The Nature of the Quebec Partnership: Moral Person, Organized Iudivisiou or Autouomous Patrimony?

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While French Civil law does not hesitate to recognize the moral personality of partnerships, Quebec law is ambiguous, which has led some anthors to espouse the unsatisfactory theory that the partnership is a "restrained" moral person. The author believes that the influence of English law and the practise of commercial law are at the source of our hesitation to recognize the moral personality of partnership. The issue of the juridical nature of partnership, however, is of great importance in interpreting legal provisions or in deriving principles of suppletive law.

The author carefully analyses the legal rules of the *Civil Code of Lower Canada* and the *Code of Civil Procedure* as well as the case law and doctrine pertaining to partnership in order to determine the present state of Quebec law. The author begins by demonstrating that Quebec law clearly recognises that the partnership has a patrimony distinct from those of its members while rejecting the alternative thesis that partnership property is held by the partners in undivided co-ownership. According to the classical theory of the patrimony, which establishes an identity between the notions of moral personality and distinct patrimony, this observation would lead immediately to the finding that partnership is a moral person. But recent developments in Quebec law based on the notion of antonomous patrimony undermine the identity thesis and any quick, clear conclusions as to the juridical nature of the partnership. Fnrthermore, the denial to the partnership of certain attributes of moral personality, most notably the right to sue and be sued in its own name, leads the author to conclude that it remains uncertain that partnerships are moral persons, although a strong case is presented in favour of such a conclusion. Turning to the provisions to be introduced by the new *Civil Code of Québec*, the author notes that the last obstacles to the recognition of moral personality may have been removed. However, the *Civil Code of Québec* avoids explicitly recognizing the moral personality of partnership, leaving it up to the doctrine and courts to take the last remaining step towards its confirmation.

Alors que le droit civil français n'hésite pas à reconnaître la personnalité morale de la société, le droit québécois est divisé quant à sa nature juridique, ce qui a donné lieu entre autres à la thèse insatisfaisante selon laquelle la société ne serait qu'une personne morale « restreinte ». L'auteur est d'avis que c'est l'influence du droit anglais et la pratique du droit commercial qui sont à l'origine de l'hésitation qne marque le droit civil québécois à reconnaître la personnalité morale de la société. Or la question de la natnre jnridique de la société prend une importance considérable aussitôt qu'il s'agit d'interpréter les dispositions de notre droit s'y rapportant ou d'en déduire un corps de règles supplétives.

L'auteur nous présente une analyse approfondie des règles positives et jurisprudentielles concernant la société, ainsi que de l'analyse qu'en fait la doctrine, afin de faire le point sur l'état du droit québécois. Dans un premier temps, il démontre que le droit québécois est unaniine à reconnaître que la société possède un patrimoine distinct de ceux de ses membres, et à rejeter la thèse selon laquelle la société serait formée par la mise en commun de biens demeurant la co-propriété indivise des associés. Selon la théorie classique du patrimoine, qui voit une identité entre personnalité morale et possession d'un patrimoine, cette conclusion mènerait directement à la constatation de la personnalité juridique de la société. Cependant, dans un deuxième temps, l'auteur indique que la reconnaissance plus récente en droit civil de l'existence de patrimoines d'affectation remet en cause la thèse classique ; de plus, étant donné qne certains attributs de la personnalité morale, notamment le droit de poursuivre et d'être poursuivi en son nom propre, ne sont pas reconnus à la société, l'auteur estime qu'il demeure incertain qu'elle jouisse en droit québécois de la personnalité morale, tout en présentant un argument convaincant en faveur de cette conclusion. Se tournant enfin vers les dispositions du nouveau *Code civil du Québec*, l'auteur constate que les derniers obstacles à la reconnaissance de la personnalité morale de la société y sont peut-être levés ; cependant, le *Code civil du Québec* évite de reconnaître explicitement la personnalité morale de la société, laissant ainsi à la doctrine et à la jurisprudence de franchir le dernier pas vers sa consécration.

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Synopsis

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Introduction

Partnership is one of the oldest forms of business organization, tracing its lineage back to Roman law.[1] It arose out of the basic human need to pool resources to achieve a common goal. This article will consider the nature of the partnership governed by the *Civil Code of Lower Canada* (*Code* or *C.C.L.C.*) and as analyzed by subsequent doctrine and jurisprudence.

Partnership, as defined by the *Code*, has characteristics of both organized indivision and the corporation, and this inherent ambivalence makes it impossible to resolve the doctrinal difficulties by simply compiling a list of partnership characteristics.[2] A more fruitful approach, adopted in this article, is to consider the systemic bias towards the creation of moral persons in the Civil law generally, and more particularly in the context of Quebec.

Post-revolutionary France until the end of the 19th century was dominated by the theory of the legal fiction, under which moral persons could arise only

[1]B. Nicholas, *An Introduction to Roman Law* (Oxford: Clarendon Press, 1962) at 185.

[2]See such a list in C. Houpin & H. Bosvieux, *Traité général des sociétés civiles et commerciales*, vol. 1, 5th ed. (Paris: A.J.N.A., 1919) at para. 35ff.

by state intervention.[3] This theory was subsequently rejected by Civilian scholars and jurisprudence and superseded by the reality theory, a view that certain patrimonial associations are *de facto* entities in law with an existence independent of their members.[4] The modern Civil law thus enlists moral personality to further the collective interests of the group by allowing the partnership the multiple advantages of civil existence, such as the ability to acquire rights and obligations.[5] In English law, by contrast, the creation of artificial persons is a matter of public law, an exclusive preserve of the state.[6] An Anglo-American partnership, therefore, is not a distinct moral person.[7]

Quebec law is ambivalent regarding the nature of partnership because of the impact of French and English law on the legal system, as well as unique developments in Quebec law. The majority of doctrine and jurisprudence, most of it relatively old, supports the modern Civilian approach set out above in finding that the Quebec partnership has a distinct patrimony and is therefore a moral person.[8] On the other hand, the adoption of English public law in Quebec has

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[3]The capacity of moral persons to accumulate vast amounts of wealth was seen as a threat to democracy. The *Loi Le Chapelier* (14 June 1791) abolished all corporations (R. Legeais, *Droit Civil*, vol. 1 (Paris: Cujas, 1971) at 109). The decree of 18 August 1792 provided that "a truly free State suffers no corporations." See also M. Cantin Cumyn, "Les personnes morales dans le droit privé du Québec" (1990) 31 C. de. D. 1021 at 1029.

[4]J. Foyer, "Sens et portée de la personnalité morale des sociétés en droit français" in S. Bastid, R. David & F. Luchaire, eds, *La personnalité morale et ses limites* (Paris: L.G.D.J., 1960) 113 at 116; G. Ripert, *Traité élémentaire de droit commercial*, vol. 1, 8th ed. by G. Roblot (Paris: L.G.D.J., 1974) at 682. In 1891, the Cour de cassation recognized that civil as well as commercial partnerships, are moral persons (Cass. Req., 23 February 1891, D.P. 1891.I.337). The same Court in 1954 stated that moral personality is not created by law, but belongs in principle to all groupings with the possibility of collective expression in the defence of legitimate rights (Cass. civ. 2e, 28 January 1954, D.1954.Jur.217 (Annot. G. Levasseur)).

[5]The roots of civilian analysis are in Roman law. Although the Romans never evolved a coherent theory of legal personality, associations could be formed freely since the XII Tables and were treated as entities in law (Nicholas, *supra*, note 1 at 60). See M. Radin, *Handbook of Roman Law* (St. Paul, Minn.: West, 1927) at 266; Cantin Cumyn, *supra*, note 3 at 1028. After the Cataline conspiracy, the *Lex Julia de collegiis* established a regime of state licences for associations, but R. Saleilles notes that these served only to make associations legal, they were not formal state grants of moral personality, as found in modern corporate legislation (*De la personnalité juridique*, 2d ed. (Paris: Rousseau, 1922) at 61). However, the Romans did not view the ordinary contract of partnership as creating a new entity (P.F. Girard, *Manuel élémentaire de droit romain*, 8th ed. (Paris: Rousseau, 1929) at 611).

[6]Moral personality is a matter of public, not private, law (Cantin Cumyn, *ibid.* at 1025; E.C. Monk, "Partnership — The Theory of the Legal Entity" in *Le droit civil français : livre-souvenir des journées du droit civil français* (Montreal: Barreau de Montréal, 1936) 479 at 503). J.C. Gray writes that with the exception of the State, "corporations are the only juristic persons known to the Common Law" (*The Nature and Sources of the Law*, 2d ed. (New York: MacMillan, 1924) at 55). He adds: "The State may not have created a corporation, but unless it recognizes it and protects its interests, such corporation is not a juristic person..." (*ibid.* at 57).

[7]R.L. Simmonds & P.P. Mercer, *An Introduction to Business Associations in Canada* (Toronto: Carswell, 1984) at 48. Before the ascendancy of the Common law, the law merchant in England (*lex mercatoria*) viewed the partnership as an entity (J.A. Crane, *Handbook of the Law of Partnership* (St. Paul, Minn.: West, 1938) at 4, 10; W.B. Lindley, *Law of Partnership*, 15th ed. by E.H. Scamell & R.C. I'Anson Banks (London: Sweet & Maxwell, 1984) at 33).

[8]P.B. Mignault, *Le droit civil canadien*, vol. 8 (Montreal: Wilson & Lafleur, 1909) at 186; A. Perrault, *Traité de droit commercial*, vol. 2 (Montréal: A. Levesque, 1936) at 433; H. Roch & R.

carried with it English notions of corporate law. Therefore, some doctrine and jurisprudence, as well as most practitioners, espouse the Anglo-American conception of moral personality — that the only true moral person must be created by state incorporation and that partnership must be viewed as a form of organized indivision.[9] Finally, the Quebec legislator has recently indicated a willingness to allow autonomous patrimonies or patrimonies without owners, which runs against the majority position in French and Quebec doctrine. This development raises doubts about the simple equation: where there is a distinct patrimony, there must be a distinct personality. Therefore, it is possible to view partnership as an autonomous patrimony.[10]

An intermediate theory has developed in Quebec to resolve these contradictory influences: the theory that partnership is somehow a "restrained" or "imperfect" moral person.[11] This theory should be rejected as a needless complication of an already complex subject. A hierarchy of moral persons with the corporation at the top is not only bad law, but serves no practical purpose, whereas a clear conception of the nature of partnership as either moral person, organized indivision or autonomous patrimony provides the suppletive rules where the law is silent or ambiguous.[12]

Paré, *Traité de droit civil du Québec*, vol. 13 (Montreal: Wilson & Lafleur, 1957) at 339; N. L'Heureux, *Précis de droit commercial du Québec*, 2d ed. (Quebec: P.U.L., 1975) at 162, 171; J. Smith, "La personnalité morale des groupements non constitués en corporation" (1979) 81 R. du N. 457 at 462; A. Bohémier & P.P. Côté, *Droit commercial général*, vol. 2, 3d ed. (Montréal: Thémis, 1986) at 20; J.-P. Verschelden, "Accidents du travail et société" (1966) 26 R. du B. 586 at 588.

There is disagreement as to whether this conclusion is founded upon the reality of the partnership entity (N.N. Antaki, "Commentaires concernant le contrat de société" (1988) 29 C. de D. 1019 at 1033) or upon the implied intention of the legislator (Perrault, *ibid.* at 431). Ironically, implied intention was rejected in Quebec in the case of labour unions (*Society Brand Clothes Ltd* v. *Amalgamated Clothing Workers of America*, [1931] S.C.R. 321, 3 D.L.R. 361), although not in English Canada (*International Brotherhood of Teamsters* v. *Therien*, [1960] S.C.R. 265, 22 D.L.R. (2d) 1), results that run counter to the traditional biases of each system towards the creation of moral persons.

[9]Monk, *supra*, note 6; G. Trudel, *Traité de droit civil du Québec*, vol. 2 (Montreal: Wilson & Lafleur, 1942) at 453ff.; *Brown* v. *Taylor* (1905), 28 C.S. 462. Cantin Cumyn criticizes this narrow conception of moral personality (*supra*, note 3 at 1035-36), although she doubts the Quebec partnership has moral personality because this would run counter to the underlying premise of Quebec legislation granting moral personality (*ibid.* at 1039). Further, she argues that the inability of a partnership to sue in its name precludes this result (*ibid.* at 1039-40).

[10]See Bill 125, *Civil Code of Québec*, 1st Sess., 34th Leg. Qué., 1990-91 (assented to 18 December 1991, L.Q. 1991, c. 64), art. 1256ff. [hereinafter *Civil Code of Québec* or *C.C.Q.*].

[11]Perrault, *supra*, note 8 at 435; Smith, *supra*, note 8 at 466, 470; M. Lizée, "Deux fictions de droit corporatif" (1983) 43 R. du B. 649 at 656. Bohémier & Côté write: "On ne peut donc prétendre que la société commerciale soit une personne morale parfaite ou complète" (*supra*, note 8 at 28). This theory is also given some support by Roch & Paré, *supra*, note 8 at 340; Mignault, *supra*, note 8 at 186-87. See also *Noël* v. *Petites Soeurs Franciscaines de Marie*, [1967] C.S. 1 at 6 [hereinafter *Noël*].

[12]The clearest statement of this was made by two American writers, W.A. Klein & J.C. Coffee, *Business Organization and Finance: Legal and Economic Principles*, 3d ed. (New York: Foundation Press, 1988) at 67:

> [I]t is clear as a matter of experience as well as logic that one can resolve problems of partnership law without taking a position on the entity-aggregate issue. The fact remains, however, that where issues are not resolved by statute, courts often do rely on

In Part I of this paper, I consider the attributes of the Quebec partnership that support its characterization as a distinct patrimony rather than as organized indivision. I also illustrate the use of patrimonial distinctiveness to supplement the law. According to the classical doctrine of the patrimony, this finding would lead us directly to the conclusion that the partnership is a moral person.

In Part II, I consider whether partnership is a moral person in the modern, more textured, context of Quebec doctrine. A strong case is made that partnership is or should be considered a moral person, but any conclusion as to the current state of the law must be more circumscribed because of the presence of autonomous patrimonies in Quebec law: partnership has a distinct patrimony, but may not necessarily be a moral person.

Nonetheless, the formal recognition by doctrine, the courts or the legislature that a partnership has a distinct patrimony and that patrimonial distinctiveness is to be used in a suppletive manner would lead to a more consistent interpretation of the current and reformed law of partnership.[13] It would also better reflect the changes in the new *Civil Code of Québec* that lend even greater support to the partnership's patrimonial autonomy.[14]

I. Recognition of a Separate Partnership Patrimony

The *Civil Code of Lower Canada* does not expressly state that partnerships have a patrimony. The codal provisions are ambiguous and could feasibly have been interpreted to give life to a theory of organized indivision.[15] In this conception, a distinct patrimony is unnecessary because the partnership's assets can be characterized as undivided.

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one concept or the other in reaching their results. Moreover, it seems fair to say that an awareness of the concepts may help to organize one's thinking about issues.

One author has argued that "restrained" personality entails, where the *Code* is silent, that the general law of indivision provides the suppletive rules (Perrault, *supra*, note 8 at 431).

[13]See arts 2186-2249 *C.C.Q.* This article will not deal with the implications of the overhaul of French partnership law — in 1966 to commercial partnerships (*Loi n° 66-537 du 24 juillet 1966*, J.O., 24 July 1966, 6357, D.1966.Lég.342) and in 1978 to civil partnerships (*Loi n° 78-9 du 4 janvier 1978*, J.O., 5 January 1978, 179, revised, J.O., 15 January 1978, 378, D.1978.Lég.69) — which hinged moral personality on registration (see art. 1842 *Code civil des Français* [hereinafter *C. civ.*] and art. 5 of the 1966 law). Early proposed reforms in Quebec, since abandoned, adopted a similar approach (Draft Bill, *An Act to add the reformed law of obligations to the Civil Code of Québec*, 2d Sess., 33rd Leg. Qué., 1988 [hereinafter *Draft Bill*], art. 2251).

References to the *Code civil des Français* (1804) are to those provisions prior to the 1978 reform. The partnership provisions of the *Code civil des Français* mirror to a large extent the provisions of the *Civil Code of Lower Canada* (1866).

[14]See, for example, art. 2225 *C.C.Q.*, which allows a partnership to sue and be sued in its name.

[15]According to this theory, partnership assets are co-owned (or in a state of indivision). However, indivision alone is insufficient to create a partnership: see art. 1830 *C.C.L.C.* or, in Common law, the *Partnership Act*, R.S.O. 1990, c. P-5, s. 3(1). "Organized" indivision requires the presence of a management structure and limitations on the power to dissolve the regime, which run counter to the precarity of indivision represented by art. 689 *C.C.L.C.* For example, art. 1895 *C.C.L.C.* holds partners liable if they dissolve the firm at an inopportune moment. One author has noted that the "patrimoine social" distinguishes partnership from indivision, but this already presupposes that the partnership has a patrimony (P.P. Côté, "Considérations sur la conception et l'élaboration du contrat de société" (1985) 15 R.D.U.S. 487 at 520).

The jurisprudence shows, however, a systemic bias against organized indivision and towards the use of patrimonial distinctiveness to supplement the law where the *Code* is silent or ambiguous. This Part sets out the process by which the existence of a distinct partnership patrimony was inferred from Book III, Title Eleventh of the *Code*.

A. *Existence of Distinct Partnership Property*

If partnership were viewed as a form of organized indivision, the property contributed by the partners to the partnership would be held in common, subject to the special restrictions of the regime. The partnership itself, not having a patrimony, would own nothing. By contrast, the *Civil Code of Lower Canada* contains a number of provisions that indirectly support the conclusion that the partnership has a patrimony. For example, there is a reference to "partnership property" in articles 1838, 1899 *C.C.L.C.* and 115 *C.C.P.*, while other provisions deal with the partner's right to use "things belonging to the partnership" (article 1851(2) *C.C.L.C.*).[16] These references alone are not decisive, however, as they could easily be construed as a convenient shorthand for property held in indivision.[17]

Of greater significance is article 1899 *C.C.L.C.*, which is often cited as proof of a distinct partnership patrimony.[18] Although the article also refers to "property of the partnership," the treatment given partnership property after dissolution goes a step further. Rather than treating the partnership property as part of each partner's patrimony, the article states that it is to be applied[19] to the payment of the creditors *of the firm* in preference to the separate creditors of the partners. Only if this property proves insufficient, does article 1899 provide that the separate property of the partners is to be applied to pay the partnership debts, subject to the preference enjoyed by the personal creditors of the partners.[20] By

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[16]See also arts 1851(3), 1851(4), 1898 *C.C.L.C.*, which refer to "property of the partnership." Art. 1852 *C.C.L.C.* refers to "any thing which belongs to the partnership."

[17]Monk, *supra*, note 6 at 490. The author writes: "If precedent is needed for this use of a single word for convenience to denote the collectivity of interest, it is to be found in the use of the word *community* for the property relationship which arises upon marriage..." (*ibid.* at 491); G. Baudry-Lacantinerie & A. Wahl make the same point in regard to the *Code civil des Français* (*Traité théorique et pratique de droit civil: Société* (Paris: L.S.R.L.A., 1898) at 10). Another example of this linguistic style is to be found in the law of trusts (arts 981a ff. *C.C.L.C.*). To this effect, Trudel wrote that the assets of a civil partnership are the undivided property of the partners (*supra*, note 9 at 456).

[18]Art. 1899 *C.C.L.C.* reads as follows:

> **1899.** The property of the partnership is to be applied to the payment of the creditors of the firm, in preference to the separate creditors of any partner; and in case such property be found insufficient for the purpose, the private property of the partners, or of any one of them is also to be applied to the payment of the debts of the partnership; but only after the payment out of it, of the separate creditors of such partners or partner respectively.

[19]The application would be by the partners or presumably by a liquidator (art. 1896a *C.C.L.C.*).

[20]The *Code civil des Français* contains no equivalent to art. 1899 *C.C.L.C.* However, given the recognition of a separate partnership patrimony in French law, jurists have held that the property of the partnership must be the common pledge of its creditors, in preference to the separate creditors of the partners. See Houpin & Bosvieux, *supra*, note 2, para. 35. Roman law never evolved

treating partnership property in this way, the *Code* arguably assimilates the rules governing partnership to those of the general law governing patrimonial rights and obligations. In particular, article 1899, the argument goes, makes allusion to the rnle that the mass of a person's assets is liable for the fulfilment of his or her personal obligations (article 1980 *C.C.L.C.*), and the rule that the property of a debtor is the common pledge of his or her creditors (article 1981 *C.C.L.C.*).[21] The common pledge is fundamental to the classical theory of the patrimony, creating a universality of rights and obligations.[22] It is therefore commonly inferred from article 1899 that the partnership has a patrimony. Because article 1899 applies to both civil and commercial partnerships, it would follow that both have distinct patrimonies, and this is indeed the dominant view[23] — although a vocal mmority, basing itself on older French authorities, has held that only commercial partnerships have patrimonies.[24] This doctrinal debate has been settled by the new *Civil Code of Québec*, which eliminates the distinction at article 2188.[25]

Article 1899 *C.C.L.C.* is not, however, as decisive as the authorities have contended and could have been interpreted consistently with a theory of orga-

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this notion in its partnership law because of a strict view of the relativity of contract: contracting parties could not set up a new entity against third party creditors (L. Michoud, *La théorie de la personnalité morale*, vol. 1, 2d ed. (Paris: L.G.D.J., 1924) at 148).

[21]Art. 1981 *C.C.L.C.* reads as follows:

> **1981.** The property of a debtor is the common pledge of his creditors, and where they claim together they share its price rateably, unless there are amongst them legal causes of preference.

[22]P. Ciotola, *Droit des sûretés*, 2d ed. (Montréal: Thémis, 1987) at 7.

[23]Mignault, *supra*, note 8 at 186-87; Smith, *supra*, note 8 at 462; L'Heureux, *supra*, note 8 at 162, 171; Roch & Paré, *supra*, note 8 at 339; Lizée, *supra*, note 11 at 656; Bohémier & Côté, *supra*, note 8 at 20; Verschelden, *supra*, note 8; Case Comment on *Desjardins* v. *Malenfant et al.*, [1961] R.L. 560 at 571 [hereinafter Case Comment]; *Babineau* v. *Théroux* (1889), 16 Que. L.R. 4 at 5; *Sale* v. *Crépeau* (1905), 28 C.S. 423 at 431 (law firm); *Noël*, *supra*, note 11 at 7, where Lacroix J. cites Mignault approvingly. See more recently *Sous-ministre du revenu du Québec* v. *Jobin*, [1971] C.S. 565 at 569 [hereinafter *Jobin*].

[24]Using the classical doctrine of patrimony, this also meant that only commercial partnerships were moral persons. See *Frenette* v. *Aqueduc St-Gilbert* (1931), 69 C.S. 167 [hereinafter *Frenette*]; *Tison* v. *Boisseau* (1900), 6 R.J. 538 at 539; *Girard* v. *Rousseau* (1887), 31 L.C. Jurist 112 at 113 [hereinafter *Girard*]; Antaki, *supra*, note 8 at 1033-34. See also J.-L. Baudouin & Y. Renaud, *Code civil annoté* (Montreal: Wilson & Lafleur, 1988) at 557, citing *Frenette*, *ibid.* Other authorities are ambiguous on the status of civil partnerships. See Perrault, *supra*, note 8 at 433; *Garneau* v. *Drapeau* (1939), 77 C.S. 350.

However, the distinction in French law was based on former art. 49 of the *Code de commerce* (repealed by *Décret n° 58-1359 du 27 décembre 1958*, J.O., 29 December 1958, 11971, D.1959.Lég.137), which stated: "L'association en participation ne constitue pas une personne morale," implying that all other commercial partnerships *were* moral persons. There is no equivalent article in Quebec, where most of the rules of commercial and civil partnerships have been unified (Mignault, *ibid.* at 181). Further, even French jurisprudence rejected this interpretation in 1891 (see *supra*, note 4). A possible argument based on a distinction in the effect of partition in art. 1898 *C.C.L.C.*, as well as on art. 115 *C.C.P.* has never been explored. See *infra*, note 41.

[25]Art. 2188 *C.C.Q.* reads as follows:

> **2188.** Partnerships are either general partnerships, limited partnerships or undeclared partnerships.
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> Partnerships may also be joint-stock companies, in which case they are legal persons.

nized indivision. One author argues that article 1899 adopts an English bankruptcy rule and was never intended to create a separate patrimony.[26] This is a credible position. Article 1899 is located in the chapter on the effects of dissolution and only comes into effect, it is argued, *after* the partnership has "ceased to exist."[27] It would therefore seem to be an unusual article upon which to rely to prove the *existence* of a partnership patrimony. Article 1899 also differs in important respects from article 1981. Rather than referring to a "claim" by a creditor on the partnership patrimony, article 1899 states that the property "is to be applied" to the payment of partnership creditors. Article 1899 could therefore be regarded as a rule of convenience, based on English law,[28] which the codifiers intended to deal with the distribution of common property after dissolution. On the other hand, although article 1899 is found amid provisions on the effects of dissolution, the article still purports to apply "the property of the partnership" in payment of the creditors of the firm. This "property" is *not* itself an effect of dissolution.[29] In addition, it is incorrect to argue that article 1899 only applies after the partnership has "ceased to exist." Given that the mass is left intact until distribution, the jurisprudence has held that the partnership patrimony continues to exist until liquidation, for the purposes of the liquidation.[30] Article 1899 has also been the major source of the evolution of a *sui generis* notion of suretyship, discussed below,[31] which only has application prior to the dissolution of the partnership at which point article 1899 applies. Finally, although the language of article 1899 differs from article 1981, the payment *pro rata* of the partnership creditors is consistent with that principle.[32]

In conclusion, article 1899 can support the view that partnerships have a distinct patrimony, and has been so interpreted. It would be incorrect (or an oversimplification), however, to suggest that the article prevents an interpretation more consistent with organized indivision. The interpretive choice — or coinflip — of the jurisprudence and doctrine is thus the first example of the use of patrimonial distinctiveness as a suppletive rule.[33]

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[26]Monk, *supra*, note 6 at 495-96. Art. 1899 is derived from *An Act respecting Partnerships*, C.S.L.C. 1861, c. 65, s. 6 (*Civil Code of Lower Canada: Sixth Report* (Quebec: G.E. Desbarats, 1865) at 32, 135). Monk traces this to an earlier English rule applicable by reception to Upper Canada (*ibid.* at 495).

Monk also argues that the mercantile system of settling accounts (citing F. Pollock, *A Digest of the Law of Partnership*, 5th ed. (London: Stevens, 1890) at 160) whereby the partnership can compete equally with a partner's individual creditors for debts owing the partnership because of an insufficiency of partnership funds, is more consistent with a distinct patrimony than the preference system set up by art. 1899 (Monk, *ibid.* at 496).

[27]Monk, *ibid.* at 493.

[28]The corresponding English rule to art. 1899 *C.C.L.C.* has been criticized as having no logical foundation. One jurist called it "an empirical way of dealing with a pressing necessity" (Pollock, *supra*, note 26 at 141).

[29]Assuming we reject the argument that this reference is a shorthand for organized indivision.

[30]In *Block* v. *Carrier* (1906), 30 C.S. 37, the Court relied for its holding on art. 1892 *C.C.L.C.*, as modified by art. 1897 *C.C.L.C.* Art. 1899 *C.C.L.C.* can also be seen as maintaining the entity distinct for the purposes of liquidation. See, however, the effect of partition, below, Part I.C.

[31]See below, Part II.C.

[32]Ciotola, *supra*, note 22 at 8.

[33]Art. 1899 does not survive in its current form in the provisions on dissolution of the *Civil Code of Québec*, although it appears to have survived in substance. See the combined effect of arts 358-364, 2221(2), 2235 *C.C.Q.*

B. Non-Retroactive Effect of Partition

Upon the dissolution of the partnership, a partner can demand a partition of the "property of the partnership."[34] This partition must be made in accordance with the rules relating to the partition of successions, "in so far as they can be made to apply."[35] With respect to commercial partnerships, the rules of successions are only to be applied when they are "consistent with the laws and usages specially applicable in commercial matters" (article 1898(2) *C.C.L.C.*). The effect of partition in the general law of successions is that each co-owner is deemed to have inherited alone and directly all the things comprised in his or her share. Thus, partition is declaratory of rights (article 746 *C.C.L.C.*).[36]

The wholesale application of the principle of retroactivity brought about by article 746 to partnerships would mean extinguishing the partnership's period of ownership, and with it, its patrimony. Under the classical doctrine of the patrimony, the partnership would never have existed as a person. The only interpretation consistent with this would be that partnership is a form of organized indivision. This view is supported by Pothier, who wrote that the act of partition has a retroactive effect; the things passing to the partners are deemed always to have belonged to them, either from the time the partnership was formed or from the date the thing was acquired by the partnership.[37] Pothier also wrote that each partner is deemed never to have had any rights in any thing passing to the other partners.[38] Partition is not a mode of acquiring property and thus no partner acquires anything from his or her co-partners by the act of partition.[39]

French and Quebec jurists later rejected Pothier's interpretation as inconsistent with the existence of a distinct partnership patrimony.[40] It followed that

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[34]Art. 1898 *C.C.L.C.* reads as follows:

> **1898.** Upon the dissolution of the partnership, each partner or his legal representative may demand of his copartners an account and partition of the property of the partnership; such partition to be made according to the rules relating to the partition of successions, in so far as they can be made to apply.
> Nevertheless, in commercial partnerships these rules are to be applied only when they are consistent with the laws and usages specially applicable in commercial matters.

[35]Art. 1898(1) *C.C.L.C.*

[36]Art. 746 *C.C.L.C.* reads as follows:

> **746.** Each copartitioner is deemed to have inherited alone and directly all the things comprised in his share, or which he has obtained by licitation, and to have never had the ownership of the other property of the succession.

[37]M. Bugnet, ed., *Oeuvres de Pothier*, vol. 4 (Paris: Marchal et Billard, 1890) at 306-07 n. 2.

[38]*Ibid.*

[39]Art. 583 *C.C.L.C.* reads as follows:

> **583.** Ownership in property is acquired by prehension or occupation, by accession, by descent, by will, by contract, by prescription, and otherwise by the effect of law and of obligations.

[40]Bugnet wrote that Pothier's view of partnership as an "état d'indivision" was incorrect because during the life of the partnership, "il y a un propriétaire unique, c'est la société" (*supra*, note 37 at 307 n. 2). Quebec doctrine rejected Pothier's interpretation, despite the codifiers' extensive reliance on him in their sixth report (*supra*, note 26). See Mignault, where he added: "Il n'y a aucun doute, à mes yeux, que notre code [at art. 1899 *C.C.L.C.*], plus encore peut-être que le code Napoléon, individualise la société" (*supra*, note 8 at 276).

if partition could not have retroactive effect to the date when the asset was contributed, the retroactive effect must be limited to the date of dissolution, which is the law today.[41] If partition is not declaratory of rights, it must be translatory and an alienation or, more accurately, a transmission must occur in favour of the partners upon dissolution.[42] Although article 583 *C.C.L.C.*, which enumerates the modes of acquisition of property, does not expressly mention partition, the transmission in favour of partners can be included within the phrase "and otherwise by the effect of law." As in the case of article 1899, in the face of the ambiguous language of the *Code*, the text has been interpreted consistently with patrimonial distinctiveness.

C. *Partners' Personal Rights in the Partnership*

If a partnership has a distinct patrimony, it alone has title to partnership property. The partners would not be titularies of real or personal rights in specific partnership property, but would have shares (personal rights) in the partnership patrimony as a whole. Given the existence of a patrimony in both civil and commercial partnerships, there would be no difference in the nature of the shares.

The evidence that the *Civil Code of Lower Canada* regards a partner's share as personal, and thus moveable in nature, can be found in article 387, which defines moveables by determination of law.[43] The article clearly applies

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[41]Mignault, *ibid.* at 275-76. See also Roch & Paré, *supra*, note 8 at 488. One practical effect of recognizing the partnership's period of ownership is that a partner cannot benefit from the principle of art. 746 *C.C.L.C.* to retroactively acquire ownership of an immoveable, for example in order to meet the property qualifications in an election (see *Girard*, *supra*, note 24). In *Girard*, the Court noted, erroneously, that art. 746 would have had its full effect with regards to a civil partnership, because such a partnership did not have a distinct patrimony and was not a moral person. A distinction in the application of the retroactive effect of partition to civil partnerships is hinted at by art. 1899(2) *C.C.L.C.* and might well have formed the basis of an argument — along with art. 115 *C.C.P.*, which permits a suit against a commercial partnership in its name — that only commercial partnerships have distinct patrimonies. However, given that art. 1899 *C.C.L.C.* applies to both civil and commercial partnerships, art. 746 must be limited in its application in either case.

[42]Mignault preferred the analogy to the succession of a person's patrimony after death (P.B. Mignault, *Le droit civil canadien*, vol. 2 (Montréal: C. Théoret, 1896) at 441). But see *Langlois* v. *Dubray* (1900), 17 C.S. 328, which involved a provision in a lease of an immoveable owned by a partnership stating that the lessor could resolve the lease upon an alienation of the immoveable. At dissolution, the immoveable was transferred to one of the partners, who then invoked the clause to terminate the lease. The Court held that the transfer had the effect of ending the state of indivision between the partners (art. 747 *C.C.L.C.*), but was not an alienation (art. 746 *C.C.L.C.*); the partner who acquired the immoveable being deemed owner when the lease was formed.

Although the reasoning in *Langlois* v. *Dubray* (*ibid.*) is inconsistent with non-retroactivity, the result may not be. If, as Mignault suggested, the partner acquires rights from the partnership by some unique form of transmission, the "alienation" clause would not be triggered. However, the partner would remain liable because he succeeds to a portion of the juridical personality of the partnership (arts 607, 1632 *C.C.L.C.*), which includes personal obligations (the lease). The partner acquires the immoveable by derivative title, but remains personally bound.

[43]Art. 387 *C.C.L.C.* reads as follows:

> **387.** Those immoveables are moveable by determination of law, of which the law for certain purposes authorizes the mobilization, so are all obligations and actions respecting moveable effects, including debts created or guaranteed by the prov-

to "shares or interests" in corporations and states that they are to be regarded as moveables, although the corporation owns immoveables.[44]

But does the provision apply to partnerships? Far from providing a clear statement, article 387 is exceedingly ambiguous. It refers only to a "partner" in a "company" — not in a partnership.[45] Therefore, it is possible that it never occurred to the codifiers that the words in article 387 would be "stretched to cover ordinary commercial partnerships."[46]

The last sentence of the French text of article 387 contains the phrase "tant que dure la société." This last sentence could be interpreted as applying only to "sociétés par actions," but it could also be viewed as a separate rule applicable to partnerships by which the immoveable effects of all partnerships are deemed to be moveable as regards the partners.[47] Thus, a link could be made between the French word for partnership (*société*) and "company," its equivalent in the English text, which opens the way to interpreting the entire article as applicable to partnerships.[48]

The ambiguity of article 387 may be attributable to poor drafting, but the authorities have made no serious attempt to unravel the Gordian knot. Instead,

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> ince or by corporations, also all shares or interests in financial, commercial or manufacturing companies, although such companies, for the purposes of their business, should own immoveables. These immoveables are reputed to be moveable with regard to each partner, only so long as the company lasts.

The article is the same in substance as art. 529 *C. civ.*

[44]A French author has noted that in the absence of such a provision, the character of the share would depend on the variable content of the corporate patrimony (Foyer, *supra*, note 4 at 120).

[45]The only other use of the word "company" by the codifiers with respect to partnerships is to be found in the provisions on joint-stock companies (arts 1889-1891 *C.C.L.C.*). Art. 1889 *C.C.L.C.* mentions three types of "companies," but only those that are formed without legislative authority or royal charter are to be treated as general partnerships. The other companies are corporations: companies incorporated by royal charter, by special act, or under provisions of a general act.

[46]Monk, *supra*, note 6 at 499.

[47]Mignault noted that these immoveables would maintain their immoveable nature as regards the partnership (*supra*, note 42 at 442). This interpretation does not directly address the nature of moveable rights, though the authorities have perhaps assumed that the purpose of deeming immoveables to be moveable is a recognition that a partner's entire right is personal and, thus, moveable. This would be consistent with the general omission of the codifiers to use the language of real and personal rights. Mignault explains the sentence as an attempt to reconcile the "fiction" of the partnership's period of ownership. Although partners have an eventual right to partnership property, their right to partition is wholly moveable (*ibid.* at 438-42).

[48]There are other interpretive difficulties. If we proceed on the assumption that art. 1899 *C.C.L.C.* is conclusive that a partnership has a patrimony, why deem a partner's share to be personal? It *must* be personal because the partnership is sole owner of its property, thus making art. 387 *C.C.L.C.* redundant. By the same reasoning, the transmuting could even be seen as evidence that partnerships *do not* have a patrimony and that art. 1899 has been wrongly interpreted. On the other hand, this argument also applies to corporations — a shareholder having no right in any thing belonging to the moral person — which are clearly covered by art. 387. (This redundancy explains perhaps the absence of an equivalent provision in the *Civil Code of Québec* at arts 899-907). But even accepting that the article is an instructive redundancy, why does art. 387 *C.C.L.C.* seem to deal only with commercial partnerships ("shares or interests in financial, commercial or manufacturing companies")? This is not a problem if we read the last sentence as independent of the first, in which case civil partnerships would be included.

they have been content to declare article 387 conclusive evidence of the personal nature of the partner's share.[49]

One basis for the categorical acceptance of this theory in the face of textual difficulties is the acceptance of juridical effects consistent with this view. For example, the *Code* itself provides that a partner cannot alienate or otherwise dispose of anything that belongs to the partnership (article 1852).[50] Jurisprudence has elaborated other related principles consistent with a distinct patrimony: creditors of the partners can only seize a partner's share, not any thing owned by the partnership;[51] a partner cannot sell an undivided share of a partnership moveable or immoveable to a third party[52] or grant hypothecs on partnership property to secure personal debts;[53] and, finally, partnership property is not subject to the legal hypothecs that burden the personal patrimonies of the partners.[54] Patrimonial distinctiveness is particularly helpful in these areas in ensuring the relative simplicity and clarity of legal results, and this may well be a motivating factor in the Civilian bias towards finding a distinct partnership patrimony amid the vague language of the *Code*.

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[49]In France, the use of the word "société" without qualification in the last sentence of art. 529 *C. civ.* was held to prove that all partnerships are moral persons with distinct patrimonies (Foyer, *supra*, note 4 at 115ff.; Houpin & Bosvieux, *supra*, note 2, para. 38; Cass. Req., 23 February 1891, *supra*, note 4), even though there seems to be a grammatical link to the commercial companies listed in the first sentence. See also M. Planiol & G. Ripert, *Traité élémentaire de droit civil*, vol. 2, 10th ed. (Paris: L.G.D.J., 1926) para. 1958; Paris, 18 August 1881, S.1882.II.25 (Annot. M. Lyon-Caen). In Quebec, see Roch & Paré, *supra*, note 8 at 341; Smith, *supra*, note 8 at 470; L'Heureux, *supra*, note 8 at 171; Mignault, *supra*, note 42 at 338-42.

[50]See *Poston* v. *Watters* (1871), 2 R.L. 736 (Sup. Ct) (a partner has no right to dispose of partnership property). Art. 1852 *C.C.L.C.* has been viewed as proof that the partnership has a separate patrimony, as well as being further evidence that civil partnerships are moral persons because it applies to all partnerships. See Houpin & Bosvieux, *ibid.*, referring to art. 1860 *C. civ.*, the French equivalent of art. 1852 *C.C.L.C.*

But again, a prohibition to alienate is not necessarily inconsistent with a theory of organized indivision: even if a partnership did not have a patrimony, a partner cannot prevent co-partners from using partnership property according to their rights, so long as the partnership exists (art. 1851(2) *C.C.L.C.*). Art. 1852 would flow from this principle. See Planiol & Ripert, *ibid.* para. 1957 n. 1 referring to art. 1869 *C. civ.*; Monk, *supra*, note 6 at 497.

[51]In *Babineau* v. *Théroux*, *supra*, note 23, a personal creditor of a partner sought to seize a debt due to the partnership. The Court held that the cession of the partner's share did not convey an undivided share in the assets of the partnership. Only upon partition would the specific things be assigned to the partners. See more recently *Caisse Populaire Pontmain* v. *Couture*, [1983] C.P. 149.

[52]*Kingley* v. *Smeall* (1928), 66 C.S. 470 at 471. When the third party requested a partition, the Court held that the disposition of the immoveable was null because the partner did not own an undivided half in any asset of the partnership, and "[t]he partnership constituted a separate and distinct entity from the person of those constituting it."

[53]Case Comment, *supra*, note 23 at 571; Planiol & Ripert, *supra*, note 49, para. 1957.

[54]Cass. Req., 22 February 1898, D.P. 1899.I.593; Planiol & Ripert, *ibid.* By contrast, an undivided co-owner acts with respect to his or her real right in the thing as an absolute proprietor. A co-owner can hypothecate the right, which will subsist with respect to that portion of the immoveable retained after partition (art. 2021 *C.C.L.C.*). See also W. Marler, *The Law of Real Property* (Agincourt: Carswell, 1986) at 46-47. However, the *Civil Code of Québec* assimilates indivision to partnership to the extent that a co-owner will no longer be free to burden the thing with real rights (art. 1026(2)).

D. Creditor-Debtor Relationship between Partner and Partnership

The nature of the partner's share is only one aspect of the creditor-debtor relationship that can arise between partners and partnership. Other manifestations can be seen in articles 1831, 1839, 1840, 1842, 1843, 1844, 1845, 1847 and 1851(3) *C.C.L.C.* For example, each partner is a "debtor to the partnership" — not the other partners — for all he or she has agreed to contribute to it (article 1839 *C.C.L.C.*).[55] The existence of a creditor-debtor relationship demonstrates that the partnership has a patrimony distinct from those of the partners.[56] Similar provisions in the *Code civil des Français* have been interpreted in a similar manner.[57]

However, as noted above in another context, although the language of the *Code* evokes a separate partnership patrimony, the codifiers may only have been using a shorthand for a relationship between the individual partner and the collectivity.[58] If there is a true creditor-debtor relationship, this would be reflected in the nature of the actions by which debts are enforced. In other words, does the action by the partnership against partners belong to the partnership or to the other partners? Likewise, when a partner sues the partnership, is he or she suing the partnership, or the other partners?

When a partnership sues a third party, it must do so in the name of all the partners.[59] But when it sues a partner as creditor (for example, under article 1839 *C.C.L.C.*), the action is always taken by one of the partners. This is strong procedural evidence that the action does not truly belong to the partnership entity, but to individual partners — that there is no true creditor-debtor relationship and, therefore, that there is no distinct partnership patrimony.

However, the language of the jurisprudence illustrates that although it is the partner who sues on a debt owed to the partnership — without even naming the partnership — the action is treated as if it belonged to the partnership.[60] The

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[55]Principles of the general law, as set out in the *Code* or by interpretation, are also used to determine the rights and obligations of partners and the partnership: when a partner contributes a certain and determinate thing, consent effects a transfer of ownership to the partnership, which is an application of art. 1025 *C.C.L.C.*; when the thing is uncertain and indeterminate, the partnership does not become owner until the thing becomes certain, which is an application of art. 1026 *C.C.L.C.* (L'Heureux, *supra*, note 8 at 173); the transfer of ownership carries with it the risks of destruction (art. 1839 *C.C.L.C.*; L'Heureux, *ibid.* at 173); when the enjoyment of a thing is contributed, such as usufruct, the risk is borne by the partner (art. 1846(1) *C.C.L.C.*); the partnership benefits from the warranties of sale as do other buyers as against the partner (art. 1839(2) *C.C.L.C.*; Mignault, *supra*, note 8 at 197; Roch & Paré, *supra*, note 8 at 369).

[56]As one author has written, "s'il y avait confusion de patrimoines, aucune relation de créancier à débiteur ne pourrait s'établir" (Smith, *supra*, note 8 at 469).

[57]Houpin & Bosvieux, *supra*, note 2, para. 38; arts 1845-48, 1850 *C. civ.*

[58]Monk, *supra*, note 6 at 490.

[59]*Dupuis* v. *Couture*, [1958] C.S. 623 [hereinafter *Dupuis*].

[60]In *Whimbey* v. *Clark* (1902), 22 C.S. 453, the defendant partner failed to furnish his share of the required capital to a partnership. He secretly registered the business in his own name and took steps to transfer the business to a joint-stock company. The complaining partner launched an action *pro socio* for the promised capital (art. 1839 *C.C.L.C.*), for an accounting, as well as dissolution of the partnership. The Court found that the business carried on under the name registered by the defendant *belonged to the partnership* existing between plaintiff and defendant and ordered the

partnership patrimony is enriched by a successful action *pro socio*, not the patrimonies of the partners who initiate proceedings.[61] Thus, although the partner and partnership are not procedurally distinct persons — the partner being able to sue on a partnership debt without naming the partnership[62] — there is no patrimonial confusion: the debts owed by a partner are owed to the partnership and not to the partner who initiates the action. The gap in the law is between the nature of the obligation (a partnership creance) and the procedural devices to exercise it, namely the action *pro socio*.[63]

The next question is whether an action by a partner against the partnership is, in fact, against the partnership as a distinct entity or against the other partners. Article 1847 *C.C.L.C.* states that a partner has a right "against the partnership" to recover money disbursed for it, or to be indemnified for obligations contracted in good faith in the business of the partnership and for risks associated with his or her management.[64] In practice, a partner's usual remedy will be the action *pro socio* for an accounting, including the condemnation of individual partners left owing the others.[65] However, there is support for the conclusion that the partner retains a right to take a direct action against the partnership, without necessarily asking for dissolution and an accounting.[66] In *Harrisson*,[67]

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defendant to hand over all properties, contracts, transactions and moneys *belonging to the partnership*. Because of the defendant's disloyalty towards the plaintiff, the Court also ordered the dissolution of the firm.

[61]Only the value of their shares increases, until dissolution and liquidation.

[62]In principle, the action should be launched in the name of the partnership, which is the true plaintiff. When a corporate creditor sues one of its officers or shareholders, the action is initiated in its corporate name. Even when a shareholder takes a derivative action to replenish the corporate patrimony, this is done in the name of the corporation. See, for example, the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, s. 239(1).

[63]This deficiency is not surprising given that the action has its origin in Roman law where the partnership was not regarded as having a distinct patrimony. Roch & Paré define the action *pro socio* this way: "C'est l'action qu'un associé a contre son ou ses associés pour les forcer à remplir leurs obligations et, après la dissolution de la société, pour leur faire rendre compte" (*supra*, note 8 at 490). This Roman law definition omits the function of the action in enforcing obligations owed by the partners to the partnership entity. However, the fact that the *actio pro socio* is personal in nature suggests that the real titulary of rights is the partnership (R. Goldwater, "La société civile est-elle une personne morale?" [1959-60] Thémis 91 at 93).

An action outside the context of the *actio pro socio* is not possible here because of the requirement that the defendant name himself as plaintiff.

[64]Art. 1847 *C.C.L.C.* reads as follows:

> 1847. A partner has a right against the partnership not only to recover money disbursed by him for it, but also to be indemnified for obligations contracted by him in good faith in the business of the partnership, and for the risks inseparable from his management.

[65]See Mignault, *supra*, note 8 at 202; *Leduc* v. *Turcot* (1861), 5 L.C. Jurist 96 (Circ. Ct). See also *Lydon* v. *Casey* (1887), 13 Que. L.R. 237 (Q.B.), where after dissolution, a partner who had paid off a partnership debt (art. 1847 *C.C.L.C.*) tried to take a direct action against the other partner for half of what he had paid. The Court held that the plaintiff must first launch an action *pro socio* to establish whether he was a debtor or creditor on the partnership books. Only after an accounting could it be established what the other partner owed. See also *Harrisson* v. *Leclerc*, [1956] Que. P.R. 283 (Sup. Ct) [hereinafter *Harrisson*].

[66]Mignault, *ibid.*: "Toutefois, et sauf à discuter cette question plus loin, on peut dire qu'en principe, et pendant l'existence de la société, le droit d'action existe."

[67]*Supra*, note 65.

the Court suggested that a partner can take a direct action against the partnership by first naming the defendant partners and, second, either naming himself as a defendant partner or identifying himself as a partner in the declaration.[68] This seems to assume that the partnership is civil. If commercial, there seems no reason, in principle, why a partner could not rely on article 115 *C.C.P.* and sue the partnership in its name.[69] Only a partnership's patrimonial distinctiveness prevents the objection that, by taking a direct action, the partner is suing himself.

It follows that a true creditor-debtor relationship exists between partners and partnership, both in terms of rights and in terms of actions. Again, the elaboration of a consistent regime required the extensive reliance on suppletive rules based on a presumption of patrimonial distinctiveness.

E. Conclusion

It can be concluded without reservation that Quebec partnerships, both commercial and civil, have distinct patrimonies. Where the *Code* is silent or ambiguous, its provisions are interpreted in accordance with the presumption that partnerships have a distinct patrimony.[70]

Much of the jurisprudence and doctrine cited above refers interchangeably to partnership's distinct patrimony and its moral personality, creating an apparent circularity of reasoning that has never been properly addressed. The authorities leave open the argument that partnerships are moral persons and that the suppletive rules are based not only on patrimonial distinctiveness, but on moral personality itself.[71] However, a number of factors, addressed below, complicate

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[68]*Ibid.* The partner sought to recover a debt owed him by the partnership from his other partners. However, as he had only demanded condemnation of his co-partners personally, and not the partnership, his action was premature; the individual liability of each partner on the partnership books must first be established by *actio pro socio* for an accounting.

[69]Art. 115(5)-115(7) *C.C.P.* reads as follows:

> **115.** ...
>
> A corporate body is designated by its corporate name with mention of its head office. If it is a defendant, mention of the head office may be replaced by mention of its principal place of business.
>
> A defending commercial partnership may be designated by its firm name; but a judgment rendered against it is then executory only against partnership property.
>
> Any group of persons mentioned in article 60 may be designated under the name which it has adopted or by which it is commonly known, but a judgment rendered against it is then executory only against the property of the group.

[70]Another example of a suppletive rule based on patrimonial distinctiveness involves the compensation of debts, a subject upon which the *Code* is silent. Doctrine and jurisprudence consider that the debt of a partuer cannot be compensated against a creance of the partnership (Roch & Paré, *supra*, note 8 at 484; *Gauthier* v. *Lacroix* (1868), 12 L.N. 508). This conclusion can only be justified if the partnership has a distinct patrimony.

[71]Would the distinct patrimony lead to the conclusion that it is a moral person or vice versa? The *Draft Bill*, *supra*, note 13, as modified, seemed to state that moral personality was the suppletive rule:

> **2255.** ... the rules respecting indivision, in the case of a joint venture, or respecting legal persons, in the case of a partnership registered as a legal person, adapted as required, apply in a *suppletory* [sic] manner to such relations. [emphasis added]

the traditional conclusion — or assumption — that moral personality means the achievement of patrimonial distinctiveness.

II. Moral Personality of Partnerships

A juridical person, subject of law, is a physical or moral person with an aptitude to enter into juridical relations with other persons, either to become the creditor of a right or the debtor of an obligation. A moral person participates in juridical life through its mandataries. According to the classical doctrine of the patrimony, all physical and moral persons have a patrimony or universality of rights and obligations. The existence of a patrimony is the manifestation of legal existence[72] and is embodied in the principles of articles 1980 and 1981 *C.C.L.C.* (the common pledge). Thus, if the *Civil Code of Lower Canada* recognizes the existence of a distinct partnership patrimony, then partnerships must be moral persons, and this is indeed the conclusion of the majority of authorities cited in Part I.

But the hegemony of the classical doctrine has been challenged. A minority of the doctrine has held that autonomous patrimonies can exist, that is, patrimonies that are owned by no one. This mass has been called a kind of collective property.[73] In Quebec, the legislator has recognized the possibility of autonomous patrimonies, as demonstrated for instance by reforms to the Quebec law of trusts.[74] These developments, as well as the general acceptance in Quebec of the English approach to moral personality, challenge the simple equation of patrimony with personality, and it is open to argue that partnership has a distinct patrimony but is not a moral person. The apparent irony of this position is that partnership property would be owned by the partnership entity, but the entity would not be a moral person. This contortion of reasoning has led many authors to reject any notion of a patrimony without an owner.[75]

A traditional compromise position is to call partnership a "restrained" or imperfect moral person. Although the classical equation leads us to the conclusion that partnership is a moral person, there are three principal areas where it can be said that partnership personality is "restrained" as compared to the corporation: the management structure and unanimity requirements; the unlimited liability of partners for partnership debts; and the incapacity of a partnership to

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[72]See Legeais, *supra*, note 3 at 108-09, for definitions of juridical and moral personality. See C. Aubry & G. Rau for the classical doctrine of the patrimony (*Cours de droit civil français d'après la méthode de Zachariae*, vol. 9, 5th ed. by E. Bartin (Paris: L.G.D.J., 1917) at 333-39; Ripert, *supra*, note 4, para. 681: "[Les] deux notions de personnalité et de patrimoine sont traditionnellement liées dans la conception juridique française"). See also Goldwater, *supra*, note 63 at 92.

[73]See Smith, *supra*, note 8 at 460-61, for a discussion of what is often referred to as the theory of the patrimony of appropriation. He considered the theory to have no supporters in Quebec and to be of little utility. See also J. Ghestin, *Traité de droit civil*, vol. 1, *Introduction générale*, 2d ed. by J. Ghestin & G. Goubeaux (Paris: L.G.D.J., 1983) at 155ff., for a discussion of the classical doctrine.

[74]See arts 1260ff. *C.C.Q.*

[75]Smith, *supra*, note 8. A subset of advocates of the patrimony by appropriation reject the notion that a patrimony can be without a titulary, but accept that a person may be at the head of more than one patrimony (Ghestin & Goubeaux, *supra*, note 73 at 157-58).

sue in its name. The compromise is weak in a number of respects. First, I will argue that complete moral personality can support all the so-called restraints, with the possible exception of the incapacity to sue. Second, the argument suggested by one author[76] that the suppletive rule to restrained personality is indivision (which Part I has already illustrated is not the law) shows the confusion that underlies this theory. Therefore, this part will consider whether partnership is a full moral person or an autonomous patrimony without moral personality.

A. *Moral Personality and the Structure of the* Civil Code of Lower Canada

Other than the classical doctrine linking a distinct patrimony with moral personality, there is no express assertion in the *Civil Code of Lower Canada* that partnership is a distinct moral person. There is also no title governing the general law of moral persons.[77] Instead, Title Eleventh deals with "corporations," their nature, creation and kinds.[78] Article 353(1) states that corporations are constituted by act of parliament, by royal charter or by prescription. There is no mention here of moral persons created by private agreement. The corporation could therefore be viewed as exhaustive of moral persons in Quebec law.[79] Some doctrine has taken this narrow approach[80] and there is no question that most practitioners in Quebec do not recognize the existence of moral persons other than the corporation.[81] Thus, on this basis we would have to conclude that partnership is an autonomous patrimony without moral personality.

But the text of Title Eleventh is sufficiently vague so as not to preclude the moral personality of partnership. Nowhere in the provisions on corporations are

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[76]Perrault, *supra*, note 8 at 435.

[77]This subject has also been ignored by Quebec writers generally. See discussion in Cantin Cumyn, *supra*, note 3 at 1024 n. 8.

[78]Arts 352ff. *C.C.L.C.* Arts 352 and 353 *C.C.L.C.* read as follows:

> **352.** Every corporation legally constituted is an artificial or ideal person, whose existence and succession are perpetual, or sometimes for a fixed period only, and which is capable of enjoying certain rights and liable to certain obligations.
>
> **353.** Corporations are constituted by act of parliament, by royal charter or by prescription.
>
> Those corporations also are reputed to be legally constituted which existed at the time of the cession of the country and which have been since continued and recognized by competent authority.

[79]Cantin Cumyn writes that although the codifiers certainly knew of the traditional Civil law approach to moral personality, they were influenced by the theory of the legal fiction and relied on English authorities in drafting this title (*supra*, note 3 at 1030ff.). She notes that the term "corporation" had a broader meaning in old French law ("Il paraît même avoir englobé toutes les entités juridiques alors admises" (*ibid.* at 1031)), which furthers the argument that the codifiers intended that the corporation be the only moral person. It is also noteworthy that art. 17(11) states that the word "person" includes bodies corporate, but makes no mention of other moral persons.

[80]Trudel considered partnership to be a form of organized indivision (*supra*, note 9 at 456). See also Monk, *supra*, note 6 at 503-04: "If artificial persons or juridical persons, other than corporations, do exist in our law, then the codifiers have left a lamentable gap in this book of our Code." Smith writes that the status of partnerships in Quebec was left in doubt by the *Civil Code of Lower Canada*'s ambiguity on the question of moral personality (*supra*, note 8 at 458). Perrault noted the absence of an article, similar to art. 352, expressly granting moral personality to partnerships (*supra*, note 8 at 433).

[81]See Cantin Cumyn, *supra*, note 3 at 1046.

other moral persons prohibited or corporations expressly made exhaustive of moral persons. Moreover, the vast majority of doctrine and jurisprudence, which considered partnership both to have a distinct patrimony and to be a moral person, must have viewed the corporation as but *one* type of moral person.[82]

We have here one of the best examples of express provisions of the *Code* being interpreted to give effect to a more fundamental idea: the classical doctrine of the patrimony. There is nothing unsound in this approach because Quebec Civil law is no longer confined by the Judicial Committee's pronouncement that the *Civil Code of Lower Canada* be interpreted as an ordinary statute.[83] Fundamental principles of the system can find their way through the obstacles set, intentionally or otherwise, by the codifiers. This was affirmed by the Supreme Court of Canada in *Cie Immobilière Viger* v. *Lauréat Giguère Inc.*,[84] where the Court recognized the doctrine of unjust enrichment, even though it is not expressly mentioned in the *Code*. Beetz J.'s reasoning is applicable to the slow recognition that partnerships are moral persons:

> Modern French case law, along with practically all the writers, finally adopted [the theory of unjustified enrichment] toward the end of the nineteenth century, after a rather long period during which the silence of the Code had been interpreted as preventing its adoption. ... [Legislative] support can also be found in an extrapolation from the numerous provisions of the Civil Code, that are only special applications of it. The Civil Code does not contain the whole of civil law. It is based on principles that are not all expressed there, which it is up to case law and doctrine to develop.[85]

But this leaves open the question: what is more fundamental to Quebec Civil law, the classical doctrine of the patrimony or a narrow conception of moral personality?

B. Management Structure and Unanimity Requirements

Articles 1849-1851, 1873-1874 and 1881 *C.C.L.C.* set out the suppletive rules governing the management of the firm. As noted above, these rules have been used to justify the conclusion that partnership is a "restrained" moral person. This section examines whether the partnership management structure can support complete moral personality.

Like a corporation, the partnership patrimony cannot be made liable except through its mandataries. Thus, article 1851(1) *C.C.L.C.* creates a presumed

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[82]Mignault, *supra*, note 42 at 327. Mignault wrote of partnerships: "Et d'abord il est certain qu'il ne s'agit pas ici de ces personnes fictives, créées par la loi et qu'on appelle des corporations..." (*supra*, note 8 at 186). In other words, there is more than one type of moral person in Quebec law. L'Heureux supported this interpretation when she wrote that of the four types of commercial partnership, the general partnership (arts 1865-1869 *C.C.L.C.*), the anonymous partnership (art. 1870 *C.C.L.C.*), the limited partnership (arts 1871-1888b *C.C.L.C.*) and the joint-stock company (arts 1889-1891 *C.C.L.C.*), the first three are private law moral persons, while the last one is a public law moral person, *i.e.*, a corporation in the sense of arts 352ff. *C.C.L.C.* (*supra*, note 8 at 179).

[83]*Berthiaume* v. *Dastous*, [1930] A.C. 79 at 85-87, 1 D.L.R. 849 (P.C.). See Monk, *supra*, note 6 at 481, where the author attacks the recognition of the moral personality of the partnership on the basis of statutory construction.

[84][1977] 2 S.C.R. 67, 10 N.R. 277 [hereinafter cited to S.C.R.].

[85]*Ibid.* at 75-76.

mutual mandate between partners that has been interpreted to make the partners mandataries of the firm.[86] Moreover, by way of partnership agreement or by way of contract of personal service, one or more managers can be selected from among the partners or third parties.[87] Only a manager can alienate partnership property (article 1852).[88]

One of the great advantages of moral personality is to allow the entity to act without the unanimous consent of its members behind the "corporate veil," and without the need to resort to express mandates among shareholders. One author has written that majoritarianism is the logical consequence of moral personality because the moral person is independent of its members, with a separate patrimony and mechanism of representation to engage that patrimony.[89]

In the case of partnership, nothing in the *Code* gives rights to the majority, and it is presumed, in the absence of the selection of managers, that the partnership decision-making process requires unanimity. Further, article 1849 states that a manager may perform only "acts connected with his management." Some acts deemed to exceed the management function are expressly dealt with in the *Code*. For example, no changes can occur in the immoveable property without unanimity (article 1851(4) *C.C.L.C.*),[90] so that a partner cannot hypothecate an immoveable,[91] nor acquire an immoveable,[92] without an express mandate from the other partners. Also the courts have held that "important" acts include modifications in the partnership agreement[93] and the launching of actions in law.[94] Thus, a dichotomy is created between "acts of management" and "important" acts requiring unanimity or express mandates.

The general view is that unanimity requirements are inconsistent with moral personality. But this is a questionable proposition. In fact, given the need for a mechanism to protect the interests of shareholders from the acts of mana-

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[86]*Noël, supra*, note 11 at 7. This is yet another example of a rule consistent with organized indivision being interpreted to give effect to a distinct partnership patrimony and personality. Art. 1851(1) *C.C.L.C.* reads as follows:

> **1851.** If there be no special stipulation as to the management of the business of the partnership, the following rules apply:
>
> 1. The partners are presumed to have mutually given to each other a mandate for the management, and whatever is done by one of them binds the others; saving the right of the latter, together or separately, to object to any act before it is concluded;
>
> ... .

[87]L'Heureux, *supra*, note 8 at 176ff.

[88]Art. 1852 *C.C.L.C.* reads as follows:

> **1852.** A partner who has no right of management cannot alienate or otherwise dispose of anything which belongs to the partnership; saving the rights of third persons as hereinafter declared.

[89]Antaki, *supra*, note 8 at 1032. See also Smith, *supra*, note 8 at 457.

[90]Thus, the power of managers to alienate mentioned in art. 1852 *C.C.L.C.* includes only moveables.

[91]*Société de Prêts et Placements* v. *Lachance* (1896), 5 B.R. 11.

[92]*Damien* v. *Société de Prêts et Placements de Québec* (1896), 3 R.J. 32 (Q.B.).

[93]*Wemyss* v. *Poulin* (1934), 57 B.R. 514 at 520-21 (The decision to acqnire a mill previously leased by the partnership was held to be outside the usual course and therefore subject to the unanimity requirement).

[94]*Dupuis, supra*, note 59; L'Heureux, *supra*, note 8 at 178.

gers in corporate law, they can be seen as necessary attributes of moral personality. The fundamental change provisions of the *Canada Business Corporations Act*,[95] for example, require two-thirds shareholder approval for the performance of certain acts. The difference between the two-thirds requirement and unanimity is, in my opinion, merely a matter of degree and a reflection of the greater possible fragmentation of participation in a corporation as well as the greater stake which partners can have in the partnership. The protective mechanisms in both cases serve the same purpose: to protect the shareholders from the most prejudicial acts of managers.

Furthermore, because certain rules of unanimity are suppletive in nature — namely those relating to immoveables[96] — the partners could set them aside in the partnership agreement and confer the power to alienate on their manager; and there seems no reason why the partners could not adopt a majoritarian scheme for decision-making. One modern writer, unswayed by the unanimity requirements, has commented that the partnership's management structure actually illustrates the distinct personality of the partnership, in particular, the relationship of mandatary to principal.[97]

The *Civil Code of Québec* includes at least one important change to the management structure that will strengthen the case for moral personality. For the first time, partners are presumed to act by majority vote, although changes to the contract of partnership continue to require unanimity (article 2216(2). It would seem that the distinction between acts of management and "important" acts remains (article 2213(2)). If the doctrine survives, "important" acts, including actions at law, can now be effected by majority vote, or by expressly granting broader powers to the manager (article 2212).[98]

C. *Unlimited Liability*

Limited liability is commonly viewed as a consequence of moral personality in Anglo-American and Quebec law.[99] According to this logic, the unlimited liability of partners, set out in articles 1854, 1865 and 1870 *C.C.L.C.*, excludes consideration of the partnership as a distinct moral person.

But is unlimited liability really inconsistent with moral personality? One way to reconcile the two conceptually is to think of the shareholders or partners as the sureties of the moral person. A shortfall in the partnership patrimony would then trigger the partners' subsidiary obligation. Such a *sui generis* notion of suretyship in partnership law would have the advantage of respecting the distinct patrimonies and personalities of partners and partnership, while providing

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[95]Ss 173ff.

[96]Art. 1851 *C.C.L.C.* begins, "If there be no special stipulation as to the management of the business of the partnership, the following rules apply: ... ."

[97]As long as the mandataries act within the scope of their authority and in the interests of the partnership, they bind the partnership (Smith, *supra*, note 8 at 467).

[98]Oddly, the *Civil Code of Québec* also assimilates the administration of undivided property to that of a moral person. See, for example, majoritarianism (art. 1026(1)).

[99]Klein & Coffee, *supra*, note 12 at 139; M. Martel & P. Martel, *La compagnie au Québec: les aspects juridiques* (Montreal: Thélème, 1984) at 1.7ff.

an allocation of risk different from the corporate model.[100] As I show below, this notion of suretyship has in fact evolved in Quebec law, and at least one case, citing French authority, has expressly stated that a partner's liability resembles suretyship.[101]

According to the basic principles of suretyship, the surety is not bound to fulfil his or her obligation, unless the principal debt is due and the debtor has defaulted.[102] If the partnership is the principal debtor, and liable for the principal obligation, and the partners are the sureties, the creditors should be required to sue the partnership on a partnership debt before trying to recoup a debt from the individual partners. In the partnership context, the suretyship is *sui generis* in that it is not contractual, but arises by operation of law.

Textual support for a *sui generis* notion of suretyship is tenuous. For example, many authorities have cited article 1899 *C.C.L.C.* However, as we have seen, the article only comes into effect at dissolution, commanding the partnership, the individual partners or their liquidators to apply partnership property in payment of partnership creditors and partner property in payment of their personal creditors. Before dissolution, nothing in the article forces a creditor of the partnership to prove against the partnership before turning to the individual partners, or prevents a creditor of an individual partuer from proving first against the partnership. Even article 1991 *C.C.L.C.*, which extends the preferences in article 1899 *C.C.L.C.* to actions prior to dissolution, does not necessarily have this effect.[103] Quite the contrary, partners in a civil partnership "are ... liable" to the creditor of the partnership in equal shares although their shares in the partnership are unequal (article 1854 *C.C.L.C.*).[104] Partners in general partnerships (article 1865 *C.C.L.C.*) and anonymous partnerships (*via* article 1870 *C.C.L.C.*)

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[100]However, some French jurists argue that unlimited liability without a *sui generis* notion of suretyship is *not* inconsistent with moral personality (Aubry & Rau, *Droit civil français*, vol. 6, 7th ed. (Paris: Librairies Techniques, 1975) at 57; Cass. civ. 3e, 6 February 1969, D.1969.Jur.434 (Annot. B. Bouloc). The real issue, they write, is whether the parties intended the obligations of the partnership and the personal obligations of the partner to be on an equal footing. If this is not their intention, it is up to the parties to stipulate that their creditors first sue the partnership. The issue is reduced to one of contractual intention, rather than hinging on the nature of partnership. It is difficult to accept this reasoning because, taken to its logical end, one would have to conclude that moral personality or a distinct patrimony are also merely matters of intention. Also, if partnership creditors are allowed to sue the partner directly, they are placing themselves among, and perhaps prejudicing, the creditors of the individual partner, even though the partnership patrimony may be sufficient to meet their claims.

[101]*Brasserie de Beauport* v. *Dinan* (1898), 14 C.S. 284 at 285: "Comme le dit Pardessus, 'la solidarité que la loi établit entre les membres d'une société commerciale, tient plus du cautionnement que de la qualité de simples débiteurs.'"

[102]Arts 1929, 1941 *C.C.L.C.* The principle is the same in the Common law: the creditor must exhaust the property of the principal debtor (discussion) towards the satisfaction of the debt, before having recourse to the surety (H.C. Black, ed., *Black's Law Dictionary*, 6th ed. (St. Paul, Minn.: West, 1990) at 467).

[103]Although a promising source of this interpretation, it was not relied on by authorities cited below, indicating that general principles, and not textual interpretation, are at play.

[104]Art. 1854 *C.C.L.C.* reads as follows:

> **1854.** Partners are not jointly and severally liable for the debts of the partnership. They are liable to the creditor in equal shares, although their shares in the partnership may be unequal.
>
> This article does not apply in commercial partnerships.

"are ... liable" in solidarity for the obligations of the partnership.[105] The above articles strongly suggest that partners obligate themselves at the same time they obligate the partnership[106] and are personally liable for partnership debts, not only if the partnership patrimony proves insufficient, but concurrently. The obligations created by articles 1854 and 1865 should therefore be treated in the same way as any other joint or solidary obligations. If one views partnership as a distinct person with a distinct patrimony, this result is unacceptable because it leaves open the objection that unlimited liability precludes moral personality.

The evolution of a *sui generis* notion of suretyship in partnership was largely a doctrinal and jurisprudential creation, driven by the same forces that led to the recognition of a distinct partnership patrimony: the use of patrimonial distinctiveness as a suppletive rule. The change in approach occurred in the years just before and immediately following codification. In the 1854 case of *Tator* v. *McDonald*,[107] Day J. of the Superior Court[108] held that a creditor could sue one of the partners on a partnership debt without first having sued the partnership.[109] Smith J., while concurring on the grounds of practice, added that he personally thought no such action could lie because a partnership "is a distinct person — *personne civile.*"[110] Therefore, he concluded that the action should have been brought against the partnership.[111] Smith J.'s interpretation was adopted in subsequent cases.[112] In *Jobin*,[113] the Court cited article 1899 *C.C.L.C.*

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[105]Mignault wrote that this is what distinguishes partnerships from corporations (*supra*, note 42 at 330-31). However, this is no longer a valid distinction in practice. For example, in the case of closely held corporations, it is common for lenders to insist that the shareholders personally guarantee the corporate debt.

[106]*Ibid.* at 331.

[107][1854] Montreal Condensed Reports 84 (Sup. Ct) [hereinafter *Tator*].

[108]Charles D. Day, one of the codifiers of 1866. His views may reflect the intentions of the codifiers in drafting the law of partnership.

[109]The Court noted that any other conclusion would be an exception to the rule of "solidarité" (*supra*, note 107 at 84).

[110]For this he cited C.B.-M. Toullier, *Le droit civil français*, vol. 5, ed. by J.-B. Duvergier (Paris: Jules Renouard, 1839) para. 381; J.M. Pardessus, *Cours de droit commercial*, vol. 4, 5th ed. (Paris: Nève, 1841) para. 1026.

[111]He also noted that the doctrine of *solidarité* had no application because this contract was not with any partner or group of partners, but with the partnership as an entity (*supra*, note 107 at 84). It is arguable that the majority was correct if the principle of art. 1105(3) *C.C.L.C.* is applied: commercial obligations are presumed to be solidary. Thus, in a commercial partnership, the partuers are liable in solidarity with the partnership.

[112]In *Cassant* v. *Perry* (1863), 7 L.C. Jurist 108, the Superior Court held that it was uot competent for a creditor of a note signed in the name of the partnership to bring an action against one of the partners alone when there was no allegation in the declaration that the firm was dissolved. In *Stadacona Bank* v. *Knight* (1875), 1 Que. L.R. 193, the Court gave *Tator* an extremely limited interpretation, amouutiug to overruling it: *Tator* applies only to suits lauuched after the dissolution of the firm. Otherwise, a creditor of the partnership cannot sue a partner without having first proven the existence and scope of the debt against the partnership. Upon dissolution, the partuers could be sued individually because the partnership no longer exists for this purpose. See also *Hill* v. *Ledoux* (1912), 14 Que. P.R. 319, confirmed on appeal. Mignault wrote that *Tator* stood for the principle that a creditor has the right "s'il le veut, de poursuivre l'un des associés sans mettre *les autres* en cause." [emphasis added] "[L]es autres" is a reference to the other partners, even though the judgment in *Tator* clearly states that the creditor need not sue the "co-partnership" (meaning partnership) before suing the partner (*supra*, note 8 at 232).

[113]*Supra*, note 23.

for the principle that the partnership has a distinct patrimony and must be sued first on a partnership debt. This interpretation is now considered settled law by the doctrine.[114]

The elaboration of a *sui generis* notion of suretyship has also been achieved in the face of article 1838 *C.C.L.C.*, dealing with the execution of judgments against the partnership. The article states that any judgment rendered against a partner of an existing partnership, "for a partnership debt or liability," may be enforced by process of execution against partnership property in the same manner as if the judgment had been rendered against the partnership.[115] What is striking here is that the article seems to provide for a situation in which a partner has been sued first on a partnership debt — a situation that jurisprudence and doctrine tell us cannot happen until dissolution. Article 1838 reads as a general rule applicable to all civil and commercial partnership and the authorities have treated it as such.[116] But if a creditor cannot sue a partner on a partnership debt, the second part of the article is deprived of much of its meaning.[117] This is another good example of the systemic pressure to give effect to a distinct partnership patrimony and, perhaps, to its distinct moral personality. Its force is such as to interpret a provision of the *Code* virtually out of existence.

The development of a *sui generis* notion of suretyship illustrates that unlimited liability is not necessarily inconsistent with moral personality. The legal result is not proscribed by any express provision of the *Code*, certainly not by articles 1854 or 1865. It is also worth noting that the *Civil Code of Québec*, in its provisions on condominiums (divided co-ownership of immoveables), has recognized that the members of a moral person (article 1039) can be subject to unlimited liability (article 1078).

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[114]Smith, *supra*, note 8 at 465; L'Heureux, *supra*, note 8 at 182. *Contra*: Mignault, despite his interpretation of *Tator*, seemed to think that the creditor could sue the partner directly (*supra*, note 8 at 214, 232). See also *Grenier* v. *Simoneau* (1914), 45 C.S. 329.

[115]Art. 1838 *C.C.L.C.* reads as follows:

> **1838.** The service of summons or process, for any claim or demand founded upon any liability of an existing partnership, at the office or place of business of such partnership within the province of Canada, has the same effect as a service made upon the members of such partnership personally, and any judgment rendered against any member of such existing partnership, for a partnership debt or liability, may be enforced by process of execution against the partnership property in the same manner as if the judgment had been rendered against the partnership.

[116]Mignault, *supra*, note 8 at 192; Roch & Paré, *supra*, note 8 at 365-67; Perrault, *supra*, note 8 at 433; Case Comment, *supra*, note 23 at 571. None of this doctrine distinguishes between the application of the first and second parts of art. 1838 *C.C.L.C.* See also *Sykes* v. *Dillon* (1905), 28 C.S. 230. Art. 1838 originates in an 1848 statute of the united Province of Canada dealing with publicity of partnerships, and could be regarded as a "foreign" graft upon the Civil law. See *An Act to Facilitate Actions against Persons Associated for Commercial Purposes, and against Unincorporated Companies*, S. Prov. C. 1848, c. 45. The substance of art. 1838 *C.C.L.C.* formed at that time the latter part of s. 4 of the statute. The *Consolidated Statutes* of 1861 made the substance of art. 1838 into a separate provision (*An Act respecting Partnerships*, *supra*, note 26, s. 4(3)).

[117]It might still apply where a creditor sues all the partners, but without naming them as carrying on business in partnership. The article would ensure that the creditor could execute against partnership property and not only the personal property of the partners. It might also apply to an action launched after dissolution, but before liquidation.

In a curious lapse in doctrine and jurisprudence, a rule based on indivision remains once creditors of the firm obtain a judgment against the partnership on a partnership debt. These creditors may then execute against the individual partner's property without first discussing partnership property.[118] Although no decision has expressly overruled this interpretation, several cases in *obiter* have stated that a creditor should first discuss partnership property before executing against the partners.[119] The *Civil Code of Québec* abolishes the aberrant rule in favour of one consistent with a distinct patrimony and moral personality.[120]

D. Incapacity to Sue in its Name

The capacity to sue and to defend legal actions without the need to name all the partners, shareholders or members, is considered to be one of the fundamental attributes of moral personality.[121] In Quebec, a commercial partnership can be served at its place of business (article 129 *C.C.P.*) and a civil partnership can be served at its office (article 1838 *C.C.L.C.*).[122] A commercial partnership can also be sued in its name (article 115 *C.C.P.*), and where commercial partnerships have failed to file a declaration (article 1834 *C.C.L.C.*), they can be sued in the name of one or more of the partners under the firm name (article 1837 *C.C.L.C.*). Otherwise, a civil partnership can only be sued by naming all the partners, and jurisprudence has held that neither a civil nor a commercial firm in Quebec can sue in its name.[123]

Support for this incapacity is based on three distinct grounds: First, some authorities, influenced perhaps by English law or based on the principles of organized indivision, treat the incapacity to sue as an inherent characteristic of partnership.[124] Second, the provisions respecting the management of the partner-

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[118]*Carmel* v. *Asselin* (1884), 28 L.C. Jurist 28 (Circ. Ct); L'Heureux, *supra*, note 8 at 183; *Stadacona Bank* v. *Knight*, *supra*, note 112 at 194. This clashes with the logic of a *sui generis* notion of suretyship.

[119]In *Jobin*, *supra*, note 23 at 570, the Court noted: "L'exécution de la condamnation prononcée contre la société devait se tenter d'abord sur ses biens. Avant que ce moyen n'ait été épuisé, aucune plainte ne pouvait être portée contre les associés." See also *Duval* v. *Duval* (1926), 28 Que. P.R. 242 at 255, both cases relying on art. 1899 *C.C.L.C.*

[120]Art. 2221(2) *C.C.Q.* reads as follows:

> **2221.** ...
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> Before instituting proceedings for payment against a partner, the creditors shall first discuss the property of the partnership; if proceedings are instituted, the property of the partner is not applied to the payment of creditors of the partnership until after his own creditors are paid.

In the current law, the right of preference in favour of creditors stems from art. 1991 *C.C.L.C.*

[121]Bohémier & Côté, *supra*, note 8 at 27; Monk, *supra*, note 6 at 500. Planiol & Ripert write that allowing managers of a partnership to sue is a necessary consequence of moral personality (*supra*, note 49, para. 1957).

[122]In France, art. 69 of the old French code of procedure, which allowed a commercial firm to be served at its "maison sociale," was considered strong evidence that the partnership was a person (Ripert, *supra*, note 4, para. 681).

[123]*Dupuis*, *supra*, note 59.

[124]Mignault, otherwise a strong supporter of the theory that partnerships are moral persons, wrote that partnerships are not moral persons to the same degree as corporations. Therefore, they are not be apt to launch actions in their own name without naming the partners (*supra*, note 8 at 187).

ship patrimony have been interpreted to prohibit managers or partners acting on a presumed mandate from performing "important" acts, such as the alienation of immoveables.[125] Initiating actions in law has been included within the class of "important" acts. Third, the presumed intention of the legislator not to allow civil or general partnerships to sue in their names can be inferred from article 1884 *C.C.L.C.*, which *expressly* allows suits in relation to the business of a limited partnership to be brought by or against the general partners,[126] as well as from article 60(1) *C.C.P.*,[127] which allows any "group of persons associated for the pursuit of a common purpose ... but which does not possess a civil personality *and is not a partnership* [emphasis added]" to defend an action in its name. Article 60(2) only accords the right to sue to labour unions.

There is no question that this state of affairs is an impediment to the civil existence of the firm and that it casts doubt on whether partnership is a full moral person. This has led some Quebec authors to argue that the incapacity to sue, and in some cases, to defend actions, proves that partnership is a "restrained" moral person.[128]

But is the capacity to sue really so fundamental to moral personality? In my opinion, it is not. The fact that the French jurisprudence accorded the same right to all assocations, even those without moral personality, has led some French authors to question the connection between moral personality and the capacity to sue.[129] Likewise, in the Common law jurisdiction of Ontario, where partnerships are not moral persons, a partnership may sue and be sued in its name.[130] It is also true that the incapacity to sue of a minor or a person under protective supervision does not lead to the conclusion that they are not persons.

Should the courts have implied a right to sue? There is no express bar to this result, the closest being article 60 *C.C.P.*, which is vague at best[131], as well as the existence of express provision, such as article 1884 *C.C.L.C.* One can also

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[125]L'Heureux, *supra*, note 8 at 178.

[126]This is a unique form of partnership in which the special partners benefit from limited liability and only the general partners may manage the firm. Limited liability and a reduced managerial class assimilates the limited partnership to the corporation.

[127]Originally arts 81a, 81b *C.C.P.*, introduced by S.Q. 1960, c. 99, s. 6. Art. 60(1) *C.C.P.* reads as follows:

> **60.** Any group of persons associated for the pursuit of a common purpose in Québec, but which does not possess a civil personality and is not a partnership within the meaning of the Civil Code, may nevertheless defend any action at law taken against it.

[126]This incapacity is the reason why Trudel views partnership as organized indivision (*supra*, note 9 at 456). In *Brown* v. *Taylor*, *supra*, note 9, the Court held that the inability to sue in its name meant that the commercial partnership was not a moral person.

[129]Planiol & Ripert, *supra*, note 49, para. 1957.

[130]Ontario, *Rules of Civil Procedure*, O. Reg. 560/84, r. 8.01 (1).

[131]Although the term "partnership" is juxtaposed against groups with a right to defend actions in their names, such groups are also juxtaposed against an entity with a "civil existence," such as a corporation, which certainly does have this right. Also, art. 115 *C.C.P.* clearly gives commercial partnerships the capacity to defend actions, which suggests that the use of the general term "partnership" here was meant only to clearly delineate the "group" targeted by the first clause. In other words, art. 60 *C.C.P.* is not relevant to a partnership's capacity.

question the classification of all actions in law within the same category as the alienation of immoveables, as "important" acts,[132] especially if the action involves moveables.[133] In the same way that the notion of patrimonial distinctiveness has been used to supplement the law, the courts might have implied a capacity to sue in order to allow a partnership to engage its patrimony. Given the general view that the capacity to sue normally follows civil existence, the failure of the legislature to expressly grant the right or of the jurisprudence to imply it, strongly suggests that partnerships are not moral persons.[134] In fact, although Part I illustrates that courts have been willing to supplement the law using patrimonial distinctiveness, they have not been willing to imply the attributes of moral personality, such as a right to sue.

Changes to the law under the *Civil Code of Québec* will, however, grant partnerships a right to sue and be sued in their names (article 2225 *C.C.Q.*), which will certainly strengthen the case for moral personality.

E. Validity of Contracts between Partner and Partnership

An important advantage of moral personality is the ability of shareholders to contract with the moral person. A partnership can contract with third parties and the partnership itself is the result of a contract between partners. But can a partner contract, not with his or her co-partners, but with the partnership itself? The situation here is different from the creditor-debtor relationship discussed in Part I because those rights and obligations arose out of the contract of partnership, and not from subsequent contracting between partner and partnership. For example, could a partner lease an immoveable to his or her partnership? There is no question that a partner can contribute a right of enjoyment to the firm,[135] and any rent due could be credited the partner on the partnership books. But could this take the form of a valid Title Seventh lease with all the rights and obligations incidental to it?

There is some suggestion in the jurisprudence that a contract between the partnership and a partner would be valid. For example, in one case a Court appears to have recognized the sale of an immoveable owned by a partnership to one of the partners.[136] In another case, a Court held that a partner can be an

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[132]An action in law can have important financial consequences for a business. However, an action undertaken under a presumed mandate (art. 1851(1) *C.C.L.C.*) or by a manager appointed by an instrument posterior to the contract of partnership (art. 1849 *C.C.L.C.*) can be halted by any of the partners. A frivolous action launched by a manager charged with the management by virtue of a special clause in the contract of partnership can be halted with "sufficient cause" (art. 1849(2) *C.C.L.C.*). This power to stop a prejudicial action cannot be said of an alienation of rights which is irrevocable.

[133]If the basis of the restriction is the principle that the nature of an action follows the nature of the right it asserts or defends, then only real actions involving immoveables should require unanimity, not those involving moveables, including personal actions.

[134]Cantin Cumyn, *supra*, note 3 at 1039-40.

[135]L'Heureux, *supra*, note 8 at 173.

[136]In *Girard, supra*, note 24, two partners executed a deed of sale (called a provisional partition) of immoveables owned by the partnership in favour of the partner running in an election in order to allow him to qualify. The Court held that the deed was not a provisional partition, but a sale

employee of his or her own partnership, necessarily implying that a contract of employment must have arisen between the parties.[137]

But enforcement is a much more difficult issue, raising great uncertainty. Jurisprudence and doctrine suggest that a partner can sue the firm directly.[138] Even in Common law jurisdictions, where such an action is regarded as the equivalent of a partner suing himself, one American jurist has noted that the procedural obstacles to the action do not affect the *existence* of the obligation.[139]

A partnership could sue the contracting partner in the name of one or more of the other partners, using article 1839 *C.C.L.C.*[140] But given that the contract arises at arm's length, the *actio pro socio* is probably unavailable, and the partnership would have to sue as a third party. This, however, is an impossible situation, because all the partners would have to be named, including the defending partner! One suggested solution, whether the creditor is the partnership or a partner, is to assign the obligation to a third party, who would then be free to enforce it.[141]

In summary, a strong case can be made for the validity of such contracts. In fact, the existence of a separate partnership patrimony alone should permit their formation. On the other hand, the uncertainty of the law in this area and procedural obstacles to enforcement, not present in corporate law, do however weigh against the recognition of moral personality. The *Civil Code of Québec* allows partnerships to sue and be sued in their names (article 2225), which could be interpreted to allow the enforcement of arm's length contracts and open the way to the recognition of full moral personality.

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for a determined price made by one of the partners of his rights in the immoveables, but also ruled that the money was owed to the partnership. The Court appears to be confusing two visions of partnership. If a partnership has a separate patrimony, a partner does not own rights in any specific thing in the patrimony of the partnership. Thus, a partner cannot cede his rights in the immovables, but only his or her share in the partnership patrimony as a universality. But even if he or she did cede the share, the partner acquiring the immoveable would owe the other partner for the sale — not the partnership. Therefore, given the reference to a debt owed to the partnership, the case may stand for the proposition that a contract of sale can arise between a partner and the partnership.

[137]*Noël, supra*, note 11. One of two partners was killed in a car accident. The widow then tried to sue the surviving partner by virtue of s. 8 of the *Workmen's Compensation Act*, R.S.Q. 1941, c. 160, which allowed an action against all persons other than the employees of the company. The Court dismissed the action on the grounds that the defendant was an employee of his own partnership, noting that a partnership is a distinct person from the partners (*ibid.* at 6) and, therefore, partners could be treated as agents or employees of the partnership. See also Verschelden, *supra*, note 8; *Harrisson, supra*, note 65, where the partner was engaged as foreman in his own partnership.

[138]If it is commercial, by virtue of art. 115 *C.C.P.* or if it is civil, by summoning all the partners, including the plaintiff (*Harrisson, ibid.*).

[139]Crane, *supra*, note 7 at 312. A movement towards the entity theory in a Common law jurisdiction can be seen in *Geisel* v. *Geisel* (1990), 66 Man. R. (2d) 153, 72 D.L.R. (4th) 245 (Q.B.) where the Court held that partners could sue their partnership in negligence. See an account of the case in S. Ellis, "Deceased farmer's estate and family can sue former partner in Manitoba negligence suit" *The Lawyer's Weekly* (24 August 1990) 1.

[140]See *Whimbey* v. *Clark, supra*, note 60.

[141]Crane, *supra*, note 7 at 314.

Conclusion

Partnerships created under the *Civil Code of Lower Canada* have patrimonies distinct from those of the individual partners. Moreover, the interpretation of the *Code* clearly shows the use of patrimonial distinctiveness as a suppletive tool where the *Code* is silent or ambiguous.

But, the existence of a distinct patrimony can no longer be taken as sufficient to justify a conclusion that partnerships are moral persons. This is due to the increasing acceptance in Quebec law of the possibility of autonomous patrimonies. On the other hand, the notion that partnerships are "restrained" moral persons must be rejected as an inadequate explanation of a partnership's nature.

The structure of the *Code*, the management structure of partnerships and the unlimited liability of partners are compatible with a notion that partnerships are moral persons. Further, the recognition that partnerships are moral persons is conceptually more attractive than the hybrid notion of autonomous patrimony. However, the incapacity of partnerships to sue in their names, the adoption in Quebec of the English technique of incorporation, as well as the uncertain status of a contract between partner and partnership remain serious obstacles to the conclusion that partnerships are recognized as moral persons. Further, although an early proposal for reform of the *Civil Code* explicitly recognized the partnership as a moral person,[142] this provision is not to be found in the *Civil Code of Québec* as recently adopted. Rather, article 2188 *C.C.Q.* states explicitly that joint-stock companies are moral persons, without specifying the status of partnerships.[143] This can mean one of two things: either the legislature does not wish to grant moral personality to partnerships; or it seeks to allow doctrinal and jurisprudential evolution to determine whether partnership has accumulated sufficient legal attributes to attain moral personality. The latter seems more likely, given that, in other respects, the *Civil Code of Québec* strengthens the argument that partnerships are full moral persons by granting them the right to sue and be sued in their names,[144] limiting the requirements for unanimity in the management structure[145] and forcing creditors of the partnership to first discuss partnership property.[146] But as the law stands, partnership appears to be best defined as an autonomous patrimony.

The question remains open as to whether it would not be better to make the leap from autonomous patrimony to fully recognizing partnerships as moral persons. Although the current law makes this leap difficult, though not implausible, the *Civil Code of Québec* provides additional material for this doctrinal development. It is perhaps exactly the need for further doctrinal development that made it preferable that the legislator remain silent on the question.

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[142]*Draft Bill, supra*, note 13, art. 2251.

[143]Art. 2188(2) *C.C.Q.* reads: "Partnerships may also be joint-stock companies, in which case they are legal persons."

[144]Art. 2225 *C.C.Q.*

[145]See text preceding note 97.

[146]Art. 2221(2) *C.C.Q.*

The recognition of a partnership's moral personality is not an attempt to "corporatize" what is a distinct institution serving a distinct economic function. Instead, it serves to give legal effect to a psychological sense that partnerships are distinct from their members. Civil law systems have also found moral personality to be an ideal way of understanding and regulating the pooling of assets to serve common purposes, a solution which, although it is not fully exploited in Quebec law, is certainly available to resolve the riddle of a partnership's nature.