, which was granted to her under the discretionary provisions of the Ontario *Family Law Reform Act, supra*. The Court pondered out loud, but did not resolve, whether there was any wiggle room left for the continued existence of a constructive or resulting trust claim for a married spouse, in light of the codification of recourses in the statute.

In *Palachick v. Kiss*,⁵⁴ the Supreme Court was exceptionally called upon to apply the doctrine of constructive trust in favour of a husband who sought compensation for contribution to his deceased wife's property, since the *Family Law Reform Act, supra*, did not apply when one spouse was deceased. This was a second marriage, hence the claim was to prevent the surviving husband's financial contributions unjustly to enrich his deceased wife's son by her first marriage. The Supreme Court awarded him \$ 50,000, noting that the fact of having occupied and enjoyed the use of the property did not constitute a bar to his claim for compensation for having maintained and improved it.

In *Sorochan v. Sorochan*,⁵⁵ the *de facto* spouses had cohabited for 42 years, operating a mixed farming operation. Six children were born of their union, and as befits many a farm wife (and we note many of these cases involved farm wives), she bore the brunt of the caretaking of the household and children in addition to her duties on the farm with her husband. The common law husband apparently felt he had an excellent grounds of defense: he owned the land and business prior to the marriage, and hence, the doctrines of resulting or constructive trust could not possibly apply.

The Supreme Court did not agree, and the common law wife was

⁵² *Ibid.* at 838.

⁵³ [1982] 2 S.C.R. 743.

⁵⁴ [1983] 1 S.C.R. 623.

⁵⁵ [1986] 2 S.C.R. 744.

awarded one of the three pieces of land, plus a further cash award⁵⁶. As Dickson C.J. noted:

24. ... Selon moi, le redressement qu'est la fiducie par interprétation ne doit pas être accordé uniquement dans les affaires où il y a eu acquisition de biens. **Certes, il importe d'exiger un certain lien entre l'appauvrissement du requérant et les biens en cause, mais il n'est pas nécessaire que ce lien revête toujours la forme d'une contribution à l'acquisition comme telle des biens.** Une contribution reliée à la préservation, à l'entretien ou à l'amélioration des biens peut également suffire. Il reste cependant que la question fondamentale est de savoir si les services rendus [TRADUCTION] "se rapportent clairement aux biens", pour reprendre l'expression du professeur McLeod. Lorsqu'un tel lien existe, il peut être approprié d'accorder un redressement foncier. Cette façon de procéder permettra d'assurer un redressement équitable et juste dans les nombreuses situations familiales où il y a enrichissement sans cause. **Comme on l'a dit dans l'arrêt *Pettkus*, aux pp. 850 et 851: "Le principe d'*equity* sur lequel repose le recours à la fiducie par interprétation est large et général; son but est d'empêcher l'enrichissement sans cause dans toutes les circonstances où il se présente."**

25. En l'espèce, Mary Sorochan a travaillé à la ferme pendant quarante-deux années. Son labeur constituait une contribution directe et importante à l'entretien et à la préservation de la ferme parce que cela a permis d'éviter la dégradation ou la perte des biens. Il y a en conséquence un "lien évident" entre la contribution et les biens en cause.

And as for the reason the *de facto* spouses had never married?

15. Mary Sorochan est allée vivre avec Alex Sorochan dans sa ferme. Ils ont cultivé la terre ensemble, ils ont eu six enfants et se sont fait passer auprès d'autrui pour un couple marié. À mon sens, Mary Sorochan s'attendait raisonnablement à recevoir quelque avantage en contrepartie de ses quarante-deux années de travail à la maison et à la ferme. En effet, elle pouvait raisonnablement croire que cet avantage prendrait la forme d'un droit sur les biens-fonds. En 1951, quand les deux frères ont procédé au partage de leur copropriété, on a demandé à Mary Sorochan de signer les actes translatifs de propriété en guise de renonciation à tout droit de douaire sur les terres cédées au frère d'Alex Sorochan. **Après la**

⁵⁶ Originally, the trial judge's award was subject to her leaving the property to her children upon her death. The Court of Appeal completely overturned both the property and cash awards. The Supreme Court, in reinstating the judgment of first instance, removed the requirement that the property be left to the children: "Mary Sorochan is the one who suffered the deprivation and it is she who is entitled to the remedy – not her children."

naissance de leur premier enfant en 1941, Mary Sorochan a demandé à Alex Sorochan de l'épouser. Elle a témoigné en première instance qu'il a répondu [TRADUCTION] "plus tard" ...

In *Rawluk v. Rawluk*,⁵⁷ the Supreme Court answered the question left in abeyance with *Leatherdale*, and noted wryly that it would be nonsensical to permit the doctrine of constructive trust to apply to the benefit of common law spouses, but to deny it to married spouses, simply because the (new) *Family Law Act, 1986*⁵⁸ now provided certain statutory recourses that essentially codify the doctrine of unjust enrichment.

This brings us to the seminal decision of *Peter v. Beblow*,⁵⁹ the first case explicitly to acknowledge that domestic services and caretaking can found a claim for constructive trust, and this contemporaneously with the recognition that domestic services can found a claim for a compensatory allowance in *M. (M.E.) v. L. (P.)*.⁶⁰

The Supreme Court held that love cannot be a valid justification rebutting a claim for unjust enrichment. The *de facto* husband had argued, citing authority, that "Setting up house together, having a baby and making payments to general housekeeping expenses...may all be referable to the mutual love and affection of the parties and not specifically referable to the claimant's belief that she has an interest in the house."

McLachlin J., as she then was, writing on behalf of four judges, had this to say in response, at pages 993-994:

...[TRADUCTION] «il n'y a aucune raison logique d'établir une distinction entre les services ménagers et les autres contributions». **La notion que les services d'entretien ménager et de soin des enfants ne méritent pas d'être reconnus par les tribunaux omet de reconnaître que ces services sont fort utiles non seulement pour la famille, mais pour l'autre conjoint. Comme l'a fait remarquer lord Simon il y a près de 30 ans: [TRADUCTION] «L'oiseau mâle peut «se replumer» précisément parce qu'il n'est pas tenu de passer la majeure partie de son temps sur le nid» («With All My Wordly Goods,» *Holdsworth Lecture* (University of Birmingham, 20 mars 1964), à la p. 32). En outre, cette notion est préjudiciable en ce qu'elle dévalue systématiquement les contributions que les femmes apportent généralement aux finances de la famille. Elle contribue au phénomène de la féminisation de la pauvreté dont notre Cour a parlé dans l'arrêt *Moge c. Moge*, 1992 CanLII 25 (C.S.C.), [1992] 3 R.C.S. 813, le juge**

⁵⁷ [1990] 1 S.C.R. 70, 1990 CanLII 152 (SCC).

⁵⁸ S.O. 1986, c. 4.

⁵⁹ *Supra* note 5.

⁶⁰ *Supra* note 4.

L'Heureux-Dubé, aux pp. 853 et 854.

Par ailleurs, cet argument n'est plus défendable compte tenu de la jurisprudence établie par notre Cour et d'autres tribunaux. Aujourd'hui, les tribunaux reconnaissent fréquemment la valeur des services ménagers. Ce fait ressort clairement de notre arrêt *Sorochan* et a amené un auteur à affirmer que: [TRADUCTION] «[!]a Cour suprême du Canada a finalement reconnu que la contribution domestique a autant de valeur qu'une contribution financière dans une fiducie de biens dans le contexte familial» (Mary Welstead, «Domestic Contribution and Constructive Trusts: The Canadian Perspective», [1987] *Denning L.J.* 151, à la p. 161). Si l'on entretenait encore des doutes quant à la nécessité en droit de reconnaître honnêtement la valeur des services ménagers, on doit considérer que l'arrêt *Moge c. Moge*, précité, les a dissipés...⁶¹

McLachlin J. was equally unperturbed by the argument that *de facto* spouses should not benefit from the rights married couples enjoy, at page 994:

Enfin, j'aborde l'argument que, parce que le législateur a choisi de priver les couples non mariés du droit de réclamer sur les biens matrimoniaux un intérêt calculé par rapport à la contribution des parties, le tribunal ne devrait pas appliquer la théorie de l'enrichissement sans cause reconnue en *equity* pour remédier à la situation. Cet argument semble également imparfait. C'est précisément dans les cas où une injustice ne peut pas être réparée en vertu de la loi que l'*equity* joue un rôle...⁶²

It is implicit that McLachlin J. considered that the legislator's failure to provide statutory protection for unmarried couples was indeed the philosophical foundation for opening the door of accessibility wider to the doctrine of unjust enrichment, specifically to protect such *de facto* spouses from the legislator's omission!

5. Meanwhile, Married Spouses Advance on the Compensatory Allowance

First, in *Lacroix v. Valois*,⁶³ the Supreme Court identified the criteria that must be established for a claimant to succeed in a claim for a compensatory allowance, confirming in this regard the opinion of the Court of Appeal which had overturned a \$ 40,000 award in favour of the wife:

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⁶³ [1990] 2 S.C.R. 1259.

1. Son apport;
2. L'enrichissement du patrimoine de son conjoint;
3. Le lien de causalité entre les deux;
4. La proportion dans laquelle l'apport a permis l'enrichissement.

But the Supreme Court parted ways with the Court of Appeal's strict constructionist interpretation of the requisites to establish the claim, and reinstated the trial judge's award. What was at stake was the husband's argument that the wife's monetary contributions to various business ventures early in the marriage could not be the subject of a compensatory allowance, because those ventures had failed, and he had gone through bankruptcy and had been liberated long ago. The Supreme Court not only noted that the liberation itself could not be a «fin de non-recevoir» to the wife's claim, but in fact that the compensatory allowance must be evaluated at the time of divorce with the legislator's intent in mind.

Gonthier J., writing for the Court, beautifully summarized the curmudgeonly history of the Court of Appeal's systematic refusal to grant destitute wives *anything*, whether via lump sum alimentary support, or a tacit partnership claim, or via unjust enrichment:

Le droit québécois reconnaît depuis fort longtemps la liberté des conventions matrimoniales et la faculté pour les époux d'opter pour le régime de la séparation de biens. Les injustices nombreuses et flagrantes ayant découlé de ce régime sont bien connues; **l'un des époux, généralement la femme, se retrouvait souvent démuné au moment du divorce alors que son conjoint avait capitalisé pendant toute la durée du mariage en profitant d'apports en argent et de labeurs non rémunérés.** À l'occasion, les autres régimes produisaient également certaines injustices dignes d'être redressées. Ces injustices étaient certes perçues par les tribunaux, mais ces derniers refusaient généralement d'intervenir, faute d'autorisation législative.

D'abord, la Cour d'appel a refusé son assentiment relativement aux ordonnances de nature compensatoire rendues au moment du divorce sous le couvert de la somme globale, parce qu'elles avaient pour effet d'anéantir rétroactivement les effets d'un contrat librement consenti et exécuté. Au demeurant la somme globale est de nature alimentaire. Dans le même souci de déférence à l'endroit des conventions librement conclues portant séparation de biens, **les tribunaux admettaient par ailleurs rarement qu'une société tacite puisse exister entre conjoints.** La personne intéressée ne pouvait en effet que difficilement prouver l'existence d'un contrat de société tacite parallèle à un contrat de

mariage écrit, dûment passé devant notaire, et dont les termes ne souffraient guère cette possibilité. **Finalement, on a jugé que, d'une façon générale, la doctrine de l'enrichissement sans cause ne pouvait servir à pallier ce type d'injustice, la cause de l'enrichissement étant le régime ou le lien matrimonial...**⁶⁴

Gonthier J. goes on to chastise the Court of Appeal for too much rigidity in its interpretation of the legislator's new creation, the compensatory allowance which "would result in denying the beneficial effects of the remedy." The legislative intent is clear:

C'est dans un tel contexte que se situe l'introduction du recours en prestation compensatoire le 1^{er} décembre 1982. On s'est d'une façon générale assez peu interrogé sur les objectifs généraux de cette innovation législative. Elle vise manifestement à pallier les injustices engendrées à l'occasion de la réalisation d'un régime matrimonial librement choisi, en permettant la compensation d'un époux ayant enrichi le patrimoine de son conjoint par son apport en biens ou en services (voir Roger Comtois, "La prestation compensatoire: une mesure d'équité" (1983), 85 *R. du N.* 367).

C'est au niveau de la portée qu'il convient de reconnaître à la discrétion accordée au juge que tous les problèmes se posent. **Le libellé de l'article est fort large** et, en pratique, il permet au juge d'anéantir de façon intégrale le régime de la séparation de biens choisi par les époux (voir André Cossette, "Le régime de la séparation de biens est-il disparu avec la naissance de la prestation compensatoire?" (1985), 87 *R. du N.* 456). **Or le législateur a choisi de maintenir en vigueur la liberté de choix en matière de conventions matrimoniales. Pour cette raison, il serait inadmissible que les tribunaux instaurent à posteriori une société d'acquêts judiciaire obligatoire et rétroactive par le biais d'une interprétation trop large de la discrétion qui leur est conférée.** À l'opposé, ce serait ignorer l'objectif législatif poursuivi que de réduire la portée naturelle du texte par une déférence exagérée à l'endroit de la liberté des conventions matrimoniales. **Le législateur a d'ailleurs récemment choisi de limiter cette liberté dans une mesure considérable par la création du patrimoine familial obligatoire: *Loi modifiant le Code civil du Québec et d'autres dispositions législatives afin de favoriser l'égalité économique des époux*, L.Q. 1989, ch. 55; *Code civil du Québec*, art. 462.1 et suiv.**

Les tribunaux doivent donc arriver à corriger les injustices conformément à l'objet de la loi, sans pour autant anéantir la liberté de choix des époux dans la mesure où le législateur avait choisi de la

⁶⁴ *Ibid.* at 1275-1276.

maintenir...⁶⁵

Certainly it was an excellent outcome for the Supreme Court to loosen up the criteria for the attribution of a compensatory allowance, such that the significant contributions of the wife not be discarded. However, the reasoning of the Court is a tad paradoxical: even though the legislator manifestly *chose* to use very broad language that would indeed allow a judge the discretion “to extinguish completely the regime of separation of property,” should the circumstances so warrant, the Court fretted that this could not possibly have been the legislator’s *real* intention, because there is still freedom of choice in marriage contracts.

It is *not* incompatible with freedom of contract for a judge to have a broad discretion that could indeed inspire an “*a posteriori* obligatory and retroactive judicial partnership of acquests,” *should the circumstances warrant*, as in where, in fact, the parties had lived a marital relationship as full economic partners, notwithstanding the contract signed back at a time they simply did not have a clue about what life had in store for them. It seems to me that the purpose of the marriage contract of separation as to property could just as easily have been viewed at the outset of the union as affirming that the spouses were free *not* to put their assets and revenues and efforts in common, with a view to starting a relationship with a sense of mutual autonomy. But then, once life took them down a different path, how would it offend one’s sense of justice to recognize a choice to engage in a joint enterprise that then followed?

It is also surprising that the Supreme Court did not carry its own prior observations further: the legislator, frustrated by the persistent refusal of the courts to remediate unjust situations via the lump sum, the tacit partnership,⁶⁶ unjust enrichment and now the compensatory allowance, *felt there was indeed no choice left but to limit freedom of contract by creating the mandatory family patrimony!*

The apotheosis of the doctrine of compensatory allowance was achieved in 1992, when the Supreme Court rendered its judgment in *M. (M.E.) v. L. (P.)*,⁶⁷ denying a claim for compensatory allowance by a *husband* who had enriched his wife by making the mortgage, property tax and insurance payments on the family residence purchased in the wife’s name prior to the marriage. He also did some renovation work on the house. When the first house was sold, a second one was bought, again in the wife’s name, and the husband continued to assume the same expenses. The Court of Appeal had found in the husband’s favour, because, needless to say, the kind of restrictive criteria the appellate court had developed to interpret the compensatory allowance were quite suitable to meet the needs of husbands whose contributions to a marriage do tend to be more quantifiable, economic, and direct.

⁶⁵ *Ibid.* at 1276-1277.

⁶⁶ Although there had been a certain mitigated success trying this technique in *Beaudouin-Daigneault v. Richard*, [1984] 1 S.C.R. 2, 1984 CanLII 15 (SCC).

⁶⁷ *Supra* note 4.

The Supreme Court overturned this award, and restored the trial judge's dismissal of the claim for a compensatory allowance. The Court considered the proper balancing exercise being to examine the spouses' contributions to the marriage, and not just to an object, and this included domestic tasks. The wife had worked part-time, had raised the couple's two children, had been responsible for the household chores, and furthermore, it was her father who had provided substantial financial assistance with the properties: he provided a low-interest loan for the acquisition of the first home, and again for the second home, but the husband only ever reimbursed the capital to his father-in-law.

In adopting the dissenting opinion of Beauregard J. in *Droit de la famille* – 67,⁶⁸ Gonthier J., writing for the Court, had this to say:

La règle de souplesse exposée dans *Lacroix c. Valois* doit inspirer l'analyse. Sur la base de ce principe, en un premier temps tous les apports devront être soupesés, sans que soit faite la distinction entre les contributions au mariage et celles au patrimoine. Les apports dits "domestiques" ou "conjugaux" ne doivent pas être à priori écartés en raison de leur nature, mais doivent faire partie de l'évaluation globale de la situation matrimoniale...⁶⁹

The Supreme Court was very much at ease with the notion that, during this marriage, the wife had not pursued a full-time career for the sake of her family, and conversely, the husband's pursuit of his career entailed he would have a significant pension upon retirement. Moreover, the acquisition of the house would not have been possible had it not been for the wife's father's contributions, plus her part-time revenues, plus her frugal management of the household. As such, they did not see a "mischief" of the kind the legislator wanted to remedy with a compensatory allowance:

...Le *mischief* auquel le législateur québécois cherchait visiblement à remédier était donc cette situation des conjoints, le plus souvent des femmes, mariés sous le régime de la séparation de biens et qui se retrouvaient démunies lors du divorce. Cette Cour a d'ailleurs écrit dans *Lacroix c. Valois*, précité, à la p. 1276, que **la prestation compensatoire vise manifestement à pallier les injustices engendrées à l'occasion de la réalisation d'un régime matrimonial librement choisi ...**⁷⁰

This begs the question as to why the courts did not simply take the legislator at his word. The Supreme Court, for all its willingness to undo the truly narrow interpretation favoured by the majority stream of the Québec Court of Appeal,

⁶⁸ *Supra* note 42.

⁶⁹ *M.(M.E.) v. L.(P.)*, *supra* note 4 at 197.

⁷⁰ *Ibid.* at 194.

nonetheless continued to make up its own limitation – no “true” redistribution of assets is possible – while noting the legislator had already remedied the problem with yet *newer* remedial legislation:

La formulation de l'art. 559 n'autorise pas une véritable redistribution des actifs; la Cour l'a souligné dans *Lacroix c. Valois*. Cette situation a d'ailleurs été modifiée depuis avec l'adoption des mesures créant le patrimoine familial. Le libellé de l'art. 559 C.c.Q. ne laissait cependant pas de doute quant au caractère "remédiateur" et véritablement équitable de cette disposition. L'article 559 C.c.Q. alloue ainsi au juge du procès une très large part de discrétion dans l'octroi d'une prestation compensatoire...⁷¹

So, despite viewing the recourse as “remedial and truly equitable” and vesting the trial judge with a “very large measure of discretion,” heaven forefend the recourse should actually *remedy, equitably*, situations where a redistribution of assets would achieve justice! Then, freedom of choice of matrimonial regimes could have stayed in place for those couples who manage to live equitable economic relationships (and there are perhaps a few, notably with second marriages, for instance, in which no children are born to the union), and the courts would be entitled to “rebalance” *post facto* the division of assets in those relationships where the economic reality turned out badly for one spouse.

The Supreme Court cited with approval the opinion of Rothman J.C.A. (Gendreau J.C.A. concurring), in *Droit de la famille – 866*,⁷² who denied a husband a compensatory allowance claim in circumstances not dissimilar to those in *M. (M.E.) v. L. (P.)*, and left the family home in the wife’s name, reasoning as follows:

Nor does this result seem unjustified or inequitable. Appellant gave up her own teaching career and salary for some twenty years to look after the house and children. This left respondent free to pursue his business career. It does not seem to me unjustified or unfair that during this period respondent was contributing to appellant’s equity in the house while he was building up his own equity in the business.⁷³

6. Where Did This Leave *De Facto* Couples after 1991-1992?

As can be seen from the Supreme Court’s own admission, by the time it got around to loosening up the criteria for the attribution of a compensatory allowance from a barely-there recourse to at least a more-or-less remedial recourse

⁷¹ *Ibid.* at 195.

⁷² [1990] R.J.Q. 1833, 1990 Can LII 3087 (QCCA).

⁷³ *M. (M.E.) v. L. (P.)*, *supra* note 4 at 204.

– but not *too* remedial! – the legislator in Québec had pretty much resolved the problem by creating the family patrimony, which put a decisive end to the problem for the vast majority of divorcing couples. Now the rule was equal division of the short list of marital assets (as borrowed from the Ontario statute of a decade earlier), and freedom was maintained for non-family patrimony assets, such freedom still tempered by the much improved compensatory allowance recourse to palliate in the event of injustice (and in the meantime, the recourse to lump sum support had also eased, being interpreted liberally under the *aegis* of the *Divorce Act*). Since the family patrimony and the partnership of acquests make it a point of excluding from partition assets that devolve to one spouse by gift or succession, and also grant a deduction for the equity in assets that existed prior to the marriage, a satisfying “moral” equilibrium was achieved: in essence, spouses divide equally that which is the fruit of their common labours during the union, whether by economic activity or domestic contribution.

As for *de facto* couples, they basically had *Peter v. Beblow* upon which to hang their hats.

And then came the landmark decision in *Miron v. Trudel*,⁷⁴ in which the Supreme Court again seemed quite prepared to move forward in the recognition of the rights of *de facto* couples, this time, with the aid of the *Canadian Charter of Rights and Freedoms*. An Ontario case by origin, John Miron was cohabiting with his *common law wife*, Jocelyne Vallière, and their two children, when he was seriously injured while a passenger in an uninsured car driven by an uninsured driver. He filed for insurance benefits under his *common law wife's* insurance policy, claiming status as a “spouse,” but this coverage was denied, based on the definition of “spouse” excluding *de facto* spouses.

In a close 5-4 decision, spearheaded by McLachlin and L’Heureux-Dubé JJ., the Supreme Court concluded that marital status is an analogous ground of discrimination to those listed in s. 15 of the *Charter*. As a result, legislated discrimination against common-law spouses can be contrary to section 15 and requires justification under section 1 of the *Charter* (a reasonable limitation in a free and democratic society).

In the *Miron* case, the Supreme Court held that exclusion of unmarried partners from accident benefits under a statutory insurance scheme available to married partners violated s. 15(1) of the *Charter*. In its ruling the Court found that discrimination based on marital status touches the essential dignity and worth of the individual in the same way as other recognized grounds of discrimination, and that marital status possesses characteristics often associated with recognized grounds of discrimination under s. 15(1). Further, the Court determined that persons involved in an unmarried relationship constitute a historically disadvantaged group, even though the disadvantage has greatly diminished in recent years. The legislation

⁷⁴ [1995] 2 S.C.R. 418, 1995 CanLII 97 (SCC).

could not be saved under section 1, in the absence of a reasonable justification to exclude *de facto* spouses from insurance coverage.

To arrive at this conclusion, L'Heureux-Dubé J. took great pains to define the comparator groups, to avoid including so broad a group of *de facto* spouses as to feed into Gonthier J.'s reasoning (in dissent) that these are too disparate a group. She reasoned:

88. La garantie d'égalité visée à l'art. 15 n'exige pas que tout le groupe collectif et hétérogène des personnes non mariées soit comparé au groupe essentiellement homogène des personnes mariées. En fait, une comparaison sans nuance de groupes dissemblables peut contrecarrer les fins de l'art. 15 de la *Charte* plutôt que d'en favoriser la réalisation. **Une comparaison ne constitue un exercice utile relativement à la distinction examinée que si elle porte sur des groupes qui possèdent suffisamment de qualités analogues. Par conséquent, la seule comparaison appropriée dans le cas qui nous occupe est celle de personnes mariées et de personnes non mariées dont l'union est analogue au mariage (c.-à-d. comportant une certaine permanence et une certaine interdépendance publiquement reconnues).** En d'autres termes, toutes choses étant à peu près égales par ailleurs, les personnes non mariées sont privées du même bénéfice de la loi pour essentiellement une seule raison: le fait qu'elles ne sont pas mariées.

L'Heureux-Dubé J. also tackled the concept of *choice* head-on, noting that people marry without regard for the legal rights that come with the institution, and conversely, may choose to be in a union without marrying again without regard for the legal rights that are (often unwittingly) given up, and further yet, that it is not a given that the choice is exercised equally by both partners:

95. À mon avis, la décision de se marier ou non peut, en effet, être la décision la plus personnelle qu'une personne prendra au cours de sa vie. Elle peut être aussi fondamentale, voire capitale, et aussi personnelle qu'un choix, par exemple, en matière de citoyenneté ou même de religion. Bien que certains droits et obligations se rattachent à chacun de ces trois choix, on ne saurait en toute justice les réduire à une question de contrat. **Par exemple, je doute fort que les gens choisissent l'institution du mariage parce qu'elle semble leur offrir un ensemble intéressant sur le plan des droits et obligations contractuels.** Dans la même veine, les personnes qui choisissent délibérément de ne pas se marier pourraient bien être motivées par des croyances fort personnelles qui n'ont rien à voir avec les droits et obligations contractuels accessoires au mariage.

96. Cependant, mon désaccord avec l'affirmation voulant que le mariage soit tout simplement une question de choix personnel va

beaucoup plus loin que cette objection préliminaire. Tout particulièrement, j'estime que cet argument se fonde sur une hypothèse importante que, selon moi, on n'a pas relevée, suivant laquelle c'est à l'issue d'un «libre choix» que la majorité des personnes non mariées vivent dans une union comportant une certaine interdépendance et d'une certaine durée. À mon humble avis, dans le cas d'un grand nombre de personnes vivant en union non traditionnelle, cette hypothèse risque de déformer la réalité. **Ce groupe silencieux, souvent oublié, se compose de couples dans lesquels un seul des deux conjoints désire s'engager dans une union d'une certaine permanence et interdépendance qui soit publiquement reconnue comme telle:**

[TRADUCTION] Les deux partenaires d'une union n'ont peut-être pas des points de vue similaires: l'un d'entre eux pourrait bien tenir à son autonomie personnelle, mais l'autre non. L'un pourrait bien être impatient de se marier, et l'autre s'y opposer. Dans un tel cas, quel point de vue doit l'emporter? [. . .] **Le revers de l'autonomie d'une personne est souvent l'exploitation d'une autre.** [Je souligne.]

(W. Holland, «Marriage and Cohabitation -- Has the Time Come to Bridge the Gap?» dans *Family Law: Roles, Fairness and Equality*, Special Lectures of the Law Society of Upper Canada 1993, 369, à la p. 380.)...

McLachlin J., Sopinka, Cory, and Iacobucci JJ. concurring, also found marital status to be an analogous ground, noting that the fundamental right of the individual is to *be* in a union, no matter of what kind:

151. Premièrement, la discrimination fondée sur l'état matrimonial touche la dignité et le mérite essentiels de la personne de la même façon que d'autres motifs de discrimination reconnus vont à l'encontre de normes fondamentales en matière de droits de la personne. **Plus particulièrement, ce motif touche la liberté d'une personne de vivre avec le partenaire de son choix, comme elle l'entend. Il s'agit là d'une question d'importance déterminante pour les personnes. Ce n'est pas une question qui devrait être écartée d'un examen fondé sur la *Charte* pour le motif que l'on se trouverait ainsi à banaliser la garantie d'égalité.**

The Court goes on to note the historic discrimination against *de facto* spouses:

152. Deuxièmement, l'état matrimonial possède des caractéristiques souvent associées aux motifs de discrimination reconnus au par. 15(1) de la *Charte*. Les personnes qui vivent en union de fait constituent un groupe historiquement désavantagé. De nombreux

faits établissent que les partenaires non mariés ont souvent subi un désavantage et un préjudice au sein de la société. En effet, traditionnellement dans notre société, on a considéré que le partenaire non marié avait moins de valeur que le partenaire marié. Parmi les désavantages subis par les partenaires non mariés, mentionnons l'ostracisme social par négation de statut et de bénéfices. Au cours des dernières années, le désavantage subi par des personnes vivant en union illégitime a grandement diminué. Nous sommes loin du temps où elles étaient obligées d'afficher sur elles la lettre A (pour adultère). **Néanmoins, on ne saurait nier le désavantage historique subi par ce groupe.**

The four judges agree with L'Heureux-Dubé J. that *choice* as to marital status is often beyond the individual's control, and hence cannot be a justification for discrimination:

153. Une troisième caractéristique parfois associée à des motifs analogues -- les distinctions fondées sur des caractéristiques personnelles immuables -- existe aussi, mais sous une forme atténuée. **En théorie, la personne est libre de choisir de se marier ou non.** Cependant, en pratique, la réalité pourrait bien être tout autre. Il n'est pas toujours possible d'obtenir la sanction de l'union par l'État par un mariage civil. **La loi, l'hésitation à se marier de l'un des partenaires, les contraintes financières, religieuses ou sociales sont autant de facteurs qui empêchent habituellement des partenaires, qui par ailleurs fonctionnent comme une unité familiale, de se marier officiellement. Bref, l'état matrimonial échappe souvent au contrôle de la personne.** À ce point de vue, l'état matrimonial n'est pas différent de la citoyenneté, qui a été reconnue comme un motif analogue dans l'arrêt *Andrews*; la personne exerce un contrôle limité, mais non exclusif sur son état matrimonial.

The Court concludes that the differential treatment based on marital status reflects the historical disapproval of non-marital unions:

154. Lorsque l'on compare la discrimination fondée sur l'état matrimonial et celle fondée sur les motifs énumérés au par. 15(1), **on peut estimer que la discrimination fondée sur l'état matrimonial s'apparente à la discrimination pour un motif fondé sur la religion dans la mesure où elle trouve son origine et son expression dans la désapprobation morale de toutes les unions à caractère sexuel, sauf celles sanctionnées par l'Église et par l'État.**

And then comes the best part, the paragraphs that could conceivably make a staid jurist fall off his or her chair:

155. **Dernièrement, les législateurs et les juristes dans l'ensemble du pays ont reconnu que c'est ignorer les valeurs ou les réalités sociales de l'heure que d'établir entre les couples qui cohabitent une distinction fondée sur le fait qu'ils sont légalement mariés ou non.** Comme l'*amicus curiae* le fait remarquer, 63 lois ontariennes n'établissent actuellement aucune distinction entre partenaires mariés et partenaires non mariés qui ont cohabité dans une union conjugale. **Par exemple, le droit aux aliments n'est pas déterminé par le mariage:** voir la partie III de la *Loi sur le droit de la famille*, L.R.O. 1990, ch. F.3, qui établit un droit aux aliments entre personnes qui ont cohabité de façon continue pendant au moins trois ans ou qui ont cohabité dans une union présentant une certaine permanence et ont un enfant. **D'autres provinces ont adopté des critères de base similaires. Dans le domaine judiciaire, les juges ont reconnu le droit des conjoints non mariés au partage des biens familiaux par application de la doctrine de l'enrichissement sans cause:** *Pettkus c. Becker*, 1980 CanLII 22 (C.S.C.), [1980] 2 R.C.S. 834; *Peter c. Beblow*, 1993 CanLII 126 (C.S.C.), [1993] 1 R.C.S. 980. **Il ressort de tout cela que l'on reconnaît que c'est souvent à tort que l'accès au même bénéfice de la loi est refusé parce qu'une personne n'est pas mariée.**

156. Prises ensemble, ces considérations donnent à entendre que la négation de l'égalité pour un motif fondé sur l'état matrimonial constitue une discrimination au sens du par. 15(1) de la *Charte*. Si le tort que le par. 15(1) cherche à redresser est la violation de la dignité et de la liberté de la personne par des restrictions ou des désavantages fondés sur l'application stéréotypée de présumées caractéristiques de groupe plutôt que sur les mérites ou les capacités d'un individu ou les circonstances qui lui sont propres, alors l'état matrimonial devrait être considéré comme un motif analogue. On retrouve les éléments nécessaires à l'application de l'objectif général du par. 15(1) -- la violation de la dignité et de la liberté, un désavantage historique de groupe et le risque de prise de décisions stéréotypées touchant le groupe -- et la discrimination est établie.

Québec has no provision for spousal maintenance that is “not conditioned on marriage.” The jurisprudence being reviewed in this article always cautions *against* using unjust enrichment to permit the imposition of sharing of family patrimony for unmarried couples.

To be sure the message is hammered home, the Court concludes:

158. ...La question n'est pas de savoir si le mariage est bon, mais bien s'il peut être utilisé pour priver une personne de l'égalité de traitement pour des motifs qui n'ont rien à voir avec les véritables

mérites ou droits de cette personne dans les circonstances. Le juge L'Heureux-Dubé affirme dans l'arrêt *Canada (Procureur général) c. Mossop*, 1993 CanLII 164 (C.S.C.), [1993] 1 R.C.S. 554, à la p. 634: «Ce n'est pas attaquer la famille que d'appuyer la protection des familles non traditionnelles.» On pourrait également dire ceci: «Ce n'est pas attaquer le mariage que d'accorder le même bénéfice de la loi aux couples non traditionnels.»

One might be left to think that the Supreme Court of Canada, having analyzed the *Charter* values that should apply throughout Canadian society vis-à-vis the legal protections afforded *de facto* spouses, might have actually said something to the benefit of Québec *de facto* spouses (keeping in mind the Attorney General of Québec intervened in *Miron v. Trudel*).

Before the century was finished, the government of Québec had ensured that provincial statutes that affect married couples now applied to *de facto* couples, so that not only Ontario could claim to have “63 statutes” making no distinction between married and unmarried partners. Unfortunately, despite the omnibus statutory amendments passed in 1999, up to and including the *Interpretation Act*, and despite reference to *de facto* spouses in domains that might be of importance to *men* (assisted reproduction, adoption, exemptions from seizure of wages, spousal privilege), the rules that would be of paramount importance to *women* (spousal support, family patrimony, partnership of acquests) remain stuck in the Stone Age.

7. Just How Useful are the Constructive Trust Cases in Québec?

The doctrine of constructive trust was applied in *Rathwell v. Rathwell* and *Pettkus v. Becker*, which paved the way for the further advance in *Peter v. Beblow*.⁷⁵ It is important to keep in perspective that this doctrine permits a wife to attain property rights, rights *in rem*, just as with matrimonial property legislation, which now codifies the notion that married women get actual property rights.

All this being said, as much as there was an interesting debate prior to 1991 as to the extent to which conventional trusts were possible in Québec in the context of the codified civil law, there is an even more interesting debate as to the meaning of conventional trusts as codified in the civil law *since* 1991. Civil jurists take as many pains with the *Civil Code of Québec* as they did with the previous *Civil Code of Lower Canada* to insist that common law doctrine pertaining to trusts must *not* be imported into Québec, under any conditions.

⁷⁵ This permits the application of an “extra-contractual” doctrine to compensate for the absence of a contract of marriage (which is not the same as a marriage contract, nor, by the way, does this mean that the contract of marriage is a contract within the meaning of the civil law; although marriage is *contracted*, meaning agreed to on a mutual and consensual basis by the spouses, it remains an *institution*, with a panoply of mandatory rules, many of which are of public order).

As such, Chaput J. explicitly and firmly excluded the possibility of the doctrine of constructive trust being imported into Québec civil law, in the following terms, in *Daniel Plachcinski v. Kovshoff, Kovshoff & Co. et al.*:⁷⁶

38. Bien qu'il y ait une parenté entre la fiducie du nouveau droit et le *trust* de la *common law*, ces deux institutions obéissent à des règles qui les distinguent l'une de l'autre.

39. Certains mécanismes du *trust* ne sont pas retenus par le droit québécois. Ni les *implied trusts*, ni les *resulting trusts* ou les *constructive trusts* ne sont visés par les dispositions du Code civil en matière de fiducie. En effet, selon les commentaires du Ministre, l'article 1262 C.c.Q., tel que rédigé, visait à écarter du droit québécois la possibilité créer un *implied trust*.

40. Contrairement au *trust* anglais, la fiducie québécoise doit obligatoirement être expresse, c'est-à-dire résulter de la volonté clairement exprimée de la part du constituant de créer une fiducie et, de la part du fiduciaire, de l'accepter. Elle ne peut non plus découler d'une déclaration unilatérale, ce qui est admis en *common law*. En effet, au Québec, il n'est toujours pas permis d'établir une fiducie par simple déclaration, telle que la *declaration of trust* de la *common law*. Selon le professeur Brierley, l'infrastructure conceptuelle et législative de la fiducie est à ce point différente du *trust* anglais que dorénavant, l'institution de la fiducie sera autonome, indépendante des sources du droit anglais qui sont, d'après une certaine jurisprudence antérieure au nouveau Code, admises comme sources supplétives du droit contemporain.

41. Ainsi, le tribunal ne peut retenir la position des intimés que l'on a affaire ici à un *implied trust* ou *constructive trust*.

This judgment was cited with approval by Guibault J. in *National Fruit 2000 Inc. et al. v. Jamieson Produce Inc.*⁷⁷

In Québec, neither married nor *de facto* spouses get actual rights in property. Whether in application of the doctrine of unjust enrichment, or the application of the rules governing the partnership of acquests and the family patrimony, *no property rights devolve, and individual rights of ownership remain untouched*. Indeed, the legislator went to great pains to note that the right of partition is one of *value* (unlike under the former community of property regime,

⁷⁶ S.C.M. 500-11-012647-992, August 13 2002, Judge Paul Chaput; appeal granted for other reasons at 2004 CanLII 14971 (QCCA).

⁷⁷ 2002 CanLII 5184 (QCCS).

where actual lots had to be formed so that partition could take place in kind). For any spouses who choose the regime of community of property today, by marriage contract, the rules of partnership of acquests apply, hence, yet again, there is only a right to partition in *value*; property rights are not altered. Moreover, in all regimes, just as in the family patrimony, there is exclusion from partition of the value of property which devolves by gift or succession, and deduction made for equity in assets acquired prior to marriage. *Many of the concerns later expressed by the Supreme Court justices in terms of broadening rights for de facto spouses turn around the notion that it would be aberrant to give them property rights in conflict with the civilly registered title to property, a problem that does not arise in Québec.*

8. Where Do De Facto Spouses Now Stand with Unjust Enrichment?

At this point, the principles have been well-established. What then of the actual results for *de facto* spouses, considering that the Québec legislator has not come to their rescue as was done for married spouses both in 1981 and 1989? Let us take a “sample” of recent cases, noting that there has been a fair increase in the number of claims by *de facto* spouses in recent years.

Case Citations	Years as couple	Sex	Amount Claimed	Amount Rewarded
<i>Sigouin c. Lavoie</i> J.E. 93-1098 (S.C.)	10 years	M	?	\$ 13,854
<i>Bédard c. Roméo</i> [1994] R.D.F. 449, conf. in appeal	11 years	F	\$ 120,080	\$ 42,000
<i>Droit de la famille - 2001</i> [1994] R.D.F.537	23 years	F	\$ 35,000	\$ 10,000
<i>Droit de la famille - 2235</i> [1995] R.D.F.494	17 years	F	\$ 37,500	\$ 10,000
<i>Caron c. Daigle (Succession)</i> J.E. 96-1104 (S.C.)	17 years	F	house	house
<i>Droit de la famille 2512</i> 1996 R.J.Q. 2589 (S.C.)	10 years	F	\$ 1,265,000	\$ 0 (no improv; normal contrib)
<i>Droit de la famille 2358</i> J.E. 96-449 (C.A.)	3 years	F	?	\$ 0 (gift)
<i>Droit de la famille - 2648</i> [1997] R.D.F. 246	24 years	F	?	\$ 26,700
<i>Noël c. Falardeau</i> REJB 1998-05727	16 years	F	?	\$ 24,540
<i>Groulx c. Beaupré</i> REJB 1999-15121	28 years	F	\$ 1,435,983	\$ 300,000
<i>Charette c. Landry</i> 2000 CanLII 11036 (Q.C.)	6 years	F	\$ 25,000	\$ 0 (no improv.)
<i>Bourdon c. Duquette</i> 2000 CanLII 4127 (Q.C.)	some months	F	\$ 1,100	\$ 1,100

Case Citations	Years as couple	Sex	Amount Claimed	Amount Rewarded
Lussier c. Pigeon 2002 CanLII 32959 (C.A.)	13 years	F	?	\$ 0 (intra; SC: \$ 40,642)
Paquin c. Vaugeois 2002 CanLII 29253 (Q.C.)	13 years	M	\$ 3,000	\$ 350
Hallée c. Simard 2002 CanLII 254 (Q.C.)	5 years	M	\$ 21,000	\$ 16,000
Pellerin c. Boissoneault 2002 CanLII 429 (Q.C.)	14 months	M	\$ 7,259	\$ 0
Pelletier c. Robitaille 2002 CanLII 36504 (S.C.)	4 years	F	\$ 50,000	\$ 10,000
V. c. V.A. 2002 CanLII 23746 (S.C.)	15 years	F	\$ 225,000	\$ 25,000
Veilleux c. Migenault 2002 CanLII 13279 (Q.C.)	8 years	M	\$ 27,699	\$ 7,500
Griffith c. Nesbitt 2002 CanLII 20047 (Q.C.)	8 years	F	\$ 3,000	\$ 0 (prescription)
Dion c. Kopersiewich (Succession) 2002 CanLII 36211 (S.C.)	15 years	F	1/2 house (own 1/2)	\$ 170 000 or 1/2 house
Côté c. Charbonneau 2002 CanLII 24496 (C.S)	15 years	M/ F	\$ 82,500 / ?	\$ 0 / \$ 0
Dupuis c. Lalanne 2002CanLII13886 (S.C.), conf. in appeal	16 years	F	\$ 60,000	\$ 0 (no improv.)
Vadeboncoeur c. Isabel 2003 CanLII 10821 (S.C.)	9 years	F	\$ 131,576	\$ 0 (justification)
Macauley c. Carle 2003 CanLII 3724 (Q.C.)	17 months	F	\$ 30,000	\$ 11,000
Desjardins c. Vallières 2003 CanLII 25953 (S.C.)	15 years	F	\$ 100,000	\$ 50,000 or immoveable
Denault c. Racicot 2003 CanLII 28489 (S.C.)	8 1/2 years	F	\$ 52,840	\$ 3,200
M.B. c. L.L. 2003 CanLII 47977 (C.A.)	14 years	F	\$ 75,000	\$ 25,000 (SC: \$ 50,000)
Fillion c. Gagné 2003 CanLII 863 (S.C.)	12 years	F	\$ 300,000	\$ 0 (no enrich. or improv.)
Dumas c. Bergeron 2003 CanLII 15527 (S.C.)	8 years	F	\$ 125,000	\$ 25,000
Lafontaine c. Danis 2003 CanLII 1307 (C.A.)	?	F	?	\$ 13,150 (SC:\$ 0; coproperty)
Dupuis c. Luedders 2003 CanLII 34539 (S.C.)	20 years	F	\$ 234,470	\$ 0 (no enrich. or improv.)
Cadieux . Caron 2004 CanLII 26397 (C.A.)	19 years	M	\$ 100,500	\$ 0 (no enrich. +coproperty)

Case Citations	Years as couple	Sex	Amount Claimed	Amount Rewarded
Lemire c. Berthiaume 2004 CanLII 20655	16 years	F	\$ 60,000	\$ 0 (no enrich or impov.)
Euphrosine c. Samuel 2004 CanLII 466 (S.C.)	7 years	F	\$ 61,669	\$ 25,000
Desphelippon c. Deumié (Succession) 2004 CanLII 456 (S.C.), conf. in appeal	20 years	F	\$ 655,606	\$ 0 (justif. or insuff. correl.)
Grondin-Lepage c. Ouellette 2004 CanLII 11174 (Q.C.)	21 years	M	\$ 22,613	\$ 10,000
M.G. c. Mi. B. 2004 QCCS 6558	12 years	M	\$ 11,785	\$ 0 (coproperty)
Voghel c. Brodeur 2004 QCCQ 4606	21 months	F	\$ 7,000	\$ 0 (gift)
Dussault c. Jolicoeur 2004 CanLII 39122 (C.A.)	9 years	H	\$ 59,570	\$ 0 (gift) (SC: \$ 35,012)
J.D. c. P.A. 2004 QCCS 21220	20 years	F	\$ 97,500	\$ 0 (no enrich. subsists)
Pepper c. Naughton 2004 QCCQ 41250	12 years	F	\$ 50,000	\$ 31,970
Caron c. Roussel 2004 QCCQ 406	13 years	M	\$ 70,000	\$ 41,900
Chiasson c. Fleury 2005 QCCS 14643	?	M	\$ 7,000	\$ 0 (gift)
Martin c. Tremblay 2005 QCCQ 9455	5 years	M	\$ 7,000	\$ 0 (gift)
Turcotte c. Côté 2005 CanLII 8952 (S.C.)	15 years	F	?	\$ 40,000
St-Jean c. Proulx 2005 QCCQ 9276	12 years	F	\$ 9,840	\$ 4,239
Hornez c. Letellier 2005 QCCS 9630	4 years	F	\$ 42,000	\$ 0 (no enrichment)
Guillemette c. Poulin 2005 QCCS 12395, conf. in appeal	13 years	M/F	\$ 62,500 / \$ 75,000	\$ 0 (no enrichment)
Charbonneau c. Boudreau 2005 QCCQ 42595	4 1/2 years	F/M	\$ 4,375 / \$ 7,000	\$ 0 (no impov.)
Lauzon c. Laporte 2005 QCCQ 41215	5 years	F	\$ 13,013	\$ 5,931
Gingras c. Poulin 2005 QCCS 57270	13 years	F	\$ 128,760	\$ 14,000
Clarke c. Georges 2005 CanLII 25859 (S.C.), conf. in appeal	9 1/2	F	\$ 774,007	\$ 50,000
Lacombe c. Deshaies 2005 QCCQ 46452	7 years	F	\$ 58,463	\$ 0 (no enrichment)

Case Citations	Years as couple	Sex	Amount Claimed	Amount Rewarded
Desjardins c. Dispaltro 2005 QCCS 54148	7 1/2 years	M	\$ 16,367	\$ 0 (no enrichment)
Daoust c. Scott 2006 QCCS 6710	32 months	M	\$ 51,830	\$ 8,750 (+ spa)
Catellier c. Bilodeau 2006 QCCS 928	18 years	F	\$ 150,000	\$ 18,000
Leroux c. Frenette 2006 QCCQ 1888	12 years	F/M	\$ 5,559 / \$ 7,000	\$ 5,559 (M to pay)
Winner c. Chagnon 2006 QCCQ 2914	4 years	M	\$ 7,000	\$ 0 (no enrichment)
Larose c. Hélie 2006 QCCQ 3483	6 months	M	\$ 20,559	\$ 15,459
Coderre c. Elliot 2006 QCCQ 3702	24 years	F	\$ 20,500	\$ 8,552
Bélanger c. Soubiran 2006 QCCS 3442, conf. in appeal	17 years	F	\$ 75,000	\$ 0 (no improv.)
Doak c. Stocker 2006 QCCS 5501	10 years	M	House	\$ 86,400
A c. B 2006 QCCS 7252	17 years	M	\$ 360,956	\$ 11,546
Tran c. Khounvonga 2007 QCCS 847	13 years	M	\$ 75,287	\$ 34,787
Malo c. Villeneuve 2006 QCCQ 12489	4 years	F	\$ 6,319	\$ 2,871
Fortin c. Bélanger 2007 QCCS 1077 (S.C.)	12 years	F	house + \$ 61,185	\$ 51,000 +half sale price
Chicoine c. Dumas 2007 QCCQ 3316	2 years	M	\$ 6,321	\$ 0 (gift)
Issa c. Paquette 2007 QCCQ 5596	3 years	F	\$ 46,800	\$ 0 (no correlation)
Girard c. Tremblay 2007 QCCQ 6653	10 years	M	\$ 69,999	\$ 30,000
J.L. c. P.A. 2007 QCCS 3059	13 years	F	\$ 125,000	\$ 40,000
Michaud c. Caron (Succession) 2007 QCCS 2380	10 years	F	\$ 71,458	\$ 10,000
Tousignant c. Lesage 2007 QCCQ 11576	9 years	M	\$ 7,000	\$ 0 (gift)
Laniel c. Neveu 2007 QCCQ 11922	2 1/2 years	M	\$ 70,000	\$ 0 (prorata)
Gaudet c. Tanguay 2007 QCCS 4492	15 years	F	?	\$ 0 (coproperty)

Case Citations	Years as couple	Sex	Amount Claimed	Amount Rewarded
S.C. c. Sy.R. 2007 QCCS 5660	9 years	F	\$ 175,000	\$ 30,000
Filon c. Déry 2008 QCCS 308	16 years	F	\$ 150,750	\$ 50,000
Robitaille c. Lamontagne (Succession) 2008 QCCS 140	12 years	F	\$ 194,264	\$ 148,180
Beaudry c. Doré 2008 QCCS 222	8 years	F	\$ 210,000	\$ 0 (no improv.)
Jean c. Haidara 2008 QCCQ 1473	5 years	F	\$ 35,524	\$ 0 (coproperty)
Unscientific Total of Claims:			\$ 9,020,286	
Unscientific Total of Amounts Granted:			\$ 1,548,538	
Unscientific Average Success Rate:			17.17 %	

What do we learn from this entirely superficial exercise? We learn that there is an ever-increasing volume of such cases, often in Québec Court, and that either claimants are being entirely unrealistic in their demands, or the courts are continuing in their historic parsimony on awards, on quantum if not on principle. The ever-increasing cost of litigation in general has already become so daunting that there are fewer and fewer civil and commercial lawsuits instituted; in fact, for some years now, over 50% of litigation clogging the courts is in the domain of family law. If even businesses find it too expensive to go to court, what then of *de facto* spouses, who cannot even request the first dollar of compensation with certainty, never mind actually claim an equitable partition of assets?

9. The Québec Court of Appeal's Great Leap Forward...

In 2002, the Court of Appeal rendered a judgment in the case of *Lussier v. Pigeon*,⁷⁸ in a unanimous judgment rendered by a senior bench: Gendreau, Mailhot and Forget, J.J.C.A. In this case, Bernard Lussier and Ghislaine Boulerice had lived as *de facto* spouses for over 13 years, when Mrs. Boulerice died of cancer. Her grown children, Isabelle, Dominique and Pascal Pigeon, made a claim for unjust enrichment against Mr. Lussier, asserting that their late mother's common endeavours with him had enriched his patrimony. The trial judge agreed, to the tune of \$ 41,760, a judgment overturned by the Court of Appeal.

Narrowly put, the recourse of unjust enrichment for *de facto* spouses

⁷⁸ *Supra* note 7.

was held to be identical to the recourse of compensatory allowance for married spouses,⁷⁹ and since the latter cannot be transmitted to one's heirs, neither can the former: either recourse is considered to be *intuitu personae*, and ends naturally upon the death of the creditor. But what is *exciting* about this decision is how the bench got to this point!

First, Gendreau J.C.A., writing for the bench, quotes Cory J. with approval in *Peter v. Beblow* to the effect that a *de facto* union is “quasi-matrimonial” and:

Il n'est pas nécessaire d'établir qu'il y a eu promesse de mariage ou de rémunération relativement aux services fournis. Dans le cas où une personne fournit à l'autre les «services d'un conjoint», on doit plutôt considérer que ces services ont été fournis dans l'attente d'une rémunération, sauf preuve contraire....⁸⁰

Making Cory J.'s broad interpretation his own, Gendreau J.C.A. goes on to observe:

[20] **Ainsi, fut facilité aux conjoints de fait le recours à la doctrine de l'enrichissement injustifié** pour faire reconnaître la participation de l'un d'eux à l'enrichissement de l'autre et **obtenir le rééquilibre des patrimoines**.⁸¹

Could one have asked for a clearer statement of the values *also expressed by L'Heureux-Dubé, McLachlin, Sopinka, Cory, and Iacobucci JJ. in Miron v. Trudel, supra?* It is very important that the observation of our Court of Appeal in *Lussier* is consistent with *Miron*, which dealt with the policy values informing whether the failure to provide a statutory protection constitutes discrimination; a reference to *Peter v. Beblow* would have been inadequate, because the Québec civil law cannot “reach” the proprietary rights assured by the common law doctrine of constructive trust.

The Court of Appeal goes even further in its characterization of the conjugal relationship formed by *de facto* spouses, where again Cory J. is cited with approval:

[22] Pour solutionner la question posée, il faut revenir à la base même de la situation d'un potentiel enrichissement injustifié: l'union de fait, la relation quasi matrimoniale dans laquelle un couple s'est engagé.

[23] **La décision de deux personnes d'entreprendre de faire**

⁷⁹ The Court of appeal went on to say at para. 27: “*L'institution de la prestation compensatoire est l'équivalent de celle de l'enrichissement injustifié pour les personnes mariées; les critères de leur octroi sont identiques.*”

⁸⁰ *Peter v. Beblow, supra* note 5 at 1018.

⁸¹ *Lussier v. Pigeon, supra* note 7 at para. 20.

vie commune dans le cadre d'une telle relation est motivée par des sentiments d'affection et d'amour qui se concrétisent dans la volonté d'un support mutuel. Le partage, l'entraide et la mise en commun sont la conséquence de cette union basée, comme le mariage, sur une relation amoureuse. C'est ce qui a fait dire au juge Cory dans l'arrêt *Peter* (précité): «*Les parties qui se marient ou vivent dans une union de fait auront rarement examiné la question de l'indemnisation des avantages reçus. Si on leur pose une question à ce sujet, elles répondraient probablement qu'elles ont, par amour pour l'autre, travaillé ensemble à atteindre l'objectif commun de créer un foyer et de se faire une vie confortable.*»[6]. En somme, pendant la vie commune, les conjoints de fait s'attendent à ce que les biens acquis ou précédemment accumulés par l'un d'eux servent à leur entretien mutuel, au jour le jour ou plus tard parce qu'épargnés en vue d'assurer un avenir qu'on prévoit être vécu ensemble. Ainsi, la richesse est à l'avantage commun des parties même si elle ne s'accumule que dans un seul patrimoine. **C'est à l'occasion de la rupture de l'union que le bénéfice découlant de l'usage mutuel maintenant ou plus tard des biens de l'un et l'autre cesse;** apparaît alors le déséquilibre entre les patrimoines au regard de la contribution de chacune des parties.

[24] **Dès lors, avec cette rupture de l'union pourrait naître une créance qui résulte de l'échec pour la personne appauvrie de maintenir son accès à la richesse que son travail a permis à son conjoint d'accumuler, mais à l'avantage commun.** La justification de l'apport, l'affection, l'amour et la perspective d'une vie commune paisible, a disparu.

[25] Qu'en est-il du décès de l'un des conjoints au cours de la vie commune? À mon sens, il ne constitue pas une rupture, comme la séparation des partenaires de leur vivant, mais le terme normal de la vie commune. **En effet, les personnes qui s'engagent dans une union de fait comme dans le mariage envisagent normalement qu'elle durera toute leur vie. Même si elles peuvent être conscientes qu'en réalité, ce souhait ne se réalise pas toujours, chaque partenaire s'engage avec l'attente légitime qu'elle durera jusqu'à sa mort. C'est d'ailleurs la justification de la contribution de chacun à l'amélioration de la situation économique commune même si, juridiquement, les biens s'accumulent davantage dans un patrimoine plutôt que l'autre.**

[26] Toutes ces considérations m'amènent à conclure que l'action *de in rem verso* ne naît que lorsque le déséquilibre économique apparaît par la cessation de la vie commune en raison de leur séparation car la justification de l'apport du créancier cesse par

son inaccessibilité à l'usage de la richesse **que l'on voulait commune**. De plus, à mon sens, la créance est véritablement *intuitu personae*.

Of all the jurisprudence reviewed, these statements of our Court of Appeal constitute the clearest judicially expressed philosophy in the history of this province to view *de facto* spouses *completely without discrimination*. This permitted the Court to conclude:

[28] **Ainsi, si la relation maritale entre conjoints de fait est analogue à celle de personnes mariées et en a le même fondement**, je vois mal pourquoi la créance découlant de l'enrichissement injustifié serait traitée différemment de celle résultant d'une institution comparable sinon identique, la prestation compensatoire, au seul motif que les conjoints ne sont pas des époux.

[31] **Il serait dès lors incohérent, voire contradictoire, que cette caractéristique d'intimité et cette nature personnelle ne se retrouvent pas dans la créance résultant de l'enrichissement sans cause d'un conjoint de fait dont l'union est fondée sur les mêmes valeurs et visent les mêmes objectifs que l'union maritale**. En effet, la finalité de l'indemnité recherchée par un conjoint de fait requérant en enrichissement injustifié, la motivation à son apport pendant l'union, les conditions d'exercice de son recours et même la nature et la forme de sa contribution à l'enrichissement de son partenaire sont les mêmes que celles de la prestation compensatoire. À mon sens, le parallélisme des institutions doit s'étendre à tous les aspects et dans tous les effets; c'est pourquoi, j'estime que l'action de in rem verso du conjoint de fait n'est pas transmissible aux héritiers et doit être exercée par le bénéficiaire du droit à l'indemnité.

10. The Québec Court of Appeal's Bigger Step Backward...

In the judgment of *M.B. v. L.L.*,⁸² another bench of the Court of Appeal, Dalphond, Pelletier and Rayle, J.J.C.A., completely undermined the precedent established in *Lussier v. Pigeon*, *supra*, leading one to conclude there are now two conflicting lines of reasoning in Québec with respect to the recourse in unjust enrichment for *de facto* spouses.

The parties had been living in a *de facto* union for 16 years, with one child born of their union. Dalphond, J.C.A., writing for the Court, had this to say about the nature of the *de facto* wife's contribution to the union:

⁸² *Supra* note 9.

[26] D'août 1986 à 2000, pendant pratiquement 14 ans ininterrompus, vu sous l'angle de leur enfant, les parties ont formé une unité familiale où il a grandi. De plus, dans leurs rapports mutuels, elles ont fait montre l'une à l'égard de l'autre de soutien, notamment lors de leur maladie respective, de fidélité, de projets communs (sorties, voyages, aménagement de la résidence, ...). **Vu sous l'angle de leurs rapports mutuels, on peut parler en l'espèce d'une union quasi matrimoniale en raison de ces similitudes fonctionnelles avec les couples mariés.**

[27] Durant cette union, il ressort de la preuve que l'intimée a assumé l'essentiel des corvées domestiques et a été la première responsable de l'entretien et de l'éducation de leur enfant. Lorsque l'appelant travaillait à Montréal et y résidait pratiquement à la semaine, elle a vu seule à l'organisation des besoins familiaux et à l'entretien de la résidence familiale, jouant un rôle important lors des rénovations et améliorations à la résidence.

[28] Pendant la vie commune, les revenus annuels de l'appelant ont été d'environ 55 000 \$, alors que ceux de l'intimée étaient d'environ 11 000 \$. Il faut cependant mentionner que vers la fin de l'union, les revenus de l'intimée étaient d'environ 25 000 \$ par année.

It was obvious this judgment was not going to expand the remedial aspect of the recourse, when the opening lines of the analysis begin with these words:

[30] Même si un nombre croissant de couples choisissent de vivre en union de fait qui a toutes les caractéristiques d'une union matrimoniale, le législateur québécois a **choisi** de n'imposer aucun cadre juridique applicable en cas de rupture des conjoints, même dans le cas où un enfant naîtrait de cette union.

What a curious observation! The Court treats the government of Québec like it treats *de facto* wives: it draws an inference of *choice* from no action at all. The "silence" of the Québec legislator should not be interpreted by the Courts as evidencing any kind of intention, good or bad.

The fact that the absence of legislative protection has led litigants to ask that the courts be more audacious, is certainly a natural result. It is not because the legislator has been silent that there are not injustices the court should, and may, rectify. *The business of the courts is justice, and the law is the servant of that quest for justice.* And the absence of "black letter law" in Québec never bothered Mignault or Beetz J. one bit:

Le Code civil ne contient pas tout le droit civil. Il est fondé

sur des principes qui n’y sont pas tous exprimés et dont il appartient à la jurisprudence et à la doctrine d’assurer la fécondité:

«... notre Code, comme le Code civil français, a maintes fois appliqué cette maxime—la maxime de Pomponius— à des situations particulières, mais il ne l’a pas érigée en règle générale. J’ai admis, toutefois, la possibilité de dire que **le législateur** reconnaît son autorité, puisqu’il lui donne effet dans tous les cas d’application qu’il prévoit. **Ne peut-on pas ajouter que, s’il avait prévu d’autres cas, et il manque quelquefois de prévision, il l’aurait appliquée encore?»**. (Mignault, *op. cit.* pp. 171, 172).⁸³

But then we learned what ingredient spoiled the sauce: the Supreme Court judgment in *Nova Scotia (Attorney General) v. Walsh*,⁸⁴ as can be seen in the following extract:

Considérant les commentaires de la Cour suprême sur l’importance de respecter la liberté de choix des couples qui ont décidé de ne pas se marier ou de ne pas se doter d’un contrat régissant les aspects économiques de leur vie commune, énoncés dans l’arrêt *Nouvelle-Écosse (Procureur général) c. Walsh*, 2002 CSC 83 (CanLII), 2002 CSC 83, **je crois qu’il serait inadmissible pour les tribunaux d’instaurer après la fin de la vie commune, soit a posteriori, à l’égard des biens accumulés pendant la vie commune, une société d’acquêts judiciaire ou un quasi-patrimoine commun par le biais d’une interprétation très libérale de notions comme l’enrichissement injustifié ou l’action *pro socio***. J’ajoute que les tribunaux québécois ne sont pas dans la même position que ceux des provinces de *Common Law* et ne peuvent créer de nouvelles institutions juridiques, ajustées aux besoins du moment, comme les fiducies par interprétation ou par déduction dont parle l’arrêt *Pettkus c. Becker*, 1980 CanLII 22 (C.S.C.), [1980] 2 R.C.S. 834.

A detailed analysis of *Nova Scotia (Attorney General) v. Walsh* is beyond the scope of this paper, notably because of significant weaknesses in the characterization of the heterogeneity of *de facto* spouses as a comparator group. However, it bears noting the extent to which this judgment should not have affected the Court of Appeal’s analysis of the Québec civil law doctrine of unjust enrichment:

- Québec is the capital of the country in number of *de facto* couples, especially those with children;

⁸³ *Cie. Immobilière Viger v. L. Giguère Inc.*, *supra* note 35 at 76.

⁸⁴ *Supra* note 8.

- As stated earlier in this paper, the majority of children born in the province from year to year are born to *de facto* couples;
- In the common law provinces, it is possible to opt out of marital property sharing regimes, an option that is not permitted in Québec with respect to the family patrimony;
- Moreover, in the common law provinces, the scope of the assets shared in the marital property sharing regimes is far broader than the assets shared in the partnership of acquests regime in Québec, and hence, caution may be more reasonable (especially when second marriages are taken into consideration);
- Moreover, in the common law provinces, women attain actual *property* rights, which makes the courts naturally hesitant to undo registered titles to property, whereas in Québec, women do not get property rights whether with the partnership of acquests, the family patrimony, the compensatory allowance or unjust enrichment;
- In the common law provinces, when the doctrine of constructive trust is applied in favour of common law spouses, they get property rights, unlike Québec, where the claims for unjust enrichment or compensatory allowance is purely personal and *intuitu personae* at that;
- In the common law provinces, *de facto* spouses have had spousal support rights by statute for many years.

And at the end of the day, *nothing* prevented Susan Walsh from making a claim for constructive or resulting trust, based on the common law doctrine of unjust enrichment! Indeed, prior to the case being pleaded at the Supreme Court, and after her victory before the Nova Scotia Court of Appeal, the spouses settled their litigation amicably. *Nothing* the Supreme Court said, in denying Susan Walsh's request for *automatic* sharing of marital assets pursuant to the *Nova Scotia Matrimonial Act* by reason of invocation of the *Charter*, in any way detracts from the possibility the Court might very well have found she was entitled to half her common law husband's assets based on the traditional common law doctrine:

61. Quant aux couples qui n'ont pas pris d'arrangements concernant leurs biens dès le début de leur union, ils peuvent encore recourir au droit de la fiducie par interprétation pour remédier aux iniquités susceptibles de survenir au moment de la dissolution. Le droit de la fiducie par interprétation est devenu un moyen de reconnaître les contributions, tant pécuniaires que non pécuniaires, d'un conjoint aux biens familiaux dont le titre de propriété est établi seulement au nom de l'autre conjoint : *Rathwell c. Rathwell*, 1978 CanLII 3 (C.S.C.), [1978] 2 R.C.S. 436; *Pettkus*, précité; *Sorochan c. Sorochan*, 1986 CanLII 23 (C.S.C.), [1986] 2 R.C.S. 38; *Peter*, précité. Après la promulgation de la *MPA*, le droit de la fiducie par interprétation a continué et continue d'offrir un recours aux partenaires non mariés qui se trouvent injustement défavorisés par rapport à leur ancien partenaire. La meilleure façon de remédier aux situations où une interdépendance économique s'est établie au fil du temps

dans le couple est de recourir à une réparation comme la fiducie par interprétation, qui est adaptée à la situation et aux revendications particulières des parties. À mon avis, lorsqu'il existe de multiples bénéfices et protections adaptés à la situation et aux besoins particuliers de chacun, il n'y a pas atteinte à la dignité humaine essentielle des personnes qui ne sont pas mariées.

How does this judgment, and this reasoning, justify taking away the liberal interpretation of the doctrine of unjust enrichment, already richly supported by past Supreme Court and Court of Appeal decisions?

We are willy-nilly back to the narrow interpretation of the doctrine of unjust enrichment, not in terms of fulfilling the criteria to have access to the recourse, but purely on quantum, which now *must*, by reason of the impact of *Walsh*, not be remedial:

[39] **Par conséquent, je suis d'avis que l'objectif d'une action en enrichissement injustifié ne doit pas tendre à un rééquilibrage des actifs ou à un partage des patrimoines de chacun accumulés pendant la vie commune**, mais uniquement à compenser une partie pour un apport, en biens ou en services, qui a permis à l'autre de se trouver en une position supérieure à celle qui aurait été la sienne n'eût été de la vie commune, bref de l'enrichir.

This approach leads to questionable interpretations such as the following:

[41] Quant aux services domestiques, l'appelant a démontré qu'il a passé entre 1992 et 1997 la majorité de son temps à l'extérieur de la résidence et y prenait peu de repas. **Pendant cette période, il est raisonnable de conclure que la plupart des travaux domestiques de l'intimée étaient pour son propre bénéfice et celui de leur enfant. L'appelant en a donc peu profité entre 1992 et 1997**, mais certes plus à d'autres périodes.

How quickly we forget that when a woman is left with the sole burden of child-rearing, domestic chores, and maintaining a home, not only is she impoverished, because she has less time available to advance in her education or career, but the *de facto* husband is enriched, because he is absent *precisely* to be able to engage in economic activities that leave him with an appreciable capital, inaccessible to the *de facto* wife.

In the older jurisprudence the criteria for the availability of the recourse were harder to satisfy, but at least quantum was left to the sovereign ("if somewhat arbitrary") appreciation of the trial judge. Now, by turning the issue of quantification of the recourse into a matter of principle (*i.e.* a question of law,

instead of a pure question of fact and credibility), it permits the Court of Appeal more readily to interfere in the sovereign appreciation of the facts and credibility that are normally the province of the trial judge, and, in this case, to cut the quantum awarded from \$ 50,000 to \$ 25,000.

11. A Sample Case to Show the Adverse Impact of *M.B. v. L.L.*

In *Lemire v. Berthiaume*,⁸⁵ Mercure J. dismissed a claim for \$ 60,000 in unjust enrichment by a woman against her *de facto* spouse in a 16-year *de facto* union (although the judge did not hesitate to call the case a «matière familiale» and the union «quasi-matrimoniale»). The parties were 16 and 18 years of age, respectively, when their relationship started, leading to cohabitation a year later, followed by the birth of two children five years later. Over the course of the union, the couple acquired and lived in three different homes, and acquired an ice-cream parlor. The assets were acquired in the husband's name. Evidence was made that the husband's father assisted considerably in the financing and defraying of costs of the properties over the years. Both spouses worked in the ice-cream parlor; the husband renovated the properties over the years; both spouses did household chores and raised the children. Upon separation, the wife left with a few moveables and personal belongings. The children remained with the husband. The wife ended up living on social welfare benefits.

Not surprisingly, there was a considerable difference of opinion between the spouses in their testimony as to who did how much work where and when. The husband argued, as do all husbands who have greater economic power in the union, that the wife *benefited* from the lifestyle generated by the husband's hard work, and hence the wife cannot have fulfilled the requirement of *impoverishment* that is a linchpin of the recourse in unjustified enrichment.

The trial judge expressed a clear preference for the credibility of the husband, and certainly, the assessment of credibility is hard to dispute. He goes on to note that the rules governing the recourse are now codified in articles 1493 and 1494 *C.C.Q.*, and cites *Cie Immobilière Viger Ltée v. Lauréat Giguère Inc.*⁸⁶ for the general civil law requirements for a suit in unjust enrichment.

He then goes on to cite *Peter v. Beblow* with approval, as follows at page 6:

[28] Dans l'affaire *Catherine Peter c William Beblow*, la Cour suprême avait à se prononcer en 1993 sur un recours fondé sur l'enrichissement sans cause entre deux conjoints de fait dans le cadre d'une cohabitation de douze ans. Rappelons qu'il s'agissait d'un appel d'un jugement de la Cour d'appel de la Colombie-

⁸⁵ 2004 CanLII 20655 (QCCS).

⁸⁶ *Supra* note 35.

britannique. La Cour suprême établissait deux présomptions applicables en matière d'unions quasi-matrimoniales de longue durée. La première a trait à la corrélation entre l'enrichissement d'un conjoint et l'appauvrissement de l'autre. Monsieur le juge Cory écrit qu'«on devrait, en l'absence d'une preuve contraire forte, conclure que l'enrichissement d'une partie donnera lieu à l'appauvrissement de l'autre». La seconde présomption a trait à l'absence de justification. Madame la juge McLachlin rappelait qu'un conjoint de fait n'est pas tenu par la loi de travailler pour son conjoint ou de lui fournir des services et qu'il n'y a pas lieu de distinguer les services domestiques ou ménagers rendus des autres contributions. La Cour suprême reconnaissait enfin deux méthodes de calcul de la contribution, soit celle de la valeur reçue et celle de la valeur accumulée laquelle, précisait-elle, est souvent préférable.

Now, Guibault J. does not dispute the dictum of *Peter v. Beblow* that «l'amour entre les conjoints ne constitue pas une justification pour une situation qui se caractérise objectivement d'exploitation.» However, this dictum does not do much to help if *de facto* unions are only measured by one standard: compensation in the event of objective *exploitation*, a word with a heavy connotation indeed. What about compensation based on the notion that if the common endeavours of the couple in the *de facto* union lead to the assets being held in the name of *one* partner, then there has been an unjust enrichment? In other words, even if the wife in this file did not meet a standard of *exploitation*, because the partners worked together in building the business, raising the children, and so on, that does not mean that in the outcome – husband with a home and a business and a revenue stream, wife with no home, no business, and welfare benefits as *her* revenue stream – the *result* was exploitative.

The chilling effect of *M.B. v. L.L.*⁸⁷ is certainly felt when the trial judge refers to it as the countervailing argument to *Peter v. Beblow*:

[31] Tout récemment, en juillet 2003, la Cour d'appel infirmait un jugement de la Cour supérieure pour réduire de 50 000 \$ à 25 000 \$ la compensation à laquelle l'ex-conjointe avait droit pour enrichissement injustifié à l'issue d'une union de fait d'environ quatorze ans. Il s'agit de l'affaire de *B. (M.) c. L. (L.)*. Sous la plume de monsieur le juge Dalphond, la Cour d'appel prend la peine d'adresser certaines mises en garde relatives à l'exercice en droit québécois du recours en enrichissement injustifié. Après avoir rappelé que le législateur québécois a choisi de ne pas imposer de cadre juridique pour les conjoints de fait en cas de rupture, monsieur le juge Dalphond écrit:

«..., je crois qu'il serait inadmissible pour les tribunaux

⁸⁷ *Supra* note 9.

d'instaurer après la fin de la vie commune, soit a posteriori, à l'égard des biens accumulés pendant la vie commune, une société d'acquêts judiciaire ou un quasi-patrimoine commun par le biais d'une interprétation très libérale de notions comme l'enrichissement injustifié ou l'action pro socio. J'ajoute que les tribunaux québécois ne sont pas dans la même position que ceux des provinces de Common Law et ne peuvent créer de nouvelles institutions juridiques, ajustées aux besoins du moment, comme les fiducies par interprétation ou par déduction dont parle l'arrêt Pettkus c. Becker [1980] 2 R.C.S. 834.»

Guibault J. notes and reiterates that the doctrine of constructive trust cannot be imported into Québec civil law, already limiting the applicability of *Peter v. Beblow* in this province. Although this may narrowly be viewed as a fair observation, in light of the historical tug of war between “trusts” at common law and at civil law, it would not hurt to remember that narrow interpretations of family law provisions is almost invariably an independent source of profound injustice that hits ordinary citizens where it hurts. People are *not* educated, prepared or counseled to make wise economic decisions about their intimate lives. Imposing a standard of “narrow” interpretation is judicial constipation at its worst. The entire stream of Supreme Court judgments rendered prior to 2002 and analyzed in this article certainly went to great pains to explain the need for flexible and generous interpretations of the law to favour the effectiveness of remedial recourses.

Certainly, Guibault J. was not going to contradict the Court of Appeal:

[32] Il précise plus loin qu'il ne revient aucunement aux tribunaux, par une approche trop libérale – comme celle qui consisterait à vouloir faire correspondre automatiquement l'augmentation de valeur du patrimoine de l'un, entre le début de la vie commune et la rupture, à l'enrichissement donnant ouverture au recours – de créer une sorte de société d'acquêts entre conjoints d'unions quasi-matrimoniales. Il appartient au législateur seul de modifier le cadre juridique entre conjoints de fait, s'il le juge à propos. Il ajoute:

«39. Par conséquent, je suis d'avis que l'objectif d'une action en enrichissement injustifié ne doit pas tendre à un rééquilibrage des actifs ou à un partage des patrimoines de chacun accumulés pendant la vie commune, mais uniquement à compenser une partie pour un apport, en biens ou en services, qui a permis à l'autre de se trouver en une position supérieure à celle qui aurait été la sienne n'eût été de la vie commune, bref de l'enrichir. C'est le cas, notamment, de la femme qui entreprend la vie commune avec un homme et ses

jeunes enfants et qui, par la suite, s'occupe de l'entretien et de l'éducation desdits enfants, entretient et améliore sa propriété et pourvoit aux besoins de la famille, le tout sans rémunération, pendant que cet homme se consacre pleinement à sa carrière, ce qui lui permet de générer des revenus, d'éviter des dépenses, notamment pour la garde de ses enfants, et d'accumuler des actifs, comme dans l'affaire Peter c. Beblow, précitée.»

Clearly then, a woman may garner sympathy if she takes care of children not her own, but gets no credit for taking care of her children with her *de facto* spouse (the “justification” being the filial bond, no doubt), even if her *de facto* spouse is thereby liberated to engage in more economically advantageous endeavours. It is almost as if it is not sufficient for a *conjointe* (but not an *épouse*) to contribute to the union “normally” by bearing children or doing domestic work; she has to be “extra” special, as in being willing to take care of “his” children. In other words, *conjointes de fait* do not attract respect by *being* the *conjointe*; they have to be something else to be noted and to attract sympathy.

Also, trials such as the one described in *Lemire* are so tedious: this is why the family patrimony was created in the first place, to *prevent* trials like the one before Guibault J. where the ability of each spouse to detail the litany of domestic tasks or remunerative tasks determines who wins and who loses. And needless to say, in our mercantile world, the tasks that **men** do are **always** looked upon as more valuable and meritworthy of respect than the tasks that women do in the home, or with children.

12. A Sample Case to Show How Unjust Enrichment Can Provide the Remedy

In *Robitaille v. Lamontagne (Succession de)*,⁸⁸ a same-sex couple, Dr. Sylvie Robitaille and Lise Lamontagne, lived together in a *de facto* union. After a lengthy illness, and prolonged period of incapacity, during which Dr. Robitaille devoted herself to the care of Mrs. Lamontagne, the latter passed away, and litigation erupted.

Dr. Robitaille had made direct and considerable financial contributions to the acquisition and renovation of a first, and then a second, home registered in Mrs. Lamontagne’s name. Mrs. Lamontagne was the spouse with the considerably lower revenue, and once incapacitated by illness, in 1997, she could no longer work at all for the last 8 years of their relationship.

The siblings of the late Mrs. Lamontagne, who had not contributed to the care of their sister through the preceding years, acted quickly to expel Dr. Robitaille from the home she had lived in with her *de facto* wife, relying on the

⁸⁸ 2008 QCCS 140 (CanLII).

legal title of the home registered in Mrs. Lamontagne's name.

The Court has this to say about characterizing their relationship:

La relation de Lise Lamontagne et Sylvie Robitaille

[51] La preuve démontre de façon prépondérante que Sylvie Robitaille et Lise Lamontagne ont vécu en union de fait pendant au moins douze (12) ans.

[52] Le couple vivait une relation avec plusieurs des caractéristiques d'une union matrimoniale: résidence commune, partage de plusieurs dépenses, projets communs, secours et support mutuels dans la maladie et le travail. Elles n'avaient pas de cachettes financières l'une pour l'autre.

[53] Les derniers jours de la vie de Lise Lamontagne sont aussi très éloquents sur le lien de couple les unissant. Sylvie Robitaille se tenait au chevet de sa conjointe en phase terminale. Lors des discussions sur les arrangements funéraires avec la famille de Lise Lamontagne, elle insistait pour obtenir les cendres de sa conjointe. De plus, leurs adieux témoignent aussi de l'affection qu'elles avaient l'une pour l'autre.

[54] Même si leur vie de couple était cachée à la famille de Lise Lamontagne et n'était pas publique, cela ne change rien à la réalité. Elles étaient des conjoints de fait, tel que l'a d'ailleurs reconnu post-mortem la Régie des rentes du Québec qui verse à Sylvie Robitaille une rente de conjoint survivant.

[55] Dans les circonstances, nous estimons que deux (2) présomptions prennent naissance, en l'espèce, comme le soulignait la Cour d'appel dans l'affaire *M.B. c. L.L. précitée*:

« Deux (2) présomptions peuvent découler d'une union de fait de longue durée, à savoir corrélation entre enrichissement et appauvrissement et absence de motifs à l'enrichissement. »

Dr. Robitaille claimed the sum of \$ 194,264, which represented the sum of the cheques she had remitted for the purchase of the two properties, plus the cost of the funeral expenses she defrayed, and was granted \$ 152,443, the property having been sold for somewhat less than expected.

The reality is that Dr. Robitaille provided "domestic services" worth far more than the aggregate of the cheques remitted to buy the two properties. The daily care of an incapacitated spouse requires an investment of considerable time and money. Moreover, she had to support her ill spouse financially. Had Dr. Robitaille been recognized as the "legal" wife of Mrs. Lamontagne, she would never have

been expelled from the family residence; she would have had her family patrimony claim against the Estate; she would also have inherited two thirds of her late wife's estate.

This illustrates the limitations of the recourse of unjust enrichment, which, after all, was only as successful as it was in this case, because the claimant spouse had cheques to back up her direct contributions.

CONCLUSION

The Supreme Court has long recognized the “quasi-matrimonial” character of common law unions. **As La Forest J. put it so eloquently in *Egan*:**⁸⁹

Or, nombre des raisons qui sous-tendent l'appui et la protection qu'apporte le législateur au mariage se rapportent également aux couples hétérosexuels qui ne sont pas mariés. Un grand nombre de ces couples vivent ensemble indéfiniment, élèvent des enfants et en prennent soin suivant des instincts familiaux qui prennent racine dans la psyché humaine. **Dans l'exercice de cette tâche critique, dont bénéficie l'ensemble de la société, ces couples ont besoin de soutien tout autant que les couples mariés.** La langue a depuis longtemps capturé l'essence de cette relation dans l'expression «union de fait».

And the “typical” economic disadvantage often experienced by women both in marriages and in *de facto* unions is eloquently described by L'Heureux-Dubé J. in *Moge*:⁹⁰

Les femmes ont eu tendance à subir les inconvénients économiques qui découlent du mariage ou de son échec en raison de la répartition traditionnelle des tâches qu'on y retrouve. Dans l'histoire, ou du moins l'histoire récente, les femmes apportaient une contribution non monétaire à l'union conjugale sous forme de travail au foyer, notamment les soins du ménage et l'éducation des enfants. De nos jours, bien que de plus en plus de femmes travaillent à l'extérieur du foyer, leur emploi continue de jouer un rôle secondaire et des sacrifices doivent encore être faits pour des motifs d'ordre domestique. Ces sacrifices empêchent souvent la personne qui les fait (habituellement l'épouse) de maximiser sa capacité de gain parce qu'elle risque de renoncer à des chances de formation et de développement professionnel. Ces sacrifices peuvent aussi permettre à l'autre conjoint (habituellement l'époux) d'accroître sa capacité de gagner sa vie puisque, ainsi libéré des tâches assumées par l'autre, il peut envisager des avantages économiques. Cette

⁸⁹ *Egan v. Canada*, [1995] 2 S.C.R. 513 at para. 23, 1995 CanLII 98 (SCC).

⁹⁰ *Moge v. Moge*, *supra* note 6 at 861-862.

situation peut entraîner une certaine iniquité. Comme l'a mentionné G. C. A. Cook, «Economic Issues in Marriage Breakdown», dans R. S. Abella et C. L'Heureux-Dubé, dir., *Family Law: Dimensions of Justice* (1983), 19, à la p. 22:

[TRADUCTION] Les hommes et les femmes apportent tous deux des contributions non monétaires au ménage; toutefois, en général, les contributions non monétaires des femmes représentent une plus grande part de leur contribution économique totale. À l'époque où la rupture des mariages était rare, il n'y avait aucun motif de s'inquiéter de cet écart et il n'était donc pas nécessaire d'attribuer une valeur monétaire à la contribution économique des conjoints dans une relation complexe. Toutefois, lorsque la dissolution du mariage est devenue chose plus fréquente, des iniquités bien connues [...] sont nées de la tendance à considérer comme les plus importantes, lors de la répartition des biens, les contributions monétaires au profit de la famille . . . [Je souligne.]

En conséquence, pendant la durée du mariage, une telle répartition des tâches, tout au moins du point de vue économique, peut être tout à fait valable si elle résulte d'une entente entre les parties. Toutefois, à la dissolution du mariage, les contributions non monétaires de l'épouse peuvent donner lieu à d'importants désavantages sur le marché du travail. C'est alors que se font sentir les sacrifices consentis; la balance penche en faveur du mari qui est demeuré sur le marché du travail et s'est orienté vers l'extérieur du foyer. En fait, l'épouse se retrouve avec une capacité limitée de gagner sa vie alors qu'elle peut avoir contribué à améliorer celle de son conjoint.

Fortunately, the Supreme Court has long held that legal solutions are possible for *de facto* spouses, even in the absence of pre-existing statutory remedy, as McLachlin J. reminded us eloquently in *Peter v. Beblow*:⁹¹

Enfin, j'aborde l'argument que, parce que le législateur a choisi de priver les couples non mariés du droit de réclamer sur les biens matrimoniaux un intérêt calculé par rapport à la contribution des parties, le tribunal ne devrait pas appliquer la théorie de l'enrichissement sans cause reconnue en *equity* pour remédier à la situation. Cet argument semble également imparfait. **C'est précisément dans les cas où une injustice ne peut pas être réparée en vertu de la loi que l'*equity* joue un rôle...**

Cory J. also justified affording a remedy based on the reasonable expectation that married or *de facto* spouses would likely have about their unions.⁹²

⁹¹ *Supra* note 5 at 994.

⁹² *Ibid.* at 1022.

... Dans une relation matrimoniale ou quasi matrimoniale, je crois que les attentes des parties quant à leurs contributions et à leur intérêt sur les biens acquis sont fort différentes de celles des parties dans une opération commerciale. Comme je l'ai dit, il est peu probable que les couples examinent, au commencement de leur mariage ou de leur union de fait, la question des attentes concernant leurs droits juridiques. À mon avis, si on le leur demandait expressément, la plupart des couples répondraient probablement qu'ils ne s'attendent pas à être indemnisés de leur contribution. Ils diraient plutôt qu'ils s'attendraient, si jamais il y avait rupture, à un partage des biens ou de la richesse qu'ils ont contribué à créer. Ainsi, plutôt que s'attendre à être rémunérés pour leurs services, selon leur valeur marchande, les couples s'attendraient plutôt à avoir droit, en cas de dissolution de la relation, à une part équitable des biens ou de la richesse que leur contribution a aidé à acquérir, à améliorer ou à entretenir. C'est la réparation de la fiducie par interprétation qui semble le mieux adaptée aux attentes raisonnables des parties à un mariage ou à une relation quasi matrimoniale...

The Supreme Court clearly considers that *all* families serve a noble and necessary function in society, whether married or *de facto*. From this perspective, *all* discrimination between all forms of families (married v. *de facto*, opposite sex v. same sex, and so on) would be eliminated. This entails an equal and non-discriminatory societal recognition and protection of law which should then be afforded to *all* families.

Unfortunately, this reality, which should be as simple to implement for opposite sex couples as it was for same sex couples, raises a certain tension that exists in society at large. For some, equal recognition of *de facto* spouses would undermine the cherished “traditional” institution of marriage, by erasing the distinction between it and “concubinage.” For others, equal recognition of *de facto* spouses would undermine their rejection of the disliked “religious” or “patriarchal” institution of marriage. For yet others, equal recognition of *de facto* spouses undermines a notably irresponsible wish to escape the mutuality of obligations between conjugal partners that had heretofore been required of all married partners, in an era when marriage was still the universal norm.

I believe this is where the issue of “choice” becomes confounded. Individuals may have good personal reasons to want to be associated, or not associated, with the “baggage” associated with traditional marriage or religious marriage or common law marriage or *de facto* union. And make no mistake about it, every community brings its own prejudices and moral values as to the respect to be afforded, or not afford, to marriages or *de facto* unions!

But this has nothing to do with how society and the law must look at *all*

unions in its protective role of conferring rights and duties in interpersonal relationships. The *more* the nature of the interpersonal relationship goes to the foundation of society, and the *more* the interpersonal relationship may be fraught with economic and power inequalities, the *more* society has a stake in setting out those rights and duties, by law, however the individuals choose to characterize themselves.

Now, elsewhere in Canada, there has been a certain balance struck in the tension between recognizing and repudiating *de facto* unions. Statutes have evolved to provide the alimentary recourse, and the jurisprudence has evolved to provide the constructive trust recourse, interpreted, as we can see, to permit a true division of assets, and not only in value, but by right and title, at least in long-term *de facto* conjugal unions.

In Québec, we do not have a statutory recourse to alimony nor to division of assets nor even to the partition of the family patrimony. As for the jurisprudence, it is disappointing to read that “only common law judges” are in the enviable position of being able to create *nouvelles institutions juridiques*. Certainly, it is a generous philosophy of belief that the common law, like the Constitution, is a living tree (to borrow an expression), and waits to be discovered, and this does indeed permit common law jurists to craft remedies to injustices as they arise. But nothing prevents the civilian jurist from applying an «*interprétation très libérale*» to notions such as unjust enrichment or the action *pro socio*, if such liberal interpretation would eliminate *injustice* and hence yield *justice*. Why would it matter if such a liberal interpretation would result in a “quasi” family patrimony or partnership of acquests? Would the world come to an end and the heavens be torn asunder? All that is needed is strength of conviction and all that has been the problem until now has been a failure of courage and will.

And instead, once the Supreme Court’s judgments on constructive trust finally compelled the Québec courts to interpret the doctrine of unjust enrichment flexibly and liberally, the odd impact of *Walsh* has been to inspire the Québec courts to narrow their interpretation on quantum, save in the clearest of cases of economic contribution.

Nonetheless, if one reviews the corpus of the recent judgments on unjust enrichment, many judges act upon a certain tacit recognition that the common efforts of *de facto* spouses should condition the economic outcome between them at the end of their union. This is a valuable step forward, and one that is morally acceptable for many people, without entering into the politically charged discourse over “choice” that so stymied the Supreme Court in 2002 in *Walsh*.

So, we could then “choose” to continue with the piecemeal application of the doctrine of unjust enrichment in the effort to equalize the outcome for *de facto* spouses, or we could try to conceive of a better option, because, as was noted

in *Moge* by L'Heureux-Dubé J.:⁹³

... il faut tenir compte, dans les actions en répartition de biens matrimoniaux, du coût et de la complexité de la poursuite, lorsqu'elle est fondée sur les principes de la fiducie par déduction ou de la fiducie par interprétation. Face à ces préoccupations, le législateur a adopté des lois sur les biens matrimoniaux qui ont remplacé le pouvoir discrétionnaire des juges par des formules de répartition des biens...

and by McLachlin J.:⁹⁴

... La pauvreté est l'un des principaux problèmes qui résultent de la dissolution du mariage; elle ne devrait pas être aggravée par des procédures longues et coûteuses.

When Québec implemented the rules governing the family patrimony, this step eliminated a considerable portion of the claims for unjust enrichment or compensatory allowance, but for married spouses only! Why not simply extend the rules governing the family patrimony to *de facto* spouses, who, after all, form *families* just like married spouses? In this fashion, we would benefit from the lesson of history that the family patrimony was the cure, for married spouses, for the inadequacies of unjust enrichment and the then narrow interpretation of the compensatory allowance.

After all, the premise of the family patrimony legislation was to ensure that married spouses share equally in the results of their common endeavours. And the goal of the family patrimony was thereby to promote the economic equality of men and women in their unions. The legislator acknowledged thereby that “choice” at the outset of the union was not a sufficient protection for spouses to ensure economic equality in the outcome. Nor was it sufficient to declare the directive that spouses are supposed to take the moral and material direction of their family together. The formal equality mandated by the language of the *Civil Code* between husband and wife was found to be insufficient to ensure *real* equality between them at the end of their union.

These same social observations and socially desirable outcomes obtain for *de facto* spouses in their *de facto* unions.

Once the family patrimony rules are equalized between married and *de facto* spouses, that would leave the compensatory allowance (for married spouses) and unjust enrichment (for *de facto* spouses) as the twin recourses available to redress a far smaller number of special situations less likely to clog court roles. Of course, this begs the question of why we would have *two* legal recourses, that the

⁹³ *Moge v. Moge*, *supra* note 6 at 872.

⁹⁴ *Ibid.* at 883.

Court of Appeal has said are one and the same,⁹⁵ instead of harmonizing the two and calling them *both* the compensatory allowance.

Then, once the family patrimony and the compensatory allowance are harmonized, we are ineluctably led to the remaining issues of alimony and the matrimonial regime. Even in *Walsh*,⁹⁶ it was noted that a state of economic dependency may arise independent of the initial “choice” of the *de facto* spouses. But beyond this, in some cases, the impoverishment of the *de facto* wife may be in the diminishment of her earning capacity while the enrichment of the *de facto* husband may be in the embellishment of his earning capacity (according to L’Heureux-Dubé J.); it is not in the division of capital that the remedy will be found, but rather in the attribution of spousal support. It is certainly time this be recognized in Québec.

And finally, insofar as the legislator has left a certain degree of “freedom of choice” to married couples, who may jointly opt *out* of the default regime of partnership of acquests, to elect the conventional regime of separation as to property, surely it does not offend to implement this choice-based idea for *de facto* couples. Then, the grand majority of *all* couples would continue to *not* direct their minds to this choice at all (according to Cory J.), but would at least end up relieved and protected when, at the end of the union, there would be an equal sharing of the assets built up during the union, the fruit of their common endeavour.

Much was made in *Walsh*,⁹⁷ via the opinion of the sociologist, Margrit Eichler, of the sad story of Rosa Becker, the *common law wife* of Lothar Pettkus in *Pettkus v. Becker*.⁹⁸ Although Rosa Becker had been awarded \$ 150,000, which was half the value of her husband’s bee farming business, only \$ 68,000 was recovered, which went to defray her legal fees. Mrs. Becker then committed suicide, having collected nothing for herself, despite her landmark award. This is thought by some to justify a societal reaction where the government should be required to protect women economically, instead of requiring them to turn to their husbands first. Thus the individual responsibility of men within their families is replaced by the collective responsibility of society vis-à-vis women and their children.

With all due respect, this is not a valid response. Disengaging men from economic responsibility for their families deprives them of the satisfaction and honour imbued in their roles of protector and provider. When men were invited to join women and participate in the equally ennobling roles of caretakers and nurturers within the family, this was not achieved by telling women to abandon *their* traditional roles. Women can join men in being protectors and providers, without releasing men from any commitment to the families they form when they engage in a union, marital or otherwise, with women. Society has an interest in

⁹⁵ *Lussier v. Pigeon*, *supra* note 7.

⁹⁶ *Nova Scotia (Attorney General) v. Walsh*, *supra* note 8.

⁹⁷ *Ibid.*

⁹⁸ *Supra* note 50.

fostering the mutuality of *all* these roles between spouses, and thereby leaving the “freedom of choice” to the partners themselves to live their unions as best meets the needs of each individual family. This leaves the law in its proper role to support and protect *all* families, so that to the extent possible, the economic impact of the breakdown of any union is borne fairly and equitably by both spouses.