

## Spousal Support in Quebec: Resisting the *Spousal Support Advisory Guidelines*

### Pensiones alimenticias para cónyuges en Quebec: La resistencia a las *Spousal Support Advisory Guidelines*

### L'obligation alimentaire entre époux au Québec: la résistance aux Lignes directrices facultatives

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Article abstract

Since 2005, the *Spousal Support Advisory Guidelines* have become an essential part of the practice of family law throughout Canada. Aimed at structuring discretionary spousal support determinations under the *Divorce Act* and increasing the fairness of awards, the *Advisory Guidelines* have been embraced by appellate courts across jurisdictions. Quebec is the exception to that trend. Despite that marriage and divorce fall under federal jurisdiction, Quebec courts resist the application of these non-binding rules, written by two family law scholars. This article responds to Quebec's resistance to the *Advisory Guidelines* and suggests that concerns about them may be misplaced. By reviewing the history of Quebec's legislative approach to married spouses, it suggests that antipathy toward the *Advisory Guidelines*, based on their failure to reflect Quebec matrimonial law, is misguided. Rather, judicial approaches in Quebec based on autonomy and economic independence fail to reflect the reality of both the provincial and federal legislative landscapes respecting marriage and divorce.

# Spousal Support in Quebec: Resisting the *Spousal Support Advisory Guidelines*

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Jodi LAZARE\*

*Since 2005, the Spousal Support Advisory Guidelines have become an essential part of the practice of family law throughout Canada. Aimed at structuring discretionary spousal support determinations under the Divorce Act and increasing the fairness of awards, the Advisory Guidelines have been embraced by appellate courts across jurisdictions. Quebec is the exception to that trend. Despite that marriage and divorce fall under federal jurisdiction, Quebec courts resist the application of these non-binding rules, written by two family law scholars. This article responds to Quebec's resistance to the Advisory Guidelines and suggests that concerns about them may be misplaced. By reviewing the history of Quebec's legislative approach to married spouses, it suggests that antipathy toward the Advisory Guidelines, based on their failure to reflect Quebec matrimonial law, is misguided. Rather, judicial approaches in Quebec based on autonomy and economic independence fail to reflect the reality of both the provincial and federal legislative landscapes respecting marriage and divorce.*

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***L'obligation alimentaire entre époux au Québec: la résistance aux Lignes directrices facultatives***

*Depuis 2005, les Lignes directrices facultatives en matière de pensions alimentaires pour époux sont devenues un outil incontournable de la pratique du droit de la famille à travers le Canada. Les Lignes directrices visent à accroître la prévisibilité et la cohérence des ordonnances alimentaires en vertu de la Loi sur le divorce. Elles ont été favorablement accueillies par les cours d'appel à travers le pays. Le Québec fait cependant figure d'exception. Bien que le mariage et le divorce relèvent de la compétence fédérale, les tribunaux québécois sont réticents à appliquer ces règles non contraignantes, rédigées par deux professeurs de droit familial. Le présent article prend le contrepied de la résistance québécoise aux Lignes directrices et il avance que les préoccupations qu'elles suscitent au Québec sont injustifiées. À l'aide de l'examen historique de l'approche législative du Québec applicables aux époux mariés, l'article suggère que la réserve envers les Lignes directrices, basée sur l'idée qu'elles ne reflèteraient pas le droit matrimonial québécois, est erronée. Selon l'auteure, l'approche judiciaire québécoise qui met l'accent sur les notions d'autonomie et d'indépendance économique est en porte-à-faux avec la législation, tant provinciale que fédérale, en matière de mariage et de divorce.*

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***Pensiones alimenticias para cónyuges en Quebec: La resistencia a las Spousal Support Advisory Guidelines***

*Desde el año 2005 las Spousal Support Advisory Guidelines (directivas facultativas de pensiones alimenticias para cónyuges) se han convertido en un elemento esencial en la práctica del derecho de familia en todo Canadá. Estas tienen como propósito estructurar discrecionalmente las decisiones vinculadas con la manutención del cónyuge, bajo la Ley sobre el Divorcio, y mejorar la imparcialidad de los fallos. Estas directivas han sido adoptadas por las Cortes de Apelaciones a través de las diferentes jurisdicciones. Sin embargo, la provincia de Quebec es la excepción a esta tendencia. A pesar de que el matrimonio y el divorcio se encuentran bajo jurisdicción federal, las cortes de la provincia de Quebec se oponen a la aplicación de estas reglas no vinculantes, que han sido redactadas por dos estudiosos del derecho de familia. Este artículo contesta la resistencia que opone Quebec para aplicar estas directivas, y explica*

que dichas cuestiones están fuera de lugar. Al examinar la historia del enfoque legislativo de Quebec con respecto a los cónyuges, se expone la aversión hacia estas directivas basándose en sus fallas, reflejándose así que las leyes matrimoniales de Quebec son desacertadas. Más bien, el enfoque judicial de Quebec basado en la autonomía y en la independencia económica no refleja la realidad de ambos panoramas legislativos, provincial y federal, con respecto al matrimonio y al divorcio.

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For more than a decade, judges across Canada have been relying on the *Spousal Support Advisory Guidelines* when adjudicating the financial consequences of divorce<sup>1</sup>. In short, the *Advisory Guidelines* use one of two formulas, depending whether there are dependent children of the marriage, to assist with the determination of spousal support by structuring the

1. CANADA, DEPARTMENT OF JUSTICE, “Spousal Support Advisory Guidelines”, prepared by Carol ROGERSON and Rollie THOMPSON, 2008, [Online], [www.justice.gc.ca/eng/rp-pr/fl-lf/spousal-epoux/spag/pdf/SSAG\_eng.pdf] (November 1<sup>st</sup>, 2018) (hereafter “*Advisory Guidelines*”).

broad grant of judicial discretion contained in the *Divorce Act*<sup>2</sup>. The *Advisory Guidelines* do not deal with entitlement to support, but rather, guide the awarding of support in the presence of a proven claim<sup>3</sup>. Moreover, they do not preclude the statutorily mandated exercise of judicial discretion; instead, they provide ranges of both amount and duration of support, which will depend on the spouses' incomes and the length of the marriage<sup>4</sup>. Further, the *Advisory Guidelines* facilitate the exercise of judicial discretion by enumerating a number of exceptions to their applicability<sup>5</sup>. Overall, their aim is to assist with complex determinations and to bring some clarity and foreseeability to an area of law historically characterized by its uncertainty and, at times, its unfairness<sup>6</sup>. Importantly, while their creation was supported by Canada's Department of Justice, the *Advisory Guidelines* do not emanate from government. They were written by two Canadian family law scholars, in consultation with an Advisory Working Group of family law professionals and stakeholders, and are rooted in the relevant case law as it had developed prior to their creation<sup>7</sup>. An example of the move away from discretion in resolving family law disputes, the *Advisory Guidelines*, like the mandatory *Child Support Guidelines*<sup>8</sup>, align with broader national and international trends toward a more accessible family justice system<sup>9</sup>.

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2. *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.), art. 15.2.

3. See *Advisory Guidelines*, *supra*, note 1, p. 2.

4. See *id.*, chap. 3.3.

5. See *id.*, chap. 12.

6. See *id.*, p. 12. See also Carol ROGERSON and Rollie THOMPSON, "The Canadian Experiment with Spousal Support Guidelines", (2011) 45 *Fam. L.Q.* 241; Nicholas BALA, "Judicial Discretion and Family Law Reform in Canada", (1986) 5 *Can. J. Fam. L.* 15; Carol ROGERSON, "Spousal Support Post-Bracklow: The Pendulum Swings Again?", (2001) 19 *Can. J. Fam. L.* 185 (the latter two on the risk of unfairness inherent in discretionary spousal support determinations).

7. See *Advisory Guidelines*, *supra*, note 1, at chap. 2; CANADA, DEPARTMENT OF JUSTICE, "Developing Spousal Support Guidelines in Canada: Beginning the Discussion", prepared by Carol ROGERSON, 2002, [Online], [www.justice.gc.ca/eng/rp-pr/fl-lf/spousal-epoux/ss-pae/pdf/ss-pae.pdf] (November 1<sup>st</sup>, 2018). The Advisory Group was composed of lawyers and judges representing eight provinces (there was no representation from New Brunswick or Prince Edward Island). While no Quebec judges participated, the province was represented by three Quebec jurists: two lawyers experienced in family law and one mediator. See *Advisory Guidelines*, *supra*, note 1, p. 157.

8. See *Regulation respecting the determination of child support payments*, CQLR c. C-25.01, r. 0.4.

9. See Carol ROGERSON, "Shaping Substantive Law to Promote Access to Justice: Canada's Use of Child and Spousal Support Guidelines", in Mavis MACLEAN, John EEKELAAR and Benoit BASTARD (eds.), *Delivering Family Justice in the 21st Century*, Oxford, Hart Publishing, 2015, p. 51.

The degree to which the *Advisory Guidelines* have been embraced varies across Canadian jurisdictions. Some courts of appeal have expressly endorsed them<sup>10</sup>, while others have simply upheld trial decisions where they have been used<sup>11</sup>. On the whole, it is fair to say that in most of Canada, these non-binding guidelines have become the central tool in determining spousal support and an essential element of the practice of family law<sup>12</sup>. Quebec, however, presents a different story. Judges in this province have continually resisted the utility of the *Advisory Guidelines* and their suitability for determining spousal support upon divorce in Quebec's civil law jurisdiction<sup>13</sup>. Scholars have likewise diminished their value<sup>14</sup>. This is not to suggest that Quebec spouses made economically vulnerable by divorce in Quebec do not regularly succeed in claiming support. Rather, this article is premised on the idea that the frequent failure to consider the *Advisory Guidelines* often results in lower awards, that do not adequately compensate for the economic losses suffered during marriage, or respond to the economic vulnerability often generated by the interdependence that characterizes marriage. Moreover, the absence of guidance that would come from regular consideration of the *Advisory Guidelines* means that the discretionary granting of spousal support remains unpredictable and seemingly arbitrary<sup>15</sup>.

This article responds to that resistance by examining the basis for Quebec's distinctive approach to adjudicating spousal support claims following a divorce. It does so by suggesting that resistance to the *Advisory Guidelines* may be grounded in unfounded beliefs about Quebec's system

10. See e.g. *Yemchuk v. Yemchuk*, 2005 BCCA 406; *Redpath v. Redpath*, 2006 BCCA 338; *Fisher v. Fisher*, 2008 ONCA 11.

11. See e.g. *De Winter v. De Winter*, 2013 ABCA 311; *Linn v. Frank*, 2014 SKCA 87.

12. See Scott BOOTH, "The Spousal Support Advisory Guidelines: Avoiding Errors and Unsophisticated Use", (2009) 28 *Can. Fam. L.Q.* 339. It is worth noting that attitudes toward the *Advisory Guidelines* across other Canadian provinces are not uniform. Not all appellate courts have endorsed their use. See *Neighbour v. Neighbour*, 2014 ABCA 62; *MacDonald v. MacDonald*, 2017 NSCA 18. Critiques emanating from Quebec courts, however, seem more forceful, and are uniquely grounded in the content of the *Advisory Guidelines*.

13. See detailed discussion below, in Part 1, of Quebec judicial treatment of the *Advisory Guidelines*.

14. See Jocelyn JARRY *et al.*, "Lignes directrices facultatives en matière de pensions alimentaires pour époux – Pertinence de leur application au Québec?", (2016) 31 *C.J.L.S.* 243.

15. See *Droit de la famille – 112606*, 2011 QCCA 1554 ("Simplement, les *Lignes directrices facultatives* cherchent à encadrer le processus de détermination de la pension, de manière à en minimiser les effets d'imprévisibilité et d'arbitraire", par. 95) (hereafter "*DF – 112606*"); C. ROGERSON, *supra*, note 6, 252.

of matrimonial law, specifically, the centrality of notions of autonomy and individualism, rooted in a formal conception of gender equality. The article argues that this outlook is based on former legislative policies and judicial beliefs, which have since, to a large degree, become obsolete. Moreover, judicial scepticism toward the *Advisory Guidelines* also does not correspond with the applicable federal law on spousal support and thus, is less likely to adequately respond to the economic interdependence that typically results from marriage and the financial vulnerability commonly associated with divorce.

Part 1 provides background to the critique that follows by setting out the Quebec courts' responses to the *Advisory Guidelines*. A close reading of the relevant decisions shows that judicial resistance to the *Advisory Guidelines* is in large part rooted in perceived problems with their substance. Following this, Part 2 suggests that the substantive opposition to the *Advisory Guidelines* stems from the legal and social weight of the concepts of choice and individual autonomy in Quebec family law, particularly in the context of marriage and matrimonial relations. More specifically, it aims to demonstrate that the refusal of some Quebec trial judges to apply the *Advisory Guidelines* may stem from the rejection of the substantive theory of equality espoused by the Supreme Court in favour of a formal conception of liberal equality characterized by individualism, autonomy, choice, and contractual freedom. By privileging independence and individual choice, the Quebec law of spousal support diminishes the value of work undertaken for the sake of the family, such as child care, which is typically performed by women, and which often impacts women's economic positions upon divorce.

With that background in place, Part 3 suggests that the emphasis on individualism and free choice does not align with much of the positive law of the province. The historical development of the province's matrimonial law suggests that while the rhetoric of individualism and choice is forceful in Quebec, it does not reflect the current legislative context, wherein the bulk of family law reforms have resulted in the almost complete removal of economic freedom for most married couples<sup>16</sup>. Part 4 goes on

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16. The review of the historical development of Quebec matrimonial law focuses more on the evolution of matrimonial property law than on the provincial law of spousal support or maintenance. This is because prior to Parliament's adoption of the first statute governing divorce (*Divorce Act*, S.C. 1967-68, c. 24), divorce was not granted in the province. Instead, couples in Quebec (and Newfoundland) seeking a divorce had to ask for the passage of a private member's bill in Parliament. There was, in other words, no law governing divorce and corollary relief in Quebec prior to 1968. See F.J.E. JORDAN, "The Federal Divorce Act (1968) and the Constitution", (1968) 14 *McGill L.J.* 209;



to demonstrate that while some Quebec judges do refer to the leading Supreme Court of Canada decisions interpreting the spousal support provisions of the *Divorce Act*, resistance to the *Advisory Guidelines* is also out of step with the applicable federal law of divorce.

With its focus on Quebec family law, this article necessarily draws on some literature related to the lively debate around the legal status of unmarried cohabitants. The focus, however, is on married spouses, as the question of spousal support—and the related issue of reliance on the *Advisory Guidelines*—does not, at present, apply to individuals in a *de facto* union in Quebec<sup>17</sup>. Further, while the *Advisory Guidelines* question applies equally to heterosexual and same-sex married couples, the majority of the case law and literature on spousal support is rooted in the traditional gender division that has historically informed debates around the economic consequences of divorce—that is, a gendered division of domestic labour wherein women shoulder a disproportionate share of the burden of social reproduction and domestic responsibility. The article is thus premised on the idea that the *Advisory Guidelines* are a valuable tool in the promotion of substantive gender equality, based, as they are, on the recognition of the economic value of domestic work and the need to redress the historically unequal effects of marriage breakdown on women.

## 1 Judicial Resistance to the Spousal Support Advisory Guidelines

Since their first appearance in a Quebec courtroom, the *Advisory Guidelines* have been approached with ambivalence, at best, and hostility, at worst<sup>18</sup>. With time, judges appeared to warm to them; eventually, the Quebec Court of Appeal expressly endorsed the *Advisory Guidelines* and

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LIBRARY OF PARLIAMENT, *Divorce Law in Canada*, Ottawa, Parliamentary Information and Research Service, revised in 2008. Note, however, that spousal support pursuant to the *Civil Code* was available for spouses separated from bed and board, but not divorced. While there is overlap between the two forms of spousal support – following separation, or divorce – as they are applied in Quebec, the focus of this article is on the granting of spousal support pursuant to the *Divorce Act*, as a corollary measure to a judgment in divorce.

17. See *Quebec (Attorney General) v. A*, 2013 SCC 5.

18. As is developed below, much of the resistance appears to be grounded on the substance of the *Advisory Guidelines* – that is, on the way they interpret the federal law on divorce. Objections, however, are not limited to substance; judges also object to their non-legislated form. The arguments presented here are limited to the substantive, or content-based objection. This should not, however, be taken as an endorsement of objections based on form, which might also be proven unsustainable. The form-based objection, rooted in the distinctly civilian hierarchy of legal sources, will be addressed in separate work.



directed trial judges to model their reasoning on spousal support on the behaviour of their counterparts in the common law provinces. In spite of that endorsement, however, some Quebec trial judges continue to refuse to meaningfully consider the *Advisory Guidelines*, with the result that awards in Quebec may be more difficult to predict, and are often lower than in the rest of the country. This Part will explain the basis for opposition to them, a crucial first step before suggesting that resistance to the *Advisory Guidelines* may rest on shaky ground.

The rest of Canada has taken a different approach. Upon their first release in draft form in 2005, judges outside of Quebec displayed openness to the *Advisory Guidelines*<sup>19</sup>. Since then, some appellate courts—notably, in British Columbia, Ontario, and New Brunswick—have been nothing less than enthusiastic about the potential of the *Advisory Guidelines* to remedy many of the demonstrated difficulties associated with the discretionary granting of spousal support<sup>20</sup>. Others, such as Alberta and Nova Scotia, have been less keen to see their discretion limited to matters of entitlement and, as a general matter, have not embraced the *Advisory Guidelines* with the same eagerness<sup>21</sup>. None of the common law courts, however, have expressed the same attitude toward the *Advisory Guidelines* as the Quebec courts, where they have been met with hostility on the part of both trial judges and, at first, the Quebec Court of Appeal. As a result, the *Advisory Guidelines* have not had the same dramatic impact in Quebec as in the rest of Canada. In consequence, awards may be less reflective of the judicially entrenched principle of substantive equality in spousal support<sup>22</sup>.

## 1.1 Quebec Judges United in Opposition

The appearance of the *Advisory Guidelines* in Quebec was accompanied by their swift rejection. They were first mentioned in a Quebec judgment in 2005, when they were still in draft form. In that decision, their unfinished, or experimental, quality spurred Justice Corrivau's cautious

19. See e.g. *Yemchuk v. Yemchuk*, *supra*, note 10; *Fisher v. Fisher*, *supra*, note 10.

20. See e.g. *S.C. v. J.C.*, 2006 NBCA 46; *Smith v. Smith*, 2011 NBCA 66. See also C. ROGERSON and R. THOMPSON, *supra*, note 6.

21. See *Neighbour v. Neighbour*, *supra*, note 12; *Strecko v. Strecko*, 2014 NSCA 66; *MacDonald v. MacDonald*, 2017 NSCA 18.

22. For further discussion of the judicial entrenchment of substantive equality principles in spousal support law, see Susan ENGEL, "Compensatory Support in *Moge v. Moge* and the Individual Model of Responsibility: Are We Headed in the Right Direction?", (1993) 57 *Sask. L. Rev.* 397; Carol ROGERSON, "Spousal Support After *Moge*", (1996) 14 *Can. Fam. L.Q.* 281; Dominique GOUBAU, "Une nouvelle ère pour la pension alimentaire entre ex-conjoints au Canada", (1993) 72 *Can. B. Rev.* 279.

refusal to apply them: “Dans leur forme actuelle, elles sont présentées pour commentaires en vue d’une révision. Il serait certainement prématuré de vouloir les appliquer telles qu’elles sont<sup>23</sup>”. More revealing illustrations of Quebec judges’ attitude toward them came the following year, when the *Advisory Guidelines* were rejected not only for their unofficial character, but also for their content. Justice Gendreau wrote, “le Tribunal n’est pas un banc d’essai ou un laboratoire de recherche”, making it clear that Quebec judges were not interested in these non-binding rules<sup>24</sup>, as did the inference that they do not properly reflect the law or the case law on spousal support<sup>25</sup>. Specifically, given their emphasis on the length of the marriage<sup>26</sup>, Justice Julien suggested that the *Advisory Guidelines* distort the requirement, in the *Divorce Act* and the relevant case law, that equal weight should be granted to each of the enumerated objectives and factors that go into a support award<sup>27</sup>.

Later parts of this article will elaborate on the disconnect between this approach and that espoused by the Supreme Court of Canada in interpreting the *Divorce Act*. But read on their own, it is clear from Quebec judges’ earliest interactions with the *Advisory Guidelines*, that opposition was based substantially on their content. Despite that divorce is a matter of federal jurisdiction, interpretations of the law on spousal support differ between Quebec and the rest of Canada.

Quebec judges did not appear to immediately grasp the potential of the *Advisory Guidelines* to benefit divorcing spouses. Indeed, both negotiation theory and experience with their use suggest that reliance on guidelines to direct an otherwise discretionary determination advantages parties in at least two important ways<sup>28</sup>. First, by creating a reference point for potential awards, guidelines inform negotiations and even the playing field for claimant spouses. Second, the existence of a set range of support outcomes means that spouses who may otherwise be deterred by the uncertainty

23. *M.F. c. N.C.*, 2005 CanLII 13719 (QC C.S.), par. 200.

24. *B.D. c. S.D.U.*, 2006 QCCS 1033, par. 20.

25. *D.S. c. M.S.C.*, 2006 QCCS 334, par. 40 and 41.

26. See *Advisory Guidelines*, *supra*, note 1 (“Under the *Advisory Guidelines* length of marriage is a primary determinant of support outcomes in cases *without* dependent children. [...] Length of marriage is much less relevant under the *with child support* formula, although it still plays a significant role in determining duration under that formula”, p. 33).

27. *D.S. c. M.S.C.*, *supra*, note 25, par. 40.

28. See Robert H. MNOOKIN and Lewis KORNHAUSER, “Bargaining in the Shadow of the Law: The Case of Divorce”, (1979) 88 *Yale L.J.* 950; Craig MARTIN, “Unequal Shadows: Negotiation Theory and Spousal Support Under Canadian Divorce Law”, (1998) 56 *U. Toronto Fac. L. Rev.* 135; C. ROGERSON, *supra*, note 9.

of results are more likely to claim the support owed to them. Both these factors, by limiting room for disagreement to the established range, have been demonstrated to reduce litigation among divorcing spouses, thus increasing access to justice<sup>29</sup>. In writing that the judicial application of the *Advisory Guidelines* would introduce a context of uncertainty for litigants<sup>30</sup>, Justice Julien appeared to have been referring to an uncertainty relative to their use. She suggested that parties wanting to invoke the *Advisory Guidelines* might be tempted to push for litigation where the opposing party disagrees, thus engendering the perverse effect of encouraging litigation over resolution by mutual agreement<sup>31</sup>. As the *Advisory Guidelines* were still in their infancy in 2006, uncertainty as to the consequences of their use was understandable; Quebec courts could not have predicted the significant ways that the *Advisory Guidelines* would impact the determination of spousal support or the speed with which they would come to form an essential part of the practice of divorce law throughout the rest of Canada.

The Quebec Court of Appeal quickly approved of trial judges' initial approach. In 2006, citing the Supreme Court's earlier statement that there is no "magic recipe" for carrying out the difficult analysis required by the law of spousal support<sup>32</sup>, the Court of Appeal endorsed Justice Julien's cautious approach<sup>33</sup>. Referring to the decision under appeal, in which the claimant invoked the *Advisory Guidelines* and the trial judge's support order fell within their range, Justice Forget, on behalf of a unanimous Court of Appeal, wrote that the trial judge erred in dispensing with the

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29. While empirical research on this question remains to be done, the authors of the *Advisory Guidelines* observe that in the years following their increased use, reported decisions in jurisdictions where they are regularly applied tend to deal with more "complex" questions – for example, where the payor spouse has custody of children. Simpler cases, then, where "a higher-income payor pays child and spousal support to a lower-income parent with custody or primary care of the children" now occupy less of the courts' time, despite that "this is by far the most common custodial arrangement". In other words, there is some indication that straightforward spousal support determinations no longer require parties to resort to the courts. See CANADA, DEPARTMENT OF JUSTICE, *Spousal Support Advisory Guidelines: The Revised User's Guide*, 2016, p. 33, [Online], [[www.justice.gc.ca/eng/rp-pr/fl-lf/spousal-epoux/ug\\_a1-gu\\_a1/pdf/ug\\_a1-gu\\_a1.pdf](http://www.justice.gc.ca/eng/rp-pr/fl-lf/spousal-epoux/ug_a1-gu_a1/pdf/ug_a1-gu_a1.pdf)] (November 1<sup>st</sup>, 2018). See also Carol ROGERSON, "Child Support, Spousal Support and the Turn to Guidelines", in John EEKELAAR and Rob GEORGE (eds.), *Routledge Handbook of Family Law and Policy*, London, Routledge, 2014, p. 153, at page 162.

30. D.S. c. M.S.C., *supra*, note 25, par. 38.

31. *Id.*

32. Referring to *Moge v. Moge*, [1992] 3 S.C.R. 813, 853, 99 DLR (4th) 456 ("There are no easy recipes nor are there neat compartments on which to rely", 871).

33. G.V. c. C.G., 2006 QCCA 763.

individualized analysis required by law<sup>34</sup>. The Court of Appeal reduced the award by nearly 40 per cent of the original order<sup>35</sup>, thus confirming the idea that the *Advisory Guidelines* do not reflect the substance of Quebec matrimonial law.

## 1.2 A Divided Approach

Despite the Court of Appeal's opposition to the *Advisory Guidelines*, trial judges eventually looked to them again. In 2010, four years after the Court of Appeal rejected them, Justice Masse wrote that even if they are not binding, the *Advisory Guidelines* may be an element to consider in determining spousal support<sup>36</sup>. One year later, a unanimous Court of Appeal re-evaluated its earlier approach and issued an unambiguous endorsement of the *Advisory Guidelines*<sup>37</sup>. In reversing its earlier position, the Court of Appeal responded to the many critiques expressed in various decisions, ultimately concluding that, as they are analogous to scholarship, Quebec judges should, as a general matter, be encouraged to apply them<sup>38</sup>. Justice Bich wrote of their many virtues and their general usefulness in that "elles favorisent une détermination moins arbitraire du montant des pensions entre ex-époux<sup>39</sup>". She lauded the excellence of arguments in favour of their use and encouraged Parliament to adopt them and "d'en imposer l'usage<sup>40</sup>". But Justice Bich stopped short of requiring trial judges to justify their departure from the *Advisory Guidelines* and mandating their use, because they are not mandatory in law and "les tribunaux ne peuvent, en droit, être liés par elles ni obligés [...] d'en faire usage<sup>41</sup>". Thus, in addition to inviting Parliament to act, the Quebec Court of Appeal instructed trial judges to consider it "une bonne pratique" to refer to the *Advisory Guidelines* and to draw inspiration from the practice of the other provinces where their use "fait partie de l'ordinaire ou est plus répandu qu'au Québec<sup>42</sup>". In short, the Court of Appeal called for a new approach to spousal support determinations, in line with that of the common law provinces.

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34. *Id.*, par. 120.

35. *Id.*, par. 147.

36. *Droit de la famille – 101242*, 2010 QCCS 3334, varied on other grounds *Droit de la famille – 103253*, 2010 QCCA 2172.

37. *DF – 112606*, *supra*, note 15.

38. *Id.*, par. 110.

39. *Id.*, par. 125.

40. *Id.*

41. *Id.*

42. *Id.*, par. 126.

The clear expression of support for the *Advisory Guidelines* was not enough to change judicial attitudes in Quebec. In the year following the Court of Appeal's endorsement, the early hostility expressed toward the *Advisory Guidelines* once again took hold. In 2012, the Superior Court re-characterized the Court of Appeal's statements, minimizing the virtues of the *Advisory Guidelines* as described by Justice Bich and emphasizing the error inherent in exclusive reliance on them<sup>43</sup>. What is more, the Superior Court issued a forceful criticism of the *Advisory Guidelines*, reiterating that they do not reflect the law in Quebec, questioning their basic premises, and calling them conceptually defective in their application to the facts before the court, all in the name of Quebec specificity<sup>44</sup>.

From then on, trial judges in Quebec have continued to minimize the impact of the Court of Appeal's approval of the *Advisory Guidelines*. Decisions persist in citing the concern, first expressed in 2006, that reliance on them would constitute an unacceptable shortcut and an illegitimate circumvention of the statutory analysis dictated by the *Divorce Act*<sup>45</sup>. This attitude endures despite another reference by the Court of Appeal to the instructive and useful nature of the *Advisory Guidelines* in calculating support<sup>46</sup>. While some more recent trial decisions indicate a slight trend toward increasing acceptance of the *Advisory Guidelines*<sup>47</sup>, the initial resistance to them, and the fact that Quebec lags a decade behind the rest of Canada with respect to their application, are revealing of judicial understandings of the role and function of spousal support in Quebec law<sup>48</sup>. As a means of gaining insight into fundamental conceptions about Quebec matrimonial law—and of using that insight to dispel common misconceptions—this article maintains that the situation merits study. Before exploring these issues further, it is useful to set out the legislative and social context in which Quebec spousal support determinations are made.

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43. *Droit de la famille – 123274*, 2012 QCCS 5873, par. 37 and 38.

44. *Id.*, par. 40, 42, 46 and 51.

45. *D.S. c. M.S.C.*, *supra*, note 25, cited in *Droit de la famille – 14165*, 2014 QCCS 403.

46. *Droit de la famille – 14175*, 2014 QCCA 216.

47. See e.g. *Droit de la famille – 152586*, 2015 QCCS 4781; *Droit de la famille – 151740*, 2015 QCCS 3284.

48. Note that resistance to the *Advisory Guidelines* in Quebec is not limited to the judiciary. A recent study by four prominent family law scholars and practitioners argues against their relevance. See J. JARRY *et al.*, *supra*, note 14. More about this will be said below, in Part 4.

## 2 Spousal Support in Quebec: Solidarity and Autonomy in a Federal State

This Part provides the background necessary to understand and critique Quebec's approach to spousal support. The discussion is premised on the idea that the judicial approach in Quebec informs the common rejection of the *Advisory Guidelines*. Because Quebec enjoys a distinct system of private law, drawing lines between federal and provincial competence is not a simple exercise. This Part will therefore begin by clarifying the "imprecise boundaries" of legislative jurisdiction over the family in the Canadian federation<sup>49</sup>, as power to regulate the family is shared between the federal government and the provinces. This Part will then set out two distinct understandings of spousal support in Quebec, evidenced by the relevant judgments: the "needs and means" model of support—grounded in the relevant provisions of the *Civil Code*—and support based on the values of free choice and economic independence—central themes of Quebec private law. These conceptions will inform the subsequent demonstration of the apparent error inherent in judicial resistance to the *Advisory Guidelines* as rooted in the basic premises of Quebec matrimonial law.

### 2.1 Shared Jurisdiction Over the Family

Quebec has a strong claim to jurisdiction over family matters. The province has enjoyed its own system of private law since the proclamation of the *Act of Quebec* of 1774<sup>50</sup>, long before Confederation, and nearly a century before the constitutional drafters turned their minds to the regulation of marriage and divorce<sup>51</sup>. Indeed, it is fair to say that historically, as an integral part of "private law", Quebec enjoyed exclusive jurisdiction over the regulation of matrimonial law. Since Confederation, however, jurisdictional lines have become blurred, as constitutional authority over the regulation of "Marriage and Divorce" now rests with Parliament<sup>52</sup>. Further, the adoption of the federal *Divorce Act* as a uniform law applicable across provincial lines means that the federal law on divorce applies in Quebec<sup>53</sup>. While, at Confederation, the inclusion of marriage and divorce among federal powers may have been contentious<sup>54</sup>, there is little debate

49. See John DEWAR, "FAMILIES", in Peter CANE and Mark TUSHNET (eds.), *The Oxford Handbook of Legal Studies*, Oxford, Oxford University Press, 2003, p. 413.

50. *The Quebec Act*, 1774, 14 Geo. III, c. 83 (U.K.).

51. See F.J.E. JORDAN, *supra*, note 16.

52. *Constitution Act*, 1867, 30 & 31 Vic., c. 3 (U.K.), art. 91 (26), reprinted in R.S.C. 1985, App. II, No 5.

53. *Divorce Act*, *supra*, note 2.

54. See F.J.E. JORDAN, *supra*, note 16.

today that the *Divorce Act*, insofar as it establishes the grounds for divorce, is valid federal legislation<sup>55</sup>.

Where corollary relief in the form of support is concerned, it was not always clear that regulating spousal and child support was a valid exercise of the federal power. Indeed, these questions arguably lie at the heart of the provincial power over “Matters of a merely local or private Nature in the Province”, as well as the provincial power over “Property and Civil rights in the Province<sup>56</sup>”. Further, it was because of this constitutional overlap that Parliament chose to leave the division of matrimonial property following a divorce to the provinces<sup>57</sup>. To do otherwise would have created difficulties given the prior existence of matrimonial property legislation in the provinces<sup>58</sup>. Thus, jurisdiction over divorce and its effects being shared by the federal and provincial governments, Parliament’s compromise lay in regulating support, but not property division.

The Supreme Court has since upheld this decision as constitutionally valid: while support is, in itself, a matter of provincial interest, as a necessary incident of divorce, the support provisions of the *Divorce Act* are

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55. For some, the legitimacy of the federal power over marriage, divorce, and corollary relief in the context of a divorce remains controversial. A textual reading of the relevant section of the *Constitution Act, 1867*, *supra*, note 52, confirms that jurisdiction over marriage and divorce lies with the federal government and, as discussed in the text below, judicial interpretations of the federal statutory provisions dealing with support have confirmed their constitutional validity. Nevertheless, the 2015 government-commissioned report on the future of Quebec family law illustrates the continued resistance, on the part of its authors – members of the *Comité consultatif sur le droit de la famille* – to Parliament’s jurisdiction over the family. In dealing with the alimentary obligation between spouses, the committee members write that the original justifications for the federal power over marriage and divorce – national uniformity and respect for the freedom of religion of members of Quebec’s religious minorities – are no longer relevant today. Accordingly, the authors invite the Quebec government to undertake negotiations with the federal government with the aim of recovering provincial jurisdiction over marriage and divorce. At the time of writing, none of the recommendations contained in the report have been put into effect. See QUÉBEC, COMITÉ CONSULTATIF SUR LE DROIT DE LA FAMILLE, *Pour un droit de la famille adapté aux nouvelles réalités conjugales et familiales*, Montréal, Thémis, 2015, p. 179 (hereafter “Comité consultatif”). Contra Suzanne PILON, “La pension alimentaire comme facteur d’appauvrissement des femmes et des enfants en droit québécois”, (1993) 6 *Can. J. Women & L.* 349 (recommending the harmonization of the *Civil Code* with the relevant federal legislation, 367).

56. *Constitution Act, 1867*, *supra*, note 52, art. 92 (16) and 92 (13). See also Robert LECKEY, *Contextual Subjects. Family, State and Relational Theory*, Toronto, University of Toronto Press, 2008, p. 33.

57. See F.J.E. JORDAN, *supra*, note 16, 249.

58. *Id.*, 262.



rationally and functionally connected to the federal power and therefore valid<sup>59</sup>. This does not mean, however, that the provinces no longer legislate in connection with support. As the application of the federal law is limited to divorcing couples, the provinces still legislate support obligations during marriage and upon legal separation (separation from bed and board in Quebec<sup>60</sup>), as well as, except in the case of Quebec, support obligations for unmarried spouses<sup>61</sup>. Thus, constitutional jurisdiction over family breakdown is shared between the different levels of government; support lies at the intersection of federal and provincial powers.

Quebec's matrimonial law dates back much further than the federal *Divorce Act*. The province has legislated familial obligations as it has seen fit since the adoption of the province's first *Civil Code* in 1866, and it continues to regulate support obligations between spouses today<sup>62</sup>. As the *Advisory Guidelines* are based on judicial interpretations of the *Divorce Act*, Quebec jurists may feel justified in approaching the *Advisory Guidelines* with caution. Indeed, in Canada's federal system, federal laws are "frequently grounded in a policy that is incompatible with underlying civilian institutions<sup>63</sup>". Thus, resistance might be based on a desire to preserve provincial jurisdiction over a matter of historically private law, which, in Quebec's civil law tradition, privileges legislation as the paramount source of law<sup>64</sup>. Where Quebec judges might err, however, is in seeming to base their resistance to the *Advisory Guidelines* on conceptions of spousal support unique to Quebec and rooted in the *Civil Code*, which does not make space for compensating the value of women's work in the home once marriage comes to an end. As Part 3 of this article suggests, these distinctive understandings of spousal support upon divorce have little currency in today's legislative landscape. Before dealing with that question, the following sections set out the Quebec approach.

59. *Zacks v. Zacks*, [1973] S.C.R. 891, 35 D.L.R. (3d) 420. See also *Jackson v. Jackson* [1973] S.C.R. 205, 29 D.L.R. (3d) 641; *Papp v. Papp et al.*, [1970] 1 O.R. 331 (ON C.A.).

60. See *Civil Code of Québec*, CQLR c. CCQ-1991, art. 493.

61. See e.g. *Family Law Act*, R.S.O. 1990, c. F.3; *Family Law Act*, S.B.C. 2011, c. 25; *Adult Interdependent Relationships Act*, S.A. 2002, c. A-4.5; *Parenting and Support Act*, R.S.N.S. 1989, c. 160.

62. See *Civil Code of Québec*, *supra*, note 60, art. 585.

63. John E.C. BRIERLEY and Roderick A. MACDONALD, *Quebec Civil Law: An Introduction to Quebec Private Law*, Toronto, Emond Montgomery Publications, 1993, p. 47.

64. See Adrian POPOVICI, "Le droit civil, avant tout un style...", in Nicholas KASIRER (ed.), *Le droit civil, avant tout un style?*, Montréal, Thémis, 2003, p. 207, at page 211; John E.C. BRIERLEY, "The Civil Law in Canada", (1992) 84 *Law. Libr. J.* 159; Pierre LEGRAND, "Antiqui Juris Civilis Fabulas", (1995) 45 *U.T.L.J.* 311 (on the *Civil Code* as a constitution and a "secular Bible", 327).

## 2.2 The *Civil Code*'s "Needs and Means" Model of Spousal Support

As a general matter, in Quebec, spousal support is often understood neither as compensatory in nature nor as responding to any sort of free-standing obligation, resulting from the fact of marriage. In other words, and as discussed below, the understanding of the alimentary obligation in Quebec may not correspond with the theoretical underpinnings of spousal support under the *Divorce Act*, on which the *Advisory Guidelines* are based<sup>65</sup>. This attitude may flow from the fact that prior to the adoption of the *Divorce Act* by the federal government, economic relief in the form of support for divorcing spouses was simply not available in Quebec; with the severance of matrimonial ties, came the end of any obligation of support flowing from the marriage<sup>66</sup>. Indeed, following a divorce, Quebec law was said to treat the former spouses as strangers, with the effect that the obligations of succour and assistance would disappear<sup>67</sup>. In light of the relationship of solidarity that is marriage—and the end of solidarity upon divorce—some Quebec scholars describe the difficulty of reconciling the continuing obligation of support with the end of the legal relationship<sup>68</sup>.

65. The *Advisory Guidelines* are grounded in the two theoretical foundations for spousal support set out by the Supreme Court interpreting the *Divorce Act*. The first, compensatory support, seeks to indemnify financially vulnerable spouses for their contributions to the household, typically at the expense of their financial well-being. These negative economic impacts, commonly suffered by women, are understood as helping to increase the financial status of their husbands. See *Moge v. Moge*, *supra*, note 32. The second, the basic social obligation, or interdependency model of support, is rooted in the inevitable interdependency between husbands and wives, and the idea that long marriages result in financial intermingling which can be difficult if not impossible to unravel. See *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420, 169 D.L.R. (4th) 577. The *Advisory Guidelines* expressly encompass these two models of support. See *Advisory Guidelines*, *supra*, note 1, p. 6-9.

66. Jean PINEAU and Marie PRATTE, *La famille*, Montréal, Thémis, 2006, p. 318. See also Jean CARBONNIER, *Droit civil*, t. 2 "La famille, l'enfant, le couple", 21<sup>st</sup> ed., Paris, Presses universitaires de France, 2002 (on the dissolution of matrimonial ties upon divorce, p. 601); Claire L'HEUREUX-DUBÉ, "The Quebec Experience: Codification of Family Law and a Proposal for the Creation of a Family Court System", (1984) 44 *Louisiana L. Rev.* 1575 (describing the reform of Quebec family law in 1980, 1590). While the proposed provisions on the effects of divorce never came into force due to constitutional barriers, the *Civil Code* provided that "divorce extinguishes the right to claim support", subject to a judicial order on a motion by one of the spouse's, thus reflecting the idea that obligations between spouses are rooted primarily in the relationship of solidarity in marriage; Jean PINEAU, *La famille. Droit applicable au lendemain de la "Loi 89"*, Montréal, Presses de l'Université de Montréal, 1982, p. 145, note 68 (for the idea that a parliamentary divorce, prior to the advent of the federal *Divorce Act*, did not give rise to an action for support under the *Civil Code of Lower Canada*).

67. See J. PINEAU, *supra*, note 66, p. 173 and 174.

68. See e.g. J. PINEAU and M. PRATTE, *supra*, note 66, p. 318.

The disconnect between Quebec's approach to support, and the rest of Canada's, is not however limited to the context of divorce. In the case of separation from bed and board, while the marriage bond subsists, so does the alimentary obligation, as spouses are solidary in marriage<sup>69</sup>. But even here, spousal solidarity in the face of separation only results in relief "in the case of necessity"<sup>70</sup>, and not in an ongoing obligation grounded in interdependency<sup>71</sup>.

As divorce has the effect of severing the bond of solidarity, a literal reading of the *Civil Code* would mean that the support obligation ceases upon the pronouncement of divorce. In line with the dictates of the *Civil Code*<sup>72</sup>, some Quebec judges, then, have traditionally conceived of support as limited to addressing a current need and promoting the eventual self-sufficiency of the dependent spouse<sup>73</sup>, and not as the natural continuation of the economic partnership that is marriage. "Need" in this context is understood as "les besoins de vie", such as food, clothing, lodging, heat and medical care<sup>74</sup>. Thus, while some authors make explicit the distinction between the support obligation contained in the *Civil Code* and that which

69. See e.g. *Civil Code of Québec*, *supra*, note 60, art. 392, 396 and 397.

70. Hélène BELLEAU and Pascale CORNUT ST-PIERRE, "Conjugal Interdependence in Quebec: From Legal Rules to Social Representations About Spousal Support and Property Division on Conjugal Breakdown", (2014) 29 *C.J.L.S.* 43, 52.

71. See *id.* ("conjugal solidarity [...] implicitly underscores a duty to provide help to a spouse in financial difficulty", 51).

72. See *Civil Code of Québec*, *supra*, note 60, art. 587 ("In awarding support, account is taken of the needs and means of the parties, their circumstances and, as the case may be, the time needed by the creditor of support to acquire sufficient autonomy"). It is interesting to note that unlike the progressive evolution of the province's matrimonial property law, set out below, the alimentary obligation between spouses has remained essentially unchanged throughout Quebec's legislative history. While consideration of the spouse's conduct was removed following the creation of no-fault divorce at the federal level, the family law reforms of 1980 saw art. 587 C.c.Q. replace the former art. 212 C.c.L.C., which provided that in awarding support upon separation, in addition to conduct, the court should take into account "the condition, means and other circumstances" of the spouses. This failure to significantly evolve might explain some of the resistance on the part of some Quebec judges to adopting the broader view of spousal support espoused by the Supreme Court of Canada interpreting the *Divorce Act*, and incorporated into the *Advisory Guidelines*.

73. See e.g. *J.D. c. S.A.*, [2003] R.D.F. 181 (QC C.S.); *G.L. c. N.F.*, [2004] R.D.F. 489 (QC C.A.), par. 73; *S.S. c. P.C.*, [2005] J.Q. No 7121, J.E. 2005-1163 (QC C.S.); *Droit de la famille – 1221*, 2012 QCCA 19. See also Robert LECKEY, "Developments in Family Law: The 2012-2013 Term", (2014) 64 *S.C.L.R.* (2d) 241, 264.

74. See J. CARBONNIER, *supra*, note 66, p. 53. Carbonnier defines the alimentary obligation as the obligation to "faire vivre" the creditor of support, to the extent of the debtor's means.

arises upon divorce<sup>75</sup>, it is commonplace that in Quebec, even in the case of divorce, spousal support is regularly granted on the basis of the “needs and means” of the parties and the promotion of economic independence, often with little regard for compensatory principles<sup>76</sup>. Indeed, with some exceptions<sup>77</sup>, Quebec courts tend to resist the characterization of support in compensatory terms, often preferring to limit support to situations of clear need and financial dependence<sup>78</sup>. While this approach aligns with the alimentary obligation between spouses as historically understood, it does not, as later parts of this article suggest, correspond with the most recent reforms to the province’s matrimonial laws.

This distinctive understanding of spousal support in Quebec was made clear in the Supreme Court’s most recent pronouncement on the subject. In the context of a constitutional challenge to Quebec’s exclusion of unmarried spouses from the province’s support regime, a number of justices weighed in on the functions and objectives of spousal support, as they are understood in Quebec<sup>79</sup>. Justice Deschamps’ reasoning, on behalf of one third of the Court, was particularly revealing, as her understanding of the Quebec support obligation reads as a significant departure from the compensatory model of spousal support established decades earlier and never overruled: “[the] *Civil Code of Québec* [...] establishes that the right to support granted to persons in need who are part of the family unit is distinct in that it does not have a compensatory function<sup>80</sup>”. For some members of the Court, then, it is the provisions concerning property division that address the need to protect vulnerable spouses as well as the need “to compensate for contributions made by the parties while living together and to recognize the economic union formed by married and civil union spouses<sup>81</sup>”. At the federal level, these purposes are typically understood

75. See e.g. Mireille D. CASTELLI and Dominique GOUBAU, *Le droit de la famille au Québec*, 5<sup>th</sup> ed., Québec, Presses de l’Université Laval, 2005, p. 365.

76. See especially *J.D. c. S.A.*, *supra*, note 73; *Droit de la famille – 1221*, *supra*, note 73.

77. See e.g. *L.S. v. A.C.*, 2006 QCCA 888; *Droit de la famille – 172259*, 2017 QCCA 1495 (note, however, that while the Court of Appeal invokes the language of compensation, its analysis on spousal support rests heavily on the spouses’ needs and means at the time of separation).

78. See e.g. *Droit de la famille – 1221*, *supra*, note 73; *Droit de la famille – 113904*, 2011 QCCA 2269.

79. *Quebec (Attorney General) v. A.*, *supra*, note 17.

80. *Id.*, par. 383, Deschamps J., dissenting in part.

81. *Id.* Note that there are mixed views about the distinct functions of spousal support and property division. See R. LECKEY, *supra*, note 73, p. 258-264.

as the objectives of spousal support and form the basis for the formulas contained in the *Advisory Guidelines*<sup>82</sup>. For Deschamps J. and concurring justices, however, spousal support in Quebec is, as a matter of statutory interpretation, non-compensatory in nature<sup>83</sup>.

Justice Deschamps' statements reflect the deep theoretical disparity between understandings of the function of spousal support in Quebec's civil law tradition and the approach adopted in the rest of Canada. Spousal support in Quebec is "focused on the basic needs of the vulnerable spouse" and is based, among other things, on "the satisfaction of needs resulting from the breakdown of a relationship of interdependence"<sup>84</sup>. Likewise, the Quebec Court of Appeal has continued to hold that compensatory principles do not factor into a spousal support determination where a claimant spouse fails to demonstrate that she has made efforts to attain self-sufficiency, typically by re-entering the workforce, even where she spent the bulk of her employable years as a full-time homemaker<sup>85</sup>. Further in *Droit de la famille—1221*, Justice Rochon characterized "l'idée civiliste de la créance alimentaire" as depending, "en tout temps des ressources du débiteur et des besoins du créancier"<sup>86</sup>. In Quebec, then, the granting of spousal support is generally premised on need resulting from the demonstrated failure to achieve self-sufficiency, either in actual fact or based on the claimant's remote prospects for employment, as evaluated by the judge.

### 2.3 Privileging Autonomy and Imputing Individual Choice

Quebec family law scholars commonly suggest that with regard to matrimonial property and support obligations upon marital breakdown, the law privileges personal autonomy and individual choice. In the academic discourse surrounding Quebec matrimonial law, much ink has been spilled around the concepts of "freedom of choice", contractual freedom, and

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82. See *Moge v. Moge*, *supra*, note 32; *Bracklow v. Bracklow*, *supra*, note 65; *Advisory Guidelines*, *supra*, note 1, p. 6-9.

83. *Quebec (Attorney General) v. A*, *supra*, note 17, par. 390.

84. *Id.*, par. 392 and 396.

85. See *Droit de la famille – 1221*, *supra*, note 73. More recently, in *Droit de la famille – 14175*, *supra*, note 46, the Quebec Court of Appeal, relying on compensatory principles, overturned a trial decision denying spousal support following a two-year marriage where the wife worked within the home and raised five children. Even here, however, the decision appears based on the premise that compensatory principles should only be considered once a claimant spouse's efforts to achieve financial autonomy have been sufficiently demonstrated.

86. *Droit de la famille – 1221*, *supra*, note 73, par. 69.

individual autonomy<sup>87</sup>. In their decision confirming the constitutionality of precluding unmarried spouses from claiming spousal support in Quebec, several justices of the Supreme Court of Canada emphasized the value of choice, both at the legislative and cultural levels<sup>88</sup>. The privileging of choice is understood as promoting the family law principle of gender equality between husbands and wives, which is deeply engrained in Quebec's social fabric<sup>89</sup>. In its 2015 report on the future of Quebec family law, the consultative committee commissioned by the provincial government to make recommendations for reform relied on this notion as one of its guiding principles, referring to the couple as "un espace d'autonomie de la volonté et de liberté contractuelle"<sup>90</sup>. Its recommendations were accordingly geared toward promoting the cultural and legislative values of autonomy and freedom in conjugal and family matters<sup>91</sup>.

The vision of spousal support set out above—that is, as a measure to respond to demonstrated need and promote economic independence—aligns with the privileging of individual autonomy and choice. For some judges, the absence of proven efforts to achieve financial autonomy is interpreted as the absence of demonstrated need. Moreover, in situations that would give rise to a compensatory claim outside of Quebec—after a long marriage during which the wife sacrificed income generating opportunities

87. See e.g. Danielle BURMAN, "Politiques législatives québécoises dans l'aménagement des rapports pécuniaires entre époux: d'une justice bien pensée à un semblant de justice – un juste sujet de s'alarmer", (1988) 22 *R.J.T.* 149; Alain ROY, "Le contrat de mariage en droit québécois: un destin marqué du sceau du paradoxe", (2006) 51 *McGill L.J.* 665; Louise LANGEVIN, "Liberté de choix et protection juridique des conjoints de fait en cas de rupture: difficile exercice de jonglerie", (2009) 54 *McGill L.J.* 697; Benoît MOORE, "Culture et droit de la famille: de l'institution à l'autonomie individuelle", (2009) 54 *McGill L.J.* 257; Louise LANGEVIN, "Liberté contractuelle et relations conjugales: font-elles bon ménage?", *Nouvelles questions féministes*, vol. 28, n° 2, 2009, p. 24.

88. See *Quebec (Attorney General) v. A*, *supra*, note 17.

89. See e.g. H. BELLEAU and P. CORNUT ST-PIERRE, *supra*, note 70.

90. *Comité consultatif*, *supra*, note 55, p. 58. It is worth noting that not all members of the committee were of the same view with respect to alimentary obligations. In dissenting reasons, Professor Dominique Goubau noted that policies based on individual choice and contractual freedom would ignore the demonstrated and ongoing economic impacts, typically on women, of childrearing. See *Comité consultatif*, *supra*, note 55, Annexe VIII. The privileging of free choice and autonomy nevertheless represented the view of the majority. Moreover, as mentioned above, none of the committee's recommendations have been implemented. Nevertheless, that a government-appointed committee made up of leading family law scholars, practitioners, and policy-makers placed principles of free choice and independence at the centre of Quebec family law is indicative of the significance of those views, at least among a critical mass of family law experts.

91. *Id.*, p. 59.

in favour of domestic responsibilities, for example—demonstrated financial independence may bar the granting of support<sup>92</sup>.

In placing significant weight on the pursuit of financial independence, Quebec judges seem to suggest that as autonomous individuals, spouses should take individual responsibility for their decisions during and after the marriage and accordingly bear the consequences<sup>93</sup>. The choice, for example, to sacrifice professional opportunities in order to devote time to domestic endeavours may give rise to a compensatory claim, but it will be viewed as a deliberate decision made by an autonomous and independent actor, who must make subsequent efforts to mitigate the consequences of her choice. The evaluation of that claim will be coloured by that choice and by the reasonableness of efforts aimed at achieving self-sufficiency. Demonstrated need, in other words, may be viewed as a result of the spouses' express choices about the division of domestic labour. Thus, it is possible to view some Quebec judges as envisioning a form of implied contract between the spouses and a consequent assumption of the associated costs<sup>94</sup>.

Such an understanding of spousal support is not completely at odds with the primacy of gender equality and autonomy in Quebec law. Formal equality and individualism, as foundational principles of law, are indeed reflected throughout the *Civil Code*. For example, spouses are presumed to contribute equally toward the "expenses of the marriage in proportion to their respective means<sup>95</sup>". That spouses also keep their legal surnames upon marriage further promotes the ideals of individualism and personal

92. See e.g. *K.F.S. c. J.C.*, [2002] J.Q. No 6234, [2003] R.D.F. 59; *J.D. c. S.A.*, *supra*, note 73; *S.T. c. R.C.*, [2003] J.Q. No 838, [2003] R.D.F. 357; *Droit de la famille – 113904*, *supra*, note 78; *Droit de la famille – 111449*, 2011 QCCS 2518. See also J.E.C. BRIERLEY and R.A. MACDONALD, *supra*, note 63 ("If the achievement of autonomy is one important goal for support awards, alimentary support may be expected to terminate as soon as a former spouses has achieved that autonomy", p. 264).

93. This interpretation may not always reflect the reasoning of the Court of Appeal. See e.g. *L.S. v. A.C.*, *supra*, note 77, where the Court of Appeal eschewed the straightforward attribution of choice to a wife's diminished financial position following family breakdown, and *Droit de la famille – 14175*, *supra*, note 46, endorsing the compensatory function of spousal support. The views described here, rather, emanate primarily from trial decisions. As the majority of spousal support decisions are not reviewed by the Court of Appeal, the reasoning of trial judges might be understood as reflecting common views.

94. See J. DEWAR, *supra*, note 49 (on the relationship between the contract model and individualism, at page 428).

95. *Civil Code of Québec*, *supra*, note 60, art. 396. Note the second paragraph of this article, which states: "The spouses may make their respective contributions by their activities within the home". The implication that in performing unremunerated work in the home,



autonomy<sup>96</sup>. Moreover, the centrality of choice is what recently drove a majority of the Supreme Court to uphold Quebec's legislative exclusion of cohabiting spouses from the *Civil Code's* protective matrimonial law regime<sup>97</sup>. But Quebec's distinctive understandings of support, as premised on the cessation of the solidarity of marriage, the needs and means of the spouses upon divorce, and the primacy of individual choice, are at odds with the conception of marriage as ongoing partnership and relationship of economic interdependence, which does not immediately end upon a judgment in divorce—that is, the conception on which the *Advisory Guidelines* are based. Moreover, as the remainder of this article suggests, judicial ambivalence toward the *Advisory Guidelines* based on the idea that they do not reflect Quebec's approach to spousal support may not withstand close scrutiny. That disconnect may stem from the fact that the approach of some judges does not reflect the legislative context, at either the provincial or federal levels.

### 3 Autonomy, Protection, and the Role of Choice in Quebec Family Law

Quebec judges appear to approach spousal support determinations from two different perspectives. The “needs and means” model of support, where the debtor spouse is responsible for ensuring that the claimant is able to meet her basic needs, is rooted in the idea that with the termination of the matrimonial bond, the economic solidarity of the spouses also ceases. The “imputed contract” model of support, described above, is premised on the idea that as independent and autonomous individuals, released from matrimonial solidarity, spouses should take responsibility for their individual choices during the marriage and bear the economic costs of those choices upon marriage breakdown. Neither of these approaches corresponds with the compensatory principle of spousal support and the theory of support as a means of recognizing and redressing the economic impacts of the interdependence that develops as the spouses' economic lives merge over time. These latter principles have been endorsed by the Supreme Court in its leading decisions on spousal support<sup>98</sup>, and it is on these same principles that the *Advisory Guidelines* are based<sup>99</sup>. Thus, even though Quebec is bound by the federal *Divorce Act*, the province's

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for the sake of the family, spouses are simply fulfilling their marital obligations, might help explain some judges' reticence to award compensation for that work when the marriage ends.

96. See B. MOORE, *supra*, note 87, 265; *Civil Code of Québec*, *supra*, note 60, art. 393.

97. *Quebec (Attorney General) v. A*, *supra*, note 17.

98. See *Moge v. Moge*, *supra*, note 32; *Bracklow v. Bracklow*, *supra*, note 65.

99. *Advisory Guidelines*, *supra*, note 1, p. 6-9.

approach to spousal support is disconnected from the legislative and judicial interpretations applied in the rest of the country<sup>100</sup>.

The concepts of freedom of choice, contractual freedom, and individual autonomy loom large in the discourse around Quebec matrimonial law. This Part maintains, however, that the invocation of choice and individualism as the theoretical foundations for spousal support is, at the level of provincial law, flawed. Quebec matrimonial law does not privilege free choice. Rather, married spouses in Quebec have little choice with respect to the organization of their economic lives, and no choice with respect to the property that composes the family patrimony, explained below. The limited period of freedom of choice between spouses ended when it became clear that freedom of choice was harmful to women. Moreover, under early Quebec law, marriage could not be characterized by the concept of pure freedom of contract. To rely on principles of choice to describe the matrimonial relationship is not only misleading, but also inaccurate. The Quebec approach, when judges emphasize individualism and the promotion of self-sufficiency, fails to recognize that the legislative framework surrounding family breakdown aims to remedy the documented economic disadvantages to women that result from privileging free choice. Insofar as resistance to the *Advisory Guidelines* is anchored in these principles, the judicial approach is out of step with provincial law.

### 3.1 The Community Regime and the Immutability of the Marriage Contract

The significance of choice in matrimonial relations dates back to the *Civil Code of Lower Canada*. Heavily influenced by the law of France, Quebec law gave spouses a choice, upon marriage, between two matrimonial regimes: community of property and separation as to property<sup>101</sup>. Under the former, all of the spouses' property was held communally between the spouses and administered by the husband. In the case of marital breakdown or dissolution, the community was shared equally between them.

100. Again, it is important to note that this critique applies primarily to trial decisions; the Court of Appeal, for its part, has shown much more openness to the compensatory principles enshrined in the federal legislation.

101. See J. PINEAU and M. PRATTE, *supra*, note 66 (defining a matrimonial regime as "un ensemble complet de règles gouvernant les rapports exclusivement pécuniaires des époux et donnant un statut particulier à leurs biens, dans leurs relations mutuelles ainsi qu'à l'égard des tiers", p. 205). Note that in theory, Quebec spouses were free to choose any regime or means of organizing their economic lives, beyond the two listed here. As the default, however, the community regime was most common, with separation of property the most likely alternative.

Spouses married under the separation as to property regime did not share in a community of property. Each spouse was responsible for his or her own assets; upon dissolution, property remained in the hands of its original owner or of the spouse that had accumulated it during the marriage<sup>102</sup>. Thus, by enabling spouses to select their regime, the first laws of Quebec accommodated choice and individual freedom in matrimonial law.

It would be a mistake, however, to exaggerate the role of free choice in 1866. While spouses were free to select their regime, the majority of couples did not contract out of the default regime, either because they were unaware of the alternatives, or because, immediately prior to the marriage, they were simply not concerned with arrangements respecting property and finances<sup>103</sup>. Moreover, it is important to note that the default regime was not considered a contract. Rather, it was a unique product of Quebec's civil law, in the *absence* of a marriage contract<sup>104</sup>. Founded on a presumption, and not on the spouses' intentions, the community of property was "not precisely equatable to common law contract, partnership, or tenancy in common<sup>105</sup>". It is accordingly inaccurate to describe Quebec marriage, in 1866, as primarily characterized by choice or contractual freedom.

Further to the fact that most couples did not, by contract, select an alternative matrimonial regime, Quebec marriage under the *Civil Code of Lower Canada*, like the French model of marriage from which it evolved, was affected by the principle of immutability of matrimonial regimes. Spouses, despite mutual agreement, were prohibited from changing matrimonial regimes<sup>106</sup>. Envisioned as "un pacte de famille", immutability protected spouses from being dispossessed of personal wealth once the marriage was celebrated<sup>107</sup>. The little choice that existed—to opt for a matrimonial contract or another regime such as the separation of property—was therefore removed once the marriage was celebrated. Further, the default regime at the time—community of property—saw the husband as administrator of the community, with the responsibility of diligent administration, so as to protect his wife's economic interests<sup>108</sup>. Thus marriage and family

102. See Jean PINEAU and Danielle BURMAN, *Effets du mariage et régimes matrimoniaux*, Montréal, Thémis, 1984, p. 12.

103. UNITED NATIONS, *Legal Status of Married Women. Reports Submitted by the Secretary-General*, U.N. Doc. ST/SOA/35 (1958), p. 48. See also *id.* (in 1958, approximately 75 percent of married couples remained in the default community, p. 122).

104. Harold MARGLES, "The New Canadian Couple: Civil Law Matrimonial Property and its Effects in Ontario", (1958) 16 *Fac. L. Rev.* 53, 53.

105. *Id.*

106. UNITED NATIONS, *supra*, note 103, p. 49.

107. J. PINEAU and M. PRATTE, *supra*, note 66, p. 187.

108. *Id.*, p. 189.

life were characterized by “marital and paternal authority, dependence and obedience of the wife, and insolubility of marriage<sup>109</sup>”. Rather than uphold principles of free choice and individualism, Quebec matrimonial law of 1866, much as it is today, was characterized by paternalism and the protection of women’s economic fates<sup>110</sup>.

### 3.2 Freedom of Choice and its Consequences for Women

The second half of the twentieth century saw the original paternalism and protectionism of Quebec family law diminish, as the years between the 1960’s and 1970’s were marked by the emancipation of Quebec’s married women. Formal equality was enshrined; the community regime was modified to enable the joint administration of communal property<sup>111</sup>, and a new default regime enabled spouses to alter their regime during the marriage and limited the default community of property to property accumulated during the marriage<sup>112</sup>. Spouses were now able to choose how to organize their financial affairs, through the vehicle of the matrimonial regime<sup>113</sup>.

Despite the increased economic powers of women within the family, many Quebec families opted out of the default regime, choosing instead to remain separate as to property<sup>114</sup>. Women, despite typically not working outside the home or accumulating personal wealth, often agreed to contract

109. C. L’HEUREUX-DUBÉ, *supra*, note 66, 1584.

110. See Jean-Maurice BRISSON and Nicholas KASIRER, “The Married Woman in Ascendance, the Mother Country in Retreat: from Legal Colonialism to Legal Nationalism in Quebec Matrimonial Law Reform, 1866-1991”, (1995) 23 *Man. L.J.* 406 (“The law consolidated in the *Civil Code of Lower Canada* in 1866 had spousal inequality as a defining feature – *les pouvoirs au mari*, said a maxim inherited from old French law, *la protection à la femme*”, 406). See also R. LECKEY, *supra*, note 56, chap. 2.

111. *Act respecting the legal capacity of married women*, S.Q. 1964, c. 66 (under which administration of communal property no longer fell exclusively to the husband).

112. *Act respecting matrimonial regimes*, S.Q. 1969, c. 77. In 1969, in response to the frequency with which spouses opted out of the default community of property regime, the Quebec legislature changed the default matrimonial regime to the “partnership of acquests”. The partnership enables each spouse to maintain control over his or her personal assets during the marriage, regardless of whether the assets were acquired before or during the marriage. Upon the breakdown of the marriage, however, certain types of property accumulated during the marriage – specifically, income and fruits of other property – are deemed assets, and are consequently shared equally between the spouses. See *Civil Code of Québec*, *supra*, note 60, art. 448-484.

113. J. PINEAU and M. PRATTE, *supra*, note 66, p. 11. For another thorough review of the legal emancipation of married women, see J.-M. BRISSON and N. KASIRER, *supra*, note 110.

114. Roger COMTOIS, “Pourquoi la société d’acquêts?”, (1967) 27 *R. du B.* 602.

out of the community of property (or partnership of acquests<sup>115</sup>). By 1967, upwards of 70 per cent of couples were using marriage contracts to choose to be separate as to property<sup>116</sup>. Spouses were attracted to the simplicity of the regime and, in many cases, were simply ignorant of the consequences of choosing to remain separate as to property<sup>117</sup>. More significantly, however, among women's motives for choosing separation, was the fact that the community of property, despite women's emancipation, did not give wives the autonomy, capacity, and powers they wished to exercise over their property, and that the community of property necessarily entailed a community of debts<sup>118</sup>. The preference for separation was thus understood as a reaction, on the part of married women, to the historically patriarchal nature of the community of property regime, which was seen as incompatible with the legal emancipation of women, and as a means of protecting themselves from the risks associated with a declaration of bankruptcy on the part of their husbands<sup>119</sup>. In other words, separation was perceived as a long awaited guarantee of married women's personal autonomy, in line with the cultural primacy of freedom of choice and individualism<sup>120</sup>. Moreover, the ability to choose one's matrimonial regime—before and during the marriage—meant that the principles of freedom of choice and contract were indeed now central to Quebec matrimonial law<sup>121</sup>.

As rates of separation, and eventually divorce, increased, it became apparent that privileging choice would have serious, and negative, economic impacts on women. Upon divorce, women who did not accumulate personal wealth were left with nothing. Indeed, the separate as to property regime was “fatal” to these women<sup>122</sup>; a woman who had no property upon marriage and who during the marriage devoted her time to unpaid domestic labour, had, at the end of the marriage, no claim to share in her husband's wealth, to which she contributed by alleviating him of domestic responsibilities<sup>123</sup>. For the Civil Code Revision Office, charged with reforming the province's matrimonial law at the time, these situations had the potential to result in

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115. *Id.*, 604.

116. *Id.*

117. *Id.*, 611.

118. *Id.*

119. See D. BURMAN, *supra*, note 87, 151.

120. *Id.*

121. See J. PINEAU and M. PRATTE, *supra*, note 66, p. 186. See also J.-M. BRISSON and N. KASIRER, *supra*, note 110 (on the connection between the removal of the principle of immutability of the matrimonial regime and the extension of freedom of contract, 429).

122. See D. BURMAN, *supra*, note 87, 152.

123. *Id.*

“real injustice” to Quebec women<sup>124</sup>. Indeed, easier access to divorce under the new federal *Divorce Act*, adopted in 1968<sup>125</sup>, meant that the potential for “devastating consequences” for non-working wives resulting from the choice of matrimonial regime was realized<sup>126</sup>. For many women, then, freedom of contract, in addition to establishing their autonomy, contributed to their poverty<sup>127</sup>. Freedom of choice, as animating theme of Quebec matrimonial law, was problematic for a large proportion of the province’s population and was thus short lived.

### 3.3 Scaling Back Choice: The Compensatory Allowance

In the 1980’s, legislative reform in response to its harmful financial effects on women began to chip away at the central value of freedom of choice. By adopting the compensatory allowance, the legislature sought to remedy a spouse’s—typically a wife’s—inability to share in the enrichment that she contributed to her husband’s patrimony<sup>128</sup>. The remedy provides for the possibility of compensation for a spouse who has enriched her husband’s patrimony, or pecuniary interests, by her contribution in the form of unpaid goods or services<sup>129</sup>. Inspired by the common law constructive trust and rooted in the civilian concept of unjust enrichment<sup>130</sup>, the compensatory allowance was created in the context of the “great many flagrant injustices” that resulted from a regime characterized by freedom of matrimonial agreements<sup>131</sup>. It was “clearly intended to mitigate the injustices produced by the implementation of a freely adopted matrimonial regime<sup>132</sup>”.

As a remedy to the courts’ consistent refusal to set aside marriage contracts and the choices contained in them, the adoption of the compensatory allowance was one of the first steps toward mitigating the consequences

124. QUEBEC, DEPARTMENT OF JUSTICE, CIVIL CODE REVISION OFFICE, *Report on Matrimonial Regimes*, vol. 5, Montréal, 1968, p. 9.

125. *Divorce Act*, *supra*, note 16.

126. *Quebec (Attorney General) v. A*, *supra*, note 17, par. 61, LeBel J. For a discussion of the huge increase in divorce rates in Quebec following the adoption of the 1968 *Divorce Act*, see Constance BACKHOUSE, *Claire L’Heureux-Dubé. A Life*, Vancouver, UBC Press, 2017, p. 182.

127. J.-M. BRISSON and N. KASIRER, *supra*, note 110, 436.

128. J. PINEAU and M. PRATTE, *supra*, note 66, p. 89.

129. *Civil Code of Québec*, *supra*, note 60, art. 427.

130. See Ernest CAPARROS, “Le régime primaire dans le nouveau Code civil du Québec: quelques remarques critiques”, (1981) 22 *C. de D.* 325, 334.

131. *Lacroix v. Valois*, [1990] 2 S.C.R. 1259, 74 D.L.R. (4th) 61, at 1275 and 1276.

132. *Id.* See also Ernest CAPARROS, “Les régimes matrimoniaux secondaires à la lumière du nouveau Code civil du Québec”, (1982) 13 *R.G.D.* 27.

of the freedom of choice that once characterized Quebec matrimonial law. Anchored in the objective of genuine economic equality between the spouses, the mechanism threatened to undermine the freedom of choice inherent in the marriage contract<sup>133</sup>. Faced with the impoverishment of many women married under the regime of separation, the compensatory allowance saw the legislature subordinate choice “to the agenda of protection<sup>134</sup>”. The compensatory allowance meant that spouses could no longer absolutely preclude any intermingling of their respective property, thus paving the way for the progressive disappearance of freedom of choice among married spouses.

In the contest between choice and protectionism, the compensatory allowance became a casualty of narrow judicial interpretations in favour of free choice. Courts, citing the cultural values of contractual autonomy and financial independence, interpreted the relevant provisions restrictively, requiring women to demonstrate a contribution over and above the typical marital division of labour, such as unpaid work for her husband’s business, as well as a causal relationship between the contribution and the enrichment<sup>135</sup>. Further, the compensatory allowance was to be interpreted in the context of codified matrimonial law, in which the legislator had made an express policy choice to allow spouses to select their regime<sup>136</sup>. To award a compensatory allowance for domestic work, freely consented to by the parties, would have constituted a disguised sharing of property and a disregard for contractual freedom<sup>137</sup>.

The judicial unwillingness to “run roughshod over the marriage contract and the chosen matrimonial regime” meant that the compensatory allowance would not be sufficient to alleviate the economic injustices that resulted from the legislative and social entrenchment of freedom of choice<sup>138</sup>. Thus, formal equality between spouses, manifested in the privileging of free choice, prevailed, while the principle of substantive equality, expressed through protectionist measures aimed at ensuring that the economic consequences of divorce were shared equally between the

133. J.-M. BRISSON and N. KASIRER, *supra*, note 110, 435.

134. *Quebec (Attorney General) v. A*, *supra*, note 17, par. 307, Abella J.

135. See *Droit de la famille – 67*, [1985] C.A. 135. See also *Droit de la famille – 391*, [1987] R.J.Q. 1998, [1987] R.D.F. 523, cited in A. ROY, *supra*, note 87.

136. See *Droit de la famille – 67*, *supra*, note 135.

137. *Id.* See also *Lacroix v. Valois*, *supra*, note 131, at 1279 discussing the close relationship between the compensatory allowance and the action in unjust enrichment, and the consequent applicability of similar narrow rules.

138. J.-M. BRISSON and N. KASIRER, *supra*, note 110, 435.



spouses, “suffered at the hands of contractual freedom<sup>139</sup>”. The Quebec legislator went back to the drawing board.

### 3.4 The Final Erosion of Choice: The Family Patrimony

The ultimate demise of freedom of matrimonial choice came in the form of the 1989 enactment of the family patrimony. Adopted in response to the demonstrated judicial restraint in interpreting the compensatory allowance<sup>140</sup>, the family patrimony is a mandatory primary regime—that is, the provisions governing the family patrimony apply obligatorily to all marriages, regardless of whether the spouses opt for a regime of separation or the default matrimonial regime of the partnership of acquests<sup>141</sup>. The family patrimony provisions dictate that, upon the dissolution of the marriage, both spouses share equally in the value of certain property, regardless of ownership and matrimonial regime<sup>142</sup>. Of public order<sup>143</sup>, spouses may not contract out of the family patrimony, which includes “the residences of the family [...] the movable property with which they are furnished or decorated and which serves for the use of the household, the motor vehicles used for family travel and the benefits accrued during the marriage under a retirement plan<sup>144</sup>”. The regime does not encompass all of a couple’s property; spouses may still choose to be separate as to property with respect to their remaining assets. But the adoption of the family patrimony nevertheless had a serious impact on the law of marriage. As a practical matter, most of a family’s wealth will lie in the matrimonial home and any secondary residences, their furnishings, any vehicles, and the spouses’ retirement savings plans. Save for its impact on the very wealthy, then, the obligatory family patrimony regime effectively overrides the chosen matrimonial regime<sup>145</sup>.

The measure’s primary objective—the reduction of economic inequalities between spouses married under the separation of property regime (but nevertheless applicable to all married spouses)—was clear from the name of the amending bill. But in addition to promoting fair outcomes, the *Act to amend the Civil Code of Québec and other legislation in order to*

139. *Id.*

140. L. LANGEVIN, “Liberté de choix et protection juridique des conjoints de fait en cas de rupture: difficile exercice de jonglerie”, *supra*, note 87, 714.

141. See J. PINEAU and M. PRATTE, *supra*, note 66, p. 199.

142. See *M.T. v. J.-Y.T.*, 2008 SCC 50, [2008] 2 S.C.R. 781.

143. *Civil Code of Québec*, *supra*, note 60, art. 391.

144. *Id.*, art. 414 and 415.

145. J. PINEAU and M. PRATTE, *supra*, note 66, p. 199 and 206. See also *G.B. c. C.C.*, [2001] R.J.Q. 1435, [2001] R.D.F. 435.

*favour economic equality between spouses* effectively deprived Quebec couples of the hard won freedom of choice that had come to characterize the law<sup>146</sup>. Thus, the adoption of the family patrimony symbolized the end of an era in Quebec matrimonial law<sup>147</sup>, during which freedom of choice was given more weight than fairness and the value of women's domestic contributions went unrecognized. In a few short decades, the law went from robustly protecting spouses' contractual freedom and economic independence, to creating a "carcan juridique<sup>148</sup>" based primarily on principles of protectionism<sup>149</sup>.

For most married couples in Quebec, freedom of choice is a now relic of earlier times. As suggested above, however, where spousal support is concerned, the legislative removal of choice does not seem to have diminished the importance of the concept in the judicial mindset. Rather, while matrimonial laws were adapted in response to social facts about the economic consequences of divorce on women, judicial attitudes about support, as reflected in the discretionary awarding of support, still appear to focus on the outdated principles of choice and autonomy and are therefore out of step with the legislative context within which spousal support determinations are made. Insofar as it informs some Quebec judges' rejection of the *Advisory Guidelines*, the ethic of choice and individualism does not correspond with the policy choices enshrined in the province's positive law. Rather, the decision to subject all spouses to a mandatory primary regime, aimed at securing substantive equality for spouses, recognized that formal equality, in the form of economic freedom for spouses, "represented a potentially de-stabilising force in married life" and "held no guarantee for the economically vulnerable partner<sup>150</sup>". Thus, spousal autonomy had to give way to the promotion of substantive equality<sup>151</sup>.

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146. *Act to amend the Civil Code of Québec and other legislation in order to favour economic equality between spouses*, S.Q. 1989, c. 55, art 8.

147. But see Nicholas KASIRER, "Testing the Origins of the Family Patrimony in Everyday Law", (1995) 36 C. de D. 795 (suggesting that rather than a new legislative creation, the family patrimony can be understood as rooted in existing "customary norms already present in the Quebec legal order at the time of its enactment", 798).

148. D. BURMAN, *supra*, note 87, 154.

149. Dominique GOUBAU, "La conjugalité en droit privé: comment concilier 'autonomie' et 'protection'?", in Pierre-Claude LAFOND and Brigitte LEFEBVRE (eds.), *L'union civile. Nouveaux modèles de conjugalité et de parentalité au 21<sup>e</sup> siècle*, Cowansville, Éditions Yvon Blais, 2003, p. 153, at page 157. See also *Quebec (Attorney General) v. A*, *supra*, note 17, par. 307, Abella J.

150. J.-M. BRISSON and N. KASIRER, *supra*, note 110, 432 (referring to the protections of the family residence, not canvassed here, but also applicable to other mechanisms aimed at protecting the economic well-being of vulnerable spouses).

151. *Id.*

The progressive development of a paternalistic matrimonial law geared primarily toward economic protectionism suggests that Quebec judges' appeal to principles of contract and individualism involves an exaggeration of the importance of choice in Quebec law, both today and historically. While more room for choice existed under the *Civil Code of Lower Canada*, the immutability of matrimonial regimes nevertheless limited spouses' economic freedom once married. Later legislative amendments, including the adoption of the compensatory allowance and the family patrimony, limited choice even further. It is therefore a mistake for trial judges to emphasize—expressly or implicitly through their reasoning—the role of choice as central organizing principle when, in truth, the importance and desirability of freedom of contract in marriage was a perpetual subject of debate and disagreement<sup>152</sup>. Examining the legislative developments in hindsight, it becomes clear that choice has taken a back seat: “Quebec explicitly subordinated a contractual theory of support to a protective one based on mutual obligation, since its law does not allow a couple in a formally recognized union to contract out of the *Civil Code*'s mandatory support provision<sup>153</sup>”. Moreover, while some degree of choice subsisted until the adoption of the family patrimony in 1989, today's matrimonial law is better characterized as concerned with conjugality, family solidarity, and protecting family members from economic vulnerability, and not with the fiction of free will<sup>154</sup>.

Quebec judges' distinct approach to the economics of marital breakdown does not seem to correspond with the province's legislative reality. Judicial reasoning rooted in freedom of choice and individualism may have some cultural resonance<sup>155</sup>, but it has little connection with the legislative landscape of Quebec matrimonial law historically, or today. Accordingly, the idea that the principles enshrined in the *Advisory Guidelines*—principles of economic partnership and compensation for lost earning capacity—should be rejected in favour of an approach to spousal support grounded in choice and imputed contract is not only paradoxical, but is harmful to women, whom the law otherwise seeks to protect. Further, as

152. *Id.*, 429.

153. *Quebec (Attorney General) v. A*, *supra*, note 17, par. 295, Abella J. In addition to the constraints imposed by the family patrimony, Quebec spouses may not, in advance of marriage dissolution, renounce the right to claim spousal support. See *Québec (Procureure générale) c. B.T.*, 2005 QCCA 748. See also R. LECKEY, *supra*, note 73 (on the “obligatory character of major elements of [Quebec] marriage law”, 255).

154. See Benoît MOORE, “La consécration de l'autonomie individuelle”, *Bulletin de Liaison. Fédération des Associations de Familles Monoparentales et Rem composées du Québec*, vol. 40, n° 1, 2015, p. 6.

155. See e.g. *Comité consultatif*, *supra*, note 55.

the following Part suggests, the idea that some Quebec judges' reasoning might instead be anchored in the relevant federal law are equally unpersuasive, as Supreme Court judges interpreting the *Divorce Act* have explicitly distanced themselves from the individualism that once characterized the prevailing approach to spousal support. Rather than viewing spouses as economically independent individuals, the provisions of the *Divorce Act* are to be interpreted in a context that recognizes the economic interdependence that typically characterizes the marriage relationship.

#### 4 Departing from Federal Law in the Courts and the Literature

Perhaps in an effort to preserve provincial autonomy over private family matters, some Quebec judges have failed to adapt their reasoning to correspond with judicial interpretations of the *Divorce Act*<sup>156</sup>. In doing so, their approach fails to grasp the reality of most marriage relationships, where spouses are typically bound by a degree of economic interdependence so that their financial lives cannot be easily or neatly severed upon marriage breakdown. Instead, the case law appears to be grounded not only in beliefs about the role of free choice in Quebec matrimonial law, but also in the privileging of self-sufficiency inherent in the “needs and means” model of support, described above. This might explain the consistent resistance to the *Advisory Guidelines*, rooted as they are in the Supreme Court's interpretations of the binding provisions of the *Divorce Act*, which have been interpreted so as to accommodate and reflect the reality of interdependence in marriage. Further, resistance to the *Advisory Guidelines* in Quebec has been attributed to their emphasis on the length of the marriage in calculating support. Scholarship from Quebec reflects similar attitudes toward the *Advisory Guidelines*, and supports the idea that they should not apply, given the province's unique matrimonial law. This final Part suggests that neither the jurisprudence nor the scholarship withstands meaningful scrutiny when read in light of the applicable federal law on spousal support.

While Quebec judges emphasize the pursuit of self-sufficiency on the part of former spouses, judicial interpretations of the *Divorce Act* have been unequivocal that the goal of spousal support is to recognize and to provide redress for the economic harms that typically result from the marriage relationship—a relationship often characterized by the merger of the spouses' economic lives and the resulting financial interdependence. To this end, the Supreme Court of Canada has set out two competing models of spousal support. First, according to the compensatory model, spousal

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156. See cases referred to in *supra*, notes 73, 76, and 78, and accompanying text.

support functions to financially compensate dependent spouses for their unremunerated contributions to the family<sup>157</sup>. Thus, spousal support seeks to remedy the professional and economic disadvantages associated with the prioritization of domestic tasks and to recognize the economic benefits to the spouse whose earning potential and long-term economic prospects have flourished, in part due to the claimant spouse's contributions. Second, spousal support, in its non-compensatory form, is grounded in the "basic social obligation" that characterizes marriage, "in which primary responsibility falls on the former spouse to provide for his or her ex-partner, rather than on the government<sup>158</sup>". Thus, spousal support recognizes the "interdependence that marriage creates<sup>159</sup>" and responds to the idea that spouses' financial (and social) lives necessarily merge over time, and that financial intermingling, or "merger over time", cannot be easily unraveled at marriage dissolution<sup>160</sup>. Accordingly, spousal support, under the interdependency model, functions to replace lost income that the claimant spouse enjoyed as an economic partner in marriage<sup>161</sup>.

One key reason that awards might be lower in Quebec than pursuant to the *Advisory Guidelines* is the different ways that courts interpret a former spouse's need in the context of non-compensatory support. In setting out the compensatory model of support in *Moge*, the Supreme Court indicated that awards might also be warranted in non-compensatory situations—that is, based on a former spouse's need alone<sup>162</sup>. But the question of how to understand the concept of need went unanswered: should need "be understood in relation to basic, subsistence needs or more contextually in relation to the former standard of living?<sup>163</sup>" Following *Bracklow*, a response began to emerge, with need regularly measured in relation to the marital standard of living<sup>164</sup>. Indeed, such an interpretation aligns with the articulation, in *Bracklow*, of spousal support as income replacement, under the mutual obligation, or independency model of marriage<sup>165</sup>, as well as the

157. See *Moge v. Moge*, *supra*, note 32.

158. *Bracklow v. Bracklow*, *supra*, note 65, par. 23.

159. *Id.*, par. 27.

160. See CANADA, DEPARTMENT OF JUSTICE, *supra*, note 7, p. 28 (connecting the "merger over time" approach to spousal support with the "interdependency" model described in *Bracklow*); *Advisory Guidelines*, *supra*, note 1 ("Merger over Time and Existing Theories of Spousal Support", p. 53).

161. *Bracklow v. Bracklow*, *supra*, note 65, par. 23.

162. See Julien D. PAYNE, "Spousal and Child Support After *Moge*, Willick and Levesque", (1994-95) 12 *Can. Fam. L.Q.* 261, 267.

163. C. ROGERSON, *supra*, note 6, 195.

164. See *id.*, 231, citing *Keller v. Black*, 18 D.L.R. (4th) 690 (ON S.C.).

165. See *Bracklow v. Bracklow*, *supra*, note 65, par. 27.

more general idea that the spousal support obligation is rooted in “[j]ustice and considerations of fairness<sup>166</sup>”.

In Quebec, however, as seen above, the concept of need seems to amount to something more basic than marital lifestyle. The Court of Appeal has measured need with reference to what is required for a spouse to “remplir ses obligations vis-à-vis la résidence et pouvoir également payer sa subsistance personnelle<sup>167</sup>”. Thus the obligation of support in Quebec is understood as providing enough to “comblent les besoins de base des membres d’une famille<sup>168</sup>”, and seems to exclude things other than housing, food, clothing, personal effects, and the like<sup>169</sup>, while in other jurisdictions, need is understood in terms of the marital standard of living, and spousal support is understood as providing a period of adjustment for a dependent spouse to adapt to a lower standard<sup>170</sup>. Accordingly, by grounding spousal support analyses exclusively in the *Civil Code*, some Quebec judges do not take into account the development of the law interpreting the binding federal legislation—the law that forms the theoretical foundation of the *Advisory Guidelines*.

A principal critique of the *Advisory Guidelines* on the part of Quebec trial judges is that they do not give equal weight to all of the statutory objectives of spousal support, including the pursuit of self-sufficiency<sup>171</sup>. But privileging the pursuit of economic independence as the principal objective of spousal support, ignores both the text and the Supreme Court’s interpretations of the *Divorce Act*, which lists four distinct objectives of spousal support<sup>172</sup>. Only one of these objectives—the promotion of “economic self-sufficiency of each spouse within a reasonable period of time”—contains qualifying language; a support order should promote self-sufficiency only “in so far as practicable<sup>173</sup>”. Interpreting these objectives, the Supreme Court has confirmed that no individual objective is to be given priority. Rather, spousal support should “reflect the diverse dynamics of

166. *Id.*, par. 48.

167. *L.(T.) c. L.A.P.*, [2002] R.J.Q. 2627 (QC C.A.), par. 69.

168. *Droit de la famille – 102866*, 2010 QCCA 1978, par. 144.

169. See *Droit de la famille – 13396*, 2013 QCCA 317, par. 41.

170. See C. ROGERSON, *supra*, note 6, 237.

171. See *D.S. c. M.S.C.*, *supra*, note 25.

172. *Divorce Act*, *supra*, note 2, art. 15.2 (6).

173. *Id.* The others are to: “(a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown; (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage; [and] (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage”.

many unique marital relationships<sup>174</sup>”. At the same time, however, Justice L’Heureux-Dubé, in the Supreme Court’s leading decision on compensatory spousal support, emphasized that the objective of self-sufficiency is, unlike the other objectives of support, “tempered by the caveat that it is to be made a goal only ‘in so far as practicable’<sup>175</sup>”. Thus, the Supreme Court rejected the “ethos of deemed self-sufficiency” that some Quebec judges privilege<sup>176</sup>.

Moreover, the Court was express in its finding, based on the evidence before it, that the self-sufficiency model of support has clearly disenfranchised women, both in the courtroom and beyond<sup>177</sup>. Accordingly, a theory that has contributed to the “feminization of poverty” and the “female decline into poverty” could not have been Parliament’s intention in setting out the objectives of spousal support<sup>178</sup>. By incorporating the principles of compensation set out by the Court in *Moge*, the *Advisory Guidelines* reflect the Court’s rebuff of self-sufficiency as a principal objective of support. Indeed, they incorporate the idea that spousal support, in its compensatory form, is not a transitional measure aimed at seeing a claimant through a difficult, but temporary, period of adjustment, but rather, is an “earned entitlement”, meant to compensate for the economic sacrifices inherent in the unequal division of labour that typically characterizes marriage<sup>179</sup>. As seen, downplaying the compensatory objectives of spousal support may align with the idea, entrenched in the *Civil Code*, that in carrying out domestic work, spouses are simply fulfilling their role in marriage<sup>180</sup>. But where federal law is concerned, rejection of the *Advisory Guidelines* based on the claim that they underemphasise the goal of self-sufficiency is not a tenable interpretation of the applicable law.

174. *Moge v. Moge*, *supra*, note 32.

175. *Id.*

176. *Id.*

177. *Id.*, 857.

178. *Id.*, at 853 and 857. Justice L’Heureux-Dubé found that in the years following the 1968 adoption of the *Divorce Act*, “the percentage of poor women found among all women in this country more than doubled. During the same period the percentage of poor among all men climbed by 24 percent”.

179. C. ROGERSON, *supra*, note 6, 250. It is worth noting that Quebec is not an exception to the repeatedly demonstrated phenomenon of women’s unequal assumption of domestic tasks. See INSTITUT DE RECHERCHE ET D’INFORMATIONS SOCIO-ÉCONOMIQUES (IRIS), “Tâches domestiques: encore loin d’un partage équitable”, 2014, [Online], [cdn.iris-recherche.qc.ca/uploads/publication/file/14-01239-IRIS-Notes-Taches-domestiques\_WEB.pdf] (November 5<sup>th</sup>, 2018).

180. *Civil Code of Québec*, *supra*, note 60, art. 396.



This should be not understood as implying that there is no longer room for considering the pursuit of self-sufficiency in awarding spousal support. *Moge* did not have the effect of making the objective of self-sufficiency irrelevant when determining awards<sup>181</sup>. Rather, self-sufficiency, insofar as it is practicable, is “only one consideration<sup>182</sup>”, and is not paramount under the *Divorce Act*. Moreover, the interdependency model of support, in line with *Bracklow*, does not relieve spousal support claimants outside of Quebec from demonstrating any pursuit of self-sufficiency after marriage breakdown. Indeed, *Bracklow* makes clear that “it is the duty of dependent spouses to strive to free themselves from their dependencies and to assume full self-sufficiency, thereby mitigating the need for continued compensation<sup>183</sup>”. In Quebec, then, the difficulty is not simply that some judges privilege the objective of self-sufficiency, but rather, it is with the understanding of when self-sufficiency has been attained. As with the question of need, some Quebec judges will equate self-sufficiency with the ability to meet basic needs<sup>184</sup>. Further, in line with the underemphasis of compensation for unpaid work in the home, a finding of self-sufficiency often signals that the claimant is no longer entitled to support<sup>185</sup>; in some cases, such a finding will have the effect of denying a former spouse her earned entitlement, compensatory in nature, on the basis that self-sufficiency has been attained and she is no longer in need. In others, the court might seek evidence of efforts to attain self-sufficiency, privileging this objective over that of compensation, even where it accepts that self-sufficiency can be difficult to achieve after a long traditional marriage<sup>186</sup>. This approach confuses compensatory and needs-based support, and risks reviving the idea, rejected in *Moge*, that the primary objective of spousal support is to ensure a clean financial break between the spouses, instead of compensating losses and responding to interdependence.

In addition to their underemphasis of the objective of financial independence, Quebec judges have criticized the *Advisory Guidelines* for their

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181. See S. ENGEL, *supra*, note 22, 404.

182. *Id.*

183. *Bracklow v. Bracklow*, *supra*, note 65, par. 29.

184. See e.g. *F.(L.D.) c. M.(M.A.)*, 2000 CanLII 11356 (QC C.A.) (for repeated references to the claimant’s ability to meet her “besoins essentiels” in evaluating her prospects for achieving self-sufficiency). For the opposite view, see *Droit de la famille – 2166*, [1995] R.J.Q. 999 (QC C.A.) (“notre Cour a maintenu cette tendance jurisprudentielle de ne pas considérer l’indépendance économique atteinte par le seul fait de subvenir à des besoins essentiels à caractère minimal”, par. 67).

185. CANADA, DEPARTMENT OF JUSTICE, *supra*, note 29, p. 97.

186. See e.g. *R.T. c. H.B.*, 2004 CanLII 40446 (QC C.S.).

overemphasis on the length of the marriage in calculating support<sup>187</sup>. This critique, however, involves an over-simplification of the *Advisory Guidelines* and ignores the dictates of the Supreme Court. Indeed, in endorsing the *Advisory Guidelines* as “un outil de travail bien fait, commode et pratique<sup>188</sup>”, the Quebec Court of Appeal observed that the length of the marriage reflects the principle of the “fusion au fil des années” (“merger over time”) of spouses’ economic lives—a concept endorsed in principle by the Supreme Court in *Moge*, dealing with compensatory support, and explicitly in *Bracklow*, referring to non-compensatory support<sup>189</sup>. Drawing on these decisions, Justice Bich wrote: “La représentation du mariage comme «association socio-économique» ressort assez nettement de [...] la *Loi sur le divorce*. L’on peut raisonnablement penser en effet que plus le mariage dure, plus l’association est étroite et sa dissolution problématique<sup>190</sup>”. As the length of a marriage increases, so too does the spouses’ economic interdependence, thus making the length of the marriage a significant factor in determining support<sup>191</sup>. Moreover, there is nothing to suggest that the same dynamic does not characterize marriage in Quebec<sup>192</sup>.

Some decisions resisting the application of the *Advisory Guidelines* in Quebec also express particular concern about their effect of placing a durational term on awards where there are no dependent children of the marriage<sup>193</sup>. As the Court of Appeal found in 2011, however, that awards may be time limited aligns well with the relational concept of merger over time and the idea that shorter marriages will result in lower levels of dependency<sup>194</sup>. This dynamic too is not unique to marriages outside of Quebec, and it corresponds with the idea, explained above, that need, pursuant to the social obligation model of spousal support, might be interpreted so as to ease a dependent spouse’s transition to a new standard of living.

The rejection of the *Advisory Guidelines* by some Quebec trial judges as rooted in the basic needs and means of the spouses, as that term is understood pursuant to the *Civil Code*, and not on the economic partnership espoused in the Supreme Court’s leading cases interpreting the *Divorce Act*, is evident not only in the decisions of the Quebec Superior

187. See *D.S. c. M.S.C.*, *supra*, note 25, par. 40.

188. *DF – 112606*, *supra*, note 15, par. 104.

189. *Id.*, par. 99.

190. *Id.*, par. 100.

191. *Id.*, par. 101.

192. See *IRIS*, *supra*, note 179.

193. See e.g. *Droit de la famille – 123274*, *supra*, note 43, par. 49. Note that time-limited support is not, however, exceptional. See e.g. *J.D. c. S.A.*, *supra*, note 73.

194. *DF – 112606*, *supra*, note 15, par. 101.

Court (and some of the Court of Appeal), but also, as highlighted above, in the concurring reasons, in *Quebec v. A*, of one Quebec judge<sup>195</sup>. The understanding of spousal support based on meeting the basic needs of the claimant spouse, however, ignores the economic merger that characterizes the marriage relationship. Instead, the needs and means model of support echoes the cultural tenet of individualism and economic self-sufficiency that, while once an important feature of Quebec matrimonial law, eventually became subordinate to the “agenda of protection<sup>196</sup>”. Justice Deschamps’ reasoning has thus been criticized not only by concurring justices on the Court<sup>197</sup>, but also by scholars in family law. Notably, one of the authors of the *Advisory Guidelines* issued a strong rebuke of Justice Deschamps’ reasoning, calling her unexplained exclusion of compensatory support “baffling”, and criticizing the decision as a whole as an abandonment of the Court’s earlier functional approach to the family<sup>198</sup>.

The conceptual gaps between the prevailing approach to spousal support in Quebec and that espoused by the Supreme Court and entrenched in the *Advisory Guidelines* suggests that the Quebec approach may not be reconcilable with either its own matrimonial law, or the federal law governing divorce. Quebec’s conception of spousal support as a measure to respond to demonstrated need and to promote economic independence aligns with the historic privileging of individual autonomy and free choice. While rooted in notions of equality, principles of autonomy and freedom of contract reflect a formal conception of equality<sup>199</sup>, wherein the emphasis lies on equal treatment under the law, regardless of its differential impacts on different members of society<sup>200</sup>. As the Supreme Court has reiterated on numerous occasions, however, the formal approach to equality—that is, treating like alike—“is seriously deficient in that it excludes any consideration of the nature of the law<sup>201</sup>”. Rather, equality is to be understood as remedial in nature<sup>202</sup>; “[c]onsideration must be given to the content of the law, to its purpose, and its impact upon those to whom it applies<sup>203</sup>”. Moreover, *Moge* is consistently understood as incorporating the principle

195. *Quebec (Attorney General) v. A*, *supra*, note 17, par. 383, Deschamps J.

196. *Id.*, par. 307.

197. *Id.*

198. Rollie THOMPSON, “Case Comment: *Droit de la famille – 091768*”, (2013) 21 *R.F.L.* (7th) 325, 326.

199. See S. ENGEL, *supra*, note 22.

200. See *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, 56 D.L.R. (4th) 1.

201. *Id.*, par. 166.

202. *Id.*, par. 171.

203. *Id.*, par. 168.

of substantive equality into the law of spousal support and setting out the idea that both spouses should experience the impacts of divorce in equal ways<sup>204</sup>. The same might be said of *Bracklow*, in its continued recognition of the differential impacts of divorce on dependant spouses. Thus, the compensatory and the interdependency models of spousal support, by recognizing the potential for uneven economic consequences of divorce on the spouses, ensure not merely that spouses are *treated* equally, but that they *experience* the impacts of divorce in substantively equal ways, accounting for context and situational differences. These models—grounded in principles of substantive equality and fairness—are the models of spousal support reflected in the *Advisory Guidelines*. Accordingly, the rejection of the *Advisory Guidelines* in Quebec is misguided in its departure not only from provincial law, but also from the federal law on divorce.

As mentioned above, Quebec resistance to the *Advisory Guidelines*, while originating in the courts, is not limited to members of the province's judiciary. A number of family law scholars support the rejection of the *Advisory Guidelines*. In 2016, four authors examined the relevance of their application<sup>205</sup>. Commissioned by the Quebec Ministry of Justice, the authors analyzed 565 divorce files spanning from 2008-2012, including cases settled by agreement and by judicial order<sup>206</sup>. The authors compared both the settlements and the judicial awards with the awards that might have been obtained pursuant to the *Advisory Guidelines* and concluded that, “[manifestement], l'application des LDF [Lignes directrices facultatives] entraîne ici une hausse non négligeable du montant des pensions alimentaires entre époux<sup>207</sup>”. In other words, the formulas contained in the *Advisory Guidelines* cannot be said to reflect Quebec practice with respect to spousal support, despite the claim, by the authors of the *Advisory Guidelines*, that they build on actual practice and aim to reflect current practice across the country<sup>208</sup>. The authors write: “les tribunaux québécois ne semblent pas partager la lecture que font les auteurs des LDF lorsqu'ils voient dans le ‘partage des revenus’ entre les époux un juste reflet de leur

204. See e.g. S. ENGEL, *supra*, note 22.

205. J. JARRY *et al.*, *supra*, note 14.

206. *Id.*, 251.

207. *Id.*, 264.

208. *Id.* It bears mentioning that the study only examined cases applying the “without child support” formula from the *Advisory Guidelines* – that is, the formula that applies in the absence of a concurrent child support obligation. In failing to examine awards rendered using the “with child support” formula, the study overlooks the fact that the vast majority of decisions applying the *Advisory Guidelines* employ the “with child support” formula. Specifically, twice as many cases are dealt with using that formula. See Carol ROGERSON and Rollie THOMPSON, “Ten Years of the SSAG”, presentation delivered at

obligation alimentaire mutuelle<sup>209</sup>”. Ultimately, the authors agree that the *Advisory Guidelines* should not apply in Quebec<sup>210</sup>.

While the study was descriptive, canvassing Quebec divorce cases and comparing their outcomes with the ranges provided by the *Advisory Guidelines*, the authors seem clear in their view that it is the *Advisory Guidelines* that get things wrong, and not Quebec judges. As with judicial views, however, that conclusion merits examination. The authors maintain that a weakness of the *Advisory Guidelines*, insofar as they might apply in Quebec, is their failure to contemplate or account for the mandatory division of family patrimony, described above<sup>211</sup>. What the authors seem to overlook, however, is that while the rules are not as rigid outside of Quebec—spouses may renounce family property in advance—all Canadian provinces mandate the equal sharing of property upon divorce<sup>212</sup>. While the details of the different legislative schemes vary across the country, in terms of what constitutes family or matrimonial property for the purposes of sharing following a divorce, all spouses in Canada mandatorily share equally in that property by default. Moreover, while spouses outside of Quebec may renounce their claim to property sharing prior to the end of the relationship—by concluding a domestic contract<sup>213</sup>, also known as a cohabitation agreement or prenuptial agreement—most spouses do not; only eight per cent of Canadian couples have a domestic contract in place<sup>214</sup>. What is more, there will be many cases where insignificant

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the Federation of Law Societies of Canada National Family Law Program, Whistler, July 15<sup>th</sup>, 2014. This is unsurprising given the strong connection between parenting and spousal support discussed in *Moge v. Moge*, *supra*, note 32.

209. J. JARRY *et al.*, *supra*, note 14, 264.

210. Note, however, that authorities in Quebec are not, in principle, opposed to the use of guidelines aimed at facilitating calculations of the financial consequences of marriage breakdown. In its 2015 report, the *Comité consultatif*, the chair of which also participated in the 2016 study, in fact envision a set of mathematical formulas designed do to just that. See *Comité consultatif*, *supra*, note 55, Annexe VI. As the committee’s recommendations with respect to the economic consequences of family breakdown were never implemented, neither were the proposed guidelines. The proposal, however, may underscore the suggestion that it is not the *Advisory Guidelines* that attract resistance in Quebec, but rather, the Supreme Court of Canada’s interpretations of the *Divorce Act*, which the *Advisory Guidelines* incorporate.

211. J. JARRY *et al.*, *supra*, note 14, 264.

212. See e.g. Ontario’s *Family Law Act*, *supra*, note 61, Part II.

213. See e.g. *id.*, Part IV.

214. See Dani-Elle DUBÉ, “Should you get a prenup or cohabitation agreement before settling down?”, *Global News*, June 16<sup>th</sup>, 2017, [Online], [www.globalnews.ca/news/3531241/should-you-get-a-prenup-or-cohabitation-agreement-before-settling-down/] (November 5<sup>th</sup>, 2018) (citing an interview with John-Paul Boyd, executive director of the Canadian Research Institute for Law and the Family at the University of Calgary).

amounts of property mean that a family's most valuable asset will be a spouse's income<sup>215</sup>. In such cases, where families do not own property, or where the value of any property would not suffice to compensate for losses incurred during the marriage, division of family patrimony will offer little relief to a financially vulnerable spouse.

Ultimately, the issue for both courts and scholars appears to be less about the *Advisory Guidelines* than about the substance of the federal law on divorce, as interpreted by the Supreme Court. The authors of the 2016 study write: "Si les dispositions relatives à l'obligation alimentaire entre époux que prévoit la *Loi sur le divorce* semblent faire l'objet d'une interprétation différente au Québec, c'est sans doute parce que la portée des principes qui les fondent demeure discutable<sup>216</sup>". Guidelines endorsing only one possible interpretation of a 30-year-old law will necessarily lead to disagreement<sup>217</sup>. Indeed, the authors suggest that the concept of "merger over time", which underlies the without child support formula, may not correspond with social conceptions of the role of the spousal support remedy in Quebec<sup>218</sup>.

Such a reading of federal divorce law as not directly applicable to Quebec is not unique. Whether interpretations of family law emanating from the common law provinces should apply in Quebec has been the subject of judicial disagreement<sup>219</sup>. In rejecting the application of federal divorce law in Quebec, Justice Dalphond, then on the Quebec Superior Court, relied on scholarship for the proposition that "la complémentarité du droit fédéral et du droit civil [...] doit être constamment entretenue,

215. C. ROGERSON, *supra*, note 22, 299, citing *Moge v. Moge*, *supra*, note 32, 849.

216. J. JARRY *et al.*, *supra*, note 14, 264.

217. *Id.*

218. *Id.*, citing *Comité consultatif*, *supra*, note 55. Recall that the 2015 report commissioned by the Quebec government placed the concepts of free will and contractual freedom at the centre of the family.

219. For arguments that federal law is not directly applicable, see *Droit de la famille* – 562, [2000] R.J.Q. 1560, [2000] R.D.F. 367; *Droit de la famille* – 608, [1989] R.J.Q. 522 (QC C.A.); *Droit de la famille* – 427, [1988] R.J.Q. 119 (QC C.A.). For the opposing view, see *Droit de la famille* – 1532, [1993] R.J.Q. 2712 (QC C.A.); *Droit de la famille* – 3462, J.E. 99-2340 (C.S.) ("Pour les mesures accessoires prévues aux articles 15 et 17 de la Loi sur le divorce, ce ne sont donc pas les principes du droit civil québécois qu'il nous faut appliquer, mais ceux de la Common Law"). Note that these decisions deal with variations of prior awards based on agreements and not initial spousal support awards; as mentioned earlier in the text, Quebec judgments on the latter question typically refer to the applicable Supreme Court case law.

réaffirmée, sinon réinventée, pour demeurer vivante<sup>220</sup>”. Indeed, Professors Brisson and Morel have maintained that federal and provincial law can work together, when they promote the same objectives<sup>221</sup>.

As seen, however, spousal support upon divorce is an area where the federal and provincial laws part ways. Whereas Quebec family law is said to promote individual autonomy, seeing the end of the marriage as the end of the obligations of solidarity and support between the spouses<sup>222</sup>, the federal law has rejected such an understanding. Instead, the corollary relief provisions of the *Divorce Act* have been understood as recognizing the existence of an economic partnership, and as aiming to remedy financial vulnerabilities that persist beyond a judgment in divorce<sup>223</sup>. To this end, Brisson and Morel suggest that while it will often be appropriate to supplement federal law with provincial interpretations, section 15 of the *Divorce Act* requires the federal law to function autonomously<sup>224</sup>. This is because it is an example of a federal law that transcends Canadian legal traditions, given its *sui generis* nature, distinct from both Quebec’s civil law and the common law of the other provinces<sup>225</sup>. The application of federal law in Quebec is not a simple matter. But the idea that provincial interpretations should prevail with respect to spousal support as an incident of divorce is not uncontroversial, suggesting that the rejection of the *Advisory Guidelines* based on that belief might not be taken as the conclusive word on their application in Quebec.

## Conclusion

A genuine understanding of the source of Quebec resistance can only be gleaned from the wording of the relevant judgments themselves. While it may be tempting to speculate about whether judicial attitudes stem from some other issue with the *Advisory Guidelines*—for example, the fact that the Advisory Working Group that participated in their creation included no members of the Quebec judiciary<sup>226</sup>—grounding resistance in reasons

220. *Droit de la famille* – 562, *supra*, note 219, par. 65, citing Jean-Maurice BRISSON and André MOREL, “Droit fédéral et droit civil: Complémentarité, Dissociation”, (1996) 75 *Can. B. Rev.* 297, 334.

221. *Id.*, 326.

222. See J. PINEAU and M. PRATTE, *supra*, note 66, p. 318; *S.A. c. J.D.*, *supra*, note 73 (“Pendant le mariage, malade ou en santé, l’obligation alimentaire de l’un envers l’autre subsiste. Il existe une présomption alimentaire mutuelle. Cependant, lors de l’échec du mariage, cette présomption ne s’applique plus”, par. 59).

223. See *Bracklow v. Bracklow*, *supra*, note 65.

224. J.-M. BRISSON and A. MOREL, *supra*, note 220, 314, note 63.

225. *Id.*, 314.

226. See *Advisory Guidelines*, *supra*, note 1, p. 157.



other than those set out in judicial decisions would amount to conjecture. It is nevertheless interesting to note that while no Quebec judges participated in the creation of the *Advisory Guidelines*, the province was represented by three jurists experienced in family law practice and mediation<sup>227</sup>. Moreover, the absence of judicial representation has not inhibited other courts from endorsing the utility of the *Advisory Guidelines*. No New Brunswick jurists participated in their creation, and yet, that province's Court of Appeal was one of the first to approve of judicial reliance on their formulas in determining an appropriate award<sup>228</sup>. Any response to judicial resistance to the *Advisory Guidelines* in Quebec must accordingly be grounded in the decisions addressing them.

This article has sought to demonstrate that the available critiques of the *Advisory Guidelines* in Quebec—set out as they are in the relevant decisions—may not stand up to meaningful scrutiny, as they reflect neither provincial matrimonial law nor federal divorce law. Instead, they lend credence to the observation by the authors of the *Advisory Guidelines* that some of the criticisms of the *Advisory Guidelines* in Quebec are “really criticisms of the current law” and, in some cases, reflect a judicial preference for a non-compensatory approach to support<sup>229</sup>. In an area of shared federal and provincial jurisdiction such as spousal support, resistance might then be anchored in an unstated rebuff of federal legislation dealing with a matter traditionally at the heart of provincial private law. However, the non-compensatory approach adopted by some Quebec judges, insofar as it is ostensibly rooted in Quebec family law, has little foundation in the current context of the province's matrimonial law, save for pre-existing interpretations of the alimentary obligation between separating spouses set out in the *Civil Code*. Moreover, while in the absence of federal law on the subject, Quebec would be within its jurisdiction in regulating family matters, the Quebec approach does not always give sufficient weight to the existing provisions of the applicable federal law, and their interpretation by the Supreme Court of Canada.

The legislative history that forms the background to the current Quebec approach to spousal support illustrates the persistent contest in Quebec family law between the cultural ideals of formal equality and freedom of choice, on one hand, and a paternalistic legislative landscape aimed at protecting the economically vulnerable, on the other. Indeed, Quebec family law has consistently sought to balance cultural mores with

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227. *Id.*

228. See *S.C. v. J.C.*, *supra*, note 20.

229. *Advisory Guidelines*, *supra*, note 1, p. 22.

protective legislative priorities<sup>230</sup>. This is not a novel issue. But at a time when Quebec family law may be on the brink of legislative reform, and in a context of broader national and international shifts in ways of thinking about the family, attitudes toward the *Advisory Guidelines* provide a new and relevant lens with which to approach these complex questions.

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230. See B. MOORE, *supra*, note 87; Nicholas KASIRER, “The Dance is One”, (2008) 20 *L. & Lit.* 69.