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QUÉBEC'S PARTNERSHIP: *UNE SOCIÉTÉ DISTINCTE*

Alexandra Popovici*

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The distinctive character of Québec's civil law does not need to be demonstrated once again. Its unique chronotope,¹ its recodification, and its lifelong *vie commune* with the common law² are all factors that have been brilliantly examined³ and will be taken for granted in this text. What is at stake—and surely all of these unique factors will be brought out during this study—is simply the peculiar nature of one of its institutions: partnership.

Québec's partnership has, without a doubt, a certain *je ne sais quoi* that might be of interest to others struggling with this juridical notion and its effects. Indeed, the histories of partnership in the

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1. This term is used by the language philosopher, Mikhail Bakhtin, to express the way time and space are inscribed in language. See Mikhail Bakhtin, *Forms of Time and of the Chronotope in the Novel*, in *THE DIALOGIC IMAGINATION: FOUR ESSAYS* 84 (University of Texas Press 1981).

2. For an analysis of this proximity and a take on "société distincte" understood as a distinctive society, see Patrice Garant, *Code civil du Québec, Code de procédure civile et société distincte*, 37 *LES CAHIERS DE DROIT* 141 (1996).

3. John E.C. Brierley, *The Renewal of Québec's Distinct Legal Culture: The New Civil Code of Québec*, 42 *U. TORONTO L. J.* 484 (1992).

civil law as well as in the common law have revealed a fascinating ambivalence about the nature of the institution, an institution that, even if it can be said to have existed forever, never found its grounding and still oscillates between legal personality, a modality of ownership and a mere contractual relationship.

In Québec, the legislature was thought, until recently, to have taken a stance. After ambiguity remained under the Civil Code of Lower Canada,⁴ and after it was recommended that partnerships should be granted legal personality,⁵ it was clearly stated that a partnership is not a legal person under the current Civil Code of Québec.⁶ Indeed, the Civil Code of Québec defines partnership, in French “*société*,” as a contract akin to what is understood as a partnership elsewhere in Canada. In doing so, the presumption seemed clear: the importance was placed on the relationship between the partners who, together, were the owners of the combined property held in some joint undivided manner and thus were solidarily liable for its debts.

Yet, recent developments have shed new light on this presumption: in *Ferme CGR enr, senc.*,⁷ the Québec Court of Appeal held that it was not necessary for the partners of a Québec general partnership to be placed in bankruptcy for the partnership itself to go bankrupt. Analyzing partnership as a *distinct and autonomous patrimony*, the Court modified—or at least bespoke—the presumed ownership structure of partnerships in Québec, making it difficult to contend, with any certainty, that partners are the owners of the combined property and thus personally responsible for its debts.

4. See *Québec (ville de) c Compagnie d'immeubles Allard ltée* [1996] R.J.Q. 1566.

5. Civil Code Revision Office, Committee on the Contract of Partnership, *Report on the Contract of Partnership*, XXIV, (1974). See <http://digital.library.mcgill.ca/ccro> for further reference.

6. See art. 2186 and 2188 Civil Code of Québec [hereinafter CCQ].

7. *Ferme CGR enr., s.e.n.c. (Syndic de)* 2010 Q.C.C.A. 719.

Thus, the question now is very simple: who owns a Québec partnership?⁸ This question is important. At stake is not only the juridical nature of partnership in Québec, but also what is understood as personality, patrimony and, ultimately, civil liability in this mixed jurisdiction. One must recall that personality has lost its primacy in Québec as the possibility of patrimony by appropriation has come into force. Indeed, by choosing patrimony by appropriation as the vehicle to recast the trust in the Civil Code of Québec,⁹ the legislature has not only changed the framework of the trust as understood in the Civil Code of Lower Canada, it literally changed the overall juridical plan: patrimonial rights today have two means of being in the Civil Code of Québec: they either belong to persons, or they are appropriated to a purpose.¹⁰ This transformation is fundamental, and has the power of transforming old stories into completely new ones. In our case, the prospect of patrimony by appropriation has clearly created a new angle within the old debate about partnership: the question is not only if a partnership has a distinct legal personality from its partners; now a partnership can be understood as not having legal personality, yet as having a distinct patrimony containing rights and obligations of its own.¹¹

The questions then become: What is a distinct patrimony? Is it the same thing as a patrimony by appropriation? Is it the right vehicle for civil law partnerships? What distinguishes patrimony from legal personality? Can there be liability without personality or even without patrimony? Why are we having so much trouble defining such an old institution? What is really at stake here?

8. Martin Boodman, *Who owns a Québec partnership?*, 5 BUSINESS LAW QUARTERLY—MCCARTHY TÉTRAULT (November 29, 2010), available at www.mccarthy.ca/article_detail.aspx?id=5201.

9. See Title 6, “Certain patrimonies by appropriation,” art. 1256 et seq. CCQ.

10. Article 915 CCQ.

11. *Ferme CGR*, *supra* note 7, para. 70.

This text has two principal aims: first, to give an overview of the debate concerning the nature of general partnerships in Québec; second, to use this debate in order to better understand the key concepts at play and their role in Québec's civilian imagination today.

The text will unfold in four parts. I will first examine the roots of the notion and its iteration in the common and civil law. I will then turn to Québec and give a brief overview of the debate surrounding the nature of partnership since its first codification. At that point, I will examine the law in force today, and its jurisprudential interpretation, which understands partnership as a distinct and autonomous patrimony, in order to finally go back to the basics and to examine what a partnership is in Québec and what makes Québec law so distinctive.

I. *SOCIETAS*, PARTNERSHIPS & *SOCIÉTÉS*

Partnerships have been around. Roman law knew this form of organization which grew out of the need—should we say universal need—to bring resources together to achieve a certain goal. The nature of the Roman *societas* is still under scrutiny today. Some scholars think about it in terms of civil status, others in pure contractual form.¹² Both ways have repercussions for our understanding of the institution today, because both are about the capacity bestowed upon a partner in regard to the collective property, in regard to the other partners and in regard to third parties.

The contractual nature of the *societas* seems to be agreed upon for common law as well as for civil law.¹³ Here is a recent description of the Roman institution:

12. David Daube, *Societas as Consensual Contract*, CAMBRIDGE L.J. 381 (1936-1938).

13. On the shift from status to contract see HENRY MAINE, *THE ANCIENT LAW, ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY, AND ITS RELATION TO MODERN IDEAS* (John Murray, 1861).

Roman partnership was a contract based on the agreement of two or more parties who cooperated to reach a common aim. Partners contributed all their goods, money or labour to the company. They brought to the partnership single goods or specific activities and they sought a profit, in proportions which could vary from one partner to another. According to Gaius:

3.148: Societatem coire solemus aut totorum bonorum aut unius negotii, veluti mancipiorum emendorum aut vendendorum. Partnership usually covers either all the partners' worldly [sic] wealth or else a single business, for instance, buying and selling slaves.

The share of profits and losses among partners is “inside” the contract and it arises from the obligations among the partners themselves, regulated by the *actio pro socio*, a civil action based on *bona fides*. However the partnership was “personale,” that is among people. The personal nature of the partnership obligations are evidenced by the fact that a partner could not convey—either by a contract *inter vivos* (among living people) nor *mortis causa* (by hereditary succession)—his membership to other people without all the partners' consent. In that case a “new” partnership would arise, both substantially and legally. . . .¹⁴

The law of *societas*, as described here, organized the relations of the partners amongst themselves. The contract was *intuitu personae* and if a partner disappeared, the partnership collapsed.¹⁵ Partnership was a membership, a relationship, a way of being with one another regulated by a contract.

The common law today still understands partnership as a mere relationship: “Partnership is the relation that subsists between persons carrying on a business in common with a view to profit.”¹⁶

14. Salvo Randazzo, *The Nature of Partnership in Roman Law*, 9 *AUSTL. J. LEGAL. HIST.* 119, 120 (2005).

15. RAYMOND SALEILLES, *DE LA PERSONNALITÉ JURIDIQUE - HISTOIRE ET THÉORIES* 47 (2d ed., Rousseau 1922), available at http://droit.wester.ouisse.free.fr/pages/brocantes/saleilles_personnes/sal_pers_1_S.htm.

16. See s. 2, Partnerships Act, RSO 1990, c P.5. In Canada, statutory regulation of partnerships falls under provincial jurisdiction and the Partnership Acts in the common law provinces are essentially an adaptation of the United Kingdom's 1890 Partnership Act. Although reforms and law commissions have taken place in the United States and United Kingdom, Canada still understands partnership as an aggregate of persons.

What distinguishes *societas* from common law partnership today is mainly this idea of business. Presently, partnership is understood as a commercial enterprise and its first aim is profit. Yet, and this is where a big part of the confusion stems from, when we read, hear, and think of a partnership, we do not think of a relationship, a way of being with one another, we think of the firm, the actual business. Thus, when we talk about the partnership property, it seems as if the partnership is a distinct entity able to hold property. This is misleading. A partnership is not a distinct and autonomous entity as a corporation is. When we talk about a partnership, we must consider all the partners. They carry out the business. They own the partnership property, which is typically held in common. They are personally liable. We should not say “the partnership property” but always “the property held in partnership” or “the property appropriated to the firm,” “the business.” Partnership is a way of being, not a being. Partnership in the common law is an aggregate of partners;¹⁷ it is not a legal person.

In the civil law, in France more precisely, the distinctions between a *société* and a legal person, between a way of being and a being, have been blurred.¹⁸ The story of the French muddling is worth revealing. It pertains to the way civil law understands collective interests and the legal capacity conferred upon a group of persons. And, it has to do, yet again, with the power of metonymic language: the linguistic reification of the partnership—*société de personnes*—as an entity able to hold property and be liable on its own, has had an enormous influence on French, and thus Québec, legal minds throughout the years.

17. The debate in the common law over entity or aggregate status of partnership is not new. *See, e.g.*, Joseph H. Drake, *Partnership Entity and Tenancy in Partnership: The Struggle for Definition*, 15 MICH. L. REV. 609 (1917).

18. Not true for all civil law jurisdictions, *see* TRAVAUX DE L'ASSOCIATION HENRI CAPITANT, LES GROUPEMENTS ET LES ORGANISMES SANS PERSONNALITÉ JURIDIQUE (vol. 21, Dalloz 1974).

The distinction between a *société* and a legal person was relatively clear until the 19th century. The *société* resembled the common law partnership taking its roots, as the word itself denotes, in the *societas*. It was thus a relationship, an aggregation of persons, like the one previously mentioned. It had no legal personality, no patrimony, no legal capacity of its own. If one partner disappeared, the relationship disappeared. The individuals, together, were owners, debtors and beneficiaries. The life of their association depended upon them. It was a mere contractual agreement, a purely private matter, a way of being together for a particular purpose.

Legal persons were not so private. They required state intervention and they took shape around the roman idea of *universitas*. A *universitas*, a notion that developed slightly later in the Roman imagination, had, contrary to a *societas*, something akin to legal capacity. With *universitas*, the idea was to create an entity that could endure, an autonomous body—*corps*—independent from its actual members, who could change and even be reduced to one. Thus, a corporation, as opposed to a partnership, had legal personality, held property personally and thus was personally liable for its own debts.¹⁹ A corporation was a being.

Until the French revolution, the dichotomy in France between partnership and corporation was clear, as it was in other jurisdictions like England and Germany. General partnerships had no legal capacity and took the shape of a kind of collective ownership organized around a contractual private agreement

19. It was mainly around the idea of *universitas* that the notion of legal person—*personne morale*—started taking shape. Raymond Saleilles, the French specialist on the topic of legal personality, described *universitas* in the following way: “*L’Universitas . . . apparait comme un sujet de droit se détachant désormais de la personnalité des individus qui en sont les parties composites.*” See SALEILLES, *supra* note 15, at 78, 87, 89, 90.

between the partners.²⁰ Corporations, on the other hand, were legal persons and could only arise by royal assent.²¹

However, following the enactment of the French Civil Code, a bizarre phenomenon²² was observed in France: legal personality was granted to partnerships while other forms of aggregation, which had previously had legal personality, for example foundations, were deprived of it.²³ This shift occurred first for commercial partnerships in the Commercial Code, and was promptly followed by a decision by the *Cour de cassation* which declared that civil partnerships had legal personality and, consequently, their own patrimony.²⁴ One of the grounds for granting legal personality to partnerships is worth mentioning because it was primarily textual: according to the court, since the Code often referred to partnerships as debtors or creditors, this indicated that the legislature wanted implicitly to grant personality to partnerships. This is important, as a long debate concerning the source of legal personality had animated the law at the time. There were two schools of thought: the *fiction theory*, according to which legal personality was only granted expressly by law to entities; and the *realist theory*, according to which legal personality existed only under certain conditions, as if there was a natural right to legal personality. Here both schools of thought wanted to seize the ruling as an application of their understanding of what ought to be.

20. *Id.* at 297.

21. The state wanted to have a say or, more precisely, a hold on these fictional persons which, because of their capacity, accumulated wealth and became a threat. On the history of legal personality see Madeleine Cantin-Cumyn, *La personne morale dans le droit privé de la province de Québec*, in CONTEMPORARY LAW, DROIT CONTEMPORAIN 44-59 (Institute of Comparative Law, McGill University, Yvon Blais 1992).

22. These are the words of SALEILLES, *supra* note 15, at 300.

23. Maitland described the paradox: "Recent writers have noticed it as a paradox that the State saw no harm in the selfish people who wanted dividends, while it had an intense dread of the comparatively unselfish people who would combine with some religious, charitable, literary, scientific, artistic purpose in view." FREDERIC WILLIAM MAITLAND, STATE, TRUST AND CORPORATION 67 (Cambridge University Press 2003).

24. Cass. Req., 23 February 1891, D.P. 1891, I. 337.

Yet, it seems that what happened was more something in between: an implicit attribution of legal personality by the legislator. Partnership was understood to be a legal person simply because of the hesitant language of the Code.

Today the French law is clear: partnerships in France are, once registered, legal persons by law. The fiction theory prevailed.²⁵ French *sociétés* are beings.

II. PARTNERSHIPS IN QUÉBEC

The ambivalent nature of the Québec partnership stems from its ambiguous relationship with both the common law and French civil law as well as from its own particular history of codification and recodification.²⁶

The story is as follows: Under the Civil Code of Lower Canada, a general partnership was a contract,²⁷ but it was understood by the majority of Québec scholars²⁸ and judges²⁹ as a

25. It was only in 1978 that this was truly clarified in the French Civil Code, which states that a partnership has legal personality once it has been registered: *see* art. 1842 of the French Civil Code, amended by Law no. 78-9 of January 4, 1978.

26. For a good overview of the story of the new Québec code, *see* the well-documented, if a bit arrogant, text of Pierre Legrand, *Bureaucrats at Play: The New Québec Civil Code*, 10 BRIT. J. OF CAN. STUD. 52 (1995).

27. Article 1830 Civil Code of Lower Canada: "It is essential to the contract of partnership that it should be for the common profit of the partners, each of whom must contribute to it property, credit, skill, or industry." ("*Il est de l'essence du contrat de société qu'elle soit pour le bénéfice commun des associés et que chacun d'eux y contribue en y apportant des biens, son crédit, son habileté ou son industrie*").

28. PIERRE-BASILE MIGNAULT, 8 LE DROIT CIVIL CANADIEN 186 (Wilson & Lafleur 1909); ANTONIO PERRAULT, 2 TRAITÉ DE DROIT COMMERCIAL 433 (A. Lévesque ed., 1936); HERVÉ ROCH & RODOLPHE PARÉ, 13 TRAITÉ DE DROIT CIVIL DU QUÉBEC 339 (Wilson & Lafleur 1957); NICOLE L'HEUREUX, PRÉCIS DE DROIT COMMERCIAL DU QUÉBEC 162 (2d ed., PUL 1975); J. Smith, *La personnalité morale des groupements non constitués en corporation*, 81 R. DU N. 457, 462 (1979); ALBERT BOHÉMIER & PIERRE P. CÔTÉ, 2 DROIT COMMERCIAL GÉNÉRAL 20 (3d ed., Thémis 1986); Charlaïne Bouchard, *La réforme du droit des sociétés: l'exemple de la personnalité morale*, 34 C. DE D. 349, 374-75 (1993). *Contra*, *see* Yves Caron, *Les associations et les groupements dépourvus de personnalité juridique en droit civil et commercial québécois*, in TRAVAUX DE L'ASSOCIATION HENRI CAPITANT, *supra* note 18, at 181; J. Smith, *La personnalité morale des groupements*

legal person or an “imperfect legal person.”³⁰ It was only in 1996, two years after the coming into force of the new Civil Code of Québec, that the Québec Court of Appeal clarified the notion found in the Civil Code of Lower Canada, although it was already outdated by this time. In *Allard*, the Court, for the first time, stated clearly that a general partnership under the Civil Code of Lower Canada was not a legal person and, consequently, that it could not have a personal patrimony: “. . . *la société civile ne constitue pas une personne juridique distincte de ses membres, et . . . , même si la société peut paraître posséder certains des attributs de la personnalité juridique, elle ne jouit pas de la propriété d'un patrimoine distinct de celui de ses associés.*”³¹

What is paradoxical here is that this 1996 judgment came about after extensive debates on the nature of partnership had already been settled by the legislature in the new Civil Code of Québec. As mentioned in the introduction, the *Civil Code Revision Office* had at the time recommended giving legal personality to partnerships in Québec.³² Yet, the legislature rejected this proposal and kept the notion as a contract and a private matter regulated by the Civil Code. In the Civil Code of Québec, partnership is placed among the nominate contracts and is now defined along these lines: “Article 2186. A contract of partnership is a contract by which the

non constitués en corporation, 81 R. DU N. 457 (1978-79); J. Smith, *Le contrat de société en droit québécois*, 83 R. DU N. 123 (1979-80).

29. See, e.g., the following judgments: *Crépeau c. Boisvert* (1898), 13 C.S. 405 (C. de R.); *Wemyss c. Poulin* (1934), 57 B.R. 514; *Garneau c. Drapeau* (1939), 77 C.S. 350; *Gareau c. Laboissière*, [1949] C.S. 41; *Reindolph c. Harrison Bros. Ltd.*, [1949] R.L. 137 (C.S.); *Noël c. Petites soeurs franciscaines de Marie*, [1967] C.S. 1; *Sous-ministre du revenu du Québec c. Jobin*, [1971] C.S. 565; *Caisse populaire Pontmain c. Couture*, [1983] C.P. 149; *Somec Inc. c. P.G. du Québec* (4 juin 1987), Québec 200-09-000496-858, J.E. 87-667 (C.A.); *Lalumière c. Moquin* (24 avril 1995), Montréal 500-09-001726-934, J.E. 95-909 (C.A.); *Menuiserie Denla Inc. c. Condo Jonquière Inc.*, J.E. 96-225 (C.A.).

30. For a good example of this last idea, see G. Demers, *Considérations sur la société commerciale et sur la rédaction du contrat de société*, C.P. DU N. 75 (1971).

31. *Supra* note 4.

32. *Supra* note 5.

parties, in a spirit of cooperation, agree to carry on an activity, including the operation of an enterprise, to contribute thereto by combining property, knowledge or activities and to share any resulting pecuniary profits.”³³

This 1991 definition keeps the two essential characteristics established in article 1830 of the Civil Code of Lower Canada—common profit and common contribution—and simply adds the infamous *affectio societatis*. The new partnership is thus not so new.³⁴ In reality, if partnerships under the Civil Code of Lower Canada took on forms that are today forgotten—the distinction between civil and commercial partnerships or between universal and particular partnerships were not carried over—their very nature is the same: a contract between partners.

In fact, the legislature, to make sure that there was no confusion around this idea, specified this time around that only partnerships that were joint-stock companies were legal persons, implying that all the other types were evidently not: “Article 2188. Partnerships are either general partnerships, limited partnerships or undeclared partnerships. Partnerships may also be joint-stock companies, in which case they are legal persons.”³⁵

33. Article 2186 QCC: “*Le contrat de société est celui par lequel les parties conviennent, dans un esprit de collaboration, d'exercer une activité, incluant celle d'exploiter une entreprise, d'y contribuer par la mise en commun de biens, de connaissances ou d'activités et de partager entre elles les bénéfices pécuniaires qui en résultent.*”

34. See MINISTÈRE DE LA JUSTICE, 2 COMMENTAIRES DU MINISTRE DE LA JUSTICE—LE CODE CIVIL DU QUÉBEC, UN MOUVEMENT DE SOCIÉTÉ (Les Publications du Québec 1993), under art. 2186.

35. Article 2188 QCC (*La société est en nom collectif, en commandite ou en participation. Elle peut être aussi par actions; dans ce cas, elle est une personne morale*). The phrasing of the provision is worth emphasising, as it clearly states that in some cases partnerships may be corporations and thus have legal personality, and this is exactly why the distinction between the two has been blurred or is at least ambivalent in contemporary Québec civil law. According to the last sentence of this article, a partnership can—in some cases—be a legal person. Yet, the reasoning behind its calling a joint stock company a partnership may not be obvious to all. What is actually going on here is a bit strange and is mainly rooted in the French text and in successive civil law and common law translations over the years. As previously noted, in the French language and in civil law of the French tradition, the word “société” has multiple legal meanings

This was not an unmotivated provision. The commentaries of the Minister of Justice at the time are clear:

. . . having failed to establish the subtle and difficult distinction between “full-fledged” and “unfledged” juridical personalities, between complete and incomplete legal personality, the previous law was instead maintained. Furthermore, the assignment of juridical personality to partnerships would not provide any real benefits. Instead, it would risk creating a disparity in treatment for Québec partnerships when compared to partnerships founded elsewhere in North America, which do not possess juridical personality. This is in addition to the potential tax

and does not only mean “contract of partnership.” A *société* can have legal personality. So, in France, writing “une société peut être une personne morale” would not be wrong. In common law Canada, even if the distinction between partnership and corporation is still well established, the word *société* has been used in a very strange manner. For example, in the federal Business Corporation Act, the term “corporation” was translated by the French term “compagnie,” rather than by the French term “corporation,” and then, for reasons that seem to be purely linguistic, the term “sociétés commerciales” (to resemble the language of Québec law under the Civil Code of Lower Canada [hereinafter CCLC]). Yet, if we look at article 1864 CCLC, we can see that “société commerciale,” in English “commercial partnership,” had multiple meanings ranging from general partnership to “société par actions” (joint-stock companies). Under the CCLC, the word *société* thus embraced both entities encompassed by the terms “corporation” and “partnership,” as if they both meant the same thing in the eyes of the law. Translating “corporations” in Canada with “société commerciales” might have felt more French, but it was legally a bit amphigoric, if not perverse! A joint-stock company was a commercial partnership but not all commercial partnerships were corporations! The use of the same word in French in Québec and at the federal level introduced difficulty with respect to the distinctions between the nature of the two institutions. Today, in both Québec and at the federal level, the Business Corporations Acts are: Loi canadienne sur les sociétés par actions L.R. (1985), ch. C-44, art. 1; 1994, ch. 24, art. 1(F) and Loi sur les sociétés par action S.Q., ch. S-31.1. Even if we are clearly not talking in these cases about a *société de personnes* (a partnership), the use of the word *société* is misleading. Someone somewhere forgot the origins of the word and idea (*societas*) and incorporated (no pun intended) it bizarrely into the law. With this looseness in the use of language, it is no wonder that partnerships in Québec can be understood as having legal personality of some kind: lost in this translation is the distinction between partnerships and corporations, between a mere contractual agreement and legal personality. On the difficulties encountered with the word corporation and the story of its multiple translations (in French) in Canada, see Antoni Dandonneau, *La francisation à l’aveuglette du droit des ‘corporations,’* 13 R.J.T. 89 (1978), and André Lavérière, *Le droit des companies,* 49 R. DU B. 851 (1989).

consequences of such an assignment.³⁶

It was decided to keep partnership as a mere contractual agreement for two main reasons: first as a matter of continuity with the old law; second, partnership elsewhere in North America did not have legal personality.

Reading these provisions and commentary, the issue seems settled: a general partnership in Québec today is a mere contract and its regime can be found, like other nominate contracts, in Book V of the Code. Yet, instead of settling the controversy, the *Allard* judgment³⁷ only sparked a new discussion: since that judgment was argued under the Civil Code of Lower Canada, it did not resolve question under the Civil Code of Québec. A new debate followed, taking the text of the new Code, and pushing the question of the nature of partnerships a step further.

Between 1996 and today, the number of articles that have been written on this matter has been fascinating, each of them taking a different stance. In fact, in Québec scholarship, it seems that almost every issue concerning the nature of partnerships and the personal liability of the partners has been argued: some argued for legal personality,³⁸ others for mere *indivision*,³⁹ some for a new

36. (Translated by the author) COMMENTAIRE DU MINISTRE, *supra* note 34, under art. 2188:

. . . à défaut d'établir une difficile et subtile distinction entre la grande et la petite personnalité juridique, entre la personnalité morale complète et incomplète, a-t-on préféré maintenir ici le droit antérieur. D'ailleurs, l'attribution de la personnalité juridique aux sociétés ne comportait pas d'avantages réels particuliers, mais risquait, par contre, de créer une disparité de traitement par rapport aux sociétés constituées ailleurs en Amérique du Nord, qui ne sont pas dotées de la personnalité juridique, sans compter les incidences fiscales possibles d'une telle attribution.

37. *Supra* note 4.

38. Ruth Goldwater, *La société civile est-elle une personne morale?*, 34 THÉMIS 91 (1960), and also Charlaïne Bouchard, *La réforme du droit des sociétés : l'exemple de la personnalité morale*, 34 C. DE D., at. 349-394 (1993).

39. Charlaïne Bouchard & Lucie Laflamme, *La dérive de l'indivision vers la société: quand l'indivision se conjugue avec la société*, 30 R.D.U.S. 317, 333 (2000).

modality of ownership,⁴⁰ others for the long-forgotten collective ownership.⁴¹ The idea of distinct patrimony occupies a big share of the landscape,⁴² the new Code giving way to the new idea of patrimony by appropriation.⁴³ What is fascinating is that the judges seemed to be as indecisive as the scholars: some affirmed the obvious lack of legal personality of partnerships under the Civil Code of Québec,⁴⁴ while others hung on to the notion of *indivision*, which was at the heart of the issue in Allard.⁴⁵ Other judges clearly preferred the dissenting opinion in Allard⁴⁶ and reaffirmed the legal personality of some partnerships.⁴⁷ Others, feeling that something else was occurring, supported the idea that, in fact, a distinct patrimony had been created.⁴⁸ In *Laval (City of) v. Polyclinique médicale de Fabreville*, a 2007 case, the bench, which

40. Donald A. Riendeau, *La « société » en droit québécois*, R. DU B. 127 (2003).

41. Générosa Bras Miranda, *La propriété collective. Est-ce grave, docteur? – Réflexions à partir d'une relecture de l'arrêt Allard*, 63 R. DU B. 29 (2003).

42. Michael Wilhelmson, *The Nature of the Québec Partnership: Moral Person, Organized Indivision or Autonomous Patrimony?*, R.D. MCGILL 995 (1992).

43. Louise-Hélène Richard, *L'autonomie patrimoniale de la société : le patrimoine d'affectation, une avenue possible?*, in SERVICE DE LA FORMATION PERMANENTE DU BARREAU DU QUÉBEC, CONGRÈS ANNUEL DU BARREAU DU QUÉBEC 149 (Éditions Yvon Blais 2002).

44. *Lévesque c. Mutuelle-vie des fonctionnaires du Québec*, [1996] R.J.Q. 1701; *Caisse populaire Laurier c. 2959-6673 Québec Inc.*, C.S. Québec, no 200-05-004938-960, 28 novembre 1996; *Gingras c. Prud'homme*, [1997] R.J.Q. 664; *Charron c. Drolet*, J.E. 2005-916 (C.A.).

45. *Gingras c. Prud'homme*, [1997] R.J.Q. 664, 675; 9137-1096 *Québec Inc. c. Ville de Montréal*, C.Q. Montreal, 2006 Q.C.C.Q. 5136.

46. See Justice Biron's dissent in Allard, *supra* note 4:

Je ne puis me convaincre que dans les articles du Code civil du Bas-Canada où le législateur parle des biens de la société, des choses appartenant à la société, des immeubles de la société, 'the property of the partnership,' il ne donne pas aux mots et aux expressions leur sens habituel. Je suis donc d'avis qu'une société peut être propriétaire de biens.

47. 2964-7922 *Québec Inc. (Syndic de)*, J.E. 99-15 (C.S.); *Société en nom collectif Vausko c. Ameublement et décoration Côté-Sud (St-Denis) Inc.*, J.E. 99-2330 (C.S.); *Groupe Kotler et al c. L'inspecteur général des institutions financières*, J.E. 2002-1429 (C.Q.); *Dufour c. Savard*, [1995] R.L. 327 (C.Q.).

48. *Servomation International and Company Limited (Syndic de)*, J.E. 98-203 (C.S.) (société en commandite); voir aussi *Corporation des maîtres électriciens du Québec c. Jodoïn Électrique Inc.* J.E. 2000-548 (C.S.); *Duval-Hesler c. Lalande*, J.E. 97-8 (C.Q.).

included Justice Brossard (who had written for the majority in *Allard*) went as far as to say: “A limited partnership, like any other partnership, has its own patrimony which, as long as it is sufficient, is distinct from the patrimony of the persons who founded it. Therefore, the limited partnership is its own entity, without being a legal person within the meaning of the Act.”⁴⁹

This is the approach that seems to have been taken in the latest judgment of interest, *Ferme CGR*.⁵⁰

III. THE JUDGMENT

The facts are quite simple. In July 2009, the Bank of Montreal gave notice to *Ferme CGR* that it intended to enforce its securities under the *Bankruptcy and Insolvency Act*.⁵¹ The trustee in bankruptcy presented the partnership’s documents but the Official Receiver refused to file the assignment on the ground that a partnership may not assign its property in bankruptcy if its partners do not do so as well. According to him, since partnerships were not granted legal personality under the Civil Code of Québec, all partners, as owners of the partnership’s property, were required to assign their own property for the assignment to take place. He grounded his position on the legal nature of partnerships in Québec as well as on common law commentary and case law.⁵² One must keep in mind that bankruptcy is a federal matter. In this

49. (Translated by the author) *Laval (Ville de) c. Polyclinique médicale Fabreville, sec.*, 2007 Q.C.C.A. 426 (CanLII) at para. 24: “*Une société en commandite, comme toute autre société, a un patrimoine propre qui, tant qu’il est suffisant, est distinct de celui des personnes dont elle est constituée; elle jouit alors d’une entité propre, sans pour autant être une personne morale au sens de la Loi.*”

50. *Supra* note 7.

51. Bankruptcy and Insolvency Act R.S.C. (1985), c. B-3 [hereinafter BIA].

52. *E.g.*: “An assignment executed by all the members of a partnership carries with it all the assets of the partnership as well as the separate assets of the partners.” *Taylor v. Leveys* (1922), 2 C.B.R. 390 (Ont. S.C.); *Cohen v. Mahlin*, 8 C.B.R. 23, [1927] 1 W.W.R. 162, 22 Alta. L.R. 487, [1927] 1 D.L.R. 577 (C.A.)” LLOYD W, HOULDEN, GEOFFREY B. MORAWETZ, & JANIS P. SARRA, THE 2010 ANNOTATED BANKRUPTCY AND INSOLVENCY ACT 199 (Thomson Carswell 2010), D§51(5) and D§72(2)(b).

perspective, the officials administering the bankruptcy system naturally favour an approach that aligns the approach in Québec with that taken in the common law provinces.

The case appeared initially before a Superior Court judge. In a very brief judgment, the judge acknowledged the problem, first noting that the BIA did assimilate a general partnership to a person in its definitional provisions, then observing that the case law supported arguments on both sides. At that point, he concluded that the remedy was in the creditors' hands according to the BIA and the Civil Code of Québec, and thus that the Official Receiver had to respect their choice to pursue only the partnership.

The case was subsequently heard at the Québec Court of Appeal. There, the Superintendent of Bankruptcy took over the position first argued by his Official Receiver: a general partnership does not have legal personality or, he added, a distinct patrimony. Consequently, it cannot assign its property without assigning that of its partners, to pursue the partnership is to pursue its partners. The solvency test set out in the BIA is a collective one. Again, the Superintendent's position was largely based on common law commentary and case law as well as on the very nature of partnership under the Civil Code of Québec. The trustee in bankruptcy, for his part, dismissed the case law submitted by the Superintendent as long repealed and, more importantly for us, as inconsistent with the legal attributes given to general partnership in the Civil Code of Québec. He argued that the Superintendent is confusing "the notion of legal personality with the objectives of the BIA, that is, with the orderly liquidation of a patrimony for the benefit of the creditors."⁵³ What was at stake, according to him,

53. *Ferme CGR*, *supra* note 7, para. 15. (The translation of the judgment used in this article is based on an unofficial English translation prepared by the Société québécoise d'information juridique (SOQUIJ) which is an entity of the Department of Justice of Québec. It is available at <http://soquij.qc.ca/fr/services-aux-citoyens/english-translation>).

was the liquidation of an “organized patrimony”,⁵⁴ regardless of whether or not it possessed legal personality.

Thus, the debate at the level of the Court of Appeal shifted slightly: the idea of the liquidation of an “organized patrimony”, that is the liquidation of a personal patrimony or some other kind of patrimony, was introduced, leaving aside the idea of ownership and liability.

I will not perform an in-depth review of all the arguments analyzed by the Court, as I want to focus on on the “patrimony” issue.” To state the opinion briefly, Justice Rochon, writing for the Court, endorsed the trustee’s point of view: the case law and commentaries given by the Superintendent of Bankruptcy relied on old statutes and ignored recent legislation, the most important one for the case at bar being the Civil Code of Québec.⁵⁵ According to Justice Rochon, the legal nature of a general partnership has changed with the coming into force of the new Code.

Justice Rochon had no intention of reopening the Court’s holding in *Allard* under the old Code. He had no intention of dismissing the fact that the absence of legal personality has been codified in the Civil Code of Québec at article 2188. But, according to him, the stakes have now shifted: with the inclusion of the patrimony by appropriation, or what he calls the objective theory of patrimony,⁵⁶ in the Civil Code, the paradigm has changed: “While providing that every person has a patrimony, the CCQ acknowledges that a patrimony may be appropriated to a purpose (articles 2 and 915 CCQ).”⁵⁷

Hence, a partnership would be, in fact, a separate entity with a separate patrimony, albeit bereft of legal personality. According to Justice Rochon, because the language of article 2199 of the Civil Code acknowledges that the contribution of the partners to the

54. *Id.* para. 15.

55. *Id.* para. 41.

56. *Id.* para. 66.

57. *Id.* para. 66 (footnotes omitted).

partnership occurs through a property transfer from the partners to the partnership, there cannot be any doubt that partnerships have their own patrimonies: “It would be impossible,” he underlines, “not to acknowledge the clearly expressed legislative will to create, through that property transfer, a patrimony that is appropriated exclusively to the partnership.”⁵⁸ Recall the rhetorical argument given by the *Cour de cassation* when it turned the *société* into a legal person. Though not explicitly, the legislature must have wanted to implicitly give a distinct patrimony to partnerships.

But Justice Rochon went further. Since the patrimony created by the contribution will only be used in the interest of the partnership (article 2208 CCQ) and managed under its rules (article 2212 CCQ), he seems to see an analogy with trusts, although this is never explicitly stated.⁵⁹ This implicit analogy leads him to concluding something that, to orthodox civilians, seems almost impossible: “there does not seem to be anything to prevent a general partnership, which does not possess a legal personality, from taking on obligations or answering to them regarding its property.”⁶⁰ According to Justice Rochon, a partnership is not only a distinct entity; it can also be a debtor, although it does not have legal personality.

General partnerships are thus, according to him, rights-and-duties-bearing units,⁶¹ which have no legal personality. The question of the holder, or holders in the case of a partnership, of the rights and duties does not seem to perturb the judge. And he has an explanation: the new paradigm of the Code, this “objective theory of patrimony” newly inserted. The idea of a patrimony without a holder seems to be an integral part of his imagination.

58. (Translated by the author). *Id.* para. 68.

59. Rochon, J.A. cites Madeleine Cantin Cumyn, *La fiducie, un nouveau sujet de droit?*, in MÉLANGES ERNEST CAPARROS 129-143 (J. Beaulne ed., Wilson & Lafleur 2002). *Ferme CGR*, *supra* note 7, para. 70, n.40.

60. *Id.* (footnotes omitted).

61. To use an expression taken from Maitland in STATE, TRUST AND CORPORATION, *supra* note 23, at 68.

In fact, to anchor his reasoning, he uses the exact language used by the legislature when discussing patrimonies by appropriation: “The partnership's property thus forms an autonomous patrimony made up of each partner's contribution that is distinct from the patrimony of its partners.”⁶² A patrimony that is distinct and autonomous; those are the exact words that we find in article 1261 of the Civil Code of Québec concerning the nature of the trust, the archetype of the patrimony by appropriation in the Code. Yet again, the analogy with trusts is never explicitly made.

Justice Rochon, before concluding his reasoning on the autonomous nature of partnership, underlined that the legislature gave partnership in the new code the power to sue and be sued in a civil action under its own name (article 2225 CCQ), which expresses yet again its autonomous nature. He goes even further: to ground his conclusion, he reiterates that his conclusion finds its basis in the language of the Code itself: article 2221, which sets out the way property should be discussed by the creditors, blatantly uses the expression “the property of the partnership”—“*les biens de la société*.” The inference is therefore clear: the legislature wanted partnerships to have a patrimony of their own without having legal personality.

Justice Rochon concludes: All these provisions acknowledge that a general partnership has an autonomous, distinct and organized patrimony independent from its partners. Consequently, it can be liquidated on its own according to the BIA. He dismissed the appeal.

IV. *LE NON-DIT*: THE BASIC JURAL CONCEPTS AT PLAY

The power of this judgment lies in what it has left unsaid. The issue was one of bankruptcy, yet the very nature of a general partnership was at play and indeed the judge set aside a complete part of his judgment to discuss the problem, analyzing the legal

62. *Ferme CGR*, *supra* note 7, para. 68.

nature of partnership and giving it a new ground. But, by doing so, Justice Rochon performed a magnificent dance: never did he explicitly say what it means for a partnership to be a distinct and autonomous patrimony and thus be able to have rights and duties, even if it does not possess legal personality. Never did he truly invoke trusts and patrimonies by appropriation, even if we understand that that is where he finds his justification. He did mention the new paradigm, the idea that according to articles 2 and 915 of the Civil Code of Québec, the Code now recognizes an objective theory of patrimony; but what does that mean? He did mention, albeit in a footnote, a text about trusts—*La fiducie, nouveau sujet de droit*, as an analogy (those are his words) to understand how an autonomous patrimony could have rights and duties.⁶³ But where does that lead us? Are analogies sufficient to create a new kind of debtor? Are analogies sufficient to set aside how the liability of the partners and the ownership structure of partnership have been until now understood? To come back to the questions posed in the introduction, what really is a distinct and autonomous patrimony? Is it, in the case at bar, the same thing as a patrimony by appropriation? Are partnerships trusts? What is a partnership in Québec law? To answer these questions, not only must we look at the basic notions at play, but also the actual regimes set out by the legislature. Only after understanding what it might mean to call a partnership a distinct and autonomous patrimony can we understand the consequences of this nomenclature and assess its value.

As mentioned before, the only place where we find the words “distinct and autonomous patrimony” in the Code is in article 1260 CCQ concerning the trust. The story of the Québec trust is quite particular and has been the object of much scholarly work, its own juridical nature still being questioned.⁶⁴ In reality, trusts and

63. *Supra* note 59.

64. See Sylvio Normand & Jacques Gosselin, *La fiducie du Code civil : un sujet d'affrontement dans la communauté juridique québécoise*, 31 C. DE D. 681.

partnerships share many similarities with respect to their history, their relationship with the common law and their juridical attributes. The question is: do they share the same juridical mechanisms in the Civil Code of Québec today?

Fundamentally a common law institution, the trust has had a difficult relationship with the civil law. If we can find it today in many civilian jurisdictions, it is not without distorting both the law and the institution.⁶⁵ In Québec, the close relationship with the common law called for the trust's insertion quite early on, and it has been part of the civil code since 1889.⁶⁶ Yet under the Civil Code of Lower Canada, the law of trusts was not without pitfalls—the ownership structure of the trust was understood to be *sui generis*, as the trustee had ownership for someone else's benefit. With the recodification came a strong desire for modifications and this is where things become interesting: the committee in charge of studying how to reform the trust proposed giving it legal personality. According to some, this was the only way the trust could find its way into the civil law without disturbing the prevalent order of things, namely the dominant understanding of person, property and obligation, or the dominant understanding of subjective rights.⁶⁷ Yet, like partnership, this way of understanding trust was too much in opposition to its common law counterpart: calling a trust a corporation simply did not get the approval of the practice. Thus, at its final stage, a look toward the modern

(1990); see also Yaëll Emerich, *La fiducie civiliste : modalité ou intermédiaire de la propriété?*, in *THE WORLDS OF TRUST /LA FIDUCIE DANS TOUS SES ÉTATS* (Lionel Smith dir., Cambridge Univ. Press, forthcoming 2013).

65. For a good account see *RE-IMAGINING THE TRUST. TRUST IN THE CIVIL LAW* (Lionel Smith ed., Cambridge Univ. Press 2012).

66. On the origins of trust in Québec, see Madeleine Cantin Cumyn, *L'origine de la fiducie québécoise*, in *MÉLANGES OFFERTS PAR SES COLLÈGUES DE MCGILL À PAUL-ANDRÉ CRÉPEAU /MÉLANGES PRESENTED BY MCGILL COLLEAGUES TO PAUL-ANDRÉ CRÉPEAU 199* (Éditions Yvon Blais 1997).

67. See Yves Caron, *The Trust in Québec*, 25 R. D. MCGILL 421 (1979-1980).

understanding of patrimony prevailed and an all-new institution was created: trust as a patrimony by appropriation.

But what is a patrimony by appropriation? No definition is given in the code. Only a few clues are provided: “Article 1261. The trust patrimony, consisting of the property transferred in trust, constitutes a patrimony by appropriation, *autonomous and distinct* from that of the settlor, trustee or beneficiary and in which none of them has any real right (emphasis added).”⁶⁸ An autonomous and distinct patrimony; the words ring a bell. Yet here, the autonomy is inscribed in the law and circumscribed: in a Québec trust, no one owns the property held in trust, none of the people implicated in its *raison d’être*—the settlor, the trustee or the beneficiary—have any real, or for that matter, personal rights in the trust patrimony. The nature of the belonging and the longing lies elsewhere. The trust in Québec is neither a being nor a way of being with one another; it is a new mode of being. Patrimony by appropriation is a new modality of patrimony.

The notion of patrimony is at the very heart of the problem. The term, obviously part of the courts’ and legal actors’ imagination, and today part of the Civil Code of Québec,⁶⁹ does not, however, know any legal definition and no general consensus has been reached concerning its juridical nature.⁷⁰ In fact, according to the Minister’s comments on the Civil Code, the theoretical questions emanating from the notion were simply too grand to even try to express them in a mere definition.⁷¹

68. Article 1261 QCC (*Le patrimoine fiduciaire, formé des biens transférés en fiducie, constitue un patrimoine d’affectation autonome et distinct de celui du constituant, du fiduciaire ou du bénéficiaire, sur lequel aucun d’entre eux n’a de droit réel*).

69. We now find the notion 67 times in the CCQ. More importantly, it is introduced at art. 2 which states that every person has a patrimony.

70. See Christopher B. Gray, *Patrimony*, 22 C. DE D. 81 (1981).

71. According to the minister:

It did not seem useful to define the notion of patrimony; in previous law, the absence of such a definition did not cause difficulties. Furthermore, the notion of patrimony constitutes a complex reality, which is difficult to express in a simple definition that would need to

The juridical notion of patrimony, which knows no equivalent in the common law, is, contrary to popular belief, a very recent doctrinal creation elaborated in the 19th century in Germany and France. Understood as a legal universality, that is an aggregate of property and debts understood as forming a whole,⁷² it knows two main schools of thoughts. The first one, called the classical or subjective theory was elaborated by Charles Aubry and Charles-Frédéric Rau, in their *Cours de droit civil français d'après la méthode de Zachariæ*.⁷³ Inspired by German doctrinal work, the authors developed the theory in order to explain certain matters in the French Civil Code at the time, mainly issues in succession and the common pledge of creditors. For Aubry and Rau, patrimony is intimately bound to the juridical notion of the person. It is a legal universality charged with the performance of a person's obligations. It is both container (the juridical capacity of a person to hold legal rights) and content (its rights and obligations, present and future). Essentially the term patrimony in the classical theory is used to describe the organization of subjective rights (personal, real and intellectual) and personal liability. This subjective organization has three fundamental outcomes: 1) every person, physical or legal, has a patrimony; 2) every person has only one indivisible patrimony; and 3) a patrimony cannot exist without a person, physical or legal, as its holder.

respond to all kinds of theoretical questions. (“*Il n'a pas semblé utile de définir la notion de patrimoine; l'absence d'une telle définition dans le droit antérieur n'a pas soulevé de difficultés, et, par ailleurs, cette notion constitue une réalité complexe, difficile à exprimer dans une définition simple qui répondrait à toutes les questions théoriques.*”) (Translated by the author).

In COMMENTAIRES DU MINISTRE, *supra* note 34, under art. 2.

72. See F. ALLARD ET AL., PRIVATE LAW DICTIONARY AND BILINGUAL LEXICONS—PROPERTY (Éditions Yvon Blais 2012), under “legal universality.”

73. For an English translation and commentary, see N. Kasirer, *Translating Part of France's Legal Heritage: Aubry and Rau on the Patrimoine*, 38 R.G.D. 453, 459 (2008).

In the civilian imagination, this understanding of patrimony has had an unexpected fate and some believe that it is impossible to think in a civilian manner without this classical notion,⁷⁴ the subjective theory of patrimony embodying the trinitarian architecture of civil codes: Persons-Property-Obligations.⁷⁵

The second school of thought, again understanding patrimony as a legal universality, is the objective or, what has been called in opposition to the classical theory, the modern theory of patrimony. Emanating from Germany at the same time as the classical theory while fundamental questions were being debated around the ideas of moral personality, and of giving a fictional person the same rights as a real person, this theory stems from the proposal that it is possible to imagine patrimonies, which are legal universalities, without personality or at least as not having personality as its main structuring feature.⁷⁶ According to this theory, that which assures the coherence of an aggregate of rights and duties is not a person but the purpose for which it was created.⁷⁷ The purpose, not the person, delimits the container.

There are two different ways of envisioning the creation and the nature of purpose patrimonies: division and appropriation. The distinction between the two modes of delimitating rights and duties

74. This doctrinal creation has been understood to be one of the most important theories of the civilian imagination. See on this matter F. Zenati, *Mise en perspective et perspectives de la théorie du patrimoine*, R.T.D.CIV. 667 (2003); F. Cohet-Cordey, *Valeur explicative de la théorie du patrimoine en droit positif français*, 95 R.T.D.CIV. 819 (1996); and R. Sève, *Détermination philosophique d'une théorie juridique : La théorie du patrimoine d'Aubry et Rau*, 24 ARCHIVES DE PHILOSOPHIE DU DROIT 247 (1979).

75. Eric Reiter, *Rethinking Civil-Law Taxonomy: Persons, Things and the Problem of Domat's Monster*, 1 J. CIV. L. STUD. 189 (2008).

76. For a good account of the theory, see L. MICHOU, 1 LA THÉORIE DE LA PERSONNALITÉ MORALE ET SON APPLICATION EN DROIT FRANÇAIS 38 et seq. (2d ed., L.G.D.J. 1924). See also F. Bellivier, *Brinz et la réception de sa théorie du patrimoine en France*, in OLIVIER BEAUD & PATRICK WACHSMANN (DIR.), LA SCIENCE JURIDIQUE FRANÇAISE ET LA SCIENCE JURIDIQUE ALLEMANDE DE 1870 À 1918, at 165 (Presses Universitaires de Strasbourg 1997).

77. Pierre Charbonneau, *Les patrimoines d'affectation : vers un nouveau paradigme en droit québécois du patrimoine*, 85 R. DU N. 491, 509 (1982-1983). See also DAVID HIEZ, *ÉTUDE CRITIQUE DE LA NOTION DE PATRIMOINE EN DROIT PRIVÉ ACTUEL* 22 et seq. (L.G.D.J. 2003).

is very important and frequently neglected, division and appropriation being too often understood as interchangeable, both being, to the eyes of some, simply purpose patrimonies emanating from the objective theory.⁷⁸ The distinction is, however, of high importance, and elaborating the differences between division and appropriation to a purpose might help us answer many questions left unresolved in the judgment and the Code.

Division of patrimony is a mode of organization that we find in many sites in the civil law: for example, property exempt from seizure,⁷⁹ property under estate administration,⁸⁰ substitutions,⁸¹ and the family patrimony⁸² are all types of divisions. When a patrimony is divided, the holder's legal rights are subject to a different regime of use, enjoyment and distribution. According to this understanding of purpose patrimonies, a person can hold many patrimonies, or what have been called small patrimonies or special patrimonies, and each patrimony is the common pledge of its own creditors.⁸³ Even if it questions the indivisible quality of patrimonies championed by Aubry and Rau in the classical theory—a person can have many patrimonies—this way of understanding purpose patrimonies has long been accepted in positive law as it does not question the vital link that exists between subjective rights and persons. With division, a person is still always the holder of rights and the debtor of obligations divided. The rights divided are only submitted to a different regime. It is simply as if the person held many containers, each having their own purpose and creditors within a big container.

78. This text of the French author Pierre Berlioz is a good example of the confusion: *L'affectation au cœur du patrimoine*, R.T.D. CIV. 635 (2011).

79. See Roderick A. Macdonald, *Reconceiving the Symbols of Property: Universalities, Interests and other Heresies*, 39 R.D. MCGILL 761, 778 et seq. (1994).

80. Article 625 CCQ and Art. 780 CCQ.

81. Article 1223 CCQ.

82. Article 414 CCQ et seq.

83. In Québec for instance, art. 2645 CCQ, which codifies the common pledge of creditors, clearly states that the performance of an obligation will not affect property that is the object of a division.

What is more, the line between the special patrimony and the personal patrimony is often permeable, the person holding the different sets of rights being ultimately responsible for all the debts he created.⁸⁴

At the other extreme of the objective theory, we find patrimonies without holders, what the Germans call the *Zweckvermögen*, literally “purpose patrimony,” what the Civil Code of Québec has called patrimonies by appropriation.⁸⁵ Here the patrimony is completely autonomous and distinct from one emanating from personality. The rights, appropriated to a purpose, do not have any titularies.⁸⁶ This way of understanding patrimonies is quite controversial,⁸⁷ as it breaks from the classical theory of patrimony and more fundamentally the classical understanding of subjective rights. Rights in this instance do not have titularies but mere administrators whose prerogatives have been stripped to mere powers⁸⁸ and who are never personally liable for the debts of the patrimony. With this way of understanding purpose patrimonies, “*un bien peut non seulement appartenir à quelqu'un, mais aussi appartenir à quelque chose, à un but.*”⁸⁹ Property cannot only belong to someone, it can belong to something. The patrimony continues to be a legal universality where property and debt respond to each other; yet, no one has title to it. Patrimonies by appropriation are rights-and-duties-bearing units with no legal personality, no titularies. Both the nature of the container and the content here have shifted.

84. See, e.g., art. 1233 CCQ concerning substitution.

85. Article 1256 et seq.

86. For a defense of the possibility, see K. H. Neumayer, *Les droits sans sujet*, 12 REVUE INTERNATIONALE DE DROIT COMPARÉ 342 (1960).

87. Some defended it. See LÉON DUGUIT, *L'ÉTAT, LE DROIT OBJECTIF ET LA LOI POSITIVE* (1901, reedited by Dalloz in 2003); and G. PLASTARA, *LA NOTION JURIDIQUE DE PATRIMOINE* (A. Rousseau 1903).

88. On the notion of powers, see Madeleine Cantin Cumyn, *Le pouvoir juridique*, 52 R. D. MCGILL 215 (2007).

89. LÉON MICHOU, 1 *LA THÉORIE DE LA PERSONNALITÉ MORALE* 39 (2d ed., L.G.D.J. 1924).

If divisions can be found in most civilian jurisdictions as exceptions to the general rule calling for indivisibility, patrimonies without holders do not share the same fate. The implications of this understanding of purpose patrimonies are far-reaching, and most civilian jurisdictions do not even fathom its possibility. In fact, to this day, only the province of Québec and the Czech Republic⁹⁰ have included this vision of purpose patrimonies in their law. And, in the Civil Code of Québec, until the judgment at hand, it was thought that there was only one type of patrimony by appropriation, and that was the trust.⁹¹

To fully understand what is meant in the judgment by autonomous and distinct patrimony, we must turn to the title dedicated to trusts in the book on property, which the legislature paradoxically called “Certain patrimonies by appropriation.” Only after understanding which elements are fundamental to the constitution of a trust and how it is that property without titularies can still be the object of rights when in trust despite the fact that no one holds any rights in it, can we assess Justice Rochon’s new grounding for partnerships in Québec.

A trust is the result of multiple explicit juridical operations: first the appropriation of property to a purpose; second the transfer of that property from the patrimony of the settlor to a new patrimony that he creates for that purpose; third, the acceptance by a trustee of his administrative mission.⁹² The acceptance by the trustee of his mission is very important as it is his acceptance that divests the settlor from his property and secures the beneficiaries’ interest. The trust always has to have an independent and

90. The Czech Civil Code (Act 89/2012 Coll.), which will come into force on January 1st, 2014, introduces a new institution into Czech private law—the “trust fund” (in Czech, *svěřenský fond*). See sections 1448 to 1474 of the Czech Code.

91. Under the heading of “Certain patrimonies by appropriation” we find the trust and the foundation. However, foundation can either take the form of a legal person or a trust (article 1257 CCQ). As such, trust is the only actual patrimony by appropriation under this title in the Civil Code of Québec.

92. We find the constitutive element of trust set out in articles 1260, 1264 and 1265 CCQ.

disinterested third party as trustee holding the property.⁹³ Otherwise, the property is literally paralyzed.

In reality, the trustee's role in the legal scheme set up by the legislature is fundamental. It is because of him that the property in trust is not understood to be without owner and thus remains the object of rights throughout the duration of the trust.⁹⁴ According to article 1278 CCQ, the trustee has control and exclusive administration of the trust patrimony. Although holding the trust property, the trustee does not have any rights in it. He is vested with mere powers. Powers, contrary to subjective rights, can be understood as legal prerogatives exercised in a disinterested manner. It is through his disinterested powers that he exercises the rights pertaining to the trust patrimony. He is, according to the code, an administrator of the property of others charged with full administration, which means the regime and legal obligations set forth by the legislature in the title called "administration of the property of others" apply to him.⁹⁵ However, contrary to other administrators of the property of others,⁹⁶ the trustee is not an administrator of the property of another person. He has no "real" debtor, as no one owns the trust property and the trust is not a legal person. He is not an agent or a mandatary acting on behalf of or representing someone else. He has a function that gives him powers and imposes upon him some legal duties that he has to fulfill, namely to pursue the appropriation given to the trust property. Since no one is his creditor, measures of supervision and control over his administrative acts are set by the legislature: the settlor, his heirs, the beneficiaries or any other interested party can take action against the trustee to compel him to act according to the trust deed and the law.⁹⁷ But these supervisors are acting as

93. Article 1275 CCQ.

94. Article 911 CCQ.

95. See art. 1299 and seq. CCQ.

96. Think about tutors, curators, or mandataries.

97. Art 1287 et seq. and the title on "Administration of property of others," art. 1299 et seq.

outsiders, albeit interested outsiders, looking over the acts of the disinterested trustee. The trustee has legal obligations towards them imposed by the regime but no personal obligations. His personal patrimony is only engaged if he commits a fault that affects them personally in his administration.

The trustee thus holds two very distinct patrimonies, one personal and the other appropriated to a purpose, which carries on like a personal patrimony that has no owner, only a disinterested administrator. The trustee accordingly has two capacities in law, a personal capacity which gives him subjective rights and personal obligations; and an administrative capacity as a trustee which gives him powers and duties and only commits the purpose patrimony.

As Justice Rochon duly pointed out, this duplicity of holding rights is now inscribed in the law in articles 2 and 915 CCQ: in the Civil Code of Québec patrimonies can be appropriated to a purpose and rights can be either subjective rights, i.e. a legal prerogative that the holder exercises in his own interest, or a legal prerogative without a titular which is exercised by a disinterested administrator entrusted for that purpose.⁹⁸ The legislator did insert the objective theory of patrimony in the code.

V. BACK TO PARTNERSHIP

Now that we have a better idea of what is meant in the Civil Code of Québec by distinct and autonomous patrimony, a more profound analysis of the contract of partnership becomes possible. Are partnerships really distinct and autonomous patrimonies? Or to ask the question differently and in light of what was just explained: is it possible that the rights in a partnership are legal prerogatives without titularies exercised by disinterested administrators? Can we call partners of a general partnership disinterested administrators in the regime currently set forth in the Civil Code of

98. F. ALLARD ET AL., PRIVATE LAW DICTIONARY AND BILINGUAL LEXICONS - PROPERTY, *supra* note 72, under “right.”

Québec? Can combining property, knowledge or activities and sharing any resulting pecuniary profits be enough to constitute a patrimony by appropriation?

Well, the answer to all these questions is simply no. A partnership is not and cannot be a patrimony by appropriation. And the reason is simple: the partners, acting for the partnership, are interested actors and keep subjective rights in the property held in partnership from its constitution to its dissolution. If a patrimony is created, it cannot be one that is organized around the idea of rights without titularies administered by a disinterested third party. As such, it cannot be a distinct and autonomous patrimony. Yet this does not mean that partnership cannot be another kind of purpose patrimony.

A partnership in the Civil Code of Québec should be understood as a simple aggregate of partners. It is a contract; a set of obligations between the partners themselves and between the partners and third parties. To create the partnership, their collaboration, the partners combine some of their property creating a specific aggregate of property that is subject to a different regime of use, enjoyment and distribution. Each partner continues to be the owner of the property he contributed to the collaborative enterprise, yet this property is now charged with a destination and a specific purpose: the partnership.⁹⁹ As such, in each partner's personal patrimony, there is a special patrimony—a divided patrimony, which is devoted to the partnership. All these special patrimonies, combined, form the partnership's patrimony. Partnership is thus a universality of property appropriated to a purpose, but which has several owners, several titularies.¹⁰⁰

To make it work, each partner is understood to be the mandatary of the other when it comes to any act performed in the

99. Article 2208 CCQ.

100. Never is the partnership without titulary, though it can now be in the hand of only one partner (does that even make linguistic sense?!) for a specific amount of time. *See* art. 2332 CCQ.

course of the partnership's business.¹⁰¹ Here, there is no distinct supervisory scheme established by the legislature, because the supervision of each partner's actions is simply made by the other partners, the mandators or principals, whose patrimonies are engaged in the acts of the others partners. They are all personally implicated in their mutual enterprise. Being a partner does not entail acting in a disinterested manner. On the contrary, partners are acting in their own personal interest, their own interest now being linked to the interests of their partners. As such, they will together suffer the joys and the pains of their association: "participation to the profits entails obligations to share the losses."¹⁰²

All that being said, it is impossible to understand, or even compare partners with trustees; partnerships with patrimony by appropriation? Partners in this scheme are at the same time settlors, trustees, and beneficiaries. They are never disinterested, never independent, and never a third party. In law, there may not even be a stipulation excluding a partner from participating in collective decisions,¹⁰³ or excluding him from the profits made. There may not even be a stipulation that releases him from the obligation to share the losses.¹⁰⁴ Of course, the management of the partnership (i.e. the business the partners decided to pursue) can be given to a third party.¹⁰⁵ Yet the constitution of the partnership does not depend on this possibility, the partners being the only essential actors to this scheme.

Ultimately, partnerships are mere personal relationships between partners. It is a mere contract, as its place in the code and its definitional provision provide. If there is the creation of a special purpose patrimony, the nature of this patrimony is quite particular and should not be understood as a patrimony by

101. Article 2219 CCQ.

102. Article 2201 CCQ.

103. Article 2216 CCQ.

104. Article 2203 CCQ.

105. Article 2213 CCQ et seq.

appropriation, i.e. a distinct and autonomous patrimony that knows no titular and implies an independent administrator acting unselfishly through powers. Partners hold the rights they have appropriated to the partnership. As holders of the rights, partners are solidarily liable for obligations contracted for the purpose of the partnership. Yet, and this is what confounds the interpreters and judges: according to article 2221 CCQ, the creditors must first discuss the property that was duly destined to the partnership; then, they have access to the personal patrimony of each of the partners, but only after their own personal creditors are paid. The legislator here created a particular scheme of distribution of assets. The assets appropriated to the partnership make divided patrimonies in the personal patrimony of each partner. The combination of these divided patrimonies form the partnership patrimony. The partnership patrimony is an open aggregate of property and liability, which permits creditors to access, if needed and as a last recourse, the multiple owners' personal patrimonies.

As such, the partnership looks as if it has a distinct patrimony, but one that cannot be said to be without holders or autonomous. The partners are, as they should be, ultimately liable.

VI. THE QUIET REVOLUTION OF LEGAL IMAGINATION

In the judgment, Justice Rochon stated that partnerships are autonomous patrimonies distinct from that of the partners, taking on obligations and using the partnership's "personless" property to respond to them. According to him, this understanding was possible because the legislature introduced the objective theory of patrimony, which entails the creation of purpose patrimonies independent from legal subjects in the new Civil Code. Because the language of the Code was ambiguous when it came to understanding whether partnership meant an aggregate of persons or an aggregate of property, and because this property was appropriated to a specific purpose, he did not see any objection in

depersonalizing partnerships and making the partners ultimately not liable for the losses and debts they engendered. A partnership, as an aggregate of property appropriated to a purpose, albeit not having a legal personality, can, according to him, assign its property.

Yet, looking at the real nature of a patrimony by appropriation as inscribed in the Civil Code of Québec and how it is possible for rights without titularies to still be objects of rights during the duration of their appropriation, understanding partnership as a patrimony by appropriation distinct from that of the partners seems a bit strange. How can the partners not have rights in the partnership? How can they be disinterested? Is not the whole purpose of the enterprise to join with others and make an interested profit?

Depersonalizing partnership is indeed not obvious. If it worked for trusts, it is because the role of the trustee is quite specific and framed in a very particular manner. The trust is a patrimony by appropriation according to the Code. Partnership is nothing but a relationship. It is a contract. A contract cannot assign property. Relationships cannot go bankrupt. Persons can.

Introducing the objective theory of patrimony in the Civil Code is one thing. Seeing patrimonies without holders every time there is property appropriated to a purpose is another. If the idea is now part of the legal imagination of Québec's jurist, its nature and mechanisms are not yet assimilated. The idea of property without a holder is revolutionary and has the power of permitting the protection of anything valuable without personalizing it. However, for the idea to work, it is fundamental that we understand the apparatus behind it, which entails a disinterested actor holding the rights and the impossibility of that actor ever being personally liable for the obligations emanating from his mission. If his personal patrimony is solicited by law, then even if there is an appropriation to a purpose, what is at stake is not a patrimony by appropriation but a simple division of patrimony. Both are purpose

patrimonies, yet both reside on two fundamentally different regimes, subjective rights and rights appropriated to a purpose. Forgetting this distinction can engender complicated consequences, in this case permitting partners to ultimately not be fully liable for the losses stemming from their collaboration.

Codified civil law stands on the absolute precision of its language and concepts. When a new concept comes into force—a new concept that in this case is using a term that is so fundamental that it is taken for granted: patrimony—it is important to come back to the basics and understand what is really at play. Partnership in Québec was a good opportunity to revisit the three basic notions upon which our law is built: person, property and obligations. As I hope I have shown, one cannot be understood without the others. Changing or, in this case, adding a new concept of property in the Code, based on disinterested management and not personal benefit, is a major change in our understanding of what a right is, and most importantly in what law is supposed to protect. Appropriating rights to a purpose is nothing new, and in this sense the judge was right: a partnership is a special purpose. But depersonalizing rights is a whole other phenomenon that should not be taken lightly. Patrimony by appropriation changes the whole premise of what we understand as fundamental to our law and accounts for the distinctiveness of Québec civil law and society.