

BANKRUPTCY, PROVINCIAL LAW, AND THE FAMILY FARM

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1. Introduction

Reaching an outcome that they admitted to appear unjust, the judges of the Supreme Court of Canada in *Schreyer v Schreyer* affirmed that the husband's discharge from bankruptcy released him from an unliquidated equalization claim owed to his wife under provincial family law.¹ The case is a reminder that joint title may protect a vulnerable spouse better than schemes which defer sharing until the relationship ends. It also suggests that, once spouses have separated permanently, resolving their property affairs sooner rather than later is preferable for the spouse who does not hold title.

The Supreme Court saw the *Bankruptcy and Insolvency Act* as the root of Ms Schreyer's difficulties.² Yet the Court's assertions that the outcome, though unavoidable, looked unfair and that Parliament should amend the *BIA* invite further analysis. That is especially the case since Ottawa is apparently considering such amendments.³ It is this paper's contention that the Court might have been less prescriptive in its call for reform, given that its judgment did not attend to complexities arising from the provincial law respecting spousal entitlements and exemptions from seizure. The second part of this paper presents the facts and decision. The third part critically draws out the Court's attitude towards variation within family law across

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¹ 2011 SCC 35, [2011] 2 SCR 605 [*Schreyer*].

² RSC 1985, c B-3 [*BIA*].

³ Cristin Schmitz, "Marital Property Law Change Urged" *The Lawyers Weekly* (10 February 2012) 4.

Canada, notably its objection to the ordinary effects of divided legislative competence in a federation and to doctrinal distinctions. The fourth part highlights the potential role of an application for lifting the bankruptcy stay. The Court approved that remedial route for spouses regarding assets that are exempt from seizure and this endorsement may be the judgment's most lasting contribution. The fifth part argues that the Court's focus on the federal statute and on exempt assets as a class led it to overlook the specificity of the asset at issue, a family farm. The source of injustice to women underscored by this judgment may lie not in federal law, but in provincial law and policy. That is, even absent a bankruptcy, gendered assumptions about the character of farm families and the overweening concern for preserving family farms may deprive a spouse of her equitable share of family property.

2. *Facts and Judgments*

Anthony and Susan Schreyer married in 1980. Throughout their marriage, they lived with their children on farms and collaborated in farming endeavours. In 1991, they moved onto two quarter-sections of farmland owned by Mr Schreyer's parents. In 1997, the husband paid his parents \$50,000 for the quarter-section where the residence and other farm buildings were located. The purchase of land, along with a purchase of livestock, was financed by a mortgage to the Manitoba Agricultural Credit Corporation for \$65,000. The husband and wife separated on December 4, 1999, when she left the property. In March 2000, she petitioned for divorce, seeking an equal division of family assets.⁴ In December 2000, the couple consented to an order for equal division, referring their assets to the master for an accounting and valuation under the applicable provincial legislation.⁵ The date of separation was set as the valuation date.

The lapse of time before the master undertook the valuation appears to have exacerbated what followed. In December 2001, the husband made an assignment in bankruptcy. He failed to list the wife as a creditor and there is some uncertainty as to whether she knew about his bankruptcy.⁶

⁴ For facts in this paragraph, see *Schreyer v Schreyer*, 2009 MBCA 84, 245 Man R (2d) 86 at paras 8, 13 [*Schreyer CA*].

⁵ The *Marital Property Act*, CCSM c M45, was replaced by the *Family Property Act*, CCSM c F25 [*FPA*]. The relevant provisions of the two statutes being identical, submissions to the Supreme Court of Canada were based on the *FPA*; see *Schreyer*, *supra* note 1 at para 4.

⁶ *Schreyer CA*, *supra* note 4 at para 14. MacInnes JA in the Court of Appeal stated that the wife was not aware of the bankruptcy. With less certainty, LeBel J reported that the wife "claims she was not aware of it;" see *Schreyer*, *supra* note 1 at para 5. In his factum the husband asserted the belief that the wife had learned of the bankruptcy from the children; see *Schreyer*, *ibid* (Factum of the Respondent at para 9).

Mr Schreyer was discharged from bankruptcy in November 2002.⁷ He retained the farm, which was exempt from seizure under the exemptions regime of Manitoba.⁸ In October 2004, a further consent order referred to the master all issues arising from the husband's bankruptcy. The master began hearing the reference in October 2005 and issued her report two years later. The master valued the farm at \$189,000 and the husband's other assets at \$13,723.96. After deducting the husband's debts as of the valuation date of \$103,203.00, the master determined his total net equity to be \$99,520.96. After accounting for the wife's net equity, the master concluded that the husband owed the wife an equalization payment of \$41,063.48. The master did not, however, address the effect of the husband's bankruptcy on that claim.⁹ A judge of the Family Division confirmed the master's report, ordering prejudgment interest of \$13,828.28 so as to increase the total debt to \$54,891.76.¹⁰

Although the Manitoba Court of Appeal heard several issues, only one would figure in argument before the Supreme Court of Canada. Namely, had the Court of Appeal erred in affirming the Family Division's finding that the husband owed an equalization payment to the wife, despite his discharge as a bankrupt? For the Court of Appeal, the wife had been entitled to the equalization payment at the time of the husband's bankruptcy. While she had not proven her claim, it had been provable under the *BIA*. Accordingly, discharge had released him from it.

Writing for a seven-judge bench, LeBel J framed the appeal as concerning a "perceived clash between family law and bankruptcy law."¹¹ He saw the core issue as whether the application of the *BIA* had released the husband from the wife's equalization claim under provincial legislation. LeBel J referred to the outcome's "apparent injustice."¹² Still, to him the effect of the husband's bankruptcy was undeniable and the Court of Appeal had not erred.¹³

Robert Klotz, counsel for the wife, advanced several arguments in support of the submission that her equalization claim had survived the

⁷ *Schreyer CA*, *ibid* at para 14.

⁸ *Judgments Act*, CCSM c J10. The property of a bankrupt divisible amongst his creditors excludes "any property that as against the bankrupt is exempt from execution or seizure under any laws applicable in the province within which the property is situated and within which the bankrupt resides;" see *BIA*, *supra* note 2, s 67(1)(b).

⁹ 2007 MBQB 263, [2007] MJ No 506 (QL).

¹⁰ Guertin-Riley J, 23 June 2008 [unreported].

¹¹ *Schreyer*, *supra* note 1 at para 1.

¹² *Ibid* at para 9. See also at para 25 ("an outcome like the one in this appeal looks unfair").

¹³ *Ibid* at para 41.

husband's bankruptcy and was executable against the exempt property, the family farm. Two are relevant here. The first concerned the character of her claim. She argued that her claim was not affected by the *BIA*, either because it was unliquidated, and thus not provable and subject to discharge, or because it was a proprietary interest, not a mere debt. The second argument related to a procedure she would have used had she known about the bankruptcy in a timely manner. She asserted that she could have sought leave from the bankruptcy court to enforce her family claim against the farm, an asset exempt from seizure, before the husband's discharge from bankruptcy liberated him from the debt.¹⁴ For his part, the husband held to the Court of Appeal's determination that the equalization claim was a debt provable in bankruptcy, from which he had been released.

Turning to the character of the wife's equalization claim and the effects of bankruptcy on it, LeBel J rehearsed the policy objectives of modern bankruptcy legislation. Such legislation establishes an orderly liquidation process for situations where reorganization is impossible, averts races to execution, and gives debtors a fresh start. He also acknowledged the costs imposed on the creditors affected. The general rule is that claims provable under the regime allow their creditors to participate in the bankruptcy process, but they are not enforceable against the bankrupt following his discharge. LeBel J observed that, while Parliament has for policy reasons exempted classes of claims from the effect of the bankrupt's discharge, "the more exemptions there are, the less likely it is that the basic policy objectives of insolvency legislation can be achieved."¹⁵ He agreed with the Court of Appeal's conclusion that the wife's equalization claim was provable. The husband's discharge from bankruptcy had thus rendered that claim unenforceable against him.¹⁶

To answer the wife's submission that her claim was proprietary in nature, LeBel J compared the regimes of different provinces. While the bankrupt's discharge from provable claims operates across the country, a provincial legislature's approach conditions the impact of discharge on the sharing of family property. Manitoba was an "equalization jurisdiction."¹⁷ Breakdown of a spousal relationship in that province triggers a valuation and accounting of family assets. One spouse then owes a debt to the other so as to equalize the value of the assets. Only at the payment stage may the creditor spouse ask for payment in money or via a transfer of assets. Alternatively, in the division-of-property jurisdictions, a triggering event produces a proprietary or beneficial interest in family assets by operation

¹⁴ *Ibid* at para 10.

¹⁵ *Ibid* at para 19.

¹⁶ *Ibid* at para 27.

¹⁷ *Ibid* at para 13.

of law.¹⁸ Where a triggering event precedes one spouse's bankruptcy, that bankruptcy is irrelevant to the other's new proprietary interest. In other words, the interest created under the family legislation will not vest in the trustee in bankruptcy as it is no longer property of the bankrupt.¹⁹

LeBel J agreed with the wife regarding the remedial route she might have taken, although in the circumstances it proved fruitless for her. Section 69.4 of the *BIA* provides that a creditor who is affected by the stay of proceedings may apply to the court for a declaration that the stay no longer operates in her respect if material prejudice is otherwise likely or if making such a declaration "is equitable on other grounds." The Court agreed with the wife that a spouse might appropriately invoke section 69.4 to seek leave to pursue a claim against exempt property. Specifically, LeBel J saw the farm's exemption from seizure as an exacerbating factor, since the husband was freed from his debts but kept the farm. Executing the equalization claim against the farm would not have prejudiced other creditors, out of whose reach the property already lay. Granting such leave on the part of the bankruptcy judge would thus have been "equitable."²⁰ The Court's premise must have been that, had the bankruptcy judge lifted the stay, the judge in family court would have granted the wife's request for a proprietary interest in the family farm in satisfaction of her equalization claim. Mr Schreyer's alleged failure to have disclosed his wife's equalization claim had obstructed that route,²¹ although the Court understood the *BIA* as providing no means to sanction that omission.²²

Before concluding, LeBel J criticized the federal statute for its impact on equalization claims respecting family property. Further amendment would best "address the potentially inequitable impact of bankruptcy law on the division of family assets."²³ Specifically, the Court objected to the differing outcomes on bankruptcy in division-of-property and equalization

¹⁸ For example, the *Family Law Act*, SBC 2011, c 25, s 81(b) [*FLA* (BC)], provides that "on separation, each spouse has a right to an undivided half interest in all family property as a tenant in common." Under the former *Family Relations Act*, RSBC 1996, c 128, s 56(1), the triggering event on which the spouse's proprietary interest took root was formal, what the civil law calls a legal act: a separation agreement, a declaratory judgment, an order for nullity or dissolution of the marriage, or a judicial separation.

¹⁹ *Schreyer*, *supra* note 1 at para 15.

²⁰ *Ibid* at para 32.

²¹ *Ibid* at para 33.

²² LeBel J held that the sole statutory remedy for breach of a bankrupt debtor's duty to disclose his debts at the appropriate time was liability for the dividend that disclosure would have generated (*BIA*, *supra* note 2, s 178(1)(f)), but there was no dividend for any of Mr Schreyer's creditors; see *Schreyer*, *ibid* at para 34.

²³ *Schreyer*, *ibid* at para 38.

jurisdictions.²⁴ A further comment looked comparatively to spousal support. Under traditional principles of bankruptcy law, family support claims were not provable debts. A chief reason was their susceptibility to judicial variation.²⁵ In 1997, however, Parliament had made claims for spousal support provable. At the same time it exempted them from discharge. Still, opined the Court, Parliament ought to have gone further. LeBel J quoted the recommendation of the Standing Senate Committee on Banking, Trade and Commerce that bankruptcy should not stay or release any claim under family property legislation for equalization or division in respect of exempt assets.²⁶ The firmness of the Court's advice to Parliament makes it fitting to examine certain of the judges' assumptions, the task to which the paper now turns.

3. *Variation within Canadian Family Law*

Schreyer illustrates two elements of the Supreme Court of Canada's conception of family law in a federation. The first is a commitment to federal legislation's unifying role in the face of varying provincial regimes. The second is sympathy for an ends-oriented or functionalist view of the mechanisms within family law as sharing a purpose. Both attitudes are insensitive to the dynamics of a federation and to provincial policy choices. This appeal, having raised no constitutional question, did not benefit from the intervention of any of the attorneys general of the provinces. Those institutional litigants might well have supplemented the parties' pleadings with alertness to a federal statute's interaction with the general private law of the provinces and to the justifications underlying distinctions within family law. One might contrast *Quebec (Attorney General) v A*, a recent constitutional decision which involved three attorneys general as party or intervener, in which several judges adopted alternative approaches to federalism and family law.²⁷ That judgment tested the validity of different treatment for married spouses and unmarried cohabitants under the *Canadian Charter of Rights and Freedoms*.²⁸ In fairness, variable treatment amongst the rules of marriage for married spouses may be distinguishable from the appropriateness of extending only

²⁴ *Ibid.*

²⁵ Roderick J Wood, *Bankruptcy and Insolvency Law* (Toronto: Irwin Law, 2009) at 248.

²⁶ *Schreyer*, *supra* note 1 at para. 39, citing Canada, Senate, Standing Committee on Banking, Trade and Commerce, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (Ottawa: Senate of Canada, 2003) at 85 [Senate Committee Report].

²⁷ 2013 SCC 5, 439 NR 1.

²⁸ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

some to cohabitants. Still, the Court's reasoning in *Schreyer* and the *Charter* judgment bespeaks a seeming inconsistency in broader attitudes.

First, when bankruptcy sharpened the bite of provincial legislatures' policy choices, the Court saw a unifying mission for federal legislation. The judges manifested unease with the variation produced by application of a federal statute against the backdrop of the general private law of different provinces. LeBel J thus called on Parliament to amend the *BIA* to address "the problems created by the failure in the *BIA* to differentiate between equalization schemes and division of property schemes."²⁹ By problems he meant that under some provinces' schemes, the discharge from bankruptcy frees the debtor from all provable claims, including one for equalization, whilst in others the undivided one-half interest in property created on a triggering event bypasses the bankruptcy.³⁰ Strictly speaking, the *BIA*'s general distinction between obligations and property already gives effect to differing provincial policy choices about the nature of matrimonial claims. Concerned not with differentiation but with uniformity, however, the Court seems to have meant that Parliament should amend the *BIA* so as to smooth over the variation resulting from provincial policy choices.³¹

For present purposes, that prescription's wisdom is less important than its underlying thrust towards uniformity. That a federal law should apply variably from one province to another as a result of differences in their general private law is the foreseeable result of provincial legislative competence.³² Do family relations, it may be wondered, raise countermending considerations? Perhaps so, but the provincial legislative

²⁹ *Schreyer*, *supra* note 1 at para 38.

³⁰ The security afforded by division-of-property schemes should not be exaggerated. On an assignment in bankruptcy in advance of a triggering event, family assets held by the bankrupt vest in the trustee; see LW Houlden, GB Morawetz and Janis Sarra, *Bankruptcy and Insolvency Law of Canada*, 4th ed, vol 2 (Toronto: Carswell, 2009) at 3-28. Moreover, an agreement or court order dividing the assets may give rise to a monetary obligation which, if not perfected at the time of the bankruptcy, is an unsecured claim; see Mark R Slay, "*Schreyer v Schreyer*: Should British Columbia Care?" (2011) 27:1 Can J Fam L 121 at 127-28.

³¹ For the view that such change is "urgent" so as to ensure that non-bankrupt spouses are "treated fairly and consistently across Canada, notwithstanding differences in family law legislation," see Susan Boyd and Janis Sarra, "Out in the Cold: *Schreyer v Schreyer*'s Call for Law Reform" (2011) 27:1 Can J Fam L 97 at 118-19.

³² See eg Roderick A Macdonald, "Encoding *Canadian* Civil Law" in JEC Brierley *et al*, eds, *Mélanges Paul-André Crépeau* (Cowansville, QC: Yvon Blais, 1997) 579. The *Interpretation Act*, RSC 1985, c I-21, s 8.1, holds that, unless otherwise provided by law, a federal enactment will be applied with reference to the rules, principles, and concepts of the law of property and civil rights in force in the province of application. On

drafters might be presumed alert to the differences between equalization via debt and division of property, including on bankruptcy.³³ Depending on the circumstances, the equalization model, which fixes a debt by reference to the valuation date, brings the creditor benefits or costs. It advantages the creditor where family assets owned by the debtor depreciate after the valuation date.³⁴ A number of provinces have elected equalization. Rather than fuelling suspicion of any breakdown in the legislative process sufficient to worry the judges, the range of provincial statutes on family property and the history of their amendment point to democratic institutions that, on at least this question, work reasonably well.³⁵ Accordingly, the judges might have been more circumspect in criticizing that model's effects and in recommending a legislative remedy.³⁶

Second, the Court espoused a functionalist, ends-oriented view of the regimes applicable to married spouses as advancing a common objective. That view is discernible in the Court's call for Parliament better to shelter equalization claims on bankruptcy analogously to claims for support. It evokes L'Heureux-Dubé J's proposition, in her dissent in *Nova Scotia*

Canadian family law and federalism, see Robert Leckey, "A Common Law of the Family? Reflections on *Rick v. Brandsema*" (2009) 25:2 Can J Fam L 257 at 284-92.

³³ That assumption underlies Blair JA's analysis of Ontario's equalization and payment regime in *Thibodeau v Thibodeau*, 2011 ONCA 110, 104 OR (3d) 161 [*Thibodeau*].

³⁴ The exception that proves the rule is *Serra v Serra* (2009), 93 OR (3d) 161 (CA), in which the Court of Appeal blenched at the husband's owing an equalization debt greater than his net worth.

³⁵ Legislatures have made changes since the initial enactments in the 1970s and 1980s. Ontario moved from a deferred sharing of some assets coupled with considerable judicial discretion (*Family Law Reform Act*, SO 1978, c 2, s 4) to a less discretionary deferred sharing of the economic gain achieved during the cohabitation under the marriage (*Family Law Act*, RSO 1990, c F.3, s 5 [*FLA* (Ont)]). The legislature of Quebec enacted the family patrimony in 1989, while the legislatures of Manitoba, Saskatchewan, and British Columbia have extended the sharing of family property to cohabitants. British Columbia's recent reform also changed the definition of family property from property "ordinarily used by a spouse or a minor child of either spouse for a family purpose" (*Family Relations Act*, *supra* note 18, s 58(2)) to property acquired during the relationship (see the exclusion in *FLA* (BC), *supra* note 18, s 85(1)(a)). Arguably, the abiding total exclusion of cohabitants from Quebec's otherwise vigorously protective regulation for the benefit of vulnerable spouses raises sharper suspicion of a breakdown in the ordinary legislative process.

³⁶ Even if reform were in order, a range of policy options would merit consideration. Parliament might amend the *Divorce Act*, RSC 1985, c 3 (2d Supp), so as better to protect married spouses on bankruptcy. Alternatively, an equalization province could tweak its regime so as to retain the valuation and payment process on separation but so as to produce a proprietary interest on insolvency, prior to the act of bankruptcy. I am indebted to Rod Macdonald for discussion of these alternatives.

(Attorney General) v Walsh, that, functionally, “no real dividing line” separated support obligations from those imposed by matrimonial-property regimes.³⁷ Rather, all aimed to “alleviat[e] the economic burden” entailed by the end of a long, intimate and interdependent relationship.³⁸ In that appeal, a majority of the Court had rejected a discrimination claim founded on marital status, untroubled by a state of affairs that confined a matrimonial-property statute to married couples where the legislature had extended spousal support to cohabitants.

The *Schreyer* Court’s view of equalization claims as meriting treatment closer to that of claims for spousal support is remarkable, given family law’s bases for distinguishing them. The decision by all legislatures but Quebec’s to confer spousal support on unmarried cohabitants without extending property sharing – although in several provinces the latter has followed – substantiates the sense of the former’s greater urgency.³⁹ In his reasons concurring with the majority in *Walsh*, Gonthier J contrasted support, as grounded in need and solidarity, with property division, grounded in contract.⁴⁰ Differing justifications for support and property blend with their temporal orientations, which pertain to the aims of the bankruptcy regime. A claim for sharing of family property is “inherently retrospective,” based on the presumed economic entwinement of the parties’ life together and a concern to reverse unjust enrichment. As for spousal support, even when ordered as a lump sum on a “compensatory” basis, it “remains alimentary and thus, broadly speaking, prospective.”⁴¹ Thus, a rehabilitative scheme focused on freeing a debtor from the crushing debt of the past might justifiably distinguish the two, as the *BIA* does.

The rejection of the *Charter* challenge to Quebec’s *laissez-faire* policy towards unmarried cohabitants in *Quebec (Attorney General) v A* will inspire commentary from constitutionalists and family lawyers. On the *Charter* questions, the Court issued four sets of reasons. What matters here is that, in an appeal which included arguments from provincial governments, the Court retreated from the approaches to federalism and family law aired in the unanimous judgment in *Schreyer*.

³⁷ 2002 SCC 83, [2002] 4 SCR 325 at para 104 [*Walsh*].

³⁸ *Ibid.*

³⁹ For argument that “the family home falls on the side of support,” see Robert Leckey, “Gimme Shelter” (2011) 34:1 Dal LJ 197 at 215.

⁴⁰ *Walsh*, *supra* note 37 at para 204.

⁴¹ See *Droit de la famille—1275*, 2012 QCCA 87 at para 46. Kasirer JA there compared a lump sum for spousal support under the *Divorce Act*, *supra* note 36, s 15.2, with a compensatory allowance under art 427 CCQ, but the contrast applies to support vis-à-vis equalization of property.

On the question of unity versus provincial difference, five judges in *Quebec (Attorney General) v A* accepted that substantial effects may flow from a province's pursuit of a distinctive path in family policy. Four of them found no discrimination in Quebec's approach. A fifth, the Chief Justice, found discrimination but upheld the Civil Code as reasonable under section 1 of the *Charter*. She referred to the risk that a stringent approach to minimal impairment would "identify[] the Canadian province that has adopted the 'preferable' approach to a social issue and requir[e] that all other provinces follow suit."⁴² She also flagged the "need to allow legislatures a margin of appreciation on difficult social issues and the need to be sensitive to the constitutional responsibility of each province to legislate for its population."⁴³ If sensitivity to the unifying effect of federal institutions is especially acute in a *Charter* case from Quebec, the consideration should also apply when federal law encounters provincial law, as in *Schreyer*. For their part, the four judges who found unjustifiable discrimination would, to varying degrees, have brought Quebec law in line with family policy in the other provinces.

As for differences within family law, Deschamps, Cromwell and Karakatsanis JJ detected relevant distinctions within the regimes that marriage attaches to spouses. They would have upheld as justifiable discrimination the exclusion of unmarried couples from matrimonial property, but not from support. The rightness of the line drawn by those justices matters less than their sense that drawing one was possible.⁴⁴ Two years prior, in the admittedly different context of *Schreyer*, Deschamps and Cromwell JJ had signed on to LeBel J's doubts about such line-drawing, at least by the Parliament of Canada. In contrast, in *Quebec (Attorney General) v A*, the understanding of marriage's rights and obligations as indivisible unified six judges, despite sharp disagreement on the *Charter* questions. Thus McLachlin CJC (justifiable discrimination), LeBel, Fish, Rothstein, and Moldaver JJ (no discrimination), and Abella J (unjustifiable discrimination) shared an operating view of Quebec's law of marriage and civil union as an all-or-nothing package.

It is surprising that the Court expressed lesser tolerance for interprovincial variation in a private-law case than in one engaging the

⁴² *Quebec (Attorney General) v A*, *supra* note 27 at para 440.

⁴³ *Ibid* at para 449.

⁴⁴ In Quebec civil law might the better distinction lie between the obligatory regimes applicable to spouses by marriage or civil union (support, family residence, compensatory allowance, family patrimony) and the suppletive or default partnership of acquests? See Alain Roy, "Affaire Éric c. Lola: Une fin aux allures de commencement" [2013] 1 CP du N 259 at 285; and Benoît Moore, "Passé et avenir de l'union de fait: entre volonté et solidarité" in *Conférences des juristes de l'État 2013* (Cowansville: Yvon Blais) 65.

fundamental rights and freedoms guaranteed by the *Charter* to all Canadians. The Court's obiter in *Schreyer* may have little direct effect, but it presages preoccupations and patterns that may return in future family appeals. For example, having declined to unify family policy by use of the *Charter*, will the judges of the Supreme Court – back on the less politicized terrain of private law – return to their unifying inclination when delineating the significance of their development of unjust enrichment in the cohabitation context for the civil law of Quebec?⁴⁵ In any event, greater change to practice can be expected of the Court's discussion of a path that spouses in Ms Schreyer's position ought to pursue under the *BIA*.

4. *The Farm as Exempt Asset*

The Supreme Court perceived a conflict between the provincial policy of sharing family assets on dissolution of a spousal relationship and the federal policy of staying execution of claims against bankrupt individuals and releasing them from their debts.⁴⁶ Yet, observed the Court, no bankruptcy policy required the wife to emerge from the marriage without substantial assets.⁴⁷ In the Court's view, injustice would have been avoided had the wife, informed of the bankruptcy, persuaded the bankruptcy judge to lift the stay of proceedings. That would have allowed her to ask a family court to liquidate the equalization claim and award her a proprietary stake in the farm in satisfaction of that claim. On this reading, the husband's nondisclosure was critical. In turn, amending the *BIA* so that bankruptcy would no longer stay or release any claim for equalization against exempt assets would prevent future injustices.⁴⁸

Consider LeBel J's positioning of the farm in a policy discussion of exempt assets. The exempt assets addressed in the Senate Committee report cited by the Court were "the bankrupt's pension and such other exempt assets as life insurance Registered Retirement Savings Plans (RRSPs)."⁴⁹ Such assets are divisible amongst the spouses on breakdown of a marriage or cohabitation relationship subject to a provincial family statute.⁵⁰ They may, however, be exempt from seizure by judgment

⁴⁵ *Kerr v Baranow*, 2011 SCC 10, [2011] 1 SCR 269 [*Kerr*]; Robert Leckey, "Unjust Enrichment and *De facto* Spouses" (2012) 114 R du N 475.

⁴⁶ *Schreyer*, *supra* note 1 at para 25.

⁴⁷ *Ibid.*

⁴⁸ *Ibid* at para 39.

⁴⁹ Senate Committee Report, *supra* note 26 at 83.

⁵⁰ See eg *FLA* (Ont), *supra* note 35, s 4(1) "property" (c); art 415 CCQ; Jean Pineau and Marie Pratte, *La famille* (Montreal: Thémis, 2006) at para 171; Law Commission of Ontario, *Division of Pensions upon Marriage Breakdown: Final Report* (Toronto: Law Commission of Ontario, 2008).

creditors.⁵¹ The Committee's witness – the ubiquitous Robert Klotz – had testified that no policy reason called for “permitting bankruptcy, which does not distribute [pensions and life insurance RRSPs] among creditors, to frustrate the principles of matrimonial property division against these assets.”⁵² On Klotz's analysis, sheltering those assets from allocation under the rules of family property during bankruptcy effectively rehabilitates the bankrupt at his spouse's expense.⁵³

What may be said about the Court's suggested path in respect of exempt assets? It is true that enforcing a family claim against a pension may prejudice no other creditors while advancing the federal bankruptcy policy of attending “to the family unit as a whole, rather than focussing on the needs of the bankrupt.”⁵⁴ Commentators have pointed to this route,⁵⁵ and applications have been allowed under section 69.4 for lifting the stay against a spouse in respect of exempt assets.⁵⁶ Adjudicators in such cases underscore that the assets' exempt status ensures that lifting the stay occasions no prejudice for other creditors.⁵⁷ If other assets were involved, the policy goals of the *BIA* would call for refusing leave to proceed.⁵⁸ The discussion in *Schreyer* of section 69.4 in the family context may inspire more spouses to advance such applications. It may also lead bankruptcy judges to grant leave to enforce an equalization claim against exempt assets more readily.

Yet LeBel J's inclusion of the farm within the general category of exempt assets is problematic. Bearing in mind other exempt assets, he

⁵¹ See e.g. *Pension Benefits Act*, RSO 1990, c P8, s 66(1)-66(3); *Insurance Act*, RSO 1990, c I8, s 196(2); art 553(7) CCP; Jacques Deslauriers, *La faillite et l'insolvabilité au Québec*, 2d ed (Montreal: Wilson & Lafleur, 2011) at paras 1130-45; Houlden, Morawetz and Sarra, *supra* note 30, vol 2 at 3-246.

⁵² Senate Committee Report, *supra* note 26 at 83.

⁵³ *Ibid.*

⁵⁴ *Schreyer*, *supra* note 1 at para 32.

⁵⁵ Robert A Klotz, *Bankruptcy, Insolvency and Family Law*, 2d ed (Toronto: Carswell, 2001) at 10-13 [footnote omitted] writes: “Proceeding against the pension does not prejudice the bankrupt estate, nor does it violate in any meaningful way the rehabilitative goals of bankruptcy, particularly when juxtaposed against the public policy favouring equal sharing of matrimonial assets.” See also Houlden, Morawetz and Sarra, *supra* note 30, vol 2 at 3-28.1.

⁵⁶ *Cunningham (Re)*, 2009 ABQB 758, 486 AR 96 (pension and RRIFs); *Miadovnik (Re)*, 2010 ONSC 3076, 69 CBR (5th) 31 (RRSP); *Stiles v Stiles* (1999), 11 CBR (4th) 315 (pension). See also *Hildebrand v Hildebrand* (1999), 140 Man R (2d) 316 (QB) (nature of exempt assets not specified) [*Hildebrand*]. For an overview of unreported cases, see Klotz, *ibid* at 10-14 to 10-18.

⁵⁷ *Hildebrand*, *ibid* at para 15; *Cunningham (Re)*, *ibid* at para 22.

⁵⁸ Klotz, *supra* note 55 at 5-28 to 5-29.

addressed possible prejudice to other creditors as the sole consideration germane to Ms Schreyer's hypothetical effort to obtain leave to pursue her claim against the farm. Since the farm – like a pension or RRSP – was already out of their reach, there would have been no such harm. By focusing on potential prejudice to other creditors, however, the Court failed to grapple with “the specificity of the farm.”⁵⁹

5. *The Farm as Farm*

What is the farm's “specificity” and how does it matter? To the extent that an injustice occurred to Ms Schreyer, the *BIA* may not have been its source. Apart from bankruptcy proceedings, or during them with leave of the bankruptcy judge, the wife might not have fared much better under provincial family law. Critics of the outcome for Ms Schreyer should thus direct their attention away from federal law to provincial law and policy. In addition, considerations for preserving family farms may temper the perceived injustice.

The Court's criticism of the *BIA* invites exploration of how Ms Schreyer's claim might have fared had she managed to press it outside the bankruptcy process. The questionable premise is that a family court, using its discretion regarding the method of payment, would have awarded the wife a proprietary interest in the farm.⁶⁰ Situations such as that in *Schreyer* – a farm wife's leaving a union without her share of family property – may arise simply from the treatment of family farms under provincial law.

Farms are distinct from other assets in a number of ways. Take farms without reference to their susceptibility to seizure by creditors. A farm's market value may increase dramatically whilst the income it produces when used for farming remains relatively low. For many farmers, their land was not bought as an investment, with an eye to its market value. It was, instead, “inherited or bought at a discount from relatives with no intention ever to resell it.”⁶¹ The *Schreyer* farm provides a case in point. Mr Schreyer had not sought unequal variation, although the circumstances of his purchase of the farm from his parents might have furnished the basis for doing so.⁶² The fact that he paid \$50,000 in 1997, granting his parents a

⁵⁹ Lori Chambers, “Women's Labour, Relationship Breakdown and Ownership of the Family Farm” (2010) 25:1 *Can J L & Soc'y* 75 at 84.

⁶⁰ *FPA*, *supra* note 5, s 17.

⁶¹ Joseph Kary, “Farmland, Free Markets and Marital Breakdown” (1992) 11:1 *Can J Fam L* 41 at 46 [footnote omitted].

⁶² The *FPA*'s non-exhaustive grounds for unequal variation include a spouse's possession of an asset “of an extraordinary value to which this Act does not apply by reason of their having been acquired by way of gift or inheritance;” see *FPA*, *supra* note 5, s 14(1)(f).

right of first refusal at \$50,000,⁶³ for land valued at \$189,000 as of 1999 – an increase of 280 per cent – indicates a measure of donative intent on their part, as well as a desire to keep the farm in the family. Indeed, the husband argued before the Supreme Court that the initial purchase price was far less than market value.⁶⁴ Consequently, as he saw it, “the real property to which the Appellant often refers was acquired as a result of the Respondent’s parents’ generosity, and not through the ‘money or effort’ of the Appellant.”⁶⁵ If one approves the policy in family-property statutes of excluding property acquired by gift or inheritance, the husband’s keeping this farm may seem less unfair.

A feminist perspective might foreground other considerations. Arguably, excluding gifts and inherited property from equalization disadvantages farm women. Such a policy may shield from sharing the asset most improved by women’s labour.⁶⁶ Scholars have observed the prevalence of male ownership of family farms, including an expectation that sons “take over the farm” while daughters marry into another family farm or obtain an education.⁶⁷ These embedded patterns affect social practice, including the intergenerational transfer of farm land.⁶⁸ It is often assumed that farm wives are “helpers,” not farmers in their own right,⁶⁹ discernible in frequent references to a woman as the “non-farming

⁶³ *Schreyer CA*, *supra* note 4 at para 101.

⁶⁴ *Schreyer*, *supra* note 1 (Factum of the Respondent at para 4).

⁶⁵ *Ibid* at para 39. Of course, by the principles of provincial family legislation, the purchase price of \$50,000 is attributable to the marriage as a joint economic endeavour: it presumptively reflects “money or effort” on the wife’s part.

⁶⁶ An exclusion of property from equalization does not, however, preclude a claim in unjust enrichment, with its evidentiary burden; see *Rawluk v Rawluk*, [1990] 1 SCR 70.

⁶⁷ Marjorie L Benson, *Agricultural Law in Canada, 1867-1995: With Particular Reference to Saskatchewan* (Calgary: Canadian Institute of Resources Law, 1996) at 161.

⁶⁸ Ella Forbes-Chilibeck, “Have You Heard the One About the Farmer’s Daughter? Gender-bias in the Intergenerational Transfer of Farm Land on the Canadian Prairies” (2005) 24:4 *Canadian Woman Studies* 26.

⁶⁹ Mary Jane Mossman speculated to me that small family businesses, perhaps particularly those run by immigrants, might present another site in which notions of “owner” and “helper” spouses obscure the enterprise’s joint character and devalue women’s work. For concern, outside the farm context, to treat a cohabitant in a joint family venture “as a co-venturer, not as the hired help,” see *Kerr*, *supra* note 45 at para 7.

spouse.”⁷⁰ The focus on farmers as men has also affected law reform and, as will be explained, adjudication.⁷¹

Judges in disputes involving family property sometimes aim to minimize threats to the viability of a family farm. They do so whether or not directed to that aim by legislation.⁷² That concern may drive decisions about unequal division and the execution of an equalization payment, with no impending bankruptcy. A study from Saskatchewan identifies “deferred distribution” as a “popular choice,” awarding the spouse who does not hold title to the farm the value of her share of matrimonial property in instalments.⁷³ Deferred distribution can allow the spouse who does not hold title to receive her share of the value of the family property without crippling the farming operation by an order for an immediate cash pay-out or the transfer of a substantial portion of land. But it makes her wait to receive her share. While waiting, she does not have the use of the capital sum to which she is entitled.⁷⁴ In the event of bankruptcy, she may never receive it. To be precise, viability in such cases is not an end in itself. If it were, a court would, at least occasionally, order the sale of a farming operation to preserve it as a viable operation, giving each spouse a share of the proceeds. Instead, the concern for viability has meant “viability of the farm in the husband’s hands.”⁷⁵

⁷⁰ M Jean Torrens, “Farm Viability in the Context of Matrimonial Property Disputes” (1993) 57:2 Sask L Rev 493, passim; Robert S Fuller and Donald E Buckingham, *Agriculture Law in Canada* (Toronto: Butterworths Canada, 1999) at 221. That term erases female spouses’ contributions to farming, making it preferable to refer to the spouse who does not hold title to the farm. I am grateful to Susan Boyd for signalling the importance of care on this point.

⁷¹ See e.g. Jean E Keet, “Law Reform Process, Matrimonial Property, and Farm Women: A Case Study of Saskatchewan, 1980-1986” (1990) 4:1 CJWL 166.

⁷² *FLA* (Ont), *supra* note 35, s 11(1), directs that an order made to carry out equalization “shall not be made so as to require or result in the sale of an operating business or farm or so as to seriously impair its operation” barring any reasonable alternative, while s 11(2) contemplates an order for a share of profits or the transfer of shares as alternatives to sale of the farm.

⁷³ Torrens, *supra* note 70 at 497.

⁷⁴ See *Windsor v Windsor* (1998), 132 Man R (2d) 44 (QB), refusing the wife’s motion for an order that husband satisfy the equalization judgment by transferring land to her. Equity and fairness were found not to allow the sale, transfer, or conveyance of the husband’s interest in his farming operation; annual payments were instead ordered to the wife. The judge distinguished *Olson v Olson* (1988), 67 Sask R 257 (CA), in which the Court of Appeal had ordered a vesting in the wife of five quarter-sections of land, on the basis that in the Saskatchewan appeal enough land had remained that the transfer would not jeopardize the farming operation. Mr Schreyer owned one quarter-section. See also the order for monthly instalments in *Burgmaier v Burgmaier* (1985), 47 RFL (2d) 251 (Sask QB).

⁷⁵ Torrens, *supra* note 70 at 498.

The distinctiveness of farms under the exemptions regimes of several provinces warrants attention. In Manitoba and some other provinces, the statute book contains a potential tension: its policies call for spouses to share in the fruits of the marriage,⁷⁶ while privileging the preservation of family farms over creditors' claims. Under *The Judgments Act*, no proceedings shall be taken under a registered judgment against "the farm land upon which [he] ... or his family actually resides or which he cultivates, either wholly or in part, or which he actually uses for grazing or other purposes, where the area of the land is not more than 160 acres."⁷⁷ The Supreme Court in *Schreyer* took account of the farm's exempt status insofar as it related to other creditors under the *BIA*. It did not, however, draw out the extent to which that status might influence family judges.⁷⁸

As someone with an unliquidated equalization claim, the wife was not a judgment creditor of the type against whom the provincial exemptions regime operates. A court might still have used its discretion under the *FPA* to order satisfaction of the equalization debt by payment in a lump sum or by instalment, by an asset transfer, conveyance, or delivery, or by some combination.⁷⁹ But, in her transition from being one of the family "actually

⁷⁶ The prairie provinces do not exclude farms from family property. Compare eg *Matrimonial Property Act*, RSNS 1989, c 275, s 4(1)(e), excluding "business assets," interpreted as including farms; see *Lawrence v Lawrence* (1981), 47 NSR (2d) 100, at para 24 (SC (AD)), leave to appeal to SCC refused (1982), 25 RFL (2d) xxxvi.

⁷⁷ *The Judgments Act*, supra note 8, s 13(1). Manitoba's exemption of up to 160 acres with no "cash ceiling" may sometimes "protect an excessively valuable asset" from creditors' claims; see CRB Dunlop, *Creditor-Debtor Law in Canada*, 2d ed (Toronto: Carswell, 1994) at 474. Compare the more detailed exemption accorded by Saskatchewan's legislation to categories of agricultural items; see *Saskatchewan Farm Security Act*, SS 1988-89, c S-17.1, s 66.

⁷⁸ For a discussion noting the variation in the scope of agricultural exemptions and the disagreement on their appropriateness from one province to another, querying whether they reflect agriculture's current importance to a region or testify to the province's cultural and economic history, see Thomas GW Telfer, *Preliminary Paper on the Law of Personal Exemptions from Seizure*, Uniform Law Conference of Canada, Regina, August 2004, at paras 47, 48. The 2011 Census of Agriculture reported a decrease of 23,643 in the number of census farms (10.3%) since the last census, a continuation of a trend since 1941. Though relevant to the policy discernible in a family farm's exemption from seizure under provincial law, those data are rightly set in a larger context. Statistics Canada reports: "The Canadian agricultural sector continues to restructure as many farms expand in scale of operation, consolidate, draw on technological innovations to enhance productivity, and augment their sales." This trend is "consistent with the economies of scale characterizing parts of Canadian agriculture." Statistics Canada, *Snapshot of Canadian Agriculture*, c 1 online: <<http://www.statcan.gc.ca/pub/95-640-x/2012002/00-eng.htm>> (date accessed: 22 March 2013).

⁷⁹ *FPA*, supra note 5, s 17. For the view that the enhanced remedies in *FLA* (Ont), supra note 35, s 9(1), should be used with restraint, cognizant that they are "exceptions"

resid[ing]” on the farm to being a creditor, the wife’s claim to a chunk of the farm’s value had become a threat to the farm’s ongoing operation in a way equivalent to judgment creditors’ claims. Although alert to the wife’s status as an unsecured creditor when contrasting equalization and division of property, the Court did not integrate her condition into a reading of the farm-protecting policy underlying the provincial exemptions law. Cases or policy discussion in which a spouse wishes to enforce an equalization claim against an exempt asset such as a pension call for caution, however, in a farm scenario. An analogy may be drawn between the exempt status of the family farm and the exempt status of tools of the trade, the latter being enforceable against a spouse.⁸⁰ By contrast, there is no equivalent ground for judicial reticence at dividing an individual’s pension – its intergenerational viability is not in question! – during the equalization of family property.⁸¹

How might these farm-specific considerations have affected the Schreyers? It is fair to conjecture that, absent any bankruptcy proceedings, Mr Schreyer would have been in no position to draw his estranged wife a cheque for the \$54,891.76 owing to her. A family judge considering the viability of the farm when ordering payment under the *FPA* might plausibly have resisted giving an order which would have forced Mr Schreyer to sell the farm, depriving him of his livelihood (however fragile) and potentially resulting in one less family farm on the Manitoban prairie.⁸² As a result of a desire to avoid that outcome, Ms Schreyer might well have found herself entitled to instalments stretching across years. Had Mr Schreyer later gone bankrupt, he would have been released from those periodic debts. In this regard, it should be noted that in 2008, when the husband had already been discharged as a bankrupt and there was presumably reason to doubt the soundness of his finances, the judge of the Family Division confirmed the master’s finding of an unsecured debt but did not deploy the statute’s more robust measures for satisfying an equalization claim. Even had the family action advanced during bankruptcy proceedings, on the Supreme Court’s counterfactual scenario, many judges might have been reluctant to order execution with the effect of forcing the

to the legislature’s chosen “equalization payment regime,” see *Thibodeau, supra* note 33 at paras 40, 37.

⁸⁰ *Miller (Re)*, 2009 MBQB 298, 247 Man R (2d) 225.

⁸¹ *MT v J-YT*, 2008 SCC 50, [2008] 2 SCR 781 (rejecting exclusion of the husband’s pension credits from partition of the family patrimony in Quebec).

⁸² Supposing (so as to bracket the interest later awarded to Ms Schreyer and any subsequent change in value) that the farm had been sold as of the valuation date in 1999, at the full valuation price of \$189,000, Mr Schreyer would have had to pay out the balance on the mortgage of \$54,434 and the \$41,063.48 to Ms Schreyer. Taking no account of sales commission or capital gains, that would have left him with \$93,502.52, and on the master’s finding his other debts at that time totaled \$48,769.

farm's sale. One consequence of acknowledging that factors specific to the family farm outweighed the discharge from bankruptcy as obstacles to enforcement of Ms Schreyer's claim is that the husband's alleged failure to disclose ceases to have affected the outcome.

This paper cannot resolve the potential conflict between a wife's entitlement to her share of family wealth and the desire to keep farms within the family. One scholar has contended that "all Canadians are unjustly enriched at the expense of farm wives" insofar as they "eat better food, and cheaper food, because of the labour of farm women, most of which is unpaid and unacknowledged and for which wives and cohabitants are not compensated upon relationship breakdown."⁸³ At a minimum, identifying these competing considerations, including the notion that farm preservation may advance a social interest, might overlay with a wash of grey the black-and-white statements as to the outcome's unfairness. In any event, absent recognition that the *Schreyer* dispute concerned a farm and engagement with that context, family judges may not take the judgment as instructing them to cease considering the viability of a farming operation when exercising their discretion regarding the payment of equalization claims. Whether or not Parliament amends the *BIA*, then, farm spouses like the wife may continue to experience difficulty in realizing their claims under provincial law.

6. Conclusion

Schreyer may prompt fruitful reflection on problems that may be perceived as arising from the federal bankruptcy scheme.⁸⁴ Perhaps the Parliament of Canada should, as the Supreme Court asserted, amend the *BIA* so as to shield equalization claims more similarly to claims for support and to facilitate enforcement of family claims against exempt assets during bankruptcy. Still, it is risky to assume that different outcomes – for example, claims for support enforceable post-discharge, but not for property – signal injustice and call for redress by the federal drafters. Not all differences are suspect and this paper's second part underscores the importance of careful attention to provincial private law and its underlying policies. The difficulties on the *Schreyer* facts show a stronger connection to patterns of property holding and division relating to farms under provincial law. On

⁸³ Chambers, *supra* note 59 at 93-94.

⁸⁴ For analysis that accepts the Court's focus on the federal statute as the problem but highlights ways in which it might have been construed to Ms Schreyer's advantage, see Janis Sarra and Susan B Boyd, "Competing Notions of Fairness: A Principled Approach to the Intersection of Insolvency Law and Family Property Law in Canada" in Janis P Sarra, ed, *Annual Review of Insolvency Law 2011* (Toronto: Carswell, 2011) 207 at 233-37.

the better reading, the appeal frames problems that exceed the federal bankruptcy statute's four corners.

Returning to the question of injustice, *Schreyer* unfolded on what is undoubtedly a "gendered terrain"⁸⁵ and the allocations entailed by family breakdown raise legitimate feminist concerns. But no rules can remedy the shortfall when a family separates and there are insufficient resources to go around. How best to assess the outcome by which Ms Schreyer left the marriage with nothing while Mr Schreyer stayed on the farm? Unlike some unjust enrichment cases decided by the Supreme Court, *Schreyer* did not raise the question of how equitably to share the surplus of a farming operation having flourished across long years or decades. Had the Schreyers separated in 1997, after 17 years of marriage, there would have been virtually no assets to divide. When they separated two years later, the main asset had been bought from the Schreyers Sr, arguably at a major discount. *Schreyer* may be a reminder of the "feminization of poverty," to use the Supreme Court of Canada's phrase,⁸⁶ and farm poverty affects farm wives disproportionately. But the judgment also represents, more generally, the straitened circumstances of many who work on farms.

⁸⁵ *Ibid* at 210.

⁸⁶ *Schreyer*, *supra* note 1 at para 38. L'Heureux-Dubé J had introduced that expression into the Supreme Court's lexicon in *Moge v Moge*, [1992] 3 SCR 813 at 853.