Concubines and Cohabitees: A Comparative Look at "Living Together"

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The author examines, from a comparative perspective, the law relating to the division of assets upon the termination of a relationship between cohabitees. After outlining briefly three possible approaches — the *laissez-faire* approach, the intention-based approach and the unjust enrichment approach — the author goes on to analyse each in the context of Québec civil law and of Canadian common law. He concludes that, broadly speaking, the two systems have adopted similar solutions to the problem of dividing assets at the end of a marital relationship, but that there is much greater divergence in the treatment of cohabitees. The common law has completed a transition from the harsh intention-based approach, to the use of the more flexible and fairer unjust enrichment principle. The civil law has experienced serious doctrinal difficulties in accomplishing a comparable shift. The civilian system tends to focus more upon rights within defined relationships than does the remedy-oriented common law. The common law could more easily produce a remedy for those who sought to share common assets without blessing the cohabitee relationship itself. The civil law, or more accurately, civilian legislators, found it more acceptable to ignore the relationship, than to sanction it in any way. Québec courts may be forced to step in to ameliorate the present unfair situation by applying the doctrine of unjust enrichment without the express approval of the legislature. The danger is that the courts will be forced to borrow unthinkingly from the common law, leading to confusion and doctrinal obscurity.

L'auteur examine dans le cadre d'une étude comparative, l'état du droit du partage des biens de concubins. L'auteur présente un bref exposé des trois façons d'aborder le problème (doctrines du laisser faire, de l'intention présumée des parties et de l'enrichissement sans cause), qu'il situe ensuite dans le contexte du droit civil québécois et du *common law* canadien. Il conclut que les deux systèmes ont adopté des solution semblables face au problème de la repartition des biens à la fin d'un mariage, mais qu'il existe d'importantes distinctions en ce qui concerne les concubins. Le *common law* a complété la transition d'un régime fondé sur l'intention présumée des parties vers un régime plus flexible et plus équitable fondé sur l'enrichissement sans cause. Cette transition ne s'est pas produite en droit civil, à cause de la tendance de ce système à porter plus attention aux droits des parties dans le cadre de relations reconnues que ne le fait le *common law*, axé sur les faits. Le *common law* était donc en mesure de fournir un recours à ceux qui voulaient partager des biens communs sans pour autant consacrer l'union de fait. Le droit civil, ou, plus précisément, les législateurs civilistes, a préféré ne pas tenir compte de cette union, plutôt que de la sanctionner d'une manière quelconque. Les tribunaux québecois pourraient donc être forcés à intervenir pour clarifier une situation injuste, en appliquant la doctrine de l'enrichissement sans cause sans l'approbation expresse du legislateur. Le danger reste que les tribunaux soient forcés d'emprunter aveuglément à la *common law*, ce qui risque de mener à la confusion, et à l'obscurité doctrinale.

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Synopsis

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Introduction

To regulate or not to regulate? The debate over the position which the law should adopt with regard to quasi-marital [1] relationships promises to be one of the most interesting issues in the family law of the 1980s. The legislative actors across Canada have all taken up preliminary positions, but without much sense of confidence or conviction, and one would not be surprised to see the stage rearranged totally by the end of the decade. It was perhaps the recent Canada-wide wave of legislation reforming matrimonial property relations which itself acted as a catalyst for debate. Prior to the reforms in the common law provinces, there was little difference [2] in the legal

[1] The question of terminology is a vexed one, all the more so given the comparative perspective of this article. The English civil law term "concubine" (exceptionally, "concubinary"; see art. 1657.2 *Civil Code*) seems to be falling into disuse, although it at least has the merit of certainty in the absence of a generally accepted replacement. The *Social Aid Act*, R.S.Q. 1977, c. A-16, subs. 1(d) extends its definition of "consorts" to "a man and a woman...who live together as man and wife" ("qui vivent ensemble maritalement"), thus avoiding the creation of a new label, and the *Workmen's Compensation Act*, R.S.Q. 1977, c. A-3 uses similar terminology in s. 49. The Civil Code Revision Office favoured "*de facto* spouses" but the use of the word "spouse" suggests a rigidity of approach which is probably not advisable. Many "*de facto* spouses" are unable to marry because of existing *de jure* spouses; many desire to eschew the institution of marriage in its entirety; and then there is the question of homosexual unions, which seem automatically excluded from recognition by a terminology importing a spousal qualification. Even if the Civil Code Revision Office thought that homosexual couples should not be assimilated to heterosexual couples for the purposes of *de facto* spousehood, it would probably be best to leave the terminological door open, given the rapidly changing social climate of the 1980s. The continental expressions "*union de fait*" and "*union libre*" are preferable but leave one without satisfactory labels for the parties to the union — *partenaires*? *unités*? One thing is certain — the usage of "*époux de droit commun*", which one occasionally sees in the Québec cases, is to be avoided at all costs, because even in the common law, the expression "common law spouse" does not refer simply to two parties who are cohabiting as man and wife. Rather, a common law marriage is an alternative form of marriage which gives rise to the normal consequences of marriage. See W. Holland, *Unmarried Couples: Legal Aspects of Cohabitation* (1982) 9-10 and 14-28.

Writers in Canadian common law jurisdictions seem to have settled on the terms "cohabitation" and "cohabitees". See Holland, at 1-2 and Bala, *Consequences of Separation for Unmarried Couples: Canadian Developments* (1980) 6 Queen's L.J. 72, especially fn. 3. It is proposed to use these terms in the absence of any better alternative, without suggesting that they be the definitive phrases for either the civil law or the common law. They at least have the advantage of casting the net as broadly as possible, a not inconsiderable benefit given the current turmoil in this area of the law.

[2] Assuming, of course, that there was no contract between the parties. As to whether the common law recognized "cohabitation agreements" between unmarried parties, see *infra*, note 22, and accompanying text. On the identity of treatment traditionally accorded spouses and cohabitees, see *Stanley* v. *Stanley* (1960) 23 D.L.R. (2d) 620, 625, (1960) 30 W.W.R. 686 (Alta S.C.) *per* Milvain J., *aff'd* (1960) 36 D.L.R. (2d) 443, (1960) 39 W.W.R. 640 (Alta S.C., App. Div.). For a more recent formulation, see *Pettkus* v. *Becker* [1980] 2 S.C.R. 834, 850, (1980) 117 D.L.R. (3d) 257, *per* Dickson J. [hereinafter cited to S.C.R.].

position of parties to marital or non-marital unions when questions of property division arose at the termination of the relationship.[3] However, once the various family law reform acts in common law Canada accorded to each spouse rights to equal division of certain assets upon termination of a marital relationship, an important distinction arose between married couples and others.[4]

In Québec too, Bill 89[5] has had a catalytic effect, though in a somewhat different way. While the existence in Québec of matrimonial regimes which, by definition, were unavailable to unmarried couples would tend to suggest that there was always a great distinction between property division upon the break-up of marital as opposed to non-marital unions, in fact, the distinction was not so great. Because separation of property was traditionally the most popular regime,[6] most spouses in Québec were free to regulate their economic relations by contract in as great or as little detail as they wished. As I will argue below,[7] cohabitees were probably free to do the same, even before the abrogation of art. 768 of the *Civil Code*.[8] In addition, in cases where an agreement led to an unconscionable result, certain remedies were available to the parties irrespective of whether they were married.[9] When the provisions of Bill 89 relating to the compensatory allowance [10] come into effect, the distinction between those within and without the charmed circle of marriage will again become important. Unmarried couples will, of course, not be able to avail themselves of the compensatory allowance, and will be left to whatever recourses are provided by the *droit commun*.

The purpose of this article is to examine, from a comparative law perspective, recent trends in the law relating to cohabitees in one specific but

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[3] As to the recourses available to parties to marital and non-marital unions at common law, see *infra*, Parts I(A) and II(A).

[4] The only province in which the division of property provisions may be extended to cohabitees is Newfoundland. Subsection 32(2) of *The Matrimonial Property Act*, S.N. 1979, c. 32, allows a man and woman who are cohabiting to adopt the provisions of the *Act* through a cohabitation agreement, after which it applies to them as if they were married.

[5] *An Act to establish a new Civil Code and to reform family law*, S.Q. 1980, c. 39.

[6] R. Comtois, *Traité de la communauté de biens* (1964), para. 374 (seventy-three *per cent* of married couples adopting separation of property in 1962). See also Rivet, *La Popularité des différents régimes matrimoniaux depuis la réforme de 1970* (1974) 15 C. de D. 613.

[7] See *infra*, note 64 and accompanying text.

[8] Accomplished by *An Act to establish a new Civil Code and to reform family law*, S.Q. 1980, c. 39.

[9] See *infra*, Parts I(B) and II(B).

[10] See Civil Code Revision Office, *Report on the Civil Code* (1977), vol. I, book II, arts 458-62, 533 and 559. These articles will apply, of course, to parties married under separation of property as well as to those married under other regimes. "Compensatory allowance", the phrase used in art. 559, is the rather lacklustre English version of the French *prestation compensatoire*.

crucial area: the division of their assets upon termination of the relationship. Following some criticisms of the current state of the law, I propose to offer some observations about current legislative policy with regard to cohabitees in general. In order to facilitate the discussion, I will use the following situation as a paradigm:

> Paul and Denise have cohabited for six years. During that time they have acquired certain moveables but their main asset is a house which is registered in Paul's name. Both parties contributed (Paul more than Denise) part of the down payment, and instalments on the mortgage or hypothec are paid from a fund to which Paul and Denise contribute approximately equal amounts. Both parties have spent many hours improving the house.

What is the legal situation of the parties when they decide to separate? The law could conceivably take one of three positions, which I will outline in summary fashion before proceeding to a more exhaustive analysis of the present situation and options for reform, focusing particularly upon where reform is needed most — in Québec.

I. Cohabitees and Separation: Three Approaches

A. *The Laissez-Faire Approach* [11]

Here the law would assume that the parties were the best regulators of their own affairs and would interfere as little as possible.[12] As the parties would be free to determine contractually the economic consequences of their relationship,[13] it is not for the law to intervene if they chose not to do so. Any personal property [14] to which Paul or Denise could establish title would belong to that party exclusive of any claim by the other. If neither party could establish ownership of a particular moveable, for instance, if the purchase receipt had been destroyed, presumably the personalty would be held in

[11] For a review of the *laissez-faire* approach in the common law, see *Niederberger* v. *Memnook* (1981) 130 D.L.R. (3d) 353, 356-7 (B.C.S.C.). For the civil law, see Brière, *Réflexions à l'occasion d'une réforme* (1970) 73 R. du N. 55, 56-7, citing Belgian jurisprudence.

[12] This would be a more modern justification of the *laissez-faire* approach. Traditionally, of course, the courts would not intervene in such disputes because of the "illicit" nature of the relationship.

[13] Such freedom is beyond doubt in Québec since the abrogation of art. 768 C.C. See *supra*, note 8.

[14] The terms "personal property", "personalty" and "moveable" will be used interchangeably throughout this paper.

common in equal shares by both parties.[15] As the object would obviously not be *res nullius*, no other solution seems possible, even for the holders of the *laissez-faire* view.

As for the house, Paul would be recognized as its sole owner. As Denise extracted no promise from Paul to repay the money which she contributed, nor any guarantee to attribute a share in the property to her, she would have no right to any interest in the property. Her payments would be characterized as gifts to Paul, or as contributions toward the household expenses of the couple, contributions which are not recoverable when the relationship ends.[16]

In summary, the law would be content to assume that proof of title or ownership entitles the holder to the exclusive enjoyment of the property in question. Only in cases where such proof is unobtainable would the law, Solomon-like, decree equal division.

B. *The Intention-Based Approach*

As mentioned earlier, cohabitees are now free to determine by contract the division of their assets upon separation. If they do so by means of an express contract, the only problem will relate to the interpretation of the document. If they do not, however, all is not lost. Implied contracts are a familiar feature of both the civil law and the common law, and there is no reason that two cohabitees could not conduct themselves in such a way as to indicate a common, though tacit, assumption that their assets were to be allocated in a particular way upon termination of the relationship.[17]

Any difficulties in this approach are mostly factual, not legal.[18] Given that direct evidence of intention is virtually always lacking in such situations, one is left in the unenviable position of having to draw inferences from conduct. The main controversy here has traditionally centred upon the identi-

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[15] The common law would say that the parties were joint owners of the property, with the right of survivorship operating. The statutory presumption that parties take as tenants in common (*i.e.* with no right of survivorship) applies only to land, not to moveables. See N. Palmer & E. Tyler, eds, *Crossley Vaines on Personal Property*, 5th ed. (1973) 56-7. The civil law would say that the parties held the property in a state of indivision, where, of course, no right of survivorship operates.

[16] For the common law, see Bala, *supra*, note 1, 128-9. The civil law position is discussed in Héleine, *Nouveaux propos autour des conflits entre mariage et concubinage: des solutions réalisant un heureux équilibre entre l'économique et le moral* (1980) 40 R. du B. 463.

[17] Common law lawyers would be more accustomed to characterizing this situation as implied (or resulting) trust rather than implied contract. For my purposes the difference is immaterial.

[18] But see McLean, comment, (1982) 16 U.B.C.L. Rev. 155, 159-60.

fication of particular types of conduct, such as contributions by labour rather than money toward the acquisition of assets enjoyed by the couple, which will or will not give rise to the required inference.

It is apparent that the *laissez-faire* and intention-based approaches are usually complementary. Although it might be possible for a court to say that the second approach was simply not open to cohabitees because of the nature of their relationship,[19] it is more likely that a court would accept the theoretical validity of the second approach, but simply hold that the facts necessary to support an inference of common intention were lacking. In the absence of sufficient factual underpinning, the intention-based approach fails and the *laissez-faire* view must necessarily be applied.

C. *The Unjust Enrichment Approach*

The final position which the law could adopt in order to resolve the Paul-Denise dispute would be to apply the general principle of unjust enrichment. This approach gives little heed to the intention of the parties.[20] It is a solution imposed by the law in order to redress an economic imbalance which has arisen as a result of the defendant's acts.[21] Its application to the cohabitee situation is simply one example of the operation of a wider principle which is largely unconcerned with the nature of the parties' domestic arrangements.[22]

II. Resolution of Property Disputes Between Cohabitees: The Intentiou-Based Approacb

A. *Canadian Common Law*

The common law recognizes a number of ways in which the party lacking title in our paradigm situation might assert a right to a share of property held by the party with title. In what follows, it is assumed that there was no express contract between the parties. We are dealing with trusts or contracts arising from implied intention, that is, an intention to be inferred from the parties' conduct.

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[19] Although theoretically possible in Québec, this avenue is, practically speaking, superseded now in common law Canada after *Pettkus* v. *Becker*, *supra*, note 2.

[20] Or at least to the intentions of the enriched party. The intentions of the impoverished party may still be relevant. See *infra*, Part II.

[21] The precise requirements of the common law and the civil law for actions based upon unjust enrichment are set out *infra*, Part III.

[22] Except, of course, in so far as those arrangements may be a justification for the enrichment which has occurred.

1. The Contractual Approach — Implied Partnership

As long as both parties had contractual capacity, there would seem to be no theoretical obstacle to establishing some form of consensual partnership arrangement, either with respect to all of their assets and liabilities [23] or with respect to the acquisition of a particular asset.[24] At one time in the not-so-distant past, judges suggested that such a contraet, "being founded on immoral consideration, would not be enforceable".[25] This opinion, however, was discredited completely by the early 1970s, and the contrary view was hailed as "more in accord with recent developments".[26]

But the partnership approach was never very popular with cohabitees, for obvious reasons. A disgruntled cohabitee usually sought only a share of a specific asset, typically a house or farm which had been acquired through the efforts of both parties. If a true partnership were established, there was a danger that the whole economic life of the cohabiting couple could be reopened by means of an accounting action. Both parties would be liable to contribute to the debts of the partnership in the "agreed upon" shares.[27] Both parties could presumably bind each other to third parties [28] respecting partnership obligations. In short, the partnership approach was too blunt an instrument for most cohabitation situations. It would be useful only where the cohabitees were actually running a business together, with most of the assets in the name of one party.

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[23] A partnership can exist in the common law although one party be exempted from responsibility for losses, provided this is made clear in the agreement. Partners will, however, share losses equally even if they share profits unequally, unless the contrary is stated in the agreement.

[24] This latter type of arrangement, limited to a specific object and pursued for a commercial objective, is often called a joint venture. It need not entail the full panoply of incidents of a true partnership, and is really only a particular type of contract.

[25] *Diwell* v. *Farnes* [1959] 2 All E.R. 379, 384, [1959] 1 W.L.R. 624 (C.A.) *per* Ormerod L.J. [hereinafter cited to All E.R.]. Hodson L.J. said, at 381, that "no contract or joint enterprise can be spelled out of their relationship of man and mistress". Willmer L.J., in dissent, approved the joint venture approach as theoretically available, although no contract had been alleged specifically in this case. His *dicta* were approved in later cases, notably *Cooke* v. *Head* [1972] 2 All E.R. 38, [1972] 2 W.L.R. 519 (C.A.) [hereinafter cited to All E.R.].

[26] *Cook* v. *Head*, *ibid.*, 41. See also *Pettkus* v. *Becker*, *supra*, note 2, 850.

[27] The common law provinces deal with this matter in their acts governing partnerships. See, *e.g.*, *Partnership Act*, R.S.O. 1980, c. 370, subs. 44(1). For the Québec civil law, see arts 1831 and 1848 C.C.

[28] G. Fridman, *Law of Agency*, 4th ed. (1976) 84-5.

2. The Trust Approach — Resulting Trust[29]

The resulting trust has enjoyed a certain popularity as a means of settling matrimonial property disputes in the common law. As common law jurisdictions did not recognize matrimonial regimes, and treated husband and wife as strangers where property was concerned,[30] the spouse with superior economic power was allowed to retain the major portion of the household assets free of any claim by the weaker spouse. If, however, there was any evidence, direct or indirect, of the spouses' intention to share the benefits of an asset held in the name of only one of them, the courts would give effect to that intention by means of a resulting trust.[31]

There was, of course, always a controversy over the nature of the evidence necessary to raise an inference that the parties intended to share. A direct cash contribution to the purchase of an asset, however, was almost always sufficient to give rise to the inference, absent any evidence of a donative intent. Indirect cash contributions (Denise pays the household expenses from her salary, allowing Paul to make the mortgage payments from his) were usually accepted,[32] but contributions of labour (Paul buys a run-down house, Denise alone does all the renovations), even where extensive, always presented difficulties.[33] The reasons for the difficulties will be discussed below.

Once the requisite intent was established, the court would declare that the spouse with title held the legal title in trust for both parties in the proportions which they had implicitly agreed upon.[34] If we assume, for the

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[29] The term is translated in the Supreme Court Reports as "fiducie par déduction". See *Pettkus* v. *Becker*, *supra*, note 2. For a more detailed analysis of the resulting trust, see D. Waters, *Law of Trusts in Canada* (1974) 277-322; and McLean, *supra*, note 18, 157-66.

[30] At least after the *Married Women's Property Act 1882*, 45 & 46 Vict., c. 75 (U.K.).

[31] See, *e.g.*, *Rathwell* v. *Rathwell* [1978] 2 S.C.R. 436, (1978) 83 D.L.R. (3d) 289 [hereinafter cited to S.C.R.]. A mere intent on the part of the party with title to benefit the party lacking title, unsupported by any consideration or contribution on the latter's part could not, of course, give rise to a resulting trust. Such an intent could only be legally binding if it took the form of a present declaration of trust, by which the party holding title would immediately divest himself of all or a part of the equitable interest in the property in question. See McLean, *supra*, note 18, 158. As to the declaration of trust in general, see Waters, *supra*, note 29, 125-8 and 141-7. The "intent" which the courts declare they are acting upon will be inferred, if at all, from some form of contribution by the party without title to the acquisition or maintenance of the asset in question. See *infra*, text accompanying notes 32 and 33.

[32] See, *e.g.*, *Madisso* v. *Madisso* (1975) 11 O.R. (2d) 441, (1975) 66 D.L.R. (3d) 385 (C.A.).

[33] See, *e.g.*, *Murdoch* v. *Murdoch* [1975] 1 S.C.R. 423, (1973) 41 D.L.R. (3d) 367.

[34] See, *e.g.*, *Rathwell* v. *Rathwell*, *supra*, note 31 (a fifty-fifty split); and *Heseltine* v. *Heseltine* [1971] 1 All E.R. 952, [1971] 1 W.L.R. 342 (C.A.) (seventy-five *per cent* to wife, twenty-five *per cent* to husband).

sake of convenience, that the parties had agreed to share equally, then the party without title would have a fifty *per cent* equitable or beneficial interest in the property itself, not just a personal right against the spouse holding title for the monetary equivalent of that half interest. In the common law system, establishing a resulting trust is tantamount to saying that the parties hold the property in common.[35] If the property is land, both parties have a right to its partition, be it physical or by means of sale and division of the proceeds.[36] The only way in which the interest of the party lacking title can be defeated is through the conveyance of the property by the party with title to a *bona fide* purchaser for value without notice.[37] Only in this instance is the interest of the party without title converted into a mere personal action against the party with title for the value of the property.

It is clear that the resulting trust device avoids many of the more inconvenient aspects of the partnership approach. The trust can accommodate a single asset or an entire complex business enterprise without difficulty. There is no problem with the party holding title binding the other party to third parties, for trustees are not agents of beneficiaries. The beneficiary will not be liable for the personal debts of the trustee, and may assert his or her interest even against the trustee in bankruptcy of the party with title. In the cohabitation context, the move from contract to trust also allows one to ignore any arguments based upon "illicit consideration".[38]

So far, I have been examining the use of the resulting trust in the matrimonial context but, as noted at the outset of this paper, the device was available equally to cohabitees.[39] Although the resulting trust doctrine developed centuries ago without any reference to spouses or quasi-spouses, it was adapted to the family law context quite readily.[40] Why, then, was it jettisoned by the legislatures (for married couples) and by the courts (for cohabitees)?

Judge-made law is often replaced by legislation because the former is not considered to create sufficiently clear norms capable of regulating the conduct

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[35] Though, of course, they hold only the equitable or beneficial title in common.

[36] All the common law provinces have statutes allowing for partition. See, *e.g.*, *Partition Act*, R.S.O. 1980, c. 369. Saskatchewan, the Yukon and the Northwest Territories rely upon the reception of the United Kindom partition statutes.

[37] For an explanation of these terms, see R. Megarry & P. Baker, *Snell's Principles of Equity*, 28th ed. (1982) 46.

[38] Even in *Diwell* v. *Farnes*, *supra*, note 25, the Court allowed the "mistress" to recover amounts which she had paid on account of a mortgage on the property in which she was alleging an interest, *semble*, on the basis of a resulting trust.

[39] See, *e.g.*, *Cooke* v. *Head*, *supra*, note 25; and *Eves* v. *Eves* [1975] 3 All E.R. 768, [1975] 1 W.L.R. 1338 (C.A.).

[40] Note, however, the criticisms made by McLean, *supra*, note 18, regarding the doctrine's extension to the matrimonial/cohabitation context.

of large segments of society. With the resulting trust doctrine, the problem was not so much a lack of clarity in the legal rule, as the uncertainty and inconsistency of its application.[41] The joint efforts of one couple in their pursuit of a farming enterprise, for example, could be seen by one court as clear evidence of a common intention to share the assets of that business[42] although the same court, differently constituted, could see similar efforts by one half of the couple as "the work done by any ranch wife".[43] As soon as one is obliged to draw inferences from conduct which may have spanned one, two or three decades, one enters a realm of shifting sands where the proper path is often a matter of sheer speculation. Less metaphorically, any court seized of such a matter would have little to guide it except its instinctive reaction to the plight of the parties. In the context of a cohabitee's claim, a court might allow itself to be swayed by unvoiced assumptions about the irregularity of non-marital unions, and therefore adopt the *laissez-faire* approach outlined above.

The evidentiary problem, however, was in a sense only a reflection of a broader issue: the extent to which "women's work" should be recognized in the context of marital or quasi-marital relationships. Here was the real battleground, one which the provincial legislatures were eventually obliged to enter. While the resulting trust had its uses, the courts were forced to apply it without any clear legislative statement as to what the balance of power within marriage (or for that matter, within the cohabitation context) should be. In the absence of direction on this crucial issue, the resulting trust approach was bound to give rise to haphazard results.

Moreover, as commentators pointed out,[44] the courts were not being totally honest about what they were doing. Just as courts once insisted that they merely ""discovered" the common law rather than creating or adapting it, so they insisted that they were merely "discovering" a pre-existing intention shared by the parties and giving effect to that intention. In reality, the courts were imposing a solution based upon the demands of changing social mores, a solution finally adopted for married couples and refined by the various provincial legislatures.[45]

If the resulting trust device was unsatisfactory from a doctrinal point of view where evidence of the parties' common intention was nebulous, there

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[41] The Supreme Court of Canada finally abandoned the resulting trust approach with regard to cohabitees in *Pettkus* v. *Becker*, *supra*, note 2, in favour of the unjust enrichment approach. For a critique of the resulting trust case law, see Waters, comment, (1975) 53 Can. Bar Rev. 366; and Oosterhoff, comment, (1979) 57 Can. Bar Rev. 356.

[42] *Rathwell* v. *Rathwell*, *supra*, note 31.

[43] *Murdoch* v. *Murdoch*, *supra*, note 33, 436, *per* Martland J.

[44] See, *e.g.*, Waters, *supra*, note 40; and Oosterhoff, *supra*, note 41.

[45] By "solution", I mean the ultimate solution of sharing family assets, not the technique by which that end was achieved.

was another potential remedy which did not depend on such evidence: the constructive trust.[46] Such a trust may be imposed by the court in order to remedy unjust enrichment, so that the enriched party is deemed to hold the legal title totally or partially for the benefit of the impoverished party.[47] This remedy will be examined in Part III, but first I will consider the experience of Québec civil law with intention-based remedies for our paradigm situation.

B. *The Civil Law of Québec*

As trusts can arise in Québec only if the required formalities are observed,[48] the only possible remedy based on implied intention which might be available to Québécois cohabitees is contractual. Although the jurisprudence on implied agreements to share property between cohabitees is sparse, such agreements were often considered in the spousal context, particularly where the spouses had married under the regime of separation of property.[49] It is to this area of the law that we now turn.

1. Innominate Contracts

Although the usual approach to the Paul-Denise imbroglio was to find an implicit contract of partnership between them,[50] other options were and are available to cohabitees in Québec. Where property was purchased solely in the name of one party, if the proceeds came from a joint bank account to

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[46] Translated in the Supreme Court Reports as "fiducie par interprétation". See *Pettkus* v. *Becker*, *supra*, note 2.

[47] Such has been the state of the law in the common law provinces since the decision in *Pettkus* v. *Becker*, *ibid.* Prior to that decision, the constructive trust was not viewed as a general remedy for unjust enrichment but only for particular examples of it, usually where a fiduciary relationship had been abused. The latter view still prevails in England and Australia (see, *e.g.*, *Allen* v. *Snyder* [1977] 2 N.S.W.L.R. 685 (C.A.)), although it has long been jettisoned in the United States. See A. Scott, *The Law of Trusts*, 3d ed. (1967), vol. 5, §462.

[48] Article 981a C.C. incorporates the formalities required for gifts *inter vivos* or wills.

[49] Until recently there has been a major difference of opinion between doctrine and jurisprudence on the question of the legitimacy of spousal partnerships. The generally negative attitude of most doctrinal writers stood in vivid contrast to the more tolerant and pragmatic view illustrated by many court decisions. It was not until relatively recently that the arguments for the validity of spousal partnerships were put forward. Marceau, *Le contrat de société entre mari et femme* (1959) 19 R. du B. 153. See now, Comtois, *La liquidation de la séparation de biens* (1981) 84 R. du N. 34; and Héleine, *Le contrat de société entre époux: d'hier à aujourd'hui* (1981) 15 R.J.T. 357. It is still possible, however, for a major text in this arca (E. Caparros, *Les Régimes Matrimoniaux*, 2d ed. (1981)) to avoid making any reference to the jurisprudence on implied partnerships and similar devices.

[50] See *infra*, Part II(B)(2).

which both had contributed, it might be inferred that both parties were to be co-owners.[51] The party lacking title could demand partition, or a share of the proceeds if the property had already been sold. A similar device is the *contrat de prête-nom*, where A alleges that property purchased by B was really purchased wholly or partly on A's behalf.[52] While both devices share the advantage that no *affectio societatis* need be proved,[53] they suffer from two drawbacks. First, absent an express contract, serious problems of proof will probably arise. Secondly, these devices work well only where one is dealing with contributions made in the form of fairly substantial sums of cash. It would be very difficult to imagine an agreement to become co-owners of property where one party's contribution is mainly in the form of services rendered after the date of acquisition.

2. Implied Contract of Partnership (*Société de Fait*)

If parties marry under the regime of separation of property, then in theory, their patrimonies remain distinct until the day the marriage is dissolved or until they change their regime, at which time assets are awarded to the spouse who can prove ownership. Failing proof of ownership by either spouse, an asset will be held in indivision by both.[54] The reality of marriage, though, does not conform to the watertight compartments of theory. Assets are sometimes financed by the funds of one spouse but put in the name of the other. Unremunerated labour flows from patrimony to patrimony, enabling one spouse to acquire or improve property. In short, on the day of dissolution, a spouse who had contributed roughly half of the parties' common capital might be left with very little. Having decided to abandon the conjugal bed, the parties were still obliged to share the Procrustean bed of their marriage contract in order to settle their disputes over property.

Or were they? In a number of cases, courts were able to find that spouses had established a type of partnership within the larger context of their regime of separation of property.[55] The partnership might relate to a particular asset[56]

[51] See, *e.g.*, *Charlebois* v. *Sabourin* [1977] C.S. 349. Although the decision of Major J. was overturned by the Court of Appeal (*sub nom Sabourin* v. *Charlebois*, C.A. (Montréal, 500-09-000 952-770) 1 June 1982), the majority did not quarrel with his view of the law. They merely differed upon the question whether the plaintiff had satisfied the burden of proof.

[52] See, *e.g.*, *Bliziotis* v. *Salemandras* [1963] C.S. 485.

[53] As must be shown in order to prove a tacit partnership. See *infra*, Part II (B)(2).

[54] Article 520 C.C.Q. (old art. 1439 C.C.).

[55] See, *e.g.*, *Cantin* v. *Comeau* [1972] C.A. 523; *Voyer* v. *Gilbert*, C.S. (Chicoutimi, 150-05-000 445-77) 28 May 1979; *Labelle* v. *Légaré* [1978] C.S. 1033; and *Invernizzi* v. *du Crest* [1982] C.S. 418. Although, in theory, such partnerships might have been found in the context of any type of matrimonial régime, in practice, cases almost invariably involved parties married under the separation of property regime. See Héleine, *supra*, note 49.

[56] In *Cantin* v. *Comeau*, *ibid.*, both spouses contributed money toward the building of a boarding house as well as labour in its operation.

or to the totality of goods acquired during marriage.[57] Because the *Civil Code* prescribes no particular formalities for such partnership agreements, it was possible to infer the requisite intention of the parties from their conduct. It was never totally clear whether the courts thought they were dealing with the partnership regulated by art. 1830 *et seq.* of the *Civil Code*, for they usually evaded the issue by referring to "*de facto* partnerships", "*sui generis* partnerships", or even (*ex abundante cautela*, no doubt), a "*société sui generis de fait*".[58] On occasion, however, judges did have recourse to some of the *Civil Code's* dispositions regarding partnerships [59] or commented that there was no distinction on a particular point between *de facto* partnerships and partnerships in general.[60]

There were always doubts whether such partnership agreements were valid between husband and wife,[61] but as the objections were based upon certain characteristics of the marital relationship, they did not apply to cohabitees. Cohabitees had to face a different obstacle: the allegation that any such contract between them was void, being founded on an illicit cause. Doctrinal writers have usually maintained that property-sharing agreements between cohabitees are void because their purpose is to compensate for the rendering of sexual services.[62] Although this view may have had some support in the case law,[63] it has now been rejected implicitly by the Québec Court of Appeal.[64] As the concept of public order and good morals in the *Civil Code* is

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[57] *Labelle* v. *Légaré*, *supra*, note 55.

[58] *Ibid.*, 1035.

[59] See, *e.g.*, *Invernizzi* v. *du Crest*, *supra*, note 55 (art. 1848 C.C. applied to determine respective shares in marital partnership of a restaurant business).

[60] See *Alary* v. *Vaillancourt* [1977] C.S. 81.

[61] Prior to the reform of 1964 (*An Act respecting the legal capacity of married women*, S.Q. 1964, c. 66), it was uncertain whether a married woman, even separate as to property, had capacity to enter such a contract. The traditional French position condemned the husband-wife partnership as an impermissible variation of the marital regime (immutable until 1965) as well as an interference with the husband's pre-eminent position within the family (old art. 1388 *Code Napoléon*). If the partnership had actually existed, however, it would be dissolved "*en équité*" in so far as it did not contradict the marriage contract. See Marceau, *supra*, note 49, 155-6. Although the Québec jurisprudence was more indulgent in this regard than the French (see the authorities cited by Marceau, at 172-3), the cases were by no means unanimous. See *Accessoires de Cuisine Ltée* v. *Page* [1953] R.L. 208, 217 (C.S.) ("Considérant que la défenderesse ne pouvait s'engager pour son mari ni former une société avec lui... .")

[62] See, *e.g.*, Ciotola, *Aperçu des conditions illicites et immorales* (1970) 72 R. du N. 315, 328; and R. Demogue, *Traité des obligations en général* (1923), t. II, no 804.

[63] Some of the older jurisprudence on the nullity of legacies to concubines (see, *e.g.*, *Vaudreuil* v. *Falardeau* [1950] R.P. 193 (C.S.)) could easily have been applied to avoid contracts between parties living in concubinage.

[64] *Richard* v. *Beaudouin Daigneault*, C.A. (Montréal, 500-09-000 582-791) 13 January 1982. Although a majority of the Court did not find sufficient evidence of a partnership agreement, all three members of the Court admitted that such an agreement was possible

fluid and not static, the two lines of jurisprudence should not be seen as inconsistent. They simply represent an evolution of attitudes over time.

Let us look more closely at the nature of these implied partnerships between spouses separate as to property, and between cohabitees. The facts in the cases on the subject bear a depressing resemblance to the common law cases on resulting trusts. All are variations on the Paul and Denise theme, with one exception: the female partner's contributions often take the form of labour rather than cash. Where cash has been contributed, there is generally no problem recovering it because gifts traditionally were forbidden between spouses and concubines.[65] In any case, gifts are not presumed: if the alleged donee fails to prove the requisite liberal intent, the "cause" of the contribution must be some type of promise to repay. Here one must answer the following question: Was the contribution made as a loan, to be repaid with or without interest, or was it to serve as partnership capital, entitling the contributor to its return with the appropriate share of profits? In the absence of any written agreement, one is left again in the realm of inferences drawn from conduct. Although the conbtributor will at least recover his or her capital (providing the other party is still solvent), the difference between the two approaches may be substantial where the assets in question have increased significantly in value. Finding a partnership will, of course, give rise to a type of *in rem* action allowing each party to share in the capital appreciation of partnership assets. A loan only entitles the lender to an *in personam* action against the borrower for non-payment.

There may be another explanation for cash contributions by spouses or cohabitees to the "common pool" — the satisfaction of household expenses.[66] While marriage contracts traditionally specified that the husband alone would bear all the household expenses, they also stipulated that the wife could not recover whatever she did actually contribute. Where wives made fairly substantial cash contributions which were used by the husband to acquire the matrimonial home or other immovables, it was held generally that such contributions were not made simply to defray household expenses.[67] Although there is officially no obligation between cohabitees to share house-

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between concubines. In France, too, the jurisprudence has admitted the possibility of tacit partnerships between cohabitees. See H., L. & J. Mazeaud, *Leçons de droit civil*, 6th ed. (M. Juglart 1976), t. I, vol. III, no. 708.

[65] Article 1265 C.C., abrogated by *An Act respecting matrimonial regimes*, S.Q. 1969, c. 77, s. 27. The old art. 768 C.C. allowed gifts between concubines only in so far as they did not exceed maintenance.

[66] See Comtois, *supra*, note 49, 41-2.

[67] See Brière, *Les charges du mariage* (1967) 2 R.J.T. 451; and *Charlebois* v. *Sabourin*, *supra*, note 51 (contributions by both spouses to joint bank account; home and other immoveables acquired in husband's name; wife's contributions not attributable to her share of domestic expenses). The Court of Appeal agreed with the trial judge on this point.

hold expenses, in practice the courts assume that they will look after their own domestic needs.[68]

It is when one considers the impact of services rendered between spouses or cohabitees that the greatest controversy arises. Although, in theory, the preceding account of the law should be valid for contributions either in cash or services,[69] in practice, the distinction assumes great importance. Courts are much more likely to assume that services rendered by one partner are simply contributions to household expenses.[70] Where married couples are concerned, there is often a tendency to dismiss summarily such contributions with the observation that the parties who choose separation of property are aware of the risks involved.[71] Cohabitees too, are deemed to know the risks they assume.[72] Such an approach simply begs the question. The "risks" are there only in so far as the court refuses to use the various legal techniques at its disposal to get rid of them. In order to establish an implicit partnership based on the provision of services, a wife had to prove either that her efforts during the marriage were superhuman,[73] or that she had contributed cash as well as services.[74]

Another control device which restricts the use of the *de facto* partnership is the concept of certainty. A partnership, like any other contract, must have sufficiently clear terms before it can be enforced. Presumably the respective contributions of each partner must be capable of ascertainment at the outset. There are obvious problems in satisfying this requirement where one is

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[68] And hence cannot usually claim support from ex-spouses or spouses from whom they are judicially separated. See *Lajoie* v. *Therrien* [1971] C.A. 493; *Michaud* v. *Bernier* [1976] C.A. 469; *Trudel* v. *Racine-Trudel* [1977] C.A. 51. *Cf. Rochefort* v. *Blanchard* [1978] C.A. 382; A. Mayrand, "L'obligation alimentaire entre époux séparés ou divorcés depuis le bill 8 et la loi fédérale sur le divorce" in *Lois nouvelles II* (1970); and Héleine, *supra*, note 16.

[69] Comtois, *supra*, note 49, 43 seems to suggest that a monetary contribution is necessary, but it is difficult to see why, in principle, this should be so. In *Cantin* v. *Comeau*, *supra*, note 55, the major part of the wife's contribution was clearly in her work. Why should it matter if she contributed no cash? An older line of cases allowed claims by the wife where she had contributed only her labour. See, *e.g.*, *Champagne* v. *Gougeon* (1939) 77 C.S. 76. Article 1830 C.C. obliges partners to contribute "property, credit, skill, *or* industry" [emphasis added]. While the French version uses "*et*" in the Wilson and Lafleur edition, the original text uses "*ou*".

[70] In the marital context, see *Lebrun* v. *Rodier* [1978] C.A. 380. For cohabitees, see *Richard* v. *Beaudouin Daigneault*, *supra*, note 64. *Cf.* the now-infamous statement of Martland J. in *Murdoch* v. *Murdoch*, quoted *supra*, text accompanying note 43.

[71] See, *e.g.*, *Lebrun* v. *Rodier*, *ibid.*

[72] As was the case in *Richard* v. *Beaudouin Daigneault*, *supra*, note 64, *per* Lajoie J.A.

[73] See, *e.g.*, *Labelle* v. *Légaré*, *supra*, note 55. There are grave doubts, however, as to the propriety of making an award based upon a *de facto* partnership during divorce proceedings, as Jasmin J. did.

[74] As in *Cantin* v. *Comeau*, *supra*, note 55.

inferring the existence of a partnership from a series of actions spread over a period of time, particularly where one party's contributions are mainly in the form of services. This fact should not be an insuperable obstacle however, because there are many commercial partnerships where one partner contributes only cash and the other only skill or industry. But the fact remains that a punctilious attitude towards the certainty issue will inevitably cause an alleged partnership to collapse like a house of cards.[75] Indeed, after cases such as *Beaudouin Daigneault,*[76] one must speculate whether there could ever be a *tacit* partnership which manifested the requisite degree of certainty. The problem does not lie in the fact that the courts are being over-scrupulous, but in the inherent unsuitability of the partnership concept as a tool for resolving these kinds of disputes.

If Denise manages to overcome all these obstacles and establish a tacit partnership, it is worth remembering that her remedies are more effective than those available to her if she succeeds in establishing liability based upon unjust enrichment.[77] First of all, if there is no agreement regarding the respective shares of the parties, each is automatically entitled to fifty *per cent.*[78] This result will virtually always occur if the partnership is based on inferences from the parties' actions. Secondly, as noted above, the action *pro socio* entitles each partner to a share in the partnership assets, rather than limiting recovery to a mere personal right against the other partner for the value of cash or services contributed. The difference between the two amounts could obviously be substantial if the assets in question have appreciated in value.

In summary, the *de facto* partnership is a very unsuitable device for settling property disputes between cohabitees, as it was for couples married separate as to property. It suffers from exactly the same defect as the common law resulting trust: the search for an elusive notional common intention arising from equivocal or incomplete facts. In both systems, the law is tolerably clear, but its application to concrete fact situations is intolerably arbitrary. This situation prompted a search for alternatives, to which I now turn.

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[75] As demonstrated in *Richard* v. *Beaudouin Daigneault, supra,* note 64. The dissenting judge, Paré J.A., agreed with the observations of the majority on the certainty issue.

[76] *Ibid.*, especially the remarks of Paré J.A.

[77] Discussed *infra,* Part III.

[78] Article 1848 C.C. See also *Invernizzi* v. *du Crest, supra,* note 55. *Cf.* the common law approach to constructive and resulting trusts, where the determination of the quantum of each party's interest is a question of fact in each case, with (ostensibly) no presumption of equal sharing. See sources cited *supra,* note 34.

III. The Unjust Enrichment Approach

A. *Canadian Common Law*

As noted above, courts were reluctant to vary the property relations of spouses or cohabitees in the absence of some agreement between them, however fictitious, dealing with the allocation of property on termination of the relationship. This attitude meant that one party might find himself or herself with virtually no reward for years of labour or for financial contributions to property owned by the other. In effect, the law was allowing, perhaps even encouraging, a state of affairs which was increasingly viewed as unacceptable by non-lawyers. How was the law to respond to this change in attitudes? By extending the restitutionary theory of unjust enrichment.

The difficulty with the application of unjust enrichment principles to the area of family property was the fact that the common law traditionally had awarded relief only in previously established instances of unjust enrichment.[79] Although Anglo-Canadian law recognized all restitutionary claims as unified by the *principle* of unjust enrichment, it did not admit that unjust enrichment could be a generalized source of *obligation*.[80] The law of restitution was not applied to proprietary conflicts within marital or quasi-marital relationships simply because such conflicts did not belong to the traditional province of restitutionary claims. It took a revolution in this traditional attitude towards restitution before cohabitees could seek remedies based on unjust enrichment. This revolution, consummated in *Pettkus* v. *Becker*,[81] elevated the notion of unjust enrichment to a generalized head of obligation and enshrined the constructive trust as its principal remedy.[82] I will now consider various aspects of the unjust enrichment approach in order to illustrate how it differs from the intention-based approach.

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[79] *Inter alia*, where money had been paid under mistake of fact, or as a result of duress, or for a consideration which had failed totally. See R. Goff & G. Jones, *The Law of Restitution*, 2d ed. (1978) 43-5. Following Goff and Jones, this article treats all claims based upon unjust enrichment under the rubric of "the law of restitution".

[80] Goff & Jones, *ibid.*, 13. As to the progression from principle to source of liability, see Klippert, *The Juridical Nature of Unjust Enrichment* (1980) 30 U.T.L.J. 356.

[81] *Supra*, note 2.

[82] When Dickson J. refers in *Rathwell* v. *Rathwell*, *supra*, note 31, 454 to the constructive trust as "a third head of obligation, quite distinct from contract and tort" he is, with respect, confusing the right (or obligation) with the remedy. It is clearly the concept of unjust enrichment which is the "third head of obligation", with the constructive trust merely one of the means by which the obligation may be enforced. See, *e.g.*, *Deglman* v. *Guaranty Trust Co. of Canada* [1954] S.C.R. 725, [1954] 3 D.L.R. 785, where the plaintiff succeeded on the basis of a head of obligation which was neither contract nor tort, but where there was equally no question of a constructive trust. It is submitted that Mr Justice Dickson's approach in *Pettkus* v. *Becker*, *supra*, note 2, is to be preferred to his statements in *Rathwell*.

1. The Role of Intention

The main theoretical difference between the resulting trust and the constructive trust based upon unjust enrichment is that the latter does not depend upon any evidence of intention.[83] One might qualify this statement by adding that, in a constructive trust, only the intention of the enriched party is clearly irrelevant. He cannot deny the rights of the improverished party by alleging that he never had any intention that the latter benefit from the property in question.[84] However, the intention of the impoverished party may be relevant in deciding whether the enrichment which occurred was "unjust", and whether restitutionary remedies are available at all. In *Pettkus* v. *Becker*, Dickson J. was careful to observe that Rosa Becker had a reasonable expectation of receiving an interest in the property in question and that Lothar Pettkus accepted the benefits of her labour under circumstances where he knew or ought to have known of her expectation.[85] If the impoverished party has contributed to the acquisition of property with the intent of making a gift to the enriched party, then, of course, there is no "unjust" enrichment. The donative intention of the impoverished party is sufficient justification for the enrichment which has occurred.[86] As long as the impoverished party did not intend to make a gift, it should not matter how one characterizes the intention with which he or she conferred a benefit on the enriched party.[87] Becker's reasonable expectations are an aid to finding unjust enrichment, but not a *sine qua non* of it. In short, one might say that while the intention of the parties is not germane to the availability of restitutionary remedies *per se*, their intent may be relevant in determining whether an unjust enrichment has occurred in the first place.

2. "Snbsidiarity" — Common Law vs Equitable Remedies

The prerequisites for unjust enrichment in the common law were identified by Dickson J. in *Pettkus* v. *Becker*[88] as an enrichment, a corresponding

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[83] See *Pettkus* v. *Becker*, *supra*, note 2, 843-4.

[84] All three Courts in *Pettkus* v. *Becker*, *ibid.*, for example, agreed that Pettkus never intended Becker to have any share in the bee-keeping business in which she was eventually held to have a half share. In the spousal context, see *Pratt* v. *MacLeod* (1981) 129 D.L.R. (3d) 123 (N.S.S.C., T.D.).

[85] *Supra*, note 2, 849.

[86] See Goff & Jones, *supra*, note 79, 25. The civil law is identical on this point. See G. Challies, *The Doctrine of Unjustified Enrichment in the law of the Province of Quebec*, 2d ed. (1952) 97; and J. Carbonnier, *Droit civil*, 7th ed. (1972), t. 4, no. 121.

[87] See McLean, *supra*, note 18, 170. One should add the proviso that the benefit must not have been conferred "officiously", which will rarely be a problem in the cohabitation cases.

[88] *Supra*, note 2, 848. He had set them out first in *Rathwell* v. *Rathwell*, *supra*, note 31, 455.

deprivation and the absence of any juristic reason for the enrichment. It should be noted that there is no requirement, as there is in the civil law, that all other recourses be previously exhausted. The subsidiary nature of the action *de in rem verso* in the civil law leaves open to doubt whether one can even bring such an action if one cannot meet a prerequisite for another form of relief.[89] There is no such problem in the common law: resulting and constructive trust are pleaded freely in the alternative,[90] as are contract and restitution. It might be said, however, that the constructive trust is "subsidiary" in a quite different sense than the civil law would understand the term. Once it has been determined that an unjust enrichment has occurred, the court must decide whether a common law or an equitable remedy will be imposed. The common law remedy will normally be a personal action of some sort,[91] and the equitable remedy the constructive trust, but equitable remedies are available traditionally only where common law remedies would be "inadequate".[92] It is worth lingering over this point, because it is noticeably absent from the judgment of Dickson J. in *Pettkus* v. *Becker*. The court found that the unjust enrichment of Pettkus lay in his acceptance of Becker's labour over a period of some fourteen years. Why was the appropriate remedy not a *quantum meruit* claim, in which Becker would have been awarded a reasonable remuneration for her services[93] and not a half share of the business? Here a closer examination of the facts becomes necessary. Dickson J. accepted the view taken by Wilson J.A. of the Ontario Court of Appeal, who noted that "[Becker] not only *made possible* the acquisition of their first property in Franklin Centre during the lean years, but worked side by side with [Pettkus] for fourteen years building up the beekeeping operation which was their main source of livelihood".[94] In other words, the value to Pettkus of Becker's services was not simply the market value of her labour, because, had he hired someone else to take her place, he would not have been able to set aside the savings necessary to acquire the properties in question. The common law *quantum meruit* remedy would be inadequate because it would not represent the real value of the services which Becker rendered. The best yardstick for

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[89] See discussion *infra*, Part III(B)(1).

[90] As they were in *Pettkus* v. *Becker*, *supra*, note 2. See also *Pratt* v. *MacLeod*, *supra*, note 84.

[91] *E.g.*, the action for money had and received where payment is made under mistake or compulsion; *quantum meruit*, for reasonable remuneration for services rendered; *quantum valebat*, for a reasonable price for goods supplied to the defendant.

[92] See H. Hanbury, R. Maudsley & J. Martin, *Modern Equity*, 11th ed. (1981) 38. The distinction arose out of the division of jurisdiction between the courts of common law and those of the Chancery.

[93] This is the approach that the civil law would take at present if the claim were based upon unjust enrichment. See discussion *infra*, note 128.

[94] (1978) 26 O.R. (2d) 105, 108, (1978) 87 D.L.R. (3d) 101 (C.A.) [emphasis added].

measuring the value of her labour would be the value of the business which that labour had helped to create. This reasoning is not made explicit in *Pettkus* v. *Becker* but it is submitted that it is the correct justification for the result reached.[95]

There may be cases where the contributions of one cohabitee are *not* important enough to demand the imposition of a constructive trust. If one partner already owned a business which was operating as a going concern when cohabitation commenced, then the proper remedy for a partner who subsequently worked in the business without remuneration would probably be *quantum meruit*. The important thing to remember is that there is a choice of remedies for unjust enrichment in the cohabitation context, and these remedies can be tailored[96] to achieve justice in the particular case. This fact deserves to be stressed because of the tendency to equate unjust enrichment as a head of obligation with only one of its possible remedies — the constructive trust.[97]

3. The Nature of the Cohabitees' Relationship

Must the cohabitees' relationship exhibit any particular characteristics before a restitutionary claim is available to one of them? Although in *Pettkus* v. *Becker*[98] the relationship lasted almost twenty years, in principle there

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[95] This approach to the interrelationship of common law and equitable remedies is somewhat unorthodox in that it suggests that the "inadequacy" threshold to equitable remedies is largely passé. After all, Dickson J. does not even consider whether a common law remedy would have been adequate. His approach is, however, consistent with the modern trend to avoid the niceties of traditional law-equity distinctions and to grant remedies, regardless of their origin, according to the justice of the case. See, *e.g.*, McLean, *supra*, note 18, 173; Girard, book review, (1981) 19 U.W.O.L. Rev. 381, 385; and *United Scientific Holdings Ltd* v. *Burnley Borough Council* [1978] A.C. 904, 924-5, [1977] 2 All E.R. 62, *per* Lord Diplock. The "inadequacy" threshold could always be resurrected as a control device, however, should the constructive trust prove to be too unmanageable a remedy. See Klippert, *supra*, note 80, 413.

[96] Subject to my observations in the preceding notes.

[97] As mentioned *supra*, note 82, even Dickson J. was guilty of conflating the right with the remedy in *Rathwell* v. *Rathwell*, *supra*, note 31. In few of the cases which follow *Pettkus* v. *Becker*, *supra*, note 2, is it made clear that there is, in fact, a choice of remedies; the courts impose a constructive trust or deny all remedy. See *McCauley* v. *Simpson* (1981) 26 B.C.L.R. 384 (S.C.); *Murray* v. *Roty* (1982) 36 O.R. (2d) 641 (H.C.); *Shupbach* v. *Rambo* (1981) 26 B.C.L.R. 154, (1981) 10 E.T.R. 305 (S.C.); *Rochon* v. *Emary* (1981) 26 B.C.L.R. 119 (S.C.); and Niederberger v. *Memnook*, *supra*, note 11. Two exceptions are *Kelly* v. *Bourne Estate* (1981) 50 N.S.R. (2d) 226 (C.A.), *aff'g* (1981) 45 N.S.R. (2d) 167 (S.C., T.D.); and *Yohnke* v. *Thomson Estate* (1981) 14 Sask. R. 129 (Q.B.) where an alternative claim in *quantum meruit* is considered briefly before being rejected by the Court.

[98] *Ibid.*

should be no magic in the duration of the relationship. In *McCauley* v. *Simpson*[99] the parties cohabited for only five years. MacDonald L.J.S.C. observed that "[t]here has either been unjust enrichment, or there has not been, and this can take place in five years, ten years, or twenty years".[100] He found that the relatively brief period of cohabitation did not prevent the impoverished party from alleging unjust enrichment,[101] but the brevity of the period, among other factors, was relevant to the determination of the *quantum* of interest to be awarded to the impoverished party. In the end, he imposed a constructive trust upon a twenty *per cent* interest in the relevant property.

Nor should there be any magic in the phrase "tantamount to spousal" used by Dickson J. to describe the relationship in *Pettkus* v. *Becker*. If unjust enrichment is truly based upon the three objective factors outlined by Mr Justice Dickson in *Rathwell*,[102] then restitutionary remedies should be available to parties cohabiting in any number of arrangements, regardless whether they behave as man and wife. Homosexual unions should not be treated any differently, nor, for that matter, should three unmarried siblings who inhabit a common house and share their resources but have no sexual relationship *inter se* at all.[103] The "spousal" element is germane only to the unjust nature of the enrichment. If, as in *Pettkus* v. *Becker*, the parties have been living together as man and wife, it is easier to label Pettkus' enrichment as "unjust" because it

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[99] *Supra*, note 97.

[100] *Ibid.*, 393.

[101] In *Niederberger* v. *Memnook*, *supra*, note 11, another case involving a five-year period of cohabitation, Bouck J. insisted that the relationship be a "lengthy" one before unjust enrichment could be alleged. His remarks were *obiter* as he found that there was no enrichment in any case, and it is submitted that Mr Justice Bouck's comments on this point should be approached with caution. It is the contribution by the impoverished party and corresponding inflation of the enriched party's patrimony that triggers the doctrine of restitution, not the time period over which those events occur.

The "lengthy" relationship qualification remains popular, however. See *Murray* v. *Roty*, *supra*, note 97 (seven to eight years sufficiently "lengthy"); and McLeod, annotation, (1981) 19 R.F.L. (2d) 165. Dickson J. probably did not have any magic figure in mind when, in *Pettkus* v. *Becker*, *supra*, note 2, 850, he spoke of "informal relationships which subsist for a lengthy period". In the next sentence he went on to state that the liaison in issue was no "casual encounter", and it is submitted that it is this qualitative difference, rather than any temporal distinction, which is relevant in determining whether unjust enrichment has occurred.

[102] See *supra*, note 88 and accompanying text.

[103] The applicability of resulting trust doctrines to any two or more parties living in homosexual, heterosexual or asexual unions was confirmed in Australia by the New South Wales Court of Appeal. See *Allen* v. *Snyder*, *supra*, note 47. The Court found that constructive trusts could not be imposed in such unions because of the lack of a fiduciary relationship between the parties, not because of the "illicit" nature of extra-marital liaisons. I am indebted to my colleague Professor W.H. Holland for bringing this case to my attention. See also Deech, *The Case against Legal Recognition of Cohabitation* (1980) 29 Int'l & Comp. L.Q. 480, 485.

contradicts the reasonable expectations of the impoverished party. However, there are undoubtedly many non-spousal situations where the enrichment would be equally "unjust". If the facts in Pettkus had been identical but the parties had been homosexuals, or brother and sister, would the enrichment have been any less unjust? Logically speaking, the answer must be — no.

There is one area, however, where the legal consequences of cohabitation may have an impact upon claims relating to unjust enrichment. In some provinces, a support obligation exists between cohabitees during cohabitation;[104] it may subsist even after the parties cease to cohabit. May an "enriched" cohabitee argue that any contributions in labour or money made by the other were made to acquit this obligation and hence did not give rise to unjust enrichment? If the enrichment is relatively modest, this argument might succeed.[105] On the other hand, if one party has been able to parlay the other's contribution for household expenses into a substantial amount of property, then, by definition, those contributions must have exceeded considerably what was necessary for the maintenance of the household. In such cases, a restitutionary claim should still be possible.

The nature of the cohabitees' relationship then, has very little impact upon the application of unjust enrichment principles. Although the emergence of unjust enrichment as a generalized, independent source of liability in Canadian common law occurred in a case dealing with cohabitees, it can be seen readily that *Pettkus* v. *Becker* is simply one example of the potentially vast realm of application of unjust enrichment principles.[106]

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[104] See the *Family Relations Act*, R.S.B.C. 1979, c. 121, s. 57; the *Family Law Reform Act*, R.S.O. 1980, c. 152, s. 15; the *Family Maintenance Act*, S.M. 1978, c. 25, s. 2; *The Maintenance Act*, R.S.N. 1970, c. 223, as am. by *The Maintenance (Amendment) Act, 1973*, S.N. 1973, No. 119, s. 5 (adding new s. 10A); the *Family Maintenance Act*, S.N.S. 1980, c. 6, s. 3 [the *Act* appears in the Consolidated Statutes of N.S. as c. F-22]; *An Ordinance to Amend the Matrimonial Property Ordinance*, R.O.Y.T. 1980 (2d), c. 15, s. 30.6(1); the *Child and Family Services and Family Relations Act*, S.N.B. 1980, c. C-21. For commentary, see Holland, *supra*, note 1, 102-18.

[105] *Niederberger* v. *Memnook*, *supra*, note 11, might be explained on this basis. The contributions of the male party in that case amounted to little more than the cost of room and board, and hence could be seen simply as his share of household expenses.

[106] Recently, courts have begun to apply restitutionary principles between husband and wife in those provinces where matrimonial property statutes have left gaps. In Ontario, for example, the *Family Law Reform Act*, R.S.O. 1980, c. 152, s.4, does not mandate sharing of family assets where one spouse dies. The Ontario Court of Appeal decided recently in *Kiss* v. *Palachik* (1981) 34 O.R. (2d) 484, (1981) 130 D.L.R. (3d) 246 (leave to appeal to the Supreme Court of Canada granted 17 December 1981; judgment rendered 17 May 1983) that a widower might establish an extra-statutory constructive trust against the estate of his deceased wife where he had contributed labour and money to property registered solely in her name. See also *Pratt* v. *McLeod*, *supra*, note 84, where one spouse died before the Nova Scotia *Matrimonial Property Act*, S.N.S. 1980, c. 9 [the *Act* appears in the Consolidated Statutes of N.S. as c. M-40] came

4. Evaluation of the Unjust Enrichment Approach

In *Pettkus* v. *Becker*,[107] Dickson J. cited the observation of the Supreme Court of California in *Marvin* v. *Marvin*[108] that the constructive trust was available to give effect to the reasonable expectations of the parties, and to the notion that unmarried cohabitants intend to deal fairly with each other. If "reasonable expectations" are indeed a crucial issue, one might well ask whether any progress has been made at all. Have the courts simply reproduced the resulting trust under another name, pulling the same rabbit out of a different hat, as it were? Although it is still rather early to make predictions (*Pettkus* was only handed down on 18 December 1980), the answer would seem to be — no. There already have been numerous cohabitee cases which have applied *Pettkus*,[109] and, as yet, there has been no backsliding from "reasonable expectations" to "common intention". Reasonable expectations are, after all, a matter of policy rather than evidence. An impoverished cohabitee does not have to prove that his or her reasonable expectations were frustrated in order to succeed; the courts now assume that inherent in the relationship of cohabitees is the notion of fair dealing. Neither party is deemed to intend to exploit the other economically, hence the burden is on the enriched party to explain any increase in his or her patrimony which seems to have been gained at the expense of the other. This approach demonstrates a marked contrast with the resulting trust approach, where the party without title had to show that a common intention to share could be gleaned from the parties' conduct. Freed from the shackles of common intention, lower courts seem to be applying unjust enrichment principles in a manner consistent with the spirit of *Pettkus* v. *Becker*.[110]

Is the unjust enrichment approach susceptible to criticism from another point of view? Does it, as Martland J. feared, "clothe judges with a very wide power to apply... 'palm tree justice' without the benefit of any guidelines"?[111] Once again, if one examines the jurisprudence subsequent to *Pettkus* v.

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into force. The *Act* was held not to be retroactive, but the widow was granted a one-half interest in the matrimonial home on the basis of the common law of unjust enrichment. For a general survey of the interaction of matrimonial property statutes and the law of restitution, see McLean, *supra*, note 18, 178-83.

[107] *Supra*, note 2, 850.

[108] 557 P. 2d 106 (1976).

[109] See, *e.g.*, *McCauley* v. *Simpson*, *supra*, note 97 (an eighty-twenty *per cent* division); *Murray* v. *Roty*, *supra*, note 97 (a sixty-forty *per cent* division of one piece of property, an eighty-twenty *per cent* division of another); *Shupbach* v. *Rambo*, *supra*, note 97 (a seventy-thirty *per cent* division of house and sailboat); and *Rochon* v. *Emary*, *supra*, note 97 (fifty-fifty *per cent* division).

[110] See the cases cited *ibid.*

[111] *Pettkus* v. *Becker*, *supra*, note 2, 859.

Becker, the answer would appear to be — no. Judges do not seem to be lamenting the absence of guidelines, or throwing up their hands in despair at the confused state of the law. In fact, if Martland J. had analysed the existing law more closely, he could have identified many control devices which delimit the parameters of remedial relief available in cases of unjust enrichment. Indeed, when an Ontario trial court judge purported to reduce the whole law of restitution to the question whether the result reached in any particular case was "in accordance with good conscience",[112] the Court of Appeal retorted: "If this were a true statement of the doctrine then the unruly horse of public policy would be joined in the stable by a steed of even more unpredictable propensities".[113] The Court proceeded to enumerate, without claiming to be exhaustive, the various control devices which mark the boundaries of the law of restitution.[114] As a final rejoinder to those who would equate unjust enrichment with uncertainty, one could reiterate the observation of Goff and Jones that "[t]he search for principle should not be confused with the definition of concepts".[115]

B. *The Civil Law of Québec*

Given the long history of unjust enrichment as a separate head of obligation in the civil law,[116] it is perhaps surprising that the occasion has seldom arisen for its application to cohabitees. In France, the doctrinal writers have remained adamant that the action *de in rem verso* cannot apply between cohabitees. Their attitude seems to be based purely and simply on a policy of discouraging the *union libre* wherever possible because of its "destabilizing" influence on family life and society in general.[117] While attitudes in Québec towards cohabitees are more relaxed, there seems to be some resistance to the idea that unjust enrichment principles may apply between them. This resistance is based partially upon doctrinal difficulties and partly upon the reluctance of courts to get involved in property disputes between cohabitees. I will consider first the theoretical difficulties involved in adopting the unjust enrichment approach.

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[112] *Nicholson* v. *St Denis* (1974) 4 O.R. (2d) 480, 486, (1974) 48 D.L.R. (3d) 344 (Dist. Ct) *per* Gould D.C.J.

[113] *Nicholson* v. *St Denis* (1975) 8 O.R. (2d) 315, 317, (1975) 57 D.L.R. (3d) 699 (C.A.) *per* MacKinnon J.A.

[114] For a more synthetic approach, see Klippert, *supra*, note 80, 371-6.

[115] Goff & Jones, *supra*, note 79, 11.

[116] See Challies, *supra*, note 86, ch. 1. See also the review undertaken by Beetz J. in *Cie Immobilière Viger Ltée* v. *Lauréat Giguère Inc.* [1977] 2 S.C.R. 67, 75-7.

[117] See, *e.g.*, Mazeaud, *supra*, note 64, no. 706; and G. Marty & P. Raynauld, *Droit civil* (1956), t. 1, no. 679. The jurisprudence has also maintained a very severe attitude towards the *union libre*.

1. Subsidiarity

While unjust enrichment is a generalized source of obligation in the civil law, there has always been some apprehension on the part of jurists that it would overwhelm or subsume all other categories of obligation if strict limits were not set upon its availability. It is for this reason that most doctrinal writers agree that claims based on unjust enrichment are "subsidiary". However, the concept of subsidiarity varies considerably. Certain authors claim that the action *de in rem verso* is subsidiary because it is essentially a judicial creation, and in a civilian system, the superiority of the *lex scripta* must always be maintained.[118] To this argument, René Demogue has replied that there is no dichotomy between the *droit d'équité* and the *droit formel*: the two form but one system of law.[119] A more common view of subsidiarity is that the action *de in rem verso* is allowed only when the plaintiff has no action based on a contract, quasi-contract, delict, or quasi-delict.[120] Here, however, one must ask *why* the plaintiff has no such action. If the plaintiff would have had a valid contractual claim, but has failed to prove a necessary element of it, or has let her claim become prescribed, then she equally will be forbidden from exercising a recourse based on unjust enrichment.[121] The *Cour de cassation* adopted this view in its most stringent form in a case where a man had effected considerable improvements to an apartment belonging to his mistress.[122] When his mistress refused to pay him after their separation, the court rejected his action *de in rem verso* because it was not impossible for him to have kept a written record of their agreement. As he had not done so, he was trying to supplement his defective action in contract with a claim based on unjust enrichment, and such a procedure is not permitted. Other writers take a much more lenient view of subsidiarity, or deny its existence altogether, saying that as long as there is no evasion of the law, the action *de in rem verso* should be allowed.[123]

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[118] See, *e.g.*, Rouast, *L'Enrichissement sans cause et la jurisprudence civile* (1922) 21 Rev. trim. dr. civ. 35, 104. Presumably the basis for this view was the *Boudier* decision, Cass. Civ. lère, 15 juin 1892, D.1892.I.596, wherein the Cour de cassation noted that "cette action... n'[a] été règlementée par aucun texte de nos lois".

[119] *Supra*, note 62, t. III, no. 78.

[120] See Cass. Civ. 1ère D.1920.I.102; and Mazeaud, *supra*, note 64, 5th ed. (M. Juglart 1973), t. II, vol. I, no. 706.

[121] See Carbonnier, *supra*, note 86, nos 120 and 121; and Mazeaud, *ibid.*, 6th ed. (M. Juglart 1976), t. II, vol. I, nos 707-9.

[122] Cass. Civ. 3e, 29 avril 1971, Gaz. Pal. 1971.I.554.

[123] See, *e.g.*, G. Ripert & J. Boulanger, *Traité de droit civil* (1956), t. 7, no. 764. Challies, *supra*, note 86, 142 states that he "can see no justification for treating the action *de in rem verso* alone of all actions as a sort of legal 'poor relation' which cannot coexist with another type of action".

All of these views have been adopted at one time or another by the courts of Québec or the Supreme Court of Canada.[124] Mr Justice Beetz has recently minimized the importance of the subsidiarity requirement [125] while the Québec Court of Appeal has insisted upon the strict view in a recent case dealing with cohabitees.[126] The point of this review is not to put forth the "true" version of the subsidiarity requirement, but to indicate that as long as the current controversy continues, the unjust enrichment approach will be an unsatisfactory basis for resolving property disputes between cohabitees in Québec. The current state of the law involves a classic dilemma: a cohabitee cannot allege unjust enrichment because her "real" recourse is contractual (the tacit partnership) and to allow her to do so would infringe the subsidiarity rule, but the degree of certainty required to prove the tacit partnership ensures that she will almost always fail![127] Despite the theoretical availability of the unjust enrichment approach, the number of obstacles which must be overcome in order to succeed make it unavailable in practical terms.[128]

2. Remedies for Unjust Enrichment

Here one finds major differences between the common law and the civil law. While the common law favours an *in rem* remedy — the constructive trust — for many unjust enrichment situations, the civil law recognizes only a

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[124] See, *e.g.*, *Pelletier* v. *Russell* [1974] C.S. 113 (alternative claim in unjust enrichment possible where plaintiff has inadequate evidence to prove the existence of a commercial partnership); *Robillard* v. *Robillard* (1935) 41 R.L. 346 (S.C.) (an alternative claim in unjust enrichment was possible where plaintiff was unable to produce written proof of a civil contract concerning a sum in excess of fifty dollars, in contravention of the requirements of art. 1233 C.C.); and *Orrell* v. *Tkachena* [1942] B.R. 621 (natural parents not allowed to bring an action *de in rem verso* against the person responsible for the death of their child, to recover sums expended on medical services, etc., despite the fact that art. 1056 C.C. excludes natural parents as beneficiaries of a wrongful death action).

[125] *Cie Immobilière Viger Ltée* v. *Lauréat Giguère Inc.*, *supra*, note 116, 77.

[126] *Richard* v. *Beaudouin Daigneault*, *supra*, note 64.

[127] Crudely phrased, this is the reasoning of the majority in *Richard* v. *Beaudouin Daigneault*, *ibid.*

[128] The unjust enrichment approach has succeeded, however, in at least one reported case. See *Paul* v. *Les Héritiers de Harold William Collins* [1977] C.S. 191, but the subsidiarity issue was not argued (female cohabitee worked without remuneration for five years in laundry business owned by male partner; recovery of value of services allowed against his estate on basis of unjust enrichment). Subsidiarity is only the major obstacle. Another difficulty which sometimes arises is the characterization of payments made or services rendered by one cohabitee as her share of the household expenses. The argument is similar to that presented *supra*, text accompanying notes 69 and 70, in the context of the *de facto* partnership. Here the satisfaction of the obligation to share household expenses is said to be the "cause" of the enrichment, negating the "unjust" element. The same observations can be made here as were made *supra*, text following note 105.

personal action against the enriched party for the amount of the enrichment. This approach means that the impoverished party can seldom share in any subsequent increase in value in the property to which she has contributed. If the enrichment takes the form of property which is subsequently sold, the impoverished party cannot "follow" it into the hands of a third party who takes with notice, as can the beneficiary of a constructive trust.[129] More importantly, if the enriched party goes bankrupt while still in possession of the property, the impoverished party ranks only as a general creditor in the civil law,[130] while her proprietary interest is insulated from the bankruptcy by virtue of the common law. Finally, the civil law imposes a ceiling on the amount recoverable by the impoverished party: in no case may it exceed the amount of the impoverishment.[131] The common law recognizes no ceiling where the constructive trust is concerned. If the personal remedies are chosen (*quantum meruit* or *quantum valebat*) then of course the "ceiling" will be the reasonable value of the goods or services provided.

Conclusion

A. *A Comparative Law Overview*

Are there any lessons for the comparative lawyer at the end of this excursion? If one takes an historical approach, it can be seen that, in Canada, the civil law and the common law have, broadly speaking, adopted similar approaches to the particular problem examined in this article. Both have proceeded from a *laissez-faire* view based on the undesirability of attributing any legal effects to non-marital unions, to a more indulgent approach which allows cohabitees to prove that the state of the title does not reflect accurately their respective interests. The interesting phenomenon for the comparatist is the tension between the solutions for matrimonial property problems and the solutions for property disputes between cohabitees.

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[129] It is uncertain what "with notice" will mean now in the common law since the release of the constructive trust from the shackles of the fiduciary obligation. Formerly, it was easy enough to tell whether a third party had or should reasonably have had notice of the breach of a fiduciary obligation. But now that a constructive trust may be imposed to remedy unjust enrichment pure and simple, how much knowledge should one impute to a third party? If I buy property from A whom I know to be cohabiting with B, am I deemed to know that B may have an interest in the property based upon her past contributions?

[130] Unless, of course, the impoverished party has previously obtained a judgment and registered it against the immoveables of the enriched party so as to create a judicial hypothec (arts 2034 and 2036 C.C.). In such cases, the impoverished party will be able to follow the property if it is subsequently sold (art. 2056 C.C.).

[131] See Carbonnier, *supra*, note 86, no. 121.

One notes an extraordinary similarity of approach in both legal systems to the resolution of matrimonial property problems.[132] Jurists in both systems struggled to find remedies to redress the inequalities which arose as a result of matrimonial regimes which treated spouses as strangers in property matters. At first, the courts were reluctant to intervene in matrimonial property disputes, and felt the need to rely on the intention of the parties themselves in order to vary the normal state of affairs. Judges relied on the techniques of their respective legal traditions in order to give effect to that intention, but the differences between the resulting trust and tacit partnership[133] should not obscure the fact that exactly the same process was taking place in both systems. On either side of the Ottawa River, courts justified their intervention in the economic affairs of married couples with the same rationale: we are only doing what the spouses implicitly agreed would be done. As we have seen, however, this approach involved certain difficulties in both systems, mainly centred on the fact that the intention of the parties was very much in the eye of the beholder. A legal doctrine which was so capricious in its application and so dependent upon legal fictions deserved to be replaced by a more reliable guide, as it was when the matrimonial property statutes were enacted.[134]

Where cohabitees are concerned, however, the similarities between the two systems are not so striking. In the common law jurisdictions, the courts completed for cohabitees what the legislatures had started for spouses. If the resulting trust had proved unsatisfactory for the resolution of disputes between spouses, why should cohabitees be hoist with the same petard? So ran the reasoning of the Supreme Court of Canada in *Pettkus* v. *Becker*.[135] The unjust enrichment approach may, at first glance, look as uncertain in applica-

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[132] This statement is obviously an oversimplification. In common law Canada, most of the statutes combine a more-or-less fixed division of "family assets" with a discretion to confer an interest in "non-family assets" upon the spouse without title if there has been unjust enrichment on the part of the spouse holding title. Even the division of family assets is based in part upon the idea of unjust enrichment, however, in that each spouse's contribution to family life is now considered worthy of some reward.

The Québec approach has been to take a global view of unjust enrichment during marriage, without reference to the concept of family assets (art. 559 C.C.Q.).

[133] The differences between these two institutions had little effect on the practical result in most cases. They both accomplished the same end: allowing the spouse lacking title to share in any capital increase in the value of assets subject to the trust or partnership, rather than limiting recovery to the original value of cash contributions or services rendered.

[134] The dispositions of Québec's Bill 89 (*An Act to establish a new Civil Code and to reform family law*, S.Q. 1980, c. 39), particularly those dealing with the compensatory allowance, seem incompatible with the continued viability of the *société de fait* as a tool for resolving matrimonial property disputes. Express partnerships with a genuine commercial flavour could presumably still co-exist with the new legislation.

[135] *Supra*, note 2.

tion as its predecessor, the intention-based approach, but the former has worked well in practice.[136] It combines the solidity of a clear general principle with the flexibility necessary to resolve a variety of particular disputes falling within the purview of that principle. The necessity of referring to established doctrines of restitution and constructive trust also circumscribes the initial generality of the unjust enrichment principle. In short, *Pettkus* v. *Becker* is a good example of the formulation of a rule at the right pitch, to borrow René David's phrase.[137] It is neither so broad as to provide little guidance in individual cases, nor so specific as to limit its range of applicability. In addition, it is accompanied by a cluster of existing sub-rules which will delineate its boundaries further.

The civil law of Québec has not, as yet, completed the transition to the unjust enrichment approach where cohabitees are concerned. The word "transition" is used with a certain sense of inexorability [138] because, as has been noted, enacted law in both Québec and the common law provinces, and judge-made law in the latter jurisdictions, have evolved toward an unjust enrichment approach to proprietary disputes between spouses and cohabitees respectively. There are, however, a number of doctrinal difficulties which arise in applying the civilian notion of unjust enrichment to cohabitees, as discussed earlier.[139] Before indicating how these difficulties could best be resolved, it will be useful to consider why the civil law has experienced some trauma in making the transition. Again, a comparative approach will be instructive.

The common law system has shown a marked preference for real or proprietary remedies in resolving the types of disputes discussed in this article. This preference was as much a feature of the intention-based approach as of the unjust enrichment approach. It would not be an exaggeration to say that the common law characterized these disputes as "property" problems rather than as "family law" problems, the law of trusts being simply an adjunct of property law in this context. The legal responsibilities of husband

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[136] See *supra*, note 97 and accompanying text.

[137] See R. David & J. Brierley, *Major Legal Systems in the World Today*, 2d ed. (1978) 86-93, for a discussion of the "pitch" of legal rules.

[138] Any comparatist familiar with the common law case law prior to the statutory reforms in the area of matrimonial property law will have a strong sense of *déjà vu* in reading the dissent of L'Heureux-Dubé J.A. in *Sabourin* v. *Charlebois*, *supra*, note 51. Her plea for the application of unjust enrichment principles in the spousal context where implicit partnerships cannot be proved mirrors precisely the dissent of Laskin J. in *Murdoch* v. *Murdoch*, *supra*, note 33. It will be remembered that it took five years for the heterodox to become acceptable in common law Canada. How long will it be before the approach of Madame Justice L'Heureux-Dubé becomes respectable in Québec?

[139] *Supra*, Part III(B)(1).

and wife, or of cohabitees, are not discussed in most of the cases,[140] and the main issue has usually been whether the contributions of the party lacking title were sufficient in kind and degree to give rise to a resulting or constructive trust. Even in the more recent cases, where the courts articulate clearly that they are using trust concepts to redress imbalances in marital or quasi-marital relationships, the whole discussion is still couched in proprietary terms. The shift to an unjust enrichment approach has not changed this underlying analysis, largely because the concept of unjust enrichment as a head of obligation has been identified too closely with one of its remedies, the constructive trust. Virtually all of the cases from common law jurisdictions which apply *Pettkus* v. *Becker* analyze disputes between cohabitees by asking whether the conditions for the imposition of a constructive trust have been fulfilled.[141] In short, the fact of cohabitation is relatively unimportant. The real issue is said to be whether a particular piece of property is subject to a constructive trust, and this can be resolved by reference to the principles of restitution and property law.

What a change when one looks at the civil law system! As Professor Merryman has noted, it is a great surprise for a common law lawyer to realize that "there is really no such field as property in the civil law".[142] What he means, of course, is not that there is no law of property in the civilian system but that property law does not have the same fascination nor the same comprehensiveness[143] for the civilian as for the common law jurist. It is simply not a category in which a civilian tends to think. What a common lawyer would characterize as a problem of property or trust, the civilian might analyze under the rubric of successions, family law, tutorship, or obligations. In other words, property law is more functional in the civilian system; it serves the needs of other areas of the law rather than remaining an entity unto itself. In the area of matrimonial property, for example, the accent is much more on the "matrimonial" than on the "property". The various community regimes which have always been a feature of civilian systems are based on the idea that the nature of the matrimonial relationship should determine the contours of the spouses' respective property rights. Thus, many of the basic concepts of civilian property law were altered markedly in order to serve the

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[140] The issue sometimes arose obliquely, in that a wife's contributions were sometimes characterized as mere "wifely duties" which did not give rise to any recognizable proprietary interest. Even here, however, the concept of "wifely duties" was not developed as an independent notion, as in the civil law, but was simply considered as another form of contribution which might or might not give rise to a trust.

[141] See, *e.g.*, the cases cited *supra*, note 97.

[142] See Merryman, *Ownership and Estate (Variations on a Theme by Lawson)* (1974) 48 Tulane L. Rev. 916, 917.

[143] See, on this point, F. Lawson, *The Rational Strength of English Law* (1951).

interests of the matrimonial regime. The rule that no one can be compelled to remain in undivided ownership [144] was suspended for community assets,[145] and the right of ownership itself is subject to a number of restrictions where the owner is married under a community or partnership of acquests regime.[146] The common law provinces have moved closer to the idea of a matrimonial regime with their family law reform legislation, but for the most part, they have altered existing property rights as little as possible. A spouse without title has no interest *per se* in the assets of the spouse holding title until the occurrence of certain specified events, among which even death is not included in all provinces.[147] Thus, in the majority of cases, the matrimonial property law reforms will have very little impact upon spousal relations. It is doubtless the shibboleth of property which has dictated the path that reform would take in the common law world. Rather than rethink the entire realm of matrimonial property law, the reformers set about in the traditional common law way to remedy the most pressing defects in the law by providing redress in certain "crisis" situations, but not otherwise.

Of what relevance is all of this to the law regarding cohabitees? My point is simply this: The common law has tended to view disputes between spouses or cohabitees regarding title to assets as "property" problems. In developing remedies for these situations, the common law relied upon a number of general principles of the law of property and trusts which could be transposed easily from marital situations to non-marital situations and which remain available for any type of relationship that may spring up in the future. The civil law, on the other hand, prefers to resolve these types of disputes by looking first to the nature of the parties' relationship, then deciding what legal consequences should flow from that relationship. And here is where the problem arises, because cohabitees simply do not exist in the civilian system. They have been virtually excluded from the *Civil Code* [148] and, apart from

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[144] See art. 689 C.C.

[145] See arts 1292 and 1425a C.C. Technically, of course, the spouses are not in a state of indivision as the community, a separate entity, owns the assets. However, the substance of the arrangement was co-ownership of the assets which could be prolonged until death or dissolution of the marriage over the objections of one party.

[146] See art. 494 C.C.Q. (partnership of acquests). See also arts 1292 and 1425a C.C. (community). Although it may be argued that these restrictions are not so much curtailments of property rights as incapacities imposed upon married women, it must be remembered that many of the prohibitions applied (and still apply) to husbands as well as wives (*e.g.*, the prohibition on gifts of acquests).

[147] For a survey of the relevant legislation, see A. Bissett-Johnson & W. Holland, eds, *Matrimonial Property Law in Canada* (1980); and McClean, *Matrimonial Property — Canadian Common Law Style* (1981) 31 U.T.L.J. 363.

[148] Article 1657.2 C.C. gives the lessee's "concubinary" the right to prolong the lease of the original lessee in certain cases. This is now the sole reference to concubines in the *Civil Code*.

scattered references in various social welfare laws, they have no legal existence. When a dispute arises between cohabitees, a court has literally nowhere to go to find legal rules to resolve it.[149] The court is told that concubinage is now "licit" since Bill 89, but that does not help in resolving particular disputes. Although, on occasion, courts have admitted that certain remedies open to spouses, such as the *de facto* partnership, might be available to cohabitees, the admission has been based on pure pragmatism because it is totally contrary to the civilian way of thinking to apply to cohabitees legal principles which are normally reserved for spouses. This reluctance is not necessarily based on any moral objection to non-marital unions *per se*. It would arise wherever unmarried parties, whatever the nature of their relationship, tried to avail themselves of remedies or obligations properly belonging only to spouses.

The history of the treatment of cohabitees by both legal systems has reflected very well the difference between a rights-based system (the civil law) and a remedy-based system (the common law). The latter did not have too much difficulty extending existing remedies to non-marital unions when social mores had evolved to the point where such solutions were seen as desirable. A rights-based system, on the other hand, tries to identify the type of right being dealt with, and then to tailor remedies to fit the situation. This has proved difficult in Québec because of the legislature's failure to give any guidance in defining the "rights" of cohabitees.[150] Until the courts are prepared to fill that gap — and the Court of Appeal as a body seems totally unwilling to assume this role[151] — we can expect reruns of *Murdoch* v. *Murdoch*,[152] cohabitee style, for years to come.

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[149] It is interesting to note the frequency with which common law decisions, particularly *Rathwell* v. *Rathwell*, *supra*, note 31 and *Pettkus* v. *Becker*, *supra*, note 2, are cited by Québec courts in disputes between cohabitees. See *Richard* v. *Beaudouin Daigneault*, *supra*, note 64; *Sabourin* v. *Charlebois*, *supra*, note 51; and *Labelle* v. *Légaré*, *supra*, note 55. In the writer's view, this tendency does not represent a sudden interest in comparative law or a concern for judicial comity across Canada. Rather, it illustrates well the current lacunae in the law (in the enacted law at any rate) of Québec on two very important topics. A judge who cannot find guidance within his or her home system, but who does not wish to be seen as a creator of new law, will invariably go elsewhere for support. In the Québec context, "elsewhere" usually means the Anglo-Canadian common law. Those who worry about the "purity" of the civil law would do well to keep this point in mind.

[150] For a critique of the current legislative policy (or lack thereof) regarding cohabitees, see Crépeau, *Les lendemains de la réforme du Code civil* (1981) 59 Can. Bar Rev. 625, 630.

[151] Paré and L'Heureux-Dubé JJ.A. seem to represent a minority view within the Court of Appeal, at least for the moment.

[152] *Supra*, note 33.

B. *Possible Avenues for Reform in Québec*

The current state of Québec law relating to property disputes between cohabitees is highly unsatisfactory. In principle, the courts are supposed to search for a fictional intent which they are unlikely to find; yet the fact that they might have found it precludes any recourse to the notion of unjust enrichment! Such is the result of the doctrine of subsidiarity. There is little doubt that the unjust enrichment approach is the only justifiable way to solve these disputes,[153] but there remains the question how that end should be achieved. Once again, a comparative perspective may be helpful.

In theory at least, the bulk of law reform in a civilian jurisdiction equipped with a civil code should be accomplished by the legislature. The Civil Code Revision Office did, in fact, recommend the official recognition of the relationship of *de facto* spouses and the establishment of prescribed legal consequences which would flow from that relationship.[154] Although the Office's recommendations did not cover the problems discussed in this article, they at least would have provided an initial framework for their resolution, and might subsequently have been amplified. The recommendations illustrate my earlier point about the framework within which civilians tend to think about these problems — they prefer to deduce from the nature of a particular relationship those remedies which should be available, rather than importing solutions willy-nilly from other areas of the law.

But how is reform to be accomplished when the legislature expressly refuses to change the law in a particular area, as was the case with the refusal of the *Assemblée Nationale* to effect the reforms suggested by the Civil Code Revision Office? The obvious answer, that reform must not proceed if the legislature has forbidden it, is not necessarily the correct answer here because the legislature expressly wished to validate *de facto* relationships.[155] If the legislature refused to specify the legal consequences of those relationsips, then the courts must do so. This is not heresy, but merely the normal relationship between court and legislature in a civilian system: the legislature

[153] Even those who argue against legal recognition of cohabitation admit that principles of unjust enrichment and constructive trust should continue to apply to cohabitees. See, *e.g.*, Deech, *supra*, note 103, 496-7.

[154] See Civil Code Revision Office, *Report on the Civil Code* (1977), vol. 1, book II, arts 49 and 338, and book III, art. 42. For reactions to these proposals, see Rivet, "Quelques notes sur la réforme du droit de la famille" in A. Poupart, ed., *Les Enjeux de la Révision du Code civil* (1979) 285, 296-8.

[155] Or at least this is the inference commonly drawn from the abrogation of art. 768 C.C. See Guy, *Les accords entre concubins et entre époux après la Loi 89* [1981] C.P. du N. 157. See also the remarks of the Minister of Justice, Marc-André Bédard on the second reading of Bill 89 in [1980] Journal des Débats, 6th Sess., 31st Legislature, 604.

enunciates broad guidelines and the courts fill the interstices of the legal fabric with sub-rules consistent with the original guidelines. In fact, the courts of Québec had already gone a considerable way toward defining the consequences of *de facto* relationships prior to Bill 89. They had recognized a support obligation during cohabitation [156] and had decided that a *de facto* spouse possessed a sufficient interest in his partner's well-being to bring an action under art. 1053 where the partner was injured by the fault of another.[157] These decisions suggest that the courts are prepared to take a relatively pragmatic approach to the problems arising from *de facto* relationships, recognizing that they constitute a social phenomenon which must be dealt with in a rational, consistent fashion.

There is really nothing to stop the courts of Québec from applying the doctrine of unjust enrichment, unfettered by the subsidiarity rule, in resolving property disputes between cohabitees. Such an approach would be consistent with the previous evolution of the law in Québec, and would give effect to the reasonable expectations of those considering cohabitation as an alternative to marriage. The fact that two parties may wish to avoid the legal consequences of marriage does not mean that they intend to exploit each other economically, and even if they did, there is no reason for the law to countenance such behaviour between cohabitees when it will not permit it between strangers. It is indeed ironic that the civil law, which has long recognized the existence of a generalized doctrine of unjust enrichment, should be so hesitant to apply it between cohabitees when the common law, which traditionally recognized only particular instances where unjust enrichment might be remedied, has recently proclaimed the merits of the doctrine as a means of resolving property disputes between cohabitees. It should be admitted frankly that the subsidiarity doctrine is simply a control device aimed at circumscribing the amorphous nature of unjust enrichment, in the same way that the pre-existing fiduciary relationship was traditionally a control device in the common law, restricting the availability of the constructive trust. As the common law world has begun to cast off the fetters of the fiduciary relationship, so should the civilians consider more critically the value and purpose of the subsidiarity rule.[158]

This article has dealt mainly with one specific problem which often faces cohabitees upon the termination of their relationship. It will be objected that this problem arises only in the context of those relationships (surely a small fraction of the total) where the parties have amassed sufficient property to make litigation worthwhile, and that conclusions reached here are not neces-

[156] *Supra*, note 68.

[157] See *Therrien* v. *Gunville* [1976] C.S. 777.

[158] As did Beetz J. in *Cie Immobilière Viger Ltée* v. *Lauréat Giguère Inc.*, *supra*, note 116.

sarily a guide to the resolution of larger issues relating to cohabitation. Those who oppose the legal recognition of cohabitation would argue that one could deal with the problems raised in this article by reference to existing principles of property law and unjust enrichment without otherwise legitimizing the relationship of cohabitees,[159] that is, without imposing an obligation of support, creating succession rights or allowing claims under fatal accidents legislation, worker's compensation statutes or similar enactments.

I would challenge this argument on two grounds. First, it is doubtful whether one *can* resolve property disputes between cohabitees without, at some point, touching the issue of the support obligation. If one treats cohabitees as strangers with regard to all financial matters, then one is hard pressed to explain the inevitable commingling of funds and property which characterizes the relationship of many cohabitees. If no support obligation exists, can the entire record of domestic accounts be reopened when the relationship terminates? Such a difficulty is sure to arise if one denies the existence of a support obligation between cohabitees. In fact, the courts have implicitly (in common law Canada) [160] and explicitly (in Québec) [161] recognized such an obligation, which demands that the partners contribute to the couple's welfare, in accordance with their respective means, while cohabitation lasts. This judicial recognition represents an effort to separate the couple's domestic finances from their extra-domestic affairs. Within the former sphere, sums paid to the "common pool" will not normally be recoverable, while in the latter sphere, contributions may give rise to the application of unjust enrichment principles depending upon the circumstances although, as noted above, unjust enrichment is more difficult to assert between cohabitees in Québec. Presumably, opponents of the legal recognition of cohabitation are not so concerned with this aspect of the support obligation as with the possible continuation of the support obligation after termination of the relationship.[162] This issue is admittedly crucial and it gives rise to my second argument in favour of broad legal recognition of cohabitation.

One opponent of the continuation of a support obligation after separation characterizes such payments as a deferred pension for sexual services, especially where the relationship has produced no children. In her view, such an obligation merely perpetuates the stereotyped view of women as dependent.[163] This may be so, but it does not seem to be much of a solution to tell a woman

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[159] See Deech, *supra*, note 103, 496-7.
[160] See, *e.g.*, Niederberger v. *Memnook*, *supra*, note 11.
[161] See *supra*, note 68 and accompanying text.
[162] See, *e.g.*, Deech, *supra*, note 103.
[163] *Ibid.*

with few marketable skills [164] to become independent, especially at a time of increasing unemployment and deepening recession. Denial of a continued support obligation means, quite simply, that many women are thrown directly onto the tender mercies of the welfare authorities. Is dependence on the State less irksome than dependence on a man? Admittedly, the mere existence of a continued support obligation would not guarantee its enforceability, and many women would, in any case, become dependent on state aid where their erstwhile partners were sufficiently elusive or insufficiently solvent. But such problems have not caused us to abandon the support system elsewhere. The existence of a guaranteed annual income for all would alleviate some of these problems, but until such a solution is adopted, the hard fact is that many women are in an economically underprivileged situation. The fact that the law must deal with this aspect of contemporary social reality does not prevent legislatures from encouraging change in other areas, for instance, by promoting equal pay for work of equal value, or increased educational opportunities for women.

Moreover, is it true to say that a continued support obligation is merely a pension for sexual services? In creating such an obligation, is the State not merely recognizing the element of reliance which characterizes the relationship of many cohabitees? This element of reliance may not exist at the outset, but it will almost certainly evolve if the relationship endures. This reliance gives rise to reasonable expectations which the law should protect. Of course, there is a circular argument here: Does the law confirm existing expectations or create them? Without conducting an opinion poll, it would be difficult to say. But one thing is certain: The law has become increasingly solicitous about protecting those who have (reasonably) relied to their detriment on the words or actions of others.[165] With the attenuation of the doctrine of freedom to contract, has come a concomitant increase in the number of non-promissory obligations to which individuals are subject. To argue, then, that cohabitees, having freely chosen their way of life, should freely choose the obligations that go with it, is to wax nostalgic for an era when, as Dr Grant Gilmore put it, "ideally, no one should be liable to anyone for anything".[166]

It is no doubt true that cohabitees may have different expectations from married couples, and that different forms of mutual reliance may arise. But that argument should not lead us to conclude that cohabitees ought to be exempt from regulation altogether; it merely suggests that regulation must be

[164] It is presumed that women possessing marketable skills would not need the benefit of an extended support obligation.

[165] See P. Atiyah, *The Rise and Fall of Freedom of Contract* (1979) 771-8.

[166] G. Gilmore, *The Death of Contract* (1974) 16.

tailored to meet their special needs and desires, with the realization that the marital model will not necessarily be apt for all people.

In the final analysis, the *laissez-faire* view, whether employed to resolve property disputes between cohabitees or to address other aspects of their relationship, is simply too facile to be effective. It solves problems by pretending they do not exist. Nor is it sufficient to say that the *droit commun* is adequate to solve all disputes between cohabitees. Although it was argued earlier that judge-made law has an important role to play in filling gaps in the legislative pattern, there comes a point where legislation should synthesize the jurisprudential experience and refashion it in the form of clear, abstract norms. This suggestion is particularly apt with regard to the support obligation, which is inevitably intertwined with most disputes arising out of cohabitation. Although, in Québec, the courts have stumbled along, on occasion, with a judicially-created support obligation, legislative norms would clearly be preferable. Again, such legislation need not mimic the marital model, nor the solutions adopted by the common law. It might provide for a continued support obligation only in exceptional circumstances, or only where children are involved. But this central policy issue in the field of cohabitation must be addressed in some fashion. The recent failure to act by the Québec legislature only increases the risk that common law solutions will be imported unthinkingly (as is already beginning), with the attendant risk of rendering a "mixed jurisdiction" merely a "mixed-up jurisdiction".