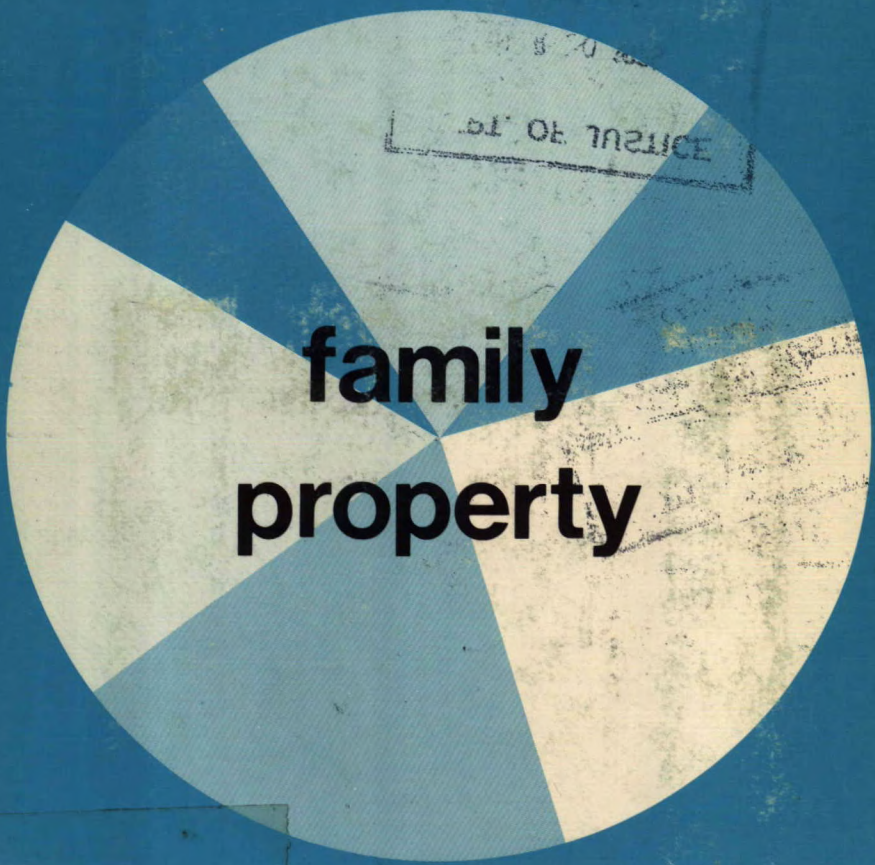
Law Reform Commission of Canada

Commission de réforme du droit du Canada



family property

Working Paper 8

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March 1975

Cat. No. J32-1/9-1975

Notice

This *Working Paper* presents the views of the Commission at this time. The Commission's final views will be presented later in its Report to the Minister of Justice and Parliament, when the Commission has taken into account comments received in the meantime from the public.

The Commission would be grateful, therefore, if all comments could be sent in writing to:

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Introduction

In this paper, the second of a series of published working papers on family law, the Law Reform Commission of Canada examines the law governing the property relations of married persons, and sets out the major alternatives to the present law. It should be noted that the present property laws affecting spouses are provincial laws, falling within the scope of provincial power to pass laws in relation to "property and civil rights". Our interest in this area is fourfold. First, legislative jurisdiction over "marriage and divorce" is assigned to the Parliament of Canada. Under this head of power, Parliament has legislated in relation to divorce and has provided for divorce maintenance orders in favour of the economically weaker spouse as well as the children of the marriage. It is apparent that questions relating to maintenance cannot be satisfactorily resolved in isolation from issues relating to property rights. A family is an economic unit, and the law should allow a court in divorce proceedings to deal in a comprehensive and coherent fashion with all economic aspects of the family when the marriage is terminated. This includes matters of property as well as matters of maintenance.

Second, while we recognize certain possible constitutional limitations upon direct federal legislative involvement in this field of law, we see a federal responsibility to raise these issues with a view to promoting uniformity, consistency, or at least compatibility among the several provincial regimes regulating matrimonial property rights. It is certainly in order to suggest that federal initiatives would be desirable as a way of encouraging and assisting the provinces and territories to focus their attention on the direction in which the law should move with respect to both property and maintenance questions upon the dissolution of marriage. In addition to playing a role in the coordination of federal and provincial efforts in this field, close federal-provincial cooperation will be necessary in order to ensure that the *Divorce Act* remains abreast of and compatible with new developments affecting matrimonial property law that may be undertaken by the provincial and territorial legislatures.

Third, although studies of matrimonial property problems have been conducted or are under way in Alberta, British Columbia, Ontario, Quebec and Saskatchewan, as well as in the Northwest Territories, not

all provinces and territories have found it possible to devote resources and personnel to this task. We are of the view that federal research can be useful to those jurisdictions in Canada that have not yet been able to conduct studies of their own.

Fourth, in a matter of this nature, that transcends the divisions of legislative jurisdiction and affects every married person in Canada, we are of the view that the Law Reform Commission of Canada has a responsibility to assist Canadians in informing themselves about the present generally unsatisfactory state of the law, and to set out the major alternatives so that interested members of the public may express their views.

We wish to make it clear that the aim of this paper is not to attempt to arrive at a federal solution to problems which in some aspects fall within federal legislative jurisdiction and in others, under provincial and territorial jurisdiction. It would be possible to amend the *Divorce Act*, subject to constitutional limitations, to provide for property distribution on divorce, just as it would be possible to amend that Act to accommodate property distribution schemes developed by the provincial and territorial legislatures. At this point, however, we believe the priority is to identify what can or should be done in this vital area in an atmosphere that is unclouded by manoeuverings for or assertions of constitutional supremacy by either level of government. The value of some substantial changes in the laws governing matrimonial property rights and relationships will speak for itself. Once this has been considered by the governments of all affected jurisdictions in Canada, we trust that the desirability of appropriate cooperative action will call into being the necessary mechanisms for achieving the goal of major reforms in this area.

Family property law reform is inseparable from the fact that the present law is in many aspects a relic of centuries of a different concept of the status of women. There are historical, religious, legal, economic and political reasons for this which can be used to explain the present state of the law. But when weighed against the demands of simple justice for all persons, regardless of sex, none of these reasons or explanations provides any justification for perpetuating the existing legal inequalities. The conscience of Canadians was shocked by the application of the present law in the recent Supreme Court of Canada decision of *Murdoch v. Murdoch*, in which a married woman unsuccessfully sought to obtain a property interest in a valuable ranch to which her husband held legal title. The Court dismissed her contribution of work and management, which was about the same as her husband's, as being what was expected of an ordinary ranch wife in any event. The fact

that she was as responsible as her husband for the value of the property did not give the Court any grounds for interfering with his legal title. When the law requires such results, then nothing could be more apparent than the fact that such law is no longer tolerable in a society that professes its laws to be both humane and just. We associate ourselves with the concept of equality before the law for married persons of both sexes and believe that it is the coherence and justice inherent in the concept of legal equality that gives the true substance to the argument that there is a need for significant change in the law governing family property relations.

In this paper we confine ourselves to unions in which the parties are legally married, to the exclusion of other relationships that resemble marriage in all respects except for the absence of the legal bond. There has been much written about the changing nature of the family, and it may well be that at some future time it will be necessary to consider the problems of persons who are "attached" but not married. Our present task, however, is limited to an exploration and analysis of the ways in which the traditional institution of marriage can be strengthened through changes in the law that are in most cases long overdue.

Marriage is an economic, emotional and cultural partnership. The family unit is the most important institution of our society. When the laws governing the relationships between married persons are examined—particularly those laws dealing with property—it is apparent that they are almost totally inadequate either in strengthening the foundations of the modern family or in ensuring the dignity and stature of each of the partners. Only one jurisdiction in Canada—the Province of Quebec—has undertaken any thorough reforms in its family property law during this century, and only two others—the Northwest Territories and British Columbia—have taken significant legislative steps in this direction. In the common law provinces and territories married persons are all subject to the regime of "separate property". The separate property system is also available in Quebec as an alternative to its newly created property regime which provides for a sharing of assets upon the termination of a marriage. Our concern in this working paper is to examine the basic deficiencies of this law of separate property, with emphasis upon the majority of those common law jurisdictions where it has not been modified and in which it has existed as a body of law, doctrine and dogma, essentially unchanged for almost one hundred years. Since we are dealing with a system that exists in every province and territory, with individual variations in each jurisdiction, our observations must necessarily be general rather than specific. But in this case we are of the view that generality is sufficient, on the simple ground that many essential concepts of the separate property tradition,

and the legal consequences for husbands, wives and children that follow from those concepts, are no longer acceptable in Canada today. Taken as a whole, as we shall take it, the regime of separate property today is unfair and inequitable because it fails to protect human values that have long since been recognized and secured in other areas of our law.

This, of course, has not always been the case. The separate property laws of the Victorians were well-suited to the conditions they were designed to meet. For their day, they accurately reflected the cultural preferences and economic realities of the society as it was found one hundred years ago. The laws of separate property only become bad laws when they are expected to accomplish things they were never designed to do, such as providing an adequate basis for the institution of marriage in a world that is different in an endless number of ways from the world that existed when those laws were originally formulated.

We feel constrained to emphasize that reform in this area of the law cannot be successful if it is conceived of as a need to impose a new philosophy upon people who, for better or for worse, have ordered their lives on the basis of the old. While tomorrow must be served, yesterday should be respected. Our aim is not to make divorce a more attractive prospect, but rather to strengthen existing marriages by proposing certain alterations in legal structures that we identify as harmful to this end, and to provide a legal framework that will enable Canadians to construct better marriages in the future.

This area of law affects many different persons in many different ways. Consequently, opinions will differ on the questions of what reforms are necessary or desirable, how they should be implemented and whom they should affect. We urge all persons to whose attention this working paper comes to express their views to the Commission. Such indications of opinion will be invaluable to us in the task of dealing with family law reform, and we emphasize that we welcome all opinions.

Property Law and Marriage

The law of separate property operates to assign ownership of property to the person who pays for it. If it were not essential in a family that one spouse provide primary care for children, this provision of the law would make very little difference to the respective property positions of married persons. Each could earn money and each could buy and own property. Indeed, this is one of the bases of the theory of separate property. A married man's earnings, and property purchased from those earnings belong to him, and his wife's earnings and property bought with her earnings belong to her. But for so long as children have a need for attention, affection and supervision, those spouses to whom the task of child care falls, and here we are referring almost exclusively to married women, will be effectively prevented from being able to obtain legal ownership of property in their own right. The law of separate property, with its doctrine of "what's his is his and what's hers is hers", provides formal equality. But when viewed against Canadian society today, this is obviously only a theoretical concession to equality based upon nineteenth century laissez-faire economics. The rhetoric of equality is there but not the reality.

The needs of children present an inevitable problem, where the division of function in marriage is concerned, that adversely affects the property position of married women. But there are also several relative problems that are no less compelling. Since the view of women as dependants and housekeepers has been almost an article of faith in Canada for so long, even the married woman with no responsibilities towards children may never have seen herself as, or been raised or educated with a view to being, a permanent member of the labour force. She may be psychologically unprepared for work outside the home, and even if not, and if she has the proper training and skills, she may be unable to find a job suited to her abilities at a salary that would attract a man of similar background. The lack of true economic opportunity for women in Canada—in the sense that men have true economic opportunity—is a notorious and unfortunate reality. This is in turn reflected in, and accounts in part for, the fact that many married women are in an inferior position to their husbands in the matter of ownership of property.

The possibility that married women will stop work in order to bear and raise children may furnish some explanation for the reluctance of many employers to train and promote them to positions of higher responsibilities and salaries. It may also account in part for the fact that important family purchases are often made in the husband's name. Since a woman's earning ability would be interrupted by the birth of a child, while her husband is expected to work continually for all of his adult life, it follows that sellers of property would prefer to deal with husbands and not wives. This is reinforced by legal provisions in most Canadian jurisdictions that make married women worse credit risks for sellers than single women, or men whether married or single.

As was pointed out by the Royal Commission on the Status of Women, there exists a strong cultural bias in Canada in favour of the stay-at-home wife that goes hand in glove with the legal dependency status of married women. And even if a wife overcomes this problem and takes a job, she may be discouraged in the pursuit of her own career by finding that the burden of housekeeping for herself and her husband still falls mainly upon her, since many men are neither trained nor psychologically prepared to assume these duties, having their own cultural biases to contend with.

None of these factors may be significant in some marriages. Yet in most marriages these things, in some combination or another, operate to ensure that more property is bought with the funds of husbands than wives. And following from this, the law of separate property ensures that when marriages end, husbands own more property than their wives. Such a fundamental economic imbalance is not, in our view, paralleled by any significant differences in the contributions that each spouse makes to a marriage. It is not necessary or desirable to attempt to approach the problem from the perspective of "how much is a housekeeper worth in relation to a chemical engineer?" or "what is the value of a wife's child-care services to a semi-skilled worker on an assembly line?". The fact is that in the great majority of marriages the spouses assume equivalent though different duties equally taxing to each and of equal importance to the family.

The law has traditionally interpreted "value" as meaning the price that services would command in terms of wages. We believe that where the family is concerned, the law should put behind it this narrow assumption that money is the single and exclusive measurement of value that is relevant in determining property rights between husband and wife. Instead, it should be concerned with the more fundamental question of the fairest way for equality in property matters between husbands and wives to be guaranteed by law, regardless of traditional or

market place inequalities, and regardless of the role assumed by either spouse in the accomplishment of functions necessary to the family. The law is capable of protecting human dignity and fostering equality between the sexes and not just a mere mechanical preservation of the more tangible forms of wealth known to our society. It is time that these finer capabilities of the law became its goal rather than its shame, with the emphasis shifted away from a sterile inquiry into who earned what and who bought what and into the more fruitful realm of ensuring that what is fair in the context of the family unit is what the law requires.

This goal cannot be achieved under the law of separate property as it now exists. The assumptions behind that law are out of step with the facts of twentieth century life and twentieth century community attitudes towards marriage. Its shortcomings are manifested during marriage primarily in a psychological sense. Many dependent married women do not own or have rights in much of the family property—they merely use it with the tacit permission of their husbands. The price a dependent married woman pays for being supported according to the means and lifestyle of her husband is not measured in terms of relative comfort. Rather, in spite of generally being raised to accept this as the natural order of things, the cost to the dependent married woman of the separate property system is paid in the coin of individuality, identity and self-esteem. When a marriage ends in divorce, as increasing numbers now do, these intangible deficiencies are transformed into harsh economic realities. A dependent wife may own at the time of divorce literally little more than the clothes on her back, regardless of how much property is held by her husband or what property was mutually used and enjoyed during the marriage.

We do not wish to be understood as characterizing marriage as being merely a business arrangement, because it obviously is far more than that. We are in full agreement with the position that there is more to marriage than property rights at the time of divorce. By the same token, however, there should be more to property rights at the time of divorce than a legal inquiry that ignores everything about the work that goes into a marriage other than work performed for wages.

Specific Problems with the Law of Separate Property

Some basic defects in the law of separate property can be illustrated by examples of how the courts are required to apply that law. If during the course of a marriage the husband works and the wife stays home with the children, on divorce the wife will not have any share in any of the property purchased from the husband's earnings. The assumption behind this result seems to be that since she has been supported for part of her life—that is, she has not had to do any work for wages—then the law should not give her any share in property that was purchased out of wages. The law of separate property does not have any means for measuring, in terms of property rights, the value to her husband, her family and society of her work as a housekeeper or mother.

A married man is required by law to provide his wife and family with the necessaries of life: food, shelter, clothing. Since most employment occupies normal shopping hours, the task of making routine family purchases is usually undertaken by the wife, using money furnished by her husband. Everything she buys this way becomes her husband's property. If, through prudent management, the wife is able to save money out of her household allowance, such savings and any property purchased with them, belong to the husband. The law of separate property does not even go so far as to find that the spouses have a joint interest in savings from a household allowance.

If both spouses work, the law of separate property has no effective ways to treat the family as an economic unit. Rather, the courts are obliged to trace the ownership of property to the spouse who was the source of the funds with which it was purchased. This becomes most harmful where the earnings of one spouse have been used to pay for property while the earnings of the other have been used for consumables such as holidays, food, children's clothing and so on. Because of the limitations mentioned earlier on credit available to married women, and the less-certain continuity of married women's income, it is most often the husband's money that is used for charge account purchases, car payments, mortgage payments, and the like. It is legally immaterial to the question of who owns property that a wife's earnings have taken up enough of the slack in a family budget to allow a husband to be able to make payments on property. The law does not look at the whole

picture of the family finances in determining ownership, but only at whose money paid for each particular asset. This rule can work both ways, so that it is not always the wife who suffers the disadvantage. The point is not whether more wives or more husbands will take a loss in this situation, but rather that the spouse who produced sufficient additional income to allow the other to acquire property must take any loss at all.

If both spouses work and contribute to the purchase of property, other rules come into play that tend to make the determination of ownership somewhat fairer. Generally speaking, if each spouse contributes money to the purchase of an asset, each will have a share, either in proportion to the amount of money he or she put up, or, where the court finds the spouses intended to share equally, an equal share. In many cases where equal sharing has been ordered by a court, the evidence of intention to share equally is highly equivocal, since most married people tend to operate on the basis of unspoken understandings rather than formal arrangements made at the time property is purchased. There is a recent trend in modern Canadian law for the courts to find that married persons intended equal sharing once some financial contribution by both spouses to the purchase of property is proved, regardless of the inequality of the contributions. The courts say "equity is equality". In our view, this tendency towards equality represents an attempt by the courts to compensate for the inability of the traditional law of separate property to produce fair results in situations where a wife's time has been mainly taken up by caring for children and household management, with only temporary periods of employment.

In order to have any sharing, however, there must always be a direct financial contribution by both spouses to the acquisition of the property. No doctrine exists that the value of a contribution towards the family home, farm or business by way of management, physical labour, cooking, housekeeping, or child care is sufficient to give a spouse making such a contribution—and these are almost invariably wives—any share in the business, farm, home or property.

It is, of course, always possible for one spouse to make a gift of property to the other. This is the way in which a non-earning wife gets any claim to assets purchased out of her husband's income, and is the one area in which the law of separate property has recognized and to some degree compensated for the propertyless position of the dependent wife. If a husband buys property out of his earnings and takes the title in the joint names of himself and his wife, he is presumed in law to have intended to make a gift to her of one-half of the value of the

property. Similarly, if he buys property in her name, the law presumes that he has made a gift of the entire property to her. This is called the "presumption of advancement" and applies only in one direction: if a wife buys property from her earnings and takes the title in joint names or in her husband's name alone, the presumption is that she retains the full interest, and that he holds the property, or a share in it, as a trustee for her. This is the presumption of "resulting trust". Both presumptions can be rebutted by evidence showing that the intention of the purchaser was different from what is presumed, but in the absence of such evidence wives take property purchased by their husbands under these conditions as gifts, while they retain the full beneficial interest in property that they have purchased and placed in their husband's names.

These presumptions—particularly the presumption of resulting trust—have been recognized by the courts as sexually discriminatory and their force has been largely eroded in recent years. There may have been a time when it was recognized as unthinkable that a married woman would give property to her husband, but this was during an earlier age when husbands took most of their wives' property and earnings by operation of law. We think, today, that a rule such as that of resulting trust embodies a patronizing and unnecessarily protective attitude towards married women, and that better alternatives exist for the law to strike a balance between the property positions of husbands and wives.

It should be mentioned that neither the presumption of advancement nor of resulting trust ever applied in Quebec under the circumstances described above. Until quite recently, gifts between spouses were prohibited by law in that province.

Other and more overt instances of discrimination based upon sex exist in the law of separate property. As we have already pointed out, the laws of most provinces impose the obligation to maintain a dependent spouse only on the husband. However, the wife's right to be maintained by her husband or to pledge his credit for necessaries is subject to a "morals test", whereby if she commits adultery or deserts her husband, she loses her rights. Adultery can also cost a wife her dower rights in those provinces where this right exists, can prevent her from taking a full share in the estate of her husband where he died without leaving a will, and can prevent her from receiving a share of his estate after his death if he made no provision or only an inadequate provision for her in his will. In general, no similar disqualifications are placed by law upon husbands after the deaths of wives. The law of separate property is, first and foremost, the law of the double standard.

There can be no doubt that this whole body of law, of which we have mentioned only a few examples, needs a thorough overhaul. The remainder of this working paper is devoted to a consideration of the directions in which meaningful reform might travel. The basic premise we have adopted is the need to put behind Canadian law, once and for all, invidious discriminaiton based upon sex and to found reforms on the principle of equality between husbands and wives. The law will, of course, still have to make distinctions—this is inseparable from the nature of law itself. Where this is necessary, however, distinctions should be made on the basis of the functions actually performed by a married person, according to the way the spouses have agreed to divide up the necessary duties of wage earning, child care, household management, and so on. It should no longer be presupposed by law that a certain role will fall to the husband and another to the wife. Following from this, the law should attach equal value to the duties within the marriage performed by each spouse, without putting the wage-earning spouse in a preferential position when ownership of property falls to be determined.

Although it is outside the scope of this working paper, it is clear that such a fundamental shift in the law of separate property should be accompanied by parallel reforms in all those other areas where differences in rights, obligations or opportunities exist, depending upon whether the person affected is a married man or a married woman.

Primary Approaches to Reform

There are three primary approaches from which to choose when significant reform to the present law of separate property is sought.

First, the law of separate property could be retained, but the courts could be given a discretionary power to transfer property from husband to wife or wife to husband at the time the marriage is terminated by judicial process.

Second, the law of separate property could be replaced by a system under which each spouse would have co-ownership of all property acquired by either spouse between the day the marriage began and the day it is terminated. The common property would be divided equally between the spouses at the end of the marriage.

Third, the law of separate property could be retained to the extent that property continues to be owned by each spouse separately during marriage, but when the marriage is terminated, the spouse who had acquired the lesser amount of property during marriage would have a right to equalization—that is, for example, at the time of divorce the court would order the spouse with the larger amount of property to transfer either money or property to the spouse with the lesser amount, thereby equalizing the position of the spouses.

In addition to major changes of the sorts just described, legislative attention should be directed toward some particular areas in which immediate improvement can and should be made. It is not necessary to create an entirely new alternative property regime in order to get rid of many of the instances of overt sexual discrimination that are found in the law of separate property. For example, a bill was introduced in Ontario in 1974 declaring that husbands and wives had "independent, separate and distinct" legal personalities and, in order to eliminate legal disqualifications imposed upon married women, it was provided that every married person has the same legal capacity as a single person. The purpose of these declaratory provisions is stated in the legislation as being:

> to make the same law apply, and apply equally, to married men and married women and to remove any difference therein resulting from any common law rule or doctrine. . . .

This is, of course, only an initial step in the reform of the discriminatory inheritance from the law of separate property. In our view, however,

it is a good example of what can be done now, pending the completion of the far more difficult task of formulating fundamental alterations in, or a replacement for, the separate property system.

Another example of reform that could stand independently would be the creation of a special property regime for the matrimonial home and its contents. Such a regime could be superimposed upon the present law of separate property, or combined with any of the major alternatives to that law. Because the matrimonial home is usually the single most valuable property acquired during marriage, and because of its unique character as the shelter and centre for the family, we are of the view that special rules should apply to it and its furnishings. These rules should have the effect of giving both spouses, regardless of which one owns the home, an equal share in its value, and giving both an equal voice in major decisions affecting it: borrowing money using the matrimonial home as security, selling the home, and questions relating to its use and occupation. A similar general principle should apply to the furnishings of the home, so that they could not be removed by the spouse who owned them without the consent of the other, or otherwise dealt with as if they were ordinary items of property, unaffected by any overriding family interests.

It should be noted that the combinations of possible reforms extend far beyond the three primary approaches described above. A family property system can be tailored to meet virtually any set of individual, community and social interests a legislature is prepared to recognize or advance. The importance of this field of choice cannot be overstated —no area or individual rule of law prescribing property and financial relations between spouses, either as we have received it from the past or as this Commission has considered it might be changed, is graven on stone. Changes should be made whenever necessary to serve the interests of fairness and equality that are pressing for recognition in Canada today. We turn now to the principal approaches to reform.

The First Approach: Separation of Property with a Discretion in the Court

The basic principle of this approach is that the law of separate property would be retained, so that ownership of property would remain with the spouse who paid for it. Upon termination of the marriage pursuant to a court order, however, the court could exercise broad powers to order one spouse to transfer property to the other or to pay money in lieu thereof. The same power with respect to property would also be exercisable for the benefit of children of the marriage.

England, New Zealand, British Columbia and the Northwest Territories have all recently adopted property regimes of this sort. Our discussion will focus primarily on the English model, mainly because the new discretionary property laws in Canada have only been in operation for a very short period.

In England, discretionary powers of the sort described are exercisable by the court at the time of the granting of a decree of divorce, nullity or judicial separation, or any time thereafter. It is worth noting that the English courts consider the question of maintenance at the same time and according to the same criteria as the matter of a final property settlement between the spouses.

In Canada today, with the recent exception of British Columbia and the Northwest Territories, a court granting a divorce to spouses governed by the law of separate property has discretionary powers only with respect to maintenance; it has virtually no power to interfere with the title to property. In our view the family partnership cannot be wound up in a satisfactory manner so long as the courts are limited to maintenance in adjusting economic imbalances flowing from the marriage. This combination of poor economics and unwise social planning adds up to bad law—something emphasized by the fact that England has now repudiated some fundamental aspects of the system of family property laws that Canada and many other countries acquired from it.

The English courts are empowered to make orders for the maintenance of family dependents and may also order the transfer or settlement of property for the benefit of either spouse or the children of the family. The court is required to exercise these discretionary powers so as to place the parties, so far as practicable, and having regard to their conduct, in the financial position in which they would have been had the marriage not broken down. In addition to these general criteria, the court is required to have regard to the following circumstances:

a. the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future;
b. the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;
c. the standard of living enjoyed by the family before the breakdown of the marriage;
d. the age of each party to the marriage and the duration of the marriage;
e. any physical or mental disability of either of the parties to the marriage;
f. the contributions made by each of the parties to the welfare of the family, including any contribution made by looking after the home or caring for the family; and
g. in the case of proceedings for divorce or nullity of marriage, the value to either of the parties to the marriage of any benefit (for example, a pension) which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring.

It is significant that the court considers the "income, earning capacity, property and other financial resources" of *each* of the spouses. While it is true that this statute does away with the tradition of unassailable vested property rights—a fact that is of greatest significance to husband-wage earners—it also, through focusing upon the financial means and abilities of each spouse, effectively cuts away at the folklore that marriage provides a lifetime economic shelter for women, regardless of their abilities to provide for themselves.

A second very significant feature of this law lies in its emphasis upon the contributions made by each of the parties to the welfare of the family "*including any contribution made by looking after the home or caring for the family*". This amounts to a legislative recognition of the obvious fact that where there is a division of function in a marriage, as there generally is, those tasks of household management, child care and similar duties usually performed by wives should be of equivalent dignity and value in the eyes of the law as the provision of a financial contribution through paid employment outside the home. We are convinced that this is evolutionary rather than revolutionary, regardless of how heretical it may appear to those who prefer to keep traditional property concepts, and the effect that those concepts have upon human beings, in separate compartments. That it may even be debated seriously at this stage of the twentieth century is merely another illustration of how easily legal orthodoxy becomes a prison from which justice must ever try to escape.

The new direction taken in England does not mean that property rights between married persons are determined other than according to the principles of law. Rather, it means that where marriage is concerned, Parliament has determined that new and fairer principles of law shall govern.

We do not propose to go into detail respecting the distinctions and similarities among the new laws conferring discretionary powers over matrimonial property now in force in England, New Zealand, British Columbia and the Northwest Territories. The interested reader is referred to the study paper prepared by this Commission's Family Law Project for a comparison and analysis. For present purposes it is sufficient to say that the new laws in each jurisdiction give the courts power to make property adjustments in the context of marriage that have heretofore been impossible under the conventional law of separate property.

A discretionary property regime, while simple in concept, raises difficulties of some magnitude, both in terms of general policy and concrete application in individual cases. Perhaps foremost among these

is the question of the effect that the conduct of the spouses should have upon their rights to property sharing. Two different approaches are reflected in the English and New Zealand statutes. New Zealand law provides that:

> in determining the amount of the share or interest of the husband or the wife in any property or in the proceeds of the sale thereof, [the judge] shall not take into account any wrongful conduct of the husband or the wife which is not related to the acquisition of the property in dispute or to its extent or value.

Sexual misconduct, and such questions as whether a married person has been "a good husband", "a wastrel", or whether a spouse has succeeded in living up to the court's view of what is expected of, for example, "an ordinary ranch wife", are simply disregarded as irrelevant in property settlements between husbands and wives in New Zealand, unless the conduct in question is in some direct way related to the property that forms the subject matter of the court hearing. In England, on the other hand, when apportioning property between spouses the court is specifically directed to consider their conduct in a much broader sense. Matters such as adultery and guilt or blame for the termination of the marriage are thrown into the scales to be weighed against whatever value is attached to evidence of sobriety, being a good provider, successfully rearing children, and all of the other activities that comprise the history of a marriage. The English courts have not particularly welcomed the task of having to translate human strengths and weaknesses into property awards, and have therefore adopted, by means of judicial interpretation, the position that misconduct should not affect a property settlement between spouses unless it has been "both obvious and gross".

Another potential disadvantage of a discretionary system lies in its lack of certainty or predictability. Many of the factors that must be taken into account in the exercise of discretion are highly subjective, and judges no less than others, differ in their subjective evaluations, and on questions of what values should be applied to what facts. If conduct of any sort is to have some effect in a discretionary property system—and this will almost certainly be the case—then it is inevitable that different judges will hold differing views on the consequences of certain conduct. A discretionary system therefore invites the practice of "judge-shopping" by lawyers—something that will always result in a disadvantage to one or the other of the parties and which tends to clog court calendars with frivolous motions and attempts to delay the due process of law. Again, because subjective judgments are required in such a system, cases that are apparently identical in their material aspects may be treated differently, thereby giving the appearance, if not the reality, of injustice.

Another drawback to a discretionary system lies in its lack of fixed legal rights. Even were equality to be stated as a general legislative policy, the essential nature of judicial discretion would leave the court free to make whatever sort of property disposition seemed to be appropriate in any given case. A married person would not have a *right* to equality, but only a *hope* to obtain it. If no concept of equality were contained in the law establishing a discretionary system, then it would be accurate to say that a married person would have no property rights at all at the time of divorce. Our concern here is not limited to the way things would work out in practice, since the courts would do their best to ensure that arbitrary dispossession did not occur. Rather, it includes the phychological advantage that accrues to a person who knows he or she has a positive right that is guaranteed and protected by law.

It must be assumed that if the legislature does not write the law in terms of fixed rights, the courts will eventually work out a series of "ground rules" for their own guidance as to how discretion should properly be exercised in different classes of cases. Until such matters of judicial policy were settled, the uncertainty that would lie over this area of the law would tend to make married persons turn to the courts for resolution of disputed property questions. Once the general policy was hammered out over a series of decisions, which could take years, the spouses' lawyers would be able to advise their clients as to how their affairs would be settled in court and could come to property agreements on that basis. Until such time, however, the system would tend to attract litigation. Further, the burden of litigating would, in our view, fall most heavily upon the non-owner spouses, since they would be placed in the position of having to establish generally unprecedented claims upon property owned by another.

The greatest advantage of a discretionary property system lies in the fact that this would be the easiest system for any separate property jurisdiction to adopt. This system would not be legally radical, however it may be characterized in social or economic terms, nor would it require any substantial re-ordering of affairs by married persons.

Such a system would also be the most flexible of the three primary approaches discussed in this working paper. Since we favour the principle of equality, we view flexibility as being of importance not as a means for encouraging the courts to depart from approximately equal sharing upon divorce, but rather as a device to allow the courts to deal fairly with the difficult problems that will arise during a transition period following the introduction not only of new property rules but also new maintenance concepts and other readjustments within the family economic structure.

A discretionary property system, as opposed to a "fixed-rules" system, would probably be the most difficult regime under which to unfairly avoid sharing. Where fixed rules exist, it may be possible for a married person, by careful manipulation of those rules, to so arrange his or her affairs as to avoid sharing property with a spouse. Fixed rules tend to attract the letter of the law, while discretion brings forth its spirit.

Making proper provision for children may also be easier under a discretionary system than under a system of fixed rules. Under any sort of property-sharing regime, it should be possible for the court to order a property settlement or disposition for the benefit of a child of the marriage. What is in the best interests of any particular child is a unique question of fact, not of law, and it would be very difficult to devise a legislative formula for dealing with such a question that did not involve a large measure of judicial discretion. If discretion is exercised in favour of a child, thereby affecting the property position of one or both parents, then it follows that fairer results would be more easily attained if the court had a discretion to ensure that what is done for a child does not result in a heavier burden on one parent than the other.

A discretionary property system would not need to contain any rules that would classify some property as sharable and other property as non-sharable. The court would be free to examine the whole economic picture of the family rather than being confined, for example, to dealing solely with assets acquired during marriage. On this point, while it may be a reasonable legislative policy to say that sharing should only apply to property acquired after marriage, there may be certain cases where such a fixed rule would not be appropriate. A discretionary system could simply leave the question open as to what property was sharable, leaving it up to the court to ensure that justice is done in any special case.

The Second Approach: Community of Property

The community property concept of marital property rights is based upon the assumption that marriage, among other things, is an economic partnership. As such, the partnership, or community, owns the respective talents and efforts of each of the spouses. Whatever is acquired as a result of their talents and efforts is shared by and belongs to both of them equally, as *community property*.

Community property regimes exist in Quebec, in many European countries and in eight of the United States. Quebec's community

property regime, like the separate property regime in that province, is an option available to married persons who choose not to be governed by the basic regime providing for separate ownership of property during a marriage, with fixed sharing upon divorce.

The essential idea of community of property is very simple: the earnings, and property purchased with the earnings, of either spouse become community property in which each spouse has a present equal legal interest. Where the community is terminated—for example by divorce—the community property, after payment of community debts, is divided equally between the spouses. The community is also terminated by the death of a spouse, and in some jurisdictions, including Quebec, by an agreement between the spouses to switch to some other regime or to regulate their property relations by a contract. This simple formula conceals some rather complex rules. We can do no more in this paper than touch upon the general principles and a few of the major problem areas involved in community property systems without dealing with finer points in any great detail.

Under community regimes, there are three kinds of property: the separate property of the husband, the separate property of the wife, and community property. Typically, the property owned by either spouse before marriage is the separate property of that spouse, along with property acquired after marriage by a spouse by way of gift or inheritance. Separate property is not shared at the time of divorce, but rather is retained by the owner-spouse. All other property, however acquired, becomes community property, in which each spouse has a present interest as soon as it is purchased or obtained, and an equal share in its division upon divorce. In some jurisdictions, someone giving property to a married person must specify that the property is to be the separate property of the recipient. Otherwise it will be treated as a gift to both spouses, even though it is only given to one, and will become community property. In the Province of Quebec, some types of property owned before marriage become community property, but it is possible for persons giving such types of property to a single person to make the gift on the condition that it remain the separate property of the recipient should he or she thereafter marry under the regime of community property.

Under a community property regime, all property owned by either spouse at the time of a divorce is generally presumed in law to be community property unless it can be proved to be separate. In many marriages the spouses will not have adequate records of ownership or the source of funds used to acquire property. This produces the legal phenomenon of "commingling"—that is, the separate property of each

spouse eventually becomes mixed with that of the other spouse and with the community property, resulting in all the property being treated as sharable community property at the time of divorce. Commingling makes it impossible for the spouses to establish that certain items of property were owned before marriage, or otherwise fall into the classification of separate property.

Community property regimes, however, are enacted into law on the assumption that commingling is not what most people desire, and they therefore contain rather elaborate rules and formulae designed to deal with the fact that married persons will be using and enjoying the three different types of property created by the law of this regime—that is, the husband's separate property, the wife's separate property and the community property. These rules and formulae tend to make the essentially simple concept of community of property a rather complicated system in practice. For example, one typical rule is that property acquired after marriage in replacement of separate property does not become community property. This means that a spouse who wishes to replace or keep replacing property that was owned before marriage must keep an account and record of every transaction, so that at the time of divorce items purchased after marriage for which separate property status is claimed can be traced back to the original property owned before marriage, and can be shown to be replacements for such original property. If a person does not have adequate records, the replacement property will be presumed to belong to the community and shared between the spouses when the marriage is dissolved.

Even assuming that the separate property of a spouse can in fact be kept identifiable, it is necessary to have rules governing the situation where community funds are expended with respect to such property. If, for example, a husband owns a house as separate property and has it repaired, using community funds, the community property is entitled to reimbursement at the time of divorce to the extent of the value of the repairs. Or if he sells the house and buys another, using for the purchase some community funds plus proceeds of the sale, the rule might be that if more than fifty percent of the price of the second house came from the first house, it remains separate property subject to an appropriate compensation to the community upon divorce. If more than fifty percent of the price of the second house came from community funds, then it loses its character as separate property and becomes community property. In the latter case there would be a compensation paid from the community at the time of divorce to the husband's separate property equal to the amount realized on the sale of the first house. When it is recognized that most families only have available the earnings of one spouse, which belong to the community,

and that many items of separate property over the course of a marriage would be maintained and repaired out of these earnings, or sold and "traded up" for newer property using the proceeds of the sale of the separate property plus community funds, then some of the practical difficulties in accounting during the marriage and sorting out community and separate property at its termination become readily apparent.

In some community property jurisdictions, the income produced by a spouse's separate property (such as the profits from renting an apartment house owned separately by one spouse) becomes community property. In other jurisdictions, the rule is the other way, so that a spouse is entitled to keep such income separate so long, of course, as he is able to establish at the time of divorce that the source of the income was his separate property.

With respect to liability for indebtedness, some community property jurisdictions distinguish between debts contracted as community obligations, such as necessaries for any member of the family or the debts connected with the prosecution of a community business, and debts contracted with respect to the acquisition or disposition of separate property or the management of a separately owned business of one spouse. In other jurisdictions, the community property is liable for the debts of the husband but not the debts of his wife. To give an example of how this matter is dealt with in the Province of Quebec, the question of whether the liability for a debt falls upon the separate property of the husband, the community property, the separate property of the wife, or some combination thereof, depends upon whether the debt was contracted by the husband, or by the wife on her own account, or by the wife as an agent for her husband, or by the wife without her husband's opposition, or by the wife with her husband's opposition, or by a wife who carries on a trade or calling with her husband's consent, or a trade or calling without her husband's consent, or whether the debt was jointly contracted by both spouses. The rights of the person to whom the money is owed may vary significantly according to the classification into which the debt falls. We do not set these matters out in order to pursue the rules and exceptions that apply to each category of debt but rather to make the point, if at some length, that the basic fairness inherent in a community property regime must be purchased at the cost of a fairly elaborate structure of legal rules that affect not only the spouses, but also all persons with whom they deal. It must also be remembered that the property available to answer for the various classes of debts does not always come neatly wrapped and packaged as "community property", "husband's separate property", or "wife's separate property", since commingling may have occurred or compensation with respect to a given item of property of one classification

may be owing from it to another classification of property—such as where an item of separate property has been improved using community funds. In all of this, the outside creditors may be somewhat at the mercy of the accuracy with which the spouses have kept their records.

Once it is conceded that fairness requires the existence of separate property as well as common property in a community property regime—and these categories are present in all such regimes—then it must also be conceded that detailed rules are essential in order to ensure that the common property of husbands and wives is not diminished or impaired by the debts of either of them unconnected to the marital relationship, and that it is equally essential to ensure that those who provide services, sell goods or extend credit to married persons are not deprived of a just recovery when the debtor has the means of satisfying the debt. These are not abstract legalistic problems, but matters that would be of immediate concern in a province or territory seriously considering a change from separate to community property. Married people are constantly entering into contractual relationships involving the creation of debts, and the adoption of a community property regime would invariably have a profound effect upon the mechanics of the economic life of a jurisdiction making such a change. The policy decision to be made here is whether the added complexities are balanced by the additional social benefits that would be brought by the creation of present property interests in both marriage partners.

Questions similar to the matter of liability for debts also arise under community property systems in relation to community liability for torts or delicts—that is, for injuries—inflicted by a married person upon a third party. Under the rules of community property jurisdictions the separate property of a spouse committing a tort is usually available to answer for injuries done to others. In this connection, however, it should be borne in mind that in most cases married couples will not have extensive separate property holdings. Their main, and in some cases only, asset will be their community property, and the issue arises as to the liability that should fall upon this mutually owned property as a result of a wrongful act of only one spouse.

It is good public policy to provide for the redress of victims of tortious acts by making it possible for them to collect their judgments. On the other hand, there is also a strong public interest in protecting the rights of the innocent spouse—that is, the one who did not commit the tort—by ensuring that such a spouse is not deprived of community property because of the wrongful act of his or her partner. In some jurisdictions, the community property is available to satisfy tort judgments against the husband but not against the wife. In others, the com-

munity property is liable to satisfy a judgment for the tortious conduct of either spouse—an approach that favours the victim of the tort over the innocent spouse. In other jurisdictions, the community is liable for judgments only if the tort was committed during the prosecution of the "community business" and not if one of the spouses has committed a tort that has nothing to do with the marriage. A fourth alternative makes half the community available to the judgment creditors of a tort-feasor spouse.

Again, as with what was said before about debts, if a previously separate property jurisdiction were to decide to adopt the community property regime, it would be required to make a careful analysis of these problems, in the effort to come up with a statutory scheme that clearly identified and gave the best accommodation to the conflicting policy interests.

Community of property contains a built-in potential for disputes because it involves one mass of common property in which two persons have an interest. The traditional solution to this problem has been for the law to designate the husband as "manager of the community". This approaches the problem of resolving conflicting interests between the spouses by simply defining it out of existence. It does nothing, however, to protect the position of a married woman whose husband dissipates or wastes the community property—which, by law, is hers as well as his—through neglect, mismanagement, or plain stupidity. At best, the husband-as-manager concept is a concession to the fact that in most cases the bulk of the community assets will have been accumulated out of his earnings. Such an arrangement, however, also bears the earmarks of sexually based discrimination, which is no more acceptable under a community of property regime than it is in a different context, under the law of separate property. The single-manager rule has been modified in most jurisdictions by provisions such as requiring the consent of both spouses before a gift of community property can be made or before disposition of community real property. As a matter of policy, however, we agree with the movement now under way in many of the American community property jurisdictions to revise the rules of management by substituting for the traditional form a concept of joint management. What this generally means is that either one of the spouses can manage all the community property, subject to the provision that in certain important transactions, usually involving real estate or large assets, the decision has to be joint.

Regardless of how the management rules are framed in a community property system, it is apparent that disputes will arise between spouses that must be settled in a way that protects the legal rights of

each. All such systems therefore provide mechanisms for application to the courts in situations where one spouse is alleged to have unreasonably withheld consent to a transaction that cannot take place without agreement between the partners, or where mismanagement of community assets is alleged or where the interests of one spouse are jeopardized by the fraudulent or improvident acts of the other. Many people who are accustomed to the separate property tradition will see this as an unwarranted intrusion by the state into the privacy and autonomy of the family. Those concerned with the administration and operation of the courts may see this as placing a strain upon already overworked judicial resources, as well as asking the courts to deal with problems that in many cases are more social than legal in their nature. In addition, of course, court applications are cumbersome and expensive.

Against these objections it must be said that such a use of the courts is contrary to the tradition of a separate property jurisdiction mainly because the law of separate property has been content to leave a non-owner spouse without any significant rights to be protected. This rule that "the King's writ does not intrude" into the home in separate property jurisdictions has a rhetorical nobility that cannot be denied, and was undoubtedly framed because of the honest conviction that court intervention in ordinary domestic affairs was an improper judicial function. Yet such intervention can only be considered legally improper for so long as the law, for better or for worse, subjects one spouse to the whims of the other, rather than granting equivalent legal rights and legal dignity to each. Regardless of what system eventually replaces separate property as it now exists—and we view such a replacement as both inevitable and desirable—the creation of new rights will require a means for their vindication. The fact that more court time will likely be consumed in interspousal dispute resolution under community property than under the other alternatives to the present law is only a valid objection to the adoption of a community system and not to the adoption of some new and fairer form of property law in lieu of separate property. Whatever new directions may be taken in the jurisdictions that now have traditional separation of property, the procedures of the courts and the very concept of the judicial role will have to be adapted to the coming Canadian reality of true legal equality between husbands and wives.

Community of property has many ramifications with which space has not allowed us to deal. A change from separate property to community of property would require the rethinking and modification not only of most provincial and territorial family laws but also the laws dealing with wills and intestate succession, gifts, pensions, commercial law, insurance law, the ownership or rental of property, including the

matrimonial home, and the registration of interests in land. Of the three major approaches discussed in this working paper, community of property would involve the most wide-ranging and radical changes in the economic and social fabric of a jurisdiction in which it was adopted. Community of property creates a whole new context and a whole new set of problems, not only for spouses, but also for anyone entering into transactions with a married person. It involves complexities of identification of ownership and tracing of funds and assets over a broad range of activities where no such requirements now exist under the law of separate property. While these problems are by no means insurmountable, and have been solved in a number of different ways, they have to be taken into account in considering the desirability of adopting the system.

Further, where the community property system exists in a federal setting such as Canada, additional problems of conflict of laws immediately are posed. Since the population of this country is highly mobile, with people constantly moving from one province to another, many questions will arise as to whether a situation involving such matters as property issues between spouses, inheritance rights or the position of creditors is governed by the law of community property or the law of separate property. Many of the conflict of laws rules are reasonably satisfactory, having been worked out in the past because of the existence of a community property regime in Quebec. But there are still many gaps in the present scheme of rules, and some of them are quite unsophisticated. In our view, if community property systems were adopted by several other provinces, the general body of rules for dealing with such situations would be clearly inadequate and much litigation would be required to deal with novel or unanticipated cases.

Because of its many unique features, we believe that a community property regime would also create the most litigation of the three alternatives with which we deal. Like the discretionary system already described, there would be a certain amount of judicial activity called for during the first years of operation of a community system, if for no other reason than that it is impossible to expect that any legislation, no matter how carefully thought out, could correctly anticipate all the tests to which it would be put in resolving property issues between spouses. Unlike the discretionary system, however, community of property will directly affect the interests of many persons besides married couples, and such persons can be expected to turn to the courts where they feel their interests are adversely or unfairly affected by the new regime, or where the laws are incomplete or unclear.

The question whether the system of community of property is sufficiently superior to a discretionary regime, or to the deferred-sharing

system we describe in the next part of this working paper, involves complex policy decisions. Fundamentally, however, we see it as a choice between two things. On one hand there is the benefit to the spouses of their common ownership. This benefit not only makes a reality out of the concept of partnership, which we think strengthens the institution of marriage, but also carries with it the emotional and psychological benefits derived from the reality of present ownership for the spouse who is not gainfully employed outside the home. Against this is the fact that the adoption of community of property, in the context of a jurisdiction that has always had separation of property, would be a radical alteration of existing customs, practices and traditions, involving the necessity of new, complex rules being learned and employed in daily affairs not only by married couples, but also by those dealing with them.

The Third Approach: Deferred Sharing

Deferred sharing, or deferred community of property as it is sometimes called, is based on the idea that there should be separate ownership of property during marriage, and an equal distribution of property on divorce. Deferred sharing, therefore, lies somewhere between the extremes of separate property on the one hand and full community of property on the other. Deferred sharing regimes exist in Denmark, Sweden, Norway, Finland, West Germany and Holland. In Canada, Quebec adopted a deferred sharing regime in 1970—the "partnership of acquests"—as its basic family property law, applicable to all married persons who did not make a positive choice of community property or separate property. In addition, the Ontario Law Reform Commission, in the spring of 1974, made a formal and detailed proposal to the government of that province that legislation be enacted to create a deferred sharing system, known as the "matrimonial property regime", to replace many fundamental aspects of the law of separate property in Ontario. Although there are some conceptual differences, its results are essentially similar to Quebec's partnership of acquests.

The basic theory of the deferred sharing system is simple. In general terms, all property acquired by either spouse during marriage is to be shared equally when the marriage partnership is dissolved. There are some exceptions to this rule which we will deal with below. In describing how this sharing plan would operate we will use the model of deferred sharing developed by the Ontario Law Reform Commission, which was conciously designed with a view to being adopted in, and solving the problems of change in a province with a separate property regime.

The deferred sharing system proposed in Ontario is obviously aimed at the unsatisfactory state of the present law of separate property as it affects persons at the time of divorce. It was recommended, however, that divorce not be the only occasion for termination of the regime. Equalization of the marriage assets would also occur upon the death of a spouse, on a joint application to the court by the spouses for the winding-up of the regime, or on an application to the court by only one spouse where normal cohabitation had ended, where the applicant's legitimate expectations in the sharable values of assets were jeopardized by the actions of the other spouse, or where a spouse had sold or granted security over the matrimonial home without the consent of the other. Equalization could also occur in proceedings for a declaration of status having the effect of determining that the marriage did not exist. In other words, although the primary concern is with divorce, it would not always be necessary for the spouses to be divorced in order to have sharing.

The theory of deferred sharing is that marriage is an economic as well as a social partnership. At present, most people being married in a separate property jurisdiction are aware of the necessity to devote their energies to succeeding as social partners, but make the assumption that the law, whatever it may be, ensures that the economic aspects of their relationship will somehow be dealt with in a just and equitable fashion. It is usually not until the social partnership breaks down, and divorce proceedings are instituted, that married persons realize that the concept of economic partnership—which in our view is a basic understanding between a majority of married Canadian couples—is not recognized by the law of separate property. Any reliance upon the law to terminate the economic relationship between the spouses in a way that is consistent with the understandings that existed during the marriage is misplaced and mistaken.

Deferred sharing is primarily designed to intervene at this stage of a marriage; that is, when the marital relationship has deteriorated to the point that the spouses must stand upon their legal rights rather than upon economic arrangements made on the basis of mutual trust and respect. Until this point is reached, both spouses, under the deferred sharing system, are separate as to property. Each is free, with some exceptions designed to protect the interests of the other, to own, buy, sell, and otherwise deal with his or her property as he or she sees fit. However, when a divorce or any other situation arises under which the property regime would be terminated, both are entitled to an equal participation in the economic gains of the marriage, without regard to such matters as which spouse was employed outside the home, or who put up the money to acquire any particular asset. A deferred sharing

regime can therefore be said to conduce to two things: the autonomy of each spouse during the marriage and the equality of each spouse at its termination.

The basic complexity of a deferred sharing system lies in the formula for determining the "total financial product of the marriage"—that is, the value that is to be shared equally between the spouses upon the occasion, for example, of a divorce. What must be done is to ascertain the value of the property owned by each spouse at the time of divorce. Each then subtracts current debts. Also subtracted is the value of property owned before the marriage, and the value of property acquired during the marriage by inheritance or gift from a third party. What is left is the net value of the property that each spouse amassed during the marriage. The husband's net gains are added to those of the wife, and each is entitled to one-half the total. In practical terms, this means that the spouse with the larger net gain during the marriage will pay an "equalizing claim" to the spouse with the smaller net gain, thereby equalizing the financial position of each.

The Ontario proposal does not create any classes of property that are exempt from sharing, such as "husband's separate property owned before marriage" or "wife's separate property inherited during marriage", nor does it create, in an analogy to community property, any class of "potentially sharable property". All property of a spouse is his or her separate property at all times. What the proposed regime deals in is *property values*. At the time of termination of the regime, the value of all property owned by either spouse would be presumed to be sharable until the contrary were shown.

A key proposal in the Ontario system is that all capital gains to, and income from property the value of which is deductible (for example, property owned before marriage) would become sharable. On the other hand, any diminution in the value of deductible property would reduce the amount of the deduction. This avoids most of the tracing of funds and property that creates such complexity with respect to separate property under a community property regime. Some record-keeping would still be required, since a spouse would have to show that the value of deductible property had been preserved in order to subtract that amount from his or her net worth at the time of sharing. Generally speaking, however, the Ontario deferred sharing proposal is much simpler in this respect than a community property system.

The debts and tort liabilities of each spouse would continue to be the separate responsibility of the married person incurring the debt or committing the tort. This represents no legal change affecting third party creditors, who would be in the same position under the Ontario deferred sharing regime as they are now. The impact upon the economic

picture in the province would be further minimized by a recommendation to the effect that a spouse's creditors rank ahead of an equalizing claim. Tradesmen, retailers and others dealing with married people would therefore incur no greater risk of non-payment under the Ontario deferred sharing system than they now do under the law of separate property.

A deferred sharing regime would require that some controls be placed upon the making of gifts by a spouse to third parties that are other than customary or usual, and upon sham sales or the creation of certain types of trusts—all of which would have the effect of jeopardizing the interests of the other spouse should the regime thereafter be terminated. Apart from these controls, no special need to resort to the courts for intervention in a family's domestic economic affairs is created by the deferred sharing system.

It was proposed that a court supervising the termination of the regime should be granted no general discretion to depart from the principle of equal sharing. A fairly narrow power of this sort was recommended where in special situations the unmodified application of rules created to conduce to autonomy during marriage and equality at its termination would "lead to grossly inequitable results". It should be noted, however, that the Ontario Law Reform Commission was firm in stating "matrimonial fault" should have no effect upon the right of a spouse to equal sharing at the time the regime was wound up.

No special exception from sharing was recommended in the Ontario proposal with respect to business assets. If such assets come into being during a marriage, their value would be shared in the same way as any other property values. It was suggested, however, with particular attention to the possible financial embarrassment of a business, that a spouse who owed an equalizing claim should have the ability to pay the claim, with interest, in instalments over a period of up to ten years, subject to the provision of an adequate security.

A deferred sharing system, although it does not approach the community property system in this respect, is complex in detail and, like the other alternatives discussed in this working paper, has ramifications in other areas besides property rights between husband and wife. A province adopting such a system would need to re-examine, among other things, some aspects of the laws respecting insurance, pensions, distribution of estates upon intestacy, interspousal maintenance, maintenance of children and conflict of laws. Federal action, particularly in the area of taxation, would also be required. The impact, however, of a deferred sharing system upon the commercial laws and practices that now exist under the law of separate property, and upon

most other community customs and usages, would be in no way comparable to the re-ordering that would be required by the adoption of a community of property regime. In addition, because the spouses would be separate as to property until a divorce or the regime was otherwise terminated, neither married persons nor those dealing with them would be required to master any substantial new body of doctrine and rules in order to function successfully under the new regime.

Although it is difficult to forecast such matters with any high degree of accuracy, we conclude that a deferred sharing system would create less litigation than the other approaches we have discussed.

Deferred sharing has at least two aspects that some may consider to be serious drawbacks. Like the discretionary system, it does not give the spouses a present equal property interest in the financial gains of the marriage. It has the advantage over the discretionary system of conferring rights rather than subjecting a non-owner spouse to the views of a particular judge at the time of divorce, but these rights are, as is implied by the title of the regime, deferred. While the psychological and practical value of present ownership that exists under a community property regime creates its own unique set of difficulties, it is also a value that should not be minimized. Here, as elsewhere, the deferred sharing system, with its postponed rights, represents a compromise between a system that depends entirely on judicial discretion and the present vested rights that would exist under a community property system.

The second possible objectionable feature of the deferred sharing regime is also shared with the discretionary regime. It assumes the continuation of the separate property system. The right to equality, however, that is the backbone of the deferred sharing regime, is fundamentally inconsistent with virtually every major abuse that exists under the present law of separate property. The monolithic concept of legal and practical inequality between the sexes found under separate property is philosophically undermined by the deferred sharing system. In recognition of this fact, the Ontario Law Reform Commission found that it was not possible to create reforms to the law respecting a right to equal participation in the financial gains of a marriage without also recommending substantial changes in many other basic tenets associated with the law of separate property. Major modifications of that law were accordingly proposed conducing to equality in maintenance obligations between husbands and wives towards each other and children; equal rights in joint bank accounts and common funds; equal rights with respect to transfers of property between spouses; equal rights in household allowances; and equal rights in the matrimonial home. The

repeal of many other sexually discriminatory laws, some affecting both spouses, but most discriminating primarily against married women, was also recommended.

Employing the law of separate property as the basis for a deferred sharing regime is therefore only a drawback to the extent that a legislature tolerates the retention of its philosophical tradition of sexual inequality. If the individual autonomy that is possible under the law of separate property can be achieved without sexually-based invidious discrimination, then we see no objection to the retention of this body of law, as reformed, as the basis for a redistribution of property rights between married persons under a deferred sharing regime.

Some Basic Policy Issues

There are several difficult policy issues that must be considered by any jurisdiction examining the creation of some form of property sharing law in place of a separate property regime. The first of these is the question of whether marital misconduct should affect the right of a married person to share in the division of property.

Marital Misconduct and Property Sharing

Marital misconduct is a moral issue with which the law has attempted, with varying success, to come to grips in the past. Humility in the face of such a difficult issue is a moral virtue that the law has yet to practice. The causes or sources of conduct by married persons that the courts are required to characterize as "guilty" or "blameworthy" are recognized by the behavioural sciences as being far less susceptible of black and white identification than the law now assumes. Nothing short of a lengthy and candid psychiatric evaluation of the whole history of the relationship between a married couple would be capable of ensuring that real justice would be done in a system that viewed moral questions as being determinative in property settlements. And most divorce hearings are neither lengthy nor candid; nor are the tools with which the courts are equipped sophisticated enough to resolve such issues with the certainty that, in our opinion, is required in cases where significant property rights are at stake, and where the outcome will often represent the fruits of the labour of the spouses' adult lifetimes.

Misconduct may be the legal reason for the termination of a marriage, but it does not necessarily follow from this that it should also be the reason for inflicting economic sanctions upon one of the parties. Like the quality of affection between spouses, the moral conduct of married persons is not something that can be purchased. Nor do we think it is a particularly appropriate task of the law to attempt to enforce an official moral code against married people through the power of the court to reward propriety or punish misconduct by the granting or withholding of property rights. While we admire the efforts made by the English and New Zealand Parliaments and courts to deal with a question that is both significant and profound, we do not think that

they should be emulated in this country. We accordingly suggest that the wisest course of action would be to introduce legislation to expressly exclude misconduct as a consideration in a property settlement hearing.

Sharing Business Assets

Another difficult problem—and one that arises under any property sharing regime, whether discretionary or fixed—is whether the business assets of one spouse should always be shared with the other, or whether the sharing should be confined to the so-called "family property"—that is, the matrimonial home, its furnishings, and other assets that have been jointly enjoyed by both spouses. One rationale for property sharing is that the spouses, each making different sorts of contributions to the marriage, both participate in the acquisition and building up of assets acquired during marriage. Where part of those assets are the assets of the business (or profession) of one spouse, however, the assumption that the other had anything to do with their acquisition or increase may be demonstrably untrue. While we recognize that the foregoing considerations are not without weight, we are nevertheless of the view that these assets should be shared, although some legal adjustments may be required to cushion the effect of such sharing in certain situations.

Marriage is an economic venture for both spouses, regardless of whether only one engages in the activity that produces the assets that are the tangible results of the venture. The life-fortunes, whether good or bad, of each spouse are inextricably bound together. A non-earning spouse—say a wife who is home caring for children—commits her economic destiny to that of her husband no less irrevocably when he is a businessman than when he is a wage earner. The risk of a business failure affects one spouse as much as the other and, in our opinion, the benefits of a business success are not fairly susceptible to a narrower allocation than the risks taken in the pursuit of such success.

We do not subscribe to the view that the spouse in a marriage whose role is non-entrepreneurial is, or should be allowed in law to be, merely "along for the ride". This is a dependency-related concept that we think is no longer tenable. Getting rid of this concept is not a matter of the reform of property law, but rather of interspousal maintenance obligations, whereby equivalent legal responsibilities towards each other would be borne by both spouses. It may therefore be anticipating to some extent a rationality in the broader areas of family law that does not now exist to suggest that, in property matters, no distinction should be drawn among assets acquired as a result of business activities, assets acquired out of ordinary wages, and assets that can be classified as "family property". Nevertheless, we feel that this should be a fundamen-

tal policy in any general reform of family law, and would therefore be appropriate to adopt in this particular area of law relating to property sharing between spouses.

Retroactivity

A third problem that must be faced by a jurisdiction adopting a property sharing regime is the question of retroactivity—that is, whether a new system should apply to persons now married as well as to people married after reform legislation takes effect.

It can be argued that it would be wrong for the law to interfere with vested property rights, and that persons who were married under the law of separate property should not be covered by any new system unless they choose to be. This appears to be the reasoning behind the proposal of the Ontario Law Reform Commission to the effect that persons who were already married when the deferred sharing regime comes into existence should have the choice of opting into the new system, or remaining separate as to property.

It should be noted that none of the four separate property jurisdictions which have recently granted their courts discretionary powers with respect to property issues between spouses (British Columbia, the Northwest Territories, New Zealand and England) made any exceptions exempting persons who were married when the new laws came into force from the operation of those laws. To this extent, these new laws can be said to be retroactive.

It is arguable, however, that the community of property and the deferred sharing alternatives, being changes of a more fundamental sort, should not be introduced without some choice being available to individuals already married as to whether the new regime will apply to them, or whether they will remain separate as to property.

In this matter we are inclined to agree with the Ontario Law Reform Commission, subject to one major difference. In our view it would be preferable for a community property or deferred sharing regime to apply to all persons who were married when the legislation came into force unless they chose to opt out, rather than requiring persons who were already married to opt in. This view, we should add, accords with what we are informed has been the opinion of a majority of persons attending a series of public meetings sponsored by the Attorney General of Ontario on the proposals of the Ontario Law Reform Commission, as well as being the position adopted by a majority of delegates at a major conference on family law sponsored by the Ontario Status of Women Council in October, 1974.

We also agree with the position taken in the four jurisdictions that have chosen to give the court the discretionary power to make orders transferring property from one spouse to another rather than giving each spouse definite property rights. Speaking with particular reference to divorce, it is our view that, in a jurisdiction where community property or deferred sharing is not available to married persons, the court should be able to exercise these sorts of discretionary powers in every case, regardless of whether the spouses were married before the date that the courts received authority to make such orders, and were given no options as to whether such powers would apply to their property relations.

Equality

The creation of a property-sharing system raises the question whether it should be intended to do nothing more than give a non-earning spouse *some* share in property, or whether the goal should be to equalize the property positions of each spouse on termination of a marriage.

Equality is the basis of a community property system, as well as a deferred sharing regime. Although both these types of regimes typically give the court some leeway in special cases to depart from equal sharing, it is only a discretionary system that leaves the matter of equality entirely open. In none of the discretionary regimes that we have mentioned in this working paper is equalization of property stated to be an object of legislative policy. An Appellate Court in England has described the judicial approach being taken under that country's discretionary system in the following terms:

> If we were only concerned with the capital assets of the family, and particularly with the matrimonial home, it would be tempting to divide them half and half, as the judge did. That would be fair enough if the wife afterwards went her own way, making no further demands on the husband. It would be simply a division of the assets of the partnership. That may come in the future. But at present few wives are content with a share of the capital assets. Most wives want their former husband to make periodical payments as well to support them; because, after the divorce, he will be earning far more than she; and she can only keep up her standard of living with his help. He also has to make payments for the children out of his earnings, even if they are with her. In view of these calls on his future earnings, we do not think she can have both—half the capital assets, and half the earnings.

In our view, equality in matters of property is an appropriate goal to aim at under a discretionary system, or under any property-sharing system for that matter. As the above-quoted words show, however, there is an element of inequality arising out of the fact that,

notwithstanding a property division at the time of divorce, "most wives want their former husband to make periodical payments as well to support them . . .". If the expectations of most husbands will require some significant re-adjustment with respect to property rights, it is no less true that there must be a change in the thinking of most wives with respect to maintenance for themselves—particularly after a divorce where there are no children involved, or where the children are not in need of constant care. Property and maintenance questions, under a discretionary property system, are not subject to the present artificial distinction drawn between the rigidities of the law of separate property and the reasonable flexibility found under the *Divorce Act* concept of maintenance. Historically, this combination of rigid property rules and flexible maintenance concepts had led to divorce maintenance awards being used to a large extent to compensate a former wife for the inequalities inherent in the law of separate property. We are of the view that the ideal of equalization of property would be the best legislative policy and, subject to what we say in the following paragraphs, that it would be appropriate for such a policy to be stated in a new law providing for any sort of property-sharing system.

Equalization of property, however, presupposes a complementary reform of a rather fundamental nature respecting the rationale of interspousal maintenance, both during marriage and following a divorce. Until this has been accomplished, a discretionary property system, with its inherent flexibility, would seem to have some advantages not possessed by a community property or deferred sharing regime, at least in a jurisdiction where family property law reform preceded the reform of maintenance obligations. Although we do not wish to anticipate matters that we shall deal with in detail in the future, our present view is that the law should move in the parallel directions of equalization of property on divorce and, subject to the special requirements of individual cases, away from a concept of maintenance that is based as much upon the sex of the maintained spouse as it is upon needs flowing from the division of functions in the marriage.

As was pointed out by the English Appellate Court, the idea of the wife going her own way after a half-and-half property division is something that "may come in the future". We are concerned, however, with the present, and recognize that a transition period would probably be necessary between the present situation, where there is no property sharing and relatively large post-divorce maintenance awards for women, and some future situation of equal property sharing with post-divorce maintenance for a non-earning spouse eliminated in some cases, and reduced in others. Of the three regimes considered in this working paper, a discretionary property system appears to afford the most con-

venient way to accommodate the legitimate expectations, needs and interests of people who may be divorced during such a transition period. On the other hand, where the disadvantages of a discretionary system are thought to outweigh its advantages, causing a jurisdiction to choose a family property regime emphasizing fixed rights, it would nevertheless be possible to provide an element of discretion in the court at the time of divorce specifically to deal with the problems inherent in the relationship between the sharing of property and the maintenance of one former spouse by the other. As we have indicated, however, we think the necessity for such dispositions will be less and less felt as women achieve a greater measure of socio-economic equality. In any event, the goal must remain a law providing for full equalization of property at the time of divorce coupled with maintenance laws from which inequalities based upon sex have been eliminated.

Some Other Considerations

The Continuing Importance of Maintenance

Although the advent of property sharing will have a direct effect upon maintenance on divorce, such sharing does not mean that property distribution will replace maintenance. Most families will accumulate relatively modest amounts of property during marriage, and in any event there will be no necessary connection between the amount of property available for sharing and the amount necessary to meet the reasonable needs of a spouse who will require periodic sums for his or her maintenance after divorce. Such needs will obviously be different for a person who has property at the end of a marriage as opposed to a person who has none, but they will not necessarily cease to exist merely because there has been a sharing of property. The property position of a spouse seeking maintenance in divorce proceedings will simply be another factor to be considered by the court in deciding whether a maintenance award would be appropriate, and if so, how much and for how long.

The Overall Goal of Family Law Reform

We should also point out that property sharing—particularly from the federal perspective, which is focused on the time of divorce—is a solution to only one of several important legal problems that affect the institution of matrimony. Property sharing means that the advantages and disadvantages that flow from a person's role within a marriage will be, with respect to the economic gains of the marriage, substantially equal for both spouses. In addition, however, we view it as an appropriate goal of law reform to remove from the law of separate property all sexually-based legal impediments to personal growth and full participation in the family as well as in the economic life of the community and to create equal legal responsibilities and opportunities for all married persons, from the day of marriage until its termination by death or divorce. Where these inequalities exist as a result of the state of the law, the law can and should be changed.

We see this goal of reform of family law as an increase in the spectrum of choice available to married persons of either sex with a consequent growth in individual freedom. The need to provide care for

children, for the family to have an income, and for household management will all remain fixed requirements for the ordinary Canadian family. The reform of private law cannot affect these matters. What it can do, however, is to ensure that husbands and wives are free to allocate these duties in accordance with their individual preferences and are required to discharge the legal responsibilities associated with these duties in accordance with their means and abilities, without being subjected to legally enforced sexual stereotyping, and without being penalized by law regardless of how these functions are divided between themselves.

Conclusions

Equality Before the Law for Married Persons

The traditional law of separate property that is applied in most jurisdictions in Canada at the time of divorce to define the property positions of spouses when a marriage is terminated is in immediate need of substantial change. Although our primary concern is with the application of the federal divorce law to persons whose property relations are governed by provincial property laws, our study of this subject has convinced us that reform of the law solely in relation to divorce would fall far short of what is required in order to ensure that justice is no longer denied to people upon entry into the legal relationship of matrimony.

Equality before the law must be the foremost goal of reform in this area.

Marriage almost invaribly creates a differentiation in functions between the partners. Application to a family unit of the ordinary property laws that exist in a separate property jurisdiction fails to recognize this fact. The result is not only economic inequality but also a denial of the legal dignity and worth of the spouse who raises the children and works in the home rather than taking outside employment.

We take the position that there must be laws assuring each spouse, regardless of the division of functions during the marriage, a right to an equal participation in the financial gains of that marriage when it is terminated. This is, however, only a partial solution to a much wider problem. The whole law of separate property is characterized by invidious discrimination against spouses of both sexes, not only in particular rules of property law, but also in a discriminatory tradition of conventions, interpretations, and assumptions having the force of law. Some of these matters affect married men, but most are aimed at married women. Not all of these deal with property in a narrow sense, but most relate to the financial relations between married persons or the financial obligations or disabilities of one spouse or the other in relation to third parties, and therefore exert an influence upon the property patterns that develop during a marriage. Regardless of which sex is the target of any particular discriminatory law or practice, however, it is common humanity that suffers. The true question is not, therefore, whether there should be property sharing between married persons, but

rather whether there should be legal equality between married persons—a concept of which property sharing is only one important part. Our answer to this question is an unqualified "yes". Property sharing must be, and must be seen to be, a logical aspect of a whole system of laws affecting married persons based upon equality rather than being the ultimate inconsistency capping the pyramid of contradictory, irrational and discriminatory rules and concepts that comprise the present law of separate property. If laws must be made to redress an imbalance between husbands and wives—and we see this as a necessary function of laws conducing to equality within the marital relationship—then those laws must be based upon the functions and duties that each spouse actually performed within the marital framework rather than upon legislative or judicial assumptions grounded in stereotypes dictating sexual roles.

It is true to say that the present law of separate property operating in the majority of Canadian jurisdictions, with its emphasis on ownership based upon who paid for the property, denies to most married women the ability to share in the financial gains of a marriage. It is no less true that the same law, with its requirements that husbands work, denies to married men the ability to fully participate in the care, instruction and upbringing of children, or to assume the more mundane, but no less important tasks associated with the management of a household. We believe the loss experienced by spouses of both sexes under the requirements of such a legal framework, while not identical, is certainly equivalent. Much has been said about the necessity to provide opportunities for careers outside the home for those married women who wish to realize their individual potential in such a way. We think that as much can be said for affording equivalent opportunities within the home for married men.

It is obvious that alterations in the present law will not result in any dramatic change in social patterns in this respect. What legal changes can and will do is to give to married people greater freedom of choice in these matters, so that they can decide for themselves how they should arrange their marriage partnership in a way that is based upon their abilities, their financial and psychological needs and their emotional interests. This choice should be capable of being made in a milieu that is free from legally based economic coercion, such as hiring practices that discriminate against married women in favour of married men on the grounds that they have a family that they alone are required to support; which deny to married women the ability to participate fully in the economic life of the community by legal restrictions upon their ability to borrow money and otherwise to employ the credit system; or that make it apparently logical that the husband should always be

the wage-earner because he, for no other reason than the fact that he is a male, can command a higher salary and will enjoy better career prospects than his wife.

We strongly disagree with the view that the law, rather than the autonomous choice of the married couple, should be responsible for telling spouses, on the basis of their sex, what they are destined to do when they are married, or whether they must be dependants, and, following from this, should attach unequal and discriminatory legal and financial consequences to the differing roles. We do not think it is possible for there to be a rational dialogue on the subject of property sharing without an examination of these more fundamental issues that are the inarticulate assumptions behind the present law of separate property. Property sharing is not an isolated improvement desirable for its own sake. Rather it is only one step on the road to equality before the law for married persons of either sex.

An Example of Change

We do not propose in this working paper, to suggest that any one of the three major approaches to property sharing would be more appropriate for adoption in any particular jurisdiction in Canada. Nor are the three approaches true alternatives, in the sense that they are mutually inclusive—it would be more accurate to say that they are examples of the three major directions in which reform has travelled in various jurisdictions that have sought some system that would be fairer than the unvarnished law of separate property. Further, the three approaches are capable of great modification, variation and combination. As an example, a province or territory could give its courts a discretion to transfer property between husband and wife at the time of divorce. The same jurisdiction could then create either a deferred sharing or a community property regime that would apply, as the basic law, to all persons who were married after the new regime came into effect. Persons married after that date could be given the power to opt out of the deferred sharing or community regime and into the separate-property-plus-discretion regime. Persons married before that date could have the option of changing to the deferred sharing or community property regime. In addition, such a province or territory could create a special community property system that would apply in every case to all married persons but which affected only the matrimonial home, and which provided that it would be co-owned, with joint rights of occupation, management and disposition, regardless of which regime applied to the other property of the married couple. We do not say that this would be an ideal property pattern for a Canadian jurisdiction to adopt,

but only that any of the approaches we have described in this working paper, or some combination of them, would be a significant improvement over the traditional law of separate property.

Tax Considerations

Any major redistribution of property rights and financial obligations within the family structure will inevitably have significant tax implications. Exactly what these may be will obviously vary according to the nature of the reforms. While we anticipate that many of the reforms discussed in this working paper would not be effected at the federal level, it will, in any event, be incumbent upon Parliament to insure that the tax burdens on an individual are no greater following a change of property and financial laws between married persons than they are now, as well as to ensure that, where any significant shift in rights or duties occurs from one spouse to another, the applicable tax burdens are reallocated accordingly. There is a further obligation upon Parliament, flowing from the nature and concept of federalism itself, to lend encouragement to the development of changes in the law of separate property within any given province or territory by providing positive support to such changes through amendments to the taxation laws and other laws dealing with family financial arrangements, whether or not those changes happen to coincide with Parliament's views of the ideal legal relationship between husbands and wives. The same requirement, we should add, also rests upon various federal departments, so that matters of administration and policy assist, rather than hinder the movement towards legal equality within marriage in Canada.

A Restatement of Principles

As a minimum, property sharing should be available at the time of a divorce. There is much to be said, however, for not restricting property sharing to divorce proceedings, and not making reform of marital property law a divorce-oriented change. We urge a broad approach to these questions.

The object of property sharing should be an equal participation by both spouses in the financial gains of the marriage, regardless of the internal division of functions in the marriage—that is, who worked outside the home, who managed the household and who cared for children —before the sharing took place. We do not favour equalization of property in isolation, however, and believe that complementary reforms should be implemented creating equality of obligation with respect to

interspousal maintenance and maintenance of children. This is an aspect of the law to which we will return in a subsequent working paper.

We do not think that moral or marital misconduct should be a consideration when property sharing takes place.

Some property, at least under a fixed-rights approach, should be exempted from sharing, such as property owned before marriage or property acquired by gift or inheritance from third parties during marriage. We believe, however, that income from and capital gains to non-sharable property should be shared. We do not believe that business or professional assets should be exempted from sharing.

We favour full retroactive application of any law giving a court discretionary powers with respect to property sharing at the time of a divorce. We also favour retroactive application of any deferred sharing or community regime unless persons who are already married make a positive choice to retain separate property.

Finally, as an integral part of any reform of family property laws, we favour the elimination from the law of separate property of all laws that either create or result in invidious discrimination against a married person based upon sex. Marriage should be a partnership between persons who are legal equals. It is within the power of the people of Canada, acting through their elected representatives, to ensure that this ideal is realized. In our view, nothing short of this goal should be sought and no law short of this goal should be tolerated.