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## Chroniques

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# Hommage à Suzanne Vadboncœur

Je voudrais rendre hommage à Suzanne Vadboncœur qui a été secrétaire du Comité de la Revue du Barreau jusqu'à ce qu'elle soit nommée juge à la Cour du Québec en novembre 2003. Suzanne est devenue avocate en 1976 et elle est entrée au service du Barreau du Québec en 1980 ; au moment de sa nomination à la magistrature, elle y occupait le poste de directrice du service de recherche et législation. À ce titre, elle était également secrétaire du Comité de la Revue du Barreau.

Le poste que Suzanne Vadboncœur occupait exige une grande polyvalence et un esprit de synthèse, qualités que Suzanne possède au plus haut degré. Il lui fallait traiter d'à peu près tous les domaines du droit et assimiler rapidement de nouveaux concepts, ce qu'elle réussissait à faire avec aisance. Passer dans une même journée d'un domaine du droit à un autre (droit administratif, droit des sûretés, droit des assurances, etc.) n'est pas facile, particulièrement lorsque les interlocuteurs sont des spécialistes ou se présentent comme tels. La barre devient encore plus haute lorsque le mandat porte non seulement sur le droit positif mais aussi sur le droit à venir. Suzanne a en effet joué un rôle de premier plan dans les travaux et représentations du Barreau en matière de réforme du droit et de changements législatifs. On peut notamment penser au nouveau Code civil du Québec au début des années 90 et plus récemment à la réforme de la procédure civile.

Les fonctions que Suzanne Vadboncœur remplissait présentent aussi un défi au niveau des relations humaines. Dans les comités du Barreau, Suzanne était rassembleuse et agissait avec diplomatie lorsqu'elle devait concilier des points de vue opposés. À la Revue du Barreau, elle savait faire preuve de tact et de respect pour expliquer à un auteur que son manuscrit comportait des lacunes et nécessitait des améliorations. La critique constructive est un art difficile à pratiquer !

Suzanne Vadboncœur est une personne chaleureuse que ses collègues de la Revue du Barreau voient partir avec regret ; elle a été secrétaire du Comité de la Revue pendant près de 22 ans. Si toutefois le départ de Suzanne est une grande perte pour le Barreau, on se consolera en sachant que la Cour du Québec s'est enrichie d'une femme possédant toutes les qualités requises pour bien rendre justice.

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Michel Deschamps
Président du Comité de la Revue du Barreau

# Matrimonial Regimes in Quebec Private International Law: Where Are We Now?

Jeffrey TALPIS

## SUMMARY

Despite a certain similarity amongst "matrimonial regimes" in civil law jurisdictions and "matrimonial property" in common law jurisdictions, the application of either "regime" in the jurisdiction of the other has been a constant source of confusion for courts and practitioners alike. For the last 15 years, since before the coming into force of the *Civil Code of Quebec*,[1] the problem has been compounded by a number of factors including: (i) the imperative application of the family patrimony rules under the domestic provisions of the Code, (ii) the definition of "matrimonial regimes" for the purposes of private international law, (iii) the interaction between unilateralism and the traditional or classical method, particularly when the court has to consider applying a foreign statute concerning the right of division of matrimonial property which, under its provisions, would not apply in the particular case, and (iv) changes occurring in a state's matrimonial regime over time. Since it is obvious that conflict of laws in this field will continue to grow, the goals of this paper are to take stock of where we are now, and to anticipate where courts and legislators may take these issues in the future.

1. The Civil Code of Quebec of January 1, 1994, L.Q. 1991, c. 64 is herein referred to as the C.C.Q. or simply as the "Code".

# Matrimonial Regimes in Quebec Private International Law: Where Are We Now?

Jeffrey TALPIS*



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## INTRODUCTION

> "Family property law should be as simple and clear as possible. Ideally the division of assets should be governed by a simple body of legislation and the codes for choosing that legislation should be transparent and easy to understand."[2]

Legal rules relating to matrimonial regimes in the civil law and matrimonial property laws in the common jurisdictions are profoundly anchored in the historical and juridical traditions of each. As a result, conflicts of law and jurisdiction continue to play an important role in this field. Given that the number of situations in which foreign elements are present either at the beginning or end of the marital relationship are increasing dramatically, it comes as no surprise that practitioners are regularly called upon to advise prospective or actual spouses on the laws applicable to a variety of questions. Such advice on the applicable law includes whether property can be divided between the spouses, and in what proportions, the valuation of property for the purpose of determining compensation in lieu of property, and the determination of extinction of certain property rights in the context of situations such as a disposition of property, dissolution of the regime by divorce, death or modification thereof, bankruptcy, tax planning or other circumstances.

While the object of the present paper is to take a critical look at the current state of Quebec private international law relating to matrimonial regimes, a brief overview of some of the strategies used by litigators is useful.

When such matters become litigious, there is often a rush to the courthouse in the jurisdiction whose conflict of law rule will designate the desired law as applicable. This is the most common reason litigation[3] takes place simultaneously in multiple *fora*. In

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2. B.C. LAW INSTITUTE, *The need for uniform jurisdiction and choice of law rules in domestic property proceedings* (Vancouver: British Columbia Law Institute, April 1998). Published on the internet at: www.bcli.org/pages/projects/uclrdpp/uclrdpp.pdf.
3. Most disputes relating to matrimonial regimes arise on the occasion of divorce proceedings. Section 3(1) of the *Divorce Act*, R.S.C., 1985, c. 3 (2nd supp.), as amended, confers jurisdiction upon the courts on the basis of the ordinary residence of either spouse for at least one year in the province prior to the commencement of proceedings. In order to consolidate the financial aspects of family

*Davenport* v. *Dumas*,[4] for example, the wife instituted divorce proceedings in the State of Connecticut where she resided, knowing that the court would take jurisdiction and apply its own equitable redistribution rules. Shortly afterward, the husband instituted proceedings in Quebec, where he resided, knowing that the court would assume jurisdiction and apply the law of Quebec to the division of assets, the whole in accordance with Quebec conflict rules applicable to their matrimonial regime. Similar strategies are seen in *Droit de la famille –2054* .[5] In that case, the husband instituted divorce proceedings in Algeria, where the courts had jurisdiction on the basis of the common nationality of the spouses as the court would apply its matrimonial regime of separation as to property. Subsequently, the wife took divorce proceedings in Quebec on the basis of her Quebec residence, so as to take advantage of the Quebec rules on the compensatory allowance, the family patrimony and the alimony provisions under the *Divorce Act*.

All of the artillery in the jurisdictional armoury may be used to jockey for the best position from which to do battle in litigation, including *lis pendens* to stay local proceedings, anti-suit injunctions to restrain foreign proceedings, *forum non conveniens* to

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proceedings in the same jurisdiction, the Quebec legislator adopted the rule that, *inter alia*, the residence of either spouse may serve as a ground for jurisdiction to make a financial order on division of matrimonial property or on effects of marriage (arts. 3145, 3154 C.C.Q.). The place of celebration of the marriage, citizenship of parties, residence or domicile at the time of marriage, and choice of court (forum selection clause) or a change of residence after the commencement of the proceedings are all relevant. The quality of habitual residence, however, is particularly important: while habitual residence may be interrupted, it must be lawful. This suggests that the residence in Canada must be legal as well as factual, which requires a resident status in Canada. Furthermore, the court having jurisdiction under art. 3154 C.C.Q. may dispose of all issues relating to matrimonial regimes wherever the assets may be situated. Where there are assets in Quebec and abroad, the courts will favour reapportioning assets within the province where it is possible, to compensate for rights in property located outside the province. The court may also make other orders ensuring effectiveness of its judgment (arts. 3138, 3140 C.C.Q.).

4. (February 14, 1990), C.S. St-Francois, 450-04-000438-894, Péloquin, J.
5. [1999] R.J.Q. 1245 (C.S.). The same scenario arose in *S.A.* v. *M.F.G.* (Nov. 29, 2001), C.S. Montreal, 500-12-258532-013. Although the spouses were married under the Quebec matrimonial regime of the partnership of acquests and subject to Quebec's family patrimony rules, the husband instituted divorce proceedings in Tunisia on the basis of their common Tunisian nationality, knowing that the courts would apply the matrimonial regime of separation as to property under Tunisian law. The wife countered with a divorce action in Quebec, seeking application of the regime of partnership of acquests and the family patrimony. When the husband responded with a motion to stay on the basis of *lis pendens* (art. 3137 C.C.Q.), the motion was denied.

send the case away[6] or *Mareva*-type orders to enjoin spouses from disposing of their foreign assets, or force them to repatriate the assets to Quebec. The question remains, however, whether or not the general dispositions of Book Ten of the Code (arts. 3134 to 3140 C.C.Q.) apply where a proceeding in divorce has been instituted in Quebec. There is a sound argument for looking to Canadian jurisprudence on these issues, just as there is a sound argument to be made that these doctrines should apply since there exists no explicit rule in the *Divorce Act* prohibiting them. Since Quebec courts refer to art. 3135 C.C.Q. on the basis of the unoccupied field, it is contended that art. 3137 C.C.Q. (*lis pendens*) and the other general provisions should also apply.

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6. There is an increasing trend in Quebec, as in other jurisdictions, to take into account the applicable law in the context of motions to decline jurisdiction under the doctrine of *forum non conveniens*. Although this is a disturbing trend, there are a few provisions in the Code on which grounds for jurisdiction depend on the applicable law. For example, jurisdiction based on the place of performance of the contract in Quebec or forum selection in art. 3148 C.C.Q. both depend upon the existence of a valid contract (although Quebec courts rarely entertain a discussion on the merits to determine whether the ground for jurisdiction exists, i.e whether there was a valid contract). For a critical opposition to this trend see S. GUILLEMARD, A. PRUJINER and F. SABOURIN, "Les difficultés de l'introduction du *forum non conveniens* en droit québécois", (1995) 36 *C. de droit* 913 at 949; J. TALPIS and S. KATH, "The exceptional as commonplace in Quebec *Forum Non Conveniens* law: Cambior a case in Point", (2000) 34 *R.J.T.* 761 (hereinafter "The exceptional as commonplace."). The rules for recognition and enforcement of foreign judgments also play an important role in the ultimate determination of the applicable law because, where the foreign judgment is denied recognition, the court will not stay the local proceedings in divorce . See e.g. *Droit de la famille – 2054* and *S.A.* v. *M.F.G*, *supra*, note 5. See also *L.P.* v. *F.B.*, [2003] R.D.F. 121, J.E. 2003-280 (C.S.), at 129, Frappier J., where the court refused to recognize the foreign divorce and, in a later judgment, proceeded to partition the family patrimony (*L.P.* v. *F.B.* (3 October 2003), C.S. Saint-Hyacinthe, 750-12-011034-027, para. 244ff). See also *G.M.* v. *M.A.F.* (3 September 2003), C.A. Montreal, 500-09-013174-032: the husband took divorce proceedings in Louisiana on September 4, 2002 seeking application of the community property rules in that State, after the wife took proceedings in Quebec on September 3, 2002. Despite the fact the Quebec proceedings were found to have been instituted first, curiously, the court recognized the Louisiana divorce judgment on the basis of the fact that the wife participated in the proceedings in Louisiana and did not contest the jurisdiction of their court insofar as the divorce itself and the partition of the community property. See also *Droit de la famille –3148* , [2000] R.J.Q. 2339 (C.S.), where, after determining that the court should recognize the Russian divorce, it erroneously refused to pronounce upon the matrimonial regime and family patrimony five years after the divorce was rendered since it held in error that the law applicable to these questions was that of the domicile of the parties at the time of the divorce. Aside from confusing applicable law and jurisdiction, this is contrary to art. 3123 C.C.Q., which dictates that with respect to matrimonial regime, the applicable law is the domicile of the spouse at the time of their marriage.

## CHAPTER ONE: APPLICABLE LAW

### A. Reasons underlying the conflicts of law

The legal systems of the world today exhibit a marked diversity in the attitude they take to the effect of marriage on property rights and to the treatment of spousal claims for sharing of assets in kind or in value.

In the past, common law jurisdictions regarded the property rights or claims of spouses for a division of property as unaffected by the fact of marriage. Each party was presumed to retain those assets which he or she brought to the marriage and to possess as separate property anything acquired in the course of the marriage. Recognizing, however, that the wealth accumulated by each spouse is likely to be the product of combined efforts, these systems now treat marriage as an economic partnership as well as a social one. It is now commonly assumed that both spouses contribute to the acquisition of marital wealth, whether that contribution comes from income earned outside the home or services provided in the home (i.e., child care or homemaking). Hence, as partners, both spouses are presumed to be entitled to share in the partnership assets at dissolution. Most jurisdictions now allow the courts faced with a dissolution of marriage or other triggering event to divide in an equitable manner all or certain property acquired by the spouses during their marriage and still owned by either at the time of divorce. Another goal of equitable redistribution schemes is to sever the economic ties of the spouses at the time of dissolution by using marital property awards to meet the financial needs of economically dependant spouses. This stands in contrast to the previous practice of granting post divorce transfers of income in the form of alimony.[7]

The court's power to divide property in this way is generally known as "equitable redistribution" and is the dominant rule today in all common law states in the United States, in English law and other jurisdictions in the common law world.

For example in England, under the Matrimonial Causes Act of 1973,[8] the court has absolute discretion over redistribution of

7. B.E. HANDSCHU and M.K. KISTHARDT, "Divorce and Distribution", (Sept. 17, 2001) *National Law Journal* at B10, B15.
8. Matrimonial Causes Act 1973, *Law Reports Statutes*, vol. I, 1973, chapter 18, at 165. In exercising its discretion to distribute property on a decree of divorce, the

assets since there are no guiding principles in the Act on how property should be allocated upon divorce. Until recently, the emphasis in English law concerning division of matrimonial assets was on the importance of needs and reasonable requirements of a spouse rather than on an arithmetic calculation. The former approach had become the practice in the majority of cases and the primary factor used concerning s. 25(2) of the Act. Typically, in cases where the assets exceeded those necessary to meet the needs of both spouses, the spouse, usually the wife, would receive considerably less than 50 % of the matrimonial assets. Clearly, this approach was potentially discriminatory against women and failed to protect mothers not employed outside the home.

The landmark House of Lords decision *White (A.P.)* v. *White and the Motor Insurers Bureau* in 2000, however, marked a fundamental change in the relevant law since the 1970's, holding that there should indeed be a presumption of an equal division of assets.[9]

The case of Mr. and Mrs. White involved a long marriage and children who were independent at the time of the divorce. The couple essentially functioned as a farming partnership in that both worked physically hard and made an equal contribution to both work and domestic activities. Their assets totalled approximately £4 million.

In the first instance, the case progressed on a conventional needs approach and Mrs. White was awarded £980,000, which was enough to satisfy her needs for housing and income from capital. In arguments before the Court of Appeal, it was pointed out that had Mrs. White been a business partner she would have received much more. The court emphasized a partnership model rather than a needs basis and awarded her £1.7 million, an amount less than half of the total due to the fact that Mr. White's family contributed in the early years.

Both parties appealed the judgment. Mr. White claimed that the case should be resolved on a needs basis and that any change in the law should be made by Parliament. Mrs. White, on the other

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Court has a duty to consider all circumstances of the case, and insofar as "property" divisions are concerned, to take into consideration the matters set out in ss. 24 and 25 of the Act.

9. *White (A.P.)* v. *White and the Motor Insurers Bureau*, (2001) 1 All E.R. 1; (2000) FLR 981; [2001] UKHL 9 [hereinafter *White* v. *White*].

hand, claimed that the needs-based law was inappropriate and an equal division of the assets was in order.

The House of Lords upheld the Court of Appeal's decision and in so doing ushered in a new direction of the law by declaring that needs-based law had not kept up with societal change. Presenting the Court's opinion, Lord Nicholls stated that if, in their different spheres each contributed equally to the family then, in principle, it matters not which of them earned the money and built up the assets. There should be no bias in favour of either the money-earner or the caregiver. In this decision, the House of Lords also recognised that by being at home and looking after young children, a wife may forever lose the opportunity to acquire and develop her own money-earning qualifications and skills.[10]

Lord Nicholls stated as follows:

> Sometimes having carried out the statutory exercise, the judge's conclusion involves a more or less equal division of the available assets. More often this is not so. More often, having looked at all the circumstances, the judge's decision means that one party will receive a bigger share than the other. Before reaching a firm decision and making an order along these lines, the judge would always be well advised to check his tentative views against the yardstick of equality of division.[11]

He went on to say that:

> [...] as a general guide, equality should be departed from only if, and to the extent that, there is good reason for doing so. The need to consider and articulate reasons for departing from equality would help the parties and the court to focus on the need to ensure the absence of discrimination.[12]

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10. *Ibid*., at 9.
11. *Ibid.* For an illustration of how the law in England is evolving, see *Cowan* v. *Cowan*, [2001] EWCA Civ 679 (May 14, 2001) (C.A.), where the English Court of Appeal held that the court's duty when considering the division of matrimonial assets following a divorce is to impose a fair settlement according to the circumstances, within the context of the rules set down by the Act. Courts should be careful not to make assumptions based upon the sex of the parties or about the roles taken by them in the course of the marriage. The test of assessing the potential consequences of an equal division of assets serves as a useful check in avoiding sex-based discrimination, but no more. In cases involving large monetary claims, the judge should also be careful not to rely too heavily on tests concerning the reasonable requirements of the parties. Such tests must be considered with an eye to flexibility.
12. *Supra*, note 9.

Similar equitable redistribution rules exist under the common law states of the United States. Under the laws of the State of Indiana,[13] for instance, a court may, in the absence of an enforceable agreement to the contrary, divide the property of the spouses whether owned by either spouse before the marriage or acquired by either spouse in his or her own right after the marriage, in a "just and reasonable manner." The law creates a presumption that an equal division of the marital property is just and reasonable. However, a party who presents relevant evidence may rebut this presumption. Such evidence may include: the relative contribution of each spouse to the acquisition of property, how each property was acquired, the economic circumstances of the parties, the conduct of the parties during the marriage, earnings or earning ability of the parties as related to a final division of property and a final determination of the property rights of the parties.

The common law provinces of Canada have all adopted statutes governing matrimonial property law which provide for a presumption of equal sharing or deferred sharing schemes with a discretionary power of adjustment for exceptional circumstances.[14] Additionally, common law rights such as those arising pursuant to a constructive trust and a resulting trust, primarily based on claims of unjust enrichment, exist as complements to these regimes and are often employed by the courts.

The equitable redistribution laws in the United States and England or the deferred sharing statutes in the common law jurisdictions of Canada are not imperative. Although the parties can-

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13. The law on equitable redistribution in force in the State of Indiana, found in the Code of Indiana, IC 31-15-7-4(a) and (b), proof of which was made in *H. (J.S.)* v. *F. (B.B.)*, [2001] R.J.Q. 1262, REJB 2001-24545 (C.S.), Laberge, J.

14. *Matrimonial Property Act*, R.S.A 1980, c. M-9 as amended; *Family Relations Act*, R.S.B.C. 1979, c. 121 as amended; *Marital Property Act,* R.S.M. 1987, c. M45 as amended; *Family Law Act*, R.S.N. 1990, c. F-2; *Family Law Act*, R.S.P.E.I. 1988, c. F-3 as amended; *Matrimonial Property Act*, S.S. 1979, c. M-6.1 as amended; *Family Law Act*, R.S.O. 1990, c. F-03 as amended*; Matrimonial Property Act*, R.S.N.S. 1989, c. 275; *Marital Property Act*, S.N.B. 1980, c. M-1.1 as amended; *Family Property and Support Act*, R.S.Y. 1986, c. 63. In general, the division is made irrespective of which spouse owns the asset in question, and the legislation does not purport to create actual property rights, save for the British Columbia statute which provides under s. 43 that each spouse is entitled to "an undivided half interest in (each) family asset as a tenant in common." See N. RAFFERTY, "Matrimonial Property", in Martin BAER *et al.*, *Private International Law in Common Law Canada: Cases, Text, and Materials*, 2nd ed. (Toronto: Emond Montgomery Publications Limited, 1997) at 863ff.

not always opt out of certain rights relating to an asset, they may and very often do create a "regime" functionally equivalent to a civil law matrimonial regime of separation as to property. Where the parties have received independent legal advice, have been provided full disclosure and are party to an agreement that is not totally unfair, the agreement has a good chance of being upheld.

The other approach to matrimonial regimes, found principally in the civil law world, is that of community of property, or partnership of acquests with each jurisdiction having its own version. This approach is seen in many civil law countries (e.g., Belgium, France, Hungary, Italy, Luxembourg, Netherlands, Portugal, Switzerland, Germany, Spain, Greece, Luxembourg) as well as in nine states in the United States (Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington and Wisconsin).

In Quebec, the legal regime is known as the partnership of acquests,[15] although the parties may adopt other regimes by marriage contract. Under this regime, spousal assets are classified as either private property or acquests. During the marriage, the legal regime of partnership of acquests operates in the same manner as the conventional regime of separation as to property, except that a spouse may not give away his or her acquests without the consent of the other.[16] Unlike the former legal regime of community of property, during the marriage no rights or interests vest in the other spouse's acquests. At dissolution, the net value of the acquests of each is established and, subject to certain adjustments and compensations, is divided equally. The party owing the greater amount pays it to the other in money or by transfer of property.[17] The Code also contains certain imperative provisions relating to the constitution and partition of certain specific assets known as "family patrimony,"[18] the net value of which is divided equally regardless of the matrimonial regime selected or who owns the assets. However, the court has discretion to order an unequal division based on any number of factors.[19]

15. Arts. 448 to 484 C.C.Q.
16. Art. 462 C.C.Q.
17. Art. 481 C.C.Q.
18. Arts. 414 et seq C.C.Q.
19. Art. 422 C.C.Q.

Most civil law jurisdictions allow the parties to opt out of the legal regime in whole or in part. Some jurisdictions impose the legal regime strictly.[20]

It is reasonable to conclude that save for those jurisdictions governed by Islamic law, in which the legal regime is one of separation as to property, in the law of nearly all jurisdictions it is generally possible to find some mechanism for allowing a division of certain assets in varying degrees which can be employed in the absence of a contract.

Despite this point of commonality, however, the differences in the matrimonial property rules in different jurisdictions create a vast potential for conflicts of law, and practitioners are continually confronted with problems flowing from this diversity. While much of the uncertainty has been eliminated by the new Code, there are still a number of controversial issues, which have yet to be resolved. The central purpose of this paper is to examine these issues and discuss solutions.

## B. Determination of the applicable law

### *1. The principle of unity applies*

In Quebec, as in most civil law jurisdictions, a unified approach is taken to the conflict of law rules on matrimonial regimes. Hence, except where the parties choose to submit their "matrimonial regime" to different laws (arts. 3122 and 3111.3 C.C.Q.), or where the court faced with an exceptional situation implements a *depeçage* (arts. 3112 and 3082 C.C.Q.), one law applies irrespective of the nature or location of the parties' assets.

### *2. Absence of designation of the applicable law (objective connection)*

Based on the principle of proximity, the Code, in art. 3123 C.C.Q., adopts a cascade of alternatives for designating the applicable law:

> Art. 3123.The matrimonial or civil union regime of spouses who have not entered into matrimonial or civil union agreements is

20. For example in Chili, Codigo Civil de Chili, art. 135. See also articles 13, 14ff of the Family Code of the Popular Republic of Bulgaria, adopted in 1968 (J.O. no. 23, 23 March, 1968); Articles 116 to 125 of the *Civil Code* adopted in 1968 in U.S.S.R.

governed by the law of their country of domicile at the time of their marriage or civil union.

If the spouses are at that time domiciled in different countries, the applicable law is the law of their first common residence or, failing that, the law of their common nationality or, failing that, the law of the place of solemnization of their marriage or civil union.

The general provisions of Book Ten (Private International Law) of the Code also apply. Thus, pursuant to art. 3082 C.C.Q., the court may apply another law in exceptional cases.

### *3. Designation of law by marriage contract (subjective connection)*

In Quebec, as in most other jurisdictions, couples may enter into marital property agreements. These agreements are referred to in Quebec as "marriage contracts", and in common law jurisdictions as "domestic contracts" or "pre-nuptial agreements." Applying the fundamental codal policy of party autonomy, the future spouses have the power to select the law which will govern their matrimonial regime whether or not the chosen law has a connection to the parties or to their present or intended residence, though this is rarely seen in practice.

Furthermore, as mentioned above, nothing precludes a couple from submitting severable aspects of their regime to different laws (art. 3111.3 C.C.Q.). In the absence of an express choice of law, an implicit choice is possible so long as it can be inferred from the terms of the contract. Where designation of the applicable law is neither express nor tacit, however, the law of the state having the closest connection with the matters governed by the matrimonial regime will apply (art. 3112 C.C.Q.).

### *4. Permanence of the connecting factor: immutability of the matrimonial regime*

In spite of the many advantages favouring the principle of mutability[21] the opposing principle of immutability of the regime was chosen by the legislator with the advent of the new Code. This

21. A plea for the adoption of the principle of "mutability" is presented in J. TALPIS, "Quelques Réflexions sur l'Avant projet du droit international privé, notamment en matière du droit de la famille", (1989) 1 *C.P. du N.* 29 at 78 to 83; J. TALPIS and G. GOLDSTEIN, "Analyse critique de l'avant projet de la loi du Québec en droit international privé", (1989) 91 *R. du N.* 293 at 499ff.

is all the more surprising given that the principle of immutability had been abandoned for some time under the domestic rules. Be that as it may, under this principle, subsequent changes of domicile, habitual residence or the common nationality of the spouses (depending on which nexus determined the applicable law), are legally irrelevant to the law applicable to the couple's matrimonial regime.

In exceptional circumstances, a court could require a change in the applicable law (art. 3082 C.C.Q.). The court could, for instance require that a different law apply if, at the time of the solemnization of the marriage, only a remote connection existed to the country whose law is applicable and there existed a much closer connection to the jurisdiction of another state. Additionally, the parties themselves could designate another law to govern their matrimonial regime under the circumstances set forth in art. 3124 C.C.Q.

There can be no doubt that the rigidity of the principle of immutability is the source of recurring problems,[22] such as those arising in the handling of changes in the law governing foreign matrimonial regimes, the question of how to interpret spatially localized foreign matrimonial regimes and the scope of issues to be governed by the rule on matrimonial regimes. Adopting the principle of mutability of the legal matrimonial regime would have eliminated the first two problems in most cases, and led to an honest characterization of certain patrimonial effects of marriage.

### *5. Modification of the foreign law governing the matrimonial regime*

In cases where the matrimonial regime of the spouses is governed by a foreign law, the laws of most jurisdictions adhering to the principle of immutability apply the transitory provisions of the foreign law.[23] Since the trend has been to move from a separation of property regime or its functional equivalent to a community, or partnership of acquests regime or to rules providing for equitable redistribution of assets, the laws usually have retro-

22. It must be noted that these problems are not necessarily limited to matrimonial regimes, and that they apply to all situations where a foreign law is applicable.
23. In English law, see for instance: *Starkowski* v. *Attorney General,* [1954] A.C. 155; in French law, see for instance: L'affaire *Leppert*, cass. civ. 1er, 3 mars 1987 (1988) 77 *Revue crit. dip.* 695.

spective effect. This means that they usually apply to spouses married prior to the coming into force of the new legislation as well as to those married afterwards. However, under Quebec law, where the rules under the foreign matrimonial regime have a retrospective effect, our courts will apply the transitory provisions as long as the spouses were still domiciled in that jurisdiction at the time the rules came into effect and will not apply the provisions where the spouses had, at the time the new rules came into force, already established their domicile elsewhere.[24] This is an application of the more general doctrine of the "petrification" of the legal situation,[25] which dictates application of the new law, including its transitory provisions, where there exists a close connection between the situation and the foreign legal order at the moment when the new law comes into force. Where there has been a change in circumstances between the time the rights were originally created and the moment when the new law comes into force the newer doctrine, which can be referred to as "relative mutability," is operative since it now possesses codal authority under art. 3082 C.C.Q.

Although the doctrine of "petrification" is simple enough to apply when changes have occurred in the foreign law governing the matrimonial regime, it often leads to an unjust solution where the spouses had acquired a new domicile prior to the progressive changes in the law governing their matrimonial regime since it cannot be presumed that the parties will be governed by the modern rules of the laws in force in their new domicile. This is one of

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24. Dame *Zamkovetz* v. *Kornychuk*, (1973) 75 *R. du N.* 433; *J.L.P.* v. *D.E.M*, *Droit de la famille – 204* , [1985] R.D.J. 247 (C.A.) (hereinafter *Palmer* v. *Mulligan*); *Topolski* v. *La Reine*, (1978) 90 D.L.R. (3d) 66 (F.C. first instance). This position was recently adopted in *H. (J.S.)* v. *F. (B.B.)*, *supra*, note 13 at para. 179, where the court applied the modified versions of Indiana law enacted prior to the time at which the parties had established a domicile in Quebec.

25. I discussed this concept in J. TALPIS, "Analyse critique de la décision Zamkovetz v. Kornychuk", (1973) 75 *R. du N.* 433. See also J. TALPIS and G. GOLDSTEIN, "Le droit international privé après l'affaire *Palmer* c. *Mulligan*", (1986) *R. du N.* 34 and cases cited; G. GOLDSTEIN and E. GROFFIER, *Droit international privé*, Vol. I: Théorie générale (Cowansville: Éditions Yvon Blais, 1998) at 198-212 (hereinafter *Droit international privé*, Vol. I); G. GOLDSTEIN and E. GROFFIER, *Droit international privé*, Vol. II: Règles Spécifiques (Cowansville: Éditions Yvon Blais, 2003) at 907-908 (hereinafter *Droit international privé*, Vol. II). The contrary position adopting the foreign law including its transitory rules is defended by E. GROFFIER, *Précis de droit international privé québécois*, 4th ed. (Cowansville: Éditions Yvon Blais, 1990) at 83; J.-G. CASTEL, *Droit international privé québécois* (Toronto: Butterworth, 1980) at 290; and C. EMMANUELI, *Droit international privé québécois* (Montreal: Wilson & Lafleur, 2001) at 222-228.

the unfortunate consequences of the principle of immutability, since the problem does not arise, or arises differently, under either the doctrine of full mutability which has been adopted in the new Swiss code[26] and in the common law provinces and territories of Canada,[27] and under the doctrine of partial mutability generally adhered to in the United States,[28] for moveable property and under the Hague Convention of March 14th, 1978 on the Law Applicable to Matrimonial Property Regimes.[29]

I submit that where there has been no change in the localization of any of the connecting factors or other circumstances, the application of the foreign transitory rules and the specific foreign law should be determined by the objectives upon which the conflict rule is based. In some situations, the foreign law as it was at the time of litigation should apply while in others, the law applicable at the time the right was created should apply.

### *6. Autodetermination of foreign matrimonial property regimes*

There are an increasing number of statutes, both foreign and domestic, which proclaim that the law of the enacting state shall apply only to transactions, events or persons having certain connections with the enacting state. These inward-looking provisions delineating the scope of application of the statutes create legal headaches for parties, courts and doctrine alike as it involves coordinating the unilateral and multilateral approaches.[30]

Nonetheless, the use of these unilateral rules in substantive statutes is likely to increase in the future. Whether because of increased protectionism, economic competition amongst states, or other reasons, there is today a greater tendency for legislators to

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26. Federal Law on Private International Law (L.D.I.P.) of December 18, 1987, art. 55.
27. See for instance, s. 15 of Ontario's *Family Law Act of Ontario*, *supra*, note 14.
28. See F.K. JUENGER, "Marital Property and Conflict of Laws: A Tale of Two Countries", (1981) *Col. Law Rev.* at 1061, for an analysis of problems created when, for example, spouse migrate from a "separation as to property" state in the north-east to a "community property" state in the southwest upon retirement.
29. Article 11, in force in France, Netherlands and Luxembourg.
30. For a thorough study of this subject see G. SAUMIER, *Public Policy, Mandatory Rules and Uniform Choice of law Rules in Contract: The Impact of European Harmonization on English Private International Law*, 1997 (Unpublished doctoral dissertation, available from the author or through the University of Cambridge, University Library).

specify whether a statute is to apply to cases with certain enumerated connections with their state than to enter into the "dismal swamp"[31] of the conflict of laws.

Assume for instance that the law of a common law province governing the matrimonial regime of the spouses by virtue of art. 3123 C.C.Q., includes a statutory rule allowing judicial discretion to divide property upon divorce, replacing the previous regime of separate as to property. Let us also assume that the spouses are not able to meet the geographical limitations required under the foreign matrimonial property statutory regime. Should the court apply the statute, ignoring the geographical limitations, or take such limitations into account and apply what remains under that law?

Sometimes there is a "fall-back" solution. Let us assume, for instance, that pursuant to arts. 3123 and 3080 C.C.Q., the spouses are governed by the internal law of the State of California. Section 760 of California's Family Code[32] provides that all property, wherever situated and without regard to which spouse acquired the property during the marriage while they were domiciled in California, is community property. How would a Quebec court partition property acquired after the couple moved to the province of Quebec? California law still applies, and fortunately s. 760 is backed up by other legislation which adopts the concept of "quasi-community": property which would have been community if acquired while the parties were domiciled in California, but which was acquired while they were domiciled in another state is treated as if it were community property.[33]

Leaving aside the possibility of a fall-back solution, the general problem with matrimonial property statutes which attempt to specify the scope of application in advance can be illustrated with another example. Assume that the spouses were domiciled and resident in New Brunswick at the time of their marriage in

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31. D. PROSSER, "Interstate Publication", (1953) 51 *Mich. L. Rev.* 959, at 971. Prosser's famous quote, in full: "The realm of the conflict of laws is a dismal swamp filled with quaking quagmires, and inhabited by learned but eccentric professors who theorize about mysterious matters in a strange and incomprehensible jargon."
32. California *Family Code*, published on the internet at http://caselaw.lp.findlaw.com/cacodes/fam/760-761.html.
33. See West's Ann California Civil Code 4803 (1980). See also E.F. SCOLES and P.H. HAY, *Conflict of Laws: Hornbook Series* (St. Paul, Minnesota: West Publishing Company, 1982) at 467ff.

1997. Pursuant to art. 3123 C.C.Q., the law of New Brunswick governs their matrimonial regime, which is now found in the *Matrimonial Property Act*.[34] Under the terms of s. 44(1) of the Act, the statute applies either where the last common residence of the spouses was New Brunswick, or where one of the spouses maintained his or her residence in New Brunswick. In a proceeding before a Quebec court between spouses now residing in Quebec, a Quebec judge will have to decide whether or not to take into consideration Section 44 (1 of the New Brunswick statute). In the affirmative, the Act will not apply.

Given that Quebec law has generally rejected and now expressly rejects the concept of *renvoi* (art. 3080 C.C.Q.), to the extent that the "self-localizing rule"[35] constitutes a conflict rule (albeit unilateral), it should be ignored and the substantive dispositions of the foreign law should be applied, notwithstanding the expressed intent of the foreign legislator.

I first reflected upon the problem of whether or not a Quebec court should take into account the self-localizing rule under a foreign statute[36] in a broader study of unilateralism in 1983. Admitting that the self-localizing rule was not the kind of broad and bilateral conflict rule that, under Quebec law, should be ignored due to the rejection of *renvoi*, I nevertheless likened it to a unilateral conflict rule and argued that the court should not take it into account. This provided for a more just solution in most cases than taking the self-localizing rule into account, since the new law is presumably superior to the old. In a case comment on *Palmer* v. *Mulligan*[37] co-authored with Professor Gérald Goldstein,[38] we took the same position, i.e., that the court should disregard the geographical or personal limitation of the foreign law and apply the internal rule rather than recognize the limitation and disregard the rule.

Subsequently, upon resorting to a strict, legal-technical-analysis, and influenced by the views expressed by both Professor

34. *Matrimonial Property Act*, S.N.B. 1980, c. 9, section 44(1)(a) and (b).
35. J. TALPIS "Legal rules which determine their own sphere of application: a proposal for their recognition in Quebec private international law", (1982-83) 17 *R.J.T.* 201.
36. *Ibid.*
37. *Supra*, note 24.
38. J. TALPIS and G. GOLDSTEIN, *supra*, note 25.

Goldstein in his treatise with Professor Groffier[39] and in a commentary with Professor J.-G. Castel on the new Code,[40] I revised my opinion. I now adhere to the view that the self-localizing rule is part and parcel of foreign internal law and should be taken into account. This will result either in application of the foreign statute (or foreign law in absence of the statute), or in application of another law if art. 3082 C.C.Q. can be invoked, with the understanding that this is not accomplished by *renvoi*. Unfortunately, while perhaps more theoretically sound, in practice this approach will often result in an unjust situation. The task to find a just solution is daunting.

The jurisprudence in Quebec both supports[41] and opposes[42] taking the self-localizing rule into consideration. The Honourable Justice Marie-Christine Laberge adopted my original position, and that of Professor Goldstein's, in *H. (J.S.)* v. *F. (B.B.)*.[43] In that case, Laberge J. disregarded a limitation in an Indiana statute which the court deemed applicable as the law governing the matrimonial regime of the spouses and which provided that the equitable redistribution could only be ordered where at least one of the spouses resided in Indiana for at least six months prior to the commencement of divorce proceedings. She endorsed our view by repeating our statement that:

> Il nous apparaît que le rejet du renvoi signifie qu'on ne devrait pas tenir compte d'une règle unilatérale d'applicabilité ou « Localiser » une loi étrangère.[44]

There is no question that this approach will usually result in a more just result.[45] The technically correct solution, to apply the

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39. G. GOLDSTEIN and E. GROFFIER, *Droit international privé*, Vol. I, *supra,* note 25 at 176, 177.
40. J. TALPIS and J.-G. CASTEL, "Le Code civil du Québec – Interprétation des règles de droit international privé", in *La Réforme du Code civil*, vol. 3 (Sainte-Foy, Quebec: Presses de l'Université Laval, 1993) at 824, nos. 65, 66.
41. *Chanteclair Pontiac Buick Limitée* v. *Ernst & Whinney Inc.*, (1984) R.L. 278 at 284 (C.S.); *Boucher* v. *Stelco Inc.* (20 June 2000), C.S. Longueuil, 505-17-000410-987, J.E. 2000-1650 (C.S.), Durocher, J.
42. *Supra*, note 13.
43. *Ibid.*
44. *Ibid.*, at para. 176.
45. Another illustration of the unfairness of the rule occurred in a U.S. Court of Appeals decision in *California Cooler Inc.* v. *Fred Briggs Distributing Co., Inc.*, unpublished decision, docket no. 92-35016 (8 November 1993), cited as 2 F.3d 1156 (9th Cir. 1993), which affirmed the judgment of a Montana court which had to determine whether or not a California statute, protective of franchisees

self-localizing rule as "internal" law would have meant that the spouses were separate as to property throughout their married life, contrary to the laws in all of the common law jurisdictions and in the province of Quebec, where they were either domiciled or resident.

What is needed is a new approach – one which respects the situation and solutions contemplated by the parties and thus reasonably fulfills their expectations. In fact, this is likely what inspired Laberge J. in *H. (J.S.)* v. *F. (B.B.)*. In some matters, such as in matrimonial regimes, the court could interpret the self-localizing rule as not being imperative. In other words, a foreign court on this basis could still apply the statute if that is what the parties contemplated. Alternatively a court could invoke art. 3082 C.C.Q. to apply another law if the situation and circumstances warrant it.

Where possible, and within the limits of party autonomy, the parties should avoid the controversy and designate the substantive dispositions of the law instead of the law of the state, in order to avoid the geographical and personal limitations to the application of dispositions of the law or statute that they wish to govern them.

### *7. Effects of the matrimonial regime on third persons*

As a general rule, the law so determined applies both to the relations between spouses as well as to third parties, even though they have no knowledge that one or both of the spouses with whom they are dealing is, or are, governed by a foreign matrimonial regime.[46] In the absence of a designation of applicable law, however, a court could under art. 3082 C.C.Q. decide that with respect to the particular relationship involving the third party and one or both of the spouses, another law should apply. This could be the case where, for example, a transaction was concluded between a

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and distributors applied to the parties who had selected California Law to govern their contract. The Montana Court took into account the geographical limitations under the California Statute and applied the common law in California, in lieu of the statute, as the distributor could not meet the conditions for the statute to apply.

46. This is the rule under art. 9 of the Hague Convention of March 14, 1978 on the Law Applicable to Matrimonial Regimes, as adopted by the Thirteenth Session in October 1976, published on the internet at: http://www.hcch.net/e/conventions/text25e.html.

third party in State A where the spouses and the third party are now domiciled. However, to implement such a partial *depeçage* there should be, in addition to good faith, a preponderance of factors which dictate shifting to a law that was contemplated by the third party. This possibility, albeit remote, exists in practice since there is no obligation imposed upon spouses to publish a notice of their matrimonial regime. The only requirement is that there be a notice of the matrimonial regime or change of a regime (arts. 441, 442 C.C.Q.) published at the request of a notary receiving a marriage contract in which the parties have adopted or modified their matrimonial regime.

## C. Scope of the law applicable to the matrimonial regime

### *1. In General*

In Quebec private international law, as in the laws of most if not all civil law jurisdictions, a broad scope has traditionally been given to the law governing matrimonial regimes[47] including the following issues and questions:

– The conditions for establishing a matrimonial regime (e.g., marriage, civil union);

– The composition of the patrimony and characterization of assets;

– The organization of the rights, powers and obligations of spouses under the various regimes (e.g. separation as to property, partnership of acquests, community of property or equivalent institutions);

– The opposability of the regime to third parties, and requirements of publicity and sanctions related to the requirements of publication;

– The right of a spouse to have an act of the other spouse annulled, where he or she has exceeded the powers granted by the matrimonial regime;

47. J. TALPIS, "Les régimes matrimoniaux en droit international privé québécois", (1974) *C.P. du N.* 225 (hereinafter "Les régimes matrimoniaux").

– Whether there exist any property rights or claims which one spouse may derive against the other spouse as a result of the acquisition by either spouse of property prior to or during their marriage;

– Whether the property rights or claims arise as a matter of law or whether they depend upon judicial discretion or both;

– The causes of dissolution of the regime (e.g., death, modification of regime, judgment of divorce, separation as to bed and board, nullity of the marriage, prolonged absence of a spouse);

– Whether the right to obtain a division of assets or to make a claim may be made on the dissolution of the marriage by death and if so at whether it is transmissible in favour of the heirs of the deceased spouse;

– The moment in time when the effects of the dissolution of the regime are to be determined (immediate or retroactive to the date when the couple ceased to live together)[48];

– The rules governing the liquidation of the regime, the consequence of the misappropriation or concealment of assets, partition, its incidents, including the valuation of property and its effects;

– The validity and the enforceability of a conventional renunciation of a division of assets prior to the dissolution of the regime.

### *2. Partition or sharing of assets*

Prior to the mid-eighties, when Quebec courts were confronted with traditional "regimes" under a foreign law such as a community of property, partnership of acquests or separation as to property, application of the matrimonial property law was relatively simple. For instance, when the common law jurisdictions did not provide for any rights of spouses to a share in the assets of the other upon divorce, they were considered to be "separate as to

48. In G. GOLDSTEIN and E. GROFFIER, *Droit International privé*, Vol. II, *supra*, note 25 at 927, the authors state as follows: "Dans le cas de l'article 466 C.C.Q. si les conjoints peuvent demander au tribunal que les effets de la dissolution du régime de la société d'acquêts remontent à la date de la cessation de la vie commune, on cherche à éviter certaines conséquences patrimoniales néfastes à l'un d'entre eux, rendues possibles par la séparation de fait. Il s'agit donc d'un intérêt de fond, lié au régime matrimonial et non d'une incidence procédurale."

property," as under Quebec's conventional separation as to property regime.

However, once the common law jurisdictions introduced equitable redistribution and eliminated the functionally equivalent separation as to property regime, Quebec courts began to be confronted with an increasing number of requests by spouses to redistribute assets in an equitable manner pursuant to the laws of an applicable common law jurisdiction,[49] *qua* regime, even though the concept of "matrimonial regime" was, and still is, officially unknown in the common law and the concept of equitable redistribution is officially unknown in Quebec law.

Similar problems have arisen since 1990, when Quebec courts began to encounter an increasing number of requests to apply the imperative family patrimony rules of Quebec law to spouses married under a foreign matrimonial regime.

In my opinion, conflicts of law arising either from equitable redistribution laws in a common law jurisdiction or from equitable partition of certain assets such as the family patrimony assets in Quebec, should be governed by the law applicable to the "matrimonial regime." The following paragraphs will take a closer look at these questions, first by examining each separately, then by exploring whether they both may apply.

*(a) Conflicts of law arising from equitable redistribution regimes*

Back in the mid-seventies, Professor Waters[50] and I[51] argued that from an international perspective, judicial discretion to redistribute assets of spouses is an integral part of the matrimonial regime of a foreign common law system. Nevertheless, in the early cases, the courts[52] refused to exercise the discretion under the *lex causae,* either by characterizing judicial discretion as "procedural" or by refusing to give effect to retroactive changes in the foreign matrimonial regime (where the spouses had established their domicile elsewhere at the time the new law empowering a

49. *Charpentier* v. *Smith-Doiron*, [1980] C.S. 84; *Palmer* v. *Mulligan*, *supra*, note 24.
50. D. WATERS, "Matrimonial Property Entitlements and the Quebec Conflicts of Law", (1976) 22 *McGill L.J.* 315, at 320.
51. J. TALPIS, "Les régimes matrimoniaux", *supra*, note 47 at 242.
52. *Charpentier* v. *Smith-Doiron*, *supra*, note 49.

court to exercise judicial discretion to redistribute assets came into force). This is what occurred in *Palmer* v. *Mulligan*,[53] where the spouses were married under the functionally equivalent regime of separation as to property pursuant to the laws of Saskatchewan, their domicile at the time of marriage. After the spouses acquired a Quebec domicile, the Saskatchewan law was modified allowing the court under the *Matrimonial Property Act* to redistribute assets of the spouses on divorce. Although the Quebec Court of Appeal refused to apply the new legislation because the spouses were no longer domiciled in Saskatchewan at the time of the coming into force of the new Act, in a seminal *obiter dicta*, the Honourable Justice Louis LeBel (presently of the Supreme Court of Canada) left no doubt as to how such a question should be characterized:

> Une législation comme le Matrimonial Property Act intervient à la fois en cas de dissolution judiciaire (articles 21 et 22) et de décès (article 30). Elle permet une intervention judiciaire dans le régime légal ou conventionnel des parties. Elles autorisent le juge à modifier, à l'intérieur de certaines règles, la répartition des biens entre les conjoints, comme par exemple de partager le domicile conjugal entre les époux.
>
> Le régime matrimonial devient alors un ensemble de règles juridiques complexes qui fait place à l'intervention d'une discrétion judiciaire encadrée par les dispositions législatives pertinentes. Dans l'analyse de la notion de régime matrimonial on ne peut faire abstraction de cette possibilité d'intervention judiciaire qui en devient une des composantes essentielles.
>
> La notion de régime matrimonial, en raison de l'évolution législative, comprend désormais une possibilité d'intervention judiciaire pour modifier la répartition des biens des conjoints lors de la dissolution du mariage. Dans la mesure où l'on applique la législation étrangère ou celle d'une autre province, on doit tenir compte de cette législation comme partie du régime matrimonial.[54]

The jurisprudence following *Palmer* v. *Mulligan* expanded this already large scope matters to be governed by the category of matrimonial regimes.[55]

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53. *Supra*, note 24.
54. *Ibid.*, note 24 at 254.
55. For instance, in *Droit de la famille –269* , J.E. 86-194 (C.S.), Savoie J. characterized a constructive trust as forming part of the matrimonial regime. See also: J. GOODMAN, "La fiducie par interprétation fait-elle partie du régime matrimonial?", (1986) 46 *R. du B.* 488; *Droit de la famille –389* , [1987] R.J.Q. 1852 (C.S.); *Picard* v. *Solange Chinien*, [1989] C.S. 141.

Once the new Code came into force in 1994 and the legislator adopted a conflict of law rule in art. 3089 C.C.Q. governing effects of marriage, it remained to be seen whether the characterization of equitable redistribution as matrimonial regime would still be retained.

Two recent cases, both rendered by the Quebec Superior Court in 2001, have dealt with the issue: *C.B.* v. *H.O.*,[56] decided by the Honourable Justice John Gomery and *H. (J.S.)* v. *F. (B.B.)*[57] decided by the Honourable Justice Marie-Christine Laberge. Both Justice Gomery in *C.B.* v. *H.O.*[58] and Justice Laberge in *H. (J.S.)* v. *F. (B.B.)*[59] affirm that the principle established by Mr. Justice LeBel in *Palmer* v. *Mulligan* is still valid, from which it follows that equitable redistribution laws in a common law jurisdiction must be part and parcel of a foreign matrimonial regime under Quebec private international law.[60]

In *C.B.* v. *H.O.*, since the court accepted the parties' admission that the legal regime in England was separation as to property (which it was before 1973), not as it is now under the *Matrimonial Causes Act*, the court did not have to decide whether or not to apply the equitable redistribution rules under the Act.

In *H. (J.S.)* v. *F. (B.B.)*, having determined that the law governing the matrimonial regime of the parties was that in force under the laws of Indiana, the court accepted the proof of the expert witness that it was the equitable redistribution law in force in Indiana that constituted their matrimonial regime, even though the institution of "matrimonial regime" is unknown under that law:

> En vertu de la loi de l'Indiana qui régit le régime matrimonial des parties, le tribunal devra diviser les biens qui ont été acquis avant la séparation des parties.[61]

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56. [2001] R.D.F. 293 (C.S.).
57. *Supra*, note 13.
58. *Supra*, note 56, at 26, 27.
59. *Supra*, note 13, para. 139 at 1277. Later in the decision, Laberge J. states "La décision de la cour d'appel dans *Palmer* c. *Mulligan* reste donc d'actualité en droit international privé avec les adaptations nécessaires que l'adoption du patrimoine familial et sa catégorisation dans les effets du mariage imposent." *Ibid.* at para. 150.
60. Although the Courts in both *C.B.* v. *H.O.* and *H. (J.S.)* v. *F. (B.B.)* were of the view that the family patrimony rules applied to the spouses having their domicile in Quebec.
61. *Supra*, note 13, para. 219 at 1285.

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> La loi de l'Indiana impose de partager « in a just and reasonable manner ». Il y a présomption que le partage moitié-moitié sera juste et raisonnable. Cette présomption peut toutefois être repoussée notamment par la preuve de la dilapidation des biens.[62]

*C.B.* v. *H.O.* was heard on Appeal[63] and the judgment was rendered subsequent to the Superior Court decision in *H. (J.S.)* v. *F. (B.B.)*. In *obiter dicta*, André Brossard J.[64] expressed the opinion that since art. 3089 C.C.Q. aims precisely at, "les effets, droits et obligations qui résultent du seul fait du mariage, indépendamment de la nature du régime matrimonial," and that these effects, rights and obligations include, "entre autres, au Québec, le patrimoine familial, la prestation compensatoire, les obligations alimentaires, [et] la somme globale,"[65] *Palmer* v. *Mulligan* should no longer be applied. It followed, according to Brossard J., that the equitable redistribution rules have nothing to do with matrimonial regime and any similar rules must be governed by the conflict rule relating to effects of marriage.

While Brossard J.'s views remain *obiter dicta* since no proof was made of the equitable redistribution law in England, with respect his opinion is not in conformity with a proper characterization of the issue from a cosmopolitan perspective requisite under the traditional method in force in Quebec. Should this doctrine be followed, and I hope it will not, Quebec law will have reincarnated the legend of separation as to property as the legal regime in the common law jurisdictions simply because such jurisdictions choose to deal with division of assets differently than Quebec domestic law.

It is useful at this point to comment on another aspect of this case, one which has consequences reaching far beyond the characterization of equitable redistribution laws.

*C.B.* v. *H.O.* involved English law, which the parties admitted to be what everyone knew it was not, a legal regime of separation as to property. Neither party chose to make proof of the

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62. *Ibid.*, para. 221 at 1285.
63. *H.O.* v. *C.B.*, [2001] R.D.F. 692 (C.A.), Brossard, J.A. for the Court, reversing in part the judgment at first instance.
64. *Ibid.*
65. *Ibid.*, at para. 62.

equitable redistribution rules in English law. Since Gomery J. knew very well what constituted the true state of English law,[66] he could have required the parties to prove English law as it is, not as it was. Alternatively, he could have taken judicial notice of the law since foreign law was alleged (art. 2809 C.C.Q.). Refusing to endorse the "conspiracy of silence" or the ignorance of the lawyers, however, Gomery J. took the position that no proof of the foreign law had been made whereupon he applied the legal regime in Quebec of partnership of acquests under Quebec law in lieu thereof under art. 2809 C.C.Q.

The Court of Appeal took Gomery J.'s approach in *C.B.* v. *H.O.*[67] to task and overruled him on this point,[68] holding that, in essence, the parties are masters of the case, that foreign law is a fact, and if admitted, it is proven. To make matters worse, Brossard J.A. took the view that Gomery J. should have applied the civil law equivalent of the foreign law of separation as to property, which no longer exists, because that was what was admitted by the parties as constituting the foreign law.

As one can see, the case raises an important issue on proof of foreign law. The Court of Appeal's decision seems to stand for the proposition that foreign law is a fact because it is proven as a fact. If the parties agree that the regime under law of England is one of a separation as to property, this admission constitutes proof of foreign law, which must be applied by the Court. Gomery J. was obviously uncomfortable with this view and with the admission by the parties of what is clearly an "incorrect" statement of the foreign law. However, to be consistent with this view, Gomery J. could have taken the option suggested above instead of simply applying a partnership of acquests.

Be that as it may, the Court of Appeal's decision stands for the proposition that foreign law can be proven as a fact, is a fact, and if admitted, constitutes proof of foreign law even if it is clearly

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66. "Most common law jurisdictions have adopted some sort of legislation dealing with what is usually described as 'matrimonial property' and its division between the spouses in the event of marriage breakdown, but the court does not know the details of such legislation in effect in England, now or at the time the parties were married, nor does it know when such legislation was adopted or how it has been interpreted by English Courts." Gomery J., *C.B.* v. *H.O.*, *supra*, note 56, at 23, 24.
67. *Supra*, note 56.
68. *Supra*, note 63.

an incorrect statement of the law. If parties can ignore foreign law by not pleading it, they can admit an incorrect content thereof and this constitutes proof thereof. This surely does not correspond to the legislator's intent in adopting art. 2809 C.C.Q. Under Quebec law, foreign law is not just a fact to be proven, but rather a mixture of law and fact, and admission of foreign law should not constitute proof of the foreign law.

The preceding diversion on proof of foreign law does not deny the fact that, despite the *obiter dicta* of Brossard J.A. in *H.O.* v. *C.B.*, *Palmer* v. *Mulligan* is still good law, at least with respect to equitable redistribution. Equitable redistribution laws are part of the law applicable to a matrimonial regime. They are substantive rules even though they involve a court's discretion, and a Quebec judge should exercise this discretion as would the judge of the *lex causae*.

While this is an encouraging development, courts applying the foreign equitable redistribution rules might have to take into account criteria which under its own conflict rules are governed by another law. For example, when applying the equitable redistribution rules, *qua* regime, courts should take into account the needs and means of the spouses (alimentary support) as this factor is often included amongst other criteria in equitable redistribution laws. Where a claim is also made for support, and where this is governed by another law, for instance, the *lex fori*, the court in determining should take into account what it has decided in applying the law governing the regime. In any event, this last approach constitutes the usual practice in Quebec.

Although Quebec courts have not yet been confronted with the need to determine whether a foreign order equitably redistributing assets is a judgment as to "matrimonial property" or as to "support," such a problem was submitted to the Court of Justice of the European Communities in 1997 in *Boogaard* v. *Laumen*.[69] In *Boogaard,* the European Court of Justice was called upon to determine whether a decision of the High Court of England of July 25, 1990, which ordered the ex-husband to pay a global sum to his ex-wife was of an alimentary nature, governed by the *Brussels-*

69. Cour de justice des communautés européennes, le 27 février 1997 (hereinafter *Boogaard*). See also: Comment, G. DROZ, (1998) 87 *Rev. crit. drt. int. priv.* 466.

*Lugano Conventions*[70] or whether it was a matter of matrimonial regimes, excluded as such from the Convention. Acknowledging that an English court has the discretion to determine alimentary obligations as well as rights under a matrimonial regime, the court indicated that the judge must clearly distinguish between the aspects of the decision relating to each matter. According to the Court, where the sums given are to ensure the needs and support of a spouse considering the means of the other party, the decision has an alimentary character. Where, on the other hand, the sum awarded simply concerns the partition of assets, the decision concerns matrimonial regimes. Based on this rather simplistic ground for making the distinction, the court decided that the English decision was alimentary in nature. In my opinion, by ordering the husband to pay to his ex-wife the enormous sum of £875,000, in part by transferring to her a valuable painting and immoveable property, the Court essentially ignored the contractual regime of separation as to property and redistributed the assets by means of a questionable characterization.

While the *Boogaard* decision seems problematic, it illustrates an unfortunate trend whereby courts, under the guise of "functional" characterization, disregard the classical, method of characterization according to the "nature"of the legal question, when they anticipate that they will not otherwise be pleased with the result.

*(b) Conflicts of law arising from Quebec's family patrimony rules*

In light of the traditionally large scope given to the rule on "matrimonial regimes" in Quebec private international law, as reaffirmed by the Court of Appeal in *Palmer* and subsequent decisions, one would have thought that Quebec jurists and courts would characterize conflicts of law arising from the constitution and partition of the family patrimony as matters of matrimonial regime. To this day, however, doctrine remains divided as to the basis for the application of the rules, although practitioners and courts now favour application of the rules to the extent that the conflict rule concerning "effects of marriage" (art. 3089 C.C.Q.) attributes legislative competence to Quebec law (*infra*).

70. Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, Brussels 27 September 1968, Lugano 16 September 1988, available on the internet at http://europa.eu.int/eur-lex/en/lif/reg/en_register_0120.html documents 468A0927(01) and 488A0592.

Currently, there are two approaches. The first consists of identifying the rules as being of necessary application (art. 3076 C.C.Q.). While defensible given the socio-economic interests sought to be advanced by the rules, this method is generally rejected in doctrine[71] and more recently in the jurisprudence. In *G.B.* c. *C.C.*,[72] the Quebec Court of Appeal held that even though the family patrimony rules are imperative and of public order, they do not meet the standard of a vital interest, i.e., that all couples in Quebec live juridically under the veil of the family patrimony.

The other approach is the traditional method, which requires characterizing the legal question raised by the potential application of the family patrimony rules. Two schools of thought are advanced and they concern either "matrimonial regime" or "effects of marriage." While the former submits all aspects of sharing or redistribution of some or all assets of the spouses to the law governing the matrimonial regime, the latter, pursuant to art. 3089 C.C.Q., requires application of the rules to the extent Quebec law is applicable under the cascade of criteria therein set forth.

The thesis favoring the "effects" theory looks principally to the text of art. 3089 C.C.Q. which mirrors the domestic characterization, the commentary of the Minister of Justice,[73] the discussions in the parliamentary commissions,[74] the social policy upon which the institution of family patrimony is founded, the location of the domestic rules in the Code, the imperative nature of the rules and the resort to a "functional" basis for characterization which does not take into account the nature of the legal question.[75]

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71. For a discussion of this option see J. TALPIS, "Champ d'application international des règles sur le partage du patrimoine familial", in *Le partage du patrimoine familial et ses conséquences juridiques* (Cowansville: Éditions Yvon Blais, 1990) at 19 (hereinafter "Champ d'application"); J. TALPIS, "Quelques réflexions sur-le-champ d'application internationale de la loi favorisant l'égalité économique des époux", (1989) 2 *C.P. du N.* 134 at 157 (hereinafter "Quelques réflexions sur-le-champ d'application"); G. GOLDSTEIN and E. GROFFIER, *Droit international privé*, Vol. II, *supra*, note 25 at 111.
72. [2001] R.F.Q. 1435 (C.A.) at para. 30.
73. Bill 125, C.C.Q. Detailed comments on the draft, Book Ten of Private International Law, arts. 3053, 3144 (first draft).
74. *Journal des Débats*, Commissions parlementaires, Sous-commission des institutions, 34e Législature, première session, 28 novembre, 1991, at 1094.
75. The following sources support the "effects" theory: J.P. SENECAL, *Le partage du Patrimoine familial et les autres réformes du projet de loi 146* (Montréal: Wilson & Lafleur, 1989) at 13, 27; E. GROFFIER, *La réforme du droit international privé québécois: supplément au Précis de droit international privé québécois*,

The "regime" thesis, of which I am probably the principal proponent, insists upon the need to characterize conflicts from an international perspective and in accordance with the true "nature" of the legal question, which essentially is a matter of division of certain assets. It rejects the "functional" characterization of the family patrimony issue as an effect of marriage as nothing short of an escape device, or gimmick, to encourage a healthy homeward trend (as if the matrimonial regime was not an effect of marriage). As for the argument concerning the social goal of the legislation, this is an issue more correctly connected with the identification of the rules as laws of necessary application. With respect to the imperative nature of the rules, there are many jurisdictions which have utilized imperative matrimonial regimes in the past and there exist a few countries which still follow this approach today (e.g. Chile, Argentina). Although the text of art. 3089 C.C.Q. and the Parliamentary debates do not favour this doctrine, I submit that it is still an open question.[76] Private international law scholars in Quebec and abroad have also defended this thesis.[77] As Professor Ernest Caparros concludes in a recently published seminal article:

> Ainsi, en accord avec la qualification proposée par les professeurs Burman, Pineau, Talpis et Glenn, et puisque le patrimoine familial

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4th ed. (Cowansville: Éditions Yvon Blais, 1993) at 67, 68; F. SABOURIN, *Les effets patrimoniaux du mariage en droit international privé québécois* (Cowansville: Éditions Yvon Blais, 1997) at 330; A. POPOVICI and M. PARIZEAU-POPOVICI, *Le Patrimoine familial* (Montréal: Wilson & Lafleur, 1989) at 19; M.D. CASTELLI et E.-O. DALLARD, *Le nouveau droit de la famille: projet de Code civil du Québec et Loi sur le divorce*, 3rd ed. (Sainte-Foy: Les Presses de l'Université Laval, 1993) at 94; C. EMMANUELLI, *Droit international privé québécois* (Montreal: Wilson & Lafleur, 2001) at 238, no. 459; and P. CIOTOLA, "Le Patrimoine familial et diverses mesures destinées à favoriser l'égalité économique des époux", (1989) 2 *C.P. du N.* at nos. 57, 58.

76. For publications in which I have argued in favour of this thesis: J. TALPIS, "Champ d'application", *supra*, note 71; J. TALPIS, "Quelques réflexions sur-le-champ d'application", *supra*, note 71; J. TALPIS, "La planification successorale dans le nouveau droit international privé québécois", (1995) 97 *R. du N.* 260 à 263; J. TALPIS and J.-G. CASTEL, "Interprétation des règles du droit international privé", *supra*, note 40; J. TALPIS, "International and Transnational Estate Planning; a View from the Civil Law and in Particular Quebec Law", (1990-1991) 19 *E.T.J.* 89, at 125; J. TALPIS and G. GOLDSTEIN, "Le droit international privé après l'affaire *Palmer* c. *Mulligan*", *supra*, note 25 at 70; J. TALPIS and G. GOLDSTEIN, "Analyse critique de l'avant projet de la loi du Québec en droit international privé", *supra*, note 21.

77. M. McCAULEY, "La planification financière et successorale depuis l'entrée en vigueur des règles sur le patrimoine familial", in *Le partage du patrimoine familial et ses conséquences juridiques* (Cowansville: Éditions Yvon Blais, 1990 at 65; D. BURMAN and J. PINEAU, *Le patrimoine familial* (Montréal: Thémis,

> est un régime matrimonial, il sera plutôt régi par l'article 3123 puisque: "Le régime matrimonial des époux qui se sont mariés sans passer de conventions matrimoniales est régi par la loi de leur domicile au moment du mariage". En effet, le texte de l'article 3089 ne vise, parmi les effets du mariage, que ceux qui ne relèvent pas du régime matrimonial. La confusion vient peut-être du fait que les régimes matrimoniaux, tout régime matrimonial, est aussi un effet du mariage, car il n'existe qu'entre gens mariés et normalement à compter du mariage, mais on a toujours distingué entre les "effets du mariage", *stricto sensu*, comme ils viennent d'être décrits (qui eux sont assujettis à la règle de conflit de l'article 3089), et le régime matrimonial qui vise le fonctionnement patrimonial de la famille. C'est dans cette catégorie que doit se situer le patrimoine familial et c'est alors l'article 3123 qui établit la règle de conflit applicable.[78]

Furthermore, there is an issue conveniently ignored by the proponents of the "effects" theory, which casts doubts upon its utility. When the law governing the "effects" of marriage changes, for instance, where the spouses acquire a new domicile, a dynamic conflict (conflit mobile) will often emerge. Successive laws then apply to the "patrimonial effects of the marriage", such as family patrimony, equitable redistribution and similar rules, since according to this doctrine they are not "effects" of the matrimonial regime. It simply does not follow that this dynamic conflict should be resolved automatically in favour of the *lex causae*, for instance, the law of the domicile of the spouses, either at the time where the effect is invoked[79] or at the time when the effects are *en cause*.[80] As such, nothing in the Code leads to the conclusion that, where Quebec law is applicable pursuant to art. 3089 C.C.Q. (for

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1991), no. 2; G. DROZ, "Compte-rendu de la thèse de F. Sabourin", (1998) *Revue crit. de droit international privé*, at 213; P. GLENN, "Droit International privé", in *La Réforme du Code Civil*, vol. 3, no. 21, adding that in certain situations, art. 3082 C.C.Q. could serve the role of an escape device to shift from the law applicable *qua* "regime", at 693. E. CAPARROS, "La nature juridique commune du patrimoine familial et de la société d'acquêts", (2000) 30 *R.G.D.* 1.

78. E. CAPARROS, *ibid.*, note 77 at 23-24. An additional argument supports the "regime" thesis. The Quebec Court of Appeal, in a thoroughly reasoned decision in *Lamarche* v. *Olé-Widholm*, [2002] R.J.Q. 1173, [2002] R.D.F. 219, has now followed the opinion of most of the Quebec doctrine and jurisprudence to the effect that the rights to a share in the family patrimony are transmissible on death. Being transmissible, its effects are not limited to living spouses, which reinforces the idea that even in domestic law the family patrimony is a mini-regime and that in an international situation the regime thesis must prevail.

79. G. GOLDSTEIN and E. GROFFIER, *Droit international privé*, Vol. II, *supra*, note 25 at 100.

80. J. TALPIS and J.-G. CASTEL, *supra*, note 40, no. 170.

instance, where the spouses had their last domicile in Quebec), the only "effects" of the marriage applicable to spouses are those to be found in the Code and that they apply retroactively to the date of marriage. While in exceptional circumstances, pursuant to article 3082 of the Code a court could resolve the problem in this way I agree with Professors Goldstein and Groffier that a distributive application of successive laws is more equitable and responds best to the interests of the parties.[81]

As such, under the "effects" theory, the system of partial mutability applies, by virtue of which the law applicable to the "effects" at the time of marriage under article 3089 C.C.Q. applies to the effects until the change in the localization of the connecting factor, for instance domicile, occurs. Subsequently the "effects" under the law of their newly acquired domicile apply. Property acquired by the spouses while domiciled in a certain jurisdiction would be subject to partition pursuant to any family patrimony or equitable redistribution type laws in force in that state. This is referred to as the "wagon" solution:[82] Spouses carry with them as many laws which would have governed the effects of their marriage. For each of the corresponding periods, liquidation of the "patrimonial effects" takes place according to different principles. Trying to ensure a cohesive solution is a complex operation, but one which flows necessarily from this doctrine!

This situation was present in *H. (J.S.)* v. *F. (B.B.)*.[83] The court in that case, however, circumvented the complexities involved in applying successive laws governing "effects" in the following way. First, it decided that notwithstanding the subsequent changes of residence, the parties had not changed their domicile in Indiana from the date they were married in 1981 until they acquired a Quebec domicile 17 years later. Having determined that the spouses had established a domicile in Quebec in 1998, the problem of the application of successive laws was resolved by deciding that the only "effects" of marriage to be considered were those of the last domicile. With respect, I think the court erred: while I disagree with the characterization of the family patrimony

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81. G. GOLDSTEIN and E. GROFFIER, *Droit international privé*, Vol. II, *supra*, note 25 at 110, para. 109.
82. A. VON OVERBECK "Le Conflit mobile et le droit transitoire en matière de régimes matrimoniaux selon la loi fédérale sur le droit international privé", Semaine juridique, Genève, 1990, at 269.
83. *Supra*, note 13.

as an effect of marriage, if one ascribes to that position, then one must apply the successive laws governing "effects." As a result of the court's determination of the domiciles of the spouses, the patrimonial "effects" under Indiana law as distinct from "regime" effects should have been taken into account, as well as those governed by Quebec law.

In spite of my continued plea for acceptance of the "regime" thesis, it cannot be disputed that Quebec courts have in most reported cases applied the family patrimony rules to spouses who were domiciled in Quebec at the time of the marriage breakdown, usually giving lip-service to the "effects" theory. In some cases, it made a difference,[84] while in others the question was never argued,[85] or the parties admitted that the rules applied,[86] or the law applicable to the regime also coincided with the law applicable to the effects of the marriage.[87] In any event, there are few cases endorsing the "regime theory."[88]

*(c) Should, or could, both equitable redistribution and family patrimony rules apply?*

On the occasion of a divorce in Quebec, what can parties expect when the foreign law applicable to the matrimonial regime provides for equitable redistribution and they are domiciled in Quebec? For example, if the parties were domiciled in Florida at the time of their marriage and in Quebec at the time of their divorce, should a Quebec court apply both the Florida law on equitable redistribution and the Quebec family patrimony rules?

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84. For example*: G.B.* v. *C.C.*, [2001] R.J.Q. 1435 (C.A.); *Droit de la famille –2210* , [1995] R.D.F. 569 (C.S.), [1995] R.J.Q. 1513; *Droit de la famille –3271* (28 January 1999), Saint-François, 450-12-018179-970, Toth J. In *H. (J.S.)* v. *F. (B.B.)*, *supra*, note 13, and in *C.B.* v. *H.O.*, *supra*, note 56, the court adopts the "effects" thesis and applies the family patrimony to spouses domiciled in Quebec at the dissolution of their marriage, although the marriage itself was governed by a foreign matrimonial regime; however, the rationale in both decisions is mitigated by the court recognizing that the equitable redistribution rules of a foreign matrimonial regime still apply.
85. *Droit de la famille –2054, supra* , note 5, where in an *ex parte* decision, Benard J. applies the family patrimony rules to Algerian spouses who were domiciled in and lived in Algeria for over 25 years of their married life, and where the wife had later established her domicile in Quebec.
86. For example see *C.B.* v. *H.O.*, [2000] R.D.F. 293 (s.c.), *supra*, note 56.
87. *Droit de la famille –1636* , [1992] R.D.F. 600, J.E. 92-1273 (C.S.); *Droit de la famile –2451* , [1996] R.D.F. 509, J.E. 96-1409 (C.S.); *B.* v. *D.*, REJB 2002-31331 (C.A.); *L.P.* v. *F.B.*, [2003] R.D.F. 121 (C.S.), *supra*, note 6.
88. *Droit de la famille – 972* , [1991] R.J.Q. 908 (C.A.), Baudouin, J.C.A., *obiter dicta*, and *Davenport* v. *Dumas*, *supra*, note 4.

Using the doctrine set forth by the Honourable Justice Brossard of the Court of Appeal,[89] the legal matrimonial regime in Florida would be interpreted as what everyone knows it is not – a separation as to property. Since equitable redistribution rules and family patrimony rules are effects of marriage, it follows that property acquired by either or both of the spouses while they were domiciled in Florida will be governed by Florida's equitable redistribution law and by Quebec's family patrimony rules with respect to property acquired from the time they established their domicile in Quebec. Furthermore, the right to opt out of any scheme of partition under either the laws of Florida or Quebec, with respect to assets acquired while domiciled in such jurisdiction, will be determined by the law of that jurisdiction. For practitioners and courts alike, this solution is a legal nightmare.

Another possibility would be for the court to apply the equitable redistribution law, of Florida, *qua* regime and then for assets acquired while domiciled in Quebec, the family property rules, *qua* effects. This is precisely the position that some judges are now taking. Both Gomery J. in *C.B.* v. *H.O.*, and Laberge J. in *H. (J.S.)* v. *F. (B.B.)* affirm that *Palmer* v. *Mulligan* is still good law, and adopt a broad interpretation of matrimonial regime. Nonetheless, they still apply the Quebec family patrimony rules where the spouses were domiciled in Quebec at the time of the proceedings. In essence, they are mirroring the domestic law in an international context. The equitable rules under the regime and the Quebec on family patrimony rules can co-exist, even though governed by different systems of law.

According to Gomery J. in *C.B.* v. *H.O.*:

> If a person domiciled at the time of his or her marriage in Quebec is entitled to make claims based upon the matrimonial regime such as partnership of acquests, what is to prevent a person domiciled elsewhere at the time of marriage from making multiple claims in the same way?[90]

In *H. (J.S.)* v. *F. (B.B.)*, Laberge J. states:

> (154) Le régime de partage prévu dans une loi étrangère reste donc pour les personnes qu'elle vise un régime matrimonial. Mais les régimes matrimoniaux quels qu'ils soient ne sont plus immuables.

89. *Supra*, note 63.
90. *Supra*, note 56, at 302.

> (155) Lorsqu'elles deviennent domiciliées au Québec, leur régime matrimonial est modifié par les dispositions qui s'appliquent à tous les époux domiciliés au Québec et auxquelles les régimes matrimoniaux ne peuvent déroger.
>
> (156) L'établissement d'un domicile au Québec a donc pour conséquence d'assujettir des étrangers au patrimoine familial québécois quant au partage de certains biens faisant partie de leur régime matrimonial.[91]

Subject to the fact that, as discussed above, there is no authority in law or in principle for applying retrospectively the law of the domicile at the time of the proceedings for "effects," one must nevertheless compliment Justices Gomery and Laberge for their recognition that equitable redistribution or deferred sharing schemes are the functional equivalent of matrimonial regimes in the civil law as chief Justice Lebel had opined in 1985 in *Palmer* v. *Mulligan*. Be that as it may, from a theoretical point of view, it makes no sense whatsoever to follow *Palmer* v. *Mulligan* in adopting a broad international definition of matrimonial regimes and then proceed to apply Quebec's family patrimony rules resulting in the application of different laws to govern the same legal question-partition of assets of spouses. It also goes without saying that the application of multiple laws is a legal nightmare for practitioners both in the planning stage and when litigation occurs.

In my opinion, Laberge J. in *H. (J.S.)* v. *F. (B.B.)* appears to have stopped short of providing the correct solution when she states:

> On aurait pu, dans le présent cas, procéder tout simplement au partage suivant la loi de l'Indiana. En effet, en présumant équitable le partage de tous les biens par moitié en tenant compte de certains critères pondérateurs, la législation de l'Indiana satisfait aux objectifs du partage du patrimoine familial québécois. L'exercice aurait cependant peu de rigueur.[92]

With respect, the Honourable Justice Laberge should have done what she had suggested was possible and applied the equitable redistribution rules of Indiana, rather than Quebec's family patrimony rules, as the law governing the matrimonial regime.[93]

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91. *Supra*, [2001] R.J.Q. 1262, note 13, at 1279.
92. *Ibid*. at para. 180.
93. Assuming that it was correct to disregard the statutory limitation of the Indiana Act.

The laws of almost all common law jurisdictions now have equitable solutions with respect to the dissolution of a marriage. When one considers the two general purposes served by equitable redistribution schemes, there is clearly no need to impose family patrimony rules in an international situation for parties who have moved to Quebec. More generally, there is no need to have different laws governing the partition of "matrimonial property."

### D. Using marriage contracts to prevent disputes on division of marital property

Due to the continued support of the "effects" doctrine in whole or in part, it is next to impossible under Quebec law for spouses to determine in advance the law that will govern all of their financial rights and responsibilities toward one another in the event of a subsequent dissolution of their marriage. Even though it is possible to designate a law applicable to the regime, it is not currently possible to designate the law applicable to the effects of marriage. Nevertheless, the recent decision rendered by the Supreme Court of Canada in *Hartshorne* v. *Hartshorne*[94] is a step in the right direction, in supporting the thesis of this paper.

Where the parties have chosen a foreign law to govern their regime, by virtue of which the parties may renounce any partition or equitable redistribution, enforceability will depend upon the law applicable to these matters and public policy. Given the controversy in Quebec on this question, there is no guarantee that the choice of law and renunciation made pursuant thereto will be respected where the parties are domiciled in Quebec at the time of the dissolution of their marriage.

It is therefore important that legal counsel advise the parties of this uncertainty. In choosing a law under which the parties may opt out of any partition, the following clause may serve as a useful preface to the designation of applicable law.

> To the extent permitted by the law or laws applicable under the applicable conflict rule of law of any court of a State having jurisdiction over the parties, the parties by these presents expressly desig-

94. The recent Supreme Court of Canada decision in *Hartshorne* v. *Hartshorne*, (2004) SCC 22, reinforces the central role of party autonomy in planning for the dissolution of marriage. The decision is supportive of the author's thesis that all partitions of matrimonial property should be submitted to the law chosen expressly or implicitly by the spouses.

nate the internal law of the State of Texas to govern their matrimonial regime and the validity and interpretation of this contract.

The parties could also provide for alternative provisions should a court not respect their choices. To avoid disputes, the contract should respect the imperative conditions and stipulations required under any law which might be applicable given the intentions of the parties. Should one of the jurisdictions be a common law jurisdiction, the parties who wish to ensure effectiveness of the contract should, at the very least, obtain independent legal advice[95] and be as fully aware as possible of each other's financial situation.

Finally, problems are sometimes encountered in common law jurisdictions in connection with the enforcement of marriage contracts executed before latin-model notaries in civil law jurisdictions. Firstly, judges in common law systems usually refuse to acknowledge that the regime of separation as to property under a civil law system is the functional equivalent of a renunciation to a division of assets. Secondly, common law courts do not comprehend the role of the notary in civil law jurisdictions who can, and should, give independent legal advice to both parties. Parties domiciled in Quebec who plan to move to a common law jurisdiction should take certain measures to avoid these problems. The marriage contract should, for example, explain in detail the meaning of the chosen matrimonial regime according to the law of the jurisdiction concerned (e.g., what exactly is meant by the term "separation as to property" in the jurisdiction whose law is being followed). Furthermore, even though the document is received by

95. *Hartshorne* v. *Hartshorne*, *ibid*., reinforces the Court's refusal in recent years to tamper with marriage contracts. The Respondent wife had been given independent legal advice to the effect that a court would easily find the contract at issue unfair and that such contract would not stand up in court. Respondent's lawyer had strongly recommended that her client should not sign the agreement in its present form. In a 6 to 3 ruling, the Supreme Court granted the appeal, concluding that the future spouses knew what they were doing when they signed the deal. According to the Honourable Mr. Justice Bastarache, "...in a framework within which private parties are permitted to take personal responsibility for their financial well-being upon the dissolution of their marriage, courts should be reluctant to second guess their initiative and arrangement, particularly where independent legal advice has been given", *ibid*., at para. 67. Although this case originated in British Columbia, the underlying foundation supports the thesis presented in the present paper that the courts should endeavor to enforce that regime or set of rules which the parties understood, at the time of the marriage, would govern their matrimonial matters.

a Quebec notary who, by law, must explain the rights and obligations to both parties in an impartial manner, each party should also have obtained additional independent advice and a clause stipulating this requirement should be included in the contract.

## CHAPTER TWO: THE UNIFORM LAW CONFERENCE OF CANADA'S MODEL ACT ON UNIFORM JURISDICTION AND CHOICE OF LAW IN DOMESTIC PROPERTY PROCEEDINGS[96]

The goal behind the creation of the *Uniform Act* was laudable. In a detailed review and explanation of the proposed legislation, the British Columbia Law Institute captures well the spirit of the Act's intent in the following statement (quoted also at the outset of this paper):

> Family property law should be as simple and clear as possible. Ideally the division of assets should be governed by a simple body of legislation and the codes for choosing that legislation should be transparent and easy to understand.[97]

The formal purpose of the Act is stated in a preliminary comment in the draft:

> This legislation sets out uniform principles to decide (a) when a court has jurisdiction to hear a dispute that concerns domestic property, (b) when a court that has jurisdiction should decline it, and (c) the selection of the territory whose law is to govern the disputes. The legislation applies where the dispute involves more than one Canadian territory as well as where it involves Canadian and non-Canadian territories.

Unfortunately, the highly desirable goal of harmonization and simplification of rules which gave rise to the Act is not at all,

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96. At its annual meeting in 1997, the Uniform Law Conference of Canada, adopted a uniform Model Act setting out jurisdiction and choice of law rules for what is referred to as "domestic property proceedings." In that the Uniform Jurisdiction and Choice of Law Rules in Domestic Property Proceedings Act [hereinafter Uniform Act or, simply the Act] represents a legislative attempt to harmonize and simplify various rules relating to matrimonial property, a close and critical review of the key provisions of the Uniform Act is in order. The Uniform Act was published by the Uniform Law Conference of Canada in the proceedings of its 1997 Conference. The full text of the Act is provided on the Uniform Law Conference of Canada website at http://www.ulcc.ca/en/us/ (choose "Jurisdiction and Choice of Law in Domestic Property Proceedings").

97. *Supra*, note 1.

in my opinion, well-served by the final version of the *Uniform Act*. The primary purpose of this Chapter is to explain why this is so. Hence, after providing a brief outline of those provisions of the *Uniform Act* which are most relevant to the topic of the present paper, I will present a detailed critique of these provisions.

## A. The Uniform Act rules

### *1. Definitions and presumptions*

The Act sets forth various definitions and presumptions in section X.1 (1).

Firstly, it states that:

> "regime of community of property" means any regime of domestic property which is imposed by law and which
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> (a) determines the extent to which each spouse has rights in and over all or certain of the domestic property owned by the other spouse during the marriage, and
>
> (b) provides for the sharing of domestic property on the break up or termination of their marriage and includes a regime of partnership of acquests, but does not include
>
> (c) a regime of separate property, or
>
> (d) a regime under which rights in or with respect to domestic property are deferred until, or after, the occurrence of an event signifying the break up or termination of the marriage.
>
> "domestic property" means real property or personal property wherever located owned by the plaintiff or defendant separately or as co-owners acquired by them before or during their marriage,
>
> "domestic property proceeding" means a proceeding brought in connection with an application for (a) a division of, (b) compensation in lieu of, or for foregoing, rights in, or (c) a declaration as to rights in domestic property,
>
> "marriage" includes any relationship involving cohabitation that is recognized under the law of the territory selected under the internal law of the territory selected under ss. X.6, X.7 or X8 that governs domestic property rights on the break up or termination of the relationship,

Section X.1 (2) stipulates that "parties do not have a common habitual residence in a territory while they live separate and apart in the territory."

### *2. Jurisdictional rules*

Sections X.2 to X.5 deal with jurisdiction and are patterned after the *Uniform Court Jurisdiction and Proceedings Transfer Act* (hereinafter *UCJPTA*).[98] The *UCJPTA* provides comprehensive rules for determining when the courts of a province or territory may take jurisdiction over a particular proceeding. They attempt to provide criteria which the courts should follow in order for the full faith and credit principle to apply in the Canadian context for international jurisdiction. Section X.3 deals with territorial competence rules and is based on *UCJPTA*, s. 3. Section X.5 is based on *UCJPTA*, s. 11, and restates the doctrine of *forum non conveniens*. Section X.9 incorporates the techniques routinely used by Canadian courts for arriving at a fair division of property when some of the domestic property is located outside Canada.

#### *(a) Territorial competence: definition and rules*

Section X.2 states that

> the territorial competence of the Court in a domestic property proceeding is to be determined solely by reference to this part.

And section X.3 states that,

> The Court has territorial competence in a domestic property proceeding that is brought against a defendant only if
>
> (a) the defendant has instigated another proceeding in the court to which the domestic property proceeding is a counterclaim;
>
> (b) during the course of the domestic property proceeding the defendant submits to the court's jurisdiction;
>
> (c) there is an agreement between the plaintiff and the defendant to the effect that the court has jurisdiction in the domestic property proceeding;

98. The full text of the Act is provided on the Uniform Law Conference of Canada website at http://www.ulcc.ca/en/us/ (choose "Court Jurisdiction and Proceedings Transfer Act").

(d) either the defendant or the plaintiff is habitually resident in [enacting province or territory] at the time of the commencement of the domestic property proceeding, or

(e) there is a real and substantial connection between [enacting province or territory] and the facts on which the domestic property proceeding against the defendant is based.

*(b) Discretion in the exercise of territorial competence*

As mentioned above, s. X.5 is patterned on the *UCJPTA* s. 11 and restates the doctrine of *forum non conveniens*.

> X.5 (1) After considering the interests of the parties to a domestic property proceeding and the ends of justice, the Court may decline to exercise its territorial competence in the domestic property proceeding on the ground that the court of another state is a more appropriate forum in which to try the domestic property proceeding.
>
> (2) The Court, in deciding the question of whether it or a court outside [enacting province or territory] is the more appropriate forum in which to try a domestic property proceeding, must consider the circumstances relevant to the domestic property proceeding, including
>
> (a) the comparative convenience and expense for the parties to the domestic property proceeding and for their witnesses, in litigating in the Court or in any alternative forum;
>
> (b) the law to be applied to issues in the domestic property proceeding;
>
> (c) the desirability of avoiding a multiplicity of legal proceedings;
>
> (d) the desirability of avoiding conflicting decisions in different courts;
>
> (e) the enforcement of an eventual judgment; and
>
> (f) the fair and efficient working of the Canadian legal system as a whole.

*(c) Property Located Outside Territory*

The Act in section X.9 allows the court to effectively deal with the situation where property is located outside its territory. It provides:

X.9 (1) A court with territorial competence to entertain a proceeding relating to domestic property may dispose of all issues relating to ownership and division of the domestic property.

(2) Where the court has territorial competence to entertain a proceeding relating to domestic property, some of which is located outside (enacting province or territory), the court may

(a) reapportion entitlement to domestic property within (enacting province or territory) to compensate for rights in domestic property located outside (enacting province or territory),

(b) order the party who has legal title to domestic property located outside (enacting province or territory) to pay compensation to the other party in lieu of division,

(c) make an order in connection with the domestic property located outside of (enacting province or territory) that is enforceable against the party that owns the domestic property, including an order preserving the domestic property, respecting possession of the domestic property or requiring the owner to convey or charge all or part of the owner's interest in it to the other party, or

(d) if the internal law of the territory in which the domestic property is located allows for the recognition and enforcement of an order for non-monetary relief made by a court of another territory, make an order for non-monetary relief.

### *3. Choice of law rules*

*(a) Contract*

Section X. 6 sets forth the only choice of law rule governing a marriage contract:

X.6 (1) If the plaintiff and defendant entered into a contract, either before the formation of, or during their marriage, that specifies how domestic property is to be divided in the event of the break up or termination of their marriage, their rights in domestic property are determined by the contract.

(2) The contract referred to in subsection (1) is enforceable subject to the internal law of the territory determined in accordance with section 8.

*(b) Absence of contract*

There are two separate conflict rules applicable in the absence of a contract.

(i) Marriage and Community of Property

Section X.7 sets forth the first conflict of laws rule under the heading "Marriage and Community of Property." It states:

> X.7 Subject to section X.6, if the internal law of the territory in which the plaintiff and defendant first had a common habitual residence during their marriage provides that some or all of their domestic property is held in a regime of community of property, then regardless of change of residence, their rights in the domestic property that is subject to the regime of community of property on the break up or termination of their marriage are determined by the internal law of that territory.

The rule is supposed to accommodate the conflict between the civil law policy of immutability, which looks to the beginning of the relationship and the common law policy of mutability which looks to the end of the relationship.

(ii) Choice of law Rules: Proper Law of the Marriage

Section X.8 states the second conflict of laws rule, under the heading "Choice of law Rules: Proper Law of the Marriage." It states:

> X.8 (1) Subject to sections 6 and 7, substantive rights of the plaintiff and defendant in a domestic property proceeding are determined by the internal law of the territory where the parties had their last common habitual residence.
>
> (2) If the territory selected by the application of subsection (1) is located outside Canada and is not the territory most closely associated with the marriage, the substantive rights of the plaintiff and defendant in a domestic property proceeding are determined by the internal law of the territory that is most closely connected with the marriage.
>
> (3) If there is no place where the parties had a common habitual residence, substantive rights of the plaintiff and defendant in a domestic property proceeding are determined by the internal law of the territory where the plaintiff has habitually resided.

As a result, absent a contract (section X.6) and a community property regime (section X.7) this section of the Act adopts the principle of the mutability of the matrimonial regime for all domestic property and *ipso facto* the family patrimony rules of

Quebec, if Quebec were to be the last common habitual residence of the spouses.

### B. Comments from the perspective of Quebec law

From the perspective of Quebec law, the Uniform Act contains some very positive elements, such as the expanded definition of marriage, which allows for the application of Quebec's civil union, as well as foreign institutions that would be characterized as such under its conflict of law rule (article 3190 C.C.Q).[99] Other useful aspects of the Act include its endorsement of the expression "regime" to describe the deferred sharing schemes in the common law provinces, submission by forum selection clause for matrimonial regimes, and the integration of the current techniques to ensure that the location of assets outside the enacting province or territory does not frustrate the objectives of the Act, to ensure a complete resolution of the issues. All of these elements are in line with the international character of the Code.

Notwithstanding these positive elements, however, there are numerous reasons why the Act cannot be said to be an improvement upon what is needed in Quebec.[100]

First, insofar as the Territorial Competence Rules are concerned, although s. X.3, paragraphs (a) and (d) correspond to Quebec law and are satisfactory and paragraphs (b) and (c) actually constitute an improvement on Quebec law since the latter does not provide for submission to jurisdiction, there is no respect for a forum selection clause which has the effect of choosing the courts of a foreign jurisdiction. In my opinion, this is a serious omission.[101] Additionally, even though the Quebec rules are based on a real and substantial connection with the forum, the notion's materialization in the Act (s. X.3 (e)), while acceptable in an interprovincial context as a constitutional imperative, is not pertinent in an international context in Quebec. The Supreme Court of Canada recently made this clear in *Spar Aerospace Ltd*. v. *American Mobile Satellite Corp*.[102]

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99. See G. GOLDSTEIN and J. TALPIS, "L'union civile boiteuse en droit international privé québécois", (2003) 82 *R. du B. can.* 1; (2003) *C.P. du N.* 301.
100. And in my opinion in the other Canadian Provinces and Territories as well.
101. See G. GOLDSTEIN and J. TALPIS, "Les perspectives en droit civil québécois de la réforme des règles relatives à l'effet des décisions étrangères au Canada", (1996) 75 *Can. Bar Rev*. 128, at 129.
102. [2002] 4 S.C.R. 205; (2002) SCC 78, LeBel J., hereinafter *Spar Aerospace*.

Concerning the Act's provisions relating to *forum non conveniens* (s. X.5), the provisions increase uncertainty, despite the inclusion of certain criteria indicated in the Act, and this is not favourable to the interests of the parties. A better solution would have been to exclude the doctrine in certain situations and, where it applies, to follow an exceptional *forum non conveniens* doctrine of the kind which has generally been followed by the Quebec courts since *Spar Aerospace*.[103]

Second, the Act proceeds on the basis of the understanding that all of these issues are only pertinent in the context of litigation. Terms such as "plaintiff" and "defendant" are employed throughout rather than neutral expressions such as "spouse" or "spouses."

Third, the "domestic property" giving rise to rights under the Act's flawed definition of community of property, which targets property owned by a spouse and, inter alia, immoveables acquired prior to marriage and partnership of acquests which is included in the regime of community of property (and which targets, inter alia, all property acquired before marriage) illustrates a complete lack of understanding and comprehension of both regimes in Quebec law.[104] Be that as it may, aside from the property affected, except for certain incidents of the Quebec partnership of acquests regime (e.g. necessity of consent of a spouse for the other to dispose of his or her acquests *inter vivos* by gratuitous title, art. 462 C.C.Q., that a conventional change of regime is also a triggering event for partition of the acquests), that which is described and defined in s. X.1(1)(d) as being excluded from the regime of partnership of acquests is, in essence, the Quebec regime of partnership of acquests. Since the Act provides for a separate rule, presumably to accommodate Quebec law, it could have simply provided that if the law of the first habitual residence is in Quebec, then in absence of a contract, that law applies.

Fourth, the Uniform Act attempts to address Quebec's interests by adopting in s. X.7 its policy of the permanence or immuta-

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103. *Ibid.* See also: J. TALPIS and S. KATH, "The Exceptional as Commonplace", *supra*, note 6.

104. This distortion of Quebec law is not diminished by the comment to the definitions section, which provides: "Once this Part is placed in the context of domestic property legislation of the enacting province or territory, which will have its own set of definitions, many of the definitions may be unnecessary or require fine tuning."

bility of the matrimonial regime and application of the law of the habitual residence at the beginning of the relationship, but only where the first common habitual residence is in the province of Quebec and domestic property is held under a regime of community as to property. In all other cases, the Act adopts in s. X.8 the principle of mutability, i.e., the law of the last habitual residence. In spite of my disagreement with Quebec's policy on immutability, it is certainly not limited to cases where the first habitual residence is in the province of Quebec. The permanence of the connection for matrimonial regimes is a bilateral, not unilateral, matter in these conflicts.

Fifth, s. X.8 (2) provides for the situation where the last habitual residence is located outside Canada, and is not the territory most closely associated with marriage, in which case the applicable law is that which is most closely associated with marriage. I see no reason to make separate rules depending upon whether the habitual residence is within or outside of Canada. If the place of the last habitual residence is pertinent, and I agree that it is, then why should it not be relevant when it is located outside of Canada?

Sixth, s. X.8 (3) concerns the situation in which the parties had never established a habitual residence, in which case the law of the last habitual residence of the plaintiff applies. In my opinion, this rule is unfair, leads to forum shopping, and is inferior to the rule in the Code (art. 3123 C.C.Q.).

Seventh, I also disagree with the definition that requires parties to be living under the same roof in the territory to have a common habitual residence therein. Choice of law is predicated on the closest connection of the spouses to the state, not to each other. As such, whether or not the parties live under the same roof should not be a pertinent consideration in determining the applicable law.[105]

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105. In the common law jurisdictions, the phrase "common habitual residence" has been interpreted to mean "the place where the spouses most recently lived together as husband and wife and participated together in everyday family life." (*Pershadsingh* v. *Pershadsingh* (1987), 9 R.F.L. (3d) 359, 361 (Ont. H.C.); *Adam* v. *Adam* (1994), 7 R.F.L. (4th) 63, 67 (Ont. Gen. Div.), confirmed on appeal (1996) 65 A.C.W.S. (3d) 756 (Ont. C.A.). This phrase is intended to reach cohabitation as well. Section X.1(2) of the Act confirms the same intent.

Eight, there is no provision permitting the parties to designate a law to govern their "matrimonial regime," i.e., the issues within the scope of the Act. This important tool for preventing disputes as to the applicable law and for ensuring predictability should have been included in the Act. Its omission is, in my opinion a serious flaw, especially given that the Act allows for a choice of court agreement, albeit only to the court of the province or territory seized of the matter (S.X.3.(c)). As a result, the conflict rules in each province or territory will determine not only the validity of the contract but the validity of a choice of law agreement to govern "the domestic property proceeding" or "matrimonial regime" and the applicable law in the absence of choice. To the extent that the law applicable to a contract allows for the division of domestic property, then pursuant to s. X.6 (2), enforceability of the contract will still be subject to the provisions of a law unknown to the parties when they enter into the contract, i.e., the law of the parties' last common habitual residence, which might allow a court to inquire into the fairness of the contract. Where Quebec law governs the contract, any agreement relating to the partition of the family patrimony assets which are "domestic property" will be null under the "regime" thesis and equally null, or unenforceable, under the Act or "effects" theory if the spouses had their last common habitual residence in Quebec.

Ninth, nothing in the Uniform Act addresses the problem, discussed above, of the spatially localized rules of a foreign designated "internal law." How will a court of one province deal with the geographic or other conditions found in another provincial or foreign law which must be met before it is deemed applicable?

Lastly and most significantly, as a result of the combined application of ss X.6, X.7 and X.8, the Uniform Act fails in its quest to adopt simple uniform rules allowing for a division of assets to be governed by a single body of law, and is no better than current Quebec law in this regard.

For all of the above reasons, this Act cannot be said to constitute an improvement upon the law in force in Quebec.

A far more interesting uniform law is the *Hague Convention of March 14, 1978*, on the *Law Applicable to Matrimonial Property Regimes*, mentioned above, which came into force on September 1, 1992, but which the committee found unacceptable for Canada,

without reasons. It is, in my opinion, an excellent Convention which should be given serious consideration by the Canadian authorities. In particular, the Convention contains very good solutions for many of the problems discussed in this paper. For example, it attributes an important role to party autonomy, avoids local, narrow characterizations, includes a rule for the effect of the matrimonial regime on third persons and adopts the principle of immutability of matrimonial regimes at the outset, together with mutability where the spouses have resided in a new jurisdiction for at least 10 years, and finally ensures that in most cases one law will apply to a division of the assets.

## CONCLUSION

Quebec courts have responded to the international outlook in Book Ten of the Code in commercial matters through the rejection of the homeward trend, that is, through a more liberal recognition of foreign judgments. It is time now to apply the same approach to matrimonial property in an international context. Aside from the rules under Islamic law, there is always some mechanism in the law of each country which is available to provide for a fair sharing of assets and if not, escape devices can be used in exceptional circumstances. In the increasingly globalized world in which we live and have our families, courts should follow the legislative directive to the effect that the application of Quebec law is neither always necessary nor appropriate.

# La propriété collective au Québec : les enjeux

Générosa BRAS MIRANDA

## RÉSUMÉ

Est-il possible que le droit québécois accueille, en plus d'une double catégorie de sujets de droit (personne physique et personne morale), une double catégorie de rapports de droit réel ? La propriété individuelle et la propriété collective.

La reconnaissance de cette dernière serait susceptible de constituer une alternative inespérée à la recherche d'une solution logique et efficace au dilemme auquel fait face la société de personnes depuis que la cour d'appel lui a refusé la personnalité morale.

Un survol de la législation révèle que de nombreuses entités juridiques n'ayant pas la personnalité sont déjà reconnues. L'admission franche de la propriété collective pose néanmoins une question grave : la responsabilité civile s'articule-t-elle nécessairement autour d'un actif et d'un passif organisés sous forme de patrimoine ?

La personnalité, loin de couvrir tout le champ juridique des sujets de droit, n'est elle-même rien d'autre qu'une propriété collective théorisée.

La réalité juridique est complexe. Là où l'on ne verrait que néant juridique, au-deça et au-delà de la personnalité, se déploie une multitude d'intérêts juridiquement protégés, en autant de nuances, tendant parfois à la personnalité mais pas nécessairement.

Nous sommes convaincue que la propriété collective, si elle était ouvertement reconnue au Québec, constituerait un cadre juridique fort utile à l'élaboration de régimes juridiques logiques et efficaces de très nombreuses organisations, en commençant par la société de personnes.

# La propriété collective au Québec : les enjeux

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Peut-on envisager, au Québec, une propriété collective qui viendrait se glisser entre la personnalité morale et l'indivision ? La voie qu'elle offre, pour étonnante qu'elle puisse paraître, présente un intérêt majeur. Elle est susceptible de constituer une alternative inespérée à la recherche effrénée d'une solution logique et efficace au dilemme auquel fait face la société de personnes, depuis que la Cour d'appel, par son arrêt *Allard*[1] lui a, à raison, refusé la personnalité morale.

La doctrine a, semble t-il, envisagé toutes les avenues susceptibles de combler le gouffre ouvert par cette décision : personnalité morale admise par la théorie de la réalité, patrimoine d'affectation, indivision traditionnelle ou encore « sans parts ». Les derniers développements semblent fonder de grands espoirs sur la notion de division du patrimoine[2]. Cette voie rapprocherait considérablement la société de la fondation et de la fiducie.

Ces propositions demeurent néanmoins ancrées sur une conception résolument patrimoniale du mécanisme de la société[3]. Or un ensemble d'indices nous incite à penser que la nature de la société de personnes s'est vue placée, depuis la réforme de 1994, en dehors du puissant giron du droit patrimonial[4].

Il est établi que le but du législateur, lors de la réforme de la société, était de la rapprocher de la *firme* de common law, afin qu'elle ne soit pas désavantagée dans le contexte économique

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1. *Ville de Québec* c. *Cie d'Immeubles Allard Ltée*, [1996] R.J.Q. 1566 (C.A.), J.E. 96-1388.
2. Louise-Hélène RICHARD, « L'autonomie patrimoniale de la société : le patrimoine d'affectation, une avenue possible ? », (2002) 36 *Thémis* 733 ; Charlaine BOUCHARD, « La société de personnes : une entité en quête d'identité », (2003) 105 *R. du N.* 591. Nabil N. ANTAKI et Charlaine BOUCHARD, *Droit et pratique de l'entreprise*, t. 1, *Entrepreneurs et sociétés de personnes*, Cowansville, Éditions Yvon Blais, 1999, p. 353 à 388 ; Donald A. RIENDEAU, « La «société» en droit québécois », (2004) 63 *R. du B.* 129.
3. Voir Jean-Claude THIVIERGE, « Le débat sur la personnalité morale de la société est-il clos ? », dans Service de la formation permanente, Barreau du Québec, *Développements récents en droit commercial (1993)*, Cowansville, Éditions Yvon Blais, 1993, p. 109, à la p. 113 ; Nabil N. ANTAKI et Charlaine BOUCHARD, *ibid.*, aux p. 353 à 388 ; Charlaine BOUCHARD, *ibid*., p. 591.
4. Générosa BRAS MIRANDA, « La propriété collective. Est-ce grave, docteur ? – Réflexions à partir d'une relecture de l'arrêt *Allard* », (2003) 63 *R. du B.* 29.

nord-américain qui est le sien. Ce premier indice concourt à expliquer pourquoi la société a accédé à une autonomie grandement accrue par l'octroi d'importants attributs, tout en se voyant soudainement dépouillée de la personnalité morale.

Par ailleurs, l'adhésion d'un système juridique à une conception de la propriété de plusieurs sur un même objet sous forme d'indivision en quotes-parts, n'est nullement un obstacle à l'admission d'un autre mode d'appropriation collective des biens. Là où la propriété commune est admise, elle n'est qu'un mode secondaire, joint à la conception traditionnelle de la propriété indivise. C'est le cas essentiellement dans les systèmes juridiques d'origine allemande[5] où l'indivision en quote-parts demeure la règle. La common law met en place, elle aussi, un système binaire d'appropriation collective des biens : un schéma de propriété collective, dite parfois *propriété conjointe* (joint ownership) y côtoie une structure globalement équivalente à celle de l'indivision civiliste, dite propriété en commun (ownership in common)[6].

Qu'en est-il au Québec ? Un survol de la législation relative aux regroupements d'intérêts, de personnes ou de biens révèle des choses étonnantes : la spécificité de certains groupes n'ayant pas de personnalité morale y est *déjà* implicitement reconnue (partie 1 ). Par ailleurs, des évolutions, tant législatives (sociétés en participation) que jurisprudentielles (arrêt *Allard*) semblent fonder quelque bon espoir quant à la reconnaissance explicite prochaine de la propriété collective en droit positif québécois (partie 2).

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5. Joseph RICOL, *La copropriété en main commune (Gesammte Hand) et son application possible en droit français*, Thèse dactylographiée, Toulouse, 1907, à la p. 106.
6. E.H. BURN, *Cheshire and Burn's Modern Law of Real Property*, 13th ed., Londres, Butterworths, 1982, p. 207 ; Frederick Henry LAWSON, *The Law of Property*, 3rd rev. ed., by Bernard Rudden, New York, Oxford University Press, 2002 ; Bruce ZIFF, *Principles of Property law*, 3rd ed., Toronto, Carswell, 2000 ; Gérard SNOW, *Les biens*, coll. Common law en poche, Cowansville, Éditions Yvon Blais, 1998, spéc. p. 13-14 ; Programme national de l'administration de la justice dans les deux langues officielles (PAJLO*), Dictionnaire canadien de la common law : droit des biens et droit successoral*, Cowansville, Éditions Yvon Blais, 1997, voir *joint tenancy*, p. 179 ; Michel BASTARACHE et Andréa BOUDREAU-OUELLET, *Précis du droit des biens réels*, Cowansville, Éditions Yvon Blais, 1993, p. 175 et s.

## Partie 1 – La personnalité juridique, seul vecteur de droits personnels ?

La propriété collective peut être perçue comme un mode primaire d'organisation de l'appropriation des biens. Historiquement, la propriété a d'abord été vécue (plutôt que conçue) comme étant collective[7] (clan familial). Son admission à l'aube du troisième millénaire, en droit civil de tradition française constituerait-t-elle un retour en arrière, une dégénérescence ? Au contraire, là où l'individualisme n'a permis d'admettre l'indivision traditionnelle (sous forme de quote-part) elle-même, qu'à contrecœur[8], la tendance actuelle à admettre une véritable propriété collective[9] aux côtés de l'indivision et de la personne morale, témoigne d'une vitalité essentielle à tout système de droit[10]. Car il n'est pas vrai que la personnalité juridique s'adapte et traduit les besoins de tous les regroupements d'intérêts ; qu'elle soit la seule solution

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7. Cf. la présentation historique du droit de propriété par Pierre-Claude LAFOND, *Précis du droit des biens*, Montréal, Éditions Thémis, 1999, aux p. 12 à 29. Pour de plus amples développements, voir aussi, entre autres, Henri LEPAGE, *Pourquoi la propriété*, coll. Pluriel, Paris, éd. Hachette, 1985 et Jean-Pierre LÉVY, *Histoire de la propriété*, coll. Que sais-je ?, t. 36, Paris, éd. P.U.F., 1972 ; Anne-Marie PATAULT, *Introduction historique au droit des biens*, Paris, éd. Presses universaires de France, 1989.
8. Voir, par exemple, les déclarations de Louis JOSSERAND, « Essai sur la propriété collective », dans *Le Code civil 1804-1904 –Le livre du centenaire,* t. 1, *Généralités –Études spéciales* , publié par la société d'études législatives, Paris, éd. A. Rousseau, 1904, à la p. 370 : « Le progrès consistera à libérer la copropriété de l'indivision, à la faire passer dans le moule de la propriété collective. La conception d'une propriété à la fois plurale et individuelle constitue une absurdité juridique. [...] [L]a notion d'indivision, par sa pauvreté et sa fausseté même, est fatalement destinée, croyons-nous, à être entamée par sa rivale, en attendant la déroute complète et définitive. Cette déroute sera amplement méritée, car dans tout l'arsenal de nos législations modernes il n'est peut-être pas une institution qui soit aussi équivoque et déconcertante que la copropriété avec indivision (*condominium pro indivisio*) » ; voir aussi Aurélien IONESCO, « La nature du droit de copropriété », dans *Aspects du droit privé en fin de 20e siècle, études réunies en l'honneur de Michel de Juglart*, Paris, éd. L.G.D.J., Montchrestien et Éditions techniques, 1986, p. 21, plus spéc. à la p. 23 : « De par son essence, le droit de propriété ne peut appartenir qu'à une seule personne. Il est exclusif. L'existence du droit de propriété sur une chose en faveur d'une personne met obstacle à ce que ce droit appartienne en même temps à une autre personne » ; Aurélien IONESCO, *La copropriété d'un bien*, Thèse, Univ. de Paris, 1930.
9. Pour un avis similaire, et plus extrémiste encore, voir André COSSETTE, (1968) 70 *R. du N.* 277, à la p. 278 : « L'évolution contemporaine attribue une fonction sociale à la propriété. [...] L'idée d'une propriété communautaire ne doit pas être rejetée [...]. La propriété au sens du Code civil a eu un commencement et elle aura nécessairement une fin, comme le régime féodal et les autres régimes archaïques. »
10. En ce sens, voir P.-C. LAFOND, *op. cit.*, note 7, à la p. 26.

théorique possible, ni qu'elle soit exclusive d'autres organisations, ni même qu'elle soit la meilleure[11]. La personnalité juridique dépasse parfois les besoins du groupe[12]. À ses côtés, il y a place pour d'autres méthodes « reflétant plus fidèlement le genre de participation de chacun des membres à l'œuvre commune »[13].

Parmi elles, la technique contractuelle se révèle particulièrement apte à organiser un intérêt et à le rendre juridiquement protégé. Elle peut se substituer à la personnalité en tant que vecteur du sujet de droit[14]. Elle se déploie en une variété de nuances qui résultent simplement du degré d'organisation interne du groupement. La plus simple de ces techniques est probablement celle du mandat que les membres d'un regroupement s'octroient les uns aux autres. La fiducie (qui résulte parfois d'un contrat) permet également de réaliser l'intérêt commun d'un groupe. L'indivision contractuellement organisée doit évidemment être aussi citée. Enfin, la société elle-même n'est rien d'autre qu'un contrat. Il ne faudrait donc pas croire que les groupements dépourvus de personnalité juridique se débattent dans le néant juridique qui

11. Claude CHAMPAUD, « Rapport sur les groupements et organismes sans personnalité juridique en droit commercial français », dans Travaux de l'association Henri Capitant, *Les groupements sans personnalité juridique*, Journées italiennes, t. XXI, Paris, éd. Dalloz, 1969, p. 118, à la p. 119 : « Il existe un large champ d'incertitude en ce qui concerne l'utilité même de la personnalité juridique et sa nécessité à l'égard de la vie et de l'activité des groupements et organismes sociaux et économiques » ; p. 128 : « [...] la reconnaissance de la personnalité morale ne résoud [sic] pas tous les problèmes posés par la vie des groupements, pas plus qu'elle est nécessaire à la solution de certains d'entre eux et non des moindres ».
12. Jean PATARIN, « Rapport sur les groupements et organismes sans personnalité juridique en droit civil français », dans Travaux de l'association Henri Capitant, *Les groupements sans personnalité juridique*, Journées italiennes, t. XXI, Paris, éd. Dalloz, 1969, à la p. 38 : « La notion de personnalité morale a atteint, dans le droit classique, une perfection qui la rend très efficace mais qui est un luxe excessif pour certains groupements de personnes ou de biens. [...]. [...], le concept de personnalité morale ne peut convenir à certaines situations parce qu'il marque une séparation trop abrupte entre le patrimoine social et les patrimoines individuels, entre l'entité juridique et les membres du groupe, entre l'intérêt collectif et des intérêts particuliers étroitement imbriqués. »
13. Selon la formulation de Jean PATARIN, *ibid.*
14. M. De VAREILLES-SOMMIÈRES, *Les personnes morales*, Paris, éd. Pichon et Durand-Auzias, 1919, à la p. 217, nº 469 : « En droit philosophique, en droit positif français, ancien et nouveau, et, on peut dire, dans toutes les législations modernes, les clauses qui constituent le régime personnifiant n'ont rien de contraire au droit commun, et leur efficacité ne réclame aucun secours extraordinaire de la loi. Les principes généraux des contrats, les principes spéciaux du contrat d'association et ceux du mandat suffisent à produire, si les associés le veulent, ces combinaisons. »

existerait entre la personnalité de ses membres et la personne morale à laquelle ils n'ont pas accédé.

Le contrat parvient à créer des « titres »[15] et ainsi aboutit au même résultat que la personnalité, qui somme toute est le titre au nom duquel une personne peut se prévaloir de droit et se lier d'obligations[16]. Dès lors que la volonté contractuelle peut aisément organiser un intérêt juridiquement protégé, c'est-à-dire un droit, selon R. von Jhering[17], la personnalité juridique n'est pas nécessaire[18]. Comme le souligne le professeur J. Patarin, elle n'est souvent qu'« un luxe dont on parvient à se passer »[19]. Quel est, en

15. Pour un approfondissement de cette idée, allant jusqu'à en conclure que les sociétés personnalisées et les fondations constituent des propriétés collectives gérées par des personnes (gérants, dirigeants) exactement de la même manière qu'un *trustee* exerce la propriété sur des biens dont la *jouissance* revient à d'autres, les bénéficiaires, voir les très intéressants développements de Raymond SALEILLES, *De la personnalité juridique –Histoire et théories* , Paris, éd. L.G.D.J., 1910, huitième leçon, dix-huitième leçon, notamment aux p. 424-425 : « Ce dédoublement du droit se retrouve partout, dans tous les domaines ; il a toujours constitué la pierre d'achoppement de toutes les théories sur la personnalité. Qui devra être considéré comme sujet de droit, le destinataire, celui qui doit en profiter, donc qui en a la jouissance, ou le gérant investi de tous les pouvoirs et même de la faculté de disposer ? [...] Les anglais, plus pratiques, n'ont pas cherché à résoudre une question qui, en soi, paraît insoluble. Toute l'évolution historique de leur droit coutumier tendait à faire admettre la dualité de propriétés. Il y aura deux sujets de droit, investi chacun d'une propriété différente. Et si, d'autre part, il n'y a pas de destinataires individuels susceptibles de détermination, la propriété légale, celle des *trustees*, se trouvera affectée d'une charge perpétuelle, nous dirons d'une affectation qui en absorbe la jouissance au profit de la réalisation du but statutaire. Pratiquement, et à s'en tenir à la surface, le problème est résolu. La propriété collective se transforme en propriété fiduciaire. »
16. Voir aussi la définition de Valérie SIMONART, *La personnalité morale en droit privé comparé*, Coll. de la faculté de droit, Bruxelles, éd. Bruylant, 1995, à la p. 7 : « la personnalité morale est un concept qui désigne l'aptitude de certains groupements à être titulaire de droits et d'obligations et qui leur confère la qualité de sujet de droit ».
17. R. von JHERING, *Œuvres choisies* , t. 2, Paris, éd. A. Marescq, 1848, spécialement le chapitre VII : « De l'intérêt dans les contrats, et de la prétendue nécessité de la valeur patrimoniale des prestations obligatoires », p. 145 et s.
18. En ce sens, voir De VAREILLES-SOMMIÈRES, *op. cit.*, note 14, notamment à la p. 105, nº 223 : « [l'intérêt collectif] n'est rien d'autre que l'intérêt de tous les associés, car la collectivité des associés n'est elle-même rien d'autre que le nombre total des associés. Or l'intérêt de tous les associés n'exige et ne prouve que la personnalité des associés. L'intérêt collectif d'une pluralité d'hommes n'est que la somme des intérêts individuels de ces hommes » et à la p. 111, nº 236 : « Dans l'association, le groupe n'est absolument rien d'autre et de plus que les associés ; elle n'est pas plus une chose distincte d'eux qu'une personne distincte d'eux ; elle est eux-mêmes, rien de plus rien de moins. Sans doute par leur union et la coordination de leurs activités, les associés forment un tout ; mais ce tout, c'est eux-mêmes et rien qu'eux ; ils sont tout dans ce tout. »
19. Jean PATARIN, *loc. cit.*, note 12, à la p. 38.

effet l'utilité juridique de la personnalité ? Celle de conférer des droits et de permettre l'obligation, *c'est-à-dire d'organiser une responsabilité civile, régente du commerce juridique*. Dès lors qu'une simple organisation contractuelle permet à un regroupement de biens et/ou de personnes[20] de se créer un titre au nom duquel il peut prendre part à la vie économique et sociale, dès lors qu'il est sujet[21] de droits et d'obligations, la personnalité est parfois « un luxe excessif »[22].

De là à dire que la volonté contractuelle réalise l'équivalent d'une personnalité juridique, au point où l'on pourrait parler de « personne contractuelle » ou plus justement, de « but personnifié »[23], comme l'on parle de « personne physique » ou de « personne morale » ; ce n'est, selon nous qu'une question de sémantique[24].

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20. Sur la possibilité qu'il y ait personnalité juridique sans mise en commun de richesses, voir les propos de Louis JOSSERAND, *loc. cit.*, note 8, à la p. 363. Voir aussi Francis DELHAY, *La nature juridique de l'indivision : Contribution à l'étude du rapport de la notion d'indivision avec les notions de société civile et de personnalité morale*, Paris, éd. L.G.D.J., 1968, plus spéc. à la p. 496, nº 336 : « Il faut admettre qu'il existe des communautés d'intérêts sans but commun déterminé et que la communauté d'intérêts est une catégorie juridique qui peut se traduire de diverses manières : tantôt par une simple activité commune, tantôt par une mise en commun de certains biens, tantôt par la poursuite en commun de fins qui restent purement personnelles à ses membres. »
21. Cf. la thèse de Léon MICHOUD, *La théorie de la personnalité morale*, 2e éd., Paris, éd. L.G.D.J., 1924, 2 vol. ; selon laquelle l'être qui a en propre des droits et des obligations est un sujet de droit ; c'est une personne.
22. Selon l'expression de Jean PATARIN, *loc. cit.*, note 12, à la p. 38.
23. L'expression est d'Edmond Binet, à propos des fondations, en droit suisse ; tel que rapporté par Jacques DROUIN, dans Travaux de l'association Henri Capitant, *Les groupements sans personnalité juridique*, Journées italiennes, t. XXI, Paris, éd. Dalloz, 1969, p 65, à la p. 69.
24. Pour un avis similaire, voir Francesco GALGANO, « Rapport général sur les regroupements et organismes sans personnalité juridique en droit civil », dans *Travaux de l'association Henri Capitant, Les regroupements sans personnalité juridique*, Journées italiennes, t. XXI, Paris, éd. Dalloz, 1969, p. 5 à 18, à la p. 18 : « Quand nous disons, [...], que tout groupement est une personnalité juridique, nous devons assumer la notion de personne juridique dans une signification si nuancée qu'elle finit par perdre toute valeur effective. Elle finit par se résoudre dans un phénomène purement linguistique, dans une façon synthétique d'indiquer le groupement. » Voir aussi, dans le même sens, la citation des propos de Baudry-Lacantinerie par le juge Brossard, dans l'arrêt *Ville de Québec* c. *Cie d'Immeubles Allard Ltée*, ci-dessus, note 1, à la p. 1579 : « [...] : il est vraisemblable que lorsque la loi parle de la *société*, elle n'emploie cette expression, à la suite de Pothier, que comme une formule abrégée pour désigner les associés envisagés exclusivement au point de vue des intérêts collectifs, par opposition à ces mêmes associés envisagés au point de vue de leurs intérêts individuels, de sorte que le législateur aurait personnifié la société pour la commodité du langage [...], sans avoir pour cela l'intention de la personnifier au point de vue juridique ». Voir aussi L. JOSSERAND, *loc. cit.*, note 8, à la p. 359 : « Aux

Mais au-delà des mots, la reconnaissance des groupements comme constituant un intérêt juridiquement protégé en dehors de toute personnalité va beaucoup plus loin. En effet, il est possible d'organiser contractuellement un intérêt juridiquement protégé autour d'une masse de biens, c'est-à-dire d'*un actif ne répondant d'aucun passif*. C'est bien là que le bât blesse. Que la volonté contractuelle organise des centres d'intérêts similaires à celui que recouvre la notion de personnalité juridique, soit[25] ! Mais peut-on admettre qu'elle puisse créer un intérêt *juridiquement protégé*, pouvant prendre part à la vie économique sans répondre de ses créances, puisqu'il ne saurait y avoir de passif ? La question est grave.

La personnalité juridique a précisément pour mécanisme interne la reconnaissance d'un patrimoine. Pour créer une personne morale, il est nécessaire que des apports soient effectués. Ils constituent l'actif (pour l'instant, simple masse de biens) de la future personne morale. Ensuite, l'octroi (généralement par l'enregistrement, la déclaration ou la décision étatique)[26] de la qualité

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dires de certains juristes éminents, [...] la propriété des personnes morales n'aurait jamais été différente de la propriété en main commune, la personnalité civile n'étant qu'une construction purement artificielle imaginée par les juristes pour abriter commodément la propriété collective ; [...] » ; voir aussi R. SALEILLES, *op. cit.*, note 15, huitième leçon, à la p. 178 ; voir enfin, Maurice COZIAN et Alain VIANDIER, *Droit des sociétés*, 15e éd., Paris, éd. Litec, 2002, à la p. 85.

Voir aussi la thèse de De VAREILLES-SOMMIÈRES, *op. cit.*, note 14, dans laquelle l'auteur réfute énergiquement l'utilité et la légitimité de la notion de personne morale.

De façon plus générale, sur le procédé de fiction juridique, voir Aimé GALLET, *Étude sur la fiction de rétroactivité en droit français*, Thèse, Univ. de Poitiers, 1903, p. 5 : « La fiction n'est souvent qu'une "manière plus laconique de formuler les dispositions qu'on veut appliquer à une situation, en disant : on déterminera les droits comme si tel fait avait eu lieu" [citation de Ortolan]. La fiction n'est alors qu'un expédient de scolastique. On peut dire qu'elle est au droit ce que la métaphore est au langage » ; cf. aussi G. WICKER, *Les fictions juridiques –Contribution à l'analyse de l'acte juridique*, coll. Bibl. de droit privé, t. 253, Paris, éd. L.G.D.J., 1994 ; Ph. WOODLAND, *Le procédé de la fiction dans la pensée juridique*, Thèse, Paris, 1981.

25. De toute façon, la plupart des personnes morales naissent de cette même volonté contractuelle. La seule différence entre la personne morale et le simple regroupement est que l'une est officiellement reconnue comme étant une personne, soit par décision étatique, soit, en vertu de la théorie de la réalité, par la constatation matérielle d'un intérêt juridiquement protégé, alors que l'autre se meut dans la vie juridique sans reconnaissance autre que tacite.

26. Voir le chapitre premier « De la personnalité juridique », du titre cinquième « Des personnes morales », du livre premier du *Code civil du Québec* « Des personnes », art. 298 à 333. Plus spécifiquement, l'article 298, al. 1 : « Les personnes morales ont la personnalité juridique » et l'article 299 : « Les personnes morales

de personne morale réalise *nécessairement* la reconnaissance de la capacité de s'obliger. Puisque celle-ci ne saurait se concevoir que dans la stricte mesure de la responsabilité civile que l'on assume sur son patrimoine (sur son actif, en réalité), cela revient à *reconnaître un passif (juridique)*. La personnalité juridique devient à cet instant titulaire d'un patrimoine (actif/passif) sur lequel se répercute désormais sa responsabilité ; ce qui lui donne accès au commerce juridique.

Une simple masse de biens autour de laquelle la volonté de ses propriétaires a réalisé un intérêt juridiquement protégé ne saurait être susceptible de supporter un passif sans constituer un patrimoine ; pourtant elle possède parfois déjà un attribut de la personnalité morale. Cette situation se rencontre fréquemment lorsqu'une personne morale est en cours de formation ; lorsqu'elle n'est pas encore publiée, enregistrée, etc. Le regroupement sans personnalité juridique est une phase nécessaire de son développement.

Est-il concevable qu'une masse de biens soit contractuellement conçue comme étant le siège d'un intérêt juridique protégé sans jamais accéder à la personnalité ? Elle pourrait être titulaire de créances, s'engager dans le commerce juridique, ... mais ne saurait être responsable d'aucune dette. La combinaison semble impossible ; parfaitement contraire à ce principe fondamental du droit civil selon lequel on ne saurait s'engager sans en subir la responsabilité sur son patrimoine. Est-ce bien exact ? Ce qui importe n'est-ce pas plutôt que les engagements pris soient supportés par un actif, *même si ce n'est pas celui de l'entité qui s'est engagée ?* Bien sûr, on ne saurait admettre que les engagements soient supportés par une personne totalement étrangère à celle qui les a pris. Mais est-il absolument nécessaire que la responsabilité civile s'articule autour d'un actif et d'un passif organisé sous forme d'un patrimoine, dans lequel l'actif répond de *son* passif ? Ne serait-il pas possible de concevoir que l'activité juridique d'un

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sont constituées suivant les formes juridiques prévues par la loi, et parfois directement par la loi. Elles existent à compter de l'entrée en vigueur de la loi ou au temps que celle-ci prévoit, si elles sont de droit public, ou si elles sont directement constituées par la loi ou par l'effet de celle-ci ; autrement, elles existent au temps prévu par les lois qui leur sont applicables. » Voir aussi l'article 2189 C.c.Q. : « La société en nom collectif ou en commandite est formée sous un nom commun aux associés. Elle est tenue de se déclarer, de la manière prescrite par les lois relatives à la publicité légale des sociétés ; à défaut, elle est réputée être une société en participation, sous réserve des droits des tiers de bonne foi. »

intérêt juridiquement protégé génère un passif (des dettes) dont un *autre* patrimoine répondrait ? Ce ne serait concevable qu'à raison d'un lien *réel*, au sens juridique autant qu'au sens commun du terme, entre la dette et le patrimoine personnel de chacun des membres du groupe[27]. C'est précisément ce que propose la propriété collective : les membres sont propriétaires de la masse de biens dont l'activité juridique a généré la dette. Ce lien, entre dette et responsabilité, entre passif et actif, ce n'est donc pas la *personnalité* mais la *propriété*.

Nous nous permettons ici de citer un intéressant passage tiré d'une note en bas de page du rapport général rédigé par F. Galgano, à l'occasion de la conférence prononcée dans le cadre des Journées H. Capitant, qui s'est tenue en Italie en 1969 et qui portait sur les groupements sans personnalité juridique :

> [...] en effaçant du monde la notion de personne juridique, on supprime le sujet de droit auquel on peut attacher les droits et obligations relatives au groupement : si les droits et les obligations n'appartiennent pas à la personne juridique, à qui donc appartiennent-ils ? Je réponds tout de suite. Quand nous introduisons dans le domaine du droit la notion de personne juridique, quand nous revendiquons le droit de cité dans le monde juridique d'autres sujets que les êtres humains, nous admettons alors l'existence d'une double catégorie de sujet de droit, précisément les personnes physiques et les personnes juridiques ; à ces dernières nous pourrons rattacher les mêmes rapports juridiques que, selon la tradition, on rattache aux personnes physiques. Toutefois, rien ne nous empêche de créer, au lieu d'une double catégorie de sujets de droit, une double catégorie de rapports juridiques : rien ne nous empêche de faire une distinction entre des formes différentes de propriété et d'obligation, de distinguer entre le droit de propriété individuelle et

27. Dans le même sens, voir la conclusion de Francis DELHAY, *op. cit.*, note 20, aux p. 497-498, n^os^ 338 et 339 : « [...] ; l'associé a un droit dans la société ; ce droit qui n'est ni un droit contre une personne, ni un droit sur une chose déterminée, nous semble être autre chose que le droit à une part des bénéfices sociaux. C'est le droit du cotitulaire d'un droit collectif à l'attribution exclusive d'une fraction de ce droit : [...]. Le droit de l'associé est donc un droit *sui generis*, à mi-chemin entre le droit réel et le droit de créance, parce qu'il se situe dans un contexte collectif. On ne s'étonnera pas que la même analyse soit applicable aux droits de l'indivisaire. [...]. L'indivision et la société marquent ainsi les limites de la distinction traditionnelle mais, selon nous, toujours nécessaire, des droits réels et des droits de créance, dans un monde où les phénomènes collectifs tendent à pénétrer dans la sphère abandonnée jusqu'à présent aux seuls rapports individuels. Au droit subjectif qui est l'expression des prérogatives d'un individu sur une chose ou contre un individu, doit se juxtaposer aujourd'hui le droit de l'individu dans une collectivité ».

> le droit de propriété collective, c'est-à-dire le droit de propriété qui est celui de chacun des membres du groupement et que le membre du groupement exerce selon des règles différentes de celles qui sont particulières à la propriété individuelle. *Il y a, du point de vue juridique, une équivalence parfaite entre les deux constructions possibles :* ou deux catégories de sujets de droit, ou bien deux catégories de rapports juridiques. *Nous ne devons pas chercher le critère de choix dans la logique juridique, parce que la logique peut nous garantir soit l'une, soit l'autre construction. [...] Nous devons le rechercher en tenant compte, [...], de la fonction de chaque construction, c'est-à-dire des résultats concrets auxquels chacun peut conduire*.[28] [nos emphases]

Une « catégorie spécifique de rapports juridiques », tel est bien ce que nous propose la propriété collective, qui est bien plus qu'une masse (inerte) de biens et bien plus même qu'une modalité de l'exercice du droit de propriété. Elle extrait le rapport de propriété du strict domaine du droit réel (liant une personne à un bien) pour entrer dans celui du droit personnel[29] (liant deux personnes par un lien obligationnel). *La propriété exercée sous sa forme collective devient un vecteur de responsabilité ; un ersatz de la personnalité*.

Elle est un lien de droit qui rapproche jusqu'à les fondre les deux rapports de droit que l'on distingue traditionnellement en droit civil : le rapport obligationnel et le rapport réel. N'oublions pas que les deux ont été intimement liés durant un millénaire, au temps du Moyen Âge. Extérieurement, la propriété collective apparaît comme un simple rapport de propriété. C'est une limitation du droit de propriété, réalisée de façon identique par plusieurs propriétaires sur une partie de leurs biens. Chacun accepte, de concours avec les autres, d'affecter les biens choisis à une même

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28. F. GALGANO, *loc. cit.*, note 24, p. 5 à 18, note infrapaginale n° 13, p. 17-18. Dans le même sens, voir la théorie de J. Van Biervliet, exposée dans Aurélian IONESCO, « La nature juridique du droit de copropriété », dans *Aspects du droit privé en fin de 20e siècle –Études réunies en l'honneur de Michel de Juglart* , Paris, éd. L.G.D.J., Montchrestien, 1986, p. 21, à la p. 26. Voir aussi, J. VAN BIERVLIET, « Les sujets collectifs en droit privé », Bruxelles, 1912.
29. Pour un avis similaire, voir F. DELHAY, *op. cit.*, note 20 ; plus spéc. aux p. 426 et s., nos 288 et s. Voir aussi, Aurélian IONESCO, « La nature juridique du droit de copropriété », dans *Aspects du droit privé en fin de 20e siècle, études réunies en l'honneur de Michel de Juglart*, Paris, éd. L.G.D.J., Montchrestien et Éditions techniques, 1986, p. 21, plus spéc. à la p. 25 : et les auteurs cités : H. CAPITANT, *Cours de droit civil approfondi*, professé à la faculté de droit de Paris en 1927-28, p. 16 ; ROQUIN, *Traité de droit civil comparé*, *Les successions*, t. 1, Paris, 1908-1912, à la p. 277.

destination particulière et collective. Pour les tiers, l'opération aboutit à l'émergence d'une masse de biens, d'une entité spécifique, d'une universalité, que l'on pourrait dire proche de la personnalité[30].

À l'interne, cette réalité est le simple résultat d'obligations prises par les membres, les uns envers les autres. La propriété collective est donc un rapport de droit spécifique né de la jonction contractuellement organisée de la propriété et de la personnalité. Cette jonction résulte, non pas de la reconnaissance du regroupement, par l'octroi abstrait de la personnalité, mais de l'affectation[31] concrète des biens communs à un but collectif, *par les propriétaires eux-mêmes*. L'autonomie juridique à laquelle on aboutit est véritablement créée, voulue, de l'intérieur ; et non, simplement admise de l'extérieur[32].

La similitude de ce type d'organisation avec la conception de la maîtrise du sol au Moyen Âge doit être soulignée : la propriété était à la fois un rapport réel et un rapport personnel[33]. On ne

30. Pour un avis similaire, voir R. SALEILLES, *op. cit.*, note 15, huitième leçon, à la p. 177 : « La propriété commune du droit germanique forme donc une petite masse à part, masse administrée par l'ensemble des copropriétaires ; et par suite, la plupart des avantages qui dérivent de la personnalité civile se retrouve dans la *Gesammte Hand*. Il y a séparation de patrimoine ; il y a incessibilité des parts individuelles et il peut même y avoir intransmissibilité héréditaire. »
31. Cf. Robert GARRON, « Influence de la destination sur le régime juridique des droits », D.S. 1965. Chr. 31.
32. De VAREILLES-SOMMIÈRES, *op. cit.*, note 14 , à la p. 13, à propos de la personne morale : « Cette personne unique, formée de tous les associés au moyen d'opérations instinctives d'abstraction et de synthèse, cette personne composée, voilà la personne morale par excellence [...]. Mais cette personne imaginaire signifie ou plutôt est les associés eux-mêmes en tant qu'ils sont associés et qu'ils ont adopté un certain régime, révélé tout entier d'un seul coup par cette manière figurée de les désigner. Par conséquent, la division en personnes physiques et en personnes morales est tout à fait vicieuse, car elle revient, qu'on le veuille ou non, qu'on le sache ou non, à opposer aux personnes physiques des personnes physiques encore, mais envisagées dans une situation particulière et désignées par une image. »
33. A.-M. PATAULT, *op. cit.*, note 7, à la p. 134, nº 112 : « Le droit sur la terre et les rapports, juridiques ou non, entre les hommes, s'enchevêtrent jusqu'à se fondre en une institution unique, la propriété foncière, à double face, face réelle et face obligatoire » ; à la p. 133, nº 111 : « [...] [Sous les yeux de la réalité coutumière], le droit réel est, à la fois, pouvoir sur les choses et obligation » ; à la p. 135 : « Voilà, [...], l'essence même de la propriété coutumière mise à nu : elle est propriété plus obligation ; elle associe les deux grandes institutions antinomiques à Rome et dans le droit moderne, la propriété des choses et le lien d'obligation entre les personnes ». À la p. 61, nº 48, l'auteur va plus loin : « La propriété médiévale est une propriété en action et non une propriété en système. Les tensions en sont permanentes. Il est d'ailleurs frappant de retrouver cet esprit aujourd'hui dans

s'étonnera donc pas que le droit anglais, qui poursuit son évolution sans heurt idéologique semblable à celui de la révolution française, reproduise aujourd'hui encore une structure juridique de la maîtrise des biens (fonciers) scindée en deux champs distincts[34]. Bien sûr, la distinction entre les biens fonds (domaine dominant) appartenant tous à la Couronne et les tenures (domaine utile) qu'elle concéda à des barons puis à des seigneurs, qui les concédèrent à leur tour à des tenants n'est plus de mise. Il est bien entendu, de plus, qu'au Canada, l'*Acte seigneurial*[35] interdit toute création de charges de nature à recréer un domaine éminent. Néanmoins, la scission entre le titre de propriétaire et la valeur utile des biens (*use*), fortement ancrée dans l'esprit juridique anglo-saxon, demeure aujourd'hui encore un trait essentiel et caractéristique du trust de common law. Le droit d'origine germanique prodigue aussi d'intéressants enseignements puisqu'il a longtemps préféré le concept de propriété collective (encore dite communiste) avant de s'ouvrir à celui de personne morale.

Il ne faut pas s'y tromper, la propriété collective est un système extrêmement contraignant pour qui y rentre. Elle restreint purement et simplement tous les attributs de la propriété, pouvoir de jouir de la chose, d'en tirer profit et d'en disposer. C'est une restriction circonstanciée : chaque propriétaire garde le pouvoir de décider de l'usage, de la jouissance et de la disposition du bien, ... mais à l'unanimité[36] avec les autres. C'est une limitation de telle

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le droit des sociétés : ainsi, en matière de cession d'actions, le retrait organisé par le jeu de la clause d'agrément et de la clause d'obligation de rachat par laquelle la société refuse d'agréer l'acquéreur choisi par l'actionnaire doit se substituer à celui qui est évincé ; là aussi le mécanisme concilie la liberté de disposition de l'actionnaire et la volonté de stabilité du groupe. Ou encore les rapports de fidélité, ou encore les propriétés simultanées de la « propriété saisonnière ». Par le biais de la personne morale, le droit moderne est en train de redécouvrir la plasticité de l'appropriation coutumière » ; cf. aussi Roger BÉRAUD, « Pluralité de patrimoines et indisponibilité », (1955) *Rev. int. D. Comp.* 775, à la p. 779, nº 12 : « Familière à notre ancien droit puis condamnée imprudemment, après la promulgation du Code civil, au nom d'une conception abstraite, factice, la notion de patrimoine d'affectation ou patrimoine séparé a été redécouverte par la doctrine moderne ».

34. Voir M. BASTARACHE et A. BOUDREAU OUELLET, *op. cit.*, note 6, aux p. 1 à 11.
35. *Acte concernant l'abolition générale des droits et devoirs féodaux*, S.R.B.C. 1861, c. 41.
36. Il est possible même que les membres s'accordent pour qu'une décision majoritaire suffise. Sur les aménagements des modalités possibles des décisions collectives, voir les développements de F. DELHAY, *op. cit.*, note 20, aux p. 450 et s., nºs 306 et s. Voir aussi, R. SALEILLES, *op. cit.*, note 15, dix-septième leçon, à la p. 389.

nature (portant sur tous les attributs de la propriété) qu'elle tend à constituer une modalité spécifique de la propriété ; que l'on pourrait dire relever de l'ordre de la *tenure*, pour peu que l'on n'enferme pas ce concept dans les spécificités moyenâgeuses auxquelles on la confine traditionnellement. La propriété collective, façon de *tenir* la propriété, est un mécanisme plus solide que l'indivision, susceptible de voir sa structure interne se modifier à tout instant, sur la décision individuelle d'un seul indivisaire de disposer de sa part, ou encore d'exiger le partage[37]. Il s'agit donc d'une « organisation rigoureusement collective, destinée à protéger les intérêts collectifs contre les initiatives individuelles »[38].

## Partie 2 – La propriété collective est-elle possible au Québec ?

La question qui se pose alors est la suivante : est-il possible qu'un système de droit, tel celui du Québec, accueille en plus d'une double catégorie de *sujets* de droit (personne physique et personne morale), une double catégorie de *rapports* juridiques (via la personnalité et via la propriété) ?

La réponse est assurément positive. Non seulement cette dualité est possible et souhaitable mais elle se retrouve à plusieurs endroits dans la législation. Songeons simplement aux biens du régime matrimonial[39] ; à ceux du patrimoine familial[40],

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37. L. JOSSERAND, *loc. cit.*, note 8, à la p. 358 : « [Car] l'indivision, legs fâcheux que nous a transmis le droit romain et qui a pesé lourdement sur le développement de nos institutions, n'est en réalité qu'une propriété individuelle et chaotique, chaque part indivise jouissant vis-à-vis des autres d'une complète autonomie pour faire corps, dans le patrimoine du copropriétaire, avec les droits dont il a la maîtrise absolue ; [...] ».
38. F. DELHAY, *op. cit.*, note 20, à la p. 424, nº 285.
39. Voir Mireille D.-CASTELLI, *Précis du droit de la famille*, 2e éd., coll. Bibliothèque juridique, Laval, éd. Les presses de l'université Laval, 1990, p. 70 et s.
Cf. aussi, en droit français, la vieille thèse de Masse démontrant que la communauté entre époux de droit français est une propriété collective, MASSE, *Caractère juridique de la communauté entre époux dans ses précédents historiques*, Thèse, Paris, 1902. Pour un exposé beaucoup plus succinct, affirmant que la communauté entre époux constitue en réalité une propriété commune, voir J. RICOL, *op. cit.*, note 5, aux p. 363 à 380. Les conclusions de ces auteurs français portant sur la nature juridique de la communauté matrimoniale (sous réserve des adaptations nécessaires au détail de chaque législation) peuvent être transposées au droit québécois.
40. Sur ce sujet, cf. Danielle BURMAN et Jean PINEAU, *Le «patrimoine familial» (projet de loi 20)*, Montréal, éd. Thémis, 1991, aux p. 43 et s ; voir aussi la décision *Caisse populaire Laurieur* c. *2959-6673 Québec inc.*, [1996] A.Q. nº 4658, nº 200-05-004938-960, 28 novembre 1996.

dont le sort est distinct de celui du patrimoine personnel de chacun des époux. Ce sont des masses de biens dont le régime juridique est conçu dans un but précis[41] et sur lesquelles ni les époux, ni les tiers n'exercent les mêmes droits que ceux qu'ils détiennent sur les biens propres. On ne saurait pourtant parler de personnalité morale. L'intérêt collectif ici protégé est celui de la *famille*.

Le législateur intervient également pour protéger l'intérêt collectif que tisse *l'entreprise*. Nous avons déjà évoqué la phase de formation des personnes morales, associations et sociétés. Là encore, des règles spécifiques tiennent compte de l'affectation des biens[42] alors pourtant que la personnalité morale n'est pas encore acquise. Le même phénomène se produit lors de la faillite d'une société dont, par fiction, la personnalité juridique est maintenue active, pour les seules fins de la liquidation[43]. Citons même, et surtout, les sociétés pleinement constituées, les sociétés de personnes auxquelles le droit québécois ne confère pas la personnalité morale. Relevons enfin la succession ouverte mais non encore partagée (l'indivision successorale). Ce sont des situations dans lesquelles la loi reconnaît et organise des intérêts collectifs majeurs non personnalisés : ceux de la famille, de l'entreprise, de la succession (ensemble des ayants cause) ou de la masse des créanciers (ensemble des ayants droit).

Il advient, au contraire, que dans certaines situations, la loi se désintéresse de l'organisation de tels groupements. L'émergence et l'organisation de l'intérêt collectif non personnalisé résultent alors exclusivement de l'initiative privée. La technique employée, nous l'avons vu, est la technique contractuelle.

La réalité juridique est complexe. Là où l'on ne verrait que néant juridique, au deçà (société en formation) et au-delà de la personnalité juridique (société en liquidation, succession en liquidation), se déploie une multitude de situations juridiques, d'in-

41. Cf. Robert GARRON, « Influence de la destination sur le régime juridique des droits », *D.S.* 1965. Chr. 31. 191, plus spéc. à la p. 192, nº 6 ; R. BÉRAUD, *loc. cit.*, note 33, plus spéc. à la p. 777, nº 7.
42. Sur le sujet, cf. Serge GUINCHARD, *L'affectation des biens en droit privé français*, Bibl. de droit privé, t. 145, Paris, éd. L.G.D.J., 1976.
43. Art. 357 C.c.Q. : « La personnalité juridique de la personne morale subsiste aux fins de la liquidation ».

térêts juridiquement protégés, en autant de nuances tendant parfois à la personnalité mais pas nécessairement[44].

Au Québec, le trait est marqué : même les sociétés de personnes pleinement constituées n'ont pas la personnalité morale. En conséquence, leurs biens sont *nécessairement* tenus en propriété collective par les associés. Non seulement la propriété collective gère les situations provisoires, les situations en cours, de formation ou de liquidation, mais elle concurrence la personnalité morale sur son propre terrain, celui des groupements, telles les sociétés et les associations, pleinement constituées[45]. Elle se pose

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44. J. PATARIN, *loc. cit.*, note 12, à la p. 39 : « Il serait faux de croire que tous ces regroupements et organismes privés demeurent dans un chaos juridique. [...] Il est plus juste de dire que par d'autres moyens juridiques les groupements et organismes sans personnalité réalisent une émergence d'intérêts collectifs hors de l'océan des intérêts individuels, une montée de ces intérêts collectifs vers une plus grande perfection juridique ». « [Les regroupements sans personnalité juridique] conclut l'auteur, à la p. 64, sont, en quelque sorte la couche protoplasmique du droit, celle des organismes mal différenciés où existent cependant des noyaux qui préparent la formation d'êtres juridiques plus complexes et mieux caractérisés » ; Claude CHAMPAUD, dans Travaux de l'association Henri Capitant, *Les groupements sans personnalité juridique*, Journées italiennes, t. XXI, Paris, éd. Dalloz, 1969, p 118, à la p. 141 : « Il n'est [donc] pas prouvé que la personnalité morale soit nécessaire à l'action économique, il n'est même pas prouvé que dans certains cas, elle soit utile. Il est probable que la notion de personnalité juridique devrait se diviser en plusieurs notions élémentaires. Comme l'enseigne le droit des associations, il existe des degrés dans la jouissance et la possibilité d'exercice des droits. Il existe des personnalités juridiques larvaires, des personnalités juridiques embryonnaires, incomplètes ou douteuses. Il en existe au contraire de parfaites, mais c'est l'unicité même de la notion de personne morale qui est finalement en cause » ; R. BÉRAUD, *loc. cit.*, note 33, à la p. 776-777, nº 5 : « La délimitation du patrimoine séparé rentrerait dans les tâches faciles si la scission à l'intérieur du patrimoine global était totale, si elle entraînait une insensibilité complète et absolue entre les masses patrimoniales intéressées. Mais cette insensibilité apparaît relative car le dédoublement de la personnalité, loin de s'affirmer entier, comporte une large part de fiction juridique. C'est au regard de l'étendue de l'indépendance existante entre les différents biens ou ensembles de biens que, reprenant les données du problème, il convient de se prononcer en chaque cas ; or, à un premier examen rapide, il est permis de distinguer les biens constituant une sûreté réelle, les biens inaliénables et ceux qu'un auteur italien, M. Negro, qualifie d'indisponibles. »
45. De VAREILLES-SOMMIÈRES, *op. cit.*, note 14, à la p. 42 : « [...] les associés, dans l'association aussi bien que dans la société, n'ont nul besoin de l'intervention d'un personnage fictif pour pouvoir posséder comme associés, et que toute association licite a le droit de constituer une masse obligatoirement affectée à l'entreprise, d'acquérir à titre onéreux, de recevoir des libéralités, en vue de la même entreprise » ; R. SALEILLES, *op. cit.*, note 15, huitième leçon, à la p. 178 ; Jean PATARIN, Préface à F. DELHAY, *op. cit.*, note 20, p. 1 de la préface : « [L'auteur expose que] la crise de la notion d'indivision provient du fait que la doctrine classique a exagéré l'opposition entre la notion d'indivision et les notions de société et de personne morale et que cette opposition a fait perdre de

en véritable *équivalent* de la personnalité morale, *pourvoyeur de la capacité de s'engager*. Nous rejoignons ici les conclusions de plusieurs juristes : celles, récentes, de V. Simonart qui, à la suite d'une étude comparée des systèmes de droit romaniste (droit français et belge), germanique (droit allemand, italien et néerlandais) et anglo-saxon (droit anglais et américain) conclut que *«la personnalité juridique est un concept qui désigne* l'aptitude *d'un individu ou d'une entité à être titulaire de droits et d'obligations »*[46] [nos emphases] ; celles aussi, auxquelles aboutit dès le tout début du XXe siècle, de Vareilles-Sommières, dans une vision si pénétrante du regroupement. On pourrait aussi citer M. Planiol et G. Ripert[47], Lainé[48], R. Saleilles[49], F. Delhay[50], J. Ricol[51] et d'autres.

## Partie 3 – Personnalité morale et propriété collective sont-elles équivalentes ?

Personnalité morale et propriété collective sont-elles équivalentes ? La personnalité, outre qu'elle permet l'engagement juridique, confère une multitude d'autres prérogatives ; celles précisément de la personnalité : le nom, l'adresse, la nationalité, le patrimoine, la capacité d'ester en justice. La personnalité reste le *summum*.

Pour le reste, il faut admettre que *tous* les attributs de la personnalité peuvent être reconnus aux propriétés collectives sans aucunement heurter les principes civilistes. Et ils le sont ! Pour prendre le seul exemple de la société de personnes, on ne saurait

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vue une réalité essentielle, qu'il nomme la communauté d'intérêts en ce sens que, dans un cas comme dans l'autre, la persistance d'intérêts communs fait nécessairement apparaître un regroupement de personnes et non seulement de biens. »

46. Valérie SIMONART, *La personnalité morale en droit privé comparé*, coll. Université Libre de Bruxelles, Bruxelles, éd. Bruylant, 1995.
47. Marcel PLANIOL et Georges RIPERT, *Traité élémentaire de droit civil,* t. 1, *Les personnes, état et capacité*, Paris, éd. L.G.D.J., 1925, à la p. 69 ; et surtout aux nos 3005 et s.
48. LAINÉ, « Des personnes morales en droit international privé », *Journal de droit international privé*, 1893, à la p. 179 : « à la base de cet être de raison [la personne morale], se trouvent nécessairement des êtres réels, des hommes, qui lui communiquent la vie et le soutiennent ».
49. R. SALEILLES, *op. cit.*, note 15, neuvième leçon, à la p. 203 : « L'idée de personnalité dérive d'un rapport abstrait aussi bien pour un individu que pour une collectivité. C'est une attribution de capacité. C'est l'individu considéré comme capable de droits ; il en est d'elle comme de la notion de «bien» dont je vous ai déjà parlé comme d'un rapport purement intellectuel. Le bien, c'est la chose considérée comme objet de droit. »
50. F. DELHAY, *op. cit.*, note 20.
51. J. RICOL, *op. cit.*, note 5, notamment à la p. 278.

nier qu'elle a un nom, une adresse, une nationalité. Même la capacité d'ester en justice lui est reconnue[52]. Finalement, quant aux prérogatives qu'elle octroie, la propriété collective *équivaut* à la personnalité.

Toutefois, s'il est vrai que nous souhaiterions une reconnaissance théorique plus franche de la propriété collective au Québec comme mode social d'organisation des nombreux intérêts collectifs, nous ne pouvons adhérer à la thèse extrémiste voulant que la personnalité morale disparaisse[53]. Ce n'est pas parce qu'ils n'ont pas de personnalité morale que certains regroupements ne peuvent posséder des biens mais plutôt parce que le législateur n'a pas permis l'opération *d'apport.* Une masse de biens appartenant à plusieurs personnes est délimitée dans l'espace juridique sans pour autant constituer un *gage particulier* susceptible de répondre des dettes générées par l'activité juridique envisagée. Cette masse est circonscrite sans qu'aucun passif ne soit reconnu. Elle ne constitue donc pas un actif... *Pas de passif, (donc) pas d'actif !*... Seule apparaît une masse, un ensemble de biens, affecté à un but particulier. *Ces regroupements n'ont pas de personnalité parce qu'ils n'ont pas de patrimoine ; et non l'inverse.* Et ils n'ont pas de patrimoine simplement parce que le législateur ne l'a pas prévu ou permis.

Mais il a toujours été possible de s'allier et de regrouper ses biens pour atteindre un but commun même si le législateur n'accorde pas la personnalité : les biens restent simplement la propriété des membres, que ceux-ci affectent librement au but de leur choix (sous réserve de l'ordre public, bien sûr). En réalité, le regroupement de biens n'est pas l'essentiel. Le levier juridique n'est pas tant le *fruit* de la mise en commun, la cagnotte, le capital social, l'actif, le patrimoine distinct qu'aurait une personne morale, que la mise en commun, *elle-même*, la volonté des membres de « se mettre ensemble ».

On en veut pour preuve qu'il peut s'agir de mettre en commun une valeur non liquide. Ainsi, la société de personnes, comme son nom l'indique si bien, peut naître de la mise à disposition des talents des personnes qui la constituent (art. 2186 C.c.Q.). Nombre d'organisations de bénévoles, d'associations d'étudiants, de comités de lecture, de cercles en tout genre, sont (presque) exclusivement constitués d'une simple mise en commun du temps

52. *Prince Consort Foundation* c. *Blanchard*, [1991] R.J.Q. 1547, 1558-1559.
53. Cf. de VAREILLES-SOMMIÈRES, *op. cit.*, note 14.

de chacun, de son énergie, de ses sentiments, de ses passions ; bref, de la *personne* de chacun, plutôt que de ses *biens*[54]. Lorsqu'on ne va pas même jusqu'à mettre en commun son infortune, ... plutôt que sa fortune[55]. Songeons aux regroupements de victimes d'un même fait dommageable en recours collectif, aux associations de lutte contre une maladie, etc.

À la question de savoir si la reconnaissance de la propriété collective doit être encouragée, nous répondons oui. Nous sommes convaincue qu'elle constituerait un cadre juridique fort utile à l'élaboration du régime juridique de très nombreuses organisations, en commençant par la société de personnes.

Mais nous ne promouvons pas la propriété collective aux dépens de la personnalité[56], donc finalement le point commun est de réaliser « une mise en commun » de ressources, humaines et/ou matérielles. Il ne faut pas s'y tromper : par ses aspirations, la propriété collective relève d'une conception socialiste du droit. Mais juridiquement, elle demeure un simple mode d'organisation de la *propriété (privée)*, c'est-à-dire de la richesse individuelle[57]. En cela, fondamentalement, elle ne diffère pas de la personnalité morale. Et ce, pour la raison simple que la personnalité morale constitue *toujours*, à la base, une propriété collective[58], remodelée – insistons sur ce point : *simplement* remodelée – par le législateur. M. de Vareilles-Sommières l'explique très bien : en accor-

54. Voir, L. JOSSERAND, *loc. cit.*, note 8, à la p. 363 ; R. SALEILLES, *op. cit.*, note 15, dix-huitième leçon, notamment aux p. 421-422.
55. Comme le souligne Louis Josserand, « Les richesses collectives ne créent pas plus les personnes morales que les richesses individuelles ne créent les personnes physiques ». Cf. L. JOSSERAND, *loc. cit.*, note 8, à la p. 363.
56. Comme l'a fait avec beaucoup de verve De VAREILLES-SOMMIÈRES, *op. cit.,* note 14, qui introduit son étude par une déclaration fracassante, à la p. 1 : « Rien d'envahissant, aujourd'hui, rien d'encombrant et d'obsédant, rien de fastidieux et de tyrannique comme les personnes qui n'existent pas. Tous les *fâcheux* de Molière, réunis, donneraient une faible idée de l'importance qu'elles se donnent ou plutôt qu'on leur donne, et des embarras qu'elles font innocemment. Si encore elles n'étaient pas fatigantes ! Mais sans le savoir, sans le vouloir, elles sont pernicieuses, elles entravent la liberté des vraies personnes, elles participent comme complices aux plus criantes injustices. »
57. *Contra* : L. JOSSERAND, *loc. cit.*, note 8, à la p. 362 : « La *Gesammte Hand* est avant tout une forme de la propriété ou, si l'on veut et d'une façon plus générale, une forme de tenure pour les droits patrimoniaux ; c'est une notion d'ordre essentiellement patrimoniale et économique. »
58. Lisons attentivement la définition que donne de Vareilles-Sommières, de la personne morale : « C'est une personne fictive, d'origine purement doctrinale, et qui, pour les seuls besoins de la pensée et du langage, est censée titulaire de droits et d'obligations *qui appartiennent en réalité à des personnes véritables* » [nos italiques] ; cf. De VAREILLES-SOMMIÈRES, *op. cit.*, note 14, à la p. 147. Pour un avis similaire, voir J. RICOL, *op. cit.*, note 5, notamment à la p. 276.

dant la personnalité, le législateur ne crée rien, n'ajoute rien. La personnalité n'est qu'une image élégante, utile uniquement à la compréhension de phénomènes dont elle n'est pas créatrice[59].

On peut bien s'interroger sur la pertinence de cette intervention qui distend le lien entre l'apport et son auteur. L'octroi de la personnalité aboutit à des résultats *concrets* différents et *utiles*. Relevons, par exemple, la capacité de la personne morale d'agir en justice sous son propre nom. La propriété collective peut aussi défendre ses intérêts en justice ; seulement, tous les membres devront agir[60].

Il nous semble donc probable que le législateur n'ait conféré la personnalité qu'à des regroupements dont la structure implique qu'elle regroupe un nombre très important de ressources et où les membres sont en continuel renouvellement. Dans ce genre de figure, telle celui de la grande société de capitaux (société par actions), telle celui de la caisse de retraite, la personnalité n'est, somme toute, qu'une justification aisée, réalisée *a posteriori*[61], de règles d'administration différentes de celles de la propriété collective simple.

Imaginons simplement la nécessité dans laquelle sont les membres d'une propriété collective d'agir chacun en son nom pour

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59. F. DELHAY, *op. cit.*, note 20, à la p. 428, nº 288 : « C'est parce que cette collectivité apparaissait mal dans la conception contractuelle de la société que les tribunaux [français] ont admis la personnalité des sociétés civiles ».
60. De VAREILLES-SOMMIÈRES, *op. cit.*, note 14, aux p. 266 et 267, nos 574 et 577.
61. De VAREILLES-SOMMIÈRES, *op. cit.*, note 14, aux p. 159-160 : « [...], dans *tous* les rapports juridiques d'une [association très nombreuse] avec le public, dans *toute* sa vie civile extérieure, tout se passe absolument comme si tous les associés pris en cette qualité composaient une seule personne, ayant pour tout patrimoine l'actif et le passif sociaux. Puisque, dans leurs rapports juridiques avec les tiers, les membres d'une telle association agissent toujours comme un seul homme, [...] la tentation pour l'esprit est grande de passer de la comparaison à la fiction et d'imaginer que tous les associés comme tels et au regard du public ne forment en effet qu'une seule personne. La justesse absolue de la comparaison rend la tentation séduisante. La facilité qu'y gagne le langage, la netteté qu'y gagne la conception et la peinture de la situation, l'élégance d'un tel résumé de relations et de règles multiples, la rendent irrésistible » ; à la p. 226, nº 486. En conclusion de sa thèse consacrée à la fiction, A. Gallet aboutit à une opinion équivalente. Selon lui, la fiction est simplement un procédé doctrinal pratique permettant d'expliquer aisément des phénomènes juridiques. Cf. Aimé GALLET, *Étude sur la fiction de rétroactivité en droit français*, Thèse, Univ. de Poitiers, 1903, p. 174 à 177 ; G. WICKER, *Les fictions juridiques –Contribution à l'analyse de l'acte juridique*, coll. Bibl. de droit privé, t. 253, Paris, éd. L.G.D.J., 1994 ; Ph. WOODLAND, *Le procédé de la fiction dans la pensée juridique*, Thèse, Paris, 1981.

récupérer la partie d'une créance qui lui revient. Cette exigence est extrêmement lourde. Inefficace, elle devient humainement irréalisable lorsque les membres sont trop nombreux ou en mouvement permanent. Non seulement parce qu'elle nécessite des investigations poussées pour déterminer combien de personnes sont membres au moment de l'action en justice (ou du fait dommageable) ; mais qui plus est, pour déterminer qui elles sont. Ensuite, chacune devra exiger personnellement un cinquième, un centième ou un millième de la créance ! Ce n'est pas seulement ridicule, c'est impossible. Le scénario se joue aussi en ce qui concerne les dettes du regroupement. Dans ces circonstances, la personnification est le remède le plus simple et le plus efficace[62]. Nous reconnaissons donc, bien sûr, l'utilité du concept de personne morale. Toutefois, nous maintenons qu'à la base, *propriété collective et personne morale sont équivalentes.* Seules leurs règles de fonctionnement diffèrent[63]. Il est vrai que ce n'est pas rien !

Il demeure grandement souhaitable que l'on repense la théorie des regroupements en la centrant enfin sur ce qui en constitue l'essence : *la mise en commun de ressources ; et non le patrimoine* (ou la personnalité, l'un équivalant exactement à l'autre) qui n'en résulte que parfois et toujours par l'intervention superflue (au sens premier du terme) du législateur[64].

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62. Pour un avis similaire, L. JOSSERAND, *loc. cit.*, note 8, aux p. 368-369. Voir aussi Christian ATIAS, *Droit civil –Les biens* , 4e éd., 1999, Paris, éd. Litec, à la p. 57 : « Économiquement, il est certain que, si les droits réels sont un bon instrument pour la répartition des pouvoirs de jouissance, la personne morale en est un «merveilleux» pour l'organisation de la gestion ; [...] ».

63. Pour un avis sensiblement différent, voir De VAREILLES-SOMMIÈRES, *op. cit.*, note 14, à la p. 225 : « Il faut pourtant que la personnalité morale ait une utilité, pour qu'on ait imaginé et conservé cette fiction. Quelle est cette utilité de la personnalité morale ? Elle est d'un tout autre ordre que [celui qu'on lui prête]. Elle est d'ordre artistique et pédagogique. L'utilité de la fiction, c'est de peindre et de résumer élégamment un état de chose, de lui donner du relief et de la couleur, de simplifier la description d'une situation compliquée ; c'est d'être un excellent procédé de conception et d'exposition ; c'est de rendre service à la science et à l'enseignement ; c'est d'alléger le langage et même la pensée. Telle est l'utilité, toute l'utilité de la personnalité morale. Pour n'être pas grande, elle n'est point à dédaigner. »
Voir aussi R. SALEILLES, *op. cit.*, note 14, dix-septième leçon, à la p. 389 : « Ce que l'on désigne sous le nom de personne civile ne vise donc, en réalité, qu'une forme particulière de copropriété. Il s'agit de patrimoines collectifs administrés par des gérants qui représentent l'ensemble des intéressés. C'est comme une espèce de tenure particulière, c'est un mode de gestion patrimoniale ».

64. L. JOSSERAND, *loc. cit.*, note 8, à la p. 359 : « La propriété des personnes morales n'aurait jamais été différente de la propriété en main commune, la personnalité civile n'étant qu'une construction purement artificielle imaginée par des juristes pour abriter commodément la propriété collective. »

# The Quebec R.R.S.P. and *Bank of Nova Scotia* v. *Thibault*

John B. CLAXTON

## RÉSUMÉ

Par jugement en date du 14 mai 2004, la Cour suprême du Canada a décidé que le libellé type des régimes enregistrés d'épargne retraite utilisé au Québec ne constituait pas des contrats de rente, tout au moins avant leur date d'échéance; en conséquence, une déclaration d'insaisissabilité ne produit pas d'effet. La Cour a également décidé que le régime ne constituait pas une fiducie.

L'auteur conclut que la décision du tribunal repose essentiellement sur le fait que Thibault n'avait pas effectué un transfert de propriété. Il note que le régime ne contenait aucune disposition spécifique d'aliénation, qu'il réservait à Thibault le droit de décider des placements, qu'il libérait le fiduciaire de toute responsabilité, sauf celle d'agir à titre de gardien, et qu'il permettait à Thibault de retirer à tout moment ses contributions. Il en conclut que le tribunal en est arrivé à sa conclusion de l'absence de transfert en se fondant sur le cumul de ces facteurs.

L'auteur examine chacun des facteurs précités en supposant que Thibault avait clairement l'intention de transférer un bien. Il conclut que, dans l'hypothèse d'un transfert véritable, la présence de ces facteurs ne devrait pas empêcher la présomption de l'existence d'une fiducie ou d'une rente.

Quant à la question d'insaisissabilité des contributions dans un RÉER, l'auteur est d'avis que, bien que les contributions à une fiducie ou à une rente ne font pas partie du patrimoine du constituant, son intérêt dans ces contributions demeure un « bien » qui serait saisissable, à moins que l'on puisse invoquer une dispense spécifique à l'encontre de la saisissabilité. Finalement, il conclut qu'un RÉER adéquatement rédigé peut constituer une fiducie ou un contrat de rente, et il énonce les fonctionnalités d'une telle rédaction.

# The Quebec R.R.S.P. and *Bank of Nova Scotia* v. *Thibault**

John B. CLAXTON**



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* Originally designated as *Scotia McLeod* v. *Thibault*, now indexed as *Bank of Nova Scotia* v. *Thibault*.

** Q.C. of the Montréal Bar. This article is extracted from the author's work *Studies on the Québec Law of Trust*, to be published (Thomson Carswell) in the spring of 2005. Special thanks are given to Professor Roderick A. Macdonald, of McGill University Faculty of Law, who kindly commented upon an earlier draft of this paper. The opinions expressed are the author's alone.

## INTRODUCTION

**1.** The practicing trusts and estates bar will be interested in the recent decision of the Supreme Court of Canada in *Bank of Nova Scotia* v. *Thibault*, which was rendered May 14, 2004.[1] The Court declared that a Quebec pre-1994 self-administered Registered Retirement Savings Plan ("R.R.S.P.", "*RÉER*" in French) was neither a contract for the constitution of an annuity, nor a Quebec trust, and that the claim of Thibault, the individual who established the plan, that the assets of the plan were unseizable by his creditors to satisfy their claims, could not be supported.

**2.** The decision is also of interest to the investment community, or at least to the sections of it comprising investment dealers, trust companies and insurance companies. It was entered into evidence in *Scotia McLeod* that seven major financial institutions had sold financial products similar to the Thibault type R.R.S.P., and that they had proved very popular. The matter was of such concern that in 2002 the Legislature amended Quebec's trust company legislation to try and assure that the individual's savings under such plans remained unseizable, only to be told by the Supreme Court of Canada that, in effect, the amendment did not achieve this purpose.[2]

**3.** A first reading of the decision in Scotia McLeod invites the conclusion that, in its disposition of the Quebec law of the trust and of annuities, it is conservative, even restrictive. Its tone seems severe, perhaps censorious. More careful reading reveals such a conclusion to be unfounded. Indeed a more liberal point of view of the law is not precluded by it. The purpose of this paper is to examine the Supreme Court judgment (Part 1); to explore the underlying issues, particularly in relation to the law of trusts (Part 2); to

1. *Scotia McLeod* v. *Thibault* (cited as "*Scotia McLeod*"), [2004] S.C.C. 29 (no. 28871), now indexed by the Supreme Court of Canada as *Bank of Nova Scotia* v. *Thibault*. The decision was unanimous, McLachlin, C.J., Bastarache, Arbour, LeBel, and Deschamps, J.J. It was delivered by Deschamps, J. It confirmed the majority decision of the Quebec Court of Appeal, [2001] R.J.Q. 2099, AZ-50099422, J.E. 2001-1654, and the decision of the Superior Court, AZ-99022132, J.E. 99-2329.
2. *An Act to Amend the Act Respecting Insurance and Other Legislative Provisions*, S.Q. 2002, c. 70, s. 187 (cited as "*The 2002 Legislation*").

explore those related to exemptions from seizure (Part 3); and finally, to assess some possible types of R.R.S.P. that would take into account the terms of the judgment (Part 4). Whether or not these retirement plans can be amended or replaced to make them unseizable will depend in large measure on the individual's circumstances and the willingness of the investment community to accommodate them.

## PART 1 – The Scotia McLeod Judgment

### What is an R.R.S.P.?

Before summarizing the finding of the Supreme Court of Canada, the reader should be made aware of the concept of the R.R.S.P. and its requirements.

**4.** ***R.R.S.P. Defined.*** There are nearly as many types of Registered Retirement Savings Plan as there are financial institutions offering them, or offering services in connection with them. They are offered by life insurance companies, trust companies, banks, investment dealers, *caisses populaires* and loan companies. Moreover the investment products resulting in consequence of R.R.S.P.s are just as varied. They include bank certificates of deposit, cumulative premium annuities and life insurance contracts, hypothecs, real estate investments, and investments primarily in Canadian marketable securities, including stocks and bonds. Generally speaking a R.R.S.P. may be defined as follows:

> Le RÉER est un contrat ou un arrangement intervenu entre un individu et une institution financière en vertu duquel cet individu (ou son conjoint) verse â cette institution financière des contributions dans le but d'accumuler, à l'abri de l'impôt, un revenu de retraite.[3]

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3. *In re: Les Coopérants; Firstcliff Development Inc.* v. *Raymond, Chabot, Fafard, Gagnon inc. et al*., (1994) R.L. 268 (C.A.), (cited as "*Les Coopérants*"). The Superior Court decision is reported as *Les Coopérants, société mutuelle d' assurance* v. *Raymond Chabot, Farfard, Gagnon inc. et Firstcliff Development Inc.*, [1993] R.J.Q. 548 at 562. It quotes the definition of Sylvie Lambert, *Les régimes enregistrés d'épargne-retraite dans le contexte du droit civil,* a University of Montreal master's thesis 1991. See also *Croft (Syndic de)* v. *Lepage et al.*, [1998] R.J.Q. 1917, at 1925; *Jean Jobin: Blais, Fortier, Touche, Ross Ltée* v. *The Monarch Life Assurance Company,* [1986] R.J.Q. 1755 (C.A.), at 1757.

**5.** ***Tax Driven.*** The R.R.S.P. is a tax driven scheme that must meet a good number of specified conditions under the *Income Tax Act* and the *Taxation Act* to qualify.[4] In essence the annual premiums paid into a taxpayer's plan, when registered with the Minister, may be deducted from the taxpayer's income in the computation of taxable income.

**6.** ***Rules of Qualification.*** The principal qualifying rules are the following: (i) The plan must be accepted for registration by the Minister of National Revenue, Customs and Excise. (ii) The premium may not exceed the lesser of 18 % of the taxpayer's earned income or $14,500 in 2004 ( $15,500 in 2005, with provision for indexation thereafter). Unused portions of allowable premiums may be carried forward. (iii) The plan must be concluded with an institution qualified to pay a retirement income through its issue of annuities, or its acting as a trust company, or its issue of investment contracts, or its qualification as a member of the Canadian Payments Association. (iv) Premiums are to be paid into a fund to be invested in qualified securities (primarily Canadian debt or equities). (v) All or part of the fund may be transferred into another R.R.S.P. of the taxpayer. Limited transfers into an R.R.S.P. are allowed from other approved types of retirement benefit provision. (vi) If the plan or its assets are transferred, hypothecated, pledged, or drawn down in whole or part before retirement, the amount involved becomes taxable income in the hands of the taxpayer in the year of any such action. (vii) Any depositary of a plan must renounce to any right of set-off. (viii) The fund must be converted to a qualified annuity or to a Registered Retirement Income Fund ("R.R.I.F." "*FEER*" in French), before the end of the year in which the taxpayer attains age 69. No premiums can be paid thereafter. If not converted to a R.R.I.F. before that date a qualified annuity must be purchased. (ix) The retirement income must be paid to the taxpayer; or, if the plan is a spousal plan, to his or her spouse. (This permits a degree of income splitting after retirement.) It is entirely taxable. It cannot be assigned except on marital breakdown or death. Generally speaking it must be paid out in annual or more frequent instalments (there are exceptions) so as to exhaust the fund at age 99. Generally speaking, upon the death of the taxpayer the balance in the

4. The *Income Tax Act*, R.S.C., c. 1 (5th Suppl.), provides for RRSPs in s. 146 (1) ff. (over 40 pages in a commercial copy). The *Taxation Act*, R.S.Q., c. I-3, s. 901.1 ff., follows suit.

fund is treated as taxable income in the year of death unless the beneficiary is the spouse, common-law partner or dependent child.

**7.** ***Self Administered R.R.S.P. Described.*** It is common, but not essential, for taxpayers to establish R.R.S.P.s with a trust company, ostensibly today as an express trust. This study is concerned with this particular type of R.R.S.P., moreover one having an even narrower focus, namely the so called self-administered plan. Here, the individual enters into a contract with a financial institution, in which he agrees that he may elect to deposit a sum of money (up to the tax specified limit) annually before retirement in a retirement fund to be maintained by a trust company, and to be invested in qualified securities. The authorization to select the investments is usually retained by the individual, but may also be given to the financial institution or the trust company. The financial institution usually acts as a mandatary of the trust company. The individual may also have the right to withdraw the premiums he has paid and to name a beneficiary.

**8.** ***R.R.S.P. as a Trust in Doubt.*** Article 1269 C.C.Q. describes the private trust by onerous contract in terms of "providing for retirement or procuring another benefit for the settlor". This reflects the *Commentaires*, in which the Minister expressly mentions the R.R.S.P. as a trust.[5] The Superior Court in *Marleau, Raymond Chabot inc., syndic* v. *Caisse populaire St-Raymond de Hull* found an R.R.S.P. to be a trust.[6] However, there is no doubt today that many self-administered R.R.S.P.s have not been established as trusts. In *Scotia McLeod,* the Supreme Court of Canada found that the R.R.S.P. established by Mr. Thibault was neither a contract of annuity, nor a trust.[7]

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5. *Commentaires du ministre de la Justice,* Les publications du Québec, Québec 1993, vol. 1, at 751.
6. *Marleau, Raymond Chabot inc., syndic* v. *Caisse populaire St-Raymond de Hull*, J.E. 99-969; REJB 1999-01269, at 10. This decision cites extensive authority. See also the Supreme Court of Canada decision of 1999 in *Poulin* v. *Serge Morency et Associés, Inc.*, [1999] 3 S.C.R. 351, which cited with approval *Compagnie Trust Royal* v. *Caisse Populaire Laurier, et al.*, [1989] R.J.Q. 550 (C.A.), which found a pre-reform RRSP to be not a trust; *Les Coopérants*, *supra*, note 2; *R.W.* v. *C.H.*, [1994] Q.J. No. 12; *Droit de la famille –2176* , [1995] R.J.Q. 1056; *Lacroix et al.* v. *Raymond Chabot inc. et SSQ Société d'assurance-vie inc. et al.*, Jan. 15, 2001, C.S., no. 235-11-000083-971 (unreported); *Croft (Syndic de)* v. *Lepage et al.*, [1998] R.J.Q. 1917. This case was heard under the provisions of the Civil Code of Lower Canada (the "CCLC").
7. *Scotia McLeod, supra,* note 1.

### *Scotia McLeod* v. *Thibault*

**9.** ***The Facts.*** In *Scotia McLeod* v. *Thibault*,[8] Mr. Thibault had signed a standard form of self-administered R.R.S.P. It was a form of contract modeled on one used in Ontario. It anti-dates the reforms of 1994 and contains essentially none of the words found in the Code on the Quebec trust. It established an investment plan (the "Plan") providing that Thibault could deposit funds annually (but without obligation) with Scotia McLeod as agent for a trust company to be named as trustee; that the funds be held and invested by the trustee; and that upon Thibault's retirement age, the accumulated funds be converted to an annuity to be paid to Thibault in periodic instalments. The Plan also provided that Thibault (or his agent) could (i) direct the investment of the funds (subject to the right of the trustee, in the exercise of its discretion, to refuse any direction that failed to comply with its administrative requirements), (ii) withdraw any and all deposits made under the Plan, and (iii) name a beneficiary, reserving the right of revocation. The Banque de Nouvelle-Écosse, as a creditor of Thibault's, seized the proceeds of the R.R.S.P. amounting to some $126,613. Thibault contested the seizure.

**10.** ***The Issues.*** Perhaps no investment scheme brings into focus more clearly the elements required for the establishment of a trust than the self-administered R.R.S.P. The questions underlying *Scotia McLeod* were the following: (i) Did the individual who established the R.R.S.P. divest himself of the property contributed to the fund so as to establish a trust? (ii) Did he do so where he retained the right to direct the trustee in the selection of the investments? (iii) Did he divest himself of property where he reserved the right to withdraw the property, or some of it, before attaining retirement age and obtaining the pension contemplated? (iv) Was a separate patrimony established? (v) If a trust was established, can its property be seized by his creditors? In *Scotia McLeod*, the questions were, however, complicated by two overlying questions, namely: (vi) Was the Plan an annuity contract? (vii) Were its assets unseizable in view of the *Trust Companies Act*,[9] the new codal definition of an annuity (2367

8. *Scotia McLeod*, *ibid*.
9. *An Act Respecting Trust and Savings Companies,* S.Q., c. S-29.01, s. 178, (cited as "*The Trust Companies Act*").

C.C.Q.[10] – differently worded from 1787 C.C.L.C.[11]), and *The 2002 Legislation*?[12]

## The Decision of the Supreme Court of Canada

**11.** The unanimous decision of the Supreme Court of Canada was given by Mme Justice Marie Deschamps. The findings were three fold. First, the particular Plan was not an annuity contract, at least prior to its maturity date and its conversion to an annuity. In consequence a declaration of unseizability was without effect (1). The Plan does not constitute a trust (2). Third, *The 2002 Legislation*, what ever it may mean, does not apply to the R.R.S.P. in question (3). The findings of the judgment will be summarized in turn, although many of the juridical elements relied upon were common to all three. Certain incidental comments are added. (In the summary which follows references in brackets to paragraph numbers are to the corresponding numbered paragraphs of the judgment.)

### *(1) Was there an Annuity Contract?*

**12.** ***The Annuity Question.*** The Supreme Court of Canada disposed of the annuity question as follows. (i) It declared that a contract of annuity under the C.C.Q. (article 2367) requires the alienation of capital to the debtor of the annuity (para. 16); that there has been no change in the law under the 1994 reforms (para. 26). (ii) The application form for the Plan described Thibault as the "*propriétaire inscrit ('rentier')* (the "registered owner ('annuitant')", whom the Court calls the "owner-annuitant" (para. 18). (iii) The mechanism under the Plan required the liquidation of the Plan assets and the application of the net-proceeds to a retirement

10. The Civil Code of Quebec; references to numbers in brackets or to articles, without more, are to articles of the Civil Code of Quebec.
11. The Civil Code of Lower Canada of 1866 (cited as the "CCLC").
12. Article 2457, 2458 C.C.Q. *The 2002 Legislation*, *supra*, note 2, declared that "[A]ny stipulation in a contract for the constitution of an annuity which allows the total or partial withdrawal of the capital does not prevent the contract from being an annuity contract within the meaning of article 2367 of the Civil Code." The amendment also contains a paragraph stating the provision is declaratory but does not infringe upon the rights of the parties in cases pending, and that a trust or insurance company that is a party to such a contract containing such a stipulation of withdrawal must compensate the contracting party or, as the case may be, the annuitant, the holder of the contract or the beneficiary under the contract on request, for any prior seizure. The Supreme Court of Canada found the amendments had no application as the RRSP in question was not a contract for the constitution of annuity.

income in the form of a fixed-term annuity to be provided by the trustee or another issuer only at the maturity date (retirement), and then at the rates of the issuer then in force (para. 19). (iv) Before maturity the trustee's only obligations were to execute the investment directions of the owner annuitant and to conserve the investments (para. 20). (v) Before the maturity date Thibault's rights were almost absolute; he could ask the trustee to distribute to him all or part of the assets without affecting the survival of the contract (subject only to the trustee's right to refuse an investment direction that does not comply with its administrative requirements) (para. 20). In conclusion (vi) there was no alienation of the property or of the value of the funds before the maturity date (paras. 21, 26). The Court said (para. 20):

> À aucun endroit le Régime ne prévoit qu'avant la date d'échéance, le propriétaire-rentier se départit de la propriété ou de la valeur des fonds en faveur de la Fiducie. Non seulement la propriété des fonds n'est pas transférée, mais le propriétaire-rentier en conserve l'entière maîtrise.

**13.** ***Les Coopérants Distinguished.*** The Supreme Court of Canada distinguished *In re Les Coopérants; Firstcliff Development Inc.* v. *Raymond, Chabot, Farfard, Gagnon, inc.*[13] In this case the Court of Appeal found that a contract does not cease to be an annuity contract by reason of a clause authorizing withdrawals by way of the return of the surrender value, and that would lead to the termination of the contract, a resolutory clause. The Court noted that no such right was provided for in the Thibault Plan. The Court found the introduction of the word *alienation* in article 2367 C.C.Q., defining an annuity, means a final disposition, and that in consequence the word *permanently* of article 1787 C.C.L.C. ceased to be necessary; thus there was no difference in meaning (para. 24). The mechanism under the Plan does not compare with that for annuities or life insurance. Under the last two contracts the payments made become the property of the debtor company, and any early return to the contract holder results in a diminished benefit or termination. Such right is available only when stipulated. This was the case in *In re Jobin: Blais, Fortier, Touche Ross Ltée* v. *Monarch Life Assurance Co.*, and in *Les Coopérants* (para. 25).[14]

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13. *Les Coopérants, supra,* note 3.
14. *In re Jobin: Blais, Fortier, Touche Ross Ltée* v. *Monarch Life Assurance Co.*, [1986] R.J.Q. 1755 (C.A.); *Les Coopérants, supra,* note 3.

**14.** ***Were the Assets Seizable?*** The Supreme Court of Canada reviewed the exceptional nature of exemptions from seizure, the legislative policy of protection of the family that is behind it, and the need for strict and restrictive construction of such provisions (paras. 9-16). The Court found that, if there were no alienation of capital, there was no contract of annuity before maturity (retirement); and in consequence, no exemption from seizure (para. 26). This is the subject of paragraph 42 and following.

### *(2) Does the Plan Constitute a Trust?*

**15.** After noting the requirements for a trust specified by article 1260, the Supreme Court of Canada examined in turn whether a transfer of property to a patrimony by appropriation had taken place under the Plan (1); whether there was appropriation to a particular purpose (2); and whether the acceptance by the trustee of his functions under the Plan constituted acceptance of a trust (3). A summary, listing the elements of each finding, follows.

**16.** ***(1) Transfer to a Patrimony by Appropriation.*** The Court noted the agreement constituting the Thibault Plan contained (i) no clause providing for a transfer of the assets (para. 32); (ii) on the contrary, and at least before the maturity date (Thibault's retirement), the right of withdrawal established that there was no divestiture of the assets, no transfer to a patrimony by appropriation (para. 32); and (iii) that the transfer to a trust must have complete legal effect (para. 34).

**17.** ***A Revocable Transfer?*** The argument of counsel in *Scotia McLeod* that a revocable transfer should be sufficient was dismissed as not constituting a sufficient divestiture to establish a trust (para. 33). Such argument was based on counsel's observation that article 1256 concerning foundations requires that a person "irrevocably appropriates" (*affecte d'une façon irrévocable*") property, while article 1260 on the trust does not qualify the form of "transfer" required. The Court noted that for the foundation the verb used ("appropriates") needs the qualification of "irrevocable". However for the trust, the word "transfer" (meaning "alienate") needs no such qualification as it automatically invokes the idea of a divestiture in favour of another. Moreover, in the trust the settlor can in fact stipulate a return of the trust property, either upon its termination (1281), or when he fails to name a beneficiary

(1297), or upon the happening of any condition (1497), or upon his election, should such a condition occur.

**18.** This reasoning of the Court may have disposed of the argument, but it does not follow that all transfers to a trust must be free from revocation. Revocation and return of the trust assets to the settlor upon the happening of a condition is common in many trusts. It is invariably the position in most security trusts (1263).

**19.** ***(2) Appropriation to a Particular Purpose.*** The Supreme Court of Canada declared that appropriation of the Plan assets to an annuity was only to occur on the maturity date, and that before that they could be freely disposed of by Thibault (paras. 35, 36).

**20.** ***(3) Acceptance by a Trustee.*** The Court concluded that (i) as decisions respecting investments were the exclusive prerogative of the owner-annuitant (subject only to the constraint of being acceptable to the trustee's administrative formalities), and (ii) as the trustee's obligations were limited to carrying out the investment directions and to conservation of the trust assets, the limited role of the trustee was different from the role of the trustee of a trust under the C.C.Q. The latter trustee must have the control and exclusive administration of the trust assets (1278). It was noted that the deed may circumscribe what he may do, but cannot limit his powers to the point where they become something else entirely (para. 37). Mme Justice Deschamps said:

> L'étendue des pouvoirs accordés à un fiduciaire ne peut être limitée au point d'en dénaturer la charge (M. Cantin Cumyn, *Traité de droit civil: L'administration du bien d'autrui* (2000), p. 241). L'acceptation de la fiducie dessaisit donc le constituant et charge le fiduciaire de l'administration des biens (art. 1265 C.c.Q.).[15]

## Constitution of an Annuity Versus a Trust

**21.** The Supreme Court of Canada then observed that the characterization of the Thibault Plan as an annuity contract is essentially incompatible with its characterization as a trust.

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15. CANTIN CUMYN, *L'administration du bien d'autrui*,Cowansville, Éditions Yvon Blais, 2000, at 201. Note that the reference in the Supreme Court of Canada judgment to p. 241, is in fact to paragraph 241, on p. 201.

Under the former the debtor of the annuity is personally obliged to pay, while under the latter the trustee has no such liability, but it is the trust that is obliged to pay. The requirement that capital be alienated is common to both institutions, but the obligations created are different (para. 39).

**22.** The suggestion of mutual exclusion of the two contracts is a novel one. A contract to constitute an annuity will generally have two phases: the accumulation phase before retirement, and the annuity phase after retirement. This underlies the holding in *Les Coopérants*.[16] That decision made no distinction regarding the nature of the contract during the accumulation phase and during the annuity payment phase. *The 2002 Legislation* inherently acknowledges the idea of the two phases.[17] Both the case of *Les Coopérants* and *The 2002 Legislation* address the two phases as a contract of annuity, allowing for a declaration of unseizability to operate in the first phase, as well as in the second. However, if the contract of annuity and the trust are mutually exclusive, the following bizarre result may occur. Should the annuity trust company elect to assure accumulation of the funds in a segregated account in the first phase (a practice for some of the pension plans described in detail in *Les Coopérants*), and declare it holds them in trust (it is after all a trust company, and under s. 175 of *The Trust Companies Act*[18] entitled to establish a trust by unilateral declaration of trust), the company could be found to be a trustee in the first phase, and the beneficiary of the trust in the second. If one pursues this reasoning, the declaration of unseizability would be invalid until retirement takes place in the second phase. This reasoning flows from the Scotia McLeod judgment. It may have intellectual purity, but it strays from the practical realities. The practical realities are overtaken by requirements of a technical formalism. In this context, the characterization of the contract under one institution should not preclude its characterization under another. Nor can one see any social utility in the distinction of an R.R.S.P. established by an annuity contract, and one established by a trust. This is particularly the case if the annuity contract allows unseizability and also allows the contributor to withdraw his contributions during the accumulation phase.

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16. *Les Coopérants, supra*, note 3.
17. *The 2002 Legislation*, *supra*, notes 2 and 12.
18. *The Trust Companies Act, supra*, note 9, s. 175.

### *(3) Do the Amendments to the Insurance and Trust Legislation Affect the Situation?*

**23.** The Supreme Court of Canada acknowledged that by its terms *The 2002 Legislation*[19] did not affect *Scotia McLeod*, and that it was not appropriate for the Court to rely upon it to determine the rights of the parties. It then made some further (*obiter*) observations (para. 43 and following). (i) It found the section was declaratory of what the law is. (ii) The section merely confirmed the conclusion of the Court of Appeal in *Les Coopérants* and made clear that a partial withdrawal also does not prevent a contract from being considered an annuity. It affirmed what was already available under life insurance policies if stipulated for. (iii) It did not change the rule for annuities and life insurance contracts that capital be alienated. (iv) It did not change the rules governing exemptions from seizure, nor extend them generally to R.R.S.P.s. (v) The investment rules for R.R.S.P.s still allow funds to be used to purchase insurance policies or annuities and thereby to obtain some protection against seizure. Thus, the Court declared that self-employed workers can have the protection provided by exemption from seizure and suffer no discrimination in comparison with employees who have access to pension plans. The Court also declared that the latter impose strict limits on transfers of pension funds under rules that are not more favourable, overall, than rules that apply to self-employed workers.

**24.** The Court made no reference to the fact that the employee contributor to a pension plan obtains protection from seizure during the accumulation period, while the self-employed contributor to an R.R.S.P. of the type before the Court does not. It is curious also that the Legislature, in the opinion of the Court, would intervene merely for the narrow purpose of extending the holding in *Les Coopérants* to cover *partial withdrawals* of annuity contributions before maturity, and assure they did not negate the declaration of unseizability.

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19. *The 2002 Legislation*, *supra*, notes 2 and 12.

## PART 2 – The Underlying Issues

### General Observation

**25.** One should not find fault with the general conclusion of the Supreme Court of Canada decision in *Scotia McLeod* if one accepts the finding that the contract, the R.R.S.P. under consideration, while itself containing no words of transfer of property, had operative and administrative features, as well as control of property features, more compatible with the continued retention of ownership of the property by Thibault. The Court also noted the application for the contract described him as the *owner*, even although the contract itself described him as the *annuitant*. That being said, the judgment gives rise to as many questions as it answers. Although the Court makes it quite clear that each case must be determined under its own special features (para. 58), the reasons expressed suggest a technical formalism new to the characterization of arrangements made under the institutions of the civil law. They may invite the reader to conclude that if any of the elements identified by the Court to show that there was no transfer of property are present in another situation, a court will find that a trust has not been constituted. The temptation to extend the considerations for the judgment beyond its immediate and essential holding is there.

**26.** ***The Essence of the Decision.*** The essence of the decision is to be found in a concluding paragraph. It states:

> La nature des REER fait qu'il n'est pas possible de leur apposer une étiquette unique. Ils peuvent établir des règles qui permettent d'acheter une police d'assurance-vie ou une rente insaisissable ou même de constituer une fiducie. Pour ce faire, ils doivent cependant respecter les règles applicables à ces contrats. Dans le cas du RÉER Scotia, une règle élémentaire, celle de l'aliénation, n'est pas respectée et empêche la qualification comme rente ou comme fiducie. Même si l'on tient pour acquis que des retraits partiels ou totaux ne font pas obstacle à cette qualification, l'actif demeure, ici, entre les mains de celui qui reste propriétaire jusqu'à l'échéance du Régime. En l'occurrence, ce propriétaire est M. Thibault.

In *Scotia McLeod* the essence of the decision was to find that the *transfer of property* required to constitute a trust did not take place.

**27.** One should be mindful of the *dictum* of Lord Halsbury, L.C., in the House of Lords:

> A case is only authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all.[20]

He was of course, speaking of the *common law* with its principle of *stare decisis*, a principle that is not a part of the traditional Quebec legal heritage. Although Quebec does not share the same system of law, it does share the same system of justice. The words of his Lordship would seem equally apt in the Quebec civil law.

## Specific Elements of Trust Law Invoked

**28.** Apart from the question of seizability, six elements or factors of trust law spoken of in the decision can be identified. To assure that their relevance in the *Scotia McLeod* decision is not taken out of context, they will each be examined in turn on the express assumption that a transfer of property has taken place; that words of *transfer* or explicit evidence of transfer are present, and the said factors do not occur, or at least do not all occur at the same time, as they did in *Scotia McLeod*.

### *(1) A Transfer of Property*

**29.** The judgment found that the Thibault R.R.S.P. contained no words of *transfer* of property ("*l'absence de toute clause prévoyant le transfert*" – para. 32), which, when coupled with other features, led to the conclusion that there was no transfer and no trust. The general principle of civil law is that the holder of property is *de facto* presumed to possess it as owner (article 921).[21] The principle was not referred to by the Supreme Court of Canada. This is a simple and rebuttable presumption. It is there to deal with situations of fact, but also to avoid legalistic requirements of

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20. *Quinn* v. *Leatham*, [1901] A.C. 495, at 506. For an examination of the principle of *stare decisis* in the civil law of Quebec, and the limitations of the principle, see PIGEON, *Rédaction et interprétation des lois,* 3e éd., Montréal, Éditions Thémis, 1999, at 197.
21. See LAMONTAGNE, *Biens et Propriété,* 3e éd., Cowansville, Éditions Yvon Blais, 1998, at 376; LAFOND, *Précis de droit des biens,* Montréal, Éditions Thémis, 1999, at 212.

technical formalism. Thus, deposit of a sum with a bank gives rise to the presumption that the sum is transferred to the bank and held by the bank as owner. The bank becomes the debtor of the depositor-creditor. As regards the trust, this would translate as a presumption that the trustee with detention of the trust property is presumed to hold title to it as trustee. Equally, a sum delivered to a trustee should normally give rise to a presumption that the trustee holds title to it as trustee. This must be the case whenever words of transfer are present. This will certainly be the case also whenever the settlor receives an acknowledgement or a release of an obligation regardless of words of transfer. Examples that come to mind are the pre-incorporation trust, the investment trust, the pension fund trust, and the security trust. Words of *transfer* (*alienation*) are not usually employed. If there is an active verb, more often it is "delivers", "deposits", "contributes" (as in *Scotia McLeod*) "pays", "conveys", etc. Subsequent payments are invariably made without any words declaring their nature.

**30.** The Supreme Court of Canada also stated that the transfer of property must have complete legal effect (para. 34). It certainly must be such that the transferor is divested of the property transferred (article 1265). It can be no more than this, as none of the three actors acquires a real right in the property, and under express provisions of the Code (1263, 1275, 1281, 1297) the property may well return to the settlor as contributor under a security trust when the obligation secured is discharged, as beneficiary, upon failure of the trust, or upon conclusion of the mission of the trust.

### *(2) Appropriation to a Particular Purpose*

**31.** The Supreme Court of Canada found there was no appropriation to an annuity before the maturity of the Plan (the retirement date – para. 35). No reasons in support of this finding are given, but one must infer that there could be no separate patrimony unless there was a *transfer* of property to it; that as there was no transfer, the trust purpose to be reflected in an autonomous patrimony was not established. This invites the observation that, intellectually, the transfer and the dedication to a purpose, such that an autonomous patrimony is established, can meld in a single intention and establish a trust. Thus, in many cases, where a separate patrimony is dedicated to a purpose and receives a property, a trust is established. Equally apposite, where property

is transferred and dedicated to a trust purpose, a separate patrimony is created. There are a number of testamentary trust cases that support this conclusion.

### *(3) The Right to Withdraw Capital*

**32.** The Supreme Court of Canada held that during the initial stage of the Plan (before retirement), since assets may be withdrawn at any time, there has been no divestiture of the assets (para. 32). This begs the question: had there been words of transfer, would the stipulation of the right to withdraw some of the deposits negate the transfer in trust? Would it do so if the right was expressed as a right to receive an advance or advances of the ultimate pension to result, and with a consequential reduction of it? Does it change it if the right was expressed as a right to terminate the Plan, or if it gave the trustee the right to terminate it should the advances exceed a certain level? Could the plan contain a resolutory clause or a termination clause? One may infer from a close reading of the judgment that, if properly structured, the general answer to these questions should be affirmative. A plan would also have complete legal effect as a trust if it were subject to a resolutory condition, or a termination clause, as there would still be a transfer and divesture of the property.

**33.** The issue should be examined from a different prospective. Should one enter into a direct contract with a life insurance company or a trust company to hold contributions for the issue of a deferred annuity, one can stipulate for the right to withdraw the contributions to be made (subject always to the reduction of the ultimate benefit or to the termination of the contract) without affecting the characterization of the contract (as in *Les Coopérants*). It is then unreasonable to suggest that, should such a contract constitute a trust to hold the contributions, one could not have such stipulation for withdrawal (leading to the same reduction of benefits or termination) without affecting such characterization. This would be particularly hard to accept where the law of trust expressly provides that the settlor may be the primary beneficiary (1275), may also reserve the right to receive the capital (1281) and, upon termination of the trust in the absence of another provision, its property is returned to him (1297). Moreover the trust is established by the first contribution, and others may be added to it in conformity with the rules of the trust (1293), but they do not essentially become a part of the initial transfer to

establish the trust, nor affect the existence of the trust. A stipulation to withdraw them should not negate the establishment of the initial trust.

### *(4) Right to Direct Investments*

**34.** In *Scotia McLeod*, the Supreme Court of Canada noted that decisions respecting investments were the exclusive prerogative of Mr. Thibault (para. 37). One is tempted to infer from this, although the Court did not expressly hold, that this limitation on the role of the trustee impeded his essential control and exclusive administration. The Court made no reference to the significant Quebec Court of Appeal decision of 1996 in *Darling et al.* v. *Le Sous-ministre du Revenu du Quebéc*. It held that, in an *inter vivos* gratuitous trust under article 981a of the C.C.L.C., the reservation of the right to direct the trustee to make the investments did not impede the characterization of the gift as a trust. In it Mr. Justice Biron said:

> On ne nous a cité aucun autre auteur qui a soutenu la proposition que la réserve, par le constituant, d'un certain contrôle sur l'administration du fiduciaire empêche la formation du contrat de fiducie, et mes recherches ne m'ont pas permis d'en trouver non plus. Il ne me semble pas que les auteurs aient porté leur attention sur cet aspect de la question et les tribunaux en seraient saisis pour la première fois.[22]

**35.** Where a transfer of property has taken place, nothing in the text of the new law of trusts would suggest that this is no longer sound law. The trust under both the C.C.L.C. and the C.C.Q. involved a divestiture by the settlor of the trust property. Mr. Justice Biron added that any direction to be given by the settlor to the trustee would be subordinate to the obligation of the trustee to act as a *bon père de famille*, and that in consequence could be refused by the trustee. In a given case the cautious practitioner could ensure that there is no impediment to *control and exclusive administration*, by framing an investment clause with words like "the trustee shall seek the advice, and consistent with prudent administration, endeavour to follow, the investment sug-

22. *Darling et al.* v. *Le Sous-ministre de Revenu du Quebec,* [1996] R.D.F.Q. 28, AZ-90011494, J.E. 96-862 at 7 (C.A.). The court cites FARIBAULT, *Traité théorique et pratique de la fiducie ou du trust civil dans la province de Québec,* Montréal, Wilson & Lafleur, 1936, at 450, who affirms that such a reserve can be made.

gestions of the settlor or his professional adviser approved by the trustee", etc.

### *(5) Control and Exclusive Administration*

**36.** ***Role of Trustee Different.*** The Supreme Court of Canada concluded in *Scotia McLeod* that the role of the trustee under the Thibault Plan was different from that of a trustee under a trust, in that under the Plan the trustee's only obligations were to carry out Thibault's instructions regarding investments and to conserve the assets (para. 37). The Court noted that, while the trust deed can circumscribe what the trustee may do, on acceptance of the trust, the settlor loses the ability to control and administer the assets of the trust (see paragraph 20 above). The Court cited Professor Cantin Cumyn in *L'administration du bien d'autrui,* who stated that the trustee's powers could be modified within limits. She gave examples, such as the requirement that a trustee have particular acts approved by another. She then states:

> Ces diverses modifications aux pouvoirs dont un fiduciaire est normalement investi ne doivent pas entraver la bonne administration du patrimoine, ni la réalisation de l'affectation. Elles ne doivent pas non plus dépouiller le fiduciaire de la maîtrise et de l'administration exclusive du patrimoine fiduciaire, soit les prérogatives essentielles de sa charge.[23]

**37.** ***Meaning of Control and Administration.*** Neither the Supreme Court of Canada, nor Cantin Cumyn, addressed the question of the meaning of *control and exclusive administration* of article 1278. In the writer's opinion these words are words of art in Quebec law with a meaning to be applied in each case. The context of article 1278 (administration of the trust involving the control and exclusive administration of the trustee), where it is used, as well as the overriding principle of article 1308 (that the trustee carry out his duties within the powers imposed by law and the constituting act), make this very clear. Summarily stated, *control and exclusive administration* can only mean that the trustee must have the power to use his discretion to make the decisions necessary to fulfil the mission of the trust free from the direction of any other person. Free from such direction does not necessarily mean free from the obligation to take advice or receive and consider the recommendations of another person. Moreover he must do so in

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23. CANTIN CUMYN, *L'administration du bien d'autrui, supra*, note 15, at 201.

the manner dictated by the trust instrument. *Control* is effected through the holding by the trustee of *titles* to the trust property or *retention* of the trust property. The powers of the trustee, having the *control and exclusive administration* of the property in the instant case are the powers of full administration, but are also always limited to (i) those needed to fulfil his mission; (ii) the terms of the trust instrument and the law; and (iii) the requirements of the responsibility he may incur for the discharge of his mission (1308).

**38.** ***Control Not the Object of the Transfer.*** In the context of the *Scotia McLeod* judgment however, there is a separate aspect to the matter. The Supreme Court of Canada used the apparent absence of *control* of the trustee to demonstrate that in fact there was no *transfer* of property. This is fine as far as it goes. It merely illustrates that there was a lack of evidence that a transfer was intended and took place, but rather evidence that it did not. However, in the opinion of the writer, where a transfer has taken place *control* is a separate concept, an administrative concept, not the object of the transfer. In his view, the direct object of the *transfer* is the *divestiture*; without *divestiture* there is no adequate *alienation*. Moreover, the Code states without equivocation in article 1453 that the transfer of a real right in a certain and determinate property vests the acquirer with the right upon formation of the contract, even though the property is not delivered immediately. Since 1866 Quebec civil law has provided that consent alone is all that is necessary to effect a transfer of real rights.[24] To attach the requirement of *control* to the transfer of property required for the formation of a trust would impose principles that go well beyond those of the fundamental civil law. In the case of the trust, article 1260 speaks simply of a *transfer*. It then simply provides in article 1265 that the settlor is *divested* of the property by the acceptance of the trustee. In both cases it is silent about *control*. If it were to become accepted that a *transfer* to a trust requires more than *divestiture*, and also requires the vesting in the trustee of *control and exclusive administration* beyond the meaning given in the preceding paragraph 37, there may well be a tendency towards the Quebec trust concept becoming so rigid that it will not serve for many investment and commercial applications.

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24. BAUDOUIN and JOBIN, *Les obligations.* 5e éd., Cowansville, Éditions Yvon Blais, 1998, at 404.

### *(6) The Right of Supervision*

**39.** The Supreme Court of Canada noted that, in the context of the power permitted by law to circumscribe what the trustee may do, the only restriction imposed on the trustee was the supervision of the trustee's administration by the settlor and the beneficiary (article 1287 – para. 37). This invites several observations. *Supervision* in its normal dictionary meaning embraces the power to direct, the power of final decision. It cannot have this meaning as it would reduce the trustee to a mere mandatary; it could lead to conflicts in direction among the settlor and the beneficiaries (who might not agree); it would undermine the ability of the trustee to use his discretion to acquit the obligations imposed upon him by law; it would negate the concept of the trust. As a minimum, it will afford the settlor or beneficiary an opportunity to seek the direction of the court on any important decisions to be made by the trustee, but not much more. But whatever it means the term supervision must expand the ability of the settlor, through the trust instrument, to define how the trustee is to act; what parties he must consult, whose advice he must obtain, what decisions he may take in various circumstances, and how he is to acquit them.

## The Court's General Observation

**40.** In her judgment in *Scotia McLeod*, Mme Justice Deschamps made one broad sweeping statement which also invites comment. She said:

> Au surplus, prêter une oreille favorable à un élargissement de la fiducie pour inclure un contrat par lequel une partie se réserve le droit de conclure des opérations touchant l'actif constituerait, à mon avis, une erreur. En 1991, le législateur a voulu intégrer un mécanisme plus flexible que celui prévu au C.c.B.C., mais il n'a sûrement pas voulu créer un véhicule où le constituant peut à son gré utiliser l'actif du patrimoine d'affectation, allant même jusqu'à se l'approprier. La notion même de patrimoine d'affectation serait minée et n'aurait plus de raison d'être. La réforme de la fiducie de droit civil répondait à un besoin réel. Le code permet maintenant d'utiliser ce mécanisme en dehors du contexte des libéralités, carcan imposé par le C.c.B.C. Le modèle de la fiducie ne peut cependant être travesti pour incorporer des contrats où le constituant conserve tous les droits sur le patrimoine. Je conclus donc que le Régime n'a pas les caractéristiques d'une fiducie.[25]

25. *Scotia McLeod, supra*, note 1, para. 41.

**41.** The Court is to be commended for providing a full inventory of the factors that led it to conclude that there was no trust established. It is important that counsel and other judges understand that it is the cumulation of these factors, and not any single one of them, that proved fatal to the characterization of the Thibault Plan as a trust. The broad language used in the judgment, if brought to bear outside the entire context of the case on any of the six factors reviewed here and that may be found in other trust situations, could so limit the institution of the trust as to emasculate it. It would go way beyond the legislated provisions on the new Quebec law of trusts or the concepts they introduced into Quebec law. It could lead to the disqualification as trusts of most pension trusts, investment trusts, almost all business trusts, and many *inter vivos*, alter ego, spousal, protective, and other trusts used in tax planning.

## PART 3 – Property Unseizable

### Seizability of Beneficiary's Interest

**42.** ***Rights to Seizure.*** Every civilian is aware of the principle that a person's assets are the common pledge of his creditors (2644), who rank rateably (2646); that by exception, and where expressly permitted by law, certain property may be unseizable or declared to be exempt from seizure (2645), and such provisions will be strictly construed; and by a further exception, also in consequence of legislation, certain creditors are holders of priority claims or hypothecs giving a right of preference against the properties affected (2647). The latter exception is not pertinent to this review.

**43.** ***Principal Exemptions from Seizure.*** The principal source of exemptions from seizure is to be found in article 553 C.C.P. and following. It includes, among other things, property declared by a donor or testator to be exempt from seizure, judicially awarded support and sums given or bequeathed as support, benefits payable under a supplemental pension plan, other amounts declared unseizable under the Act governing such plans, and anything declared unseizable by law. Some of those express incidents of stipulations of unseizability are to be found in the Code. Articles 1212 and 1215 permit declarations of inalienabil-

ity, which carries with it unseizability, and are valid only if temporary and justified by a serious and legitimate interest. Annuities may be declared unseizable, but only for the amount found necessary for support (2377, 2378). So, without express declaration, are benefits of insurance of the person payable to a designated beneficiary who is a spouse, an ascendant or a descendant of the policy holder or participant under a group policy (2457). The same privilege is extended to beneficiaries irrevocably designated (2458); and by section 178 of the *Trust Companies Act*, is extended to annuity holders from such companies.[26] These provisions have now been further extended by legislation in 2002 (see footnote 12). Article 2649 allows a stipulation of unseizability in an act by gratuitous title provided it is temporary and justified by a serious and legitimate interest (the same words as article 1212).[27] The act must be published. As noted, unseizability can only be invoked where there is an express statutory exemption. Moreover such exemptions must be strictly construed.[28]

## Seizability of Beneficiaries' Trust Interests

**44.** ***A Form of Property.*** The question then arises, to what extent may any other trust benefit be seized at the hands of the creditors of the beneficiary? The beneficiary's absence of a real right in the trust property, which constitutes a patrimony distinct from his (1261), would ordinarily place the property beyond the reach of his creditors. The trust property ceases to be a part of his patrimony and part of the common pledge of his creditors (2644).[29] The settlor and the trustee are in the same position. The trust property is unseizable by the creditors of any of them. However, the right of the beneficiary is established with certainty by the

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26. *The Trust Companies Act, supra,* note 9, s. 178.
27. *In re Maziade (Syndic de)*, [1995] R.J.Q. 1894, J.E. 95-1397 (C.S. Chicoutimi) held that the limitations of article 2649 did not apply to stipulations that had opened prior to the reforms of 1994; cited also in *Godin* v. *Mayer*, (C.Q. Que.), AZ-98031439, [1998] R.D.I. 687, J.E. 98-2136, J.E. 99-1637, and *Robinovitch* v. *Banque de Montréal*, (C.Q. Que.), AZ-99031089, [1999] R.D.I. 160, J.E. 99-508.
28. The general principles concerning exemptions from seizure were reviewed and approved by the Supreme Court of Canada in *Poulin* v. *Serge Morency et Associés, supra*, note 6, citing *Caisse populaire de Lévis* v. *Maranda*, [1950] B.R. 249, at 259 (Galipeau) and 262 (Bissonnette). They were again affirmed by the Supreme Court of Canada in *Scotia McLeod*, *supra*, note 1.
29. In *Droit de la famille –2285,* AZ-95011893, [1995] R.J.Q. 2784, J.E. 95-2035 (C.A.), the Court of Appeal found an interest in a deferred profit sharing plan to be a trust under article 1260 and 1261 and to be excluded from property comprising a community of acquests.

acceptance of the trust by the trustee (1265), and the beneficiary has a personal action against the trustee for payment of his benefit (1284, 1290). This makes his interest in the trust a form of property; property which forms a part of his patrimony, and as such seizable, subject always to the lawfully stipulated terms of the trust.[30] If the beneficiary then has rights of election or options they also are property and can be seized. Once seized, and once exigible, the rights of the beneficiary can be exercised by the seizing creditor.

**45.** ***Future Rights.*** It is important to underline, however, that the seizing creditor cannot exercise more than the beneficiary's immediate right and interest in the trust. If they are future rights, rights not yet opened, the attachment can be declared binding pending such opening (639 C.C.P.). The seizing creditor cannot force payment of the capital of a trust unless the capital is then payable or unless the capital is payable on termination and the beneficiary has an immediate right to terminate the trust.

**46.** ***By Bankruptcy Trustee.*** The principle of the bankruptcy trustee's right to seize such personal rights, and the principle of exemptions from seizure were extensively reviewed by the Supreme Court of Canada in *Poulin* v. *Serge Morency et Associés*[31] and in *Perron-Malenfant* v. *Malenfant (Trustee of),* both in 1999.[32] In the first case the court affirmed that unseizability was the exception and that legislative declarations of unseizability had to be restrictively applied; that funds that were once unseizable and paid out (from a Quebec Government pension fund established under special legislation to a personal self-directed R.R.S.P.) could not be traced (possibly through a principle of real subrogation – which was found not to apply) so as to remain unseizable in the second fund, income tax law notwithstanding. In the second case the issue involved the seizure and exercise of the right of the bankruptcy trustee to obtain the cash surrender value of a life insurance policy, issued to the bankrupt corporation as owner, upon the life of its principal officer, with his wife named as beneficiary. As the corporation (not the life insured) was the owner of the policy, a declaration of unseizability under article 2457 could not

30. This principle is affirmed by the Supreme Court of Canada (*obiter*) in *Scotia McLeod, supra*, note 1. See also PAYETTE, *Sûretés réelles dans le Code civil du Québec*, 2e éd., Cowansville, Éditions Yvon Blais, 2001, at 823.
31. *Poulin* v. *Serge Morency et Associés*, *supra*, note 6, at 361, 364.
32. *Perron-Malenfant* v. *Malenfant (Trustee of)*, [1999] 3 S.C.R. 375, at 404.

operate. The court found that if the right to obtain the cash surrender value could be exercised by the policy owner, it could also be exercised by its bankruptcy trustee. This operated through the principle that the latter stands in the shoes of the former, and can exercise all his rights, including extra-patrimonial rights.

**47.** ***By Other Creditors.*** One should also note particularly that in *Perron-Malenfant v. Malenfant (Trustee of)*, the court found it was unnecessary to decide whether the right to elect to obtain the cash surrender value of a life insurance policy was a purely personal (extra patrimonial) right, one not available to the ordinary seizing creditor. The characterization of the life insured's right to receive the cash surrender value as an extra-patrimonial and purely personal right was one made by the courts, with a finding that it was a principle of public order; a principle common to the civil law in France and the *common law* in Canada and the United States. It was found to be a part of the principle of unseizability of the insurance benefit when granted to the preferred beneficiaries (spouse, descendants or ascendants); one intended to protect the insured's family.[33] Reason might suggest this principle might also apply when a trust is interposed to hold the contract leading to an insured or deferred annuity with a retirement or death benefit and naming one or more of the class of preferred beneficiaries as residual beneficiary. The decision of the Supreme Court of Canada in *Scotia McLeod,* as well as *Perron-Malenfant et Associés (Trustee of)*[34] (above) makes the application of the principle to the trust unlikely.

**48.** ***Procedure to be Followed by Seizing Creditor.*** Where the right of the beneficiary to the benefit of the trust is exercisable immediately, must these two rights, the seizure of the beneficiary's right to a benefit under a trust, and the exercise of his right against the trust, be exercised in separate steps taken sequentially? Must the creditor first seize the beneficiary's patrimonial right in the trust and only thereafter seize the trust assets declaring that the creditor exercises the beneficiary's right to pay-

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33. *Gagnon* v. *The City of Montreal and The Manufacturers Life Insurance Company,* [1956] R.P. 356, at 356 (C.S.); *Jarry Automobile Ltée* v. *Medicoff and Sulla*, [1947] C.S. 465; *Banque Canadienne Nationale* v. *Dame Carette-Poulin and Aetna Life Insurance Co. of Hartford* (1934), 56 B.R. 143, at 150; *Crown Life Insurance Co.* v. *Perras*, [1953] B.R. 659, at 661; *Lauwers* v. *Tardiff*, [1966] C.S. 79, at 81.
34. *Perron-Malenfant et Associés (Trustees of)*, *supra,* note 32.

ment of the benefit in the trust property? One can see no practical reason why the seizing creditor cannot exercise the second right in anticipation. His initial seizure would be addressed to both the beneficiary as the one holding a right in the trust, and to the trustee as the one who must deliver against the exercise of such right. In this seizure addressed to both the beneficiary and the trustee, the creditor could seize the beneficiary's interest in the trust, declare that he exercises the beneficiary's right to payment of the benefit, and seize such benefit in the hands of the trustee. *L'économie de la loi* suggests this action.

## PART 4 – The R.R.S.P. Constituted as a Trust, or an Annuity, in Quebec

**49.** It must be remembered that all the Quebec cases concerning an R.R.S.P. and the trust since reform involve one established by a form of contract modelled on one used in *common law* Canada prior to the adoption of the law of the trust as now found in the Code. There is no doubt that in Quebec an R.R.S.P. can be structured through the use of a trust, or through the use of a contract of annuity, in each case that complies with the requirements of the Code.[35]

### Terms of the Contract Establish an R.R.S.P. as a Trust

**50.** ***Basic Terms.*** If one takes into account the findings of the Supreme Court of Canada in *Scotia McLeod*, the contract establishing such an R.R.S.P. as a trust would contain the following features: (i) The individual taxpayer enters into an onerous contract with the investment institution (or with a trustee) (1260-1262), and agrees to pay reasonable periodic fees to it, (or to the trustee, or both). (ii) An R.R.S.P. is established by the investment institution (or the trustee) as a segregated investment account and declared to be a trust fund and a separate patrimony to be held by it, and the individual as settlor transfers to the fund an initial contribution of a stated sum. (iii). The R.R.S.P. is to receive periodic transfers of funds from the individual, invest the funds in the account in a portfolio of qualified investment securi-

35. Louis Rabeau expresses the same opinion, in "L'insaisissabilité des REER et autres produits connexes", in *Répertoire de droit/Nouvelle série,* vol. 1, Doctrine, Faillite et insolvabilité, document 2, at 74.

ties, and in due course provide a retirement income benefit to the settlor or his beneficiary to be named. (iv) The investment institution names a trust company to act as trustee, who then accepts the trust, and also agrees that the investment institution act as custodian of the investment fund (mandatary of the trustee). (v) It is agreed that the individual may make periodic additional transfers of funds, up to the annual specified limit under tax law, to the fund prior to his retirement date. (These additional transfers are made under article 1293, and in consequence neither the addition, nor the withdrawal of these additional amounts, affect the constitution of the trust.) (vi) The trustee (through its mandatary) is to have the control and exclusive administration of the fund, which shall include the safekeeping of cash and investment securities in the name of the custodian (or the trustee), the keeping of records of all transactions, the making of timely investments and realizations, the provision of tax information and periodic reports, all as a prudent administrator (1278). (vii) Upon retirement of the individual, but not later than upon the expiration of the year in which he turns 69, the fund shall be applied to purchase or to provide a fixed term approved periodic annuity to the individual, or at his option an approved Registered Retirement Income Fund ("R.R.I.F.", "*FEER*" in French) as a trust. (The requirements of the R.R.I.F. trust are essentially quite similar to those of the R.R.S.P.) (viii) The individual is named the first beneficiary of the trust. He reserves the right to name a secondary beneficiary to receive the retirement benefit in the event that on his death it has not been exhausted (1282); and he further reserves the right to revoke any such nomination (1269). (ix) The agreement would contain such other clauses as are necessary to qualify the plan (and any resulting R.R.I.F.) under tax law.

**51.** ***Supplementary Terms.*** The following supplementary provisions should also qualify as appropriate provisions of such a trust: (x) The custodian (or the trustee) agrees to consult the individual on investment purchases and dispositions, and agrees to endeavour to act upon them, subject to the overriding right and power of the trustee (or custodian), acting in its sole discretion, to refuse to act on any recommendation it considers to be in breach of its obligation to act as a prudent administrator (1309), or that are prohibited by its administrative or investment policies from time to time in place. The individual renounces to any claim that may arise in consequence of any loss on any investment recommended or approved by him and to any claim against the trustee for acting

on any such recommendation or approval. (xi) The individual, as first beneficiary, reserves the right, on reasonable notice, to periodically obtain prior to his retirement a prepayment of any retirement benefit or benefits to his credit in the trust fund (1281). However, should such prepayments be such that the amount remaining does not exceed the amount of the initial contribution or equivalent value in marketable securities (or such higher amount as the parties agree upon) the trust shall terminate (1296). The individual acknowledges that any prepayments received by him will be treated as taxable income in his hands.

**52.** ***Seizability of the Trust R.R.S.P.*** The property of the R.R.S.P. last described and established as a trust, does not form a part of the settlor's patrimony and is not a part of his common pledge to his creditors. As such it cannot be seized directly to satisfy his obligations. However, the settlor, as a beneficiary, has an interest in it and such interest is property. This property is a part of his patrimony and is a part of his common pledge to his creditors.[36] It may be seized, and any rights he has as beneficiary may be exercised.

### Terms of a Contract to Establish an R.R.S.P. as an Annuity

**53.** ***Basic Terms.*** In the light of the Supreme Court of Canada holding in *Scotia McLeod*, it would seem that an R.R.S.P. could still be constituted as an annuity (or life insurance) contract in Quebec. Such a contract would not be a trust. It would be between an individual and a qualified annuity (life insurance) company. It would be called an annuity (or a life insurance contract). It would contain many of the features of the R.R.S.P. last described, but modified as follows. (i) The individual transfers (alienates) to the annuity (life insurance) company a sum up to the annual R.R.S.P. limit. (ii) He has the further (optional) right to make a similar transfer each year before retirement. (iii) The annuity (life insurance) company agrees to invest the accumulated sum until the retirement date. (iv) On the retirement date, the annuity (or life insurance) company agrees to apply the total, net of stipulated costs (and annual cost of insurance in the case of life insurance), to the payment of a life or fixed term annuity, payable to the individual, in the first instance, and ultimately to

36. *Scotia McLeod*, *supra,* note 1, para. 1.

his designated beneficiary. (v) The contract discloses what such annuity would be if in each year the maximum allowed contribution is made and if annuity rates remain unchanged.

**54.** ***Supplemental Terms.*** One may suggest that nothing in the characterization of the contract as one of annuity (or life insurance) will change if the annuity (life insurance) company agreed to any or all of the following additional features: (vi) To keep the contributions as a part of its assets in a segregated account and to invest them in marketable securities; (vii) To accept and endeavour (subject to requirements of prudent administration) to act upon investment recommendations of the individual; (viii) To give the individual the right to obtain advances of the annuity, with a provision that the contract terminate if the advances exceed a specified amount. Nor would the characterization of the contract change if it gave the individual (ix) the optional right on retirement to convert the accumulated investments to an R.R.I.F. (The writer does not speculate on whether an annuity company or insurance company would in fact want to grant all these supplementary clauses. He merely notes that the law does not prohibit them.)

**55.** ***Seizability of the Annuity Assets.*** A contract of this nature could contain a declaration of unseizability, which should be valid if the ultimate beneficiary is the spouse, an ascendant or descendant of the individual, or if the nomination of the beneficiary is irrevocable. However its capital will be unseizable only to the extent necessary to meet the requirements of the annuitant for support. Moreover, such a stipulation should be valid in the accumulation period. This, according to the *Scotia McLeod* decision, would be different from such a stipulation if made in the R.R.S.P. constituted as a trust.

## CONCLUSION

**56.** The decision in *Scotia McLeod* reflects a conservative, but not entirely surprising, interpretation of the present law of trusts, and of annuities in Quebec. Of course it had to deal with a form of R.R.S.P. designed some years before Quebec introduced the trust as a general institution of the civil law. The decision is also carefully cast so as not to preclude the establishment of an R.R.S.P. by way of a trust or as a contract of annuity. Indeed most of its observations are finely qualified to permit this. In the opin-

ion of the writer, most self-directed R.R.S.P.s could be amended or replaced to constitute a trust or to constitute a contract of annuity. The latter might also have the advantage of protecting the individual's family from his creditors in many circumstances, while the former would not. Each could afford some flexibility of matters of investment and matters of withdrawal of the assets before maturity, if truly desired. At the same time, the Thibault form of R.R.S.P. is not a bad form of investment account. It does afford the tax shelter intended, and remains an appropriate vehicle for the self-employed individual, who is reasonably prosperous, to provide for his retirement.

**57.** The writer questions whether the contract of annuity and the establishment of a trust are truly mutually exclusive, or should be. Pragmatically there is very little difference in their operation in the marketplace as vehicles to accommodate the retirement savings of an individual. The Department of Justice and the Legislature should focus on these differences, and particularly on the result of the *Scotia McLeod* holding that the one may be unseizable, while the other may be seizable, by the creditors of the individual. There would appear to be no social reason for the difference.

**58.** The writer particularly cautions members of the legal profession not to take in isolation any of the *dicta* relied upon by the Supreme Court of Canada in *Scotia McLeod* as interpretive of the general principles of the new law of trust. To do so would so restrict the trust as an institution as to render it almost useless in many investment, commercial and even testamentary situations. It would frustrate the clear intention of the Legislature. The elements of the law of trust noted by the Court work together in the case to disqualify the R.R.S.P. in question as a trust. It is their cumulative effect that was telling. Taken separately, or even together in a properly drafted instrument, they should not have the same result.

# Analysis of the Interaction between Security under Section 427 of the Bank Act and Provincial Law: A Bijural Perspective

Marc-Alexandre POIRIER

## RÉSUMÉ

L'article 427 de la *Loi sur les banques* crée un régime de sûretés particulier qui permet aux banques de consentir des prêts garantis à des entreprises œuvrant dans certains secteurs précis. Le régime de sûretés a été instauré il y a plus de cent ans, lorsque le prédécesseur de l'article 427 a d'abord été incorporé dans la *Loi sur les banques* de 1890. Le régime de sûretés constitue un exemple de choix d'une loi fédérale qui coexiste avec le droit provincial qui régit essentiellement la même question, à savoir les *sûretés mobilières.* Par conséquent, l'interaction entre la *Loi sur les banques* et le droit provincial dans ce domaine est inévitable. Le présent article porte sur la question de l'interaction entre le régime de sûretés de la *Loi sur les banques* et le droit provincial. L'auteur étudie cette question d'un point de vue bijuridique, c'est-à-dire qui prend en compte la terminologie, les concepts et les visions du droit civil et de la common law. Ce faisant, l'auteur se penche sur les nombreuses difficultés causées par cette interaction.

D'abord, l'auteur examine certains principes constitutionnels de base portant sur les rapports entre le droit fédéral et le droit provincial et s'appliquant au régime de sûretés de la *Loi sur les banques*. Ensuite, l'auteur effectue un survol des principales caractéristiques du régime de sûretés de la *Loi sur les banques* et compare ces caractéristiques à celles des régimes contemporains de sûretés mobilières en vigueur dans chaque province. Enfin, l'auteur analyse la façon par laquelle les conflits de rang entre la

sûreté créée par l'article 427 et les droits des tiers sont réglés en vertu de la *Loi sur les banques*. Ces conflits constituent non seulement la principale source d'interactions entre le régime de sûretés de la *Loi sur les banques* et le droit provincial mais aussi la principale cause de difficultés. À la lumière de cette analyse, l'auteur conclut que le régime de sûretés de la *Loi sur les banques* doit faire l'objet d'une réforme et suggère certaines avenues par lesquelles cette réforme pourrait être réalisée. En particulier, l'auteur soutient que même si le régime de sûretés de la *Loi sur les banques* a joué, par le passé, un rôle important dans l'évolution de l'économie canadienne, le maintien de son existence n'est plus justifié. Toutefois, il se peut que l'abrogation du régime ne soit pas réalisable, car les banques s'y objecteront vraisemblablement. Ainsi, l'auteur propose un certain nombre de modifications législatives visant à améliorer le régime de sûretés de la *Loi sur les banques* et à l'harmoniser avec les régimes provinciaux de sûretés mobilières.

# Analysis of the Interaction between Security under Section 427 of the Bank Act and Provincial Law: A Bijural Perspective

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## INTRODUCTION

Section 427 of the *Bank Act*[1] creates a special security device[2] allowing chartered banks to make secured loans to commercial borrowers engaged in certain specified industries. The security device was created over a hundred years ago, when the predecessor to section 427 was first included in the *Bank Act of 1890*.[3] Being a creature of federal statute, the security device provides a prime example of federal legislation coexisting with provincial law governing essentially the same matter: *secured lending*.[4] As a result, interaction between the Bank Act and provincial legislation in this area is inevitable. This article analyses the interaction of the Bank Act security system with provincial law, from the perspective of both the common law and civil law systems, and examines the many difficulties generated by this interaction. There are two sources out of which these difficulties arise.

A first set of problems occur because the Bank Act security regime is not comprehensive;[5] there are many matters which the

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1. S.C. 1991, c. 46, as am. [the Bank Act]. Unless otherwise indicated, statutory references in this text are to the Bank Act. For convenience, all references to past versions of the Bank Act provisions in case-law and commentary have been changed to take account of the most recent numbering used in the Bank Act.
2. Referred to herein as the "section 427 security".
3. *Banks and Banking Act* (1890), 53 Vict., c. 31, ss. 74-79 [the *Bank Act of 1890*]. The origins of the section 427 security can be traced back to pre-confederation banking legislation in the Province of Canada. However, it is with the *Bank Act of 1890* that the section 427 security was first cast in the form that it bears today. For a more detailed review of the origins of the section 427 security, see *Bank of Montreal* v. *Hall*, [1990] 1 S.C.R. 121 at paras. 22-26 [*Hall*]. See also R.H. ANSTIE, "The Historical Development of Pledge Lending in Canada" Part I (1967) 74 *Canadian Banker II* 81 [ANSTIE, Part I]; Part II (1967) 74 *Canadian Banker III* 35 [ANSTIE, Part II]; B. CRAWFORD, *Crawford and Falconbridge on Banking and Bills of Exchange*, 8th ed., Vol. 1 (Toronto: Canada Law Book, 1986) at 403-408 [CRAWFORD].
4. As such, it falls under the broader category of "federal security interests", comprising a multitude of federal statutory provisions governing, to varying degrees, the taking of security by federally regulated entities or on federally regulated property. For an overview of the various federal statutory and regulatory provisions dealing with security interests, see Fraser, Milner, Casgrain, *Federal Security Interests: Contract #99-08-2*, June 2000, online: <http://www.lcc.gc.ca/en/themes/pr/cpra/fraser/fsi.asp> (date accessed: September 30, 2004).
5. R.J. WOOD, "The Nature and Definition of Federal Security Interests", (2000) 34 *C.B.L.J.* 65 at 77 [WOOD, "Federal Security Interests"]; R. MACDONALD, "Provincial Law and Federal Commercial Law: Is "Atomic Slipper" a New Begin-

Bank Act does not address. For example, the Bank Act often uses terms and concepts which it leaves undefined. Moreover, the Bank Act's provisions governing the validity, priority and enforcement of the section 427 security contain many gaps.[6] The body of law that will be used to complement the Bank Act where it is incomplete is provincial law. However, the end result is aptly described by one author as an "unpredictable, complex and highly acrobatic law of security on movable property bearing little semblance of rationality or simplicity."[7]

Second, a great range of potential conflicts arise due to the outdated language, concepts and approaches embodied in the Bank Act, which are at odds, in many respects, with the modern secured lending regimes both in Québec and the common law provinces.[8] Notwithstanding the frequent amendments since the *Bank Act of 1890*, the section 427 security, in its present form, still bears close resemblance to the terms of the original statute.[9] Conversely, the conception of security devices in both common law provinces and Québec has undergone radical changes in intervening years, with the adoption of Personal Property Security Acts and the enactment of the new *Civil Code of Québec*.[10] As a result, the respective priority theories, registration systems and enforcement provisions of the federal and provincial regimes "conflict in almost every respect".[11] These conflicts often produce unreasonable and incoherent outcomes.[12] The potential for conflict is fur-

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ning?", (1991-92) 7 *B.F.L.R.* 436 at 444-447 [MACDONALD, "A New Beginning?"].

6. These gaps are identified in Part II (Overview of the Bank Act Security System and Comparison with The Provincial Secured Lending Regimes), throughout the overview of the Bank Act security regime, see below at 300.
7. R.A. MACDONALD, "Security Under Section 178 of the Bank Act: A Civil Law Analysis", (1983) 43 *R. du B.* 1008 at 1036 [MACDONALD, "A Civil Law Analysis"].
8. It is interesting to note that when they were first enacted, the Bank Act security provisions were already being described as "somewhat obscure". This obscurity can only have been intensified by the passage of time. See *Tennant* v. *Union Bank of Canada*, [1894] A.C. 31 at 44 [*Tennant*].
9. See the *Bank Act of 1890, supra* note 3.
10. S.Q. 1991, c. 64, as am. (proclaimed January 1, 1994) [the *Civil Code* or C.C.Q.].
11. J.S. ZIEGEL, "The Interaction of Section 178 Security Interests and Provincial PPSA Security Interests: Once More into the Black Hole", (1990-91) 6 *B.F.L.R.* 323 at 351 [ZIEGEL, "Interaction"].
12. These outcomes will be highlighted in Part III (Priority Disputes Between Section 427 Security and Conflicting Rights in the Collateral), below at 330.

ther accentuated by the common practice of banks to take security under both the Bank Act and provincial regimes.[13]

A growing body of literature has addressed the problems caused by the interaction between the section 427 security and provincial law, in both the common law jurisdictions and Québec.[14] To the author's knowledge, the issue has never been addressed from a truly bijural perspective, that is, one which takes account of the both civil law and common law terminology, concepts and approaches. This article proposes to adopt such a bijural perspective.

Part I reviews certain firmly entrenched constitutional principles regarding the relationship between federal and provincial

13. See Part III, Section 2.7 (Double Documentation), below at 391.
14. See *e.g.* (PPSA jurisdictions); WOOD, "Federal Security Interests", *supra* note 5, J.S. ZIEGEL, "Harmonization of Section 427 of the Bank Act and the Provincial Personal Property Security Acts: Is There a Better Solution", (1997) 12 *B.F.L.R.* 425 [ZIEGEL, "Harmonization"]; R.V. DE CORBY & D.H. LAYH, "PPSA and Bank Act Priorities – Some Answers, Some Questions", (1996) 11 *B.F.L.R.* 95; B. CRAWFORD, "Interaction Between the PPSA and Section 178 of the Bank Act", (1993) 8 *B.F.L.R.* 1; R.C.C. CUMING, "The Position Paper on Revised Bank Act Security: Rehabilitation of Canadian Personal Property Security Law or Curing the Illness by Killing the Patient", (1992) 20 *C.B.L.J.* 336 [CUMING, "Position Paper"]; ZIEGEL, "Interaction", *supra* note 11; R.C.C. CUMING, "The Relationship Between Personal Property Security Acts and Section 178 of the Bank Act: Federal Paramountcy and Provincial Legislative Policy", (1988) 14 *C.B.L.J.* 315; R.C.C. CUMING & R.J. WOOD, "Compatibility of Federal And Provincial Personal Property Security Law", (1986) 65 *Can. Bar Rev.* 267 [CUMING & WOOD, "Compatibility"]; J.S. ZIEGEL, "Interaction of Personal Property Security Legislation and Security Interests under the Bank Act", (1986) 12 *C.B.L.J.* 73; (Québec) P. CIOTOLA, *Droit des sûretés,* 3d ed. (Montréal, Québec: Thémis, 1999) [CIOTOLA, *Droit des sûretés*]; MACDONALD, "A New Beginning?", *supra* note 5; M. DESCHAMPS, "La garantie de l'article 178 – Développements récents et questions d'actualité", in *Développements récents en droit bancaire* (Cowansville, Québec: Éditions Yvon Blais, 1991) 129 [DESCHAMPS, "La garantie de l'article 178"]; J.M. DESCHAMPS, "Les sûretés sur les équipements et les stocks: développements récents et questions controversées", (1987) *C.P. du N.* 125-161; R. DEMERS, *Le financement de l'entreprise – aspects juridiques* (Sherbrooke: Les Éditions Revue de droit Université de Sherbrooke, 1985) at 165 ff [DEMERS, *Le financement de l'entreprise*]; M. PAQUET, "Pouvoir de prise de possession informelle dans le cas des garanties des alinéas 178(1) a) et b) de la Loi sur les banques", (1984) 44 *R. du B.* 333 [PAQUET, "Pouvoir de prise de possession"]; J. AUGER, "Les sûretés mobilières sans dépossession sur les biens en stock en vertu de la Loi sur les banques et du droit québécois", (1983) 14 *R.D.U.S.* 221 [AUGER, "Les sûretés mobilières"]; MACDONALD, "A Civil Law Analysis", *supra* note 7; Y. GOLDSTEIN, "A Bird's Eye View of Conflicting Claims", in *Meredith Memorial Lectures: New Developments in Commercial Lending*, 1981, at 88 [GOLDSTEIN, "A Bird's Eye View"]; J. FENSTON, "Section 88 of the *Bank Act* and 'le droit de suite'", (1951) 11 *R. du B.* 298 [FENSTON, "Section 88"].

law, as they apply to the Bank Act security regime. Part II then provides an outline of the main features of the Bank Act security regime, comparing these features with those of the modern secured lending regimes in force in each province. Part III conducts a detailed analysis of the way in which priority disputes between section 427 security and conflicting interests are resolved under the Bank Act, such disputes being the main source of interaction between the Bank Act security regime and provincial law and also the main source of difficulties. The article concludes that there is a serious need for reform of the Bank Act security regime and briefly discusses certain ways in which such reform could be achieved. In particular, it is argued that although the Bank Act security regime has in the past played a pivotal role in the development of the Canadian economy, its continued existence is no longer justified. However, repeal may not be realistic or feasible, as it is likely to be opposed by the banks. Consequently, the article recommends a number of amendments that should be made if the current regime is kept in place, in order to better harmonize the Bank Act security system with the provincial secured lending regimes.

## PART I

## THE RELATIONSHIP BETWEEN THE BANK ACT SECURITY REGIME AND PROVINCIAL LAW: PARAMOUNTCY AND COMPLEMENTARITY

As previously stated, the matter governed by the Bank Act security regime (secured lending) clearly relates to "property and civil rights within a province". As such, it is a matter over which legislative power has been exclusively assigned to provincial legislatures by section 92 of the *Constitution Act of 1867*.[15] However, there is also a federal constitutional aspect to secured lending, when the lender is a bank.[16] Indeed, pursuant to paragraph 15 of section 91 of the *Constitution Act, 1867*, the Parliament of Canada is granted the power to legislate over matters relating to

15. *The Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3. as am.
16. Therefore, it can be said that secured lending by banks is a matter "which in one aspect and for one purpose fall[s] within sect. 92, [and which] in another aspect and for another purpose fall[s] within sect. 91". See *Hodge* v. *The Queen* (1883), 9 App. Cas. 117 at 130 (P.C.). As such, it may be the object of validly enacted federal and provisional legislation under the "double aspect" doctrine. See *Multiple Access Ltd.* v. *McCutcheon*, [1982] 2 S.C.R. 161 at 180-81 [*Multiple Access*]; *Law Society of British Columbia* v. *Mangat*, [2001] S.C.J. No. 66 at paras. 48-49 (QL).

"Banking, Incorporation of Banks, and the Issue of Paper Money". The federal banking power has been broadly interpreted as encompassing every transaction within the legitimate business of banks, including the lending of money on the security of property.[17] It is on this basis that the constitutional validity of the Bank Act security regime has been consistently upheld by the courts, to the point where it has become unquestionable.[18]

This holding has led to the emergence of a limited conception of the role of provincial law (or rather, lack thereof) in applying the Bank Act. According to this view, provincial law which purports to regulate the rights and obligations of secured creditors and debtors does not apply to banks holding a section 427 security.[19] In other words, the Bank Act security regime is exempt from the operation of provincial law.[20]

The above view does not reflect a proper understanding of the interaction between federal and provincial law. Indeed, it fails to give proper recognition to the *principle of complementarity* of federal law and provincial law with respect to property and civil rights. Based on this principle, where a federal enactment does not address a matter relevant to property and civil rights that is necessary for its application in a province, the body of law to which

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17. *Tennant*, *supra* note 8 at 46.
18. *Tennant*, *supra* note 8; *Royal Bank of Canada* v. *Nova Scotia (Workers / Workmen's Compensation Board)*, [1936] S.C.R. 560 [*Nova Scotia (W.C.B.)*]; *Hall*, *supra* note 3.
19. See *e.g.* M.H. OGILVIE, *Canadian Banking Law*, 2d ed. (Scarborough, Ontario: Carswell, 1998) at n. 383 [OGILVIE, *Canadian Banking Law*]; *Hall*, *supra* note 3 at paras. 35 and 64; *Landry Pulpwood Company Ltd.* v. *La Banque Canadienne Nationale*, [1927] S.C.R. 605 at 615 [*Landry Pulpwood*]; *C.I.B.C.* v. *Canada* (1984), 52 C.B.R. (N.S.) 145 at 159 (F.C.T.D.).
20. A number of judicial pronouncements from Canada's highest court are often cited as authority for this proposition. The most compelling example is the statement of LaForest J. in *Hall*, *supra* note 3 at para. 64, to the effect that the Bank Act contains a "complete code that at once defines and provides for the realization of the security interest." A second example is that of Mignault J. in *Landry Pulpwood, supra* note 19 at 615 stating: "We must look solely to the Bank Act to determine the effect of a lien acquired by a bank by virtue of section [427]". Subsequent case law suggests that these statements should be given a very limited application (see *infra* note 175 and accompanying text).
21. The word "complement" is used herein to refer to the situations where provincial law is applied: (1) in order to provide substance and meaning to certain concepts and terms used in the Bank Act; (2) to fill in the gaps in the regime, when it is silent on an issue; or (3) as a source of additional legal rules which remain applicable in the "backdrop" against which the Bank Act security regime is applied. It should be noted that the terms "supplement" and "suppletive law"

reference must be made in order to complement[21] the federal legislation is the private law applicable in that province.[22] This heretofore implicit constitutional principle is now expressly set forth in section 8.1 of the federal *Interpretation Act*.[23] Moreover, there is nothing in the Bank Act to displace the principle of complementarity.[24] On the contrary, the Bank Act security regime depends on the laws of contract (the law of obligations under the civil law) and property as essential conceptual underpinnings.[25]

In light of the foregoing, the relationship between the Bank Act security regime and provincial law may be reduced to two basic propositions. First, the Bank Act is the primary source of law: where it either explicitly or implicitly governs an issue, provincial law does not apply.[26] This proposition is grounded in the doctrine of federal paramountcy. According to this doctrine, if there is an "actual conflict in operation" when two otherwise constitutionally valid federal and provincial enactments purport to

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are often used to describe the aforementioned situations. However, in the interests of consistency, the word "complement" shall be used throughout this article.

22. On the principle of complementarity of federal and provincial law, see A. MOREL, "Harmonizing Federal Legislation with the *Civil Code of Québec*: Why? And Wherefore?", in *The Harmonization of Federal Legislation with Québec Civil Law and Canadian Bijuralism*, Collection of Studies, Department of Justice, Canada, 1999, at 4-10; in the same collection, see J.M. BRISSON and A. MOREL, "Federal Law and Civil Law: Complementarity, Dissociation" at 216. See also *Husky Oil Operations Ltd.* v. *Canada (M.N.R.)*, [1995] S.C.J. No. 77 at para. 81 [*Husky Oil*].
23. *Interpretation Act*, R.S.C. 1985, c. I-21, as am. by *Federal Law-Civil Law Harmonization Act No. 1*, S.C. 2001, c. 4 [the *Interpretation Act*]. S. 8.1 of the *Interpretation Act* reads: "Both the common law and the civil law are equally authoritative and recognized sources of the law of property and civil rights in Canada and, unless otherwise provided by law, if in interpreting an enactment it is necessary to refer to a province's rules, principles or concepts forming part of the law of property and civil rights, reference must be made to the rules, principles and concepts in force in the province at the time the enactment is being applied."
24. For a demonstration of the complementary relationship between the provisions of the Bank Act and the private law of the provinces, see MACDONALD, "A New Beginning?", *supra* note 5.
25. To illustrate, the Supreme Court of Canada [S.C.C.] has recognised that in enacting the section 427 security provisions, the federal parliament did not implicitly remove the property covered by the security from the operation of the laws of the province in which the property is situated. See *Nova Scotia (W.C.B.), supra* note 18 at 563. See also *Bank of Montreal* v. *Guaranty Silk Dyeing & Finishing Co. Ltd.*, [1934] O.R. 625 at 632 (Ont. S.C.) [*Guaranty Silk (S.C.)*], Davis J. stating: "the general law of mortgages is applicable except where the [Bank Act] intervenes with any special provisions."
26. See MACDONALD, "A Civil Law Analysis", *supra* note 7 at n. 103. See also *infra* note 148 and accompanying text.

function side by side, the federal enactment must prevail.[27] Provincial law is rendered inoperative to the extent of the conflict. The Bank Act may therefore fully define the rights and obligations of the bank and its customer, from the creation of the security interest to the manner of its realization, even if in doing so it interferes with or modifies property and civil rights in the provinces.[28] Provincial legislation dealing with such matters is superseded by the provisions of the Bank Act, and therefore inapplicable to the bank holding a section 427 security.

Where the Bank Act is silent on any of these questions, however, provincial law as it exists from time to time in each province will *prima facie* continue to apply, unless there is an operational conflict between the Bank Act and the provincial law at issue.[29] As a result, when the Bank Act is applied in Québec, it is the civil law that will apply in order to complement the Bank Act security regime. Correspondingly, when the Bank Act is applied in the other provinces and territories, it is the common law, and any applicable statutory law, that will fulfil this role.

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27. See *M & D Farm Ltd.* v. *Manitoba Agricultural Credit Corp.*, [1999] S.C.J. No. 4 at para. 17 (QL) [*M & D Farm*]; *Husky Oil*, *supra* note 22 at para. 87; *Multiple Access, supra* note 16 at 191, per Dickson J. (as he then was). Where there is an "express contradiction" between the federal and provincial statute, which entails an impossibility for a citizen or court to simultaneously comply with both statutes, it is clear that an operational conflict exists. See *Multiple Access, supra* note 16 at 191; *M & D Farm, supra* at paras. 41-42; *Hall*, *supra* note 3 at para. 59. Recently, the S.C.C. has advocated a broad purposive view of paramountcy. According to this expanded interpretation, the focus of the inquiry is on whether the operation of the provincial enactment is compatible with the federal legislative purpose. Although it may be possible *in fact* to comply with the stricter requirements of a provincial statute, there remains the possibility that the stricter requirement runs counter to the federal legislative purpose underlying the less restrictive requirement. See *Law Society of British Columbia* v. *Mangat*, *supra* note 16 at paras. 68-72; and *Hall*, *supra* note 3 at paras 55-56, 63.
28. *Hall*, *supra* note 3 at paras. 40, 51; *Tennant*, *supra* note 8.
29. R. A. MACDONALD, "*Atomic Slipper Co.* v. *Banque Nat. Du Can.*: Commercial Practice Meets Constitutional Law", 73 C.B.R. (N.S.) 1 at para. 31 (eC, Law.pro) [MACDONALD, "Atomic Slipper Co."]. See also *Re Leblanc and Bank of Montreal* (1988), 54 D.L.R. (4th) 89 at 100 (Sask. C.A.), Sherstobitoff J.A. stating: "One starts with the proposition that banks, when operating within a province, are bound by provincial laws of general application, unless such laws are in direct conflict with the Bank Act or other valid federal legislation."; *M & D Farm*, *supra* note 27 at para. 23, stating that, with respect to subject matter having a *double aspect*, "[s]tatutes of the two levels of government regulating this subject matter will therefore coexist insofar as they do not conflict."; and *Husky Oil*, *supra* note 22 at para. 87.

## PART II

## OVERVIEW OF THE BANK ACT SECURITY SYSTEM AND COMPARISON WITH THE PROVINCIAL SECURED LENDING REGIMES

This section provides an overview of the main features of the Bank Act security regime and compares these features with those of the modern provincial secured lending regimes.[30] First, it is necessary to briefly introduce the two different regimes that exist in Canada.

All common law jurisdictions in Canada have enacted *Personal Property Security Acts*[31] that are more or less based on Article 9 of the *American Uniform Commercial Code*.[32] The PPSAs of all provinces except Ontario are based on the *Canadian Conference of Personal Property Security Law* Model Act ("CCPPSL Model Provinces").[33] While not identical, the PPSAs of the CCPPSL Model Provinces have many common features.[34] Despite

30. This section does not purport to conduct an exhaustive review of the intricacies of the Bank Act security regime. For a detailed description of either regime, the reader should consult specialized treaties on the subject of Canadian banking law, such as OGILVIE, *Canadian Banking Law, supra* note 19; CRAWFORD, *supra* note 3; I.F.G BAXTER, *The Law of Banking,* 4th ed. (Toronto: Carswell, 1992). See also W.D. MOULL, "Security Under Sections 177 and 178 of the Bank Act", (1986) 65 *Can. Bar Rev.* 242 [MOULL]; and DAVIES, WARD & BECK, *Taking Security Under Sections 177 and 178 of the Bank Act* (Toronto: Bowne, 1990) [*DAVIES*].
31. The term "PPSA(s)" is used herein to refer, generally, to *Personal Property Security Acts* in force in all common law provinces and territories of Canada.
32. For an overview of the legislative history of Article 9 and of the gradual adoption of PPSAs in Canadian common law jurisdictions, see J.S. ZIEGEL, R.C.C. CUMING & A.J. DUGGAN, *Secured Transactions in Personal Property and Suretyships: Cases, Text and Materials*, 4th ed. (Toronto: Edmond Montgomery Publications Limited, 2003) at 16-21 [ZIEGEL et al., *Secured Transactions*].
33. The Canadian Conference on Personal Property Security [the CCPPSL] is an unofficial organisation composed of representatives from all Canadian jurisdictions and dedicated to the harmonization and reform of Canadian personal property security law. The CCPPSL Model Act is the model PPSA adopted by the CCPPSL as a prototype for adoption by the PPSA jurisdictions throughout the country. Although there is no published version of the CCPPSL Model PPSA, it would appear that the Saskatchewan PPSA is virtually identical. See R.C.C. CUMING and Catherine WALSH, "Potential Changes to the Model Personal Property Security Act of the Canadian Conference on Personal Property Security Law, Par. 1 (ss. 1-41)" (paper presented at the Montreal annual CCPPSL conference, May 27-31, 2000 and in revised form at the annual meeting of the Uniform Law Conference of Canada, Victoria, B.C. August 2000), online: <http://www.bcli.org/ulcc/ULCC-PPSL.htm> (date accessed: September 30, 2004).
34. In particular, see Part III, Section 1.1.2 (The Relationship Between the PPSA and the Section 427 Security), below at 334.

the many variations that exist between the PPSAs of the CCPPSL Model Provinces and the Ontario PPSA,[35] the basic concepts and principles underlying them are the same. For this reason, it is possible to consolidate the analysis of all PPSAs in force across Canada into a single discussion, pointing out provincial variations only where deemed necessary.

With respect to Québec, the enactment of the new *Civil Code* in 1994 effected a complete overhaul of the legal regime governing security on property in that province.[36] Among other things, the confusing mass of legislation that applied to a multitude of consensual security devices existing prior to the reform,[37] was replaced by a comprehensive regime governing a single generic security device called the *hypothec* (the "hypothecary regime").[38] Although influenced by the Article 9 model, the *Civil Code* hypothecary regime differs from it in many important respects, as will be apparent from the following discussion.

## 1. SCOPE

### 1.1 Scope of the Bank Act Security Regime

As opposed to its provincial counterparts, the Bank Act security regime is limited in scope. A first limitation is that the section 427 security can only be given in favour of a bank or authorised foreign bank listed in Schedules I, II or III of the Bank Act.[39] Other financial institutions who lend money on security, such as trust

35. *Ontario Personal Property Security Act*, RSO 1990, c. P.10, as am. [OPPSA].
36. For an overview of the reform process in relation to the law of security on property in Québec, see J.B. CLAXTON, *Security on Property and the Rights of Secured Creditors under the Civil Code of Québec* (Cowansville, Québec: Éditions Yvon Blais, 1994) at 4-15 [CLAXTON, *Security on Property*]; CIOTOLA, *Droit des sûretés*, *supra* note 14 at paras. 2.1, 3.1, 4.0; and A. GRENON, "Major Differences Between PPSA Legislation and Security Over Movables in Québec under the New Civil Code", (1995-96) 26 *C.B.L.J.* 391 at 392-395 [GRENON, "Major Differences"].
37. For an overview of the legal framework governing security over movable property existing in Québec prior to the reform, see J. DESLAURIERS, *Précis de Droit des Sûretés* (Montréal: Wilson & Lafleur, 1990); Y. DESJARDINS, "Les garanties mobilières", (1971) 74 *R. du N.* 64; R.A. MACDONALD & R.L. SIMMONDS, "The Financing of Movables: Law Reform in Québec and Ontario" (paper presented at the Meredith Memorial Lectures: New Developments in Commercial Lending (1981)) at 246.
38. See Title Three of Book Six of the *Civil Code*, "Hypothecs", arts. 2660-2802 C.C.Q.
39. See definition of "bank", s. 2 of the Bank Act. See also s. 555 of the Bank Act making the Bank Act security regime applicable to authorized foreign banks.

companies, credit unions, finance companies, caisses populaires and department stores are excluded from the scope of the Bank Act.[40] Such lenders are therefore not permitted to take section 427 security, except in very limited circumstances.[41]

A second limitation, is that the security can only be given by certain kinds of debtors, over certain kinds of personal or movable property (hereinafter referred to as "collateral"),[42] and in some cases, only for certain particular purposes. Subsection 427(1) contains a detailed list of these classes of eligible debtors and eligible collateral. The list has been gradually expanded throughout the years, to the point where it now covers almost all types of economic activity in Canada.[43] Today, the section 427 security is available to wholesale or retail purchasers, shippers, dealers, manufacturers, aquaculturalists, farmers, fishermen and forestry producers, allowing them to obtain bank loans on the security of a wide range of tangible personal property used in their business. Further, the Bank Act allows the bank to take security in both the presently owned and *after-acquired property*[44] of such debtors.[45] However, to the extent that the bank's security is given by a debtor or purports to cover property that does not fall within one of the eligible classes listed in subsection 427(1), it will be invalid.[46]

### 1.2 Scope of the PPSA

The PPSA applies to every transaction that in substance creates a "security interest", without regard to title or form.[47] This distinctive feature of PPSA legislation is commonly referred to as

40. *Hall supra* note 3 at para. 48.
41. Exceptionally, some federal statutes allow non-banks to take section 427 security for limited purposes. See *e.g. Canada Wheat Board Act*, R.S.C. 1985, c. C-24, ss. 2 (definition of "bank") 62, 63.
42. It is understood that "collateral" is a PPSA term of art and that the word "collateral" can have a different meaning under the *Civil Code*. For convenience, this article shall use the term "collateral" to refer to property that is charged by a security right.
43. OGILVIE, *Canadian Banking Law*, *supra* note 19 at 361; CUMING & WOOD, "Compatibility", *supra* note 14 at 269.
44. For convenience, the term "after-acquired property" is used throughout this article to refer to property in which the debtor has acquired rights *subsequently* to the execution of a security agreement.
45. See subs. 427(2) of the Bank Act, discussed below at 309.
46. *Provincial Bank of Canada* v. *Gagnon (Air-Tech Refrigeration Inc. (Trustee of)*, [1981] 2 S.C.R. 98; *Waldron* v. *Royal Bank* (1991), 78 D.L.R. (4th) 1 (B.C.C.A.) [*Waldron*].
47. See *e.g.* OPPSA para. 2(a); and *Saskatchewan Personal Property Security Act*, 1993, c. P-6.2, as am. [SPPSA] para. 3(a).

the "substance of the transaction" rule. By way of this rule, the complexity of security forms and devices that prevailed under the prior law[48] are replaced by a generic concept of "security interest". The term "security interest" is broadly defined as an interest in personal property that secures payment or performance of an obligation.[49]

There are three general limitations to the scope of the PPSA, which may be gathered from the "substance of the transaction" rule. First, the PPSA only applies to consensual security interests, that is, created by agreement between the parties. It does *not* apply to non-consensual security interests that arise by statute or common law. However, the PPSA does not, like the Bank Act, contain any limitation as to the kinds of business debtors and lenders that fall within its scope.

Second, the PPSA only applies to interests in *personal property*. Significantly, as under the Bank Act, interests in *real property* are generally excluded from the scope of the PPSA. "Personal property" is defined broadly enough to include virtually any kind of tangible or intangible personal property, including inventory, equipment, bills of lading, negotiable instruments, securities, money, accounts and other intangibles, such as intellectual property rights.[50] In addition, a security interest may be granted on either a specific item of property, all property of a specified kind or on all of the debtor's personal property. Like the Bank Act, the PPSA allows a security interest to be taken in both the presently owned and *after-acquired property* of the debtor.

The third limitation is that, in principle, the interest in personal property must be intended by the parties *to secure payment or performance of an obligation*. Consequently, the PPSA's scope of application is not limited to old forms of security transactions, such as chattel mortgages, pledges and fixed or floating charges; the PPSA will also apply to transactions which were not viewed

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48. J.S. ZIEGEL, "The New Provincial Chattel Security Law Regimes", (1991) 70 *Can. Bar Rev.* 681 at 685-86, cited in M.G. BRIDGE, R.A. MACDONALD, R.L. SIMMONDS & C. WALSH, "Formalism, functionalism, and understanding the law of secured transactions", (Nov. 1999) 44 *McGill L.J.* 567 at para. 4 [BRIDGE et al., "Formalism"].
49. See *e.g.* SPPSA para. 2(1)(qq) "security interest".
50. "Personal property" is defined by reference to a number of other defined terms and ascertaining the details of the definition can be quite complex. See *e.g.* SPPSA para. 1(ff). Compare with OPPSA, subs. 1(1) "personal property".

as security by the common law,[51] but which nevertheless are intended to serve a security function, such as conditional sales, security leases (i.e. hire-purchase agreements and finance leases) and security consignments.[52] Exceptionally, certain "true" ownership interests are incorporated into the PPSA framework, albeit for certain limited purposes. The PPSAs of all provinces apply to non-security assignments of accounts or chattel paper, by "deeming" the ownership interests of assignees to be security interests.[53] The PPSAs of CCPPSL Model Provinces go further in their list of "deemed" security interests. In these provinces, lease agreements for a term of more than one year and commercial consignments are deemed to be "security interests", even if they do not perform a security function.[54] As a result, these "deemed" security interests are made subject to the PPSA perfection and priority regime. They are, however, excluded from the PPSA default enforcement regime.[55]

### 1.3 Scope of the Civil Code Hypothecary Regime

The *Civil Code* hypothecary regime does not contain a "substance of the transaction rule" as does the PPSA. That is not to say that the framers of the *Civil Code* did not flirt with such an idea. In fact, a report submitted by the *Civil Code* Revision Office in 1977 recommended the adoption of a similar rule in the form of a "presumption of hypothec".[56] By way of this presumption, every agreement which had in essence conserved or granted a right in property to secure payment of an obligation would have been deemed to be a hypothec. As a result, all such agreements would have been subject to the provisions of the *Civil Code* applicable to hypothecs, including those relating to the creation, publication, priority and exercise of hypothecary rights.[57]

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51. See *e.g.* R.M. GOODE, *Legal Problems of Credit and Security* (London: Sweet & Maxwell, 1982) at 2: "There are only three types of consensual security known to English law: the pledge, the mortgage and the charge."
52. See *e.g.* OPPSA para. 2(a); SPPSA subs. 3(1). For a succinct description of these old forms of security, see ZIEGEL et al., *Secured Transactions*, *supra* note 32 at 5-9.
53. See *e.g.* definition of "security interest": SPPSA subs. 3(2); OPPSA para. 2(1)(b).
54. See *e.g.* definition of "security interest": SPPSA para. 2(1)(qq). "Commercial consignment" and "lease for a term of more than one year" are specifically defined terms. See *e.g.* SPPSA para. 2(1)(h) and (y).
55. See *e.g.* SPPSA subs. 3(2) and para. 55(2)(a).
56. See *Civil Code* Revision Office, *Report on the Québec Civil Code*, Vol. II. T. 1 at 431 (Québec City: Éditeur officiel, 1978).
57. *Ibid*.

Ultimately, the framers of the *Civil Code* rejected this approach, on the basis that it would have created considerable uncertainty and would have offended the civil law conception of obligations and security.[58] Instead, the concept of hypothec (or charge) on property was expanded with the intention of making it into the universal form of security device by which security on property would be granted and to provide a uniform scheme of remedies in the event of default.[59] It follows that the hypothecary regime only applies to transactions that rely on the concept of hypothecation as security.[60] In consequence, the numerous transactions which rely on title-retention by the creditor as security, such as instalment sales, leasing agreements or consignment sales ("security ownership devices"), are subject to their own distinct rules, which are located elsewhere in the *Civil Code*.[61]

Though more restrictive than the PPSA as to form, the scope of the *Civil Code* hypothecary regime is much broader in two principal respects. First, a hypothec may be conventional or legal, meaning that a hypothec either may be created by contract or may arise by operation of the law.[62] Second, a hypothec may charge either movable or immovable property,[63] which is roughly equivalent, though not identical, to personal or real property in PPSA jurisdictions, respectively.[64] Since the section 427 security may only cover movable property, only the rules governing *conventional movable hypothecs* shall be examined in this overview.

Like the PPSA, the *Civil Code* does not contain any restrictions as to the kinds of business debtors who may grant movable

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58. See MINISTÈRE DE LA JUSTICE DU QUÉBEC, *Commentaires du ministre de la Justice* (*Le Code civil du Québec*) Tome II (Québec: Publications du Québec, 1993) at 1654.
59. CLAXTON, *Security on Property*, *supra* note 36 at 4.
60. See art. 2660 C.C.Q. which defines a hypothec as, *inter alia*, "a real right on a movable or immovable property made liable for the performance of an obligation", and art. 2666 C.C.Q. stating that a hypothec, "is *a charge* on one or several specific corporeal or incorporeal properties...". See also art. 2664 C.C.Q. which states, "[h]ypothecation may take place only on the conditions and according to the formalities authorized by law."
61. For example, the rules relating to instalment sales are located at arts. 1745-1749 C.C.Q. For leasing agreements, see arts. 1842-1850 C.C.Q.
62. Art. 2664 C.C.Q. For legal hypothecs, see art. 2724 C.C.Q.
63. Art. 2665 C.C.Q.
64. In most cases, property classified as personal property in PPSA jurisdictions will be treated as movable in Québec. For an explanation of the differences between these terms, see GRENON, "Major Differences", *supra* note 36 at 395, n.6 and accompanying text.

hypothecs, although there are some important restrictions applicable to debtors who do *not* operate an enterprise.[65] Another similarity, is that the *Civil Code* allows a movable hypothec to be granted on either a specific item of movable property, or a "universality" of such property (i.e. "all" inventory or receivables or movable assets of another kind).[66] Likewise, a hypothec may charge present or after-acquired property of the debtor.[67] Finally, it should be noted that the *Civil Code* distinguishes between several kinds of conventional movable hypothecs, including: (1) a movable hypothec with delivery, or pledge, pursuant to which the debtor gives possession of the collateral to the creditor;[68] and (2) a movable hypothec without delivery, allowing the debtor to remain in possession of the collateral.[69]

## 2. CREATION OF THE SECURITY AND VALIDITY BETWEEN THE PARTIES: ATTACHMENT

All three regimes contain similar though not identical requirements that must be met in order for their respective security rights to affect the collateral and to become valid and enforceable as between the secured creditor and the debtor. In PPSA jurisdictions, these requirements are embodied in the concept of "attachment".[70] Although neither the Bank Act nor the *Civil Code* refer to the concept of "attachment", for ease of reference, this article will use the term generically to refer to the idea of a security right affecting the collateral.

The pre-conditions to the attachment of a section 427 security, a PPSA security interest and a conventional movable hypothec may be divided into three categories: (1) formalities; (2) requirements with respect to the obligation secured; and (3) requirements with respect to the rights that the debtor must have in the collateral.

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65. See *e.g.* arts. 2683, 2684 C.C.Q. Under the *Civil Code*, the operation of a business is included in the notion of the carrying on of an "enterprise". See art. 1525 C.C.Q.
66. Art. 2665 C.C.Q.; CLAXTON, *Security on Property, supra* note 36 at 7.
67. Art. 2684 C.C.Q.
68. Art. 2702 C.C.Q.
69. Art. 2696 C.C.Q.
70. See *e.g.* SPPSA subs. 12(1); OPPSA subs. 11(2). "Attachment" is a PPSA term of art meaning that all of the events necessary for the creation of a security interest have taken place. It is used to establish the moment at which the rights of the debtor in the collateral are restricted and affected by the rights of the secured party. See MCLAREN, *Secured Transactions in Personal Property in Canada*, §2.01 (eC, Law.pro) [MCLAREN, *Secured Transactions*].

### 2.1 Formalities

Under the Bank Act, the security must be given by signature and delivery by the debtor to the bank of a document in the form set out in Schedule II to the *Registration of Bank Special Security Regulations*.[71] The prescribed form is not compulsory, but rather is intended as a guide, and the security document that ends up being used need only be "of like effect".[72] In particular, the security document must contain a description of the collateral and of its location. It may also contain a warranty by the debtor that the collateral is and shall remain "free from any mortgage, lien or charge thereon", except as disclosed to the bank. It is apparent that the formalities prescribed by the Bank Act have been kept relatively simple, the intention being to avoid the necessity for the involvement of lawyers in the preparation of the documentation.[73]

Similarly, both the PPSA and the *Civil Code* provide as a first essential pre-condition to attachment that there be executed a written agreement containing a sufficient description of the collateral.[74] Unlike the Bank Act, however, neither provincial regime prescribes a form of security document to be used by the parties. Another significant difference, is that since both provincial regimes recognise the pledge as a valid form of security, attachment may occur in these cases by handing over the collateral to the secured party instead of executing a written agreement.[75]

### 2.2 The Obligation Secured: Contemporaneity of the Loan?

The second pre-condition to attachment under the Bank Act, is that the delivery of the security document and the making of the loan must be contemporaneous.[76] As a result, the section 427 security cannot be taken to secure past indebtedness, and a fresh

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71. See subs. 427(1) *in fine* and subs. 8(2) of the *Registration of Bank Special Security Regulations* [SOR/92-301], as am. SOR/94-367; SOR/95-171 [the *Regulations*].
72. *Royal Bank of Canada* v. *Mackenzie*, [1932] S.C.R. 524; *Imperial Paper Mills* v. *Québec Bank* (1913), 13 D.L.R. 702 (P.C.).
73. CRAWFORD, *supra* note 3 at 407.
74. For PPSA jurisdictions, see *e.g.* SPPSA para. 10(1)(b) and OPPSA para. 11(2)(a). For Québec, see arts. 2696, 2697 C.C.Q.
75. For PPSA jurisdictions, see *e.g.* SPPSA para. 10(1)(a) and OPPSA para. 11(2)(a). For Québec, see art. 2702 C.C.Q. In such cases, the hypothec is called a "movable hypothec with delivery" or "pledge", see art. 2665 C.C.Q.
76. See subs. 429(1) of the Bank Act. Non-compliance with the requirements of subs. 429(1) are made an offence under subs. 984(4).

advance is an essential requirement for its validity.[77] The courts have, however, demonstrated a certain flexibility in this respect and have upheld the validity of a security where the contemporaneous advance was applied to discharge pre-existing indebtedness.[78] In doing so, they have effectively created a way to circumvent the contemporaneity requirement, simply by making past indebtedness "fresh" again. Further, the Bank Act makes an exception to the contemporaneity requirement and allows the section 427 security to cover advances made after the taking of the security ("future advances"), where a promise to give security is first executed by the debtor in favour of the bank.[79]

In contrast, neither the PPSA nor the *Civil Code* requires that the security be given contemporaneously to the loan, and it is possible under both systems for security to be granted to secure a pre-existing obligation.[80] Further, both the *PPSA* and *Civil Code* regimes expressly allow their respective security rights to cover future advances.[81]

## 2.3 Rights of the Debtor in the Collateral and Time of Attachment

### *2.3.1 Bank Act Security Regime: Ownership by the Debtor*

The third pre-condition to attachment under the Bank Act is contained in subsection 427(2), the relevant portion of which reads as follows:

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77. *Berryland Canning Col* v. *Toronto-Dominion Bank*, [1972] S.C.R. 259; *C.I.B.C.* v. *Fletcher* (1978), 82 D.L.R. (3d) 257 (H.C.J.). See also F. BENNETT, *Bennett on Creditors and Debtors Rights and Remedies*, 4th ed. (Toronto: Carswell, 1994), cited at para. 26 of *P.E.I. Produce Co.* v. *Springloam Farms Ltd.*, [1997] P.E.I.J. No. 50 (P.E.I.S.C.) (QL).
78. *Ibid.* For a criticism of these decisions, see OGILVIE, *Canadian Banking Law*, *supra* note 19 at 364-365.
79. Para. 429(1)(b), which provides that where a promise to give security has been first executed, the loan may be made before, at the time of or *after* the delivery of the security document.
80. In the PPSA framework, this rule is embodied in the second pre-condition to attachment, which requires that "value" be given. "Value" is defined as "any consideration that is sufficient to support a simple contract and includes an antecedent debt or liability". See *e.g.* SPPSA para. 2(1)(tt); OPPSA subs. 1(1) "value". In Québec, the rule is framed from a different perspective. Art. 2687 C.C.Q. states that, "a hypothec may be granted to secure any obligation whatever." See also L. PAYETTE, *Les sûretés réelles dans le Code Civil du Québec* (Cowansville, Québec: Éditions Yvon Blais, 2001) at 270 [PAYETTE, *Les sûretés réelles*].
81. For PPSAs, see *e.g.* OPPSA s. 13; for Québec, see art. 2688 C.C.Q.

> Delivery of a document giving security... vests in the bank, in respect of the property therein described... of which the debtor is owner at the time of the delivery; or of which the debtor becomes owner at anytime thereafter... the following rights and powers, namely... [Emphasis Added]

The provision indicates that, in order for the bank's rights to attach to the collateral, the debtor must either be "owner" or become "owner" of the collateral during the continuance of the security agreement.[82] The term "owner" is not defined in the Bank Act. The task of defining the terms, conditions and extent of the debtor's ownership is thus left up to provincial law.[83]

Subsection 427(2) also establishes the point in time when the bank's rights begin to affect the collateral. It is beyond dispute that the bank's security attaches to the debtor's present property at the time of delivery of the security document.[84] The position with respect to after-acquired property, however, is *unclear*. For the vast majority of commentators and courts in Canadian common law jurisdictions, the effect of subsection 427(2) is that the bank's interest does not attach to any after-acquired property covered by the security until the point in time when the debtor "becomes owner" of the property (the "time of ownership" approach).[85] Others have argued, on the basis of the opening

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82. *Barry* v. *Bank of Ottawa* (1908), 17 O.L.R. 83; *La Chaîne Coopérative du Saguenay Inc.* v. *Laberge et al.*, [1959] C.S. 320; *Pottendorfer Textilwerke A.G.* v. *C.I.B.C.* (1973), 18 C.B.R. (N.S.) 260 (Ont. Co. Ct.); *Royal Bank of Canada* v. *Port Royal Pulp & Paper Co*., [1941] 4 D.L.R. 1 (P.C.); *Les Entreprises Maurice Canada Ltée* v. *Cossette et Frères Ltée*, [1980] C.S. 895; *Bank of Nova Scotia* v. *International Harvester Credit Corporation of Canada Ltd.* (1990), 73 D.L.R. (4th) 385 at 396 (O.C.A.) [*International Harvester*].

83. *Royal Bank of Canada* v. *Hodges*, [1930] 1 D.L.R. 397 (B.C.C.A.); see also the judgement of Laskin J.A., dissenting on other grounds, in *Abraham* v. *Canadian Admiral Corp.*, 39 O.R. (3d) 176 (O.C.A.).

84. See *Royal Bank of Canada* v. *Sparrow Electric Corp.*, [1997] 1 S.C.R. 411 at para. 59 [*Sparrow*], Gonthier J., citing MOULL, *supra* note 30 at 251. See also DESCHAMPS, "La garantie de l'article 178", *supra* note 14 at n. 22; MACDONALD, "A Civil Law Analysis", *supra* note 7 at 1061; CIOTOLA, *Droit des sûretés*, *supra* note 14 at para. 3.136; AUGER, "Les sûretés mobilières", *supra* note 14 at 283.

85. See *Rogerson Lumber Co. Ltd.* v. *Four Seasons Chalet Ltd. and Bank of Montreal et al.* (1980), 113 D.L.R. (3d) 671 (Ont. C.A.) [*Rogerson*]. See especially the judgement of Wilson J., dissenting on other grounds. See also *Abraham* v. *Canadian Admiral Corp*., *supra* note 83 at 187-188; *Sparrow*, *supra* note 84 at para. 64, citing MOULL, *supra* note 30; MACDONALD, "A Civil Law Analysis", *supra* note 7 at n. 97; WOOD, "Federal Security Interests", *supra* note 5 at 77; OGILVIE, *Canadian Banking Law*, *supra* note 19 at 369.

words of the subsection, that the moment that the bank's rights begin to affect the collateral is deemed *retroactively* to be the date of delivery of the security document.[86] "Delivery of a document giving security" has the effect of *presently* attaching the bank's rights under the security to the after-acquired property of the debtor (the "retroactive" approach).[87] The lack of clarity of the Bank Act on this point is unfortunate, as the moment of attachment is central to the resolution of priority disputes under the Bank Act.[88] In order to resolve this difficulty, a tortuous analysis of the provisions is required.

Upon delivery of the security document, the bank acquires, *inter alia*, "the same rights and powers as if the bank had acquired a warehouse receipt or bill of lading in which [the collateral] was described".[89] Subsection 435(2) describes the rights that are acquired by the bank as a result of acquiring a warehouse receipt or bill of lading (the nature of which are discussed in more detail below). With respect to timing, the subsection provides that such rights are vested in the bank "from the date of the acquisition" of the warehouse receipt or bill of lading. Therefore, the key to resolving the moment of attachment question in relation to after-acquired property lies in determining the time at which the bank is deemed, under subsection 427(2), to have acquired a warehouse receipt or bill of lading with respect to after-acquired property. Is the bank deemed to receive a warehouse receipt or bill of lading covering each item of after-acquired property at each point in time when the debtor becomes the owner of such property (as per the time of ownership approach)?[90] Or, is the bank deemed to have received *only one* warehouse receipt or bill of lading at the date of delivery of the security document, covering both present *and after-acquired property* (as per the retroactive approach)?

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86. See *e.g. William Neilson Ltd.* v. *Red Carpet Distribution Inc. (C.A. Qué.)*, 9 C.B.R. (3d) 86 at 105-107 [*William Neilson*]; DESCHAMPS, "La garantie de l'article 178", *supra* note 14 at 137; AUGER, "Les sûretés mobilières", *supra* note 14 at 282*; Bank of Boston Canada* v. *Montreal Fast Print (1975) Ltd.*, [1986] R.J.Q. 2709 (C.S.), [1986] Q.J. No. 1430.
87. *Sparrow, supra* note 84 at para. 64. The court in *Sparrow* is ambiguous as to the moment of attachment of the bank's security, using language that tends to support either approach. In particular, see para. 64.
88. See Part III, Section 2 (Resolution of Priority Disputes under the Bank Act Security Regime), below at 344.
89. Paras. 427(2)(c) and (d).
90. This is the position taken by Wilson J., dissenting on other grounds, in *Rogerson*, *supra* note 85.

The wording of subsection 427(2) tends to support the retroactive approach. A contextual analysis of the provision, however, leads to the conclusion that the time of ownership approach is probably correct. Indeed, the provision allowing the bank to take security over the debtor's *after-acquired property* was not added to the Bank Act until 1944.[91] Prior to this, borrowers had to deliver additional security documents for each subsequent advance and covering each item of property newly acquired by them. The bank's rights attached on each of the successive dates when additional security documents were given by the borrower.[92] The rationale behind the provision was to *simplify* the procedure between the bank and the debtor.[93] It was *not* meant, however, to improve the bank's relative entitlement in the debtor's *after-acquired property*. The problem with the retroactive approach, is that it would have precisely this unintended effect. By deeming the bank's rights to have been acquired at a *prior* point in time, this approach could potentially allow the bank to gain priority over intervening interests.[94]

In summary, under the Bank Act, the bank's rights under the section 427 security attach (1) to the debtor's presently owned property at the time of delivery of the security document; and (2) to the debtor's after-acquired property as and when the debtor becomes "owner" thereof.

### *2.3.2 PPSA Regime: "Rights in the Collateral"*

The third and final pre-condition to attachment of a security interest under the PPSA framework is that the debtor must have acquired "rights in the collateral".[95] Although the meaning of this expression is not entirely unambiguous, it is clear that it does not require that the debtor have full legal ownership rights in collateral and encompasses possessory or equitable rights.[96] As to timing of attachment, with respect to present property of the debtor,

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91. See subs. 88(2) of the Bank Act of 1944, S.C. 1944-1945, c. 30.
92. See *Bank of Montreal* v. *Guaranty Silk Dyeing & Finishing Co. Ltd.*, [1935] O.R. 493 (C.A.) [*Guaranty Silk (C.A.)*].
93. ANSTIE, Part II, *supra* note 3 at 38.
94. An intervening interest would be an interest acquired in the collateral *between*: (1) the date of delivery of the security document; and (2) the date at which the debtor becomes owner of the collateral.
95. See *e.g.* OPPSA para. 11(2)(c).
96. J.J. WHITE & R.S. SUMMERS, *Uniform Commercial Code*, 4th ed. (St. Paul, Mn.: West, 1995) vol. 4 at 67; BRIDGE et al., "Formalism", *supra* note 48.

attachment will generally occur at the moment of execution of the security agreement. With respect to after-acquired property, although the question is not free from controversy,[97] the predominant view is that the PPSA security interest attaches as and when the debtor acquires rights in such property.[98]

As regards certain kinds of property, there are significant differences between the PPSA and Bank Act attachment rules.[99] In particular, the PPSA prevents attachment of a security interest to future crops that are planted more than one year after the security agreement has been executed.[100] Consequently, farmers are at a greater liberty to use future crops to secure advances under the Bank Act regime, which contains no such restriction,[101] than under the PPSA. The *Civil Code* does not contain such a restriction.

### *2.3.3 Civil Code Hypothecary Regime: Ownership by the Debtor*

According to article 2670 of the *Civil Code*, "[a] hypothec on the property of another or on future property begins to affect it only when the grantor acquires title to the hypothecated right." The implication is that the hypothec does not attach where the debtor has mere possession of property; it is necessary that the debtor *acquire the right of ownership* in the property before it can attach.[102] For instance, a buyer under an instalment sale does not

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97. It has been said that the decision of the S.C.C. in *Sparrow, supra* note 84, stands for the proposition that the moment of attachment of a PPSA security interest with respect to after-acquired property is deemed to have taken place at the moment when the security agreement is executed by the parties. See *e.g.* K. DAVIS, "Priority of Crown Claims in Insolvency: *Royal Bank of Canada* v. *Sparrow Electric Corp* and its Aftermath", 29 *C.B.L.J.* 145 at 149 [DAVIS, "Priority of Crown Claims"].
98. MCLAREN, *Secured Transactions*, *supra* note 70 at §2.02, "[b] Attachment of after-acquired property"; J.S. ZIEGEL & D.L. DENOMME, *The Ontario Personal Property Security Act: Commentary and Analysis*, 2d ed. (Markham, ON: Butterworths, 2000) [ZIEGEL & DENOMME, *Ontario PPSA*]; DAVIS, "Priority of Crown Claims", *supra* note 97 at 149.
99. See *e.g.* OPPSA para. 11(3)(a) (or SPPSA subs. 12(3)) which delays attachment with respect to: (a) crops until they become growing crops; (b) fish until they are caught; (c) the young of animals until they are conceived; (d) minerals or hydrocarbons until they are extracted; or (e) timber until it is cut. The Bank Act does not appear to contain such restrictions. See generally subs. 427(1).
100. See *e.g.* SPPSA subs. 13(2); OPPSA subs. 12(2).
101. Para. 427(1)(d) of the Bank Act.
102. See *e.g.* CIOTOLA, *Droit des sûretés*, *supra* note 14 at 205; CLAXTON, *Security on Property*, *supra* note 36 at 19; PAYETTE, *Les sûretés réelles*, *supra* note 80 at

acquire the right of ownership in the property sold until full payment of the sale price.[103] If the buyer were to grant a movable hypothec on such property, the hypothec would not attach to the property until the final payments were made.

### 2.4 The Rights Acquired by the Bank on Attachment

Upon attachment, the Bank Act grants two different kinds of security rights to the bank in respect of the collateral. The first are described by reference to those rights and powers which the bank would have acquired had it received a warehouse receipt or bill of lading in which the collateral was described. These rights are granted to the bank in respect of all classes of eligible collateral listed in subsection 427(1).[104] According to subsection 435(2), the acquisition of a warehouse receipt or bill of lading vests in the bank:

> (a) all the right and title to the warehouse receipt or bill of lading and to the goods, wares and merchandise covered thereby of the previous holder or owner thereof; and
>
> (b) all the right and title to the goods, wares and merchandise mentioned therein of the person from whom the goods, wares and merchandise were received or acquired by the bank, if the warehouse receipt or bill of lading is made directly in favour of the bank, instead of to the previous holder or owner of the goods, wares and merchandise.

Despite the convoluted drafting of the subsection, a consensus has emerged as to its effect which, in combination with subsection 427(2), is often referred to as the "document of title fiction". Pursuant to this legal fiction, *the bank effectively acquires the title to whatever rights the debtor may hold in the collateral* at the time of attachment.[105] The acquisition by the bank of the debtor's "right and title" to the collateral has many important consequences upon

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84. As discussed later in this article, under Québec law, only one person may be regarded as holding the ownership right in property at any given time (subject to cases of co-ownership) (see *infra* note 230 and accompanying text). Also note that the "dismemberments" of the right of ownership may also be hypothecated, but the hypothec does not extend to the full ownership right in the property in such cases (art. 2669 C.C.Q.).

103. Art. 1745 C.C.Q.

104. Paras. 427(2)(c) and (d).

105. *Sparrow, supra* note 84 at para. 59, citing MOULL, *supra* note 30 at 251; CRAWFORD, *supra* note 3 at 424, n. 29. For a detailed analysis and explanation of subs. 435(2), see *Barry* v. *Bank of Ottawa*, *supra* note 82 at paras. 41-43.

the respective rights of the parties under provincial law. These consequences, and the precise nature of the rights acquired by the bank pursuant to the document of title fiction, shall be discussed later in this article.[106]

In addition to the security rights acquired under the document of title fiction, in certain cases, the bank is also granted a "first and preferential lien and claim" upon the collateral.[107] The lien is given only in respect of certain kinds of property, such as crops, agricultural or forestry equipment, having the potential of being attached to real or immovable property.[108] Apparently, the purpose of granting this first and preferential lien is to secure the priority of the bank's claim over those holding security on the real or immovable property to which the collateral has become attached.[109] The Bank Act, however, provides no definition of the terms "lien and claim", nor does it elucidate the consequences of the bank having acquired such rights. Instead, the Bank Act defers to provincial law on these matters. For whatever reason, the courts have not attached any importance to this "first and preferential lien". The focus of their attention has been on the rights acquired by the bank under the document of title fiction.[110] As a result, the precise effect of the lien remains unclear.[111]

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106. See Part III, Section 1 (Characterization of the Section 427 Security and Applicable Provincial Law), below at 331.

107. The term "lien" does not correspond to any known institution under the *Civil Code*. This was also the case under the *Civil Code of Lower Canada*. "Lien" loosely corresponds to the civil law concept of "privilege" that arose in a wide variety of circumstances under the *Civil Code of Lower Canada*. The French version of the provision refers to "un gage ou privilège de premier rang". With the enactment of the new *Civil Code* in 1994, the various "privileges" which existed under prior-law were abolished. Certain privileges have been replaced by "prior claims" and "legal hypothecs".

108. More particularly, the first and preferential lien is granted with respect to the following classes of property: stock growing or produced in an aquaculture operation or aquacultural equipment (para. (1)(*c*)); crops or agricultural equipment (para. (1)(*d*)); aquacultural equipment (paras. (1)(*m*)(*n*)); forestry equipment (para. (1)(*p*)); or any property listed in paras. (1)(*e*), (*f*), (*k*) and (*l*), comprising, generally, agricultural equipment, seed, pesticide or fertilizer or aquacultural stock or equipment.

109. DAVIES, *supra* note 30 at 7; OGILVIE, *Canadian Banking Law*, *supra* note 19 at 367; CRAWFORD, *supra* note 3 at 421-423.

110. See *e.g.* CRAWFORD, *supra* note 3 at 421-423: "[t]hose judgements that have concentrated on the nature of the bank's rights have uniformly concentrated on the warehouse receipt concept".

111. For example, in common law jurisdictions, the question would arise as to whether the language used by the federal Parliament is sufficiently clear to defeat pre-existing property rights under the principle in *British Columbia (Board of Industrial Relations)* v. *Avco Financial Services Realty Ltd.* (1979), 98 D.L.R. (3d) 695. In Québec, given that the concept of "privilege" has disappeared

## 3. EFFECTIVENESS OF THE SECURITY RIGHTS AGAINST THIRD PARTIES

### 3.1 Bank Act Security Regime: Registration of a Notice of Intention

In order for the bank's security rights to be effective against other parties claiming rights in the collateral, paragraph 427(4)(a) of the Bank Act requires that there be registered a "notice of intention" to give security by the debtor.[112] This publicity requirement was not added to the Bank Act until 1923.[113] Prior to then, there was no way by which third parties dealing with the debtor could learn of the existence of a section 427 security, which was often referred to as the "secret lien" of banks.[114] The provision was enacted in order to meet this criticism.

The notice of intention is a very simple document, the form of which is set forth in Schedule III to the *Regulations*. The document merely states the debtor's intention to give security under section 427 to the bank. It does *not* mention the amount of the loan, nor does it provide a description of the collateral covered by the security. Moreover, the fact that a notice of intention is registered does not mean that security has in fact been given. As a result, a third party searcher must make further inquiry in order to discover whether and if so, to what extent the property of the debtor is covered by the bank's security. The difficulty is that the Bank Act contains no requirement that the bank provide further information to a third party searcher as to any security which may exist.[115]

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from Québec law, the issue is whether the transitional provisions of the *Act respecting the implementation of the reform of the Civil Code*, S.Q. 1992, c. 57 (see arts. 133-140), apply to *transform* the privilege created by subs. 427(2) into a prior claim or legal hypothec (see art. 134(5) of such Act).

112. The notice must be registered in the "appropriate agency" which, according to subs. 427(5), generally means the office of the Bank of Canada situated in the province in which is located the principle place of business of the debtor. The details of the registration system are set forth in the *Regulations, supra* note 71. The Bank of Canada has delegated the responsibility for the administration of the registration system to a private entity called the Canadian Securities Registration System (CSRS), see online <www.csrs.ca>.

113. See *Bank Act*, S.C. 1923, c. 32, s. 88A. For a more detailed discussion of the policy debates surrounding the adoption of the provision, see ANSTIE, Part II, *supra* note 3 at 36-37; CRAWFORD, *supra* note 3 at 405; MOULL, *supra* note 30 at 245, n. 10.

114. See *Re Weiss Air Sales Ltd. and Bank of Montreal* (1982), 134 D.L.R. (3d) 706 at 708 (Ont. H.C.).

115. OGILVIE, *Canadian Banking Law*, *supra* note 19 at 372.

With respect to timing, the notice of intention must be registered no more than *three years immediately before* the security is given.[116] Failure to register will cause the bank's rights to be "void as against creditors of the person giving the security and as against subsequent purchasers or mortgagees in good faith of the property covered by the security".[117] Late registration, when the notice of intention is registered *after* the execution of the security agreement, will have the same voiding effect.[118] As between the bank and the debtor, however, the section 427 security remains effective notwithstanding the failure to properly register a notice of intention.[119] As a result, absent the intervention of another creditor, the bank may enforce its improperly registered security against the debtor, who may not challenge the bank's security rights on this basis.[120] The notice of intention is cancelled automatically after five years, unless renewed.[121] It may also be cancelled by filing a "certificate of release".[122] Cancellation of the notice of intention operates as a full release of the bank's security against the debtor.[123]

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116. Although no case law has specifically addressed the issue, it would appear that the notice of intention could be filed only minutes before the giving of security to the bank in order to comply with this requirement. This is made possible by the fact that the Bank Act security registration system (see *supra* note 112 and accompanying text) specifically indicates the time of the filing of the notice of intention.
117. See para. 427(4)(a).
118. *Re Hickman Equipment (1985) Ltd.*, 2003 CarswellNfld 84 (WL) [*Hickman*] (the bank's security was void as against the trustee in bankruptcy); *Blaiklock Inc.* c. *Zittrer, Siblin & Associates*, [1995] A.Q. nº 698 (Que. C.A.) (QL) [*Blaiklock*] (the bank's security was void as against the trustee in bankruptcy); *Discovery Enterprises Inc.* v. *Hongkong Bank of Canada*, [1995] B.C.J. No. 1362 (QL) [*Discovery Enterprises*]; *Re Davanti Contemporary Interiors Ltd.* (1992), 4 Alta L.R. (3d) 362 at 367 (Alta. Q.B.) [*Davanti*]; *Re Canadian Imperial Bank of Commerce* v. *281787 Alberta Ltd. et al.* (1984), 9 D.L.R. (4th) 765 (Alta. C.A.).
119. *Blaiklock*, *supra* note 118; *Discovery Enterprises*, *supra* note 118 at para. 23; *Davanti*, *supra* note 118 at 367-368.
120. *Ibid.* Since the security is void *ab inito*, all other creditors have priority over the bank's improperly registered security. This priority should apply even where the creditors intervene *after* the bank has completed its realization process and their claim is to the proceeds of sale of the collateral. See discussion by Lambert J.A. to that effect at paras. 21-28 of *Discovery Enterprises*, *supra* note 118, disapproving of *Davanti*, *supra* note 118. However, see *Hickman*, *supra* note 118 at paras. 44 – 46, where Hall J., *in obiter* and in distinguishing *Davanti*, states that once a bank takes possession of the collateral, creditors who subsequently attempt to enforce their rights against such collateral or a subsequently appointed trustee can no longer invoke the invalidity of the Bank Act security for reason of late registration of the notice of intention.
121. S. 7 of the *Regulations*, *supra* note 71.
122. Para. 427(4)(b); ss. 5 and 6 of the *Regulations*, *supra* note 71.
123. *Re Weiss Air Sales Ltd. and Bank of Montreal*, *supra* note 114.

### 3.2 PPSA Regime: Perfection

Under the PPSA, the concept of making a security interest effective against third parties is referred to as "perfection". In cases where the debtor retains possession of collateral, a security interest is generally perfected by registration.[124] Similarly to the Bank Act, the PPSA uses a notice filing system: a document called a "financing statement" is registered as a substitute for the security agreement.[125] In addition, the financing statement may also be registered before the security agreement is concluded between the parties.[126] Unlike the Bank Act, however, the PPSA imposes an express obligation on secured creditors to provide additional information to third party searchers, upon request.[127] Further, registration of a financing statement *after* the conclusion of a security agreement does not have any voiding effect, although this may have an impact on the secured creditor's priority position. Failure to register or perfect by other means[128] results in the security interest being declared subordinate or ineffective against a number of specifically designated third parties, including secured creditors, transferees for value and the debtor's trustee in bankruptcy.[129]

### 3.3 Civil Code: Publication

Under the *Civil Code*, the rights of a hypothecary creditor are rendered effective against third parties by "publication".[130] The publication of a movable hypothec does not require the filing of the agreement itself, but rather of a document containing certain prescribed information, including the names of the hypothecary creditor and debtor, and a description of the collateral.[131] There are

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124. See *e.g.* OPPSA ss. 19 and 23. Note that the PPSA also recognizes other methods of "perfection". For instance, registration is not required where the creditor obtains possession of the collateral: see *e.g.* OPPSA s. 22. The other type of perfection is *temporary perfection*, which exists when a security interest is protected even though no financing statement has been registered and the secured party is not in possession of the collateral. See *e.g.* OPPSA s. 24.
125. See *e.g.* OPPSA s. 45.
126. See *e.g.* OPPSA subs. 45(3).
127. See *e.g.* OPPSA s. 18.
128. See *supra* note 124 and accompanying text.
129. See *e.g.* OPPSA subs. 20(1) for the complete list of such third parties.
130. Art. 2663 C.C.Q. Like the PPSA, the *Civil Code* recognizes other methods of "publication", such as giving possession of the collateral to the hypothecary creditor (art. 2703 C.C.Q.).
131. Arts. 2981, 2983 C.C.Q. See also the *Regulation respecting the register of personal and movable real rights*, D. 1594, (1993) 125 *G.O.* II, 8058 [the *RPMRR*

two notable differences between the *Civil Code* on the one hand and the Bank Act and PPSA regimes on the other. First, the hypothec *cannot* be published before the date of its creation by agreement between the parties.[132] Second, the failure to publish a hypothec has greater consequences than failure to perfect under the Bank Act and the PPSA. Rather than listing specific third parties against whom the unpublished security right is rendered void or subordinate, the *Civil Code* declares that the unpublished rights of a hypothecary creditor are ineffective against *all third parties*.[133]

## 4. PRIORITY

Both the PPSA and the *Civil Code* provide a comprehensive and sophisticated method of resolving priority disputes between conflicting rights in the collateral, the details of which exceed the scope of this article.[134] Generally, priority disputes between conflicting rights in the collateral under both systems are determined according to the order of registration.[135]

Unlike the modern provincial secured lending regimes, the Bank Act relies on an unsophisticated *temporal priority scheme,* whereby priority is to be determined based on the order of *attachment* of the competing rights in the collateral.[136] The difficulty, however, is that there is no consensus as to whether the priority scheme is grounded entirely in the Bank Act itself, or also partially in provincial law. The issue is of more than mere theoretical interest. Because of the doctrine of federal paramountcy, the oper-

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*Regulation*]. The *Civil Code* devotes an entire Book to creating a comprehensive and sophisticated system for the publication of rights in movable and immovable property, the description of which exceeds the scope of this article. The rules governing this regime are found in Book 9, entitled "Publication of Rights", at arts. 2934 ff.

132. The *Civil Code* does not prohibit advance registration. However, the regulations which determine the form of document to be filed in the *Register of Personal and Movable Real Rights* require a reference to the date of the agreement creating the movable hypothec without possession. See RH form, Appendix I to the *RPMRR Regulation, supra* note 131. See also the discussion in PAYETTE, *Les sûretés réelles*, *supra* note 80 at 157-159.

133. Art. 2941 C.C.Q., *a contrario*. See also art. 2663 C.C.Q.

134. For PPSA jurisdictions, see *e.g.* OPPSA, Part III – Perfection and Priorities. For Québec, see arts. 2945-2956 C.C.Q.

135. For PPSAs, see *e.g.* OPPSA subs. 30(1). For Québec, see art. 2945 C.C.Q.

136. The date of registration of the notice of intention is irrelevant in determining the relative priority position of the bank: CIOTOLA, *Droit des sûretés*, *supra* note 14 at para. 3.136; AUGER, "Les sûretés mobilières", *supra* note 14 at 283.

ational force of the priority rules will vary depending on whether they are rooted in provincial or federal law. In order to resolve this issue, the Bank Act's few priority provisions must first be viewed in their historical context.

### 4.1. The Historical Perspective

When the Bank Act security regime was first devised, priority disputes in the collateral were, with one exception,[137] not expressly contemplated by the Bank Act.[138] The bank's interest was meant to be the sole, primary interest in the collateral.[139] The overall scheme of the Bank Act was aimed at preserving the bank's position as primary creditor. For instance, the form of security document by which security was to be granted to the bank contained a warranty by the debtor to the effect that the collateral was "free from any mortgage, lien or charge thereon."[140] A debtor who wilfully made a false statement in the security document was guilty of an offence.[141] The Bank Act also made it an offence for the debtor to sell the collateral without the bank's consent.[142] Despite these provisions, many disputes arose between banks and other parties claiming rights in the collateral. Since the Bank Act did not contain any general statutory priority rules, the primary method of resolving these disputes was to ascertain the effect of the document of title fiction under provincial law. As a general rule, in both common law jurisdictions and in Québec, this meant that priority was to be given to the first party to have acquired rights in the collateral.[143] However, nothing prevented provinces from enacting measures in order to reverse this outcome, so long as such measures were of "general application" and did not target

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137. A special priority rule subordinated the "claim of any unpaid vendor" in certain circumstances. See s. 77 of the *Bank Act of 1890, supra* note 3. This rule remains in the Bank Act to this day and will be discussed in more detail below (see Part III, Section 2.6 (Special Priority over the "Claim of any Unpaid Vendor") at 387).
138. See ss. 74-79 of the *Bank Act of 1890, supra* note 3.
139. OGILVIE, *Canadian Banking Law*, *supra* note 19 at 383-384.
140. See Schedule C to the *Bank Act of 1890, supra* note 3.
141. S. 75, para. 3 of the *Bank Act of 1890, supra* note 3.
142. S. 75, para. 4 of the *Bank Act of 1890*, *supra* note 3.
143. See *e.g. Landry Pulpwood*, *supra* note 19; *Goebel* v. *Can. Bank of Commerce* (1921), 61 D.L.R. 402 (Sask. K.B.), aff'd (1922), 63 D.L.R. (Sask. C.A.) [*Goebel*]. The document of title fiction did not in all cases call for the strict application the temporal priority rule. See *e.g. Union Bank of Halifax* v. *Indian and General Investment Trust* (1908), 40 S.C.R. 510 (the bank took priority over a *prior* floating charge where it did not have notice of such equitable charge when taking its security).

banks in particular.[144] This state of affairs remained unchanged until 1944, when the predecessor to subsection 428(1) of the Bank Act was first introduced.[145] The relevant portion of the subsection reads as follows:

> All the rights and powers of the bank [acquired under the document of title fiction in respect of the property] shall [...] have priority over all rights subsequently acquired in, on or in respect of such property [...].

Although the bank's priority over subsequent rights had already been derived from the document of title fiction, the provision was *not* redundant. The intention of Parliament in enacting this provision was to protect the section 427 security from the encroachment of provincial statutory liens that were given priority over prior security interests, including the bank's.[146] By providing for the bank's priority in the Bank Act, it henceforth became insulated from and would operate notwithstanding provincial legislation purporting to reverse it.

### 4.2 The General Priority Scheme: A Mixture of Federal and Provincial Law

The foregoing indicates that the Bank Act's general priority scheme is rooted not only in the Bank Act, but also in provincial law. More particularly, it is composed of two basic rules.

**Rule 1** – Priority disputes between the bank and competing rights acquired *subsequently* to the attachment of the bank's security are to be determined solely by reference to subsection 428(1) of the Bank Act.[147] In such cases, the bank's rights must be consid-

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144. See *Nova Scotia (W.C.B.)*, *supra* note 18 at 569.
145. Compare subs. 89(1) of the 1944 *Bank Act*, S.C. 1944-1945, c. 30 with subs. 89(1) and (2) of the 1934 *Bank Act*, S.C. 1934, c. 24.
146. The constitutional validity of provincial legislation giving priority to statutory liens *prior* to this amendment was recognised by the S.C.C. in *Nova Scotia (W.C.B.)*, *supra* note 18. The amendment was intended to reverse the outcome of this decision. For an explanation of the rationale behind the amendment, see *Re Fermo's Creations Inc.* (1970), 10 D.L.R. (3d) 560 at 566 (Que. C.A.) [*Re Fermo's*], Brossard J.; CUMING & WOOD, "Compatibility", *supra* note 14 at 273, n. 21; OGILVIE, *Canadian Banking Law*, *supra* note 19 at 384, n. 221.
147. See *Ouellette* v. *Banque de Nouvelle-Écosse,* REJB 1998-04293 at paras. 16, 24; *Re Fermo's*, *supra* note 146 at 565; *Sparrow*, *supra* note 84 at para. 78. See also WOOD, "Federal Security Interests", *supra* note 5 at 76; MACDONALD, "A Civil Law Analysis", *supra* note 7 at 1031-1032; MOULL, *supra* note 30 at 256; AUGER, "Les sûretés mobilières", *supra* note 14 at 274-275 & 282-285;

ered as having priority. Provincial law that purports to give priority to the subsequent right will be rendered inoperative on the basis of the doctrine of paramountcy of federal legislation.[148] Indeed, it is difficult to imagine a clearer case of operational conflict than in this latter situation, there being an *express contradiction* between the Bank Act and provincial law. For whatever reason, the courts have shown a tendency to ignore the subsection 428(1) priority over subsequent rights, and to hold that the priority of the bank arises as a consequence of the bank having acquired the "right and title" of the debtor pursuant to the document of title fiction.[149] In some cases, though not all, this approach has led to erroneous outcomes.[150]

**Rule 2** – Priority disputes between the bank and conflicting rights acquired *prior* to the attachment of the bank's security are to be determined by ascertaining the effect of the document of title fiction under provincial law. As previously stated, the Bank Act, through the interplay of subsections 427(2) and 435(2), provides that the bank acquires title to the rights of the debtor in the collateral. Nowhere, however, does the Bank Act expressly subordinate the bank's security to prior existing rights. Moreover, contrary to

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DESCHAMPS, "La garantie de l'article 178", *supra* note 14 at 142, n. 33; DEMERS, *Le financement de l'entreprise*, *supra* note 14 at 202-203.

148. *Ouellette* v. *Banque de Nouvelle-Écosse, supra* note 147 at paras. 16-20; *Re Fermo's*, *supra* note 146; See also *Bank of Montreal* v. *Pulsar Ventures Inc.*, [1988] 1 W.W.R. 250, 42 D.L.R. (4th) 385 at 387 (Sask. C.A.), Vancise J.A. stating: "If the Bank Act provides directly or by implication a priority rule then that provision will govern notwithstanding that it is in conflict with a provincial scheme of priorities. This rule is based on the primacy of federal law." And at 394-395: "[s]ection 428 of the Bank Act sets out the basic scheme governing the priority to a bank's claim pursuant to s. 427 [...] Section 428(1) clearly establishes that a bank's s. 427 security takes priority over competing claims that are created or arise at a later time than the assignment to the bank." The principle that provincial legislation cannot re-order federal priorities without creating an operational conflict and therefore being rendered inoperative is well established in the bankruptcy context. See *Husky Oil*, *supra* note 22; and *Canada (Attorney General)* v. *Québec (Attorney General)*, [1929] S.C.R. 557 at para. 2 (eC, Law. pro), per Anglin C.J.C.: "[i]n so far as there may be conflict between priority created by [a federal statute] and that which [a provincial] statute ... purports to give, each being within the legislative jurisdiction conferred by the B.N.A. Act on the legislature which enacted it, it is well established that the former must prevail. This must be so whether the provision for priority – substantially the same in each Act – is attributable to the exercise of a jurisdiction which should be regarded as an integral part of that conferred by an enumerated head, or as ancillary thereto."

149. For example, see the cases cited at notes 306 (subsequent buyers) and 353 (subsequent PMSI) *infra*.

150. For example, see the cases cited at note 399, *infra*.

certain views expressed in common law jurisdictions,[151] the subordination of a bank's security to prior existing rights cannot be *implied* in the Bank Act. To do so would constitute a failure to recognise the complementary relationship between the Bank Act and provincial law. The correct view is that the Bank Act, having vested the bank with the rights of the debtor in the collateral through the document of title fiction, relies on provincial law to determine the consequences of holding such rights.[152]

### 4.3 Other Special Priority Issues

Priority disputes between banks and competing rights in the collateral give rise to a number of issues which fall outside the general priority scheme outlined above. The following special priority issues are of particular interest for the purposes of the present study.[153]

#### *4.3.1 Unpaid Vendors*

As an exception to the general priority scheme, the Bank Act contains a special priority rule which subordinates the "claim of

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151. The most common view in common law jurisdictions is that subs. 427(2) and 435(2) provide, by implication, that priority disputes should be resolved by application of the common law principle of *nemo dat quod non habet* (see Part III, Section 2.3.1.1 (Conventional Security Interests), below at 359). While it is true that this principle may apply in accordance with the law of property, one must be careful not to mistakenly import provincial common law rules into the Bank Act. For examples of this view, see *Royal Bank of Canada* v. *Agricultural Credit Corp. of Saskatchewan,* 115 D.L.R. (4th) 569 at 586-587 (Sask. C.A.); *Bank of Montreal* v. *Pulsar Ventures Inc.*, *supra* note 148; *Abraham* v. *Canadian Admiral Corp.*, *supra* note 83; *Sparrow*, *supra* note 84 at paras. 67, 85. See also OGILVIE, *Canadian Banking Law*, *supra* note 19 at 384.

152. CRAWFORD, *supra* note 3 at 444. See also CUMING & WOOD, "Compatibility", *supra* note 14 at 274: "[s]ection 427(2) provides that the bank obtains all the right and title of the borrower in the collateral, but by implication leaves it to the law of property to determine the consequences of holding such an interest..." [emphasis added].

153. Unfortunately, due to the breadth of the topic, it has not been possible to address all possible special priority issues. The reader should nevertheless be aware of two additional issues that are not discussed in this article. The first relates to the respective priority positions of the bank and of competing secured creditors with respect to future advances. The second relates to the effect on the bank's rights of certain physical or juridical transformations which may affect the collateral. Such transformations are only partly anticipated by the Bank Act, in subs. 428(12) (goods manufactured from goods covered by the bank's security), para. 427(2)(d) and subs. 428(2)(3) (affixation of certain types of collateral to real or immovable property). For a discussion of these issues, see CUMING & WOOD, "Compatibility", *supra* note 14 at 281, 197; MACDONALD, "A Civil Law Analysis", *supra* note 7 at 1049-1050; OGILVIE, *Canadian Banking Law*, *supra* note 19 at 372.

any unpaid vendor" to the bank's security. The expression "claim of any unpaid vendor" is not defined in the Bank Act. Therefore, it is necessary to resort to provincial law to determine what claims are subject to this exceptional priority rule. The scope of the rule remains unclear, and shall be discussed in detail in Part III.[154]

At first glance, this special priority seems to be completely at odds with the priority rules of the provincial secured lending regimes. Rather than expressly subordinating the claims of unpaid vendors, upon certain conditions both the PPSA and *Civil Code* secured lending regimes grant vendors who obtain a security right on property sold to the debtor a "super-priority" over other security rights on that property.[155] The *Civil Code*, however, is less generous than the PPSA on this matter, as it limits the priority to a seller having created a hypothec in the contract of sale.[156] Under the PPSA priority framework, the special priority is not limited to sellers of the collateral, but equally extends to lenders granting a loan to a buyer to enable the buyer to acquire the collateral. The PPSA uses the concept of "purchase-money security interest" [PMSI] to extend this special priority.[157] The status of these super-priorities under the Bank Act security regime is discussed later in this article.[158]

### *4.3.2 Special Priority of Employees and Producers*

A second exception to the general priority scheme is set forth in subsection 427(7) of the Bank Act. In the context of bankruptcy, the provision confers a special priority to two categories of claims, which are: (a) claims of employees of the debtor for wages owing in respect of the period of three months preceding the bankruptcy;[159] and (b) claims of suppliers of agricultural products for money owed to them by the debtor in respect of deliveries made within the period of six months preceding the bankruptcy, up to a certain

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154. See Part III, Section 2.6 (Special Priority over the "Claim of any Unpaid Vendor"), below at 387.
155. See *e.g.* OPPSA s. 33 and subs. 1(1) "purchase-money security interest". For Québec, see art. 2954 C.C.Q.
156. For a comparison between art. 2954 C.C.Q. and the PMSI priority, see PAYETTE, *Les sûretés réelles*, *supra* note 80 at 332-333.
157. See *e.g.* OPPSA subs. 1(1) "purchase-money security interest"; SPPSA para. 2(1)(jj) "purchase-money security interest".
158. See Part III, Section 2.3.1.2 (Purchase Money Security Interests), below at 363; and Section 2.3.2 (Movable Hypothecs) below at 369.
159. Para. 427(7)(a).

prescribed amount.[160] Subject to certain conditions, these claims rank in priority over the bank, which in realizing its security is made liable for such claims to the extent of the amount realized on the disposition of the property.

The conditions of application of this special priority are twofold. First, the bankruptcy of the debtor must have occurred. Secondly, the bank must then choose to realize on the collateral under its section 427 security.[161] Where the bank chooses to realize under some other security, the special priority does not apply.[162] As a result, the wage-earners or suppliers have no claim against the bank under the Bank Act and revert to their preferred position under section 136 of the *Bankruptcy and Insolvency Act*.[163] As it happens, the protection conferred by this provision is quite illusory. The reason is that banks commonly conclude a separate provincial security agreement in addition to the section 427 security document, covering all or part of the same collateral and securing the same obligation.[164] Thus, the special priority of wage-earners or suppliers may be easily circumvented by the bank, merely by choosing to rely on its provincial security agreement.

### *4.3.3 Proceeds*

A dispute may arise over accounts receivable and/or cash generated from the sale of collateral covered by a section 427 security. Since the Bank Act does not permit the bank to take security on such forms of property as original collateral, the bank's entitlement to the cash or accounts must be as *proceeds* of the original collateral. It is almost universally accepted by courts, in both common law jurisdictions and in Québec, that a bank holding a section

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160. Para. 427(7)(b).

161. *Manitoba Cattle Producers Assn.* v. *Toronto-Dominion Bank* (1993), 22 C.B.R (3d) 305 at para. 22 (Man. Q.B.); *Armstrong* v. *Coopers & Lybrand Ltd.* (1986), 58 C.B.R. (N.S.) 209 (Ont. S.C.), aff'd (1987), 65 C.B.R. (N.S.) 258 (C.A.), leave to appeal to S.C.C. refused (1988), 87 N.R. 398n; *Abraham* v. *Canadian Admiral Corp.* (1993), 48 C.C.E.L. 58 (Ont. Gen. Div.), rev'd in part on other grounds, 39 O.R. (3d) 176 (O.C.A.), leave to appeal to S.C.C. refused, [1998] S.C.C.A. No. 276; *Canadian Bank of Commerce* v. *Turcotte*, [1957] B.R. 127.

162. *Kassian* v. *National Bank of Canada* (1998), 61 Alta. L.R. (3d) 92 (Q.B.), aff'd 73 Alta L.R. (3d) 56 (C.A.); *Royal Bank* v. *Manitoba; Re William Cane & Sons Co.* (1930), 12 C.B.R. 128 (Ont. S.C. in Bkcy.).

163. CRAWFORD, *supra* note 3 at 439.

164. This practice is commonly referred to as "double documentation" and will be discussed in more detail below. See Part III, Section 2.7 (Double Documentation), below at 391.

427 security will be entitled to such proceeds.[165] The problem is that the Bank Act is silent on the issue. In comparison, both provincial secured lending regimes clearly spell out the secured creditor's right to proceeds.[166]

This gap has led to uncertainty over whether the bank's entitlement to proceeds is implicit in the Bank Act, or whether it is grounded in provincial law. If the former view is adopted, then the bank's claim extends automatically to proceeds without the need to comply with any additional requirements that may exist under provincial law.[167] The bank also conserves its initial priority position with respect to proceeds. However, the weight of authority seems to indicate that the latter view is correct: the bank's right to proceeds should be grounded in provincial law.[168] This means that provincial law applies to determine the pre-conditions to the bank's claim to proceeds and will also govern the outcome of a priority dispute over such proceeds.[169]

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165. For common law jurisdictions, see *e.g. Canadian Western Millwork Ltd. (Re), Flintoft* v. *Royal Bank of Canada*, [1964] S.C.R. 631; *Royal Bank of Canada* v. *United Grain Growers Ltd.*, [2001] 6 W.W.R. 664 (SKQB), aff'd [2001] 6 W.W.R. 677 (SKCA), leave to appeal to S.C.C. refused [2001] S.C.C.A. No. 271; *Canada* v. *National Bank of Canada; Canada* v. *Mercantile Bank of Canada* (1997), 147 D.L.R. (4th) 652 (C.A.); *Re Perepeluk: Canadian Imperial Bank of Commerce* v. *Touche Ross Limited* (1986), 25 D.L.R. (4th) 73 (Sask. C.A.); *C.I.B.C.* v. *Kernel Farms Ltd.* (1982), 138 D.L.R. (3d) 128 (Ont. H.C.), aff'd (1984), 6 D.L.R. (4th) 384 (Ont. C.A.), leave to appeal to S.C.C. refused (1984), 4 O.A.C. 281n. For Québec, see *e.g. Banque Canadienne Nationale* v. *Lefaivre*, [1951] B.R. 83 (Que. C.A.); *Jean Charpentier Inc.* v. *Banque Nationale du Canada*, [1987] R.L. 125, 129; J.E. 87-464 (C.A.).

166. See *e.g.* SPPSA s. 28; OPPSA s. 25. For Québec, see art. 2674 C.C.Q.

167. This appears to be the view taken by the court in *Royal Bank of Canada* v. *United Grain Growers Ltd.*, *supra* note 165. In this case the court (Q.B.) stated at para. 33: "...the collateral has simply changed in character but the substance of the Bank's interest and therefore priority continues to apply. There is not some new collateral created that is free from the Bank Act security and priority result". The basis of the bank's entitlement to proceeds was not discussed at the appeal level.

168. In common law jurisdictions, the bank's right to proceeds is grounded in trust law. See *Re Giffen*, [1998] S.C.J. No. 11 (QL) indicating that the basis of the claim in *Flintoft* v. *Royal Bank of Canada, supra* note 165, was that the proceeds were held in trust by the debtor. See also *Thomas* v. *Royal Bank* (1985), 20 D.L.R. (4th) 471 (Sask. Q.B.), rev'd on other grounds [1987] S.J. No. 12 (QL); *Henfrey* v. *G.H. Singh and Sons Trucking Ltd.*, [1982] 2 W.W.R. 177 (B.C.S.C.). See also the discussion of the right to proceeds in CUMING & WOOD, "Compatibility", *supra* note 14. In Québec, the matter is more ambiguous, but see *L.P. Royer Inc.* v. *Cambridge Shoes Ltd.*, [1987] R.J.Q. 435 (Que. S.C.). See also the discussion of the right to proceeds in AUGER, "Les sûretés mobilières", *supra* note 14; and MACDONALD, "A Civil Law Analysis", *supra* note 7.

169. For example, this has an impact on the applicability of provincial law protecting subsequent buyers of proceeds. See Part III, Section 2.2 (Subsequent Buyers of the Collateral), below at 354.

## 5. ENFORCEMENT

### 5.1 The Bank Act Enforcement Provisions

Upon default of the debtor, the Bank Act provides the bank with two important remedies for the enforcement and realization of its security. First, in limited circumstances, the bank is granted an immediate right to take possession of the collateral without prior judicial authorisation.[170] The right only arises upon certain specified acts of default of the debtor, including failure to pay the loan and failure to care for the collateral.[171] Moreover, the right only applies with respect to security given under paragraphs 427(1) (c) to (p). Second, pursuant to subsection 428(7), the bank is granted the power to sell the repossessed collateral in the event of failure to pay the loan. The bank may apply the sale proceeds to the payment of the loan, but must return any surplus to the debtor.[172]

The Bank Act also contains a number of provisions aimed at restricting and containing the bank's enforcement rights. Subsection 428(8) provides that, unless otherwise agreed by the parties, the sale of the collateral must proceed by way of public auction. The subsection also obliges the bank to comply with certain notice and publicity requirements prior to the sale. Furthermore, subsection 428(10) imposes upon the bank a general duty to act honestly and in good faith in exercising its power of sale. Likewise, where the bank has taken possession of collateral pursuant to subsection 427(3), it is also under a duty to act expeditiously in proceeding with the sale of such collateral.[173] Should the bank fail to meet these statutory requirements, it will be guilty of an offence under the Bank Act.[174]

It is apparent that the Bank Act's enforcement provisions fall short of providing a comprehensive system of rules governing the

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170. *National Bank of Canada* v. *Atomic Slipper Co.*, [1991] 1 S.C.R. 1059 [*Atomic Slipper*]; *Waldron*, *supra* note 46, per Lambert J.A. at 10; *Hall*, *supra* note 3 at para. 58. The bank's right to possession upon default is supported by para. 984(2)(b), which makes it an offence for the debtor to withhold possession of the collateral "if demand for its possession is made by the bank...after failure to pay the loan..."
171. Subs. 427(3).
172. *Banque Provinciale du Canada* v. *Martel and Presson*, [1959] B.R. 278 at 286 (S.C.) [*Martel and Presson*].
173. Subs. 428(11).
174. Subs. 984(3).

realization of the bank's security, and leave many issues unaddressed.[175] For example:

- The power to take possession without judicial authorisation under subsection 427(3) is not expressly provided for in the case of security given by wholesale or retail purchasers, shippers, dealers, or manufacturers (see paragraphs 427(1)(a) and (b) of the Bank Act).[176]
- The Bank Act makes no provision for the appointment of monitors or receivers.
- The Bank Act does not expressly mention the bank's right to claim any deficiency.[177]
- Although the Bank Act imposes a number of duties on the bank enforcing its security, other than stating that the bank is guilty of an offense, it fails to mention the consequences of breaching such duties.[178]

In comparison, the PPSA and *Civil Code* enforcement regimes are much more complete. Both provincial regimes give

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175. WOOD, "Federal Security Interests", *supra* note 5 at 75, n. 39. The judgement of the Supreme Court of Canada in *Hall*, *supra* note 3, contains a few problematic statements to the contrary. See para. 62, where LaForest J. states, "the sole realization scheme applicable to the s. 178 security interest be that contained in the Bank Act itself". Also, at para. 64, LaForest J. states that the Bank Act enforcement provisions constitute a "complete code that at once defines and provides for the realization of a security interest. There is no room left for the operation of the provincial legislation...". It is clear that these statements must be given a very limited application. See *Waldron*, *supra* note 46 at 10. See also *Atomic Slipper*, *supra* note 170; and MACDONALD, "A New Beginning?", *supra* note 5.

176. *Banque Nationale du Canada* v. *Atomic Slipper Co.*, [1988] Q.J. No. 1204, 53 D.L.R. (4th) 703 at 713-716 (Q.C.A.) [*Atomic Slipper (Q.C.A.)*], rev'd on other grounds (see *Atomic Slipper*, *supra* note 170); *St-Louis Automobiles Ltée* v. *Banque Nationale* (1981), 42 C.B.R. n.s. 275 (C.S.), Gervais J. However, with respect to collateral falling under paras. 427(1)(a) and (b), it is arguable that a right to take possession without judicial authorization may be implied from para. 984(2)(b), which makes it an offence for a person to withhold the collateral from the bank if demand for possession is made after failure to pay the loan.

177. Although not expressly set forth in the Bank Act, the bank's claim to a deficiency has been recognized under provincial law. See *e.g. C.I.B.C.* v. *Doucette* (1968), 70 D.L.R. (2d) 657 (P.E.I.S.C.); *Royal Bank of Canada* v. *Disco Sound Distributers Ltd.* (1986), 73 A.R. 13 (Q.B.); *C.I.B.C.* v. *Roisin* (1971), 17 D.L.R. (3d) 379 (Ont. Dist. Ct.); *Goebel*, *supra* note 143.

178. It has been held that the bank's claim to a deficiency is liable to be reduced by that portion of the deficit which arose through its own fault or negligence. See *C.I.B.C.* v. *Doucette*, *supra* note 177 at 663; *C.I.B.C.* v. *Roisin*, *supra* note 177 at 381; *Goebel*, *supra* note 143; *Canadian Imperial Bank of Commerce* v. *Whitman* (1984), 63 N.S.R. (2d) 407 (C.A.).

secured parties, upon default by the debtor, the right to take possession of the collateral and dispose of it, without discriminating between *kinds* of collateral.[179] Provincial secured parties are also allowed to retain the collateral in satisfaction of their claim (the so-called *foreclosure* remedy or "taking in payment" in Québec).[180] The provincial regimes expressly deal with, *inter alia*: (1) the appointment of receivers or administrators;[181] (2) the order of distribution of surpluses and the debtor's liability for any deficiency;[182] and (3) the consequences of the failure of the secured party to discharge its obligations in enforcing its security.[183]

Although the provincial regimes may be more complete than the Bank Act security regime, they are also more cumbersome. The provincial regimes impose more stringent limitations on the enforcement rights of secured creditors than their federal counterpart. For example, defaulting debtors and other interested parties (including subsequent secured creditors) are given an express right to redeem the collateral by paying off the obligation secured.[184] In all provinces except Ontario, defaulting debtors are given a right to cure any default and reinstate the security agreement.[185] Further, the provincial regimes provide for an extensive notice requirement prior to the sale of the collateral.[186] In contrast, the Bank Act affords very little protection to the defaulting debtor and other secured creditors. For example, there is no express right of redemption or reinstatement in the Bank Act. In addition, although the Bank Act does provide for a pre-sale publication requirement and obliges the bank to satisfy certain prior ranking claims, these protections only apply in very limited cir-

179. See *e.g.* OPPSA ss. 62-63; SPPSA ss. 58-59; art. 2748 C.C.Q.
180. See *e.g.* OPPSA s. 65; SPPSA s. 61; arts. 2748, 2778 C.C.Q.
181. See *e.g.* OPPSA s. 60; SPPSA s. 64; art. 2773 C.C.Q.
182. See *e.g.* OPPSA s. 64; SPPSA s. 60; arts. 2789, 2793 C.C.Q. & arts. 615, 616, 714, 715 of the *Code of Civil Procedure*, R.S.Q., 1977, c. C-25, as am. [C.C.P.]
183. See *e.g.* OPPSA subs. 67(2) (compensation for loss or damages), subs. 63(10) (defect in sale). Under the *Civil Code*, the right to compensation falls under general principles of civil liability. Regarding the sale of the collateral, see generally PAYETTE, *Les sûretés réelles*, *supra* note 80 at 796-809.
184. See *e.g.* OPPSA subs. 66(1) (right of redemption); art. 2761 C.C.Q. (right of debtor or "other interested person" to defeat the exercise of a hypothecary right by paying the amount of the obligation secured). See discussion of PAYETTE *supra* note 80 at 739.
185. See *e.g.* SPPSA para. 62(1)(b)(iii); art. 2761 C.C.Q. In Ontario, a very narrow right to cure a default is only given in the context of consumer transactions (OPPSA subs. 66(2)).
186. See *e.g.* OPPSA subs. 63(4) to (7); arts. 2757-2758, 2784 C.C.Q.

cumstances.[187] What is more, these provisions do not even appear to be mandatory, for the debtor may "agree to the sale of the property otherwise" than as provided therein.[188]

### 5.2 Applicability of Provincial Restrictions on Enforcement Rights of Secured Creditors

Quite apart from the provisions of the PPSA and *Civil Code* secured lending regimes, provincial law contains a multitude of rules that govern the rights of secured creditors enforcing or realizing their security. The question arises as to whether and to what extent a bank relying on its rights under the Bank Act must comply with these provincial rules. The answer will depend on whether or not there is an operational conflict between the provincial legal rule and the Bank Act, so as to render it inoperative on the basis of federal paramountcy.

To illustrate, both the common law and civil law require that a secured creditor give the debtor reasonable notice prior to seizing the collateral.[189] It has been held that such general reasonable notice requirements do not conflict with the Bank Act and are therefore applicable to the bank realizing under its section 427 security.[190] On the other hand, it has been held that provincial legislation which operates to super-add conditions governing realization over and above those found within the confines of the Bank Act is incompatible with the section 427 security framework and therefore inapplicable to the bank.[191] An example of legislation that has consistently been held to be inoperative on the basis of federal paramountcy is provincial legislation purporting to exempt all or part of the section 427 collateral from seizure.[192]

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187. Subs. 428(7)(8). The requirement that the bank satisfy certain prior ranking claims only applies in the case of the sale of livestock.
188. Subs. 428(8).
189. For common law jurisdictions, see *Ronald Elwyn Lister Ltd.* v. *Dunlop Canada Ltd.*, [1982] 1 S.C.R. 726. For Québec see art. 7 C.C.Q. and *Houle* v. *Canadian National Bank*, [1990] 3 S.C.R 122.
190. *Waldron*, *supra* note 46.
191. *Hall*, *supra* note 3 at para. 62, LaForest J.
192. A good example of such legislation is the *Saskatchewan Farm Security Act,* S.S. 1988-89, c. S-17.1. See *e.g. Kovlaske* v. *Canadian Imperial Bank of Commerce*, [2002] S.J. No. 693; *C.I.B.C.* v. *Sledz*, [1991] 1 W.W.R. 42 (Alta. Q.B.); *Re Leblanc and Bank of Montreal* (1987), 46 D.L.R. (4th) 15 (Sask. Q.B.), aff'd (1988), 54 D.L.R. (4th) 89 (Sask. C.A.); *C.I.B.C.* v. *Surkan* (1978), 5 Alta. L.R. (2d) 323 (Dist. Ct.), 84 D.L.R. (3d) 548; *Royal Bank* v. *Riehl*, [1978] 6 W.W.R. 481, (1978) 28 C.B.R. (N.S.) 211 (Alta. Dist. Ct.).

### 5.3 Collateral Agreements Between The Parties

In order to compensate for the Bank Act's deficiencies, it is common commercial practice for banks and their customers to enter into collateral agreements providing for additional enforcement rights. These agreements almost invariably include a right to take possession of the collateral without a court order. The Bank Act is not opposed to such agreements.[193] On the contrary, the Bank Act expressly contemplates the entering into of collateral agreements regarding the realization of the bank's security.[194] The validity and effect of such contractual enforcement rights fall to be determined pursuant to applicable provincial law.[195] As it happens, it would appear that a contractual stipulation to take possession of the collateral is valid and enforceable in all provinces.[196] However, because these rights are not grounded in the Bank Act, when the bank exercises any contractual enforcement rights, it is bound by any provincial restrictions that may apply.

## PART III

## PRIORITY DISPUTES BETWEEN SECTION 427 SECURITY AND CONFLICTING RIGHTS IN THE COLLATERAL

Priority disputes between section 427 security and third parties claiming rights in the collateral are by far the most common cause of interaction between the Bank Act security regime and provincial law. This interaction has generated many problems. This section conducts a detailed analysis of the way in which

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193. *Atomic Slipper*, *supra* note 170 at paras. 43-46; *Gabriola Building Supplies Ltd.* v. *Lloyd's Bank of Canada* (1989), 41 B.L.R. 241 (B.C.S.C.) [*Gabriola Building Supplies*].

194. To that effect, see subs. 427(3), stating that the right to take possession is "in addition to and without limitation of any other rights or powers vested in or conferred on it"; subs. 428(8) which expressly contemplates an agreement to sell the property otherwise than by public auction; subs. 428(11), which allows the bank and debtor to enter into an agreement defining the duties of the bank with respect to repossessed collateral; and para. 984(2)(b), which is not limited to those cases where the bank demands possession under subs. 427(3), suggesting that there may be other sources for the bank's right to possession.

195. MACDONALD, "A Civil Law Analysis", *supra* note 7 at 1030, cited in *Atomic Slipper (Q.C.A.)*, *supra* note 176 at 719.

196. In Québec, the validity of contractual rights of seizure was recognized in *Atomic Slipper*, *supra* note 170. As regards common law provinces, see *R* v. *Doucette* (1960), 25 D.L.R. (2d) 380 (O.C.A.); *Gabriola Building Supplies*, *supra* note 193.

priority disputes are resolved under the Bank Act, with a view to highlighting these problems and criticizing the current state of the law with respect to the Bank Act priority scheme.

As demonstrated in the previous section, the resolution of even the most basic priority dispute between a bank and a competing party cannot be determined solely by reference to the provisions of the Bank Act; it is often necessary to resort to provincial law in order to complement the Bank Act's basic priority scheme. Under provincial law, the characterization of the rights acquired by the bank and of those which remain with the debtor will determine the body of rules which are to be applied. For instance, both the civil law and pre-PPSA provincial legal systems treat owners differently than mere holders of security rights. Both systems also treat holders of security rights differently as amongst themselves, depending on the nature of the right. The situation is further complicated in light of recent reforms in all provinces. It is therefore necessary to begin by characterizing the section 427 security for the purposes of provincial law.

## 1. CHARACTERIZATION OF THE SECTION 427 SECURITY AND APPLICABLE PROVINCIAL LAW

The starting point for any discussion about the nature of the section 427 security is the "document of title fiction", pursuant to which the bank acquires "all the right and title" of the debtor in the collateral.[197] The question to be addressed in this section may therefore be restated as follows: for the purposes of provincial law, what is the nature of the rights acquired by the bank and of those retained by the debtor pursuant to the document of title fiction?

### 1.1 Common Law Jurisdictions

#### *1.1.1 Common Law Characterization of the Section 427 Security*

As regards common law jurisdictions, although the nature of the section 427 security has been the subject of some controversy in the past,[198] this controversy has largely been put to rest by two

197. See Part II, Section 2.4 (The Rights Acquired by the Bank on Attachment), above at 313.

198. More particularly, there have been two levels of controversy over the appropriate common law characterization to be given to the section 427 security. The

recent decisions of the Supreme Court of Canada: *Bank of Montreal* v. *Hall*[199] and *Royal Bank* v. *Sparrow Electric Corp*.[200] Both decisions refer to an article by Professor Moull of Osgoode Hall Law School,[201] and cite the following passage as an accurate description of the nature of the rights acquired by the bank and of those retained by the debtor pursuant to the document of title fiction:[202]

> The result then, is that a bank taking security under section [427] effectively acquires legal title to the borrower's interest in the present and after-acquired property assigned to it by the borrower... The borrower retains an equitable right of redemption, of course, but the bank effectively acquires legal title to whatever rights the borrower holds in the assigned property from time to time.[203]

The passage indicates that, in common law jurisdictions, the document of title fiction effects a *transfer of legal ownership* of the collateral to the bank. Correspondingly, the debtor retains a right of redemption allowing it to recover the legal title to the collateral upon repayment of the debt. A ready analogy can therefore be made between the transaction of giving security under section 427 of the Bank Act and a mortgage transaction.[204]

Nevertheless, the analogy has its limits, and the section 427 security is not identical to a chattel mortgage.[205] One marked dif-

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first has focused on whether it should be likened to a pledge or bailment or whether it is more in the nature of a chattel mortgage (see *Hall*, *supra* note 3). The second has been over whether it was in the nature of a floating or a fixed and specific charge (see *Sparrow*, *supra* note 84 at para. 44).

199. *Hall*, *supra* note 3.

200. *Sparrow*, *supra* note 84, Gonthier J. It should be noted that the only disagreement between Gonthier J. and Iacobucci J., writing for the majority in this case, was with respect to the application of the "implied license theory", as acknowledged by Iacobucci J. at para. 90. The court was in agreement on other matters, such as to the nature of the bank's PPSA security interest and the applicable priority rules. However, the majority did not find it necessary to conclude as to the nature of the bank's section 427 security.

201. MOULL, *supra* note 30.

202. See the opinion of LaForest J. in *Hall*, *supra* note 3 at para. 19, and the opinion of Gonthier J., in *Sparrow*, *supra* note 84 at para. 59. See also *Sun Life Assurance Co. of Canada* v. *Ritchie*, [2000] B.C.J. No. 692 at para. 23 (B.C.C.A.) (QL).

203. MOULL, *supra* note 30 at 251.

204. See cases cited at *infra* note 208. See also *e.g.* MOULL, *supra* note 30 at 250; CUMING & WOOD, "Compatibility", *supra* note 14 at 295; MACDONALD, "Atomic Slipper Co.", *supra* note 29, n. 7.

205. MOULL, *supra* note 30 at 250. For instance, the section 427 security has been held not to constitute a "chattel mortgage" as the word is used in certain provincial legislation or contracts. See *C.I.B.C.* v. *Surkan, supra* note 192; and *Guimond et al.* v. *Fidelity-Phenix Fire Ins. Co.* (1912), 9 D.L.R. 463 at 427, Duff, J.

ference is the ability of the bank under a section 427 security to acquire legal title to the after-acquired property of the debtor.[206] But, like a mortgagee, the bank does not become *absolute* owner of the collateral following the section 427 security transaction.[207] Rather, the transfer of legal title to the bank is a form of security only.[208] The debtor retains an *equitable interest* in the collateral, the so-called "equity of redemption".[209] By virtue this equity of redemption, the debtor also has a *proprietary interest* in the collateral: the residual ownership rights that remain after the security is granted (also referred to as "beneficial ownership").[210]

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206. As a result, in *Sparrow*, the section 427 security was characterized by Gonthier J. as a "fixed and specific charge" over the present and after-acquired property of the debtor. Gonthier J's use of the words "fixed charge" to describe the section 427 security is rather unfortunate. The term "charge" is generally used in English law to embody the concept of hypothecation, which imposes an equitable encumbrance on the property but which does not involve a transfer of legal title to the holder of security. Gonthier J. must therefore be seen as having used the word "charge" to refer to an encumbrance on property in the broad sense, the thrust of his decision being to emphasize the "fixed" rather than "floating" nature of the section 427 security. See *Sparrow*, *supra* note 84 at paras. 45-46, 61. Note that under pre-PPSA law, a chattel mortgage over after-acquired property gave no legal title to the creditor. Only an equitable interest passed to the creditor upon the collateral being acquired by the debtor. See *A.P. Holroyd* v. *J.G. Marshall* (1861-62), 11 E.R. 999, 10 HLC 191; *Joseph* v. *Lyons* (1884), 15 QBD 280 (C.A.).

207. See the opinion of Davis J., in *Nova Scotia (W.C.B.)*, *supra* note 18 at 567, stating that the section 427 security "did not operate to transfer absolutely the ownership in the goods but [...] the transaction was essentially a mortgage transaction and subject to the general law of mortgages except where the statute has otherwise expressly provided."

208. *Guaranty Silk (S.C.)*, *supra* note 25, Davis J., cited with approval in *Nova Scotia (W.C.B.)*, *supra* note 18 at 567; and *Sparrow*, *supra* note 84 at para. 58. See also *Guaranty Silk (C.A.)*, *supra* note 92, Masten J.A.; *C.I.B.C.* v. *Gulf Transport Ltd.* (1971), 19 D.L.R. (3d) 104 (P.E.I.S.C.), leave to appeal to S.C.C. refused [1971] S.C.R. ix; *E.J. Maxwell Ltd.* v. *Bank of Nova Scotia* (1928-29), 63 O.L.R. 323b at para. 40 (QL), Orde J.A. (the bank's rights were those of a mortgagee); *Discovery Enterprises*, *supra* note 118 at para. 22; *Re Canadian Hart Productions Ltd., Ex parte Royal Bank* (1923), 54 O.L.R. 293 at 298 (H.C.); *Ford Motor Co. of Canada Ltd.* v. *Manning Mercury Sales Ltd. (Trustee of)* (1996), 140 D.L.R. (4th) 344 at 366 (Sask. C.A.), stating that the interest of the bank "arises as an adjunct to a loan secured on property. The real nature of the interest is for security purposes." See also OGILVIE, *Canadian Banking Law*, *supra* note 19 at 369; MACDONALD, "Atomic Slipper Co.", *supra* note 29 at para 11, stating: "It goes without saying that the underlying contract is a security agreement. Whatever rights the bank acquires are acquired as security, and not absolutely."

209. This equity of redemption is founded on the debtor's right to specific performance of the bank's implied covenant to retransfer the collateral to the debtor upon repayment of the loan. See ZIEGEL et al., *Secured Transactions*, *supra* note 32 at 6.

210. For a further discussion of the nature of the "equity of redemption", see B. ZIFF, *Principles of Property Law*, 3rd ed. (Toronto: Carswell, 2000) at 387-388;

Although this conclusion is supported by a majority of courts,[211] it is not free from debate. There is a line of cases which regards the bank as owner of the collateral and the debtor as holding a mere right of possession. On this basis, it is argued that the section 427 security should not be treated the same as other forms of interests.[212]

### *1.1.2 The Relationship Between the PPSA and the Section 427 Security*

A second critical step in identifying the body of rules that will apply to complement the Bank Act's basic priority scheme is to determine whether the PPSA can fulfil this role. In other words, does the PPSA apply to a section 427 security?

As mentioned in Part II, the applicability of PPSA legislation depends on whether the transaction at issue creates a "security interest". It is no longer seriously open to question that the proprietary interest obtained by the bank pursuant to the section 427 security transaction falls within the meaning of "security interest" under the PPSA.[213] The starting point, therefore, is that PPSA legislation applies to the section 427 security, unless the particular provision being applied is contrary to terms of the Bank

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BRIDGE et al., "Formalism", *supra* note 48 at n. 72 and accompanying text; E. SYKES & S. WALKER, *The Law of Securities*, 5th ed. (Sydney: Law Book, 1993) at 145-147.

211. See cases cited at note 208, *supra*.

212. For example, this notion has been used to argue that the collateral covered by a section 427 security is not the property of the debtor, but rather the property of the bank, and as a result does not vest in the trustee in bankruptcy. See *Abraham* v. *Canadian Admiral Corp.*, *supra* note 83. For cases supporting this position in other contexts, see *Royal Bank of Canada* v. *United Grain Growers Ltd., supra* note 165; *Royal Bank of Canada* v. *The Government of Manitoba*, [1978] 1 W.W.R. 712 at 720 (Man. Q.B.)). See *C.I.B.C.* v. *Surkan*, *supra* note 192. This conclusion is not well-founded as it ignores much of the case-law dealing with the nature of the section 427 security device. See CUMING & WOOD, "Compatibility", *supra* note 14 at 295; and WOOD, "Federal Security Interests", *supra* note 5 at 75.

213. See *International Harvester, supra* note 82; *Bank of Montreal* v. *Pulsar Ventures Inc.*, *supra* note 148; *Bank of Montreal* v. *Hall* (1987), 7 P.P.S.A.C. 197, rev'd on other grounds (a section 427 security is a "security interest" within the meaning of the Saskatchewan *Limitation of Civil Rights Act*). Some authors have tried to argue that a limitation should be implied in the Bank Act, as a matter of policy or on constitutional grounds, but the courts have refused to find such an implied limitation. See *e.g.* CUMING & WOOD, "Compatibility", *supra* note 14 at 284-286; and ZIEGEL & DENOMME, *Ontario PPSA*, *supra* note 98 at 52-55.

Act and thus rendered inoperative based on the paramountcy doctrine.[214]

In light of the considerable differences between the respective rules of the PPSA and the Bank Act security regime (highlighted in Part II, above), the potential for conflict is great. In order to deal with this problem, all CCPPSL Model Provinces have enacted a provision expressly excluding the section 427 security from the scope of their PPSA.[215] To illustrate, paragraph 4 (k) of the Saskatchewan PPSA reads as follows:

> Except as otherwise provided in this Act or the regulations, this Act does not apply to: [...] (k) a security agreement governed by an Act of the Parliament of Canada that deals with the rights of parties to the agreement or the rights of third parties affected by a security interest created by the agreement, including an agreement governed by sections 425 to 436 of the *Bank Act* (Canada). [Emphasis Added]

The effect of this exclusion is that the PPSA provisions governing the validity, perfection, priority and enforcement of security interests do not apply to the section 427 security itself. Consequently, where the Bank Act is silent on any of these issues, it is necessary to refer to the unreformed rules of property law when applying the Bank Act in CCPPSL Model Provinces.[216]

Although the internal priority rules of the PPSA cannot be applied to resolve priority disputes between a section 427 security and a competing PPSA security interest in CCPPSL Model Provinces, that is not to say that the PPSA should be completely set aside.[217] On the contrary, the PPSA retains considerable importance. This is because the PPSA provisions regarding the validity, effect and rights of the parties to the security agreement continue to apply to the PPSA security interest that may be in competition with the section 427 security. For example, where it is necessary

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214. WOOD, "Federal Security Interests", *supra* note 5 at 71.

215. The corresponding provisions in the other CCPPSL model provinces are: *Alberta PPSA*, R.S.A. 2000, c. P-7, para. 4(b); *British Columbia PPSA*, R.S.B.C. 1996, c. 359, para. 4(b); *Manitoba PPSA*, S.M. 1993, c. 14, para. 4(k); *New Brunswick PPSA*, S.N.B. 1993, c. P-7.1, para. 4(l); *Newfoundland PPSA,* S.N. 1998, c. P-7.1, para. 5(k); *Nova Scotia PPSA*, S.N.S. 1995-96, c. 13, para. 5(k); *P.E.I. PPSA*, S.P.E.I. 1997, c. 33, para. 4(k).

216. *Royal Bank of Canada* v. *Agricultural Credit Corp. of Saskatchewan*, *supra* note 151 at 586.

217. CUMING & WOOD, "Compatibility", *supra* note 14 at 275.

to apply the Bank Act's priority scheme based on order of attachment to resolve a dispute between a bank and a PPSA security interest, the PPSA applies in order to determine the moment of attachment of the PPSA security interest.

### *1.1.3 The Ontario PPSA and the Section 427 Security: the Issue of "Double Registration"*

The OPPSA is *not* based on the CCPPSL Model Act, and differs from it in many respects. Significantly, the OPPSA does *not* contain a provision excluding the section 427 security from its scope. *Prima facie*, when the Bank Act is applied in Ontario, the OPPSA provisions governing the validity, attachment, perfection, priority and enforcement of security interests should therefore apply to complement the Bank Act when it is silent, subject to the doctrine of federal paramountcy.[218] The problem is that such an approach is not being used by the courts.

The leading authority on the relationship between the section 427 security and the OPPSA is the decision of the Ontario Court of Appeal in *International Harvester*,[219] where the court seems to have adopted a three-pronged approach:

1. Since the section 427 security is a "security interest" to which the OPPSA applies, a bank may perfect its section 427 security under the OPPSA, whether by registration or by possession.[220]

2. Should a bank *fail to perfect* its section 427 security under the OPPSA, then the OPPSA priority and enforcement provisions do not apply to the bank. The resolution of priority disputes between the bank and PPSA security interests will be governed by the Bank Act, as complemented by the rules of property law, as in the case of CCPPSL Model Provinces. Notably, the common law rule, *nemo dat quod non habet* (one cannot transfer a better title than one possesses), will generally apply to give priority to the first party to have acquired rights in the

218. This approach is taken by Professor Roderick J. Wood of the University of Alberta in his recent article, "The Nature and Definition of Federal Security Interests", *supra* note 14 at 78-79.
219. *International Harvester*, *supra* note 82 at 396.
220. OPPSA ss. 22-23.

collateral and to the conditional seller having reserved title to the collateral.[221]

3. Should a bank *have perfected* its section 427 security under the OPPSA, it is allowed to elect between its rights under the Bank Act or the OPPSA.[222] More precisely, it may claim the benefit of the rules governing the validity, priority and enforcement of its security under *both* statutes. The bank will undoubtedly elect to rely on those rules that are most favorable to it in the circumstances.

The *International Harvester* approach has been the subject of much criticism.[223] In particular, the validity of its second and third prongs is questionable.

As regards the second prong, once it is accepted that the section 427 security is a "security interest", it is arguable that the rules of common law are no longer applicable to complement the Bank Act in Ontario: it is the OPPSA rules regarding priority and perfection which must fulfil this role.[224]

As regards the third prong of the *International Harvester* approach, it is doubtful that a bank has the freedom to elect between the rules of the Bank Act and the OPPSA. On the contrary, based on the doctrine of federal paramountcy, it would seem that the rules of the Bank Act should apply to the exclusion of the provisions of the OPPSA. For instance, suppose that a bank fails to file a notice of intention in accordance with the Bank Act, but perfects its security under the OPPSA. In such cases, subsection 427(4) of the Bank Act declares that the bank's security is *void* as against subsequent creditors. Under this view, perfecting its section 427 security under the OPPSA can be of no assistance to the

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221. See Part III, Section 2.3.1.2 (Purchase Money Security Interests), below at 363.
222. See the opinion of Houlden J.A. in *International Harvester*, *supra* note 82 at 388, stating, "[i]f a bank has validly perfected its security interest under both statutes, the bank should be able, in my opinion, to claim the benefit of the priority rules of both statutes." See also the opinion of McKinlay J.A. at 399, stating, "I have no doubt that the PPSA can apply to security taken pursuant to section 427 of the Bank Act where the bank elects to utilize the provisions of the Act."
223. See *e.g.* WOOD, "Federal Security Interests", *supra* note 5 at 80-81; R.C.C. CUMING, "PPSA – Section 178 Bank Act Overlap: No Closer to Solutions", 18 *C.B.L.J.* 135; ZIEGEL, "Interaction", *supra* note 11.
224. The proposition that the OPPSA must be applied to complement the Bank Act appears to have been implicitly adopted by at least one court. See *Case Credit Corporation* v. *Canadian Imperial Bank of Commerce* (1985), 45 Sask. R. 74 (Sask. Q.B.). It has also received the assent of at least one author, see WOOD, "Federal Security Interests", *supra* note 5 at 78-79.

bank. This is because any provision of the OPPSA purporting to give the bank priority over subsequent creditors is *in direct conflict* with the Bank Act. Indeed, while the Bank Act provides that the unregistered section 427 security is *void*, the OPPSA provides that it is *not void* and has priority. The OPPSA provisions should therefore be rendered inoperative based on federal paramountcy.[225] In contrast, under the third prong of the *International Harvester* approach, the bank can still claim the benefit of the priority provisions of the OPPSA to defeat a PPSA security interest. This outcome is contemplated by Houlden J.A., who states in his opinion:

> I see no reason why the bank should not be able to perfect its security interest by taking possession of the collateral, even though the bank has failed to comply with the registration provisions of the Bank Act. The security interest of the bank would be invalid under the Bank Act, so that the bank would be unable to claim the benefit of the priority provisions of that statute; but it would be perfected under the P.P.S.A., and the bank, like any other holder of a security interest, could claim the benefit of the priority provision of that statute.[226]

Given these inconsistent outcomes (the Bank's security is void under one approach, but valid for the purposes of the OPPSA under the *International Harvester* approach), it is apparent that *International Harvester* is a cause of considerable commercial uncertainty. Both the second and third prongs of the *International Harvester* approach represent the current law of Ontario, but both are also clearly disputable. As a result, it is difficult to accurately predict the outcome of priority disputes with section 427 security in Ontario.

## 1.2 Québec

### *1.2.1 Civil Law Characterization of the Section 427 Security*

With respect to Québec, there are two competing theories regarding the nature of the rights acquired by the bank pursuant to the section 427 security.

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225. This position is also adopted by Professor Wood, see WOOD, "Federal Security Interests", *supra* note 5 at 81.
226. *International Harvester, supra* note 82 at 387. The statement is obiter, since the bank had duly filed a notice of intention in the circumstances of that case.

### (a) The Restricted Ownership Theory[227]

The restricted ownership theory has consistently been adopted by the great majority of authors[228] and courts.[229] According to this theory, the effect of the document of title fiction is to transfer the ownership right in the collateral from the debtor to the bank. Unlike ownership at common law, the civil law concept of ownership is unitary and cannot be divided into "legal" and "beneficial" ownership.[230] Consequently, after the section 427

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227. Under this theory, the bank is also referred to as acquiring a *sui generis* right of ownership, meaning a right of ownership with attributes "hitherto unknown to Québec civil law and inconceivable in traditional civil law theory." See *R.* v. *Construction Bérou Inc.*, [2000] 2 C.T.C. 174, 1999 CarswellNat 2502 at para. 10 (F.C.A.).

228. See *e.g.* CIOTOLA, *Droit des sûretés*, *supra* note 14; DESCHAMPS, "La garantie de l'article 178", *supra* note 14 at 133; PAQUET, "Pouvoir de prise de possession", *supra* note 14; LEDAIN, "Security Upon Movable Property in the Province of Québec", (1956) 2 *McGill L.J.* 77; FENSTON, "Section 88", *supra* note 14.

229. The leading authority for the restricted ownership theory is the decision of the Québec Court of Appeal in *Banque Canadienne Nationale* v. *Lefaivre, supra* note 165. For example, in this decision Galipeault J. states at 88: "Et s'il faut conclure, comme je le conçois, que les droits conférés à la banque par l'art. [427] en font la propriétaire des marchandises..." [emphasis added]. (Author's translation: "And if it is held, as I believe it must, that the giving of section 427 security confers ownership of the goods to the bank...") For a more recent decision, see *Bérard* v. *Cie Montréal Trust*, [1997] A.Q. nº 82 at paras. 34, 37 (Q.C.A.) (QL) [*Bérard*], per Biron J. stating: "Il me semble aller de soi que le propriétaire d'un bien qui cède tous les droits qu'il possède dans ce bien, cède son droit de propriété....Pour toutes ces raisons, je suis d'avis, avec déférence pour l'opinion contraire, que le cessionnaire est propriétaire du bien cédé." (Author's translation: "It is evident that the owner of property who assigns all his right and title to the property assigns his right of ownership [...] For the above reasons, with respect, it is my opinion that the assignee is owner of the assigned property.") See also *Banque Nationale du Canada* v. *Jean Fortin & Associés Syndics Inc.*, REJB 20001-28026 at para. 20; *R.* v. *Construction Bérou Inc.*, *supra* note 227; *Canada* v. *National Bank of Canada; Canada* v. *Mercantile Bank of Canada* (1997), *supra* note 165; *William Neilson*, *supra* note 86; *Banque Royale du Canada* v. *Fontaine*, [1987] A.Q. nº 1225; *Sous-ministre du Revenu du Québec* v. *Formulations Epoxyde Beaudry Inc.*, [1984] R.D.F.Q. 134 (C.S); *Banque Provinciale* v. *Canadian General Electric*, [1974] C.A. 220; *Re Fermo's*, *supra* note 146; *Martel and Presson*, *supra* note 172; *La Chaîne Coopérative du Saguenay Inc.* v. *Laberge et al.*, *supra* note 82; *In Re Paramount Leather Goods: Druker Services Banking and Coating Copr.* v. *Toronto Dominion Bank*, [1959] C.S. 42, (1958-59) 37 C.B.R. 93; *Banque Provinciale du Canada* v. *Dionne*, [1957] C.S. 167.

230. Notions of beneficial ownership and legal title are foreign to the Civil Law. This means that, except in cases where there is co-ownership, only one person may hold the right of ownership in property at any given time. See *Bérard*, *supra* note 229 at para. 66. See also MACDONALD, "A Civil Law Analysis", *supra* note 7; and GRENON, "Major Differences", *supra* note 36 at 396-397. The *Civil Code* does allow the creation of limited rights, carved out of ownership and granted to a person other than the owner, called "dismemberments". The result is that certain attributes of ownership, such as the right to use and enjoy property, can be allocated to a person other than the owner (arts. 947, 1119 C.C.Q.).

security transaction the debtor can no longer be regarded as owner of the collateral; in principle the bank is full owner,[231] and the debtor merely holds the collateral on the bank's behalf.[232] Nevertheless, the bank's right of ownership is not absolute, as it is subject to a number of restrictions,[233] which are contained in the Bank Act and in the security agreement. The three main restrictions are as follows:

- The bank's ownership is subject to an express or implied obligation to retransfer the right of ownership to the debtor upon repayment of the loan.[234]
- In principle, the right of ownership carries with it the right to possession of the property.[235] However, the bank's right is limited by the express or implied contractual right of the debtor to hold the collateral until default and to deal with it in the ordinary course of its business.[236]
- Like the right to possession, the bank's right to dispose of the collateral may only be exercised upon default, and the bank is obliged to return any surplus to the debtor.[237]

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231. Art. 947 C.C.Q. The notion of "full" ownership refers to a person holding all the attributes of ownership as set forth in art. 947 C.C.Q. It is used in contradistinction to the concept of "dismembered" ownership, see *supra* note 230 and accompanying text.
232. As such, it has been said that the debtor has the obligations of a depositary of movable property (art. 2280 C.C.Q. ff). See CIOTOLA, *Droit des sûretés*, *supra* note 14 at 325. See also *Banque Provinciale du Canada* v. *Dionne*, *supra* note 229 at 170; *Bock et Tétrault Ltée* v. *Fonderie de l'Islet Ltée*, [1971] C.S. 379 at 383 (Que. S.C.).
233. See *Martel and Presson*, *supra* note 172 at 284, per Hyde J. stating: "While it is true that a bank taking security under section [427] becomes proprietor of the goods in question, [that ownership right is subject to] certain restrictions....". "Restricted ownership" is consistent with the civil law concept of ownership. See also art. 947 C.C.Q., stating that the right of ownership may only be exercised "...subject to the limits and conditions for doing so determined by law."
234. *Re Beatrice Pines Ltd.; Vendome Knitting Mills Ltd.* v. *Lawrence and Waxman* (1967), 11 C.B.R. (N.S.) 26 at 31 (Que. S.C.). This effectively transforms the bank's right of ownership, which is traditionally perceived as a principal right, into a mere accessory of the loan. Note the similarity with the accessory character of the reservation of ownership of the creditor under an instalment sale. See PAYETTE, *Les sûretés réelles*, *supra* note 80 at 887. Another way of putting it is that the initial transfer of ownership from the debtor to the bank is subject to a resolutory condition (repayment of the debt) the fulfillment of which obliges the bank to return to the debtor the prestation the bank has received (ownership of the collateral) as though the obligation had never existed (art. 1507 C.C.Q.).
235. Arts. 947, 953 C.C.Q.
236. See *infra* note 315 and accompanying text (Part III, Section 2.2 (Subsequent Buyers of the Collateral), below at 354).
237. *Martel and Presson*, *supra* note 172 at 284. See Part II, Section 5.1 (The Bank Act Enforcement Provisions), above at 326.

The restricted ownership theory has far-reaching implications, and disrupts the conceptual coherence of the civil law.[238] It also has the potential to lead to unreasonable outcomes. For example:

- Once the debtor transfers ownership of the collateral to the bank, the collateral is no longer part of the debtor's *patrimony*.[239] The implication is that the collateral is no longer available to satisfy the claims of the debtor's creditors.[240] This also disrupts the *Civil Code* secured lending regime by subverting the claims of persons holding prior claims[241] and those of subsequent hypothecary creditors.[242]

- Correspondingly, the collateral forms part of the patrimony of the bank. This means that, at least in theory, it is available to be seized and sold by the bank's own creditors.[243] Further, if the bank has also taken a hypothec on the collateral, it is arguable, at least in theory, that the reunion of the qualities of owner and hypothecary creditor operates to extinguish the hypothec.[244]

- Since the bank is owner, all the *Civil Code* provisions governing the rights and obligations of owners, in principle, apply to the

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238. See *Bérard, supra* note 229 at para. 66, Baudouin J. stating: "[...] je suis néanmoins d'avis que l'intention du législateur était bel et bien, et malgré la totale incongruité et le manque de rationalité d'une telle décision en regard de la notion civiliste de droit de propriété, d'effectuer un véritable transfert du droit de propriété." (Author's translation: "[...] nevertheless, it is my opinion that the intention of the legislature was to effect a transfer of the right of ownership, despite the total lack of congruence or rationality of such a decision in light of the civil law concept of ownership.") For a detailed discussion of the theoretical difficulties involved in treating ownership as security under civil law and of the mechanisms needed to protect the debtor and the debtor's creditors, see generally P. CROCQ, *Propriété et Garantie*, Bibliothèque de Droit Privé, Tome 248 (Paris: Librairie Générale de Droit et de Jurisprudence, 1995).
239. Under civil law, creditors of personal rights may seek payment of their claims on the debtor's patrimony, which is comprised, in principle, of all assets and liabilities that can be translated into a pecuniary value. This patrimony is made liable for the fulfillment of the debtor's obligations. See arts. 2644, 2645 C.C.Q.; and BRIDGE et al., "Formalism", *supra* note 48 at para. 154.
240. See *Bérard, supra* note 229 at paras. 37-38; and arts. 2644, 2645, 2646 C.C.Q.
241. See Part III, Section 2.4 (Non-Consensual Security Rights in Québec), below at 375.
242. See Part III, Section 2.3.2 (Movable Hypothecs), below at 369.
243. See CROCQ, *Propriété et Garantie*, *supra* note 238 at 149, 169-175. Although insolvency of banks is rare, it is not an unknown occurrence. Recall the failures of the Canadian Commercial Bank and the Northland Bank in 1985, and of the Home Bank in 1923.
244. See Part III, Section 2.7 (Double Documentation), below at 391.

bank.[245] For example, this means that banks should assume the risks of loss of the collateral.[246]

- Since the debtor is left with no real right in the collateral, his right to recover ownership of the collateral upon repayment of the loan is a mere personal right against the bank. Consequently, should the bank transfer its rights to a third party without also assigning its claim against the debtor, the third party will not be bound by the obligation to retransfer ownership upon repayment of the loan.[247]

**(b) The Accessory Real Right Theory**

According to this theory, the section 427 security gives the bank an accessory real right in the collateral.[248] The theory is based on the notion that the nature of the section 427 security should be ascertained from the provisions of the Bank Act as a whole, rather than from a strict reading of the provisions setting forth the document of title fiction. In this regard, the Bank Act security regime contemplates the debtor holding the collateral and the bank's rights becoming exercisable only upon default. Further, the bank is granted the right to follow the collateral into the hands of third parties,[249] to take possession of and sell it and to apply the proceeds to pay off its debt. On this basis, it is argued that the section 427 security has the characteristics of an accessory real right, such as a hypothec, not those of a right of ownership.

In contrast to the restricted ownership theory, the accessory real right theory is more compatible with the civil law. One important implication of the theory is that it is the debtor who must be regarded as the owner of the collateral, not the bank. This avoids all of the conceptual problems involved in the restricted owner-

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245. The application of any provincial statutory rule is always limited by the doctrine of federal paramountcy. See Part I (The Relationship Between the Bank Act Security Regime and Provincial Law: Paramountcy and Complementarity), above at 296.
246. Art. 950 C.C.Q. See also OGILVIE, *Canadian Banking Law*, *supra* note 19 at 391.
247. In practice, the possibility of assignment of the bank's rights is limited by subs. 430(14). See the discussion of this difficulty in CROCQ, *Propriété et Garantie*, *supra* note 238 at 161.
248. The leading articulation of this theory is that of Professor Roderick Macdonald, in MACDONALD, "A Civil Law Analysis", *supra* note 7.
249. The right to follow the collateral is implicit in subs. 428(1).

ship theory. Further, this is more consistent with the *Civil Code* hypothecary regime, which is premised on the debtor retaining ownership of the collateral upon giving security.[250]

**(c) Critical Assessment**

It is difficult to determine which of the above approaches is correct. On the one hand, the arguments in support of the accessory real right theory are compelling, since it maintains the conceptual integrity of the civil law governing security on property.[251] It is not surprising, therefore, that it has been adopted by at least a few authors[252] and courts.[253] On the other hand, the accessory real right characterization seems to ignore the clear wording of the Bank Act. The language used (delivery of the security document "vests in the bank...all the right and title" of the debtor to the collateral)[254] clearly implies that the debtor's rights in the collateral are transferred to the bank. In contrast, the creation of an accessory real right (or charge) does not involve the transfer of any rights. As previously discussed, in common law jurisdictions it is unquestionable that the section 427 security transaction effects a conveyance of title from the debtor to the bank, hence the analogy with the chattel mortgage.[255] It is difficult to then argue that the *same transaction* effects no transfer of property rights when it occurs in Québec, but instead merely creates a charge on the collateral.[256]

It is apparent that the document of title fiction is an important cause of commercial uncertainty in Québec. This is because both theories remain arguable, and it is impossible to accurately

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250. See art. 2733 C.C.Q.
251. For a full account of these arguments, see MACDONALD, "A Civil Law Analysis", *supra* note 7.
252. See *e.g.* MACDONALD, "A Civil Law Analysis", *supra* note 7. See also AUGER, "Les sûretés mobilières", *supra* note 14.
253. *Bérard, supra* note 229 at para. 90, Delisle J., dissenting; *Atomic Slipper (Q.C.A.)*, *supra* note 176; *Opron c. Société Générale Tortue* (1985), 51 C.B.R. 90.
254. See Part II, Section 2.4 (The Rights Acquired by the Bank on Attachment), above at 313.
255. Arguably, the intention of Parliament in enacting the provision was to emulate the common law chattel mortgage and to make it applicable in all provinces, including Québec. See *Nova Scotia (W.C.B.)*, *supra* note 18 at 567, Davis J.; and FENSTON, "Section 88", *supra* note 14.
256. Québec courts have already relied on the decision of the S.C.C. in *Hall, supra* note 3, to support the proposition that the bank acquires ownership of the collateral. See *e.g. Bérard, supra* note 229 at paras. 29, 65; and *William Neilson*, *supra* note 86.

predict whether the bank will be treated as owner of the collateral or as holder of an accessory real right. In many cases, this may have an impact on the rights and relative priority position of other parties dealing with the debtor, as will be seen in the next section.[257]

## 2. RESOLUTION OF PRIORITY DISPUTES UNDER THE BANK ACT SECURITY REGIME

The following is proposed as a basic analytical framework for resolving conflicts between the rights of a bank under a section 427 security and those of a third party claiming rights in the collateral (a "competing party"). It is assumed throughout that the bank's section 427 security is valid and properly registered, and therefore effective against third parties. The framework comprises three steps:

1. It is necessary to begin by determining whether the bank and the competing party have acquired any rights in the collateral. Since the rights of the bank do not attach to the collateral unless the debtor is "owner" thereof, provincial law must be applied to resolve this issue.[258] If for some reason, the debtor is not "owner" of the collateral, the bank's rights do not attach and no priority dispute can arise: the competing party will prevail. Correspondingly, should the competing party have no rights in the collateral, the bank will prevail.

2. It is then necessary to determine the moment at which the rights of the competing party arose in relation to those of the bank.[259] There are three possibilities. The competing party's

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257. For example, the ownership/real accessory right characterization has a potential impact on priorities in the case of: (1) subsequent buyers of proceeds (Part III, Section 2.2 (Subsequent Buyers of the Collateral), below at 354); (2) subsequent hypothecs (Part III, Section 2.3.2 (Movable Hypothecs), below at 369); and (3) persons holding prior claims (Part III, Section 2.4.2 (Non-Consensual Security Rights in Québec), below at 380).

258. See the discussion of the requirement that the debtor be "owner", above at 309.

259. For examples of courts having adopted a similar approach, see *Ouellette* v. *Banque de Nouvelle-Écosse*, *supra* note 147 at para. 16; *Re Fermo's*, *supra* note 146 at 560 ("In any conflict between the rights of a bank under section 427 and the privilege of a lessor, the question to be determined is whether the lessor's rights were subsequently or previously acquired.") See also the opinion of Wilson J., dissenting on other grounds, in *Rogerson*, *supra* note 85. ("In order to determine whether or not the bank is entitled to the benefit of s. 428(1)... [t]he issue... is whether the bank is in the position of a subsequent encumbrancer or whether the bank is not prior in time as to the creation of its interest."

rights may arise (1) *subsequently* to; (2) *prior* to; or (3) *simultaneously* with the rights of the bank.

3. In light of step 2, the Bank Act's basic temporal priority scheme must be applied.[260] If the rights of the competing party arose *subsequently* to the bank's, then the priority rule in subsection 428(1) over subsequently acquired rights is dispositive and the bank must be considered as having priority.[261] If the rights of the competing party arose *prior* to or *simultaneously*[262] with those of the bank, the Bank Act does not provide a rule for resolving the dispute. Therefore, it is necessary to resort to provincial law in order to determine who has priority in the circumstances.

The body of legal rules that apply to complement the above framework will not only depend on the province in which it is being applied, but also on the nature of the rights asserted by the competing party. It is therefore necessary to examine how the framework might apply to the various competing parties which are likely to claim rights in the collateral, both in PPSA jurisdictions and in Québec. There are six categories of potential competing parties:

1. Third parties asserting *ownership* rights in the collateral ("third party owners").[263]

2. Buyers of the collateral.[264]

3. Secured creditors holding *consensual* security rights in the collateral.[265]

4. Holders of *non-consensual* security rights.[266]

5. Unsecured creditors and their representative, the trustee in bankruptcy.[267]

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260. See the discussion of the basic temporal priority scheme, above at 320.
261. See notes 147 and 148 and accompanying text.
262. See *e.g.* MACDONALD, "A Civil Law Analysis", *supra* note 7 at 1032, stating that the Bank Act, "is silent as to the case where the bank acquires its rights simultaneously with another creditor. It follows that the respective priority of the creditor and bank in such situation *must fall to be determined by provincial law*." See also CUMING & WOOD, "Compatibility", *supra* note 14 at 276.
263. Below at 346.
264. Below at 354.
265. Below at 358.
266. Below at 375.
267. Below at 385.

6. Unpaid vendors, who are subject to the special priority over the "claim of any unpaid vendor" under subsection 428(1) of the Bank Act.[268]

## 2.1 Third Party Owners

Disputes with third party owners are resolved differently in PPSA jurisdictions than in Québec. This is because the Bank Act defers to provincial law to determine the circumstances in which the debtor can be considered "owner" of the collateral for the purposes of attachment of the bank's rights.

### *2.1.1 Third Party Owners in PPSA Jurisdictions*

What quantum of rights must the debtor have in PPSA jurisdictions to be considered "owner" of property within the meaning of section 427? It is clear that the bank's security will attach where the debtor acquires full legal ownership of the property. Likewise, it is clear that absolute ownership by the debtor is not required: the Bank Act also contemplates *equitable ownership* interests.[269] However, "ownership" cannot be reasonably interpreted as including a mere possessory interest. Therefore, where the debtor has mere possession of property, it is clear that the bank's rights will not attach to such property.[270] In order to illustrate how the above principles may apply, three categories of third party owner disputes that could arise in PPSA jurisdictions shall be examined:[271]

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268. Below at 387.

269. *Royal Bank of Canada* v. *Hodges*, *supra* note 83 at 399, per Martin J.A. For a discussion of the broad meaning of "owner" in common law jurisdictions, see generally CRAWFORD, *supra* note 3 at 441. See also the opinion of Arnup J. in *Rogerson*, *supra* note 85 at 678, stating: "The important question, for the court, was not whether he was "owner" but rather, what rights did he own and therefore could transmit to the bank."

270. *Barry* v. *Bank of Ottawa*, *supra* note 82. See also CRAWFORD, *supra* note 3 at 445.

271. Note that there are a wide range of cases in which disputes with third party owners may arise. These include: (1) *Theft*. X steals goods from Owner. X sells goods to Debtor. Debtor gives Bank a section 427 security. This case is governed by the *nemo dat* rule; (2) *Voidable title*. X tricks Owner into giving up possession. X sells the goods to Debtor. Debtor gives Bank a section 427 security. This case is governed by the voidable title provisions in provincial sale of goods Acts; (3) *Seller in possession*. Debtor sells goods to Owner, but Owner lets Debtor remain in possession after the sale. Debtor gives Bank a section 427 security. This case is governed by the seller in possession provisions in provincial sale of goods Acts. The following cases are dealt with in the body of this article: (4) *Buyer in possession*. Owner sells goods to Debtor, retains title but gives possession to Debtor (i.e. conditional sale agreement). Debtor gives Bank a section

**Category (A): The third party's interest is a "true" ownership interest.**

In Category (A) type disputes, the third party transfers possession of property to the debtor, but retains ownership of the property. Further, the third party's interest is a "true" ownership interest, as it is not intended to secure payment or performance of an obligation. Therefore, the PPSA does not apply to the transaction (with respect to "deemed" security interests, see Category (C), *infra*). For example, this would include the ownership interest of a third party under (1) a warehousing or storage agreement; and (2) a simple lease for less than one year. In such cases, it is clear that the debtor does not acquire anything more than bare possession of the property. As a result, the bank's security cannot attach to such property, and the third party's ownership interest will prevail.[272]

**Category (B): The third party's interest is a "security interest".**

In Category (B) type disputes, the third party also transfers possession of property to the debtor and retains ownership of the property. However, in this case the third party's ownership interest is held as security for the payment or performance of an obligation owed by the debtor. Therefore, it is a "security interest" and the PPSA applies. For example, this would include the ownership interest of a third party under (1) a conditional sale agreement; or (2) a lease or consignment that is intended to serve a security function.[273] In such cases, despite the third party's reservation of title, the debtor must be viewed as "owner" of the property for the purposes of the Bank Act and the bank's security can attach. Conse-

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427 security; (5) *Security / Non-security Lease*. Owner leases goods to Debtor under a lease that may or may not be in substance a security agreement. Debtor gives Bank a section 427 security; (6) *Security / Non-security consignment.* Owner places goods on consignment with Debtor under a consignment that may or may not be in substance a security agreement. Debtor gives Bank a section 427 security; (7) *Other non-security bailments*. For instance, Owner gives possession of goods to Debtor for purposes of warehousing or storage, or carriage or transport.

272. See *Barry* v. *Bank of Ottawa*, *supra* note 82.

273. Differentiating between a security lease and a non-security lease is often a complex exercise, the details of which exceed the scope of this article. The same can be said of the distinction between a security consignment and a non-security consignment. For a succinct discussion of this issue, see ZIEGEL et al., *Secured Transactions*, *supra* note 32 at 8-9.

quently, Category (B) type disputes will be determined according to the Bank Act's general priority scheme based on order of attachment.[274]

Two arguments may be advanced in support of the proposition that the debtor is "owner" of the property in Category (B) type cases. The first argument is based on the notion that PPSA has rendered locus of title irrelevant.[275] In other words, the effect of the application of the PPSA to conditional sales, security leases and security consignments, is to reduce the third party's status from an owner to a secured creditor; the owner of the collateral is the debtor.[276] Secondly, even under a traditional title-based approach, the courts have generally held that the accumulated equity of the debtor under a conditional sale agreement gives rise to an equitable beneficial ownership that is sufficient to constitute the debtor "owner" of the collateral for the purposes of the Bank Act.[277] By the same token, it is likely that the courts would apply a similar analysis in the case of security leases, although there is no case-law on point. That is not to say that the bank's section 427 security will take priority over the rights of a conditional seller or lessor. Rather, the implication of the debtor under a conditional sale agreement or a security lease being considered the "owner" of the collateral is that priority falls to be determined by the Bank Act's general priority scheme based on order of attachment. As will be discussed further below, the bank's section 427 security will take priority only in very limited circumstances.[278]

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274. See Part III, Section 2.3.1.2 (Purchase Money Security Interests), below at 363.
275. *Re Giffen*, *supra* note 168 at paras. 25-28. See also CUMING & WOOD, "Compatibility", *supra* note 14 at 274.
276. BRIDGE et al., "Formalism", *supra* note 48 at paras. 45, 59. See also C.C. CUMING & R.J. WOOD, *Alberta Personal Property Security Act Handbook*, 2d ed. (Toronto: Carswell, 1993) at 117-118, stating in respect of conditional sales that the seller should be viewed as a "secured creditor and not an owner of the collateral; the owner of the collateral is the buyer."
277. On the nature of the conditional buyer's interest in the property under pre-PPSA law, see BRIDGE et al., "Formalism" *supra* note 48. For cases holding that the conditional buyer is "owner" for the purpose of the attachment of the section 427 security, see *International Harvester*, *supra* note 82; *Rogerson*, *supra* note 85; *Hallett* v. *Canadian Imperial Bank of Commerce*, [1988] S.J. No. 764 at p. 5 (Sask. Q.B.) (QL); *Royal Bank of Canada* v. *Hodges*, *supra* note 83; *Grouse Mountain Resorts Ltd.* v. *Bank of Montreal* (1960), 25 D.L.R. (2d) 371 (B.C.S.C.). *Contra*: *Pottendorfer Textilwerke A.G.* v. *C.I.B.C.*, *supra* note 82; *Kawai Canada Music Ltd.* v. *Encore Music Ltd.* (1993), 10 Alta. L.R. (3d) 105, 101 D.L.R. (4th) 1 at 7 (C.A.).
278. See Part III, Section 2.3.1.2 (Purchase Money Security Interests), below at 363.

**Category (C): The third party's interest is a "deemed" security interest.**

Category (C) type disputes are identical to Category (A) type disputes, except that in this case the third party's ownership interest is "deemed" to be a security interest and the PPSA applies. For example, in CCPPSL Model Provinces, lease agreements for a term of more than one year and commercial consignments are deemed to be "security interests", even if they do not perform a security function.[279] It has been held that as against the debtor's secured creditors and trustee in bankruptcy, the effect of these deeming provisions is to effectively vest ownership of the leased or consigned property in the debtor.[280] This raises the issue of whether these provisions can also be said to vest ownership of the leased or consigned property in the debtor for the purposes of attachment of the bank's section 427 security.

Absent these provisions, it is clear that the bank's rights would not attach to property held by the debtor pursuant to a non-security lease or consignment. These transactions are simple bailments under which the debtor does *not* acquire an ownership interest. The fact that the interests of lessors and consignors under such agreements are deemed to be security interests should not alter this conclusion. This is because the PPSA regulatory framework is made applicable to the true ownership interests of lessors and consignors *only* for the limited purposes of perfection and priority. However, the basic distinction between security and non-security leases and consignments remains. It is only in the former case that the "debtor" is ultimately intended to obtain the benefit (or suffer the burden) associated with the residual economic value in the collateral.[281]

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279. See the discussion of the scope of the PPSA, *supra* at 302.

280. Should the lessor or consignor fail to perfect its deemed security interest, the leased or consigned asset will be available to the debtor's security creditors and/or trustee in bankruptcy (*Re Giffen*, *supra* note 168). See also BRIDGE et al., "Formalism", *supra* note 48 at para. 64.

281. BRIDGE et al., "Formalism", *supra* note 48 at paras. 61, 67. The PPSAs expressly recognize this distinction, by excluding "true" ownership interests from the PPSA enforcement regime. It must be remembered that it is the applicability of the PPSA enforcement regime which truly effects a recharacterization of title-retention security devices as security, by granting the buyer-in-possession "a full-fledged right of redemption and a corresponding right to any surplus on a forced resale of the collateral." See BRIDGE et al., "Formalism", *supra* note 48 at para. 45.

Consequently, the bank's rights cannot attach to property that is in possession of the debtor pursuant to a non-security lease or consignment. Further, because the bank under its section 427 security cannot take advantage of the PPSA provisions in CCPPSL Model Provinces, the bank loses whether or not the lessor or consignor has properly registered its interest under the PPSA.[282] This outcome is inconsistent with that which is attained by applying the internal PPSA perfection and priority rules under which a competing security interest is given priority over the interests of a lessor or consignor if they are unregistered.[283]

### *2.1.2 Third Party Owner Disputes in Québec*

It is convenient to distinguish between two categories of third party owner disputes that may arise in Québec.

**Category (A): Third parties asserting a right of ownership, whether or not intended as security.**

In Category (A) type disputes, the third party hands over property to the debtor, but retains ownership of the property. For example, this could include property held by the debtor pursuant to a contract of deposit,[284] a loan for use,[285] or a lease.[286] In some transactions, the right of ownership may be intended to serve as a security device. Examples of security ownership devices include instalment sales[287] and leasing agreements.[288] In each of these cases, the third party is the sole owner of the property for the purposes of civil law, and the debtor merely holds such property with the third party's authorization.[289] Consequently, the bank's secu-

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282. See the discussion of the applicability of PPSAs to the section 427 security in CCPPSL Model Provinces, in Part III, Section 1.1.2 (The Relationship Between the PPSA and the Section 427 Security) above at 334.
283. See *e.g.* SPPSA para. 35(1)(b).
284. Art. 2280 C.C.Q.
285. Arts. 2312-2314 C.C.Q. Note that under a simple loan, the debtor becomes the owner of the property loaned, and therefore the bank's security may attach. See art. 2327 C.C.Q.
286. Art. 1851 C.C.Q.
287. Arts. 1745 – 1749 C.C.Q.
288. Arts. 1842 – 1850 C.C.Q.
289. As stated above, unlike ownership at common law, the civil law concept of ownership is unitary and cannot be divided into "legal" and "beneficial" ownership. See *supra* note 230 and accompanying text.

rity cannot attach to such property, even if it is of a kind that is also covered by its section 427 security.[290]

In the case of security ownership devices like instalment sales and leasing agreements, the fact that the right of ownership is held as security does not alter the third party's status as owner under the *Civil Code*.[291] However, the right of ownership of the lessor or seller does not have effect against third persons unless it has been published within the requisite time period.[292] This means that if the lessor or seller fails to meet the publication requirement, as against third persons (including the bank), the debtor is owner of the property.[293] As a result, the section 427 security will attach to the property and the bank's claim will take priority over the third party's claim.[294]

**Category (B): Previous owners of the collateral.**

In Category (B) type disputes, the third party transfers ownership and possession of property to the debtor under, for example, a contract of sale.[295] The property is of a kind covered by a section 427 security, and therefore the security attaches. The seller then applies to have the contract of sale *annulled* or *resolved*. The *Civil Code* provides a number of grounds upon which

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290. See *e.g. Ackroyd Brothers Canada Ltd.* v. *Brackon Products Inc*., [1948] C.S. 407 (the section 427 security did not attach to goods in storage on the debtor's premises).
291. This is because of the rejection of the "presumption of hypothec". See Part II, Section 1.3 (Scope of the Civil Code Hypothecary Regime), above at 304.
292. Arts. 1745, 1847 C.C.Q. Publication is also required in the case of certain non-security leases (art. 1852 C.C.Q.).
293. PAYETTE, *Les sûretés réelles*, *supra* note 80 at 909-910.
294. There are two possible grounds for the bank's priority. First, the subs. 428(1) priority over subsequently acquired rights applies because the lessor's or seller's rights will necessarily be subsequently acquired either by later publication or seizure. Second, under the restricted ownership theory, the section 427 security effects a transfer of ownership of the property to the bank. Therefore, the property is no longer in the debtor's patrimony and out of the reach of the third party's claim.
295. Note that disputes with previous owners may also arise in cases where the debtor acquires the property, not directly from the third party owner, but from an intervening party who represented itself as owner. For example: X steals property from Owner. X sells property to Debtor. Debtor gives a section 427 security to Bank. Subject to the rules regarding prescription and possession (arts. 921-933 C.C.Q.), the true owner may apply for annulment of the sale and revendicate the property in the hands of the debtor (arts. 953, 1713-1714 C.C.Q.).

annulment or resolution may be achieved.[296] Significantly, under certain conditions the unpaid seller of movable property is granted the right to consider the sale resolved and to revendicate the property sold in the hands of the debtor (art. 1741 C.C.Q. – the "unpaid seller's right of resolution"). Upon annulment or resolution of the contract of sale, ownership of the thing sold retroactively reverts to the seller. The contract is deemed never to have existed, and the debtor never to have owned the property.[297] Correspondingly, the bank's section 427 security is deemed never to have attached to the property and the seller's claim prevails.[298]

The above reasoning is supported by a majority of courts[299] and authors.[300] Despite this fact, the conflict between the unpaid seller's right of resolution and the section 427 security has been the subject of much controversy and litigation.[301] One reason is the bank's special priority over the "claim of any unpaid vendor",

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296. For example, the general rules governing the formation and execution of contracts provide for several grounds upon which a seller might apply to a court in order to have a contract annulled (arts. 1398-1408, regarding defects of consent, such as error, fear or lesion) or resolved (arts. 1604-1605 C.C.Q. in the case of an important default of the debtor).

297. Arts. 1422, 1606 C.C.Q.

298. *William Neilson*, *supra* note 86 at 116-118; *Fonderies Franco-Belges, S.A.* v. *Import-export Dimex (Canada) Inc.*, [1987] A.Q. nº 203, J.E. 91-852 (C.A.); *Re Beatrice Pines Ltd.; Vendome Knitting Mills Ltd.* v. *Lawrence and Waxman* (1967), *supra* note 234; *In Re William A. Marsh Co.* v. *Buzzell* (1930), 11 C.B.R. 463; *Knitrama Fabrics Inc.* v. *K. & A. Textiles Inc.*, [1984] Q.J. No. 39 (QL); *Provigo (distribution) Inc.* v. *Laverdière* (1985), 61 C.B.R. (N.S.) 43 (C.S.), J.E. 85-716; *La Chaîne Coopérative du Saguenay Inc.* v. *Laberge et al.*, *supra* note 82. Alternatively, the priority of the owner may be based on a *nemo dat* type reasoning. See *e.g. Knitrama Fabrics Inc.* v. *K. & A. Textiles Inc., supra* at 1206: "...the bank's customer cannot give to the bank free and clear ownership, but only an ownership based on a contract which is subject to dissolution at the instance of the unpaid vendor." See also MACDONALD, "A Civil Law Analysis", *supra* note 7 at 1059: "If the buyer's rights are subject to retroactive resolution so too must those of the bank."

299. See *supra* note 298 and accompanying text.

300. MACDONALD, "A Civil Law Analysis", *supra* note 7 at 1060; CIOTOLA, *Droit des sûretés*, *supra* note 14 at 360; PAYETTE, *Les sûretés réelles*, *supra* note 80 at 96. See also AUGER, "Les sûretés mobilières", *supra* note 14 at 298; DEMERS, *Le financement de l'entreprise*, *supra* note 14 at 203; GOLDSTEIN, "A Bird's Eye View", *supra* note 14 at 91.

301. Some less recent cases have held that the bank's claim prevails over the seller's right of resolution. See *e.g. Bock et Tétrault Ltée* v. *Fonderie de l'Islet Ltée*, *supra* note 232; *In Re Eastern Wood Cop.: P.L. Robertson Mfg. Co.* v. *Lawrence*, [1975] C.S. 539; *In Re Paramount Leather Goods: Druker Services Banking and Coating Copr.* v. *Toronto Dominion Bank, supra* note 229; *Intersplice Inc.* v. *Industries Unik Ltée*, J.E. 84-1004 (C.S.); *Sawyer Tanning Co.* v. *Leather Group Ltd., et al.*, [1977] C.S. 1150.

discussed later in this article.[302] A second source of controversy is the document of title fiction, which creates uncertainty over whether or not the conditions of article 1741 C.C.Q. are met. In particular, it is arguable that the taking of possession of the property by the bank prevents the exercise of an unpaid seller's right of resolution, under both the restricted ownership theory and the accessory real right theory.[303]

### *2.1.3 Critical Assessment*

Disputes involving third party owners serve to highlight at least two deficiencies of the Bank Act security regime:

- In the case of disputes with deemed security interests in CCPPSL Model Provinces (i.e. lessors under leases for a term of more than one year and consignors under commercial consignments), the bank loses even if the deemed security interest is unregistered. This undermines the provincial legislative policy underlying the registration requirement[304] and produces a commercially unreasonable outcome: the claim of a subsequent bank is subordinated despite the fact that it has no way of learning of the existence of the lessor's or consignor's interest.

- In the case of disputes involving unpaid sellers exercising the right of resolution under article 1741 C.C.Q., the giving of section 427 security creates uncertainty over whether the conditions prescribed for resolution are met. This provides an illustration of the problems involved in attempting to integrate the section 427 security into the framework of rights and obligations under the *Civil Code*.

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302. See Part III, Section 2.6 (Special Priority over the "Claim of any Unpaid Vendor"), below at 387.

303. If the accessory real right theory is adopted, then it is arguable by analogy that the bank taking possession is a "hypothecary creditor who has obtained surrender" of the property, thereby preventing the unpaid seller from exercising its right of resolution. See CIOTOLA, *Droit des sûretés*, *supra* note 14 at 364. *Contra* PAYETTE, *Les sûretés réelles*, *supra* note 80 at 97. If the restricted ownership theory is adopted, it could be argued that the property has "passed into the hands of a third person who has paid the price thereof", although this argument is undermined by the decision in *William Neilson*, *supra* note 86 at 116-118, where it was held that the bank's taking of possession did not prevent the exercise of the right under art. 1543 of the *Civil Code of Lower Canada*.

304. Roughly speaking, the rationale for requiring registration of leases for more than one year and commercial consignments is to address the *ostensible ownership* problem, by notifying subsequent third party's of the lessor's or consignor's interest.

## 2.2 Subsequent Buyers of the Collateral

### *2.2.1 The Law*

By its very nature, the collateral that is subject to the bank's section 427 security is likely to be used in the debtor's business. The collateral will usually be held as inventory (e.g. livestock and crops) or as a necessary implement for running the business (e.g. agricultural equipment). It is therefore not uncommon for the collateral to be sold to third parties. If the bank decides to sue the buyer for the value or return of the sold property,[305] the question arises as to whether or not the buyer takes the collateral free of the bank's security.

The *prima facie* answer is provided by the Bank Act itself. Since the buyer's rights in the collateral are inevitably acquired *subsequently* to the bank's, subsection 428(1) is dispositive. The bank takes priority over the rights of the subsequent buyer, regardless of provincial law which may purport to protect the buyer's rights.[306] Any provincial legal rules which purport to reverse this outcome should be rendered inoperative on the basis of the doctrine of federal paramountcy.[307] Examples of rules that should not apply to the bank on this basis include:

- in Ontario, OPPSA provisions protecting buyers in good faith[308] and those rendering unperfected security interests ineffective against subsequent transferees;[309] and

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305. In common law jurisdictions, the bank would claim damages on the basis of *conversion* (see *Toronto-Dominion Bank* v. *Dearborn Motors Ltd.* (1968), 64 W.W.R. 577, 69 D.L.R. (2d) 123 (B.C.S.C)). In Québec, the action would be based on the general principles of civil liability or possibly an action in revendication of the collateral in the hands of the third party. See *Banque Royale du Canada* v. *Fontaine*, *supra* note 229.
306. Although the bank's priority over subsequent buyers of the collateral is firmly established, it should be noted that the courts having dealt with such disputes invariably fail to mention the express priority over subsequent rights of subs. 428(1). Instead, priority is given on the basis of the nature of the rights acquired by the bank in the collateral pursuant to its section 427 security. See *Toronto-Dominion Bank* v. *Dearborn Motors Ltd.*, *supra* note 305; *Banque Royale du Canada* v. *Fontaine, supra* note 229. For cases giving priority to the bank on a similar basis, but *before* the enactment of the subs. 428(1) priority over subsequent rights, see *Goebel*, *supra* note 143; *Landry Pulpwood*, *supra* note 19.
307. See Part II, Section 4.2 (The General Priority Scheme – A Mixture of Federal and Provincial Law), above at 320.
308. OPPSA s. 28 (ordinary course sales) and subs. 63(9) (sale by secured party).
309. OPPSA para. 20(1)(c).

- in Québec, the rules protecting buyers in good faith of property sold by a person other than the owner ("sale of property of another" – art. 1713-1714 C.C.Q.).[310]

In CCPPSL Model Provinces, the paramountcy issue does not arise. This is because the PPSA regime does not apply to section 427 security and provincial law is of no assistance to the buyer. At common law, an innocent purchaser for value without notice is not protected against the bank's *legal title* in the collateral.[311]

The apparent harshness of the above rule is somewhat tempered in practice. It is clear that a subsequent buyer of the collateral takes it free of the bank's security where the sale is either expressly or impliedly authorized by the bank.[312] The rule is based on the more general principle that the bank's authorization amounts to an express or implied waiver of its right to priority under subsection 428(1).[313] The security agreement between the bank and the customer will generally contain an express authorization to deal with the collateral in the ordinary course of business.[314] If it does not, the courts will of necessity imply such an authorization with respect to collateral that is held by the debtor

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310. See discussion in MACDONALD, "A Civil Law Analysis", *supra* note 7, at n. 168. The cases having held that these rules apply must therefore be regarded as wrongly decided. See *e.g. Banque Provinciale du Canada* v. *Dionne, supra* note 229; *Attorney General of Canada* v. *Mandigo* (1964), 46 D.L.R. (2d) 563 (Que. C.A.), [1965] B.R. 259; *Banque Royale du Canada* v. *Fontaine*, *supra* note 229.

311. Under the rules of property law, a competition between two purportedly legal interests in property will be governed by the maxim *nemo dat non quod habet*. The result is that the first in point of time of creation will prevail. In this case, the bank's interest being first in time will take priority over that of the subsequent purchaser, regardless of whether the latter had notice of the bank's prior interest. See also *Toronto-Dominion Bank* v. *Dearborn Motors Ltd.*, *supra* note 305.

312. *Hurly* v. *Bank of Nova Scotia*, [1966] S.C.R. 83; *Indian Head Trading Co.* v. *Royal Bank*, [1976] 5 W.W.R. 583 (B.C.C.A.); *Canadian Western Millwork Ltd. (Re), Flintoft* v. *Royal Bank of Canada*, 47 D.L.R. (2d) 141 at 634, per Judson J.; *Bank of Montreal* v. *J & L Meats Co. Ltd., B.C.* (1982), 34 B.C.L.R. 248. For Québec, see *Can. Cold Storage* v. *Banque Provinciale*, [1971] C.S. 859; *C.I.B.C.* v. *General Factors Ltd.*, [1968] S.C.R. 435 (with respect to the impliedly authorized sale of proceeds of the collateral).

313. See *e.g. Ford Motor Co. of Canada Ltd.* v. *Manning Mercury Sales Ltd. (Trustee of), supra* note 208 at 362, citing MOULL, *supra* note 30 at 255: "When the borrower deals with the inventory by selling in the ordinary course of business, the bank's section 427 security will not follow the inventory into the hands of the third party purchaser because the bank has released its security [either expressly or impliedly]...".

314. *Bank of Montreal* v. *J & L Meats Co. Ltd., B.C., supra* note 312 (express authorization to sell cattle in the ordinary course of business).

as inventory.[315] Further, in cases where the sale does not fall within the scope of the general express or implied authorization to deal with the collateral, the bank may nevertheless have tacitly consented to the sale through its subsequent course of conduct. An example of this is where the bank, with full knowledge of the sale, receives the proceeds and credits the account of the debtor.[316] However, where the sale is unauthorized (expressly or impliedly) the bank will take priority over the subsequent buyer under subsection 428(1) of the Bank Act.

The principle that the bank may waive its priority rights under subsection 428(1) may also apply to give priority to subsequently acquired security rights in the collateral. Where the bank has prior knowledge of a security right that arises in the course of an authorized dealing (expressly or impliedly), the bank must be taken to have relinquished its priority against the subsequent security right.[317] Knowledge can be imputed to the bank where it can be said that the security right falls within "the usual legal incidents" of dealing with the collateral in the ordinary course of business.[318] To illustrate, where a bank has authorized the repair of

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315. *Sparrow*, *supra* note 84 at paras. 61 and 66, Gonthier J. holding that the section 427 security is in the nature of a fixed and specific charge with an implied licence to sell the inventory. See also *Ford Motor Co. of Canada Ltd.* v. *Manning Mercury Sales Ltd. (Trustee of)*, *supra* note 208 at 361; *David Morris Fine Cars Ltd.* v. *North Sky Trading Inc. (Trustee of)* (1994), 21 Alta. L.R. 107 (Alta. Q.B.), aff'd [1996] A.J. No. 392 (C.A.) (QL) (lease of car where debtor was in the business of leasing cars); *Juniper Lumber Co. (Re.)*, [2000] N.B.J. No. 364 (Q.L.), aff'd [2001] N.B.J. No. 67 (QL); *Discovery Enterprises*, *supra* note 118 at para. 22. See also CRAWFORD, *supra* note 3 at 427: "The theory of the security from the beginning has been that the customer is free to carry on its business in the ordinary way without regard for the interest of the bank." See also CIOTOLA, *Droit des sûretés*, *supra* note 14 at 352.

316. *Hurly* v. *Bank of Nova Scotia, supra* note 312; *Indian Head Trading Co.* v. *Royal Bank*, *supra* note 312; *Can. Cold Storage* v. *Banque Provinciale*, *supra* note 312; *C.I.B.C.* v. *General Factors Ltd., supra* note 312.

317. *Guaranty Silk (C.A.)*, *supra* note 92, per Masten J.A.; *Bank of Boston Canada* v. *Montreal Fast Print (1975) Ltd.*, *supra* note 86 (although the argument failed on the facts of that case); *Re La Cie De Bois de Natagnan; Roy* v. *La Banque d'Hochelaga*, [1924] 2 D.L.R. 1155 (C.S.) (priority given to privileged creditor); *Can. Cold Storage* v. *Banque Provinciale*, *supra* note 312 (priority given to pledge creditor).

318. See *British Columbia* v. *Federal Business Development Bank*, (1987) 17 B.C.L.R. (2d) 273, 43 D.L.R. (4th) 188 at 226, where McLachlin J. held that a license or permission to deal with the collateral under a fixed security "must be taken to encompass all the usual legal incidents of dealing with the stock in the ordinary course of business." The transfer of title is not the only incident of dealing with the stock in the ordinary course of business, which also includes liens which arise out of such dealing. In that case, the bank was taken to have tactility

certain equipment that is covered by its section 427 security, it should be deemed to have knowledge of the non-consensual security rights that are granted to repairers in all provinces.[319] Consequently, it will have waived its priority rights against them.

In the case of disputes involving transferees of proceeds of the section 427 collateral, the subsection 428(1) priority should *not* apply. This is based on the notion that the bank's entitlement and priority as against transferees of proceeds is determined by provincial law.[320] Accordingly, provincial legal rules protecting transferees of such proceeds should apply to the bank. For instance, in common law provinces it has been held that the bank's entitlement to proceeds terminates once the proceeds reach the hands of a bona fide purchaser for value without notice[321] and is subject to equitable set-off.[322] In Québec, the bank's claim to proceeds has been held to be liable to be extinguished by compensation.[323] However, there exists authority to the effect that the bank's entitlement to proceeds is *implicit* in the Bank Act.[324] Under this view, the subsection 428(1) priority should override all of the above provincial legal rules protecting transferees of proceeds. Consequently, the outcome of disputes involving transferees of proceeds of the section 427 collateral remains uncertain.

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accepted that it would cede priority not only to *bona fide* purchasers for value, but to other persons who might acquire rights incidental to such sales. This was subsequently recognized by the S.C.C. as the leading articulation of the license theory in *Sparrow*, *supra* note 84, although the majority held that it did not apply to the facts of that case.

319. For common law jurisdictions, see *e.g. Repair and Storage Liens Act*, R.S.O. 1990, c. R.25, granting a possessory and non-possessory lien to repairers and storers in respect of their claims. For Québec, see arts. 1592 and 2651(3) C.C.Q., granting a general "right of retention" and corresponding "prior claim", which would be available, *inter alia*, to repairers.

320. See Part II, Section 4.3.3 (Proceeds), above at 324. See *Bank of Nova Scotia* v. *Groupe Procycle Inc.*, [1999] O.J. No. 24 (O.C.J.G.D.) (the bank was given priority over a subsequent assignee of the debtor's accounts on the basis of the conventional property law analysis).

321. *C.I.B.C.* v. *Kernel Farms Ltd.* (1982), *supra* note 165; *Bank of Nova Scotia* v. *Bank of Montreal* (1982), 38 O.R. (2d) 723 (H.C.); *Union Bank of Halifax* v. *Spinney* (1906), 38 S.C.R. 187. See the excellent discussion of this topic in CUMING & WOOD, "Compatibility", *supra* note 14 at 294-301.

322. *Mercantile Bank of Canada et al.* v. *Leon's Furniture Ltd.*, 11 O.R. (3d) 713 (O.C.A.).

323. *Banque Provinciale* v. *Canadian General Electric*, *supra* note 229. See arts. 1672-1682 C.C.Q.

324. *Royal Bank of Canada* v. *United Grain Growers Ltd., supra* note 165. See also *supra* note 167 and accompanying text.

### *2.2.2 Critical Assessment*

The main deficiency of the Bank Act security regime as it relates to subsequent buyers is that the protection accorded to such buyers depends on a judicially created rule that requires a determination of whether or not the sale was expressly or impliedly authorized by the bank. This does not reach the level of certainty that is required in a modern commercial context. In comparison, both the *Civil Code* and the PPSA clearly set forth the conditions upon which a subsequent buyer of collateral takes it free of prior security rights.[325] The uncertainty is intensified in the case of disputes with transferees of proceeds of the section 427 collateral, given by the Bank Act's failure to deal with the bank's entitlement to such proceeds.

## 2.3 Consensual Security Rights[326]

### *2.3.1 PPSA Security Interests*

In PPSA jurisdictions, all consensual security devices, without regard to title or form, have been replaced by the generic concept of *security interest*.[327] For the purposes of this section's analysis, it is convenient to distinguish between two categories of security interests that may compete with section 427 security. The first category comprises conventional security interests, such as debentures, chattel mortgages, pledges and fixed or floating charges, or generic "security interests" ("conventional security interests"). The second category comprises "purchase-money security interests" (PMSIs), which includes conditional sale agreements, security leases and generic PMSIs that do not rely on retention of ownership. In the interests of manageability, this article's analysis shall be limited to disputes arising in CCPPSL Model Provinces, where the PPSA does not apply to section 427 security.[328] With respect to priority disputes in Ontario, the uncertainty that exists in light of *International Harvester* has already been discussed.[329]

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325. See *e.g.* OPPSA s. 28; arts. 2674, 2700 C.C.Q.
326. A consensual security right is a security right that is created by agreement between the parties.
327. See Part II, Section 1.2 (Scope of the PPSA), above at 302.
328. See Part III, Section 1.1.2 (The Relationship Between the PPSA and the Section 427 Security), above at 334.
329. See Part III, Section 1.1.3 (The Ontario PPSA & Section 427 Security: the Issue of "Double Registration"), above at 336.

*2.3.1.1 Conventional Security Interests*

In order to apply the Banks Act's priority scheme, it is necessary to determine the moment at which the PPSA security interest attaches to the collateral in relation to the section 427 security. As explained in Part II,[330] a PPSA security interest generally attaches: (1) to the debtor's present property at the moment of execution of the security agreement; and (2) to the debtor's after-acquired property as and when the debtor acquires rights in such property. Similarly, the section 427 security attaches: (1) to the debtor's presently owned property at the moment of execution of the security agreement; and (2) to the debtor's after-acquired property as and when the debtor becomes "owner" thereof.[331] Consequently, disputes between PPSA security interests and section 427 security may produce three possible cases:

**Case (1): The PPSA security interest attaches after the section 427 security**

In Case (1) types disputes, the moment of attachment of the PPSA security interest is *subsequent* to that of the section 427 security. In these cases, the bank is given priority pursuant to subsection 428(1) of the Bank Act.[332]

**Case (2): The PPSA security interest attaches before the section 427 security**

In Case (2) type disputes, the PPSA security interest attaches before the section 427 security. For example:

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330. See discussion of time of attachment regarding PPSA jurisdictions, in Part II, Section 2.3.2 (PPSA Regime – "Rights in the Collateral") above at 311.

331. It should be noted that certain courts and commentators have argued that the moment that the bank's rights begin to affect after-acquired property is deemed retroactively to be the date of delivery of the security document. However, for the reasons explained above (see Part II, Section 2.3.1, (Bank Act Security Regime – Ownership by the Debtor) at 308), the better view is that the section 427 security attaches to after-acquired property as and when it is acquired by the debtor. As a result, the analysis of priority disputes in this article is based upon the latter approach.

332. Note that it is common for courts in common law jurisdictions to ignore the subs. 428(1) priority over subsequent rights and apply provincial property law principles in order to resolve priority disputes between a section 427 security and a subsequently acquired competing provincial right. See *e.g. Bank of Montreal* v. *Pulsar Ventures Inc., supra* note 148, where Vancise J.A. appears to base his judgement both on subs. 428(1) and on common law principles. See also *Hallett* v. *Canadian Imperial Bank of Commerce*, *supra* note 277. See the cases cited *supra* at note 306 (subsequent buyers) and *infra* at note 353 (subsequent PMSI).

> On January 1, D grants C a PPSA security interest on a tractor. C fails to properly register a financing statement in respect of its security interest. On February 1, D grants B a section 427 security on the same tractor. D defaults. Both C and B claim the tractor.

In these cases, the rights of the secured creditor (C) (January 1) are acquired *prior* to those of the bank (B) (February 1). Therefore, the subsection 428(1) priority over subsequent rights does not apply, and the dispute falls to be resolved according to the common law rules of property.

For the purposes of property law, the PPSA security interest must be viewed as a legal interest in the collateral.[333] Recall that the section 427 security also gives the bank a legal interest in the collateral.[334] In the case of disputes between two purportedly legal interests, the solution of the common law is to give priority to the first interest to have been created, in accordance with the maxim *nemo dat quod non habet* (one cannot give that which one does not have).[335] In other words, a debtor cannot confer on a creditor a greater title than that which he or she holds. In the example, B under its subsequent section 427 security can only take the residual interest of the debtor in the tractor, that is, as diminished by the pre-existing legal interest of C. It follows that C's prior PPSA security interest will be given priority over B's subsequently attached section 427 security.[336]

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333. CUMING & WOOD, "Compatibility", *supra* note 14 at 275. See also *Sparrow*, *supra* note 84, in which the PPSA security interest was held to be in the nature of a "fixed and specific charge" which gives its holder legal title to the collateral and leaves the debtor with an equity of redemption. Language to this effect is found in the decision of Gonthier J. at paras. 54, 56, 64 and 87. This was also approved in the decision of Iacobucci J. at para. 90. The *Sparrow* characterization is not immune to criticism. This characterization confuses the concepts of "charge" and "mortgage". If the security interest is really in the nature of a "charge", then the debtor should retain legal ownership of the collateral. As it happens, PPSA analysts are generally in agreement that the debtor should not be viewed as giving up legal title to the collateral under the PPSA. A better characterization is provided by Professors Cuming and Wood. They argue that a PPSA security interest "is a statutory legal interest in the collateral." Despite this ambiguity, one thing is certain: the interest held by a secured creditor in the debtor's present and after-acquired property under the PPSA is a legal interest, not an equitable one.
334. See Part III, Section 1.1.1 (Common Law Characterization of the Section 427 Security), above at 331.
335. ZIFF, *supra* note 210 at 412-413.
336. See *e.g. Royal Bank of Canada* v. *Agricultural Credit Corp. of Saskatchewan, supra* note 151, where the first-in-time priority rule was applied to give priority to a prior attached PPSA security interest over a bank's subsequently attached section 427 security. See also CUMING & WOOD, "Compatibility", *supra* note

Moreover, C's prior PPSA security interest will prevail *even though it is unperfected* for the purposes of the PPSA.[337] The reason is that the bank's section 427 security is not mentioned in the list of interests in respect of which an unperfected PPSA security interest is rendered subordinate or ineffective.[338] Because the CCPPSL Model Provinces have chosen to exclude the section 427 security from the scope of their PPSA, the bank cannot protect itself by registering a financing statement.[339] This produces a commercially unreasonable outcome: the bank's claim is subordinated despite the fact that it had no way of learning of the existence of the prior unregistered PPSA security interest.[340]

**Case (3): The PPSA security interest and the section 427 security attach simultaneously to after-acquired property.**

The PPSA security interest and the section 427 security may also attach simultaneously to the debtor's property. For example:

> On January 1, D grants C a PPSA security interest on all present and after-acquired tractors. C fails to register its PPSA security interest. On January 10, D buys a tractor ("tractor one"). On February 1, D grants B a section 427 security on all present and after-acquired tractors. On March 1, D buys a second tractor ("tractor two"). D defaults. Both C and B claim tractor one and tractor two.

Since both C's PPSA security interest and B's section 427 security attach automatically as and when the after-acquired collateral comes into the possession of the debtor, both interests attached simultaneously when D bought tractor two on March 1.

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14 at 275; and MCLAREN, *Secured Transactions*, *supra* note 70 §5.02, at n. 930 and accompanying text.

337. *Rogerson*, *supra* note 85.

338. *Rogerson*, *supra* note 85. See *e.g.* SPPSA s. 20; OPPSA s. 20. Note, however, that the unperfected security interest will be subordinated if the bank qualifies as an execution creditor (see e.g. OPPSA para. 20(1)(a)(ii)). Also note that the bank will not qualify as an execution creditor merely by taking possession of the collateral under section 427 (as per *Rogerson*, *supra*).

339. See Part III, Section 1.1.2 (The Relationship Between the PPSA and the Section 427 Security), above at 334.

340. WOOD, "Federal Security Interests", *supra* note 5 at 78; and Uniform Law Conference Of Canada/Law Commission Of Canada Joint Committee On Harmonization Of The Federal Bank Act Security And The Provincial Secured Transactions Regimes, "Background Paper 1 on PPSA Harmonization", online: <http://www.ulcc.ca/en/cls/index.cfm?sec=2&sub=2ia> (date accessed: September 30, 2004) [*Background Paper on Section 427*].

In such cases, the *nemo dat* rule is of no assistance. Accordingly, it has been suggested that priority should be awarded to the first party to have entered into the security agreement.[341] The basis for applying such a rule is the following: upon the execution of the security agreement, a present though inchoate *equitable security interest* is created which is waiting for the property to be acquired to attach.[342] Therefore, a dispute between two simultaneously attached legal interests is also a dispute between two equitable interests, which arise at the respective dates of execution of the security agreements. In a contest between two equitable interests, where the equities are in all other respects equal, the first in time prevails.[343] This principle is often expressed by the maxim *qui prior est tempore potior est jure* – the person who is first in time has the strongest claim in law.

In the example, C's PPSA security interest would therefore take priority on the basis of the first in time rule over B's section 427 security with respect to tractor two. This is because C's security agreement (January 1) was executed before B's security agreement (February 1). C would also take priority with respect to tractor one on the basis of the *nemo dat* rule (see Case (2) type disputes). In consequence, C's priority over all present and after-acquired tractors is acquired from the date of the security agreement, despite the fact that C's PPSA security interest is unregistered. This aggravates the commercially unreasonable outcome mentioned above. Further, although the first in time rules leads to reasonably predictable outcomes, there is very little judicial authority to support its application in the context of disputes between two legal interests arising simultaneously in the same asset.[344]

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341. CUMING & WOOD, "Compatibility", *supra* note 14 at 276; WOOD, "Federal Security Interests", *supra* note 5 at 77.
342. In the words of Professor Goode, although it is true that "in a sense, an agreement for security over after-acquired property cannot attach to that property prior to acquisition, yet the agreement constitutes a *present* security. In other words, it creates an incohate security interest which is waiting for the asset to be acquired so that it can fasten on to the asset but which, upon acquisition of the asset, takes effect *as from the date of the security agreement*." See R.M. GOODE, *Legal Problems of Credit and Security* (London: Sweet & Maxwell, 1982) at 7.
343. ZIFF, *supra* note 210 at 416.
344. One decision that appears to have applied the rule is *Bank of Montreal* v. *Pulsar Ventures Inc., supra* note 148. As pointed out in CUMING & WOOD, "Compatibility", *supra* note 14 at 276, n. 35: "[t]he problem, of course, is that provincial law in the past never had to develop a priority rule for disputes between two legal interests in the same asset that arise simultaneously."

*2.3.1.2 Purchase-Money Security Interests*

Under the PPSA priority framework, purchase-money security interests enjoy priority over all other security interests in the same collateral, so long as certain requirements are met.[345] The PPSA defines "purchase-money security interest" as including, *inter alia*: (i) a security interest taken in collateral to the extent that it secures all or part of its purchase price; and (ii) a security interest taken in collateral by a person who gives value for the purpose of enabling the debtor to acquire rights in the collateral, to the extent that the value is applied to acquire those rights.[346] Part (i) of the definition includes not only the interest of a vendor or lessor under a conditional sale or security lease, but also includes an outright sale of the collateral on credit coupled with the grant of a security interest to the seller. Part (ii) is even broader, as it encompasses the interest of a lender who grants a loan to the debtor to enable the debtor to pay cash to the seller. For convenience, the term "purchase-money creditor" will be used hereinafter to refer to any vendor, lessor or lender holding a purchase-money security interest.

Again, in order to apply the Bank Act priority scheme to disputes between purchase-money creditors and a bank under section 427, it is necessary to determine the respective moments of attachment of the competing security interests. With respect to time of attachment, moreover, there is no reason to distinguish between PMSIs and general PPSA security interests: attachment will generally occur at the moment of signature of the security agreement or when the debtor acquires rights in the collateral, whichever is later.

Determining the respective moments of attachment of a section 427 security and a PMSI can be a mind boggling exercise. There are three possible cases:

**Case (1): The PMSI attaches prior to the section 427 security.**

The PMSI will attach *prior* to the section 427 security where the security agreement between the debtor and the purchase-

345. See *e.g.* SPPSA s. 34.
346. SPPSA para. 2(1)(jj) "purchase-money security interest". See also OPPSA subs. 1(1) "purchase-money security interest." In CCPPSL Model Provinces, the definition also includes deemed security interests, as noted above – See Part II (Section 1.2: Scope of the PPSA), above at 302.

money creditor pre-dates the bank's section 427 security agreement. For example:

> On January 1, D buys a tractor from C under a conditional sale agreement. C fails to register a financing statement to perfect its PMSI. On February 1, D gives B a section 427 security on all present and after-acquired tractors. D then defaults. Both B and C claim the tractor.

In the example, C's PMSI (January 1) attached to the tractor *prior* to D's section 427 security (February 1). Since the Bank Act priority over subsequent rights (subsection 428(1))[347] does not apply, the dispute is resolved according to the common law rules of property, as in the case of conventional security interests. C's prior attached PMSI takes priority, regardless of whether or not it is perfected under the PPSA (*nemo dat quod non habet*).[348]

**Case (2): The PMSI attaches <u>after</u> the section 427 security.**

In order for a section 427 security to attach *prior* to the PMSI, the taking of the PMSI must have been preceded by an outright sale of the collateral to the debtor. Since by definition, a debtor cannot own the collateral securing a purchase-money loan before the loan itself is made, a prior creditor (in this case, the bank) can only claim an interest in such collateral as *after-acquired property* under its security agreement.[349] Where the taking of the PMSI is preceded by an outright sale of the collateral to the debtor, there is a period of time prior to the attachment of the PMSI where the debtor may be regarded as unencumbered "owner" of the collateral, however short that period may be. This allows the bank's section 427 security to attach *in priority* to the PMSI. For example:

> On January 1, D gives B a section 427 security on all present and after-acquired tractors. On February 1, D buys a tractor from C on

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347. Note that the special priority over the "claim of any unpaid vendor" does not apply to disputes with PMSIs either. See Part III, Section 2.6 (Special Priority over the "Claim of any Unpaid Vendor"), below at 387.
348. In the following cases, the *nemo dat* rule was applied to give priority to sellers under *prior executed conditional sale agreements*. It is important to note that these were *not* cases of simultaneous attachment: *YMCF Inc.* v. *406248 B.C. Ltd*., [1998] B.C.J. No. 316 (QL); and *International Harvester, supra* note 82 (conditional sales contracts were improperly registered and therefore unperfected under the PPSA).
349. JACKSON & KRONMAN, "Secured Financing and Priorities Among Creditors", (1979) 88 *Yale L.J.* 1143 at 1165.

credit terms. D obtains immediate possession of the tractor. On February 2, D gives C a PMSI on the tractor. On the same day, C registers a financing statement, thereby perfecting its PMSI. D then defaults. Both B and C claim the tractor.

In the example, B's section 427 security attached when D acquired the tractor on February 1. C did not receive its PMSI until February 2. Consequently, subsection 428(1) of the Bank Act applies: B's section 427 security takes priority over C's subsequently attached PMSI. Further, B prevails regardless of the purchase-money priority provisions of the PPSA. These provisions would normally give C's security interest priority over all other security interests in the same collateral, because C registered its security interest within the requisite time period and qualifies for the PMSI super-priority.[350] However, in CCPPSL Model Provinces, where the section 427 security is excluded from the scope of the PPSA, these provisions do not apply to disputes involving section 427 security.[351] Further, even if the PMSI provisions did apply (as in Ontario), they would be pre-empted by subsection 428(1) of the Bank Act based on the doctrine of federal paramountcy. This outcome (that a subsequently attached PMSI loses to a bank even where it is registered in time) clearly contradicts the provincial legislative policy underlying the decision to grant purchase-money creditors priority in these circumstances.[352]

In practice, this apparently harsh rule will rarely apply.[353] The PMSI holder may avoid this outcome by ensuring that the security agreement is made before or at the same time as the debtor acquires the collateral.

**Case (3): The section 427 security and the PMSI attach simultaneously.**

Three elements must be present for Case (3) type disputes to occur: (1) the bank's section 427 security agreement is prior

350. See *e.g.* SPPSA subs. 34(2).
351. See Part III, Section 1.1.2 (The Relationship Between the PPSA and the Section 427 Security), above at 334.
352. For an overview of the various theories underlying the purchase-money priority, see *e.g.* JACKSON & KRONMAN, "Secured Financing and Priorities Among Creditors", *supra* note 349.
353. In *Hallett* v. *Canadian Imperial Bank of Commerce*, *supra* note 277, a prior section 427 security was given priority over a subsequently attached but *perfected* PMSI on the basis of the *nemo dat* rule, once again illustrating the propensity of courts to ignore the subs. 428(1) priority rule.

in time; (2) the bank claims an interest in the collateral as after-acquired property under its security agreement; and (3) the PMSI is taken by the purchase-money creditor *before* or *at the same time* as the agreement pursuant to which the debtor acquires the collateral. In such a case, there is no *scintilla temporis* (moment in time), where the debtor can be viewed as unencumbered owner of the collateral. Attachment of the PMSI occurs immediately upon the acquisition by the debtor of the collateral. Similarly, it is at this moment that the debtor becomes "owner" of the collateral for the purposes of attachment of the bank's security.[354] Therefore, attachment of the bank's security and the PMSI occurs *simultaneously*. For example:

> On January 1, D gives B a section 427 security on all present and after-acquired tractors. On February 1, D buys a tractor from C under a conditional sale agreement. D obtains immediate possession of the tractor. C does not register a financing statement. D then defaults. Both B and C claim the tractor.

Recall that under the PPSA, D must be regarded as "owner" of collateral purchased under a conditional sale agreement.[355] Therefore, in the example B's section 427 security attached on February 1, when D obtained possession of the tractor. Likewise, C's PMSI attached at the exact same moment.

The Bank Act does not provide a rule for resolving disputes between simultaneously attached interests. Thus, such disputes fall to be determined by the common law rules of property. In this regard, the courts have consistently held that a conditional vendor who has expressly reserved title to the collateral in the agreement of sale takes priority over a bank's claim under section 427, even where the bank's security pre-dated the conditional sale agreement.[356] The leading authority on this matter is the decision

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354. See Part II, Section 2.3.1 (Bank Act Security Regime – Ownership by the Debtor), above at 308.
355. See Part III, Section 2.1.1 (Third Party Owners in PPSA Jurisdictions), above at 346.
356. If the agreement containing the alleged title-retention clause is preceded by an outright sale, then the bank takes priority for its security is first to attach. See discussion in *Hallett* v. *Canadian Imperial Bank of Commerce*, *supra* note 277. Also note that under pre-PPSA conditional sales legislation, failure to register the conditional sale agreement invalidated the title-retention clause as against the bank under section 427. This is no longer the case under the PPSAs. See discussion of Arnup J. to that effect in *Rogerson*, *supra* note 85 at 676. See also *Kawai Canada Music Ltd.* v. *Encore Music Ltd., supra* note 277, at 7 which was decided under pre-PPSA conditional sales legislation.

of the Ontario Court of Appeal in *Rogerson*.[357] According to the court in *Rogerson*, where a conditional vendor expressly reserves ownership of the collateral in a conditional sale agreement, the bank's security can only attach to the debtor's possessory rights and accumulated equity (*nemo dat quod non habet*). As a result, the conditional vendor takes priority. The bank's claim is limited to any surplus to which the debtor may be entitled after satisfaction of the conditional vendor's claim.[358] Further, the conditional vendor's security interest takes priority even though it is unregistered, since the PPSA provisions do not apply to the bank.[359]

The reasoning in *Rogerson* seems to be limited to purchase-money creditors who have expressly reserved title to the collateral, such as conditional vendors and lessors under security leases. *Rogerson* did not deal with cases where: (1) there is an outright sale of the collateral on credit coupled with the grant of a security interest to the seller; or where (2) a lender grants a loan to the debtor to enable the debtor to pay cash to the seller and the lender gets a security interest in return. For example:

> On January 1, D gives B a section 427 security on all present and after-acquired tractors. On February 1, D obtains a loan from C, in order to buy a tractor. The loan agreement provides for the creation of a PMSI on the tractor in favour of C. On February 10, D buys the tractor from the seller using the loan money. C does not register a financing statement. D then defaults. Both B and C claim the tractor.

As in the previous example, both C's PMSI and B's section 427 security attached simultaneously when D acquired the tractor on February 10. In this case, however, the outcome of the dispute is uncertain. There are two possibilities:

- The first-in-time rule could be applied to give priority to the first party to have entered into a security agreement, as in the case of disputes involving conventional security interests: B

357. *Rogerson*, *supra* note 85. The court's analysis was also applied in *International Harvester, supra* note 82. In that case, however, the conditional sale agreement pre-dated the section 427 security agreement. See also *Kawai Canada Music Ltd.* v. *Encore Music Ltd., supra* note 277.
358. See the application of the *Rogerson* reasoning by Mickinlay J. in *International Harvester*, *supra* note 82 at 399.
359. *Rogerson*, *supra* note 85. See also *supra* note 338 and accompanying text.

would prevail since B is prior in time (B's agreement is dated January 1, C's agreement is dated February 1).

- It is arguable that the *Rogerson* reasoning could be applied *by extension* to cases where the purchase-money creditor has not retained ownership of the collateral: C would prevail even though its PMSI is unregistered. This view is based on the notion that the collateral is encumbered by the PMSI from the very inception, and the debtor never acquires unencumbered ownership of the collateral.[360] As a result, B's section 427 security can only attach to the debtor's residual interest in the collateral, as diminished by the pre-existing PMSI of C (*nemo dat quod non habet*). It follows that C will be given priority. This approach has been applied by at least one court.[361]

It is apparent that the status of PMSIs under the Bank Act security regime lacks any semblance of coherence or rationality. In some cases (conditional sale agreements and security leases), PMSIs are given an unqualified super-priority over pre-existing section 427 security in the same collateral. In other cases (PMSIs that do not take the form of title-retention transactions), PMSIs are either subordinated to the bank or possibly given an unqualified super-priority, depending on whether or not the security agreement was made before or at the same time (Case (3) type disputes) or after the debtor acquires the collateral (Case (2) type disputes). All of these outcomes are inconsistent with provincial law. Under the PPSA, the PMSI super-priority does not depend on the form of the transaction, and is also made subject to a number of restrictions, such as timely registration and prior notification in the case of inventory collateral.[362]

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360. A similar reasoning has been applied by the House of Lords in the case of disputes involving a prior floating charge and a subsequent mortgage. See *In re Connolly Brothers Ltd. (No. 2)*, [1912] 2 Ch. 25. Also, see *e.g. Abbey National* v. *Cann*, [1991] 1 A.C. 56, per Lord Oliver of Aylmerton, stating: "The reality is that the purchaser of land who relies upon a building society or bank loan for the completion of his purchase never in fact acquires anything but an equity of redemption, for the land is, from the very inception, charged with the amount of the loan without which it could never have been transferred at all and it was never intended that it should be otherwise."

361. See *Royal Bank of Canada* v. *Moosomin Credit Union*, [2001] S.J. No. 586 (QL), which involved a dispute between the bank and a purchase-money security interest where the security agreement did not expressly reserve title to the seller. Nevertheless, the court stated at para. 5: "the entire nature of the security agreement is that of a purchase-money security interest, and the absence of a specific reservation of title clause is of no consequence under our current PPSA regime. Title to collateral is, for most purposes, irrelevant under the PPSA."

362. See *e.g.* SPPSA subs. 34(2)(3).

A further inconsistency arises in respect of "production security interests". This expression refers to security interests in crops given to enable the debtor to produce the crops, or a security interest in certain animals given to enable the debtor acquire food, drugs or hormones for the animals. In CCPPSL Model Provinces, these production security interests are, subject to certain conditions, given priority over prior security interests in the same collateral.[363] In Ontario, the priority is given only in respect of crops.[364] When the prior interest is a section 427 security, however, the bank will be given priority over the subsequent production security interest on the basis of subsection 428(1) of the Bank Act. This undercuts the value of the production security interest priority and makes it more difficult for farmers or aquaculturalists to finance the acquisition of crops or animals.[365]

### *2.3.2 Movable Hypothecs*

Under the *Civil Code*, the hypothec is the only true consensual security right on property.[366] As a general rule, only *movable hypothecs* may compete with a section 427 security. This is because the section 427 security can only cover movable property.[367]

The resolution of disputes between movable hypothecs and section 427 security will depend on the moment at which the rights of the hypothecary creditor were acquired in relation to those of the bank. In this regard, the moment of acquisition of the hypothecary creditor's rights is determined by two events:

(1) With respect to the debtor's presently owned property, the hypothecary creditor's rights are acquired at *the moment of*

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363. See *e.g.* SPPSA subs. 34(11)(12).
364. OPPSA s. 32.
365. *Background Paper on Section 427, supra* note 340.
366. J. AUGER, A. BOHÉMIER & R.A. MACDONALD, "The Treatment of Creditors in the *Bankruptcy and Insolvency Act* and Security Mechanisms in The Civil Law of Québec", in *The Harmonization of Federal Legislation with Québec Civil Law and Canadian Bijuralism* (Ottawa: Justice Canada, 1997) 887 at 940 [AUGER et al., "The Treatment of Creditors"]. In contrast to PPSA jurisdictions, holders of security ownership devices such as instalment sales and leasing agreements are subject to their own distinct rules. Disputes between such devices and section 427 security are resolved based on the creditor's status as owner (see Part III, Section 2.1.2 (Third Party Owner Disputes in Québec), above at 350).
367. Subject those cases where the section 427 security collateral becomes affixed to real property. See para. 427(2)(d) *in fine*, subs. 428(2) *in fine* and subs. 428(3).

*publication* of the hypothec, not the moment of its creation.[368] The reason is that, although the hypothecary creditor may acquire rights against the debtor at the moment of creation, these rights are not effective against the bank until the moment of publication.[369] Further, since advance registration of a hypothec is *not* allowed under the *Civil Code*, publication will necessarily occur after creation.[370]

(2) With respect to the debtor's after-acquired property, the hypothec does not attach to such property until the debtor becomes the owner thereof.[371]

As regards the bank, recall that the section 427 security attaches: (1) to debtor's presently owned property at the time of delivery of the security document; and (2) to the debtor's after-acquired property as and when the debtor becomes owner thereof.[372] In light of the above, competitions between movable hypothecs and section 427 security, may give rise to three possible cases:

**Case (1): The hypothec is published after the attachment of the section 427 security.**

In Case (1) type disputes, the competing hypothec is created and published after the attachment of the section 427 security. In these cases, subsection 428(1) applies to give priority to the bank over the hypothecary creditor, whose rights in the collateral are *subsequently* acquired. This leads to outcomes that are inconsis-

368. This position is also taken in CIOTOLA, *Droit des sûretés*, *supra* note 14 at 359. Note that this article's analysis does not take account of the special rules applicable to "floating hypothecs", whose effects are generally suspended until registration of a notice after default (art. 2715 C.C.Q.). CIOTOLA, *supra* note 14 at 360, states that priority between floating hypothecs and section 427 security will be determined based on the date of the publication of a notice of crystallization.

369. Art. 2941 C.C.Q., *a contrario*.

370. See Part II, Section 3.3 (Civil Code – Publication), above at 317.

371. See art. 2670 C.C.Q., which provides that "[a] hypothec on the property of another or on future property begins to affect it only when the grantor acquires title to the hypothecated right". See also Part II, Section 2.3.3 (Civil Code Hypothecary Regime – Ownership by the Debtor), above at 312. It is understood that, under the *Civil Code*, the moment of "attachment" has no impact whatsoever on the rank of the hypothec, which is generally determined by the moment of publication. However, the moment of "attachment" of the hypothec is central to the application of the Bank Act's basic temporal priority scheme. In this regard, art. 2670 C.C.Q. is clear to the effect that a hypothec on future property only "attaches" at the moment when the debtor acquires such property.

372. Part II, Section 2.3.1 (Bank Act Security Regime – Ownership by the Debtor), above at 308.

tent with the rules of the *Civil Code*. Consider the following example:

> On January 1, D gives B a section 427 security on all present and after-acquired tractors. On February 1, C sells a tractor to D on credit, and creates a hypothec on the tractor in the contract of sale. On February 5, C publishes its hypothec. D then defaults. Both C and B claim the tractor.

In this case, the *Civil Code* gives C, as vendor, a "super-priority" over prior movable hypothecs, because C's hypothec was published within fifteen days after the sale.[373] In contrast, since B is claiming the tractor as after-acquired property under a pre-existing section 427 security agreement, B takes priority over C. The reason is that C's rights are subsequently acquired: B's section 427 security attached on February 1, C's rights only became effective against the bank on February 5.

A further difficulty may arise in Case (1) type disputes if the restricted ownership theory is adopted. The implication of the bank becoming owner of the collateral under section 427 is that a subsequently created hypothec *cannot* attach to such collateral, which is no longer owned by the debtor.[374] This may lead to incoherent outcomes. For example:

> On January 1, D grants B a section 427 security on a tractor. On February 1, D grants C a hypothec on the *same tractor*. C publishes its hypothec the same day. On March 1, an execution creditor (C1) seizes and sells the tractor. C claims the proceeds of sale. B is not a party to the dispute.

Under Québec law, C may exercise its rights as hypothecary creditor upon the proceeds of sale of the tractor, and have its claim paid out in preference over C1's unsecured claim.[375] However, because the bank acquired ownership of the tractor on February 1, C's hypothec never affected the tractor. On this basis, C1 could argue that C is a mere unsecured creditor who must share the proceeds of sale proportionately to its claim. Similarly, D might also demand the nullification of the seizure in execution on the ground that D does not own the property.[376] These unreasonable outcomes illustrate the irrationality of the restricted ownership theory in light of the unitary concept of ownership under civil law.[377]

373. Art. 2954 C.C.Q.
374. Art. 2670 C.C.Q.
375. Arts. 2646, 2647 C.C.Q. and art 604 C.C.P.
376. Art. 596(4) C.C.P.
377. See *Bérard, supra* note 229 at para. 66, Baudouin J.

**Case (2): The hypothec is published before the attachment of the section 427 security.**

In Case (2) type disputes, the competing hypothec is published before the attachment of the section 427 security.[378] For example:

> On January 1, D grants C a hypothec on a tractor. C publishes its hypothec the same day. On February 1, D grants B a section 427 security on *the same* tractor. Both C and B claim the tractor.

In this case, the rights of the hypothecary creditor were acquired *prior* to those of the bank. Therefore, subsection 428(1) does not apply, and the dispute falls to be determined according to the *Civil Code*. This is problematic, for two reasons: (1) the *Civil Code* does not expressly contemplate the section 427 security; and (2) the civil law characterization of the section 427 security remains uncertain,[379] thereby making it difficult to integrate the security within the *Civil Code* priority framework. Nevertheless, it can safely be said that the prior hypothecary creditor will take priority over the bank. The registration of a notice of intention to give security under section 427 does not count as "publication" within the meaning of the *Civil Code*. As regards civil law, the bank's rights are therefore ineffective against third persons.[380] The implication is that the bank has no special status as against hypothecary creditors for the purposes of the *Civil Code*.[381] This conclusion applies even if the restricted ownership theory prevails and the bank is considered owner of the collateral. The reason is that a hypothecary creditor may exercise its hypothecary rights against the owner of property.[382]

Should the hypothecary creditor *fail to publish* its hypothec before the attachment of the section 427 security, however, the bank will prevail. Continuing with the previous example, if C had not published its hypothec on the tractor until March 1, then as

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378. A variant is when the competing hypothec attaches to after-acquired property *before* the attachment of the section 427 security. This case is resolved in the same way as Case (2) type disputes.
379. See Part III, Section 1.2.1 (Civil Law Characterization of the Section 427 Security), above at 338.
380. Art. 2941 C.C.Q.
381. Arts. 2646, 2647 C.C.Q.
382. Arts. 2660, 2663, 2751 C.C.Q. See also *Sous-ministre du Revenu du Québec* v. *Formulations Epoxyde Beaudry Inc.*, *supra* note 229 at 137 (the case involved a legal hypothec).

against the bank, C's rights in the property were not acquired until that date. Since the bank's rights were acquired on February 1, the bank would take priority on the basis of subsection 428(1).

**Case (3): The hypothec and section 427 security attach simultaneously to the after-acquired property of the debtor.**

Case (3) type disputes will occur when both the section 427 security and the hypothec cover after-acquired property of the debtor.[383] Since both the section 427 security and the hypothec attach as and when the debtor becomes owner of such property, attachment will occur *simultaneously*. For example:

> On January 1, D grants B a section 427 security on all present and after-acquired tractors. On February 1, D grants C a movable hypothec on all present and after-acquired tractors. C publishes its hypothec on the same day. On February 10, D buys a tractor. On March 1 D defaults. Both B and C claim the tractor.

In this example, both the hypothec and the section 427 security attached simultaneously when the debtor bought the tractor on February 10. Since the Bank Act contains no provision indicating how such a priority dispute should be resolved, it falls to be determined in accordance with the rules of the *Civil Code*.[384] Therefore, for the reasons given when examining Case (2) type disputes (i.e. the bank has no special status as against hypothecary creditors under civil law), the hypothecary creditor should take priority.

This outcome is, however, far from being certain, as a number of courts and commentators in Québec have argued that the bank's rights under section 427 are deemed *retroactively* to have been acquired at the date of delivery of the security document, even with respect to after-acquired property.[385] If this approach is adopted, the bank will take priority under subsection 428(1), because the hypothecary creditor's rights are acquired *subsequently* (in the above example, B's rights in the tractor are deemed

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383. More precisely, the hypothec will charge a universality of movable property of the debtor (art. 2665 C.C.Q.).
384. MACDONALD, "A Civil Law Analysis", *supra* note 7 at 1032, 1061; CUMING & WOOD, "Compatibility", *supra* note 14 at 276.
385. See Part II, Section 2.3.1 (Bank Act Security Regime – Ownership by the Debtor), above at 308.

to have been acquired on January 1, while C's rights were not acquired until February 10).

Given these contradictory outcomes, it is impossible to accurately predict the relative priority positions of a bank holding a section 427 security and of a hypothecary creditor with respect to after-acquired property.

### *2.3.3 Critical Assessment*

Disputes with consensual security rights serve to emphasize at least three kinds of problems with the current Bank Act security regime.

- *Complexity and uncertainty.* It is apparent that the application of the Bank Act's priority scheme based on order of attachment is extraordinarily complex. This increases the probability for judicial error, and makes it more difficult for credit-grantors to accurately predict their relative priority position in relation to a potential section 427 security. The complexity is further intensified in the case of disputes over after-acquired property, where the conflicting rights may potentially attach *simultaneously*. Resolving priority disputes between simultaneously attached rights in collateral is an arduous exercise, which leads to considerable uncertainty. This is especially true in Québec, where there is no consensus as to the time of attachment of the section 427 security to after-acquired property. Ultimately, the foregoing account serves to illustrate the superiority of registration based priority systems.

- *Conflict with provincial legislative policy*. Many of the outcomes produced by the Bank Act priority scheme conflict with provincial legislative policy. In PPSA jurisdictions, depending on the form and circumstances of the transaction, PMSIs are either granted an unqualified super-priority or subordinated to the bank. This is inconsistent with the PPSA position, which gives a PMSI priority regardless of the form of the transaction, but makes the priority subject to certain restrictions. Similarly, the priority conferred upon production security interests by the PPSA is ineffective under the Bank Act security regime. In Québec, the priority given to the vendor having created a hypothec in the contract of sale suffers the same fate.

- *Commercially unreasonable outcomes*. In PPSA jurisdictions, a prior unregistered security interest will defeat a subsequent

section 427 security, despite the fact that the bank has no means by which it can learn of its existence.[386] The problem does not arise in Québec, where the hypothecary creditor's rights are not acquired as against the bank until the date of publication.[387]

## 2.4 Non-Consensual Security Rights[388]

### *2.4.1 Non-Consensual Security Rights In Common Law Jurisdictions*

There exists a great diversity of non-consensual security rights in common law jurisdictions, arising under both federal and provincial law. In some cases, these security rights are created in favour of private creditors; in others, they are created in favour of federal and provincial government departments, agencies and commissions for monies owing to them. Due to this diversity, it is not possible to conduct an exhaustive analysis of all non-consensual security rights that may compete with a section 427 security in common law jurisdictions.[389] Rather, it will be sufficient to use the following three examples for purposes of the present analysis:

(1) the possessory and non-possessory liens granted to *repairers* of items of personal property in respect of their claims, under the Ontario *Repair and Storage Liens Act* (the "*RSLA*").[390]

(2) The statutory charge created in favour of the Alberta Worker's Compensation Board, securing amounts due to the Board under the Alberta *Workers' Compensation Act*

386. WOOD, "Federal Security Interests", *supra* note 5 at 78.
387. *Background Paper on Section 427*, *supra* note 340.
388. A non-consensual security right is one that arises not through agreement of the parties but through operation of the law. Because of the special rule regarding the "claim of [any] unpaid vendor", the non-consensual security rights of unpaid vendors will be discussed separately. See the discussion in Part III, Section 2.6 (Special Priority over the "Claim of any Unpaid Vendor"), below at 387.
389. For a more general discussion of non-consensual security rights in common law jurisdictions, see R.J. WOOD and M.I. WYLIE, "Non-Consensual Security Interests in Personal Property", (1992) 30(4) *Alta. L. Rev.* 1055 [WOOD & WYLIE, "Non-Consensual Security Interests"].
390. *Repair and Storage Liens Act*, *supra* note 319. For an example of similar legislation in another province, see the Alberta *Garage Keepers' Lien Act*, R.S.A. 2000, c. G-2.

(the "*WCA*"), and charging all present and after-acquired property of the employer;[391] and

(3) The statutory trust created in favour of the Crown under the so-called "super-priority" provisions of the *Income Tax Act* (the "*ITA*"), deeming certain property of a person that fails to remit employee payroll deductions to be held in trust and to be beneficially owned by the Crown.[392]

In the interests of simplicity, the term "statutory lien" shall be used hereinafter to refer to all kinds of non-consensual security rights, including liens, charges and deemed trusts. The creditor holding a statutory lien will be referred to as a "lienholder".

Despite their many differences, each of the above statutory liens have two basic characteristics. First, they give the lienholder a right *in rem,* exercisable against the property of the debtor and securing the payment of amounts owed to the lienholder. Secondly, subject to meeting certain requirements, the statutory liens are expressly given priority over prior security interests in the property to which they attach.[393] Consequently, in a dispute between a statutory lien and a section 427 security over the same property the statutory lien should take priority, *prima facie*.

In reality, however, it is not that simple. As usual, in order to resolve disputes between conflicting interests under the Bank Act, it is necessary to begin by ascertaining the moment at which the competing interest (in this case, the statutory lien) attached to the collateral in relation to the rights of the bank under its section 427 security. In this regard, there are three possible cases:

**Case (1): The statutory lien arises before the section 427 security agreement.**

Where the statutory lien comes into existence and attaches *before* the section 427 security is given to the bank, the Bank Act does not provide a priority rule. Therefore, it is necessary to find another source of legal rules to resolve the dispute. In each of the examples mentioned above, the statute creating the lien, charge

391. *Workers' Compensation Act*, R.S.A. 2000, c. W-15, subs. 129(1)(2).
392. *Income Tax Act,* R.S.C. 1985, c. 1. (5th Supp.), as am. subs. 227(4)(4.1).
393. See *RSLA*, *supra* note 319, ss. 6, 7; *WCA*, *supra* note 391, subs. 129(3); *ITA*, *supra* note 392, subs. 224(1.3).

or deemed trust gives priority to the lienholder. Thus, assuming all pre-conditions to priority are met, these statutory liens will take priority over a subsequent section 427 security. In the absence of a statutory priority rule, the common law principle, *nemo dat quod non habet* would have applied to determine priority based on order of attachment: in this case, the prior attached statutory lien would have taken priority.[394]

**Case (2): The statutory lien arises subsequently to the section 427 security agreement.**

In practice, the section 427 security is most likely to have been created first. The reason is that consensual security interests are usually taken when the debtor is in good financial health, while statutory liens often arise when the debtor is in financial difficulties and failing to meet its obligations.[395] Since priority disputes at common law are generally resolved based on the order of attachment,[396] prior secured creditors will usually prevail over subsequently created statutory liens.

In some cases, legislatures have attempted to reverse this outcome by including express priority language in the statute creating the lien. The language purports to give priority to the statutory lien over all other competing rights, even pre-existing ones. Each of the above mentioned examples provides a striking illustration of such language.[397] In disputes with PPSA security interests and other provincial security rights, it is clear that the statutory lien will take priority if the conditions of the statute are met. Where the pre-existing interest is a section 427 security, however, the outcome depends on whether or not the statutory lien is created by federal or provincial law.

***(a) Provincial Statutory Liens***

Where the competing statutory lien is created by provincial law and arises *subsequently* to the bank's section 427 security, the

394. That the general rule at *common law* is that priorities between non-consensual liens and consensual security interests are to be resolved by order of attachment was confirmed by the S.C.C. in *Sparrow*, *supra* note 84. In particular, see the decision of Gonthier J. at para. 87.
395. WOOD & WYLIE, "Non-Consensual Security Interests", *supra* note 389 at n. 147.
396. See *supra* note 394 and accompanying text.
397. See legislation cited at notes 390, 391 and 392, *supra*.

dispute is governed by subsection 428(1) of the Bank Act. The bank holding a prior section 427 security should take priority, even in cases where the provincial statute clearly and unambiguously purports to give priority to the statutory lien.[398] In such a case, there is an operational conflict between the provincial statute and subsection 428(1) of the Bank Act. The federal statute must prevail on the basis of the doctrine of federal paramountcy. For example, the section 427 security should prevail over subsequently created statutory liens under the *RSLA* and the *WCA*.

This outcome is clearly inconsistent with the provincial legislative policy underlying the creation of these liens. It is therefore not surprising that many courts have refused to give effect to the subsection 428(1) priority, and have given priority to subsequently created statutory liens.[399] Although these cases may be justifiable on policy grounds, they are clearly incorrect as a matter of law.[400] Nevertheless, these cases are so numerous[401] that it is impossible to predict the outcome of disputes between section 427 security and provincially created statutory liens, such as those created under the *RSLA* and the *WCA*.

***(b) Federal Statutory Liens***

Where the statutory lien is created by federal legislation, the doctrine of federal paramountcy does not apply to resolve the conflict between the Bank Act (under which the bank takes priority) and the federal legislation (under which the statutory lien takes priority). It is necessary to resort to general principles of statutory interpretation in order to determine which provision was

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398. *Re Fermo's, supra* note 146; *Royal Bank of Canada* v. *The Government of Manitoba*, *supra* note 212. In some cases, the bank has been given priority on the basis of the *nemo dat* principle. See *e.g. Sparrow, supra* note 84; *C.I.B.C.* v. *Klymchuk* (1990), 70 D.L.R. (4th) 340 (Alta. C.A.); *Re Elec. Fittings & Foundry Co.*, 58 O.L.R. 364.

399. *Re Richmac Interiors Ltd.* (1996), 38 Alta. L.R. (3d) (Alta. Q.B.), 1996 CarswellAlta 119; *Royal Bank of Canada* v. *Canadian Aero-Marine Industries Inc.* (1989), 67 Alta. L.R. (2d) 172 (Q.B.); *Royal Bank of Canada* v. *Erdman*, [1986] 1 W.W.R. 733 (Sask. Q.B.); *Armstrong* v. *Coopers & Lybrand Ltd.*, *supra* note 161; *Johnson* v. *Bank of N.S.* (1985), 41 Sask. R. 292 (Sask. Q.B.); *Canada Trust Co.* v. *Cenex Ltd.*, [1982] 2 W.W.R. 361 (Sask. C.A.), leave to appeal to S.C.C. refused (1982), 16 Sask. R. 180; *Re Swaan* (1980), 37 C.B.R. (N.S.) 1 (B.C.S.C.).

400. See Part II, Section 4.1 (The Historical Perspective), above at 319.

401. See cases cited at note 399, *supra*.

intended by Parliament to outrank the other.[402] Although it is difficult to generalize on this matter, it is probable that the legislative provision which gives priority to the statutory lien will either expressly or impliedly indicate that it is intended to operate notwithstanding any other. For example, the "super-priority" provisions of the *ITA* are clearly intended to prevail over the subsection 428(1) priority, as they are said to operate "notwithstanding any other provision of ... any other enactment of Canada". As a result, in a competition between a section 427 security and a deemed trust under the *ITA*, the deemed trust should prevail, regardless of the order of attachment of the competing interests.

**Case (3): The statutory lien and the section 427 security attach simultaneously to the debtor's after-acquired property.**

Case (3) type disputes may arise where the statutory lien covers not only property owned by the debtor at the time of the creation of the lien, but also property acquired by the debtor *after* that time (i.e. after-acquired property). For example, both the charge under the *WCA* and the deemed trust under the *ITA* cover after-acquired property.[403] A statutory lien cannot attach until the debtor acquires the property. This is also true of the section 427 security.[404] Consequently, as regards property acquired by the debtor *after both interests have been created*, the interests attach *simultaneously*. For example:

> On January 1, D grants B a section 427 security on all present and after-acquired inventory. On February 1, D becomes indebted to the Alberta Worker's Compensation Board (the "Board"). On March 1, D buys an item of inventory (the "widget"). On April 1, D goes bankrupt. The Board claims the widget under the statutory charge created in its favour under the *WCA*. B claims the widget under its section 427 security.

In the example, both B's section 427 security and the Board's statutory charge attached *at the same time* when D acquired the widget on March 1. The Bank Act does not provide a priority rule

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402. See generally R. SULLIVAN, *Statutory Interpretation* (1997), at Chapter 14 (QL).
403. That the deemed trust under the *ITA* covers after-acquired property was recently confirmed by a unanimous judgement of the Supreme Court in *First Vancouver Finance* v. *M.N.R* (2002), 212 D.L.R. (4th) 615 (S.C.C.).
404. See discussion regarding the time of attachment of the section 427 security, above at 308.

to resolve disputes in such cases. Thus, it is necessary to look to another body of law to determine which interest has priority. The *WCA* clearly states that the statutory charge should take priority and there is no reason to prevent the priority from applying in this case. The same result should follow in the case of the deemed trust provisions of the *ITA*.

The problem is that such an approach is not being used by the courts. Faced with a competition between a simultaneously attached section 427 security and a statutory lien, the courts have attempted to rely on the *nemo dat* rule. In order to do so, they appear to have deemed one of the competing interests to have attached *prior* to the other. In one case, it was held that the debtor's after-acquired property was encumbered *ab inito* by the statutory lien. As a result, the statutory lien took priority over the bank's security, which could only attach to the debtor's residual interest.[405] The opposite conclusion was reached in a more recent case: it was held that it was the bank's security which attached *prior* to the statutory lien.[406] These conflicting outcomes provide a noteworthy example of the pitfalls involved in the Bank Act's unduly complex priority scheme based on order of attachment.

### *2.4.2 Non-Consensual Security Rights in Québec*

There are three main kinds of non-consensual security rights under the *Civil Code*: (1) the legal hypothec; (2) the right of retention; and (3) the prior claim.[407]

#### *2.4.2.1 Legal Hypothecs*

A legal hypothec is a hypothec that arises by operation of the law, that is, without the need for an agreement between the parties. The claims that may give rise to a legal hypothec are listed in article 2724 C.C.Q. Insofar as disputes with section 427 security are concerned, only the claims listed in article 2724(1) are relevant.[408] The article creates a legal hypothec that secures certain

405. *Armstrong* v. *Coopers & Lybrand Ltd.*, *supra* note 161.
406. *Abraham* v. *Canadian Admiral Corp.*, *supra* note 83.
407. As regards federal non-consensual security rights that also apply in Québec (such as the *ITA* "super-priority" provisions), see by analogy the analysis for common law jurisdictions: Part III, Section 2.4.1 (Non-Consensual Security Rights In Common Law Jurisdictions), above at 375.
408. The legal hypothec of persons having taken part in the construction or renovation of an immovable (art. 2724(2) C.C.Q.) and the legal hypothec of a syndicate of co-owners (art. 2724(3) C.C.Q.) only charge immovable property and are

claims of the government for sums due under fiscal laws and of legal persons established in the public interest under a specific provision of law. In this regard, there is a panoply of legislation that establishes legal hypothecs in favour of public agencies and other public bodies.[409] One example is the legal hypothec established in favour of the *Commission de la santé et de la sécurité du travail* securing amounts due to the Commission under the *Act respecting industrial accidents and occupational diseases*.[410]

Legal hypothecs may charge either movable or immovable property of the debtor.[411] As regards movable property, they take effect only from their registration in the *Register of Personal and Movable Real Rights*.[412] Consequently, disputes between section 427 security and legal hypothecs are subject to the same analysis as those involving conventional hypothecs, discussed above.[413] Roughly speaking, the legal hypothec will only have priority if it is registered before the attachment of the section 427 security.[414]

#### *2.4.2.2 Rights of Retention*

A "right of retention" is a right to retain the property of another pending full payment of the creditor's claim against that person.[415] The *Civil Code* grants such rights in many instances.[416]

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therefore not likely to come into competition with a section 427 security (except in cases where the section 427 collateral becomes affixed to immovable property, see *supra* note 366 and accompanying text). The legal hypothec under a judgement (art. 2724(4) C.C.Q.) is essentially a process for executing a judgement (see PAYETTE, *Les sûretés réelles*, *supra* note 80 at 666). The judgement creditor will virtually always be *subsequent* to the bank and will lose under subs. 428(1), like other execution creditors. See Part III, Section 2.5 (Unsecured Creditors and Trustees in Bankruptcy), below at 385.

409. For examples of such legislation, see PAYETTE, *Les sûretés réelles*, *supra* note 80 at 624-625.
410. R.S.Q., c. A-3.001, s. 324, as am.
411. Art. 2725 (1). It is questionable whether they may also charge *after-acquired* property of the debtor (PAYETTE, *Les sûretés réelles*, *supra* note 80 at 625).
412. Arts. 2725 (2), 2934 C.C.Q.
413. See Part III, Section 2.3.2 (Movable Hypothecs), above at 369.
414. See CIOTOLA, *Droit des sûretés*, *supra* note 14 at 365. See *Sous-ministre du Revenu du Québec* v. *Formulations Epoxyde Beaudry Inc.*, *supra* note 229 (the relevant date was that at which the claim became due and payable, but the case was *prior* to the new *Civil Code*).
415. The right of retention has been characterized as a "quasi-security" mechanism as it is essentially a mechanism for enforcing performance of the debtor's obligation. For a detailed discussion of the right of retention, see PAYETTE, *Les sûretés réelles*, *supra* note 80 at 98-109.
416. See *e.g.* art. 2058 C.C.Q. (carrier); art. 2185 C.C.Q. (mandatary); art. 2293 C.C.Q. (depositary).

Significantly, a right of retention is granted to those persons who have detention of the property of their debtor with the latter's consent, if their claim is exigible and is directly related to the detention of the property (article 1592 C.C.Q.). This right would arise, for example, in favour of the repairer of property pending full payment of the cost of the repairs.

Disputes between the holder of a right of retention and a bank under section 427 will depend on the moment at which the right of retention arises in relation to the rights of the bank. In this regard, there are two possible cases:

**Case (1): The right of retention arises prior to the attachment of the section 427 security.**

A right of retention could arise prior to the attachment of the section 427 security. Consider the following example:

> On January 1, D hands over a tractor to C to have it repaired. The repairs are completed on January 10, at which point C's claim for the cost of repairs becomes exigible. On February 1, D gives B a section 427 security on all present and after-acquired tractors. On March 1, D defaults. C's claim has not yet been paid, and C continues to hold the tractor. B claims the tractor in C's hands.

In the example, C's right of retention arose on January 10. B's section 427 security attached on February 1. Since C's rights arose *prior* to the bank's, the subsection 428(1) priority over subsequent rights does not apply, and the dispute falls to be determined according to the *Civil Code*. In this regard, article 1593 C.C.Q. provides that the right of retention may be exercised against anyone, which clearly includes the bank holding a section 427 security.[417]

**Case (2): The right of retention arises after the attachment of the section 427 security.**

Where the right of retention arises *after* the attachment of the section 427 security, the subsection 428(1) priority over subsequent rights applies and the bank prevails.[418] Article 1593 C.C.Q.

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417. Art. 1593 C.C.Q. *Contra*, see CIOTOLA, *Droit des sûretés*, *supra* note 14 at para. 3.138, who argues that art. 2770 C.C.Q., which forces the holder of the right of retention to surrender the property to the hypothecary creditor subject to his priority should apply by analogy to the bank.

418. Subject to an express or implied authorization to deal with the property (*Bank of Boston Canada* v. *Montreal Fast Print (1975) Ltd., supra* note 86) see Part III,

(providing that the right of retention may be exercised against anyone) conflicts with subsection 428(1) and is therefore rendered inoperative on the basis of federal paramountcy. Continuing with the previous example, the right of retention would have arisen *after* the attachment of the section 427 security (February 1) if the tractor had been handed over to C for repairs on February 10. In such a case, C's right of retention is overridden by the Bank Act, and C is bound to surrender the property to B.

This outcome is in direct conflict with *Civil Code* policy. Under the *Civil Code*, the holder of a right of retention is also bound to surrender the property when a hypothecary creditor exercises its rights in respect of the property.[419] However, upon surrender, the right is replaced by a prior claim, which entitles the retainer to be paid in preference over other creditors out of the proceeds of sale of the surrendered property.[420] The problem is that this prior claim is ineffective against the bank under section 427 (see discussion of prior claims under heading 2.4.2.3, below). The result, then, is that in disputes with a section 427 security, the holder of a subsequent right of retention is stripped of all its rights under the *Civil Code.*

*2.4.2.3 Prior Claims*

A prior claim is essentially a right of a creditor to have its claim paid out in preference over other creditors from the proceeds of sale of the debtor's property.[421] The claims that are given such priority are listed in article 2651 C.C.Q.[422] Of particular relevance for present purposes are: (1) claims of persons having a right of retention;[423] (2) claims of the government for amounts due under fiscal laws;[424] and (3) claims of municipalities for taxes on movables in respect of which the taxes are due.[425] These prior claims are exercised in respect of the proceeds of sale of the movable property of the debtor, and may therefore compete with a bank holding

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Section 2.2 (Subsequent Buyers of the Collateral), above at 354. For *contra,* see CIOTOLA, *Droit des sûretés*, *supra* note 14 at para. 3.138.

419. Art. 2770 C.C.Q.
420. Art. 2651 C.C.Q.
421. Art. 2650 C.C.Q.
422. Note that in addition to those listed in art. 2651 C.C.Q., a few other prior claims not mentioned in the *Civil Code* are conferred upon other public bodies by specific legislation. See PAYETTE, *Les sûretés réelles*, *supra* note 80 at 121.
423. Art. 2651(3) C.C.Q.
424. Art. 2651(4) C.C.Q.
425. Art. 2651(5) C.C.Q.

section 427 security.[426] Further, prior claims are effective against other creditors without being published.[427] They rank before all other creditors, including hypothecary creditors, without regard to their date.[428] This raises the question: what is the status of prior claims in a dispute with a bank holding a section 427 security?

The answer, it seems, is that as against a section 427 security prior claimants are in no better position than unsecured creditors.[429] With one exception,[430] prior claims are not real rights, and prior claimants have merely a personal claim against the debtor. They do not acquire rights against the debtor's property until they take steps to execute. It follows that the rights of prior claimants are necessarily acquired *subsequently* to those of the bank, who will take priority under subsection 428(1). Further, under the restricted ownership theory, prior claims may not even be executed against collateral under a section 427 security agreement, because the property is no longer part of the debtor's patrimony.[431]

### *2.4.3 Critical Assessment*

The two main problems of the current Bank Act security regime are readily apparent in the case of disputes with non-consensual security rights:

- *Conflict with provincial legislative policy*. The inconsistencies between federal and provincial law in this area are obvious. Subsection 428(1) of the Bank Act effectively overrides any provincial rule of law that purports to give priority to subsequently acquired non-consensual security rights, whether they be liens, charges, deemed trusts, rights of retention or prior claims. Moreover, the Bank Act security regime effectively discriminates between federally and provincially created non-consensual security rights. Where the security right is given priority

426. AUGER et al., "The Treatment of Creditors", *supra* note 366 at 933.
427. Art. 2655 C.C.Q.
428. Arts. 2647, 2650, 2657 C.C.Q. As amongst themselves, they rank according to the order set forth in art. 2651 C.C.Q.
429. See Part III, Section 2.5 (Unsecured Creditors and Trustees in Bankruptcy), below at 385.
430. Exceptionally, prior claims of municipalities and school boards for property taxes constitute a real right against taxable immovable property (art. 2654.1 C.C.Q.). These prior claims will likely not compete with a section 427 security since they are executed on immovable property (subject those cases where the section 427 security collateral becomes affixed to real property, see *supra* note 367 and accompanying text).
431. *Bérard*, *supra* note 229 at paras. 37-38.

pursuant to federal legislation, the doctrine of federal paramountcy does not apply to override the priority. It is difficult to find any justification for such an arbitrary rule, especially bearing in mind that there may be valid policy reasons underlying the provincial legislature's decision to prefer the particular class of creditors in question.

- *Complexity and uncertainty*. In response to the above difficulties, many courts have seemingly ignored the express priority conferred upon banks under subsection 428(1) of the Bank Act. While these cases may be justifiable on policy grounds, they are a source of considerable uncertainty in resolving disputes between section 427 security and provincially created non-consensual security rights. This is in addition to the uncertainty that is already caused by the complex Bank Act priority scheme based on order of attachment.

### 2.5 Unsecured Creditors and Trustees in Bankruptcy

Prior to bankruptcy, unsecured creditors may assert claims against their debtor's property through provincial judgment enforcement measures. In both common law jurisdictions and Québec, the most common method of enforcement involves the issue of a writ directing an executing officer to seize the debtor's personal or movable property to the amount of the debt, sell it, and pay the proceeds to the creditor in satisfaction of the debt.[432] Once a bankruptcy occurs, however, the enforcement rights of unsecured creditors are suspended. The property of the debtor vests in the trustee in bankruptcy, and the unsecured creditors must look to the trustee to assert their claims. The trustee, as the representative of these creditors, becomes the exclusive repository of all claims and actions in relation to the debtor's property.[433]

A dispute between the bank and the debtor's unsecured creditors or trustee may arise in cases where these latter parties assert their claims against property of the debtor that is covered by the bank's section 427 security. As a general rule, so long as the section 427 security is valid and a notice of intention has been properly registered, the bank will take priority. Only the residual interest of the debtor in the property (i.e. the surplus that is left

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432. ZIEGEL et al., *Secured Transactions*, *supra* note 32 at 3. For Québec, see *e.g.* arts. 569, 580, 615 C.C.P.

433. *Re Giffen*, *supra* note 168 at paras. 38-39.

over after the payment of the bank's loan), will be available for unsecured creditors or the trustee in bankruptcy.[434]

The basis for this general rule is as follows. Unsecured creditors have merely a personal claim against the debtor, and do not acquire rights against the debtor's property until they take steps to execute.[435] A trustee in bankruptcy does not acquire a right in the debtor's property before the occurrence of bankruptcy. These events will undoubtedly occur *subsequently* to the signature of the section 427 security agreement. It follows that the rights of unsecured creditors and trustees are necessarily acquired *subsequently* to those of the bank. Consequently, the bank is given priority by subsection 428(1) of the Bank Act. Moreover, the *Bankruptcy and Insolvency Act*[436] (the *"BIA"*) also recognizes the priority of the bank's rights in bankruptcy. The *BIA* contains a number of provisions which indicate that, as a general rule, bankruptcy does not affect the rights of secured creditors.[437] Further, section 212 of the *BIA* expressly states that nothing in the *BIA* "interferes with or restricts the rights and privileges conferred on banks [by the Bank Act]",[438] except for certain specifically mentioned provisions ordinarily applicable to secured creditors.[439] In the result, it is clear that the bank may enforce its section 427 security notwithstanding bankruptcy.

Where the bank fails to register a notice of intention, however, the bank's security is expressly declared by paragraph 427(4)(a) of the Bank Act to be void as against the creditors of the debtor. This provision also applies to invalidate the security against the debtor's trustee in bankruptcy, being the representative of the creditors.[440] In such a case, the bank is for all intents and purposes in the same position as an unsecured creditor, both

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434. *Re Toronto Specialty Manufacturers Ltd.; Ex parte Loeb* (1932), 14 C.B.R. 77 (Ont. S.C. in Bkcy.).
435. *Davanti supra* note 118 at 368. For Québec, see PAYETTE, *Les sûretés réelles*, *supra* note 80 at 6-7, 270. This reasoning would also apply to the judgement creditor who acquires a legal hypothec under arts. 2724(4) and 2730 C.C.Q.
436. *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3.
437. See *BIA*, s. 2 "Secured Creditor"; and subs. 69.3(2), 70(1), 71(2).
438. It is clear that s. 212 of the *BIA* refers to the rights of banks under s. 427. See MACDONALD, "A Civil Law Analysis", *supra* note 7 at 1097-1098. See the discussion of cases on this subject in P. BOURQUE, "Les Banques face à la loi sur la faillite sont-elles vraiment privilégiées?", (1981) *Meredith Memorial Lectures* 16.
439. The provisions which remain applicable are ss. 69 to 69.4, 81, 81.1, 81.2 and Part XI of the *BIA*.
440. *Hickman*, *supra* note 118; *Blaiklock*, *supra* note 118.

before and after bankruptcy, unless it holds another valid security.[441] It should be noted, however, that certain recent case law suggests that if a bank takes possession of the collateral, creditors who subsequently attempt to enforce their rights against such collateral or a subsequently appointed trustee can no longer invoke the invalidity of the section 427 security for reason of late registration of the notice of intention.[442] This proposition is questionable, as the language of paragraph 427(4)(a) seems to indicate that a bank's improperly registered security is void *ab inito*. In such circumstances, all other creditors and the trustee should have priority over the bank, even if they intervene only after the bank has taken possession of the collateral.[443]

### 2.6 Special Priority Over the "Claim of Any Unpaid Vendor"

It may be gathered from the above analysis that, as a general rule, where the rights of a competing party arise *prior to* the section 427 security agreement, the competing party will take priority over the bank under provincial law. With respect to unpaid vendors, however, the Bank Act purports to reverse this outcome. The rule which does this is embodied in subsections 428(1) and (2) of the Bank Act. This rule has been part of the Bank Act security regime since its inception in 1890.[444] The relevant portions of the provisions read as follows:

> (1) All the rights and powers of a bank [acquired under the document of title fiction in respect of the collateral] have...priority...over the claim of any unpaid vendor.
>
> (2) The priority referred to in subsection (1) does not extend over the claim of any unpaid vendor who had a lien on the property at the time of the acquisition by the bank of the warehouse receipt, bill of lading or security, unless the same was acquired without knowledge on the part of the bank of that lien [...] [emphasis added]

Pursuant to subsection (1), if the claim of a competing party can be characterized as a "claim of [an] unpaid vendor", the bank's security will take priority, regardless of the time of acquisition of either party's rights in the collateral. The only exception to this special priority arises when two conditions are met: (1) the third

441. See Part III, Section 2.7 (Double Documentation), below at 391.
442. See note 120, *supra*.
443. *Ibid.*
444. See *supra* note 137 and accompanying text.

party has a "lien" on the collateral at the time that the section 427 security was granted; and (2) the bank had knowledge of the "lien". The terms "claim of any unpaid vendor" ("créance de tout vendeur impayé") and "lien" ("privilège") are not defined in the Bank Act. Instead, the Bank Act relies on provincial law to provide substance to these terms. Accordingly, it is necessary to determine what competing parties are subject to this exceptional priority rule and thus subordinated to the bank.

The provision may be subject to two different interpretations. First, it has been suggested that the "claim" that is referred to in subsection (1) should be restricted to security rights that may also be characterized as a "lien" ("privilège") under provincial law, as provided in subsection (2). In other words, the priority of the bank only extends over the unpaid vendor who is claiming under a "lien" ("privilège") affecting the collateral.[445] In common law jurisdictions, this clearly refers to the non-consensual possessory lien granted to unpaid sellers at common law and under provincial sale of goods Acts, allowing unpaid sellers to retain possession of the goods sold until payment or tender of the price or where the buyer has become insolvent.[446] Under the *Civil Code of Lower Canada*, the unpaid vendor was granted three "privileged" rights that were generally thought to be caught by the provision. These were (i) the right to refuse delivery of the goods sold until payment or when the buyer was insolvent (or "right of retention"); (ii) the right to revendicate the goods for non-payment of the purchase price; and (iii) the right to have the vendor's claim paid in priority out of the proceeds of sale, or right of "privilege".[447] These rights

445. GOLDSTEIN, "A Bird's Eye View", *supra* note 14 at 93; MACDONALD, "A Civil Law Analysis", *supra* note 7 at 1060.

446. See *e.g. Sale of Goods Act*, R.S.O. 1990, c. S.1, s. 39; and *Mutchenbacker* v. *Dominion Bank* (1911), 21 M.L.R. 320 (Man. C.A.).

447. Arts. 1496-97 (right of retention), 1998-1999 (right of revendication) and 1998, 2000 (privilege) of the *Civil Code of Lower Canada*. In support of the proposition that the vendor's rights of retention, revendication and privilege were caught by the special priority over the claim of any unpaid vendor, see *Ackroyd Brothers Canada Ltd.* v. *Brackon Products Inc*., *supra* note 290 (privilege of the unpaid vendor); *In Re Paramount Leather Goods: Druker Services Banking and Coating Copr.* v. *Toronto Dominion Bank*, *supra* note 229 (privilege and right of dissolution); *In Re Eastern Wood Cop.: P.L. Robertson Mfg. Co.* v. *Lawrence*, [1975] C.S. 539 (right of revendication of unpaid vendor). See also authorities cited *infra* at note 457. *Contra*: *Acier Casteel Inc.* v. *Cie Trust Royal*, [1992] A.Q. nº 1109, where it was held that an unpaid supplier's right of revendication was *not* caught by the subs. 428(1) priority, being merely a step towards the exercise of the right of resolution. The issue has now been rendered moot by the new *Civil Code*, under which the two rights are merged: see *infra* note 449 and accompanying text.

have been largely eliminated under the *Civil Code*, and only the right of retention in the case of insolvency of the buyer remains relevant.[448] The right of revendication and privilege have been replaced by other rights that can no longer be regarded as "liens" or "privileged" rights of an unpaid vendor.[449] It is apparent that, under this first interpretation, the special priority of the bank is very limited.

Upon a literal reading, however, the provision could be given a much broader scope. The terms "claim of any unpaid vendor" could be read very generally as encompassing all rights accruing to any vendor who is in fact unpaid.[450] There is some indication of such an interpretation having received acceptance by some authors and courts.[451] Consequently, one could argue that the priority should extend over vendors claiming under prior conditional sale agreements or PMSIs in PPSA jurisdictions. The same argument could be made with respect to instalment sales and movable hypothecs taken by vendors in Québec. In addition, the rights of resolution granted to unpaid vendors under the *Civil Code* could also be preempted by this special priority. With respect to property sold under conditional or instalment sale agreements, the courts in both jurisdictions have relied on the *nemo dat* principle in order to avoid this outcome: since the bank cannot acquire any greater rights in the collateral than the debtor had himself, the bank's security either does not attach at all (in Québec), or only attaches to the debtor's residual interest in the collateral (in common law jurisdictions).[452] But this reasoning does not apply in the

448. Art. 1721 C.C.Q.

449. The right of retention in the case of non-payment of the purchase price has been replaced by a right of automatic resolution of the sale (art. 1740 C.C.Q.). The right of revendication now only exists in conjunction with the right of resolution of the sale (art. 1741 C.C.Q.). As we have seen, the numerous "privileges" which existed under the *Civil Code of Lower Canada* have been largely replaced by "prior claims" or "hypothecs". The vendor's privilege, however, has no *Civil Code* equivalent in the context of commercial dealings. See art. 2651 (3), where the unpaid vendor is only granted a prior claim for movables sold to natural persons not operating an enterprise.

450. See MACDONALD, "A Civil Law Analysis", *supra* note 7 at 1060, who disagrees with this interpretation.

451. See *e.g. International Harvester, supra* note 82 at 397, McKinlay J.A.; *Intersplice Inc.* v. *Industries Unik Ltée*, *supra* note 301 (the relevant extract is cited in *William Neilson*, *supra* note 86 at 116-118. See also MCLAREN, *Secured Transactions*, *supra* note 70 at §5.06, n. 905 and accompanying text.

452. See *e.g. International Harvester, supra* note 82. See also Part III, Section 2.1 (Third Party Owners), above at 346; and Part III, Section 2.3.1.2 (Purchase Money Security Interests), above at 363.

case of PMSIs or movable hypothecs, where the vendor has not reserved ownership of the property. Moreover, although the reasoning should also apply in the case of rights of resolution in Québec,[453] the courts have not always been consistent in this respect.[454] This raises the question of whether this second, broader interpretation is warranted so as to give priority to the bank over these latter claims.

The answer is that, in light of the history of the provision and as a matter of policy, the former, more restrictive interpretation should prevail. An excellent historical analysis of the origins of the priority of the bank over unpaid vendors has already been conducted, and it is not necessary to repeat it here.[455] It is sufficient to note that when the provision was first enacted in 1861, it was intended to protect the bank from two particular rights in existence at the time: (1) the extensive right of revendication and privilege granted to vendors under pre-Confederation civil law in the province of Québec; and (2) the more limited rights of stoppage in transit (involving a resumption of possession while the goods are in the course of transit) granted to unpaid vendors in the common law provinces.[456] The provision, then, was only intended to protect the bank against the *non-consensual possessory rights of unpaid vendors* that continued to affect the collateral once assigned to the bank under section 427; it was never intended to remove all other rights of unpaid vendors, such as consensual security rights and rights of resolution. Moreover, as a matter of policy, there appears to be no principled justification for keeping the provision today. On the contrary, the thrust of modern commercial law has been to provide additional mechanisms to protect sellers in order to encourage trade. This reason alone justifies a strict reading of the provision. This may explain why this more restrictive interpreta-

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453. The Québec Court of Appeal appears to have settled this issue, at least for the purposes of the *Civil Code of Lower Canada*. See *William Neilson*, *supra* note 86 at 112-120; and *Fonderies Franco-Belges, S.A.* c. *Import-export Dimex (Canada) Inc., supra* note 298.
454. This is precisely what occurred in *Bock et Tétrault Ltée* v. *Fonderie de l'Islet Ltée*, *supra* note 232; *In Re Paramount Leather Goods: Druker Services Banking and Coating Copr.* v. *Toronto Dominion Bank*, *supra* note 229; and *Intersplice Inc.* v. *Industries Unik Ltée*, *supra* note 301.
455. See M. PATENAUDE, "L'origine de la primauté du privilège d'une banque sur les droits d'un vendeur impayé", (1981) 22 *C. de D.* 667. The article was cited extensively in *William Neilson*, *supra* note 86 at 116-118.
456. See discussion in *William Neilson*, *supra* note 86 at 107-110.

tion has received the assent of a majority of courts and commentators.[457]

In summary, the priority of the bank over the claim of the unpaid vendor should be limited to the non-consensual possessory security rights of vendors, being: (1) in Québec, the right of retention in the case of insolvency of the buyer under article 1771 C.C.Q.; (2) in common law jurisdictions, the unpaid seller's lien provided under provincial sale of goods Acts;[458] and (3) in both jurisdictions, the right to stop delivery of goods in transit.[459] The ideal solution, however, in light of the uncertainty that it has caused and its apparently unjustifiable policy basis, would be to eliminate the provision from any further revision of the Bank Act.

### 2.7 Double Documentation

It is a common practice of banks to conclude a separate provincial security agreement in addition to the section 427 security document, covering all or part of the same collateral and securing the same obligation. This practice is commonly referred to as "double documentation".

Double documentation raises two principal difficulties. First, although the Bank Act does not prohibit double documentation,[460] at a theoretical level provincial law may preclude the practice. With respect to common law jurisdictions, it is questionable whether it is even conceptually possible for a debtor to grant two

457. *William Neilson*, *supra* note 86 at 112-120; *Knitrama Fabrics Inc.* v. *K. & A. Textiles Inc.*, *supra* note 298 at paras. 34-38; *Rogerson*, *supra* note 85, per Houlden J. ("unpaid vendor" does not include conditional seller); *Kawai Canada Music Ltd.* v. *Encore Music Ltd., supra* note 277 ("unpaid vendor" does not include conditional seller). See also MACDONALD, "A Civil Law Analysis", *supra* note 7 at 1060; GOLDSTEIN, "A Bird's Eye View", *supra* note 14 at 93-94; DEMERS, *Le financement de l'entreprise*, *supra* note 14 at 205; AUGER, "Les sûretés mobilières", *supra* note 14 at 299; CUMING & WOOD, "Compatibility", *supra* note 14 at 273; CRAWFORD, *supra* note 3 at 446.

458. See *e.g. Sale of Goods Act*, R.S.O. 1990, c. S.1, s. 39.

459. Art. 1740(2) C.C.Q. See *e.g. Sale of Goods Act*, R.S.O. 1990, c. S.1, s. 42.

460. Prior to 1967, banks were prohibited from making loans on the security of property otherwise than pursuant to the Bank Act. See para. 75(2)(d) of the 1954 Bank Act, S.C. 1953-54, c. 48. With the coming into force of the 1967 Bank Act, banks were expressly empowered to lend money and make advances on the security of property. See para. 75(1)(c) of the 1967 Bank Act, S.C. 1966-76, c. 87. This power is no longer expressly set forth in the Bank Act and must now be regarded as covered by the general permission in subs. 409(1) to engage in the business of banking. See OGILVIE, *Canadian Banking Law*, *supra* note 19 at 302.

equally ranking security interests to the same party on the same collateral.[461] Although there are countless decisions in which the facts refer to some kind of double documentation by the bank,[462] the courts do not appear to have addressed these conceptual difficulties, and the answer remains unclear.

In Québec, to the extent that the *sui generis* ownership theory is authoritative, an argument could be made to the effect that double documentation is not conceptually possible. Article 1686 of the *Civil Code*, states that "[a] hypothec is extinguished by confusion of the qualities of hypothecary creditor and owner of the hypothecated property." If under a section 427 security the bank must be regarded as owner of the property for the purposes of civil law, then it is arguable that any hypothec held by the bank on the same property is automatically extinguished by confusion. The argument has far-reaching implications. In theory, it would allow any third party embroiled in a dispute with a bank to force the bank to rely on its section 427 security. In the context of the bankruptcy of the debtor, this could be advantageous for employees or suppliers, given their special priority status over the bank under subsection 427(7) of the Bank Act. It would appear, however, that the difficulty has yet to receive any attention by courts or commentators.[463]

A second issue is whether the bank can elect between its rights under the Bank Act and the provincial regime depending on which regime is most favourable in the circumstances. The question will only arise where the rights or remedies provided for under both regimes are somehow inconsistent. Inconsistencies are likely to occur, considering the many incompatibilities between the federal and provincial perfection and priority rules that have the potential to lead to opposite outcomes. A significant example is the priority of employees' and suppliers in the context of bankruptcy under subsection 427(7) of the Bank Act, which does not have its provincial counterpart.

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461. For authors having addressed the problem from the perspective of common law jurisdictions, see CUMING & WOOD, "Compatibility", *supra* note 14 at 287-292; and ZIEGEL & DENOMME, *Ontario PPSA*, *supra* note 98 at 52-55.

462. See *e.g. Royal Bank of Canada* v. *United Grain Growers Ltd.*, *supra* note 165; *David Morris Fine Cars Ltd.* v. *North Sky Trading Inc.*, *supra* note 315 (Alta. Q.B.). See also cases cited *infra* at note 464.

463. See CIOTOLA, *Droit des sûretés*, *supra* note 14 at para. 3.136, stating that nothing in the *Civil Code* prevents banks from holding two security rights on the same collateral.

A review of the case-law suggests that banks will at least be allowed to make an initial election in favour of one regime.[464] A further question is whether the bank can simultaneously pursue inconsistent rights or remedies under both regimes. For example, can the bank obtain the best of both worlds by relying on its section 427 security to defeat one competing party and then assert its provincial security interest to defeat another?[465] Commentators have suggested that the bank should be required to elect one system, and then be prohibited from asserting its rights or remedies under the other system.[466] Despite the obvious common sense underlying this approach, its legal basis is far from being infallible.

In order to deal with these difficulties, a provision has been added to the Saskatchewan PPSA with the intention of preventing banks from taking both a section 427 security and a separate PPSA security interest covering all or part of the same collateral. The provision is contained in subsection 9(2) of the Saskatchewan PPSA, the relevant portion of which reads as follows:

> A security interest in collateral ceases to be valid with respect to that collateral to the extent that and for so long as the security interest secures payment or performance of an obligation that is also secured by a security in favour of that secured party on that collateral created pursuant to sections 425 to 436 of the *Bank Act* (Canada).

Anecdotal evidence suggests that the provision has not changed the practice of banks in Saskatchewan, who continue to take both PPSA security interests and section 427 security on the same collateral. It seems that the reason for this is that the section 427 security presents important advantages for banks in Saskatchewan, as it allows them to avoid the considerable restrictions on enforcement rights of secured creditors that exist in that province.[467]

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464. *Kassian* v. *National Bank of Canada* (1998), *supra* note 162; *Canada* v. *National Bank of Canada*, [1997] F.C.J. No. 289 at 659 (F.C.A.) (QL), per Chevalier D.J. (contrast the dissenting opinion of Decary J. at 663, which treats both security agreements as operative); *Birch Hills Credit Union Ltd.* v. *C.I.B.C.*, [1988] 5 W.W.R. 592 (Sask. C.A.); *International Harvester*, *supra* note 82 (this was a case of double registration, so it applies *a fortiori* to double documentation).

465. WOOD, "Federal Security Interests", *supra* note 5 at 84.

466. CUMING & WOOD, "Compatibility", *supra* note 14 at 287-289; ZIEGEL & DENOMME, *Ontario PPSA*, *supra* note 98 at 52-55.

467. See *e.g.* the *Saskatchewan Farm Security Act*, S.S. 1988-89, c. S-17.1. See also Part II, Section 5.2 (Applicability of Provincial Restrictions on Enforcement Rights of Secured Creditors), above at 329.

## CONCLUSION

The current state of the law governing the section 427 security is fraught with confusion and uncertainty. There are a number of reasons for this. For one, there are many important matters that the Bank Act does not address. A significant example is the failure to mention the bank's entitlement and priority position with respect to proceeds.[468] This makes it necessary to speculate on the identity of the legal rules that will apply to fill in these gaps.[469] Another cause of uncertainty lies in the outdated and unclear terminology and concepts used in the Bank Act. Examples include the special priority over the "claim of any unpaid vendor",[470] the "first and preferential lien"[471] and the document of title fiction.[472] In all Canadian jurisdictions, the precise scope and effect of each of these provisions remains unclear. Significant uncertainty also arises out of the overlap between the Bank Act and provincial legislation governing the rights and obligations of secured creditors. The reason is that a complex federal paramountcy analysis is required each time it is necessary to determine whether or not such legislation applies to the bank.[473] In Ontario, where the PPSA rules regarding priority and enforcement *prima facie* apply to the section 427 security, the overlap, and hence the uncertainty, is even greater. By far the greatest cause of uncertainty, however, is the Bank Act's basic priority scheme based on order of attachment. In contrast to the registration based provincial regimes, the determination of priorities under the Bank Act requires an extraordinarily complex analysis. This has led to many inconsistent and conflicting decisions.[474] In many cases, this complexity also makes it impossible to reasonably predict the outcome of priority disputes.[475] This uncertainty

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468. See *e.g.* the *Saskatchewan Farm Security Act*, S.S. 1988-89, c. S-17.1. See also Part II, Section 5.2 (Applicability of Provincial Restrictions on Enforcement Rights of Secured Creditors), above at 329.
469. WOOD, "Federal Security Interests", *supra* note 5 at 75.
470. See Part III, Section 2.6 (Special Priority over the "Claim of any Unpaid Vendor"), above at 387.
471. See Part II, Section 2.4 (The Rights Acquired by the Bank on Attachment), above at 313.
472. See Part III, Section 1 (Characterization of the Section 427 Security and Applicable Provincial Law), above at 331.
473. See Part II, Section 5.2 (Applicability of Provincial Restrictions on Enforcement Rights of Secured Creditors), above at 329.
474. Especially in the case of disputes with non-consensual security rights, see above at 384.
475. Especially in the case of priority disputes in after-acquired property, where the time of attachment remains the subject of controversy in both Québec and PPSA

is intensified in Ontario, where banks are seemingly allowed to elect between the priority and perfection provisions of the Bank Act and PPSA regimes, according to the *International Harvester* approach.[476] In all other provinces except Saskatchewan, the practice of double documentation creates a similar puzzle.[477]

In addition to the commercial uncertainty that it creates, the Bank Act security regime all too often demonstrates a complete *lack of harmony* with the provincial secured lending regimes. As a result, it produces outcomes that are either commercially unreasonable or inconsistent with provincial legislative policy. A prime example of the former kind of outcome is the failure of the present law to subordinate a prior unperfected PPSA security interest to a subsequent section 427 security.[478] Inconsistent outcomes between the Bank Act and the provincial secured lending regimes occur primarily in the case of disputes involving creditors who are granted a special priority status under provincial law, such as: (i) an unpaid seller claiming an interest in the collateral under a "lien" or "right of retention";[479] (ii) a holder of a non-consensual security right;[480] and (iii) a holder of a PMSI or a vendor's hypothec.[481] In Québec, the lack of harmony between the Bank Act and provincial law is even more pronounced than in common law jurisdictions. In particular, by making the bank owner of the collateral, the document of title fiction creates significant incoherence that extends beyond the *Civil Code's* regime of security on property and into the law of property and obligations in general.[482]

In light of the above, the need for reform of the Bank Act security regime appears both evident and pressing. One potential response is to explore possible reforms geared towards producing more predictable and commercially reasonable outcomes, and

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jurisdictions (see above at 308). The outcome of disputes with PMSIs in PPSA jurisdictions is also uncertain (see above at 363).

476. See Part III, Section 1.1.3 (The Ontario PPSA & Section 427 Security: the Issue of "Double Registration"), above at 336.
477. See Part III, Section 2.7 (Double Documentation), above at 391.
478. See Part III, Section 2.7 (Double Documentation), above at 391.
479. See Part III, Section 2.6 (Special Priority over the "Claim of any Unpaid Vendor"), above at 387.
480. See Part III, Section 2.4 (Non-Consensual Security Rights), above at 375.
481. A similar inconsistency exists in the case of production security interests under the PPSAs. See *e.g.* SPPSA subs. 4(11)(12). See Part III, Section 2.3.1.2 (Purchase Money Security Interests) above at 363. For Québec, see Part III, Section 2.3.2 (Movable Hypothecs), above at 369.
482. See discussion on characterization of bank's right in Québec – Part III, Section 1.2.1 (Civil Law Characterization of the Section 427 Security), above at 338.

harmonizing the Bank Act security regime with provincial law. But before beginning this exercise, a more fundamental question must be addressed: is there any justification for the continued existence of a separate personal or movable property security regime for banks? If not, then perhaps the simplest and most effective solution would be to repeal the Bank Act security regime altogether.

The original objective of the section 427 security was to foster the development of certain primary industries by providing an incentive to banks to make loans to persons engaged in these industries.[483] At the time of its enactment, the provincial secured lending regimes were in a confused and complicated state.[484] A national security device was needed in order to achieve Parliament's objectives of providing primary industries nationwide with an injection of capital "that would not have otherwise been available, or available only at a much higher cost."[485] The section 427 security thus provided the most effective and inexpensive way of allowing targeted classes of borrowers to give security in order to obtain bank loans.[486] Up until recently, this was still the case. But today, a highly effective and efficient secured lending regime exists in every province and territory in Canada.[487] These regimes allow borrowers engaged in *any industry* to give security and obtain credit from *any kind of lender* at reasonable rates of interest. In fact, in most cases provincial security rights are now considered to be the banks' primary security; the section 427 security is generally viewed as a backup that will be relied upon only if it provides some special advantage.[488] Consequently, the original justification that is behind the creation of this unique feature of Canadian banking legislation no longer holds true.[489] Although the Bank Act security regime has in the past played a pivotal role in the development of the Canadian economy, it is difficult to find

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483. For a more detailed discussion of the origins of the section 427 security, see generally *Hall, supra* note 3 at paras. 22-26; R.H. ANSTIE, "The Historical Development of Pledge Lending in Canada", *supra* note 3; CRAWFORD, *supra* note 3 at 403-408.
484. CRAWFORD, *supra* note 3 at 407.
485. *Hall, supra* note 3 at para. 28.
486. See MOULL, *supra* note 30 at 243; *Davanti*, *supra* note 118; ANSTIE Part I, *supra* note 3 at 81-82.
487. *Background Paper on Section 427*, *supra* note 340 at 5.
488. *Background Paper on Section 427*, *supra* note 340 at 5.
489. See WOOD, "Federal Security Interests", *supra* note 5 at 109; and MACDONALD, "A Civil Law Analysis", *supra* note 7 at 1103, stating with respect to the section 427 security that "[i]ts traditional purposes have been served".

any current justification for the continued existence of a separate personal or movable property security regime for banks.

Furthermore, it is apparent from Part III of this article that the Bank Act security regime creates a complex and uncertain legal environment, particularly in determining priorities between third parties and banks holding section 427 security. The regime also creates a non-level playing field in favour of banks over other financial institutions. In particular, the regime provides banks with at least three important advantages as compared with non-bank lenders: (1) the Bank Act enforcement regime is less cumbersome than those of the provincial secured lending systems;[490] (2) the bank realizing under its section 427 security is insulated from provincial legislation restricting the enforcement rights of secured creditors, on the basis of the doctrine of federal paramountcy;[491] and (3) the section 427 security is sometimes given an enhanced priority position as compared with provincial security rights.[492] In providing banks with advantages that are not provided to other financial institutions, the federal system thereby puts them on an uneven footing.[493] In addition to being plainly unfair, this has the effect of reducing the amount of competition and efficiency in the market.[494]

Academics who have studied the problems with the Bank Act security regime are almost unanimous in their support for its repeal.[495] A joint committee set up by the Uniform Law Conference of Canada and the Law Commission of Canada to address,

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490. See Part II, Section 5 (Enforcement), above at 326.
491. Examples include farm protection and consumer protection legislation. See *e.g.* *Kovlaske* v. *Canadian Imperial Bank of Commerce*, *supra* note 192; WOOD, "Federal Security Interests", *supra* note 5 at 109; and *Background Paper on Section 427, supra* note 340. See also Part II, Section 5.2 (Applicability of Provincial Restrictions on Enforcement Rights of Secured Creditors), above at 329.
492. Examples include the priority over the "claim of any unpaid vendor" (see discussion above at 387) and also over subsequent non-consensual security rights (see discussion above at 384).
493. WOOD, "Federal Security Interests", *supra* note 5 at 109.
494. See CUMING, "Position Paper", *supra* note 14 at 346: "[...] the best system is one that facilitates the greatest amount of competition and efficiency in the market. [...] How can credit users do any "comparison shopping" for a product (financing) when there is artificial product differentiation resulting from differences in the legal regimes applicable to the various sources of financing?"
495. See generally WOOD, "Federal Security Interests", *supra* note 5 at 108; Canadian Bar Association, National Business Law Section, *Submission on Harmonization of Section 427 of the Bank Act and Provincial Personal Property Security Acts* (Ottawa: Canadian Bar Association, November 1997); CUMING, "Position Paper", *supra* note 14; ZIEGEL, "Harmonization", *supra* note 14.

among other things, the difficulties created by the Bank Act security regime, recently published a report in which it recommends the repeal of the regime.[496] These observations do not come as a surprise: the Bank Act security regime is a source of considerable inefficiency and unfairness, and it is difficult to see what possible legitimate offsetting benefits there might be in retaining a separate regime for banks. This article's principal conclusion, therefore, is that the federal Parliament should vacate the field and the Bank Act security regime should be repealed.

However, it may be that repeal is not politically feasible. The reason is that banks stand to lose many advantages if the repeal option is adopted, and are likely to oppose it. If for any reason the current regime is kept in place, at the very least a number of amendments should be made in order reduce the potential cases in which overlap between the federal and provincial regimes might occur, and to better harmonize the interactions between the regimes when they *do* occur. Among others, the following amendments should be considered:

- *Adopt a "first-to-register" priority rule* . The general consensus among jurisdictions having adopted a modern secured lending regime is that priority between conflicting security rights should be based primarily on order of registration (the so-called "first-to-register" rule).[497] Adopting a first-to-register priority rule at the federal level would better reflect commercial realities and expectations and improve harmonization with the provincial secured lending regimes.[498]

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496. Uniform Law Conference of Canada, Civil Law Section, *Reform of the Law of Secured Transactions –Report of the Working Group 2002-2003* , August 2003, online: <http://www.ulcc.ca/en/poam2/PPSA_Rep_2003_En.pdf> (date accessed: September 30, 2004).

497. For example, registration based priority systems exist in all Canadian jurisdictions and in all 50 U.S. states, where Article 9 of the *Uniform Commercial Code* has been adopted with substantial uniformity.

498. Devising a modern and coherent set of priority rules at the federal level would be an extremely complex exercise. The following are only a few examples of the complex issues needing to be addressed in adopting such rules: (1) What status will be given to special priorities, such as those given to purchase-money-security interests and production security interests under the PPSA and to vendors who create a hypothec in the contract of sale under the *Civil Code*? (2) Will the regime recognize the priority of non-consensual security rights, such as liens, charges, deemed trusts, rights of retention and prior claims? (3) What rules will govern priority disputes in respect of proceeds? (4) What rules will

- *Reduce Scope*. The scope of the current regime should be reduced by repealing paragraphs 427(1)(a) and (b). These provisions essentially permit inventory financing by borrowers engaged in commercial sectors, such as manufacturers and wholesale or retail purchasers. In practice, it would appear that banks virtually always take security rights under provincial legislation in connection with such inventory financings, and the section 427 security is viewed merely as a "backup" device. Repealing these provisions would reduce the potential cases in which overlap between the federal and provincial regimes might occur.

- *Prohibit Double-Documentation*. As previously discussed, the practice of "double-documentation" raises a number of conceptual difficulties and fairness concerns.[499] An amendment should be made in order to prevent the section 427 security from attaching to collateral that is also covered by a hypothec or security interest in favour of the bank and securing the same obligation.

- *Nature of Section 427 Security*. The "document-of-title fiction", through which the bank effectively acquires legal ownership of the collateral in common law jurisdictions and a *restricted* form of ownership in Québec, should be eliminated and the rights acquired by the bank under section 427 should be given a characterization that reflects their true nature as security rights.[500] In PPSA jurisdictions, the rights of the bank could be described by reference to the concept of a *fixed charge*. As regards Québec, the bank could acquire an *accessory real right* in the collateral.

- *Repeal of the "First and Preferential Lien"*. The "first and preferential lien and claim" that is granted to the bank in respect of certain kinds of collateral should be repealed.[501]

- *Repeal of priority over the "claim of any unpaid vendor"*. The provisions giving priority to the bank over the "claim of any unpaid vendor" should be repealed.[502]

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apply in cases where the collateral becomes affixed to real or immovable property or where the collateral is mixed with other property in order to form a new product that is not covered by the bank's security?

499. See Part III, Section 2.7 (Double Documentation), above at 391.
500. See Part III, Section 1 (Characterization of the Section 427 Security and Applicable Provincial Law), above at 331.
501. See Part II, Section 2.4 (The Rights Acquired by the Bank on Attachment), above at 313.
502. See Part III, Section 2.6 (Special Priority over the "Claim of any Unpaid Vendor"), above at 387.

It should be noted, however, that no amount of reform could completely do away with the unfairness and complexity that is inherent in retaining two overlapping secured transactions regimes.[503] The end result of implementing the above recommendations would be imperfect, but it would be a considerable improvement over the current state of affairs.

503. See *Background Paper on Section 427*, *supra* note 340 at 5: "Although amendments and harmonization and reform could reduce some of the uncertainties as to priorities, the Committee was of the view that these problems can only be reduced and not eliminated."

# CHRONIQUES

## DROIT COMPARÉ

Luc-Marie AUGAGNEUR*

### De la preuve et des systèmes judiciaires en France et au Québec

*Idem est non esse aut non probari*[1]

**1.** Robert Badinter[2] conseillait, au sujet de l'art de la plaidoirie, de mettre « des faits dans les faits, des faits dans la procédure et des faits dans le droit ».

Ce parti pris de l'omniprésence des faits dans le procès a de quoi surprendre de la part d'un avocat et professeur d'université civiliste, qui n'aurait dû être guère engagé à consacrer la primauté des faits sur le droit.

En effet, dans la tradition civiliste, tout le processus du syllogisme repose sur l'opération fondamentale de qualification juridique qui consiste à traduire une situation de fait en termes juridiques[3]. En faisant entrer une situation donnée dans des concepts abstraits, le juriste reconnaît qu'il faut s'extraire du chaos factuel pour apporter une réponse que le droit puisse appréhender. Et le juriste apparaît alors comme ce passeur entre deux rives, celle des faits et celle du droit, fuyant la première pour atteindre la seconde.

Il est, en somme, un Charon de la Justice.

Néanmoins, l'invitation de Robert Badinter est moins surprenante lorsque l'on sait qu'il a eu l'occasion d'observer le fonctionnement du système judiciaire américain. Il faut croire qu'il en reviendra suffisamment marqué pour établir cette primauté des faits sur

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L'auteur tient à remercier tous les avocats de la firme POULIOT MERCURE qui lui ont apporté leurs lumineux conseils ainsi que leurs précieuses corrections.

1. *Ne pas être ou ne pas être prouvé, c'est tout un.* Adage du Droit français dont l'origine est incertaine, mais attribué aux commentateurs anciens. Et comme le prolongent si bien le Professeur Roland et le Doyen Boyer : « La preuve double le droit, comme l'ombre suit le corps ». H. ROLAND et L. BOYER, *Adages du Droit français.*
2. Avocat, ancien ministre français de la Justice, ancien Président du Conseil constitutionnel.
3. A propos de cette machine à décrire et à transformer le réel, Ambrose Bierce a cette définition astucieuse du droit : « law – a machine you go into as a pig and you come out of as a sausage ». Ambrose Bierce, *The Devil's dictionary.*

le droit dans le procès et pour que sa pratique professionnelle en soit à ce point imprégnée.

**2.** La France et le Québec partagent, contre les marées anglo-saxonnes, un Code civil qui ressemble encore aujourd'hui d'assez près à ce Code Napoléon de 1804 dont l'œuvre normative a fasciné plus d'un juriste. L'occasion m'a été donnée de revenir récemment dans le Journal du barreau de Lyon[4] sur les conditions dans lesquelles ce Code fit une surprenante apparition dans le Bas Canada de 1866. Sir Georges-Étienne Cartier, qui louait la Conquête Anglaise pour avoir « sauvé le Québec de la misère et de la honte de la Révolution française », avait alors préconisé aux rédacteurs de compiler les règles en vigueur en s'inspirant de la structure du Code des Français mais en se gardant d'en retenir le contenu. Mais adopter les mots de Portalis, c'était se marier pour de bon avec le droit civil. C'est ainsi que naquit, par un curieux destin, la communauté d'un héritage, celui du patrimoine civiliste dont le nouveau Code de 1994 traduit toute la vitalité.

Or le Code civil n'était pas une loi parmi d'autres, un sédiment supplémentaire. Il est une charpente de la pensée, un système qui éclabousse toute la société et toute la conception de la justice articulée autour de la place centrale faite à la loi. Et ce légicentrisme s'exprime de façon cinglante dans l'injonction de Robespierre : « point de jurisprudence mais des lois précises ».

Dans cette tradition juridique qui imprime le Code de 1804, le juge n'apparaît que comme « la bouche de la Loi », selon l'expression de Montesquieu. Il doit être servile et dévoué au texte, ainsi qu'on le conçoit en réaction au pouvoir pris sous l'Ancien Régime par les parlements.

**3.** Mais un code sans lecteur n'est rien. Paul Valéry écrivait qu'« il n'y a pas de vrai sens d'un texte. Pas d'autorité de l'auteur. Quoi qu'il ait voulu dire, il a écrit ce qu'il a écrit. Une fois publié, un texte est comme un appareil dont chacun peut se servir à sa guise et selon ses moyens ». Les œuvres juridiques n'échappent pas au principe et il en va du droit comme de la littérature. Qu'avez-vous fait de nos codes civils pourrait-on lancer en parallèle aux juristes de France et du Québec ? Quelle place pour les faits dans ce divin droit qu'ont admiré les exégètes du XIX$^{e}$ siècle ?

## Le juge dans le système judiciaire

**4.** La lecture comparée des décisions de justice française et québécoise ne peut qu'étonner par la dissemblance de forme. La décision québécoise y est narrée, imprimée du ton et de la perception personnelle du juge qui l'a rendue[5], à l'instar du style de Lord Denning.

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4. L.-M. AUGAGNEUR, *Journal du barreau de Lyon*, Déc. 2003, p. 3, Le Québec ou un autre Code civil.
5. J'ai en particulier été frappé par les observations du juge Dionne dans l'affaire *Antonino Antinoro* c. *Fusion Magic 1999 inc.*, C.Q., n$^{o}$ 500-22-051388-000, 30 jan-

Mais une telle rédaction est absolument inimaginable pour un juge français. Jamais aucune, ou rarement, de considération personnelle ; cette « justice d'attendus » est toujours froide et désincarnée, à l'image de la scansion de sa construction anaphorique[6] et dépouillée.

**5.** L'impersonnalité du style traduit beaucoup plus que la plume toute une conception de la justice. À l'inverse du juge québécois qui exerce la justice, le pouvoir de juger, son homologue français en est la manifestation car il ne rend pas la justice en son nom mais « au nom du peuple français » comme le rappelle la formule sacramentelle qui imprime chaque décision.

À ce titre, l'office du juge québécois s'inspire davantage de la tradition de *common law* où la justice est un véritable pouvoir personnalisé. Le juge y est presque une partie au procès, un participant qui aura seulement, après avoir partagé l'aventure commune de l'audience, le privilège d'en écrire la fin. Le nom du juge qui rend une décision y est d'ailleurs l'indicateur du poids juridique et moral éventuel de celle-ci, un élément d'interprétation propre. Ce n'est le plus souvent pas le cas en France.

La différence radicale du rôle du juge dans chacun des systèmes est le résultat de plusieurs facteurs : l'origine du juge, le temps consacré au procès, la place du témoignage et des parties dans le procès.

### *Origine du juge*

**6.** Au contraire du juge québécois, son homologue français n'est pas un ancien avocat. Il n'a pas pu connaître la façon dont les parties peuvent vivre un dossier, dans sa longueur, ses rebondissements, ses crispations. Il est juge *ab initio*, dès la sortie de l'École Nationale de la Magistrature où, École de la République française, se cultive un certain sens de l'État. Être juge n'est pas seulement une fonction, c'est aussi une carrière qui se déroule au Siège ou dans les rangs du ministère public, puisque ces deux magistratures, desquelles on passe de l'une à l'autre, ne forment qu'un seul corps.

**7.** Encore ne faut-il pas parler du juge mais des juges français, car leur origine et leur sensibilité est très différente selon les juridictions. En effet, deux institutions notables ressortent de la compétence de juges non professionnels élus par leurs pairs. Il en est ainsi du conseil des Prud'Hommes et du Tribunal de Commerce. Le premier est le Tribunal qui connaît de l'ensemble des litiges dérivant de la relation de travail entre employeur et salarié. Le second se voit

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vier 2002. « Tony est un jeune homme éminemment sympathique, le Tribunal le dit d'entrée de jeu [...] il occupe un emploi qu'il n'aime pas et a toujours rêvé d'avoir sa propre entreprise et d'être son propre patron » ; insistant plus loin « Tel que dit au début de ce jugement, le Tribunal éprouve beaucoup de sympathie pour Tony [...] il s'agit d'un jeune homme intelligent, très bien articulé et débrouillard ».

6. Traditionnellement les décisions françaises sont construites sur le modèle d'une phrase unique dont chaque paragraphe commence par « Attendu que ... ».

dévolu l'ensemble du contentieux commercial dès lors que sont opposés deux commerçants ou sociétés commerciales.

Ces juges à part entière, dont la compétence juridique n'est textuellement pas un critère d'élection, statuent en premier ressort sur des pans essentiels de la vie des affaires. Élus parmi les commerçants pour les uns, et parmi les syndicats d'employeur et de salariés pour les autres, leur sensibilité au fond des litiges qui leur sont soumis et à l'application des règles de droit est incontestablement différente de celle des juges professionnels.

Ces deux institutions singulières que sont le Conseil des Prud'hommes et la juridiction consulaire[7] sont d'ailleurs apparues en crise au cours de ces dernières années. La difficulté à appréhender un ensemble normatif complexe pour les juges non professionnels dépourvus de formation juridique, en particulier dans les plus petites juridictions, n'est pas étrangère à cette critique généralement formulée par les avocats. Sans doute la survivance historique de ces juridictions destinées à être plus proches des justiciables s'accommode-t-elle mal de l'inflation des législations nationales et de la superposition des règles communautaires issues de l'Union Européenne.

Mais bien plus c'est l'impartialité des magistrats qui a été mise en cause. La présence marquée du syndicalisme salarié dans les Conseils de Prud'hommes est régulièrement regrettée par les praticiens, pour dire le moins. Quant aux Tribunaux de commerce, un rapport d'enquête parlementaire et quelques scandales avaient sérieusement entamé la crédibilité et l'impartialité des juges, notamment dans le cadre des procédures de faillite.

**8.** Si le système présente ce type d'inconvénients, il n'est naturellement pas sans avantage. À la disparité géographique de la qualité de la pratique juridictionnelle et la moins bonne formation technique des juges répond leur meilleure connaissance du milieu professionnel qu'au contraire n'auront jamais vécus les magistrats de formation. Pour ces derniers, l'ignorance d'une certaine vision du quotidien confère une sensibilité moindre aux situations de fait, une rigueur plus intangible. Et cette conception peut assez bien passer pour une vertu de l'ignorance lorsque l'on place l'égalité devant la loi, l'impartialité objective, comme critères déterminants de la position du juge.

Mais dans tous les cas, l'origine (sociale, intellectuelle, professionnelle) diffère fondamentalement du modèle en place au Québec.

La confraternité révolue entre le juge et l'avocat québécois ne pourra ôter la nature de lien qui préside en principe à leur relation, tandis qu'il faut bien regretter la trop médiocre qualité des relations entre avocats et magistrats français, trop souvent pétrie de défiance et parfois même de mépris réci-

7. Nom donné aux Tribunaux de Commerce.

proque. La distance du juge français détermine de façon importante le dispositif judiciaire et toute la conception d'une justice froide[8] qui n'est toutefois pas sans vertu.

### *Économie judiciaire*

**9.** Mais cette distance est aussi le fruit d'une économie judiciaire dont il n'est pas vain ni insignifiant de rappeler le contexte. En France, un paradoxe d'abord ; celui de la démocratisation de l'accès à la justice quand l'accès au juge devient de plus en plus difficile aux parties.

L'un des reproches chroniques fait à l'institution judiciaire française est de n'avoir pas suffisamment de juges. Le nombre de magistrats de l'ordre judiciaire français se porte à 7 000, parquet inclus. Mais le plus surprenant est qu'il n'a que très peu varié depuis un siècle[9] alors que la Justice a dû faire face à la massification du contentieux ainsi qu'à sa complexification croissante. Ajoutons à ces considérations le principe de la collégialité (auquel il est de plus en plus souvent fait entorse dans les textes) par lequel la formation de jugement est composée de trois juges, dès le premier degré de juridiction. De ces constats, il résulte une très faible disponibilité des juges français pour le justiciable, notamment dans les tribunaux les plus engorgés.

**10.** Mais il faut encore mettre en relation ce contexte avec la très large accessibilité à la justice dans les principes et dans les textes.

Au-delà des dispositifs d'aide juridique dont la France et le Québec partagent les mécanismes sensiblement identiques, il faut revenir sur un principe déterminant de l'économie judiciaire : celui du régime des honoraires extrajudiciaires. Pour dire vite, le système en vigueur au Québec consiste en ce que chaque partie supporte la charge des honoraires de son propre avocat. Ce n'est que dans le cadre exceptionnel de l'atteinte à un droit fondamental ou dans l'hypothèse d'un abus de procédure, lequel est apprécié restrictivement, que le juge pourra mettre à la charge de la partie perdante une fraction des honoraires du procureur de son adversaire.

Le droit français fait un choix radicalement inverse puisque le principe est celui de la justice indolore pour celui qui l'emporte. L'article 700 du nouveau *Code de procédure civile* est d'application systématique puisqu'il prévoit que « dans toutes les instances, le juge condamne la partie tenue aux dépens, ou à défaut la partie perdante à payer à l'autre partie la somme qu'il détermine, au titre des frais exposés et non compris dans les dépens. Le juge tient compte de l'équité ou de la situation économique de la partie condamnée »[10]. L'effet de ce texte est

8. Nietzsche disait de l'État qu'il est : « le plus froid de tous les monstres froids ». F. NIETZSCHE, *Ainsi parlait Zarathoustra, de la nouvelle idole*.
9. Sources : *L'Express*, 19 septembre 2002.
10. Article 700 du nouveau *Code de procédure civile*.

décisif en ce qu'il ne décourage pas l'avènement du procès pour celui qui est sûr de son droit. Certes il fait aussi courir le risque plus grand de se voir soi-même condamné, en cas de défaite, à supporter les honoraires de l'adversaire. Mais le plaideur se convainc en général assez facilement du bien fondé de sa cause et de l'injustice qui le frappe, de sorte que le procès y apparaît comme la perspective de l'amortissement de ses dépenses.

**11.** Le dispositif conduit à favoriser les logiques jusqu'au-boutistes, à ne laisser que peu d'intérêt au règlement amiable et hors Cour. Bref cette accessibilité à la Justice, rapportée à la faible disponibilité de magistrats ne peut que conduire à un nombre démesuré de procédures à traiter par juge.

Il en résulte un fort encombrement des rôles et l'absolue nécessité consécutive de raccourcir le temps consacré à chaque affaire.

Si un procès peut atteindre facilement, pour une affaire comparable, deux à trois jours d'audience au Québec, il est courant de ne voir attribuer en France que quinze à trente minutes à l'avocat par le Président de la juridiction pour une affaire dont l'enjeu peut porter sur plusieurs milliers voire millions de dollars. Un rôle moyen d'une après-midi d'audience peut ainsi comporter une dizaine de dossiers plaidés sur le fond.

**12.** Voilà qui donne le ton de l'organisation judiciaire française, comparée à celle du Québec.

Ce contexte est loin d'être neutre. Il explique en grande partie la nette différence entre les systèmes de preuve. Il explique, avant même toute opposition conceptuelle, le rejet rendu matériellement nécessaire de la preuve par témoignage, de la proximité des parties et du juge, d'un temps du procès, d'un temps d'audience.

### Procédure orale, procédure écrite ...

**13.** En France, la procédure est essentiellement écrite. Elle l'est juridiquement devant le Tribunal de grande instance. Ceci implique que tous les moyens de droit doivent avoir été préalablement exposés dans l'acte introductif d'instance ou dans les conclusions subséquentes. Mais à l'audience, le tribunal ne peut tenir aucunement compte de tout autre moyen qui n'aurait été contenu dans les écritures des parties.

Au Tribunal de commerce ou au conseil des Prud'hommes – pour seuls exemples – la procédure est théoriquement orale. Mais les obligations déontologiques du principe du contradictoire vues au travers du prisme d'un système empreint de procédure écrite, conduisent également à une procédure quasi-écrite devant ces juridictions. Ainsi l'ensemble de l'argumentation et de la démonstration des plaideurs est contenu dans leurs procédures. Surtout, comme le juge ne bénéficiera pas d'une immersion totale dans le litige lors de l'audience, comme sa connaissance du dossier sera incertaine pour l'avocat, la trace écrite et solide constituera une sécurité que les plaideurs ne se refusent pas.

L'audience, cette fraction de procédure orale, n'est alors plus le temps de l'élaboration du procès mais de sa conclusion. Elle se résume à la plaidoirie. Point de preuve orale, point de témoignages[11] ; seule la conviction est orale, mais toute la substance du procès est faite.

### *Les parties et leur procès*

**14.** Ce qui est finalement décisif, dans la différence de conception du procès français et du procès québécois, c'est la place respective des parties dans leur procès.

En France, les parties sont d'abord exclues des débats. Elles leur sont physiquement étrangères. Ce parti pris se manifeste juridiquement par le caractère exceptionnel de la comparution personnelle des parties. Cette dernière est, aux termes de l'article 184 du nouveau *Code de procédure civile*, seulement une faculté pour le juge. L'article 185 précise que cette faculté n'appartient qu'à la seule formation de jugement ou au juge de la mise en état. Des dispositions exactement analogues sont prévues par les articles 200 et suivant en matière d'enquête et d'audition des témoins.

Alors qu'un juge québécois suspendrait assurément les débats de lui-même en l'absence d'une partie, les avocats français ne peuvent même pas exiger leur audition ou celle de témoins. Et si le juge devait vouloir les entendre ou accéder à la demande d'un avocat, il n'est certainement pas question que ce dernier prenne une part prépondérante à l'enquête. Son rôle y est infiniment subsidiaire. La rédaction du nouveau *Code de procédure civile* est à cet égard particulièrement explicite puisque, si les avocats ne peuvent certainement pas provoquer l'interrogatoire, leur présence semble même seulement tolérée. L'article 192 prend d'ailleurs la peine de préciser – et cela ne semblait donc pas une évidence – que « la comparution personnelle a lieu en présence des défenseurs de toutes les parties ou ceux-ci appelés »[12]. Et même dans leur rôle subsidiaire, les conseils ne peuvent intercéder directement auprès des témoins puisque, selon l'article 193, « le juge pose, s'il l'estime nécessaire, les questions que les parties lui soumettent après l'interrogatoire »[13]. Les conseils n'apparaissent alors que dans le rôle limité de la suggestion. Le texte est même extrêmement méticuleux puisque lorsqu'une enquête par le juge est ordonnée aux fins de procéder à l'interrogatoire du témoin, le code avertit l'avocat qu'il ne doit « ni interrompre, ni interpeller, ni chercher à influencer les témoins qui déposent, ni s'adresser directement à eux »[14].

**15.** Cette faculté d'audition des parties et des témoins par le juge n'est, en pratique, que très excep-

11. Il faut tout de même remarquer qu'avant la réforme des textes relatifs au divorce en 1975, des témoignages étaient reçus oralement par le juge avec des interrogatoires et des contre-interrogatoires menés par chaque avocat.
12. Article 192 du nouveau *Code de procédure civile*.
13. Article 193 du nouveau *Code de procédure civile*.
14. Article 214 du nouveau *Code de procédure civile*.

tionnellement usitée par le juge français. Celui-ci se satisfait généralement des documents qui auront ponctué l'affaire. Ce qui est entre ces documents, le contexte factuel et personnel qui les entoure ne l'intéresse pas vraiment, parce que cela n'est pas suffisamment tangible à ses yeux.

Selon les règles de preuve du Québec, il n'est certes pas davantage possible qu'en France de contredire par témoignage les dispositions d'un contrat écrit (article 2863 CCQ). De même, en common law, selon la *Parol Evidence Rule,* aucune preuve orale ne peut être admise pour ajouter, nuancer ou contredire un écrit, « *all evidence falling outside the four corners of the document* ». Mais la jurisprudence québécoise semble influencée par les importantes exceptions à cette règle. En particulier, le témoignage parvient à s'insinuer dans le contrat, et le juge l'entendra, pour peu que les termes en soient moindrement ambigus, qu'ils aient une signification technique, scientifique ou particulière dans le commerce. Alors, contre l'intangibilité de l'écrit, surgit cet instrument d'équilibrage contractuel qui permet souvent à la partie la plus faible de balancer les stipulations pourtant acceptées *que le plus fort était libre de lui imposer*.

Mais le juge français se refuse « à sonder les reins et les cœurs », selon l'expression consacrée. Il se contente de ce qui est vraisemblable. Tout témoignage lui est suspect. On le suppose pollué de passion, on redoute ses débordements, on s'inquiète de devoir pénétrer l'âme humaine pour démêler le vrai du faux. A telle enseigne d'ailleurs que l'article 441 du nouveau *Code de procédure civile* octroie à « la juridiction la faculté de retirer [aux parties] la parole si la passion ou l'inexpérience les empêche de discuter leur cause avec la décence convenable et la clarté nécessaire ». Plutôt que d'envisager la crédibilité de tel témoin, le juge préfère la distance et la froideur du droit. La justice y est une grande abstraction.

**16.** Le juge québécois sera pour sa part conduit à descendre dans l'arène, à se confronter avec les parties et leur procès, à les voir revivre un peu les causes et les tenants de leur dispute.

L'interrogatoire de chacun des témoins est l'occasion pour l'avocat de redonner vie au déroulement des faits qui président au litige. La preuve se pétrit de la personnalité de chacun d'eux. Le témoin commente telle pièce – ici un contrat, là une correspondance – que lui soumet l'avocat. Il restitue sa chronologie, les conditions de signature. L'audience est à la fois le litige et sa gangue.

La redondance des questions d'un témoin à l'autre est à la fois source de confrontation des preuves (de corroboration ou de contradiction). Tel en est l'objet évident, mais de fait, c'est aussi l'occasion d'une imprégnation par les parties et par le juge.

**17.** Par ailleurs, l'interactivité que suppose le dialogue qui s'instaure alors constitue une composante singulière du procès au Québec.

Dans la procédure française, les parties demeurent silencieuses et seul l'avocat plaide. Il plaide dans ce silence qu'on lui accorde en principe. Il s'adresse au juge dans un monologue que n'investit aucun des autres participants. Il n'existe aucune interaction. L'audience française est faite de juxtapositions. De sorte que l'avocat est plongé dans l'appréhension constante de ne pas être écouté. Sa plaidoirie a quelque chose d'incantatoire, quelque chose de l'ordre du mystère face au juge silencieux.

Le temps du procès québécois crée la certitude de l'implication de tous les protagonistes (juge, avocats, parties) dans la reconstitution des faits et du dossier, dans sa scénarisation.

C'est une justice de participation. Toute la matérialité du procès y est mise en place, y est vécue, y est re-vécue. Le litige est reconstitué dans cette justice *in vivo*. Et cette justice tient alors du drame si l'on oppose drame et tragédie[15] – si le drame y est l'issue incertaine, la possibilité du renversement jusqu'au dénouement. Tout peut encore se passer dans cette dramaturgie dont seules les grandes lignes ont été établies par les parties elles-mêmes.

**18.** Cela ne signifie pas que la procédure écrite soit inexistante en droit québécois, mais elle est beaucoup plus limitée. Elle a surtout un objet différent : celui de préparer l'audience, de circonscrire le procès par le jeu des allégations.

Cette composition de la géographie du procès est évidemment primordiale dans la stratégie judiciaire. Plus il y aura d'allégations, plus il existera de moyens au soutien des arguments ; mais en retour plus l'adversaire se verra offrir des moyens de relever les contradictions et de naviguer dans le périmètre pour y perdre juge, témoins et même adversaire.

La procédure écrite consiste donc à la circonscription du litige. De même, l'institution de la conférence préparatoire répond à un objectif similaire. Dans cette phase, les parties se réunissent pour simplifier le procès, amender les procédures et éventuellement définir les questions de droit et de fait véritablement en litige.

Cette mise en état diffère donc fondamentalement de celle qui existe en France. Pour filer la métaphore dramaturgique, elle n'est pas l'écriture de la pièce, mais seulement le choix du décor, des dimensions de la scène et des acteurs.

### *La preuve, entre méfiance et défiance*

**19.** La différence procédurale de la place accordée aux parties n'est pas seulement le résultat des textes, au hasard de leur élaboration. Elle est surtout la conséquence de toute une conception de la vérité, et même de la place de la parole humaine.

15. La tragédie est alors cette fin inexorablement malheureuse, ce qui donne à Anouilh l'occasion de cette remarque fulgurante : « C'est reposant la tragédie, au moins on sait qu'il n'y a pas d'espoir ».

Il faut une évidente confiance en celle-ci, pour abandonner la preuve au témoignage, dans ce balai qui va d'une partie à l'autre, d'un avocat à l'autre.

Sitôt que l'avocat aura fini d'interroger son témoin, son confrère adverse se livrera à cet exercice délicieux de l'art judiciaire qu'est le contre-interrogatoire. Cet aspect unique du procès constitue une identité saillante de ce type de système procédural. Il est l'expression du dialogue et de la confrontation directe.

Pour l'essentiel, le contre-interrogatoire a pour objet de tester la crédibilité du témoin. Celle-ci repose sur la capacité, la partialité et la réputation du témoin. L'avocat tentera de montrer, dans la grande liberté que lui octroie le code de procédure civile, l'inaptitude du témoin à faire une déposition valable, il relèvera ses contradictions, le confrontera à son mensonge et ne manquera pas, le cas échéant, de lui rappeler ses condamnations antérieures. Cet exercice est parfois d'une violence et d'une intensité assez difficilement soutenables ; à tel point d'ailleurs qu'a été mise en place une charte des droits du témoin afin de préserver son intégrité psychologique.

Les parties se livrent ainsi successivement à l'administration de leur preuve orale et contradictoire. Cette conception est assise sur une maïeutique judiciaire présidant à la découverte de la vérité, c'est-à-dire à l'établissement de l'exactitude matérielle des faits par le dialogue. En arrière plan est l'idée que la vérité est latente, détenue par ces témoins, et qu'il faut la faire ressortir par la pression de ces fruits mûris par la procédure.

**20.** La violence de cette preuve, violence du langage, violence psychologique, qui effrayerait tout juriste français non averti, est en pratique la nécessité du contradictoire contre toute tentation d'angélisme.

Ainsi la preuve y apparaît comme une gageure. La parole est suspecte, objet de la défiance du juge, mais la preuve par témoignage demeure possible.

Cet ancrage du procès québécois dans la preuve traduit ce que Maître Brian Riordan[16] décrit comme « un rapport tactile » avec les faits. Le juge, les avocats et même les parties qui sont nécessairement présentes ont besoin de ressentir la cause.

La méthodologie judiciaire est fondamentalement empirique, c'est-à-dire qu'elle consiste à vivre la cause d'expérience, de l'éprouver, d'en traverser les faits avant que de les comparer à ceux d'une espèce existante ayant donné lieu à une décision. Telle est la raison première de cette justice par imprégnation qui, à l'image de la doctrine de la *stare decisis,* veut s'assurer de la proximité suffisante avec les précédents.

16. Avocat, membre du Barreau du Québec, et pratiquant à la firme Pouliot Mercure, à Montréal.

**21.** À la défiance du juge québécois dans la preuve, répond à notre avis la méfiance[17] du juge français. Dans le système procédural et judiciaire français, l'établissement des faits, dans leur détail, est moins l'objet d'un défi lancé aux parties, un duel de crédibilité, qu'une preuve en définitive impossible. En pratique le juge souhaite rarement une preuve totale. Il ne la sollicite pas ; il s'en agacerait même. Tout dire, prétendre à l'exhaustivité de la vérité lui paraîtrait une chimère.

Pourtant la justice, y compris la justice civile, ne peut naturellement pas renoncer totalement à la preuve. L'esprit qui gouverne cette recherche nous paraît être une logique de l'interprétation. Il s'agit très souvent pour le juge de sélectionner une série de données objectives dont la valeur est variable et qui repose sur la primauté de l'écrit.

Le juge est amené à extrapoler la portée de ces éléments, et il se livre alors non pas à une balance de crédibilité comme le fait le juge québécois mais à une balance de probabilité, de l'incontestable à l'impossible, en passant par le certain, le probable, le possible et l'improbable.

Sitôt que la technique est au cœur des débats, l'expertise y est reine. C'est le juge qui désigne un expert judiciaire unique et neutre, le chargeant, après avoir entendu les parties, de retracer la réalité des données techniques et de l'éclairer sur la façon de les interpréter.

Dans certains cas se noue alors un procès bis, arbitré par l'expert, dont la complexité des faits peut induire des problématiques juridiques auquel l'expert n'est pas en mesure d'apporter des réponses. L'absence du juge lors des travaux d'expertise le laisse ainsi parfois démuni contre les dires[18] des avocats.

L'expertise est la forme la plus aboutie, et la plus onéreuse aussi, de la recherche probatoire tournée vers le passé et son interprétation. D'une façon générale, c'est en quelque sorte un travail d'archéologie auquel doit se livrer le juge à partir des traces qu'a bien voulu laisser le litige et ses parties : contrats, comptabilité, correspondances et parfois constats d'huissiers, sont les signes à décrypter.

**22.** Pour être précis et rigoureux, annonçons clairement qu'il n'y a pas de règles, mais leur absence n'est-elle pas la démonstration de la parfaite liberté du juge. Point de règle, ou peut-être celle que les magistrats utilisent au quotidien comme Monsieur Jourdain fait de la prose. On serait en effet assez tenté de rapprocher ce travail d'extrapolation d'un mécanisme prévu par le Code civil : celui de la présomption.

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17. « La méfiance fait que l'on ne se fie pas du tout, la défiance fait qu'on ne se fie qu'avec précaution. Le défiant craint d'être trompé, le méfiant croit qu'il sera trompé ». E. LITTRÉ, *Dictionnaire, article Défiance*.
18. En procédure civile française, acte par lequel l'avocat adresse une communication à l'expert.

Le Code civil les définit ainsi en son article 1349 : « les présomptions sont les conséquences que la loi ou le magistrat tire d'un fait connu à un fait inconnu ». L'article 1353 du même code complète assez joliment :

> Les présomptions qui ne sont point établies par la loi sont abandonnées aux lumières et à la prudence du magistrat, qui ne doit admettre que des présomptions graves, précises et concordantes, et dans les cas seulement où la loi admet des preuves testimoniales, à moins que l'acte ne soit attaqué pour cause de fraude ou de dol.

Ce texte dit toute la latitude du juge, autorisé à reléguer le témoignage à un rang insignifiant pour lui substituer la mécanique d'interprétation de la présomption. Rares sont les textes aussi forts, aussi pleins d'emphase, qui ne confèrent pas un pouvoir à quelque autorité mais qui « abandonne à la lumière du magistrat ».

C'est ce que la jurisprudence désigne sous le terme « d'appréciation souveraine des juges du fond » et qui échappe au contrôle de la Cour de cassation. Cette liberté d'appréciation et d'interprétation des faits par le juge ne peut manquer de nous renvoyer à un autre texte issu du *Code de procédure pénale*. Le principe n'est a priori certes applicable qu'en matière pénale mais son inspiration lui donne un rayonnement qui dépasse les frontières de cette seule discipline et irradie un peu le chemin de conviction de tout juge. C'est ainsi que prêche l'article 353 de ce code :

> La loi ne demande pas compte aux juges des moyens par lesquels ils se sont convaincus, elle ne leur prescrit pas de règles desquelles ils doivent faire particulièrement dépendre la plénitude et la suffisance d'une preuve ; elle leur prescrit de s'interroger eux-mêmes dans le silence et le recueillement et de chercher, dans la sincérité de leur conscience, quelle impression ont faite, sur leur raison, les preuves rapportées contre l'accusé, et les moyens de sa défense. La loi ne leur fait que cette seule question, qui renferme toute la mesure de leurs devoirs : « Avez-vous une intime conviction ? ».

Ce texte cité, il me semble que tout ce qui sépare les deux systèmes est dit.

**23.** Les avocats québécois, tirant cela des influences de la *common law*, n'ont pas cette abdication devant les faits. La preuve n'est pas l'apanage du juge, elle est au contraire l'œuvre des parties. Loin d'arriver en fin de cause, elle est la matrice de la procédure.

La fracture entre le droit et les faits n'apparaît pas avec la même netteté qu'en droit français où elle est presque la *summa divisio*. Il n'existe pas, comme en common law, quoique le Québec n'en connaisse pas, ce concept d'*equity* qui constitue ce pont permanent entre le droit et les faits. Mais cette omniprésence des parties et de leur litige, et pas seulement de l'abstraction du problème qu'il pose, imprègne fortement toute la justice du Québec.

**24.** On peut estimer que la distance de la justice française, cette justice à froid, est difficilement acceptable. On peut l'estimer lointaine et trop subjective. On peut estimer

que le large pouvoir d'appréciation du juge, relève de l'intolérable arbitraire.

Mais dans le même temps, il faut se garder d'idéaliser le mécanisme probatoire d'un système contradictoire absolu. Sans doute ne peut-on, à coup sûr, faire éclater la vérité par le seul interrogatoire des témoins, car on ne réduira jamais la nécessaire partialité de celui qui sera amené à choisir son camp à un moment ou à un autre dans le clivage exacerbé qu'est le procès. Et même sans évoquer la potentielle mauvaise foi du témoin, sa mémoire se trouve souvent défaillante ou altérée par les événements postérieurs, par sa propre perception des événements, par son désir inconscient de réconcilier les faits avec la cause de son camp. Les témoins, dans leur plus grande intégrité, peuvent se persuader assez facilement du déroulement de tels événements. L'immuabilité de la perception humaine est trop rare pour fonder toute une justice.

Enfin, malgré toutes les précautions déontologiques que peut prendre l'avocat, et même malgré lui, le témoin est nécessairement manipulé. Manipulé par lui-même. Manipulé par les questions, telle est l'essence de tout dialogue, y compris dans la maïeutique où la pédagogie se fait intoxication. Manipulé surtout par l'impression que peut faire sur lui la justice et son rituel.

Dans son ouvrage intitulé *The art of cross examination*, Irving Younger conseille, en son 10e commandement, de n'utiliser que des questions dirigées :

> Toute l'idée du contre-interrogatoire est qu'il faut prendre le témoin par le col et l'emmener là où vous voulez qu'il aille. Mettez les mots dans sa bouche. Faites-lui dire ce que vous voulez qu'il dise. La façon de le faire, c'est par des questions dirigées.

Ainsi à la subjectivité supposée du juge français répond la subjectivité probable de la vérité dégagée de l'enquête à la barre. Le système judiciaire contradictoire ne peut trouver sa pleine mesure et sa pleine efficacité que s'il se garde de tout angélisme probatoire, s'il ne conçoit pas la vérité comme une et indivisible, comme un fantôme qui hante la salle d'audience et qu'on tente de mettre au jour, en un mot s'il ne cède pas à la tentation d'une conception trop romantique de la vérité et de la preuve.

La justice ne pourra jamais recréer avec exactitude la chronologie des faits. Cette histoire là est passée, elle ne peut être qu'approchée, avec humilité. On la réécrit nécessairement, toujours avec des vérités de seconde main. Pour pasticher Chateaubriand, on pourrait dire qu'un juge réduit à se nourrir de vérités est bien près de mourir de faim.

**25.** Pour conclure, et c'est ce que l'évidence commandait, il n'est sans doute pas de système idéal ou préférable. Seulement s'agissait-il ici de dresser un portrait des différences entre deux systèmes judiciaires, sans juger de leur efficacité respective.

Ce qu'au plus on peut retirer de cette comparaison, c'est de ne pas rester figé dans une conception de la justice. C'est parfois une invitation à remettre en cause certaines règles qu'on estimait indéboulonnables, c'est une source d'innovation et de créativité dans l'administration de la preuve ou dans sa réfutation. Car l'apprentissage d'un autre régime est autant une découverte de l'autre qu'une redécouverte de soi.

## DROIT DU TRAVAIL

Jacques DESLAURIERS* et Pierre VERGE**

# L'insolvabilité de l'employeur et l'application des lois régissant les rapports collectifs de travail

Le plus souvent, l'insolvabilité d'une personne morale résulte simplement des difficultés de la seule entreprise qu'elle possède et à laquelle elle s'identifie. Il peut arriver aussi qu'une entreprise soit toujours financièrement viable malgré l'insolvabilité de la société qui la contrôle juridiquement, notamment à l'intérieur d'un groupe de sociétés. Dans certaines circonstances, il pourra être indiqué, même parfois indispensable, de poursuivre l'activité de l'entreprise concernée en espérant ainsi rétablir la solvabilité de son propriétaire ou de pouvoir l'aliéner comme un tout en activité ; dans d'autres circonstances, il sera jugé préférable de mettre fin aux activités d'une entreprise insolvable et de la démanteler, dans un processus général de liquidation des actifs de la société insolvable.

Différents régimes juridiques peuvent intervenir à l'occasion du maintien en activité de l'entreprise. Dans le cas d'un redressement espéré de la situation financière de la société qui la possède, il s'agira de la proposition concordataire déposée selon les modalités prévues par la *Loi sur la faillite et l'insolvabilité*[1], ou encore d'un arrangement selon la *Loi sur les arrangements avec les créanciers des compagnies*[2]. La liquidation des biens de la société procédera pour sa part de la *Loi sur la faillite et l'insolvabilité,* d'une loi particulière régissant la personne morale insolvable, ou encore de la *Loi sur la liquidation et la restructuration des sociétés*[3], quand la personne morale est exclue du champ d'application de la *Loi sur la faillite*[4]. Il en sera ainsi dans la mesure, manifestement, où les conditions d'application de chacune des lois en cause pourront se réaliser.

Ainsi, le régime général des propositions prévu par la *Loi sur la faillite et l'insolvabilité* s'applique à toute personne insolvable, selon la définition de l'article 2, à savoir une personne devenue incapable de faire face à ses obligations au fur et à mesure de leur échéance et dont la réalisation de l'actif ne réussirait pas à acquitter toutes ses obligations échues et à échoir. Ce régime général prévoit un pro-

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1. L.R.C. (1985), c. B-3, art. 50 à 66 (ci-après désignée « L.f.i. » dans les références).
2. L.R.C., c. C-36 (ci-après désignée « L.a.c.c. » dans les références).
3. L.R.C., c. W-11 (ci-après désignée : « L.l.r. » dans les références).
4. Art. 2 L.f.i., définition de « personne morale ».

cessus préétabli de protection de la personne insolvable qui s'applique automatiquement à la suite du dépôt de l'avis d'intention ou de la proposition. Par contre, pour les entreprises endettées de 5 000 000 $ ou plus et dont les problèmes et les démarches de redressement sont plus complexes, il est possible de recourir à la *Loi sur les arrangements avec les créanciers des compagnies*, mais les mesures de protection auxquelles cette loi donne ouverture ne sont pas automatiques et doivent être octroyées à la suite d'une requête présentée au tribunal, qui jugera s'il est opportun de les octroyer. Enfin, s'agissant d'une liquidation, la *Loi sur les liquidations et les restructurations* peut s'appliquer dans le cas d'une liquidation pure et simple de la compagnie, volontairement, pour une question d'opportunité autre que l'insolvabilité. Elle s'appliquera aussi pour assurer la liquidation d'une société insolvable. Toutefois, si une requête en faillite ou une cession de biens a été déposée à l'égard de la société, la *Loi sur la faillite et l'insolvabilité* aura préséance[5]. Observons aussi que la *Loi sur les liquidations et les restructurations* ne s'applique pas aux sociétés par actions, constituées selon la *Loi canadienne sur les sociétés par action*[6], cette loi prévoyant elle-même son propre processus de liquidation[7].

La poursuite des activités de l'entreprise selon l'une ou l'autre des situations ci-haut mentionnées conduit à s'interroger, pour ce qui est du cours des rapports collectifs de travail qui s'y greffent, sur l'identité de l'employeur, c'est-à-dire de l'entité responsable des différentes obligations reliées à ces rapports collectifs (I) de même que sur celui des conditions de travail applicables dans ces circonstances (II).

## I. Qui est l'employeur ?

Le processus de redressement de l'entreprise elle-même ou des affaires de la société qui la contrôle, manifeste une volonté de continuité à laquelle devrait naturellement correspondre le maintien de cette société en tant qu'employeur des salariés œuvrant dans l'entreprise. La proposition concordataire déposée en vertu de la *Loi sur la faillite et l'insolvabilité,* qui se réduit à une offre de règlement proposée aux créanciers de la société n'y fait simplement pas obstacle. Le syndic ne joue alors en effet qu'un rôle général de conseiller envers le débiteur et de médiateur entre ce dernier et ses créanciers.

Une semblable perspective de continuité des activités devrait également conduire au maintien de l'employeur en place, lors d'un redressement entrepris selon la *Loi sur les arrangements avec les créanciers des compagnies*. La version française de l'article 11.8 (1) de cette loi pourrait toutefois laisser entendre que le contrôleur, nommé par le tribunal pour surveiller les affaires de la compagnie

5. Art. 213 L.f.i.
6. *Loi canadienne sur les sociétés par action*, L.R.C. (1985), c. C-44, art. 3(3) (ci-après : L.c.s.a.).
7. *Ibid.,* art. 207 à 228, L.c.s.a.

et qui « ès qualités continue l'exploitation de l'entreprise de la compagnie débitrice ou succède à celle-ci comme employeur », devient précisément un nouvel employeur des salariés. Il ne s'agit cependant là que d'une disposition dont l'objet est d'exclure toute responsabilité personnelle du contrôleur, relativement à des obligations contractées par la compagnie débitrice avant sa nomination. De toute façon, la version anglaise du même texte ne permet pas de soulever le même doute au sujet du maintien de la qualité d'employeur chez la compagnie en voie de redressement : « where a monitor carries on in that position the business of a debtor company or continues the employment of the company's employees, the monitor is not by reason of that fact personally liable [...] ». Elle est conforme à l'économie générale de la loi qui ne prévoit pas de dévolution de biens de la compagnie au contrôleur ; lorsque ce dernier agit, il le fait non à la place de la compagnie, mais bien pour celle-ci, comme pouvaient le faire ses administrateurs dans le cours ordinaire de ses activités[8].

La situation découlant d'une faillite est tout à fait différente : elle entraîne, en effet, la dévolution immédiate des biens du failli au syndic et le failli cesse lui-même d'être habile à en disposer[9]. Partant, il y a dévolution de l'entreprise au syndic, qui devient le nouvel employeur s'il y a bien, dans les faits, continuation de l'activité de l'entreprise[10]. Il en va autrement lorsqu'un séquestre intérimaire est nommé lors d'une requête de mise en faillite (art. 46 L.f.i.), lors d'une proposition concordataire (art. 47.1 L.f.i.), ou lorsqu'un créancier se voit imposer des délais pour réaliser ses garanties (art. 47 L.f.i.). À moins que, dans des circonstances particulières, le tribunal n'en ait décidé autrement, les fonctions du séquestre intérimaire se ramènent en effet à la seule surveillance et la seule conservation des biens du débiteur, dans l'intérêt des créanciers en général ou de ceux qui ont demandé sa nomination. Les biens de la société insolvable ne lui sont pas dévolus.

L'autre mode de liquidation, soit celui de la *Loi sur les liquidations et les restructurations*, loin d'emporter un tel transfert de propriété des biens de la société au profit du liquidateur, prévoit le maintien de l'existence de la compagnie jusqu'à la fin du processus de liquidation[11]. À l'instar du contrôleur nommé en vertu de la *Loi sur les arrangements avec les créanciers des compagnies,* le liquidateur « prend sous sa garde ou sous son contrôle tous les biens [...]

8. Voir, en ce sens, *Syndicat national de l'amiante d'Asbestos inc.* c. *Mine Jeffrey Inc.*, [2003] R.J.D.T. 23, [2003] R.J.Q. 420 (C.A.), notes du j. Dalphond, à la page 34.
9. Art. 71(2) L.f.i. Voir aussi art. 14.06 (1.2) et 16(3) L.f.i.
10. Exemple *Caron Bélanger Ernst et Young inc.* c. *Syndicat canadien des travailleurs du papier, section locale 204*, [1993] T.T. 317. En l'espèce, le Tribunal du travail concluait qu'en raison de son statut de nouvel employeur, le syndic se trouvait lié en vertu de l'article 45 C.t., par le régime de rapports collectifs qui liait le failli, question qui sera examinée dans la seconde partie du présent texte.
11. Art. 19 L.l.r. Voir *Coopérants (les), Société mutuelle d'assurance-vie (Liquidation de)* c. *Dubois*, [1996] 1 R.C.S. 900, à la p. 913.

de la compagnie [...] »[12] ; il n'en devient pas propriétaire, mais il agit à leur sujet au nom de la société en liquidation de la même façon que ses administrateurs le faisaient auparavant. Dès lors, si, aux fins de la liquidation, il y avait exceptionnellement maintien de l'activité caractéristique de l'entreprise faisant partie de l'actif de la compagnie, ceci, dans le but de l'aliéner comme un tout en activité pour le bénéfice commun des créanciers, la société en liquidation demeurerait l'employeur dans l'intervalle[13].

La présence d'un pareil contexte d'insolvabilité ne devrait pas s'opposer à l'exercice de la compétence de la Commission des relations du travail pour ce qui est d'identifier l'employeur aux fins du *Code du travail*, comme l'établit généralement cette loi provinciale[14]. Du moins, envisagée isolément, cette question paraît elle-même dénuée de tout aspect patrimonial pouvant rendre inopérante, voire inapplicable, cette législation en raison de la compétence fédérale en matière d'insolvabilité. La difficulté devient, au contraire, plus facilement présente dès lors qu'il s'agit de savoir si l'employeur demeure toujours lié par le régime collectif de travail qui prévalait antérieurement dans l'entreprise[15].

## II. Quelles sont les conditions de travail applicables dans les circonstances ?

Les conditions de travail qui auront cours dans l'entreprise

12. *Ibid*., art. 33.
13. Dans les faits, il pourra s'agir, sous le couvert de la détermination de l'employeur, de la question du maintien du régime collectif de travail dans l'entreprise, question faisant l'objet de la seconde partie de la présente note. Il devient alors primordial d'établir la nature de l'entreprise en cause une fois le processus de liquidation enclenché : s'agit-il, aux fins de cette liquidation de la société, de la poursuite exceptionnelle de l'activité caractéristique de l'entreprise originelle qui lui appartient ou n'est-on pas plutôt en présence en définitive d'une autre entreprise, soit celle du liquidateur lui-même, qui, par son propre personnel, s'active seulement à fermer des dossiers au profit de l'ensemble des créanciers ? La dissidence du juge Baudouin dans *Syndicat des employés de coopérative d'assurance-vie* c. *Raymond Chabot, Fafard, Gagnon inc.*, [1997] R.J.Q. 776 (C.A.), p. 782, laisse supposer qu'il s'agissait dans l'espèce de cette dernière hypothèse. Il n'en pose pas moins généralement, comme le juge de première instance, que l'ordonnance de liquidation « met légalement fin au contrat d'emploi et au lien créé par celui-ci, qu'il soit individuel ou collectif » (p. 785). Dans cette perspective, la compagnie débitrice ne peut plus être l'employeur, comme nous sommes portés à l'affirmer, si, du moins, il s'agit bien de la poursuite de l'activité de l'entreprise originelle.
14. *Code du travail*, L.R.Q., c. C-27, art. 39 et 114 (ci après désigné : « C.t. », voir art. 72(1) L.f.i.). Voir en ce sens l'arrêt majoritaire *Syndicat des employés de coopérative d'assurance-vie* c. *Raymond Chabot, Fafard, Gagnon inc., ibid*. La question demeure de savoir si le recours devant la Commission des relations de travail doit être autorisé selon l'article 215 L.f.i. Voir *infra,* p. 13. *Ibid.* en ce qui a trait à l'article 21 L.l.r.
15. Si l'entreprise relevait exceptionnellement de la compétence du Parlement central, la compétence juridictionnelle du Conseil canadien des relations industrielles s'affirmerait semblablement selon le *Code canadien du travail*, L.R.C. (1985), c. L-2, art. 16.0.1(i) (ci- après désigné « C.c.t. »), sans préoccupation d'ordre constitutionnel.

maintenue en activité dépendent, selon notre préoccupation, du maintien ou non, du régime collectif de travail qui y prévalait avant l'application des lois relatives à l'insolvabilité. Cette question met en œuvre à la fois ces dernières lois et la loi qui régit le régime collectif de travail. Si cette dernière est une loi provinciale, comme c'est souvent le cas, elle deviendra « inopérante » dès que surviendra un conflit « opérationnel » avec la législation fédérale régissant une situation d'insolvabilité. Si la loi provinciale prétendait intervenir relativement à ce qui serait considéré comme faisant partie du « noyau dur » du chef de la compétence fédérale qu'est « faillite et insolvabilité », elle serait alors invalide pour autant, c'est-à-dire « inapplicable »[16]. Autrement, elle s'appliquera normalement[17].

Dans le cas plus exceptionnel des rapports collectifs régis par la Partie I du *Code canadien du travail*, la difficulté, qui ne serait pas ainsi d'ordre constitutionnel, devrait se résoudre par l'application du principe d'interprétation « *specialia generalibus derogant* », selon lequel une loi particulière doit être appliquée nonobstant une loi générale qui énonce une règle contraire. Dans les circonstances, la loi spéciale est celle qui régit l'insolvabilité[18]. Reste à voir si ces principes trouveront à s'appliquer à l'occasion des cas de figure précédemment évoqués.

Pour ce qui est de la législation visant le redressement de la situation financière de la compagnie insolvable, la proposition concordataire déposée selon la *Loi sur la faillite et l'insolvabilité,* a-t-on vu, n'entraîne pas de bouleversement institutionnel dans la gestion de l'entreprise. Le régime légal de la proposition ne postule aucune dérogation à la législation du travail pour ce qui est de son application au travail exécuté à la suite de la proposition. En particulier, les salariés sont en droit d'exiger « sans délai » le paiement du salaire pour ce travail[19], et, de toute façon, la proposition devra établir les créances selon les termes de la convention collective. Il ne s'agira alors que d'un paiement fait par l'employeur dans la continuité des affaires de l'entreprise[20].

Observons en passant, pour ce qui est cette fois du travail exécuté avant le dépôt de la proposition ou de l'avis d'intention, que la proposition devra comporter un paiement prioritaire d'arrérages de salaire équivalent à celui que pré-

16. Voir *Workers' Compensation Board* c. *Husky Oil Operations Ltd.*, [1995] 3 R.C.S. 453, 504 à 507 (j. Gonthier) ; *Banque de Montréal* c. *Hall*, [1990] 1 R.C.S. 121, 155 (j. LaForest). Voir aussi, sur la question, Henri BRUN et Guy TREMBLAY, *Droit constitutionnel*, 4e éd., Cowansville, Éditions Yvon Blais, 2002, p. 456-465.
17. Voir art. 72(1) L.f.i.
18. Voir P.-A. CÔTÉ, *Interprétation des lois*, 3e éd., Montréal, Éditions Thémis, 1999, p. 454.
19. Art. 65.1(4) L.f.i.
20. De leur côté, les salariés ne sauraient exciper de la proposition pour mettre fin avant terme à leurs rapports de travail avec l'employeur, pour la simple raison que ce dernier a déposé une proposition (*ibid.*, art. 65.1 L.f.i.).

voit l'article 136(1)d) L.f.i. à l'occasion d'une faillite[21]. À l'instar de cette dernière, le dépôt de la proposition entraîne la suspension des procédures « en vue du recouvrement de réclamations prouvables en matière de faillite »[22]. Ceci ne devrait pas faire obstacle à la poursuite arbitrale d'un grief de convention collective dont l'objet n'est pas d'ordre monétaire, ni même celle d'un grief monétaire dont la portée ne serait qu'interprétative, c'est-à-dire de nature à déterminer les montants exigibles dont devra tenir compte la proposition. Il demeure de plus loisible au tribunal de déclarer non applicable cette suspension pour éviter un préjudice sérieux, ou encore, s'il lui paraît équitable pour d'autres motifs de rendre une telle décision[23]. Enfin, l'acquéreur de l'entreprise du débiteur qui a fait la proposition, qui deviendrait ainsi le nouvel employeur, serait lié par le régime des rapports collectifs qui liait son auteur[24].

L'application de la *Loi sur les arrangements avec les créanciers des compagnies,* précisément parce que l'ensemble de ses dispositions se veulent un « outil flexible pour la réorganisation des entreprises insolvables »[25], conduit à se demander si elle permet de déroger au régime de rapports collectifs, en l'occurrence, à la convention collective en vigueur dans l'entreprise, ce, dans le but de faciliter la survie de l'entreprise. Cette finalité de la loi incite en effet à concevoir d'une façon souple et libérale le pouvoir d'ordonnance du tribunal, pouvoir lui permettant d'inclure dans l'ordonnance de sursis qu'il émet en vertu de la Loi sur les arrangements, des éléments se situant au-delà des seules mentions spécifiques de la loi[26]. Pour atteindre les finalités de la loi, on reconnaît ainsi au tribunal une « compétence inhérente ». Notamment, le tribunal s'autorisera de cette dernière pour libérer la société insolvable d'obligations contractuelles qui lui sont préjudiciables. Ceci pourra ainsi conduire à la résiliation de contrats comprenant des obligations à exécutions successives[27].

Quant à l'application d'une convention collective à du travail qui se poursuit dans l'entreprise, on voit ainsi, en Ontario, à l'occasion d'un arrangement concernant *Air Canada*, le tribunal permettre à l'employeur, nonobstant les stipulations de la convention collective, de mettre fin au rapport de travail de certains salariés, ou de

21. *Ibid.*, art. 60(1.3) et 136(1)d).
22. *Ibid.,* art. 69 (dans le cas d'un avis d'intention) ; art. 69.1 (dans le cas d'une proposition).
23. *Ibid.,* art. 69.4. Application à un recours selon l'article 15 C.t., l'ordre public étant en cause : *In re Engrenages P.Y.G. : Syndicat des travailleurs de la métallurgie de Québec Inc.* c. *Malette, Syndics et gestionnaires,* J.E. 2003-865, REJB 2003-38698, D.T.E. 2003T-426 (C.S.) (j. Banford).
24. Art. 45 C.t. et 44 C.c.t.
25. *Dans l'affaire de l'arrangement relatif à P.C.I. Chemicals Canada inc.*, [2002] R.J.Q. 1093 (C.S.), p. 1099 (j. Dalphond).
26. Art. 9 à 11.7 L.a.c.c.
27. Voir ainsi *Dans l'affaire de l'arrangement relatif à P.C.I. Chemicals Canada inc.*, *supra*, note 25. Dans l'espèce, il s'agissait de la résiliation d'un contrat d'approvisionnement conclu à des conditions désavantageuses.

les mettre à pied, moyennant un court préavis établi par l'ordonnance et aux conditions pouvant résulter d'une négociation avec ces mêmes salariés ; le tribunal l'autorisait également à mettre fin ou à modifier un régime de retraite établi par la convention collective aux conditions que le tribunal pouvait déterminer[28].

Au Québec, la Cour d'appel a statué, dans l'affaire *Mine Jeffrey*[29], que le pouvoir inhérent du tribunal puisse faire en sorte que l'ensemble des obligations non honorées résultant de l'application de la convention collective à du travail effectué antérieurement à l'ordonnance « [...] constituent des créances de la débitrice [...] dont il sera disposé dans le cadre du plan de réorganisation, ou, à défaut de sa faillite »[30]. Elle a aussi accepté que l'employeur soit autorisé à mettre fin à l'emploi des salariés et à les réembaucher sans toutefois vraiment s'interroger sur l'obligation de respecter l'ordre de préséance que devrait normalement établir la convention collective ; dans les faits, observe-t-elle cependant, les salariés réembauchés l'avaient été en fonction de leur ancienneté mais sans le concours du syndicat[31].

La Cour d'appel n'a cependant pas accepté que les salariés rappelés au travail voient leur régime de travail établi par un contrat individuel de travail, sans égard à la convention collective. En particulier, ces ententes qu'avait proposées le contrôleur différaient de la convention collective en matière de rémunération et d'avantages sociaux. Selon la Cour d'appel, le travail dont il s'agissait demeurait visé par l'accréditation syndicale et le pouvoir de représentation collective du syndicat qui en découlait ; l'employeur ne pouvait donc s'entendre directement avec les salariés à ce sujet sans porter atteinte à ce pouvoir exclusif. Partant, il continuait d'être régi intégralement par la convention collective. Celle-ci, compte tenu de la législation qui la régit, est, a-t-elle posé, « [...] plus qu'un simple contrat bilatéral, mais un instrument original »[32]. Selon l'article 11.3 de la *Loi sur les arrangements avec les créanciers des compagnies*, les salariés avaient donc droit d'être payés « immédiatement » pour tout service rendu après la date de l'ordonnance « [...] et ce, selon les termes de la convention collective applicable dans sa version originale [sic] ou modifiée de consentement avec le syndicat accrédité »[33]. En effet, selon la Cour d'appel, « [...] rien dans la *Loi sur les arrangements avec les créanciers des compagnies* n'autorise le contrôleur ou le tribunal à arrêter unilatéralement la contrepartie payable à celui qui fournit un bien ou un service à la débitrice [...] »[34].

28. Voir ainsi, à cet effet, *In re Air Canada*, [2003] O.J. No. 1157, Ont. Superior Court of Justice, Commercial List (j. Farley), 1er avril 2003, par. 24c) et d) de l'ordonnance.
29. *Syndicat national de l'Amiante d'Asbestos inc.* c. *Mine Jeffrey inc.*, *supra*, note 8.
30. *Ibid.*, p. 38.
31. *Ibid.*, p. 29.
32. *Ibid.*, p. 37.
33. *Ibid.*, p. 38.
34. *Ibid.*, p. 36.

En définitive, la Cour d'appel ne se réclame des principes du *Code du travail* – et de la portée de la convention collective à laquelle il donne effet – que pour déterminer la contrepartie salariale à laquelle les salariés que l'on choisit de maintenir au travail ont « immédiatement » droit en vertu de l'article 11.3 de la *Loi sur les arrangements avec les créanciers des compagnies*[35]. Elle n'avait pas dans l'espèce à traiter d'autres aspects de la convention collective. De toute façon, la législation du travail en cause n'établit pas de distinction entre les conditions de travail de nature immédiatement salariale et celles qui ne le sont pas. De plus, le contenu de la convention collective, fruit de compromis, ne se prête guère à une telle dissociation.

Les éléments de droit auxquels la Cour se réfère pour refuser de permettre de déroger à la contrepartie salariale du travail établie par la convention soulèvent certaines questions. Ainsi, le monopole légal de la représentation du syndicat accrédité s'opposait, certes, à la conclusion d'ententes individuelles avec les salariés. Mais, le pouvoir inhérent d'ordonnance véhiculé par la loi fédérale n'aurait-il pas pu permettre de déroger unilatéralement à la rémunération établie par la convention collective, dans l'hypothèse où cela aurait été jugé nécessaire pour assurer la rentabilité des activités de l'entreprise qui se poursuivaient ? La préséance constitutionnelle de la loi fédérale en matière d'insolvabilité aurait alors fondé la dérogation à l'effet de la législation provinciale du travail, aspect dont ne traite par l'arrêt *Mine Jeffrey*. Quant à l'article 11.3 de la *Loi sur les arrangements avec les créanciers des compagnies,* son libellé ne se réfère qu'à l'exigibilité immédiate des salaires ; il ne traite pas de la détermination de sa quotité.

Quoi qu'il en soit des aspects précédents, la conclusion de l'arrêt paraît justifiée. Elle représente, en effet, un exercice d'un pouvoir inhérent d'ordonnance, partant d'appréciation, qui se distingue de solutions jurisprudentielles auxquelles il a pu donner lieu dans d'autres contextes. Un tel pouvoir, a-t-on vu, permet en effet de résilier un contrat à exécution successive contraignant une société insolvable à fournir une prestation ; il lui permet également de se libérer d'une obligation de recevoir une prestation à titre onéreux, comme dans le cas d'un bail immobilier. Dans l'arrêt *Mines Jeffrey,* il en allait différemment : l'employeur était tout à fait libre de se

35. Voir aussi l'application de l'article 11.3 L.a.c.c., pour assurer l'effet d'une entente antérieurement conclue avec le syndicat accrédité et qui accordait aux salariés une participation aux bénéfices de l'entreprise : *Dans l'affaire de l'arrangement relatif à Uniforêt Inc.* et *9027-1875 Québec Inc.,* [2003] R.J.Q. 2073 (C.A.), conf. J.E. 2002-1647 (C.S.) (j. Lévesque). Selon la Cour d'appel, qui s'appuie sur l'arrêt *Mine Jeffrey,* une ordonnance du tribunal autorisant généralement l'employeur à résilier, avec le consentement du contrôleur, tout contrat ne pouvait lui permettre de se libérer unilatéralement de la précédente entente d'intéressement des salariés de nature salariale : « [...] il lui fallait d'abord négocier et obtenir l'accord du syndicat intimé, s'il tenait à suspendre le régime de participation tout en continuant les salariés dans leur emploi » (p. 2078).

prévaloir ou de refuser de se prévaloir du travail régi par la convention collective. S'il s'en prévalait, comme dans l'espèce, il assumait alors d'en payer le prix convenu avec le syndicat.

Par ailleurs, les observations précédentes faites dans la présente note à l'occasion de la proposition concordataire au sujet de la suspension des procédures contre le débiteur sont transposables à la suspension pouvant résulter d'une ordonnance en vertu de la L.a.c.c.[36]. Enfin, celui qui acquiert l'entreprise du débiteur sera tout aussi bien lié par le régime collectif de travail s'attachant à l'entreprise en vertu de la loi du travail[37].

Dans le cas d'une faillite, le syndic qui, a-t-on vu, devient l'employeur dans l'entreprise qui poursuit ses activités, se trouve-t-il de ce fait lié par le régime de rapports collectifs de travail qui liait le failli, soit essentiellement l'accréditation syndicale et la convention collective qui pouvaient s'attacher à l'entreprise ? La loi régissant ces rapports collectifs impose une réponse affirmative. Il y a, en effet, transmission légale de l'entreprise, notion qu'une interprétation téléologique d'ensemble de la disposition légale assurant le maintien du régime collectif de travail conduit à englober dans la portée de cette dernière[38].

Reste à voir si les exigences de l'administration de la faillite ont conduit la loi fédérale en la matière à permettre d'ignorer le régime de rapports collectifs de travail établi par la loi provinciale du travail, auquel cas cette loi fédérale aurait préséance d'un point de vue constitutionnel[39].

Aucune disposition de la *Loi sur la faillite et l'insolvabilité* ne fonde clairement un pouvoir d'ordonnance permettant au syndic d'ignorer le régime de rapports collectifs de travail, en particulier, de passer outre à la convention collective. On doit toutefois observer que la jurisprudence des tribunaux de certaines provinces de common law, en particulier de l'Ontario, s'est montrée diversement permissive à ce sujet. Certaines décisions reprennent d'abord simplement à leur compte l'affirmation péremptoire suivante de la juge Abella, dissidente dans l'arrêt *St-Marys Paper Inc.* : « Contracts of employment with employees, including

36. Art. 9(3) et (4) L.a.c.c.
37. Art. 45 C.t. et art 44 C.c.t.
38. Voir *Caron, Bélanger, Ernst and Young inc.* c. *Syndicat canadien des travailleurs du papier, section locale 204*, *supra* note 10, à la p. 321. Si le j. Beetz, dans *U.E.S. local 298* c. *Bibeault*, [1988] 2 R.C.S. 1048, faisait reposer l'aliénation « sur la transmission volontaire du droit de propriété », il le faisait alors pour établir généralement une exigence d'un lien de droit entre l'ancien et le nouvel employeur, sans envisager une situation de transmission légale de l'entreprise, comme dans le cas présent. L'une des définitions d' » aliénation » qu'il mentionne voit d'ailleurs en ce terme une « transmission volontaire ou légale de la propriété d'une chose ou d'un droit considéré par rapport à celui qui transmet » (H. CAPITANT, *Vocabulaire juridique*, 1936, à la p. 46). Voir p. 1114 du jugement.
39. Cet aspect constitutionnel spécifique prête encore à débat : voir ainsi *In Re Royal Crest Lifecare Group Inc.,* [2004] O.R. 174 (Ont. C.A.), par. 14 à 19.

collective agreements, terminate with a bankruptcy »[40]. L'occasion de ce propos était un litige d'une nature différente de la présente question. Pour leur part, les jugements qui y prennent appui l'ont fait jusqu'à présent, uniquement pour refuser d'autoriser le syndicat, selon l'article 215 de la *Loi sur la faillite et l'insolvabilité,* à exercer un recours devant une commission des relations de travail, chargée d'appliquer la loi régissant les rapports collectifs de travail, pour lui faire déclarer que le syndic était lié par la convention collective, contrairement à ce que le syndic avait déjà décidé à ce sujet[41].

Plus récemment, un juge rejetait une telle demande d'autorisation, la jugeant prématurée dans les circonstances, car elle avait été présentée le jour même de la mise en faillite du débiteur. Il estimait que la faillite entraîne la rupture du rapport individuel de travail et que la convention collective se trouve momentanément suspendue à l'endroit du syndic pour renaître éventuellement à l'endroit de l'acquéreur à l'occasion d'une transmission de l'entreprise par ce syndic[42]. Il craignait aussi que le syndic se retrouve chargé d'obligations trop onéreuses dans l'exécution de sa tâche, si l'issue devant la juridiction du travail devait être favorable au syndicat[43]. Il constatait néanmoins que la question de la survie de la convention à la suite de la faillite n'avait pas encore été l'objet d'une analyse approfondie[44]. Par un arrêt majoritaire, la Cour d'appel a refusé de voir en ce refus d'autorisation un exercice inapproprié du pouvoir d'appréciation du juge, lequel n'a pas décidé, souligne-t-on, du fond de la question[45]. Toutefois, selon la dissidence, le juge de première instance n'avait pas tenu suffisamment compte de l'intérêt que voulait défendre le syndicat[46].

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40. *In re St-Marys Paper,* (1994) 26 C.B.R. (3d) 273 (Ont. C.A.), à la p. 291 ; pourvoi rejeté par la Cour suprême en raison de son caractère « théorique » dans les circonstances, [1996] 1 R.C.S. 3. Voir cependant un jugement plus ancien, *Maritime Life Assurance Co.* c. *Château Gardens (Hanover) Inc*., (1983) 2 D.L.R. (4th) 553 (Ont. H. Ct.), selon lequel le syndic était, à titre de nouvel employeur, lié par la convention collective.
41. Voir aussi *In re 588871 Ontario Ltd.,* (1995) 33 C.B.R. 28 (Ontario Ct. of Justice) ; *In re Trustee of Associated Freezers of Canada Inc.* c. *Retail, Wholesale Canada, local 1015,* (1995) 36 C.B.R. 36 (N.S. Spr. Ct), conf. par (1996) 39 C.B.R. 311 (N.S. Court of Appeal).
42. Voir *In Re Royal Crest Lifecare Group Inc.*, [2003] 40 C.B.R. (4th) 146 (Ont. Sup. Court of Justice) (j. Farley), par. 30. Voir aussi, en ce sens, *Saan Store Limited v. Nova Scotia Stores Limited* c. *Nova Scotia Labour Relations Board*, (1999) 172 D.L.R. (4th) 134 (N.-S. C.A.), à la p. 150. Dans l'espèce il s'agissait d'une proposition concordataire. Notons aussi que l'arrêt *In re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 R.C.S. 27, que l'on invoquait notamment, n'a pas décidé que la faillite entraînait l'extinction des contrats individuels de travail ; il a plutôt décidé qu'une indemnité légale de licenciement devenait exigible à la suite d'une perte d'emploi résultant d'une faillite.
43. *Ibid.,* par. 24.
44. *Ibid*., par. 17.
45. *In re Royal Crest Lifecare Group inc.,* n. 39, par. 33.
46. Selon le juge Borins : « In summary, the bankruptcy judge placed too much emphasis on the bankruptcy environment and gave insufficient weight to the

Ajoutons en passant qu'au Québec, il pourrait être encore indiqué de faire constater dans un délai raisonnable par la Commission des relations de travail, l'application de l'article 45 du *Code du travail* qui assure la survie du régime collectif de travail à la suite d'un changement d'employeur, ce, malgré un récent amendement qui a fait disparaître une disposition énonçant une obligation spécifique en ce sens[47].

Toutefois, la Loi sur la faillite comporte une certaine indétermination en ce qui a trait aux instructions que le tribunal peut valablement donner lors de la nomination d'un séquestre intérimaire. Il peut ainsi lui ordonner « de prendre toute [...] mesure qu'il estime indiquée »[48]. Dans ces circonstances, a-t-on vu, le séquestre intérimaire n'est pas un employeur. C'est ce que font d'ailleurs voir les autres pouvoirs que le tribunal peut lui attribuer en vertu des mêmes dispositions. Il semble bien que l'énoncé général dont il s'agit et qui suit ces énoncés particuliers est de même nature qu'eux ; plus généralement, la loi en cause, à la différence de la *Loi sur les arrangements avec les créanciers des compagnies*, n'a pas pour objectif en soi de rétablir la solvabilité du débiteur. En conséquence, ce pouvoir général ne devrait pas conduire à une ordonnance permettant au séquestre intérimaire de déroger à la convention collective[49].

Semblablement, le pouvoir du tribunal statuant sur une demande de mise en liquidation en vertu de la *Loi sur les liquidations et les restructurations* de « rendre toute ordonnance provisoire ou autres qu'il croit juste »[50] s'inscrit dans une perspective conservatoire et non de restructuration. Aussi l'employeur demeure-t-il également lié par la convention collective, ce, du moins, avons-nous vu, s'il s'agit bien de la poursuite exceptionnelle de l'activité de l'entreprise originelle[51].

* * * * *

D'importants groupements syndicaux ont fait valoir devant le Comité sénatorial permanent des banques et du commerce, à l'occasion de son récent examen de la *Loi sur la faillite et l'insolvabilité* et de la *Loi sur les arrangements avec les créanciers des compagnies,* que « les tribunaux ne devraient pas avoir le droit, sous prétexte qu'il s'agit de la procédure convenue dans la Loi sur les arrangements, de s'ingérer dans le fonctionnement des ententes convenues librement par le truchement de la négociation collective et ainsi,

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essential character of the issues that unions sought to advance before ORLB on behalf of their members » (par. 70).

47. *Loi modifiant le Code du travail*, L.Q. 2003, c. 26, art. 3.
48. Art. 47(2)c) et 47.1(2)c) L.f.i.
49. *Contra*, quoique sans motivation particulière, *In re Royal Oak Mines Inc.*, [2001] O.J. No. 562, 20 février 2001, (Cour d'appel de l'Ontario). En l'absence de fonds, le tribunal avait interdit au séquestre intérimaire d'autoriser tout versement à une caisse de retraite prévu à la convention collective.
50. Art. 13 et 39 L.l.r.
51. Voir note 13.

d'entraver les droits de nombreux travailleurs »[52]. Selon ces groupements, « la LACC devrait dire clairement que les tribunaux ne peuvent dans l'exercice de leur juridiction inhérente, modifier, annuler ou passer outre les dispositions d'une convention collective sans le consentement de l'employeur et du syndicat en cause »[53].

Prenant sans doute implicitement acte du fait que le syndicat accrédité et les salariés qu'il représente sont des parties prenantes à l'entreprise, mais non les seules, le Comité se refuse de faire droit à ces positions et se contente de recommander en général que les lois examinées soient modifiées pour permettre généralement la résiliation des « contrats exécutoires » qui existent au début des procédures entamées aux termes de ces deux lois. Toutefois, s'agissant particulièrement de la convention collective, le débiteur, pense-t-il, devrait alors avoir le fardeau d'établir « que des négociations après le dépôt de la requête ont été menées de bonne foi en vue d'alléger les aspects trop onéreux de la convention collective et que la résiliation est nécessaire à une restructuration viable »[54]. Cette recommandation correspond substantiellement au droit fédéral américain[55].

52. Position des Métallurgistes unis d'Amérique, citée dans *Le débiteur et les créanciers doivent se partager le fardeau*, *Examen de la Loi sur la faillite et l'insolvabilité et de la Loi sur les arrangements avec les créanciers des compagnies*, Rapport du Comité sénatorial permanent des banques et du commerce, Ottawa, novembre 2003, à la p. 146.
53. Position des T.C.A.-Canada, *ibid*.
54. *Ibid.*, p. 151.
55. Voir à ce sujet les notes du juge Dalphond dans *Syndicat de l'amiante d'Asbestos inc.* c. *Mine Jeffrey Inc.*, n. 8, à la p. 36 (note 27 de l'arrêt).

# SÛRETÉS

Marc LEMIEUX

## Les décisions *Bombardier Inc.* c. *Hermes Aero LLC* et l'autonomie des crédits standby

### 1. Rappel des principes généraux

Les lettres de crédit sont employées dans des contextes variés pour garantir des obligations. On les appelle alors « crédits standby », pour les différencier des lettres de crédit employées pour effectuer des paiements notamment dans le cadre de ventes internationales.

Lorsqu'ils sont émis de façon irrévocable par une institution solvable, les crédits standbys présentent de nombreux avantages sur d'autres types de sûretés. En cas de défaut, le créancier (le bénéficiaire du crédit standby) peut réaliser sa sûreté dans de courts délais en présentant à la banque émettrice les documents prévus, qui ne consistent généralement qu'en une demande de paiement, souvent accompagnée d'une attestation que le débiteur (le donneur d'ordre du crédit standby) est en défaut. Contrairement au créancier hypothécaire, le bénéficiaire d'un crédit standby n'a pas à se soucier du rang de sa sûreté ou des priorités occultes d'autres créanciers, ni du choix et de l'exercice d'un recours hypothécaire, ni des délais que peut occasionner la restructuration financière du débiteur[1], ni des aléas des marchés et de la valeur des biens hypothéqués.

De plus, les crédits standby sont des engagements autonomes de l'obligation garantie, ce qui signifie qu'en présence de documents en apparence conformes aux conditions spécifiées, la banque émettrice doit en principe payer le montant demandé, sans égard à tout litige entre le créancier et le débiteur[2]. Ils présentent incontestable-

1. On estime généralement qu'une demande de paiement d'un crédit standby ne constitue pas une procédure contre le débiteur ou ses biens, de sorte que la restructuration et la faillite d'une entreprise insolvable ne suspendent pas, en principe, le droit du bénéficiaire d'un crédit standby d'en demander le paiement. Voir *Meridian Developments Inc.* c. *Toronto Dominion Bank*, (1984) 32 Alta L.R. (2d) 150 (Alta Q.B.) et l'article 11.2 de la *Loi sur les arrangements avec les créanciers des compagnies*, Statuts révisés du Canada 1985, c. C-36.
2. *Banque de Nouvelle-Écosse* c. A*ngelica Whitewear Ltd.*, [1987] 1 R.C.S. 59 (ci-après *Angelica-Whitewear*), à la p. 70: «Le principe fondamental régissant les lettres de crédit documentaire et la caractéristique qui leur donne leur utilité et leur efficacité commerciales internationales sont que l'obligation de la banque émettrice d'honorer une traite tirée sur un crédit lorsqu'elle est accompagnée de documents qui présentent l'apparence de conformité avec les conditions du crédit est indépendante de l'exécution du contrat sous-jacent à l'égard duquel le crédit a été accordé.

ment des avantages sur le cautionnement, puisque la caution peut invoquer, en plus des moyens de défense qui lui sont propres, les moyens de défense du débiteur principal[3].

En revanche, le principe de l'autonomie souffre d'une exception en cas de fraude. Lorsque les documents présentés, malgré leur apparence de conformité aux conditions du crédit, sont des faux, la banque émettrice est justifiée de ne pas payer le crédit, ou le tribunal est justifié d'émettre une injonction empêchant la banque de payer, selon le cas, si la fraude est « portée suffisamment à la connaissance de la banque avant le paiement de la traite ou démontrée devant un tribunal auquel le client de la banque a demandé de délivrer une injonction interlocutoire pour empêcher la banque d'honorer la traite »[4]. L'exception de fraude n'est toutefois pas limitée aux cas où les documents sont frauduleux ; elle s'étend également à tout acte du bénéficiaire qui aurait pour effet de lui permettre d'obtenir frauduleusement le bénéfice du crédit[5].

C'est à la lumière de ces principes généraux qu'il convient maintenant d'examiner deux décisions récentes de la Cour supérieure dans l'affaire *Bombardier Inc.* c. *Hermes Aero LLC*[6].

## 2. Les décisions

Dans cette affaire, Bombardier Inc. (« Bombardier ») avait vendu un avion à Hermes Aero LLC (« Hermes »). Le contrat prévoyait le paiement d'avances par Hermes et l'émission, à la demande de Bombardier, d'une lettre de crédit standby en faveur d'Hermes, pour garantir le remboursement de ces avances, dans l'éventualité d'un défaut par Bombardier. Conformément aux dispositions du contrat, Bombardier a demandé à Banque Nationale du Canada (« BNC ») d'émettre une lettre de crédit standby payable à Hermes contre présentation d'un certificat signé par un représentant d'Hermes attestant (1) que l'avion n'est pas prêt à être livré dans les délais prévus au contrat, (2) que Bombardier a reçu un avis de résiliation du contrat, et (3) que Bombardier a fait défaut de payer

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Les différends entre les parties relativement à l'exécution du contrat sous-jacent ne peuvent en règle générale justifier le refus par la banque émettrice d'honorer une traite qui est accompagnée par des documents en apparence conformes».

3. Art. 2353 du *Code civil du Québec*.
4. *Angelica-Whitewear*, *supra*, note 2, à la p. 71. Le fardeau de preuve du bénéficiaire n'est pas le même dans les deux cas. Une «solide preuve *prima facie* de fraude» est requise dans le cadre d'une injonction, alors qu'une preuve rendant «l'acte frauduleux clair et évident aux yeux de la banque» s'impose dans les cas où la banque doit exercer son propre jugement pour déterminer si elle doit ou non honorer une demande de paiement»: *ibid*., p. 84.
5. *Ibid*., p. 83.
6. C.S. Montréal, nº 500-17-016481-031, 4 décembre 2003, REJB 2003-51226, requête en autorisation de pourvoi rejetée: C.A. Montréal, nº 500-09-14087-035, 13 janvier 2004 (ci-après *Bombardier No. 1*) et C.S. Montréal, nº 500-17-016481-031, 30 juillet 2004 (ci-après *Bombardier No. 2*).

le montant demandé dans les 10 jours de cet avis.

Un litige est survenu entre Bombardier et Hermes suite à la transmission d'un avis à l'effet que Bombardier avait identifié un dommage au fuselage de l'avion. Hermes a demandé à Bombardier de lui livrer un autre avion, Bombardier s'estimant toutefois justifiée de lui livrer l'avion malgré le dommage. Hermes a réitéré sa demande après que l'avion eut été frappé par la foudre. Les parties ont négocié, mais sans succès, et se sont échangé des avis de résiliation de contrat.

Au moment du litige, Hermes avait fait des avances en faveur de Bombardier pour un montant global de US $12,577,500. Hermès demandait le remboursement de ce montant, plus les intérêts, une somme de US $19,345,262. Bombardier offrait plutôt de rembourser le principal des avances, moins un montant de US $4,192,500 qu'elle souhaitait retenir à titre de dommages liquidés.

C'est dans ce contexte qu'Hermes a présenté une demande de paiement aux termes de la lettre de crédit et que Bombardier a déposé en Cour supérieure une requête en injonction pour empêcher BNC de payer la lettre de crédit.

Dans son jugement *Bombardier No. 1*, la Cour supérieure a accueilli la requête de façon provisoire et ordonné à la Banque de s'abstenir de payer la lettre de crédit.

Il ressort des motifs du jugement que les circonstances ne permettaient pas de conclure que la demande de paiement d'Hermes était entachée de fraude. Ainsi, la Cour écrit :

> Le tribunal ne peut malheureusement partager les prétentions d'Hermes, reconnaître la complète autonomie de la lettre de crédit et refuser l'émission d'une ordonnance de sauvegarde au seul motif qu'il n'y aurait *prima facie* aucune fraude de sa part.[7]

La Cour reconnaît même expressément que le certificat présenté « ne peut être qualifié de frauduleux »[8].

En l'absence de fraude, la Cour estime toutefois que ce certificat est « insuffisant »[9] et même « faux »[10]. La Cour se penche plus particulièrement sur un aspect du litige impliquant un avis de livraison, transmis par Bombardier par courriel et télécopie, alors que, selon Hermes, les dispositions du contrat exigeaient que cet avis soit transmis par messager ou courrier recommandé. La Cour examine les dispositions du contrat relatives à l'avis de livraison et juge mal fondée la position d'Hermes, soulignant que d'autres dispositions du contrat prévoient que le contrat ne peut être annulé par Hermes qu'en cas de manquement significatif par Bombardier. Selon la Cour, l'attestation par Hermès que

7. *Bombardier No. 1, supra,* note 6, par. 20.
8. *Ibid*., par. 28.
9. *Ibid.*, par. 28.
10. *Ibid.*, par. 32.

l'avion n'était pas prêt à être livré n'est *prima facie* qu'un simple prétexte « sans véritable fondement juridique »[11].

Il se dégage donc des motifs que si les circonstances ne permettaient pas de conclure que la demande de paiement était frauduleuse, l'« insuffisance » et la « fausseté » de l'attestation de défaut jointe à cette demande justifiaient de faire exception au principe de l'autonomie et d'empêcher BNC d'honorer la demande de paiement, malgré l'apparence de conformité des documents présentés aux conditions stipulées dans le crédit.

La Cour s'est également appuyée sur les « intérêts de la justice » et le fait que l'engagement de BNC ressemblait plus à une lettre de garantie qu'à une lettre de crédit :

> De plus, bien que le document émis par la Banque nationale porte le nom de « Irrevocable standby letter of credit » et réfère au « Uniform Custom and Practice for Documentary Credits » de la Chambre de commerce international, il s'agit, selon le tribunal, beaucoup plus d'une lettre de garantie que d'une lettre de crédit généralement utilisée à titre d'effet de commerce (mode de paiement) dans des transactions internationales.
>
> Ne permettre aucune référence à la relation contractuelle entre les parties, dans un tel contexte, irait contre les meilleurs intérêts de la justice.[12]

La Cour supérieure a par la suite été appelée à se prononcer sur le maintien de l'ordonnance provisoire émise dans son jugement *Bombardier No. 1,* et dans son jugement *Bombardier No. 2* elle a rejeté la demande d'injonction et ordonné à la BNC de payer le montant demandé par Hermès, moins les fonds que Bombardier avait offert de payer.

Selon la Cour supérieure, les circonstances n'établissant pas le caractère frauduleux à première vue de la demande de paiement, il n'y avait pas lieu d'émettre une injonction. S'appuyant sur une jurisprudence canadienne dont il sera question ci-après, la Cour écrit :

> Disagreeing on the interpretation of the underlying agreement is not roof of a serious *prima facie* case of fraud.[13]

De plus, la Cour a refusé de se pencher sur le mérite du litige concernant l'interprétation du contrat, en invoquant l'autonomie de la lettre de crédit du contrat sous-jacent.

### 3. Fraude et fausseté de l'attestation de défaut

La Cour d'appel de Terre-Neuve s'est récemment penchée sur un cas dans lequel la banque émettrice a refusé d'honorer une demande de paiement en apparence conforme, au motif que l'attestation de défaut qui y était jointe était fausse, sans toutefois pouvoir être qualifiée de frauduleuse.

11. *Ibid*., par. 23.
12. *Ibid.*, par. 29 et 30.
13. *Bombardier No. 2, supra*, note 6, par. 36.

Dans l'affaire *Standard Trust Co.* c. *Bank of Nova Scotia*[14], Standard Trust Company (« Standard ») avait fait un prêt à Regatta Plaza Limited (« Regatta ») pour financer la construction d'un immeuble. Parmi d'autres sûretés consenties en faveur de Standard, Regatta a demandé à la Banque de Nouvelle-Écosse (« BNE ») d'émettre une lettre de crédit standby au montant de 300 000 $ payable contre présentation d'une demande de paiement accompagnée d'une attestation à l'effet que le montant dont le paiement est demandé est dû et payable par Regatta à Standard, et que Standard en a demandé le paiement à Regatta sans toutefois le recevoir.

La lettre de crédit venait à échéance le 25 mai 1991 et ne comportait pas de disposition permettant à Standard de demander paiement, au cas où elle ne serait pas renouvelée avant cette date. Le 2 mai 1991, Standard a été placée en liquidation. Le 15 mai 1991, Regatta a écrit à BNE pour l'aviser que Standard était en défaut aux termes du prêt et que BNE devrait en conséquence s'abstenir d'honorer toute demande de paiement que Standard pourrait présenter. Par la suite, BNE a été informée de discussions entre Regatta et Standard à propos d'un refinancement impliquant un renouvellement de la lettre de crédit.

Le 24 mai 1991, le liquidateur de Standard a présenté à BNE une demande de paiement accompagnée d'une attestation en apparence conforme aux conditions du crédit. BNE a refusé d'honorer cette demande, au motif qu'elle avait compris des discussions entre Regatta et Standard que Standard ne demanderait pas le paiement de la lettre de crédit. BNE a aussi indiqué avoir eu des motifs de croire que, malgré l'attestation présentée, Standard n'avait pas, dans les faits, demandé à Regatta de payer le montant dont Standard demandait le paiement aux termes du crédit. Standard envoyait régulièrement des relevés faisant état du solde du prêt et demandant le paiement des intérêts, mais BNE estimait que ces relevés ne constituaient pas des demandes de paiement pour les fins de la lettre de crédit.

Standard a intenté une action contre BNE. BNE a contesté cette action au motif que l'attestation qu'une demande de paiement avait été faite à Regatta était fausse. BNE a mis en cause Regatta, qui a fait valoir que la fausseté de cette attestation rendait la demande de paiement de Standard frauduleuse. BNE et Standard ont respectivement demandé à la Cour de rejeter et d'accueillir l'action par jugement sommaire.

En première instance, la Cour a rejeté l'action de Standard contre BNE. La Cour a souligné que l'hypothèse de la fraude n'était pas la seule conclusion possible à l'égard des circonstances :

> It is possible Standard Trust officials made an honest mistake as to the effect of earlier requests for

14. [2001] N.J. No. 147 (Nfld. C.A.) (ci-après *Standard Trust*).

> payment, contained in the periodic statements, referred to above, sent by Standard to Regatta up to January 30, 1991.[15]

Toutefois, la Cour a accueilli la prétention de BNE à l'effet que les relevés de compte ne constituaient pas des demandes de paiement pour les fins de la lettre de crédit. Il s'ensuivait que l'attestation était fausse, ce qui, même en l'absence de fraude, permettait selon la Cour d'écarter le principe d'autonomie :

> As to whether there must be a fraudulent intention, as opposed to an innocent misrepresentation or mistake, to justify the Bank's withholding of payment, I believe the intention of the beneficiary is not the determining factor. The key is the falsity of what is set out in the demand letter. [...].
>
> [...]
>
> Once an issuing bank has knowledge a demand letter falsely certifies that a condition of the letter of guarantee has been met, this is all the bank needs in order to withhold payment. The Bank need not establish the intention or state of mind of the certifier. [...][16]

La Cour d'appel a renversé ce jugement, accueilli l'action de Standard et condamné sommairement BNE à payer le montant demandé.

La Cour d'appel a jugé qu'en l'absence de fraude, le principe de l'autonomie doit être respecté :

> In my view, in the absence of fraud, « clear and obvious to the bank », the trial judge was not entitled to consider the contractual arrangements which had been made between Standard and Regatta in his interpretation of the Letter of Guarantee issued by the Bank to Standard. He was in error in so doing.[17]

La Cour d'appel a souligné que le jugement de première instance n'a pas conclu que les circonstances rendaient la demande de paiement de Standard frauduleuse. La Cour d'appel a examiné les autorités et jugé que celles-ci n'appuient pas la position exprimée en première instance :

> The question arises as to whether something less then fraud can have the same effect as would fraud so as to justify the refusal of the Bank to pay the sum demanded of it under the Letter of Guarantee.
>
> I can find nothing in the authorities to indicate that anything less than fraud on the part of Standard would justify, in law, the Bank's refusal to honor its obligation to pay under the Letter of Credit upon its receiving Standard's demand.[18]

Avec égards, l'approche de la Cour d'appel de Terre-Neuve dans l'affaire *Standard Trust* s'apparente à celle de la Cour supérieure dans son jugement *Bombardier No. 2* et paraît préférable à celle de la même Cour dans son jugement *Bombardier No. 1*. On peut débattre de la définition du terme « fraude » ou de l'application ou non de l'exception de fraude à un cas don-

15. *Ibid.*, par. 30.
16. *Ibid*., par. 32.
17. *Ibid.*, par. 57.
18. *Ibid.*, par. 71-72.

né[19], mais il n'existe effectivement aucun appui à la suggestion que le droit canadien reconnaîtrait d'autres exceptions que celle de fraude au principe de l'autonomie. L'exception a été limitée aux cas de fraude par la Cour suprême dans l'arrêt *Angelica-Whitewear*[20] pour éviter de porter atteinte indûment à l'utilité et à l'efficacité commerciales des lettres de crédit. C'est précisément la conséquence qu'il faut redouter d'un jugement comme celui rendu dans l'arrêt *Bombardier No. 1*.

## 4. Autonomie des crédits standby

Les crédits documentaires font référence presque toujours aux Règles (« RUU ») et usances uniformes de la Chambre de commerce internationale (« CCI ») relatives aux crédits documentaires, lorsque les crédits sont employés comme moyens de paiement. Lorsque les crédits sont employés comme sûretés, ils font référence parfois aux RUU, parfois à d'autres règles de la CCI mieux adaptées aux crédits standby, dont les Règles (« RPIS ») et pratiques internationales relatives aux standby et les Règles (« RUGD ») uniformes de la CCI relatives aux garanties sur demande, et parfois à aucune règle externe. Il est exact que les RUU ne sont pas les mieux adaptées au contexte des standby, et cette carence des RUU explique pourquoi la CCI s'est intéressée à la rédaction des RUGD et des RPIS. Mais l'article 1 des RUU indique on ne peut plus clairement que ces règles s'appliquent lorsque le crédit y fait référence, « y compris dans la mesure où elles seraient applicables aux lettres de crédit standby ».

Le principe de l'autonomie est consacré aux articles 3 et 4 des RUU, qui s'appliquent comme on vient de le voir aux crédits standby qui y réfèrent. Le même principe est consacré aussi à l'article 1.06 des RPIS à l'égard des crédits standby et à l'article 26 des RUGD à l'égard des garanties à demande. Les règles de la CCI se veulent le reflet des pratiques internationales et selon ces règles le crédit est autonome de l'obligation sous-jacente, que la lettre de crédit soit employée comme moyen de paiement ou comme sûreté.

Enfin, une référence expresse aux règles de la CCI n'est pas requise pour qu'une lettre de crédit soit assujettie au principe de l'autonomie. Les droits français[21],

19. Voir *Cineplex Odéon Corp.* c. *100 Bloor West General Partner Inc.*, [1993] O.J. 112 (Ontario, Gen. Division, à la page 9: «While the notion of fraud may elude a precise definition, it is a concept well-known to the law, and it must, in my view, import some aspect of impropriety, dishonesty or deceit». Voir aussi *Royal Bank of Canada* c. *Gentra Canada Investments Inc.*, (2000) 1 B.L.R. (3d.) 170 (Ont. S.C.I.), à la page 182, confirmé par (2001) 15 B.L.R. (3d) 25 (Ont. C.A.): «The exception for fraud to the autonomy of letters of credit must be narrowly construed lest it risk depriving the letter of credit of its autonomous nature. Thus, a demand for payment is only fraudulent if the claim to the funds is not even colourable as being valid or has absolutely no basis in fact.»
20. *Supra*, note 2.
21. J.-P. MATTOUT, *Droit bancaire international*, La Revue Banque Éditeur, 1987, p. 243 et s. (au sujet de la garantie à première demande).

britannique[22], américain[23] et canadien[24], pour ne nommer que ceux-là, reconnaissent le caractère autonome d'engagements portant des noms variés, dont ceux de lettre de crédit, lettre de crédit standby, lettre de garantie et garantie, lorsque la rédaction du document indique que telle est l'intention des parties.

Avec égards, non seulement l'engagement de BNC était pleinement assujetti au principe de l'autonomie en raison de la référence expresse aux RUU qui y était contenue, mais il en aurait été de même en l'absence de cette référence. L'efficacité et l'utilité commerciales des crédits standby dépendent autant de leur autonomie à l'égard du contrat sous-jacent que celles des lettres de crédit employées comme moyen de paiement. Malgré toute suggestion à l'effet contraire dans les motifs du jugement *Bombardier No. 1*, et comme le suggère plutôt le jugement *Bombardier No. 2*, la portée du principe de l'autonomie ne devrait donc pas dépendre des fins que sert le crédit documentaire.

22. *R.D. Harbottle (Mercantile) Ltd.* c. *National Westminster Bank Ltd*., [1977] 2 All E.R. 682 (Q.B.) et *Edouard Owen Engineering Ltd*. c. *Barclays Bank International Ltd*., [1978] All E.R. 976 (C.A.).
23. La définition de «Letter of Credit» à l'article 5-102(a)(10) du Uniform Commercial Code ne fait pas de distinction entre les lettres de crédit employées comme sûretés et les lettres de crédit employées comme moyen de paiement, et l'article 5-103(d) énonce le principe de l'autonomie qui s'applique à toute lettre de crédit.
24. L'engagement de BNE dans l'affaire *Standard Trust* portait le nom de «Guarantee» et ne référait pas aux règles de la CCI. En droit québécois, voir notamment *Société en commandite Stationnement de Montréal* c. *Banque Nationale du Canada*, C.S. Montréal, nº 500-17-005493-997, REJB 2000-21832.

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|---|---|---|---|
| Almaleh | Jak | 1976 | Montréal |
| April | Pierre | 1974 | Montréal |
| Archambault | Pierre | 1994 | Montréal |
| Bélanger | Marcel | 1946 | Montréal |
| Beauchemin | Marcel-J. | 1946 | Montréal |
| Beaudry | Aimé | 1974 | Bedford |
| Beauregard | Jules | 1945 | Montréal |
| Beauvais | Jean | 1959 | Québec |
| Bergeron | Marius-G. | 1943 | Québec |
| Bergeron | Pierre | 1954 | Saguenay – Lac St-Jean |
| Bernier | Bertrand | 1958 | Montréal |
| Bordua | Adrien | 1961 | Laurentides – Lanaudière |
| Boyer | Raymond | 1966 | Montréal |
| Braconnier | Gilles | 1969 | Richelieu |
| Charlebois | Michel-Charles | 1981 | Laval |
| Choquette | Marguerite | 1950 | Québec |
| Cliche | René | 1980 | Montréal |
| Cohen | Abraham | 1953 | Montréal |
| Crevier | Pierre | 1977 | Québec |
| Deveau | Carolle | 1978 | Laval |
| Devlin | Charles | 1948 | Montréal |
| Dion | Henri | 1948 | Montréal |
| Forget | Yves | 1970 | Montréal |
| Francœur | Hermann | 1998 | Bas St-Laurent et Gaspésie |
| Gagné | Jean-Maurice | 1976 | Montréal |
| Grégoire | Jean-Paul | 1944 | Montréal |
| Huot | Robert | 1974 | Longueuil |
| Kaufman | Max S. | 1934 | Montréal |

| Nom | Prénom | Date d'admission | Dernière section |
|---|---|---|---|
| Lacoursière | Jacques | 1944 | Mauricie |
| Lajoie | Louise | 1984 | Longueuil |
| Landry | Charlemagne | 1937 | Montréal |
| Langis | Pierre-Paul | 1938 | Montréal |
| Lefrançois | Michelle | 1976 | Montréal |
| Marcotte | Claude | 1948 | Montréal |
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| Miller | Arnold | 1964 | Laurentides – Lanaudière |
| Miller | Irving | 1976 | Montréal |
| Monette | Guy | 1966 | Longueuil |
| Mongeau | Jacques | 1957 | Montréal |
| Paiement | Rose Anne | 1980 | Montréal |
| Poissant | Michel | 1975 | Longueuil |
| Racicot | Guy | 1974 | Laurentides – Lanaudière |
| Rioux | François | 1981 | Montréal |
| Salomon | Nathaniel H. | 1957 | Montréal |
| Savard | Jacquelin | 1986 | Hull |
| Savard | Robert | 1969 | Longueuil |
| Spector | Reuben | 1931 | Montréal |
| Turgeon | Raynald | 1972 | Québec |
| Viau | Jacques | 1942 | Montréal |

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*Liquidations et les restructurations (Loi sur les)*, (L.R.C. (1985), c. W-11), **415-426**

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