



Common Law and Civil Law: A Comparative Primer

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Introduction

Canada is one of the few countries in the world which can boast a connection to both of the two major Western legal traditions, i.e. the Common Law and the Civil Law. As a result of colonization or through voluntary adoption (in whole or in part), these two legal traditions have worldwide ramifications. For instance, according to the University of Ottawa's JuriGlobe research project, 60.06% of the world's population currently lives under a legal system entirely or partly inspired by the Civil Law tradition, while 35.17% lives under a legal system affiliated to the Common Law tradition. Only 3.84% is governed by a legal system where both legal traditions interact with each another.¹ In light of such figures, Canada's connection to both traditions has unsurprisingly proven to be a significant asset for securing the country an interesting position in many international and comparative legal forums.

Yet, Canada's bijuralism, as it is called, is experienced differently on the ground. While the Common Law is present, with some variations, in the entire territory of the country, the Civil Law has historically been concentrated in the province of Quebec. This situation has given rise to various kinds of asymmetries. Arguably, the most significant one, because it directly affects lawyers' capabilities to work on a pan-Canadian basis, has to do with the legal training they receive across the country and, consequently, with their variable level of exposure to the "other" tradition while they are at law school.

All Quebec lawyers get some exposure to Common Law rules, methodology and epistemology during their legal studies, but lawyers from outside Quebec generally do not benefit from a similar access to the Civil Law. Leaving aside the possibility of exchanges with Quebec universities, of which only a small minority of students take advantage, most graduates from non-Quebec law schools obtain their degree without having been acquainted with the Civil Law tradition in general or with Quebec Civil Law in particular. On the other hand, Quebec lawyers all get some knowledge of the Common Law through a number of compulsory or optional courses at law school, even though their exposure to the evolution and the underpinnings of that legal tradition may vary. This brings to light a fact often overlooked outside Quebec: that province is not, strictly speaking, a "Civil Law jurisdiction" but a "mixed law" one. That is to say, thanks to the combined effect of the *Royal Proclamation of 1763*, the *Quebec Act, 1774*² and the *Constitution Act, 1867*,³ the law in Quebec feeds on both the Common Law and the Civil Law, in the latter case primarily in matters pertaining to "property and civil rights." This means that in all matters pertaining to "public law," i.e. where persons interact with the state acting as a public power rather than as a private actor, the law applicable in the province is inspired by the Common Law. In addition to that, areas such as labour law or corporate law feed on both traditions. Actually, it is "core" private law matters that, for the most part, are essentially inspired by the Civil Law tradition – in sum, what can be found in the *Civil Code of Québec*. Thus, in that it

¹ <http://www.juriglobe.ca/eng/syst-demo/tableau-dcivil-claw.php>

² *Quebec Act, 1774*, 14 Geo. III, c. 83.

³ *Constitution Act, 1867*, R.S.C. 1985, app. II, no. 5.



governs most relations between private actors, the Civil Law clearly is a central component of Quebec law. Moreover, it is a defining feature of the province's legal identity: indeed, it is the anchoring of Quebec law in the Civil Law tradition that makes it distinct from the law applicable elsewhere in Canada. That being said, the actual relationship that Quebec lawyers entertain with the Civil Law may vary extensively depending on their area of practice. For instance, a merger and acquisitions lawyer or a constitutional lawyer may very well have rather weak ties with the Civil Law and share more with Common lawyers working in the same fields of practice than with their Quebec colleagues doing civil litigation. This is also part of Quebec's legal life.

Another phenomenon that needs to be factored in the analysis is the influence that one legal tradition may have on the other. In the Canadian context, this influence was for a long time asymmetrical. Indeed, the Supreme Court of Canada long proved insensitive to the peculiarities of Quebec Civil Law, notably by importing Common Law concepts – such as the law of trespass – in cases that had to be decided on the sole basis of Civil Law concepts. These transplants were vigorously denounced by Civil Law scholars in the early days of the twentieth century, and the practice eventually stopped. Yet, cross-influences remain, even if they may sometimes be very subtle or difficult to identify. For example, because of considerations pertaining, *inter alia*, to business and fiscal competition, partnerships in Quebec are not endowed with legal personhood; this replicates the situation existing in Common Law provinces and territories but distinguishes Quebec from most other Civil Law jurisdictions where partnerships are endowed with legal personhood. Perhaps less frequent or obvious is the Civil Law's influence on the development of the Common Law in Canada. For instance, as regards the law of restitution, it is hard not to find a resemblance between the Common Law analytical framework laid out in 1980 in *Pettkus v. Becker*,⁴ and the Civil Law framework elaborated three years before for the doctrine of unjust enrichment in *Cie immobilière Viger v. L. Giguère Inc.*⁵ The latter's influence on the former is not acknowledged, and the *Viger* case is not referred to in *Pettkus* but still, as Iacobucci J. observed more than twenty years later in *Garland Consumers*,⁶ there is at the very least a form of convergence between the two and it is fair to surmise that the influence of one on the other might have been the cause of that convergence.

Last, beyond differences between provincial laws, Canadian bijuralism finds a further expression in federal legislation. In a way, Canadian bijuralism is first and foremost an institutional rather than cultural feature of the legal order: while institutions enshrine the co-existence, at some level, of the Common Law and the Civil Law, most jurists have either a nonexistent or only a partial grasp of the actual normative consequences of that bijuralism.⁷

The primary purpose of this text is not to fill this knowledge gap for jurists. This text seeks instead to alert them to some essential methodological and conceptual differences between the Common Law tradition and the Civil Law tradition as it is found in Quebec. It will do so by focusing on what could be called a “red flag approach”. We will indeed highlight some of the most significant differences between the two legal traditions in selected areas of the law without examining these differences in a detailed manner. It goes without saying that this text is by no means exhaustive or comprehensive. The “red flags” we want to raise essentially serve as warnings against an undue reliance on reflex reactions, stereotypes, and false assumptions - a position that many jurists with a limited knowledge of the “other” legal tradition may be inclined to adopt, consciously or not. Beyond

⁴ *Pettkus v. Becker*, [1980] 2 S.C.R. 834. For a critique, see: L. Smith, “The Mystery of 'Juristic Reason,’” (2000) 12 *Supreme Ct. L. Rev.* (2d) 211.

⁵ *Cie immobilière Viger v. L. Giguère Inc.*, [1977] 2 S.C.R. 67.

⁶ *Garland v. Consumers' Gas Co.*, [2004] 1 S.C.R. 629.

⁷ On the distinction between institutional and cultural bijuralism, see generally: J.-F. Gaudreault-DesBiens, *Les solitudes du bijuridisme canadien. Essai sur les rapports de pouvoir entre les traditions juridiques et la résilience des atavismes identitaires* (Montréal: Éditions Thémis, 2007).

identifying such pitfalls, we also want to draw their attention to the basic legal preconceptions their colleagues socialized in one tradition or the other may have of legal issues. Indeed, when a jurist trained in the Civil Law interacts with a colleague from another province or territory, or vice-versa, she needs to understand what this colleague's intellectual starting point is so as to avoid misunderstanding his or her reactions or commitments. We are talking here about deep legal preconceptions, which go beyond the mere knowledge of regulatory differences across traditions. By also seeking to expose some of these deep preconceptions, notably methodological and epistemological ones, it is hoped that this text will foster the development of the legal-cultural skills – a form of “cultural intelligence” - that jurists need when interacting with colleagues from the other legal tradition.

That being said, the non-exhaustive nature of this study brings to the fore an important assumption that inspires this paper: jurists who find themselves in situations where they have to make sense of concepts emanating from a legal tradition with which they are not socialized will bear in mind their ethical duty to remain within the bounds of their competencies, i.e. to not undertake tasks for which they are ill-prepared, or at the very least to seek assistance from other, more competent, jurists if a question arises in an area of the law that they do not, or cannot, reasonably master.

After addressing some basic methodological and epistemological issues inherent to Canada's bijural condition that Canadian jurists must minimally be aware of (Part I), we will turn to specific conceptual differences in selected areas of private law (Part II), namely contracts, torts and civil responsibility, judicial remedies, civil procedure and evidence, property and securities, trust and fiducies, and family. This emphasis on private law concepts is easily explainable, as lawyers from Quebec and other provinces or territories already partake in the same “public law” intellectual environment.

A last terminological observation is warranted before going further. In this text, we will systematically capitalize Common Law and Civil Law when referring to the legal traditions themselves, as opposed to common law and civil law envisaged as *jus communes*.⁸ The expression ‘civil law’ will not be used to designate, as is often the case, the bulk of private law rules within a given legal system, as opposed to public law ones, and most notably criminal law ones.

⁸ In so doing, we follow in part R.A. Macdonald's proposal in, “Encoding Canadian Civil Law, on line: ”[http://www.bijurilex.org/site/Export/Recueil\(1997\)/_e/premier-recueil\(1997\)_e/04-MACDO.htm](http://www.bijurilex.org/site/Export/Recueil(1997)/_e/premier-recueil(1997)_e/04-MACDO.htm), no. 12.

Part 1 - Canada's Bijuralism and its Consequences

Before examining some of the most significant conceptual differences between the Common Law and the Civil Law, which Canadian jurists may bump into, it is critical to first highlight a few important methodological and epistemological distinctions between these two traditions, for even before trying to make sense of conceptual differences, Canadian jurists must have a glimpse into how Common Law lawyers and Civil lawyers think. Indeed, even if the two traditions sometimes converge as to the solutions they offer to legal problems, the road taken to identify these solutions may be markedly different from one tradition to the other. We will thus briefly examine which sources of law are deemed authoritative or persuasive in each of them, and look at how lawyers use these sources in their reasoning and interpretive strategies (A). We will then comment on the style of legislation and judgments (B). Finally, we will address, albeit cursorily, how bijuralism is susceptible of affecting the interpretation of federal legislation (C) and how bilingualism and bijuralism interact at some points (D).

These questions will be tackled taking into consideration the relative informational asymmetry about the “other” legal tradition that generally exists between jurists from Quebec and from provinces or territories outside Quebec. They will also be approached with reference to Common Law and Civil Law as they exist and evolve in the Canadian context. It is of the utmost importance to stress this point, as there are various expressions of these two traditions worldwide. Although Common Law jurisdictions tend to share a common methodology and epistemology as well as common institutions – the same being true for Civil Law jurisdictions –, their law may still differ widely because of their particular evolution. Variations are arguably even greater among Civil Law jurisdictions: the Roman law roots they share are very ancient and have been adapted to many different cultural contexts; as well, unlike English in the Common Law tradition, no single language unites all Civil Law countries. As a result, the Civil Law tradition has split into so-called “families”, Quebec being rather predictably linked to the French family. Yet, there are archetypical differences between these two legal traditions, which, as we shall see, are not all replicated in the Canadian context.

In a nutshell, the canonical features commonly attributed to systems belonging to the Common Law tradition may be summarized as follows.

- First, the origins of that tradition can be found in Medieval English customary law.
- Second, the primary source of law, which is constitutive of the *jus commune*, is case law.
- Third, formal rationalization and systematisation of the law, notably through codification, is not a central concern.
- Fourth, reasoning tends to be inductive and casuistic.
- Fifth, and subject to other institutional characteristics that have little or nothing to do with a country’s association to a particular legal tradition, Common Law jurisdictions tend to have unified judicial systems, with courts competent to hear all sorts of disputes, be they civil, administrative, criminal, etc.
- Sixth, adjectival law (evidence and procedure), which takes on a significant role, relies on an adversarial model in which the parties to the dispute themselves control most of the process.¹⁰

⁹ Federalism in the United States of America would be an example.

¹⁰ This summary draws from various sources, among which: Y.-M. Morissette, “Les caractéristiques classiquement attribuées à la common law,” [2013] *Revue internationale de droit comparé* 613; J. Smits, *The Making of European Private Law. Toward a *Ius Commune Europaeum* as a Mixed Legal System* (Antwerp: Intersentia, 2002).

What are, on the other hand, the essential characteristics associated with the Civil Law tradition?

- First, it originates in the Roman law.
- Second, the primary source of law is legislation, the *jus commune* generally residing in a particular type of enactment called a “code”.¹¹
- Third, the systematization of law, linked to an ideal of legal intelligibility and accessibility, is an important concern, albeit to various degrees, and finds a peculiar expression in codification endeavours.
- Fourth, the reasoning tends to be deductive and syllogistic.
- Fifth, omni-competent courts are the exception rather than the rule (not in Quebec, though).
- Sixth, the inquisitorial model, with a judge or magistrate actively seeking evidence, predominates (but this model does not apply in Quebec where adjectival law is predominantly influenced by the Common Law model).

Such archetypes are useful, but they represent nothing more than points of departure from which to approach actual legal systems. As such, they cannot entirely be relied upon by practicing lawyers who wish to understand with a certain level of depth how these traditions unfold in any particular legal system.

A - Sources, Reasoning and Interpretation

As was noted by Stephan Vogenauer, “[I]aw does not just happen. Every rule of law has an origin. It can be said to ‘flow’, ‘emerge’, or ‘descend’ from this ‘source’.”¹² From this perspective, reflecting on the sources of positive law in a given jurisdiction presupposes a genealogical inquiry, the results of which ground the validity of legal claims. One of the problems that may arise while performing such an inquiry is to assume the uniformity of the ‘theories of sources’ across jurisdictions, an obstacle upon which lawyers may easily stumble given the anchoring of most of their legal education in a single system of law and the still relatively marginal space occupied by comparative law in most law school curricula. The fact is that given the variety of expressions used by the Common Law and Civil Law traditions, theories of sources sometimes differ significantly within a single legal tradition. Yet, as we shall see, it is the theories of sources associated with the latter that, given their internal complexity, arguably pose the most daunting challenges for lawyers. This level of complexity is amplified in Quebec because of the province’s mixed legal heritage. A further problem that must be taken into consideration when addressing the question of sources of law is that the type of authority that a particular type of source – say, case law - may exert in a given jurisdiction might not be the same in another jurisdiction.

Let us begin with the easiest topic of this section, i.e. the theory of sources within the Common Law tradition or, if one prefers, the absence thereof. Indeed, contrary to the Civil Law tradition, it is hard to speak of a formal ‘theory’ of sources in the Common Law tradition. As Poirier observes, questions pertaining to the sources of the Common Law have historically been envisaged from the perspective of the institutions empowered to give law, primarily courts of various types, but also Parliament.¹³ Yet, the primary source of law is deemed to be found in judicial precedents, which form the *jus commune* and which hold together through stare decisis, that all Canadian lawyers, wherever they come from, know about. Statutes are also – and perhaps more than ever - an important source

¹¹ While the *jus commune* is codified in an overwhelming majority of Civil Law jurisdictions, Scotland has refrained from codifying it. See: D.M. Walker, *The Scottish Legal System. An Introduction to the Study of Scots Law*, 8th d., (Edinburgh: W. Green/Sweet & Maxwell, 2001), p. 584-586.

¹² S. Vogenauer, “Sources of Law and Legal Method in Comparative Law”, in: M. Reinmann & R. Zimmermann (eds.), *The Oxford Handbook of Comparative Law*, (Oxford: Oxford University Press, 2006), p. 869, 877.

¹³ D. Poirier, “Droit et common laws: de sources multiples à une common law à l’image de chaque culture », in : L. Castonguay & N. Kasirer (eds.), *Étudier et enseigner le droit : hier, aujourd’hui et demain. Études offertes à Jacques Vanderlinden* (Cowansville : Éditions Yvon Blais, 2006), p. 81, 88.

of law, but the type of relation they entertain with the precedents-based *jus commune* is markedly different from the interaction that exists between legislation and case law in the Civil Law tradition. We will return to these questions later.

Another important source of law in the Common Law tradition is equity, which began as a system parallel to the common law, precisely because it sought to remedy some injustices created by the formalism that characterized the early centuries of common law adjudication. Even if equity and the common law were united in the 19th century, many important concepts and institutions of the Common Law tradition find their origins in equity and retain to some extent its remedial purposes. The law of trusts, which stems from equity, is arguably the most famous area of the law that arose out of equity. It also plays an important role in property law, especially as regards real property. Although conflicts between common law and equity have by and large been abolished, Canadian jurists must be aware of the potential impacts of this genealogical distinction on the concepts on which they ground their arguments.¹⁴

Theoretically, custom can also be a source of law in the Common Law tradition provided it meets a certain number of conditions, but in most accounts, it is when it is adopted and iterated in a precedent that it actually becomes law; for instance, the origins of many foundational common law concepts or rules can be traced back to ancient customs transposed into positive law by common law courts. Custom's significant influence on the evolution of the common law, if less visible than in the past, highlights the particular importance of social practices in that tradition.¹⁵ Last, legal scholarship was not historically considered to be a source of law; for a long time, English courts were even reluctant to cite an author who was not dead. However, the emergence in the past half-century or so of a class of academic jurists in most Common Law jurisdictions has led to a rise in judicial citations of legal scholarship, be they doctrinally or critically inclined.¹⁶ In the Canadian context, it is far from unusual to see courts of law, including the Supreme Court of Canada, referring to scholarship to decide cases to which a Common Law legal framework applies. It is thus fair to say that not unlike the role it plays in the Civil Law tradition, legal scholarship has become a kind of secondary, not determinative, source of law in the Common Law tradition, at least in its Canadian iteration.

In Canada as in several other Common Law jurisdictions, the interplay between the two main primary sources of law, i.e. judicial precedents and legislation, must be envisaged in light of the principle of Parliamentary supremacy, even if its impact has been mitigated since the advent of constitutionalism. Indeed, Parliament may decide, through legislation, to confirm, to modify or even to abrogate a common law rule, even if there is a *juris tantum* presumption of conformity of the legislation with the common law. In grasping that interplay, interpreters thus have to rely on rules of statutory construction.

¹⁴ For example, two different persons may claim an interest on the same property, the first one under the common law, the other under equity. A typical situation would be that created by a deed of trust, whereby the property is formally transferred by the settlor to the trustee, as a result of which the common law recognizes the latter's ownership over the property transferred. But since the deed of trust provides that the property so transferred is to be held for the benefit of a third party, the beneficiary of the trust, equity recognizes the latter as the beneficial owner of the property. As can be seen, two persons can simultaneously claim proprietary interests emanating from two different legal sources, each with its own genealogy and conceptual economy.

¹⁵ See: C.K. Allen, *Law in the Making*, 7th ed., (Oxford: Clarendon Press, 1964), p. 127.

¹⁶ Y-M Morissette, *loc. cit.*, note 10, pp. 634-636.

Their reasoning is generally characterized as “inductive”, that is, as stemming from the facts. Even though this image is a bit simplistic, it remains true that a close interaction between law and facts exemplifies the eminently casuistic Common Law reasoning. An eloquent and accessible illustration of such reasoning can be found in the torts case of *Cooper v. Hobart*¹⁷ which dealt with the question of whether a statutory regulator can be found negligent for having failed to properly oversee the conduct of a licensed investment company.¹⁸ In *Cooper*, the court begins its analysis by reconciling three important precedents in order to assess whether pre-existing legal categories applicable to the case at bar are closed. It further examines whether legislative evolutions that took place after the common law was settled, had affected the scope of the tort of negligence in that case. Last, the court carefully narrows down its ruling to the facts of the case, refusing to close the door to a future recognition of a “private law duty of care to members of the investing public giving rise to liability in negligence for economic losses that the investors sustained.”¹⁹ In good common law fashion, it simply concludes: “we find that this is not a proper case in which to recognize a new duty of care.”²⁰ The evolution of the law is thus linked to the appropriate factual matrix.

Let us now turn to the Civil Law tradition’s “theory of sources”. A first observation is warranted: reflecting on the sources of law has long been an academic cottage industry in the Civil Law tradition, some iterations of that theory adopting a doctrinal stance, others a more sociological one. Much indeed has been written about this question, and particularly about “formal” sources of law. Moreover, the very notion of “formal sources” has increasingly been seen as problematic, the criteria for determining the “formality” of the source being unduly fluid and arbitrary.²¹ Another problem plaguing any generic reflection on the sources of law in the Civilian tradition lies in the significant variations from one country to another, bearing in mind the influence of some dominant expressions of this tradition, namely the French and German ones. That being said, Civil Law scholars tend to distinguish between primary and secondary sources. The most important primary source clearly is legislation. Two types of laws can be envisaged: Codes and particular laws. Strictly speaking, a Code is a law the enactment of which must satisfy the same procedural requirements as any other law. However, a Code is more than a mere law; it partakes in a social project; it therefore “occupies a unique place”.²² It is where the general law is expounded; it is where the *jus commune* is laid out: when no particular statutory rule provides a solution to a private law problem, codal provisions play a supplemental role.²³ In a Civil Law jurisdiction, the Code thus serves the same function as unlegislated common law in Common Law jurisdictions, which entails important consequences for codal interpretation.

Yet, a Code cannot be entirely self-sufficient. Custom thus represents a second primary source. In practice, this source is more often than not referred to in the Code itself, implicitly through various provisions incorporating standards such as the duty to act in good faith,²⁴ or explicitly through

¹⁷ *Cooper v. Hobart*. [2001] 3 S.C.R. 537.

¹⁸ In this case, the investment company had allegedly used its investors’ funds for unauthorized purposes, as a result of which they had suffered economic losses. The plaintiff was arguing that at some point, the regulator became aware of illegalities committed by the investment company but had failed to suspend its license and to notify the investors that an investigation had been launched. This omission was at the source of the alleged breach by the regulator of its duty of care towards the plaintiff. Absent a precedent finding that the law of negligence could be extended to encompass such a factual situation, the Supreme Court had to decide whether or not to make that determination. In the circumstances of the case, the court found that it could not, because “there was insufficient proximity between the regulator and the investors to ground a *prima facie* duty of care.” (*Id.*, p. 559, par. 50)

¹⁹ *Cooper*, *supra*, note 17, p. 541, par. 1.

²⁰ *Ibid.*

²¹ P. Jestaz, “Source délicateuse... Remarques en cascades sur les sources du droit”, (1993) 92 *Revue trimestrielle de droit civil* 73, 77.

²² R.A. Macdonald & J.E.C. Brierley (eds.), *Quebec Civil Law. An Introduction to Quebec Private Law* (Toronto: Emond Montgomery, 1993), p. 116. It is particularly the case with civil codes (as opposed to penal or commercial codes).

²³ It should be noted that while the bulk of rules laid out in the *Civil Code of Québec* can be said to belong to areas pertaining to “private law”, the Code also establishes rules that form part of the province’s “public law”. See, for example, the rules concerning legal persons which also apply, as a matter of principle, to “legal persons established in the public interest.” (art. 298 *Civil Code of Québec*)

²⁴ Art. 6 *Civil Code of Québec*. For an interesting analysis of the reasons invoked in classic Common Law scholarship to reject the integration of the standard of good faith in that tradition, see: Y.-M. Morissette, *loc. cit.*, note 10, p 631-634.

references to interpretive sources such as “usage”.²⁵ In such cases, however, custom is somehow absorbed by legislation, which is the primary source at play. Leaving aside that hypothesis, it is fair to say that in some areas where custom has not been absorbed by the Code, it could theoretically supplement it. Last, a third, increasingly recognized, primary source can be found in general or overarching principles, which may flow, for example, from Roman law maxims, natural law, allegedly universal conceptions of justice, or inferences from the Code’s structure.

These primary sources can be supplemented by secondary ones. Case law is one of them, and clearly the most contentious one. It is contentious in the sense that characterizing case law as a secondary source is, in an increasing number of Civil Law jurisdictions, misleading at best. True, given the dominant conception of the separation of powers between branches of the state adopted in many Civil Law countries, judges can hardly be said to “create” law. Instead, dogmatic theory posits that, at best, they interpret law. However, in practice, things are markedly different. Even in a country such as France, judges occupy an increasingly large space; actually, the ideological reluctance to characterize them as producers of law somehow stems from a cosmetic conception of sources of law, bordering on wilful blindness. Even the Civil Code itself, through some of its open-textured norms, invites them to create the law under the guise of interpreting it. This, of course, is not true of all Civil Law jurisdictions: Germany, for instance, is more open than France in this respect. Since case law is not “formally” recognized as a primary source of law and, most importantly, since it is not deemed to form the *jus commune*, there is no need in that tradition for an equivalent of *stare decisis*. Thus, while some cases may have more weight than others when they emanate from a higher court and may even be commonly referred to, they do not technically bind lower courts. In practice, however, and especially in a mixed jurisdiction such as Quebec, lawyers tend to vest a Supreme Court decision on the interpretation of the Civil Code with such an authority that it would be a grave mistake if they ignored a precedent from that court under the pretext that it is not technically binding... Moreover, the broader interpretation given to legislative enactments, to which we will return below, and the actual interpretive latitude afforded to judges in their reliance on various sources of law somehow undermine the Civilian archetype of a purely deductive and formalistic mode of reasoning. Indeed, while it is true that normative reasoning in the Civil Law tradition is probably not as tightly linked to factual matrixes as it is in the Common Law tradition, it would be incorrect to say that facts do not represent important variables in a case. This is especially so in Quebec, where adjectival law has been greatly influenced by the Common Law tradition.

For its part, legal scholarship (commonly referred to in French as “doctrine”) has historically played a very important role of systematization and critique, albeit an internal one, of the positive law in the Civil Law tradition. Courts of law tend to give it great weight. However, it clearly remains a secondary source of law.

That being said, making sense of the sources of Quebec law requires constantly bearing in mind the mixed nature of that law. In matters governed by public law rules, such as constitutional and administrative law, the sources and the method are those traditionally associated with the Common Law tradition. Yet, there are several areas of the law which feed, directly or indirectly, on both the Common Law and the Civil Law traditions. Labour law is one of them, with some rules found in the Civil Code and therefore submitted to codal techniques of interpretation and others found in particular statutes enshrining concepts more closely aligned with the Common Law tradition. The law of business associations represents another interesting area where both traditions interact. Even though the *jus commune* applicable to such associations, be they incorporated under provincial or federal

²⁵ Art. 1434 *Civil Code of Québec*. On the use of usages, see: S. Parent, *La doctrine et l’interprétation du Code civil* (Montreal: Thémis, 1997).

law, can be found in the codal provisions applicable to legal persons, the Quebec legislator has refrained from imposing a sharp break between this *prima facie* Civilian regime and the Common Law genealogy of many of the rules that are now codified. Hence the continuing relevance, unless the text of the Code or of any applicable statute opposes it, of common law precedents on the interpretation of many central provisions such as those dealing with lifting the corporate veil or the duties of directors.²⁶

Quebec law's mixed nature also entails another significant consequence for legal interpretation, i.e. having to wrestle with two distinct types of legislative enactments, on the one hand, and with statutory interpretation rules that are sometimes more or less akin to those applied in Common Law jurisdictions and with others that are more liberal and closer to the Civilian mindset,²⁷ on the other. Identifying the genealogy of the rule to be applied in order to figure out how to interpret it therefore becomes a necessary step of the analysis.

This highlights the importance of taking into consideration one very significant difference between the Common Law and Civil Law traditions regarding how lawyers approach legislative enactments. In the Common Law tradition, “statutes have traditionally been regarded as exceptions and thus strictly interpreted: in principle, the provisions of a statute cannot be “extended” by analogous reasoning to situations which are not formally specified. These cases, when they present themselves, are to be resolved through the common law, which is the law of principle.”²⁸ The situation is markedly different in Civil Law jurisdictions where the *jus commune* is codified. As Professor Côté notes, “[t]o the Quebec jurist, the separation between civil and statute law is not nearly as great as the gulf between common and statute law confronting common lawyers. Civil law and statute law are both written law of the same legislature. In practice, it would seem that statute law has been interpreted less narrowly in Quebec than elsewhere in Canada. (...) The province's jurists, trained in Civilian methods for the most part, have tended to give greater weight to the purposive method, that is, to the *ratio legis*.”²⁹ A further variable may explain the rather liberal interpretation of statutes in the Civil Law tradition. Indeed, Codes and other relevant legislative enactments establish the *jus commune* “for the recognition of rights, the imposition of obligations or the furtherance of the exercise of rights” and not merely for “the remedying of some injustices or securing of some benefit.”³⁰ In other words, legislative enactments in the Civil Law tradition do not replicate the primarily remedial nature of statutes in the Common Law tradition. The maxim “no remedy, no right” does not correspond to either the epistemology or the methodology of the Civil Law. Last, precisely because it seeks to posit the *jus commune*, a Code will try to be as comprehensive as possible. This effort at conceptual comprehensiveness opens wide the door to analogical reasoning, under which a particular rule is found applicable, beyond its immediate scope of application, to a situation that is not fundamentally different but that would not usually trigger its application if it were construed literally. This type of reasoning, which often implies an extrapolation of the meaning of that rule, is far from unusual in Civilian reasoning.

Now, in light of the difficulty of drawing a clear-cut distinction between the Code, which contains both broad standards and precise rules, and statutes, which often contain precise rules while positing important principles, Côté further observes that, “for all practical purposes, the most important distinction is less the difference between civil and statutory law than the critical difference between statutes which establish the fundamental *jus commune* in a given area and special statutes, which

²⁶ See: S. Rousseau & R. Crête, *Droit des sociétés par actions*, 2nd ed. (Montréal : Éditions Thémis, 2008), p. 51-57.

²⁷ On this, see: P.-A. Côté, S. Beaulac & M. Devinat, *The Interpretation of Legislation in Canada*, 4th d., (Scarborough: Carswell, 2011), p. 30.

²⁸ *Ibid.*

²⁹ *Id.*, p. 33.

³⁰ *Interpretation Act*, R.S.Q., c. I-16, s. 41.

derogate from or complement the *jus commune*.”³¹ Thus, if the Civil Code is undeniably the most important and visible repository of the *jus commune*, the latter is irreducible to the former.

That is what the Preliminary provision of the *Civil Code of Québec* seeks to capture, at least in part, when it states that:

The Civil Code of Québec, in harmony with the Charter of human rights and freedoms (chapter C-12) and the general principles of law, governs persons, relations between persons, and property.

The Civil Code comprises a body of rules which, in all matters within the letter, spirit or object of its provisions, lays down the *jus commune*, expressly or by implication. In these matters, the Code is the foundation of all other laws, although other laws may complement the Code or make exceptions to it.

The 1997 Supreme Court case of *Doré v. Verdun*³² provides an eloquent illustration of the Civilian mode of interpretation and reasoning, which appears more openly normative and less facts-centered than its Common Law counterpart. In that case, a person who had broken his leg because of a fall on the city of Verdun’s sidewalk sued the city in damages, but the city asked for the dismissal of the case because the plaintiff had failed to send a notice in writing of his intent within 15 days of the date of the accident as was required by a provision of the *Cities and Towns Act*. That provision, which sought to limit actions against the city, contradicted the *Civil Code of Québec* which posited a three-year prescriptive period (time limitation) for actions ‘based on the obligation to make reparation for bodily injury caused to another.’³³ The city argued *inter alia* that the *Cities and Towns Act*, being a more specific statute derogating from the Civil Code, should prevail. The Supreme Court rejected the city’s contentions, on the basis of an examination of the text of the relevant provision of the Civil Code as “a mandatory provision of public order³⁴, of the nature of the Civil Code as positing the *jus commune*, and of the general principle underlying the legislative decision to ensure a fair compensation for bodily injury. The court confirms that “the fact that the *jus commune* is supplementary in nature does not mean that the legislature cannot give a specific provision of the Civil Code precedence over special Acts applicable to municipalities, provided that it expresses a sufficiently clear and precise intention to that effect.”³⁵ In the case at hand, the text of the relevant provision hinted at such an intention. This finding was buttressed by a variety of codal provisions which, even if they applied to facts different from that of the case at bar, revealed a clear legislative policy to enshrine in various ways the principle of a fair compensation of bodily injuries. To be noted, the court further referred to the Charter of Human Rights and Freedoms, which also protects “the right of every human being to personal inviolability.”³⁶

³¹ P.-A. Côté, S. Beaulac & M. Devinat, op. cit., note 30, p. 34. On the distinction between *jus commune* and special statutes, see also S. Beaulac, “‘Texture ouverte’, droit international et interprétation de la Charte canadienne”, in E. Mendes and S. Beaulac (eds.), *Canadian Charter of Rights and Freedoms*, 5th ed. (Toronto: LexisNexis, 2013), 191.

³² *Doré v. Verdun (City)*, [1997] 2 S.C.R. 862.

³³ Art. 2930 *Civil Code of Québec*

³⁴ *Doré v. Verdun (City)*, supra, note 35, p. 881, par. 29.

³⁵ *Id.*, p. 877, par. 21.

³⁶ *Id.*, p. 882, par. 30.

B - Style

The different methodologies and epistemologies of the Common Law and the Civil Law also affect how jurists write.³⁷ Most Canadian lawyers are acquainted, through federal statutes, with the legislative style traditionally associated with the Common Law tradition. Legislative drafting in that tradition tends to be very precise and technical. These characteristics flow from the particular economy of the relationship between common law and statutes in that tradition. Indeed, a central idea that presides over legislative drafting in the Common Law tradition is that the function of statutes, which may sometimes merely confirm the common law³⁸, is first and foremost to create exceptions to the common law or to remedy something. It is assumed that the reader of a Common Law statute knows, or should know, what the common law serving as the backdrop of that statute is about.

On the contrary, the Civilian legislative drafting style, especially in countries associated with the French tradition, tends to favour clarity, concision and a certain level of generality. The very fact that the *jus commune* is mostly established in legislative enactments, changes the nature and scope of such enactments, which are not bound to remain primarily remedial. The legislative style is inevitably affected by such variables, since it does not have to adopt the technical language necessary to enter into a dialogue with an unwritten and somewhat more elusive *jus commune*, that is, the common law. Thus, the Civilian legislative drafting style tends to apply the principle “one idea, one provision (or article)”. Moreover, the Civilian style gives great significance to the values of coherence and order, and generally tends to go from general considerations to more specific ones.

As far as the style of judgments is concerned, however, differences between these two legal traditions, as experienced in Canada, are marginal at best. Indeed, judgments in Quebec tend to adopt the Common Law tradition’s discursive style and reject the purely syllogistic and formalistic style associated to, say, rulings made by French courts. As well, Quebec appellate courts, even when deciding civil law cases, accept a plurality of concurring or dissenting opinions, which is unconceivable in some “pure” Civil Law jurisdiction such as France.

C - Bijuralism and Federal Legislation

In the introduction, we alluded to the fact that Canadian bijuralism remains a primarily institutional rather than cultural feature of the country’s legal landscape and that most jurists tend to be rather uninformed about the “other” legal tradition unless they are directly bound to interact with it. One problem stemming from this lack of information is that jurists for whom bijuralism is a non-issue might be inclined to overlook the tangible normative consequences flowing from the country’s commitment to bijuralism. It bears remembering here that in furtherance of the harmonization of federal legislation with Quebec civil law, the federal *Interpretation Act* now states that:

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.³⁹

³⁷ On stylistic distinctions between the two legal traditions, see: R. Munday, “The Common Lawyer’s Philosophy of Legislation” (1983) 14 *Rechtshteorie* 1991.

³⁸ There is even a presumption of conformity with the common law. See: D. Poirier, “La Common Law: une culture, une histoire et un droit procédural”, in : L. Bélanger-Hardy & A. Grenon (eds), *Éléments de common law canadienne : comparaison avec le droit civil québécois* (Thomson/Carswell, 2008), p. 25, 70.

³⁹ *Interpretation Act*, R.S.C. (1985), c. I-21, s. 8.1.

This provision establishes two principles: first, that the Common Law and Civil Law traditions are *de jure* on the same footing in Canada's federal legal order (the principle of equal authority); second, that, "unless otherwise provided by [federal] law", resort must be had to the applicable provincial private law in the interpretation of "rules, principles or concepts forming part of the law of property and civil rights" to which a federal statute refers (the principle of complementarity). S. 8.1 of the *Interpretation Act* is supplemented by s. 8.2, which reads as follows:

Unless otherwise provided by law, when an enactment contains both civil law and common law terminology, or terminology that has a different meaning in the civil law and the common law, the civil law terminology or meaning is to be adopted in the Province of Quebec and the common law terminology or meaning is to be adopted in the other provinces.

Together, these two provisions pave the way for an uneven application of some federal statutes in areas of the law where the federal legislator has not manifested, expressly or implicitly, its intent to dissociate its legislation from provincial *jus communes*.⁴⁰ Jurists practicing law in fields under federal jurisdiction and potentially involving reference to provincial or territorial private law should thus be aware of the possibility of a differential application of the statutes they are used to construing in the new context in which they will find themselves.

D - Bijuralism and Language

Law is about language. But in a country with two official languages the language of the law often turns into a vexing issue. Given the objectives of this text, we will not delve into the study of legal bilingualism in Canada. However, we deem it important to make a few observations that, we believe, will assist Canadian jurists in acquiring a better grasp of the cultural complexity of law in a bilingual – and bijural – federation.

First, even though the Common Law tradition is often, and for good reason, associated with the English language, there also exists a still relatively new, but dynamic, school of Common Law in French, developed by French-speaking lawyers from various Common Law provinces and territories. As well, even though the Civil Law is, at least in Canada, intimately tied to the French language, the realities of legal practice in the province of Quebec have allowed for the flourishing of a tradition of Civil Law in English, which has notably resulted into the elaboration over the years of a rich Civilian scholarship in that language.

Second, it is important to draw the attention of Canadian jurists to a certain number of important normative facts or consequences that flow from practicing law in an officially bilingual federation.

One is that the French and English versions of federal statutes are equally authoritative, making it essential for jurists to pay attention to both.⁴¹ This may require non-bilingual jurists to consult bilingual ones on the possible normative uses that can be made of the "other" linguistic version of the statute at hand.

A second consequence is that Canadian jurists should familiarize themselves with the rules of interpretation applicable to bilingual statutes.⁴² Given that the focus of this text is on the common law-

⁴⁰ On the interpretation of these provisions, see, recently: A. Grenon, "Le bijuridisme à la croisée des chemins? Réflexions sur l'incidence de l'article 8.1 de la Loi d'interprétation," (2011) 56 *McGill L.J.* 775.

⁴¹ *Constitution Act, 1867*, *supra*, note 3, s. 133; : *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being appendix B of the *Canada Act*, U.K., c. 11, s. 35, s. 18; *Official Languages Act*, R.S.C. (1985), c. 31, 4th Supp., s. 13. On the ups and downs of the practice of bilingual interpretation, see P.A. Côté, "Bilingual Interpretation of Enactments in Canada: Principles v. Practice," (2004) 29 *Brooklyn Journal of International Law* 1067.

⁴² For a summary, see: P.-A. Côté, S. Beaulac & M. Devinat, *op. cit.*, note 30, p. 343-353.

civil law interaction, we will not examine the issue of bilingualism as it may affect the legislation of the various common law provinces and territories.⁴³ However, we want to remind our readers of a third important fact that they should not lose sight of: in Quebec, legislative enactments, whether in the form of special statutes⁴⁴ or Codes,⁴⁵ must be adopted in French and English and both versions have equal authority. In practice, this means that when faced with any legislative enactment emanating from the province's National Assembly, both versions should be read.

Thus, in many situations, bilingualism and bijuralism are intertwined. At the very least, all Canadian jurists should strive to develop some sensitivity towards them and be aware of their potential consequences on the interpretation of the law.

Part II - Differences in Canada's Private Law: Specific Topics

Before examining substantive legal differences between Quebec Civil Law and Canadian Common Law, a word is warranted about the somewhat different role lawyers play in Quebec and elsewhere in Canada. In spite of the fact that lawyers across the country by and large perform the same type of activities, the role of lawyers in Quebec must be understood bearing in mind the classical Civilian distinction between lawyers strictly speaking, on the one hand, and notaries, on the other. Indeed, as in other Civil Law jurisdictions, Quebec has granted lawyers and notaries the privilege to perform some “reserved acts”.⁴⁶ Outside the scope of these reserved acts, their professional activities may overlap. In essence, lawyers, i.e. members of the Barreau du Québec, are the only ones who can take files in “contentious matters”; in contrast, notaries alone can perform acts that require execution in notarial form⁴⁷, which notably covers various aspects of transactions relating to immovable property or real estate, particularly the registration of hypothecs. Common lawyers overseeing transactions in Quebec must thus be aware of this legislative restriction to the acts Quebec lawyers can perform related to real estate. Conversely, Quebec lawyers doing the same in Common Law jurisdictions must realize that lawyers in such jurisdictions are more heavily involved in the real estate area than they are in Quebec. Caution is therefore warranted in this respect.

A - Contracts

With a view to giving perspectives on the differences between the law of contracts in Europe's two legal traditions, Hugh H. Beale wrote: “it is remarkable to what extent the civil law systems do in fact reach similar results to the common law. Perhaps this should not surprise us: the needs of an effective legal framework for the use of resources in producing goods and services will be essentially the same in every society of a given type.”⁴⁸ What follows will not emphasize the similarities in solutions or general concerns between the two systems, nor the historical reasons behind the different approaches or doctrines in contract law. Subject to one general comment, we shall dive right into the particulars in

⁴³ It bears noting in that respect that a distinction must be drawn between jurisdictions under a constitutional obligation of bilingualism and jurisdictions which may not be subject to such a constitutional obligation but which may nevertheless have enacted statutes imposing various levels of bilingualism on their governmental institutions. See, generally: M. Bastarache & M. Doucet (eds.) *Les droits linguistiques au Canada* (Cowansville: Éditions Yvon Blais, 2013).

⁴⁴ *Constitution Act, 1867*, supra, note 3, s. 133; Charter of the French Language, R.S.Q., c. C-11, s. 7.

⁴⁵ *Doré v. Verdun (City)*, supra, note 35.

⁴⁶ We assume that Canadian jurists will get acquainted with the relevant legislation or regulatory regime governing their professional activities in any province in which a file they are responsible of is being dealt with. See, for Quebec, *An Act Respecting the Barreau du Québec*, R.S.Q., c. B-1, and the *Notaries Act*, R.S.Q., c. N-3.

⁴⁷ For the list of acts reserved to notaries, see: ss. 15-16 of the *Notaries Act*, *ibid.*

⁴⁸ H.G. Beale, W.D. Bishop and M.P. Furmston, *Contract – Cases and Materials*, 3rd ed. (Oxford and New York: Oxford University Press, 1995), at 9.

order to red-flag the most important distinguishing features for the purpose of a Canadian jurist wishing to get acquainted with the legal tradition in which he or she has not been trained. Given that the Common Law is highly pragmatic and that its private law sprang from, not an all-encompassing general legal theory (despite attempts to speak of contracts in terms of expectation, reliance and restitution interests), but from different types or forms of action and species of legal remedies, the terminology used to refer to this area of the law is substantially different than in the Civil Law.⁴⁹ The « law of obligations » is generally the Civilian expression to cover rules pertaining to contracts, by far the most comprehensive scheme, but also those governing so-called quasi-contracts (unjust enrichment), as well as civil delicts (torts) and quasi-delicts (liability without fault). Inasmuch as there is, indeed, a law of contracts based on the shared denominator of an agreement binding and enforceable in law between the parties (*convention and consensus*) in both Canada's legal traditions, the focus below will be on the most important differences in these rules and doctrines.

Two preliminary issues need to be addressed at the outset. First, the Common Law takes an objective view when considering the process of contract formation⁵⁰ and the interpretation of contract,⁵¹ more than the Civil Law in Quebec.⁵² Accordingly, in Canadian Common Law jurisdictions, what the parties appear to say and do as understood by a third party observer generally trumps what the parties might have actually understood themselves as saying or doing. Second, unlike in Quebec,⁵³ the Common Law, for a long time, did not have a general or overriding principle of good faith. However, it achieved some of the goals good faith has in Civilian legal systems through the careful manipulation of general rules of contract law, including on offer and acceptance.⁵⁴ It is only recently, in *Bhasin v. Hrynew*⁵⁵, that Canada's highest court recognized that the performance in good faith of contracts constituted a foundational principle of the Common Law, and that parties to a contract must honestly perform their contractual duties.

At its core, the skeleton of contract is very similar across the country, with an offer and an acceptance, as well as a cause or consideration for the agreement between the contractual parties. At each of these stages of formation, however, there are features that distinguish Civil Law and Common Law rules, some of them false friends, of which Canadian jurists must be aware. At the outset, in fact, there is a preliminary question that needs to be addressed in Common Law that has no equivalent in Civil Law, namely whether or not there is a serious intention to contract, also known as the requirement of an intention to create a legal relation. The reason is a concern, a judicial policy prominent in the Common Law legal world, to limit the scarce resources of the law to cases worthy of its sanction. In short, Quebec jurists should be aware that not all agreements that have the guise of a contract will be deemed enforceable by the Common Law. Not to be mistaken for preparatory agreements (or "avant-contrat"), these situations show a lack of intention, from one or both parties, to enter into a binding agreement, either because it is no more than an agreement in principle or a so-called "gentlemen's agreement", or because they amount to a mere statement of intention or a letter of patronage, often equivocally undertaking, to do something for another party. These agreements are no contract in Common Law.

⁴⁹ See G. Samuel, « Western Law of Obligations », in M. Bussani and F. Werro (eds.), *European Private Law: A Handbook* (Berne: Stämpfli Publishers, 2009), 129.

⁵⁰ See the British case *Raffles v. Wichelhaus* (1864), 2 H. & C. 906, 159 Eng. Rep. 373 (Ex.).

⁵¹ See, for example, *Dumbrell v. The Regional Group of Companies* (2007), 85 O.R. (3d) 616 (Ont. C.A.).

⁵² See S. Grammond, "L'interprétation des contrats", in P.-C. Lafond (ed.), *Obligations – JurisClasseur Québec, coll. "Droit privé"* (Montreal: LexisNexis Canada, 2008), loose-leaf, chap. 6.

⁵³ See M.-A. Grégoire, *Liberté, responsabilité et utilité: la bonne foi comme instrument de justice* (Cowansville: Éditions Yvon Blais, 2010).

⁵⁴ See the British case *Interfoto Picture Library Ltd. v. Stiletto Visual Programmes Ltd.*, [1989] Q.B. 433 (C.A.).

⁵⁵ [2014] 3 S.C.R. 494.

As for contract formation, one must not be deceived by the apparent shared ideas of offer and acceptance because they hide several substantial differences. The Common Law draws a crucial distinction between an actual offer and what is referred to as an “invitation to treat”, which amounts to a request for information in preliminary communications about a transaction. In such a situation, a party “does not himself make an offer but, invites the other party to do so,”⁵⁶ as in for instance the listing of a house on the real estate market, which is no more than an invitation to potential buyers to make propositions. Obviously, this rule limits greatly the commitment of the party, as she will not be bound on the basis of her representations, reserving her decision to go ahead after the other party makes an offer. In contrast, Civil Law would see the display of products on the shelves of a self-service grocery store, for instance, as an offer to sell and the conclusion of the contract would occur when the customer picks it up and pays for it. To decide in Common Law whether we have an offer or an invitation to treat, in advertising for example,⁵⁷ one needs to evaluate the nature of the undertaking and the details of the representations, such as terms and conditions for the sale of goods found in store catalogues.

In Civil Law, the party making an offer open for a determined period of time is bound by it and cannot normally rescind it before the end of that period. Article 1390, paragraph 2, of the *Civil Code of Québec* provides that: “Where a term is attached, the offer may not be revoked before the term expires; if none is attached, the offer may be revoked at any time before acceptance is received by the offeror”. The latter rule has its equivalent in the Common Law, but not the former rule. Indeed, a distinguishing feature of Common Law contracts – intertwined with the doctrine of consideration (which we will see shortly)⁵⁸ – is the freedom for one making an offer to withdraw it at any time before acceptance, even though it was a firm offer accompanied by a time limit for acceptance. The main exception, based on reasonable reliance, is in the case of a unilateral contract, when the accepting party has started to perform his part of the bargain. More broadly, there is fundamental difference of approach between Canada’s two legal traditions in terms of good faith in the pre-contractual stage. Unlike the Civil Law, which applies a general duty in that regard,⁵⁹ the situation in the Common Law is straightforward: there is no obligation to negotiate in good faith (save for fraud or duress).⁶⁰

The Common Law has the particularity that a counter-offer cancels out the original offer and, in effect, reverses the roles of the parties: the offeree becoming the offeror, whose counter-offer must then be accepted by the party who first made an offer. The only way to seal the deal on the original terms of the offer is for the other party to accept it as is, in its integral form, without any change. The dynamic of negotiation in Civil Law is slightly less formalistic, as the parties may agree on the substantial terms and, indeed, create a contract, even though there was a counter-proposition as to secondary terms.⁶¹ The key element is whether or not there is a meeting of the minds on the “substantial” elements of the agreement when the offer is accepted.⁶² With regard to acceptance in Common Law, the other feature to be addressed is the “reception rule”, to the effect that the contract is formed where and when the offeror receives the acceptance. This general rule

⁵⁶ G.H. Treitel, *The Law of Contract*, 8th ed. (London: Sweet & Maxwell / Stevens, 1991) at 10.

⁵⁷ A famous case is *Carlill v. Carbolic Smoke Ball Co.*, [1892] [EWCA Civ 1](#), where an advertisement promised to pay 100 pounds if the user of a carbolic smoke ball caught influenza; it was held an offer, not an invitation to treat.

⁵⁸ See H. Beale, A. Hartkamp, H. Kötz and D. Tallon, *Cases, Materials and Text of Contract Law* (Oxford and Portland: Hart Publishing, 2002), at 201: “No binding obligation can arise from the offeror to keep his offer open, even if he expressly fixes a period during which his offer may be accepted, since there is no consideration from the other party for such a promise”.

⁵⁹ See art. 1375, *Civil Code of Québec*.

⁶⁰ Two recent English cases confirming the stand are: *Petromec v. Petroleo*, [2006] 1 *Lloyds Report* 121; and *Cable & Wireless plc v. IBM United Kingdom*, [2002] *EWHC* 2059.

⁶¹ See art. 1387, *Civil Code of Québec*, last paragraph.

⁶² See art. 1393, *Civil Code of Québec*.

knows only one exception, namely the “postal rule”⁶³ : if the means of communicating acceptance is set to be the mail (expressly, impliedly) – or other similar means, such as courier – acceptance occurs when posted. This contrasts with the Civil Law which, in all cases, favours acceptance at the time of reception.⁶⁴

One extremely significant difference to highlight is between the concepts of “cause” in Civil Law and “consideration” in Common Law. In Quebec, inherited from France and influenced both by Roman law and the Canonist tradition: “It is [...] of the essence of a contract that it have a cause and an object”.⁶⁵ Cause and object are joined at the hip in Civil Law, as they both concern what is at the heart of the agreement between the parties. Article 1412 of the *Civil Code of Québec* defines the object of a contract as “the juridical operation envisaged by the parties at the time of its formation” and, article 1413 adds that a contract “whose object is prohibited by law or contrary to public order is null”. Thus, for instance, the contract for the sale of an illegal drug is unenforceable in a Quebec court. As for cause, article 1410 defines it as “the reason that determines each of the parties to enter into the contract”; similarly, article 1411 provides that a contract “whose cause is prohibited by law contrary to public order is null”. Thus, for instance, a bank loan to start up a business selling illegal drugs would also be void and null, not because the money loan is illegal, but because the reason behind it is. Accordingly, these two concepts are complementary in Civil Law, the latter being interested in the subjective motive which prompted the parties to strike an agreement. In most bilateral contracts (or synallagmatic contracts), the cause is simply the counter-part a party receives from the other party in exchange for his own performance of his part of the deal. As for gratuitous contract, with no counter-part, such as a donation, the cause is said to be the individual altruistic motive of the giving party.

This notion of subjective cause for a contract has no functional equivalent in the Common Law, which shows that this legal tradition has no interest in the reason or motive for a transaction and is rather geared towards an essentially commercial logic.⁶⁶ In fact, what constitutes the soul of Common Law contracts is the doctrine of “consideration”, which very much confirms the market type of reasoning at work in the Common Law system. This essential element of a contract is often put in terms of “bargain theory of contract”, because it is based on an economic analysis of what is exchanged between the contracting parties. In reality, the doctrine of consideration gives a means by which to decide what agreements are worthy of legal sanction and those that are mere agreements unenforceable at law.⁶⁷ Its classic formulation comes from the 1875 case of *Currie v. Misa*, where Justice Losh said: “A valuable consideration, in the sense of the law, may consist either in some right, interest, profit or benefit accruing to one party or some forbearance, detriment, loss or responsibility, given, suffered or undertaken by the other”.⁶⁸ Although no one agrees on a precise definition of consideration, the central point is the notion of bargain or “*quid pro quo*”: the counter-weight to a promise, either in the form of a benefit given or of some act of forbearance. In the contract, therefore, the promises of the parties come together in a sort of relationship of reciprocity, where economic value is exchanged. It is noteworthy that the actual value of the consideration is irrelevant, as the Common Law will not second guess the bargain; for instance, buying a mansion for \$1 is a valid contract.

⁶³ The postal rule also has an impact on the possible revocation of an offer because, as soon as acceptance is in the mail, the deal is sealed and the party cannot withdraw her offer anymore.

⁶⁴ Art. 1387, *Civil Code of Québec*.

⁶⁵ Art. 1385, paragraph 2, *Civil Code of Québec*

⁶⁶ See R. David, « Cause et consideration », dans *Mélanges Jacques Maury* (Paris : Dalloz & Sirey, 1960), 111.

⁶⁷ See A.G. Chloros, « The Doctrine of Consideration and the Reform of the Law of Contract » (1968) 16 *I.C.L.Q.* 137.

⁶⁸ *Currie v. Misa* (1875), L.R. 10 Ex. 153, at 162.

Unlike Civil Law, Common Law knows no gratuitous contracts (unless under seal, as discussed below), by means of a donation for instance, because there would be no consideration from the promisee, namely the one receiving the gift. Consideration must be of some economic or material value, even if negligible; it cannot be merely sentimental or otherwise emotional in value. There are many other consequences of the doctrine of consideration, the most interesting ones from a comparative point of view being:

- As we alluded to earlier, “an offer may be freely revoked, even if it is a firm offer expressed to be open for a specified period, because the offer was unsupported by consideration.”⁶⁹
- The doctrine of consideration does not allow the amendment of a contract, without a new bargain, or the waving of a debt (that would be deemed gratuitous).⁷⁰
- “Any modification and indeed any transaction may also be invalid for being based on past consideration, that is to say consideration passing in respect of a promise already executed.”⁷¹
- In fact, the traditional rule is that the consideration must move from the promisee to the promisor, meaning that the contract must not be in favour of a third party beneficiary (as we will see).⁷²

There is one main exception to the doctrine of consideration, in particular in relation to gratuitous contracts, namely promises made under seal or contracts by deed. In such cases, the formalistic feature replaces, in a way, the rationale for requiring a consideration in the contract. Lastly about consideration, similar to Civil Law cause, it cannot be illegal, immoral or contrary to public morals.

Another major difference between Canada’s two laws of contracts pertains to the rules on third party rights and obligations, also known as the relativity of contract, or in the Common Law world as the doctrine of privity. The latter “means that a contract cannot, as a general rule, confer rights or impose obligations arising under it on any person except the parties to it.”⁷³ Thus there is no “*jus tertii*” in Common Law: third parties cannot sue or be sued on a contract, even if it affects their rights and interests. While a number of *ad hoc* ways have been used to avoid the effect of privity of contracts, a major development occurred in private law in the Canadian Common Law jurisdictions when the Supreme Court recognized a general principled exception for third party exoneration clauses.⁷⁴ Diametrically opposed is the approach in Civil Law, as shown by the provisions on stipulation for another in the *Civil Code of Québec*. For example article 1444: “A person may make a stipulation in a contract for the benefit of a third person.” To be precise, unlike in a trust setting (which we will discuss later), it is indeed the third party beneficiary that has the right and the standing to enforce performance against the promisor.

Linked to some issues already addressed – acceptance, consideration – there is a point on terminology that is essential to make in regard to the expression “unilateral contract”. In Civil Law, the expression is used, as explained in article 1380 of the *Civil Code of Québec*, to distinguish such contracts from bilateral or synallagmatic ones, defined as contracts where “the parties obligate themselves reciprocally, each to the other, so that the obligation of one party is correlative to the obligation of the other”. Such a description, no doubt, would correspond to bilateral contracts in Common Law. The situation is different for unilateral contracts, which article 1380, paragraph 2, *Civil Code of Québec* defines as those “when one party obligates himself to the other without any

⁶⁹ H. Beale, A. Hartkamp, H. Kötz and D. Tallon, *op. cit.*, note 61, at 143.

⁷⁰ See *ibid.*

⁷¹ *Ibid.*, at 149.

⁷² See *ibid.*, at 150.

⁷³ G.H. Treitel, *op. cit.*, note 59, at 523.

⁷⁴ See *London Drugs Ltd. v. Duehne & Nagel International Ltd.*, [1992] 3 S.C.R. 299; expanded in *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltds.*, [1999] 3 S.C.R. 108. See also *Brown v. Belleville (City)*, 2013 ONCA 148.

obligation on the part of the latter.” At Common Law, this would amount to a gratuitous contract which (unless under seal) is not a binding contract, for lack of consideration, as we saw. But the meaning of unilateral contracts for Common Law lawyers is totally different, as it relates to a contract formed when an offer is accepted by means of performance. For example, an offer to give a \$100 reward for the recovery of a lost dog is a unilateral contract, as the acceptance is done by the delivering of the dog; it is an open offer by the offeror, accepted unilaterally by the offeree with his performance.⁷⁵

Other unique attributes of Common Law contracts are: first, the *Statute of Frauds* or other writing requirements; second, issues related to the parol evidence rule. Virtually every Canadian Common Law jurisdiction, in one form or another, has statutory provisions, patterned after the English *Statute of Frauds (1677)* – many incorporated in other legislation, such as a Sale of Goods Act – listing classes of contracts on which “no action shall be brought [...] unless the agreement [...], shall be in writing, and signed by the party to be charged therewith”. Although varying from one jurisdiction to another, the more important categories of such contracts are (i) sales of goods (over a certain amount), (ii) contracts not to be performed within one year, (iii) real estate transactions, (iv) and suretyship contracts. The functional equivalents in Civil Law are contracts that are required to be notarised (i.e. signed before and kept by a professional notary), such as marriage contracts, mortgage agreements, as well as divided co-ownership declarations (condominium agreements). There are also a few other types of legal documents which must be in writing to be valid, the most important example being a testament; thus videotaping a last will is not an option in Quebec.

However, one must note that writing requirements at Common Law do not affect the contract’s validity, but its applicability. Written evidence of the formation of a contract is needed to avoid frauds, which does not mean that the contract itself must be in writing. Some exceptions, such as the partial performance of contractual commitments, may compensate the lack of a written document.⁷⁶ Canadian jurists must thus distinguish between these two regimes, because, in Quebec, a contract that must be notarized is void if all the prerequisites are not met.

Another particularity of the Common Law is the parol evidence rule, which is judge-made-law: “By the general rules of the common law, if there be a contract which has been reduced into writing, verbal evidence is not allowed to be given of what passed between the parties, either before the written instrument was made, or during the time that it was in a state of preparation, so as to add to, or subtract from or in any manner to vary or qualify the written contract”.⁷⁷ Thus a party cannot introduce oral evidence of earlier negotiations of a contract with a view to proving that the agreement is different than what is on the face of the writing. In the Civil Law, proof of a juridical act must be done by the production of the original document or a copy of it; evidentiary rules will not allow oral testimony to contradict written provisions in the contract. Noteworthy, also, is article 2862 of the *Civil Code of Québec*, to the effect that a juridical act may not be proven “by testimony where the value in dispute exceeds \$1500”, unless there is a “commencement of proof” which, pursuant to article 2865, “may arise from an admission or writing of the adverse party, his testimony or the production of real evidence.”

⁷⁵ See, for example, *Dawson v. Helicopter Exploration*, [1955] S.C.R. 868. It was explained earlier that the offeror cannot revoke a fixed offer in the context of a unilateral contract if the offeree already started to perform based on reasonable reliance: see *Errington v. Errington*, [1952] 1 K.B. 290, [1952] 1 All E.R. 149 (British C.A.).

⁷⁶ *Delgman v. Guaranty Trust Co. of Canada*, [1954] S.C.R. 725.

⁷⁷ *Goss v. Lord Nugent*, (1833), 5 B. & Ad. 58, at 64, *per* Denman C.J. For a strict application of this rule in Canada, see *Bauer v. The Bank of Montreal*, [1980] 2 S.C.R. 102; for a more nuanced one, see *Chinn v. Hanrieder*, 2013 BCCA 310.

B - Torts and Civil Responsibility

Compared to the Civilian law of civil responsibility, Common Law torts is said to be a patchwork of separate delicts, or civil wrongs, that have no shared core except to be (mainly) compensatory in their objective (as opposed to penal). This contrasts with article 1457 of the *Civil Code of Québec*, which is the basis of the whole legal scheme of extra-contractual obligations:

1457. Every person has a duty to abide by the rules of conduct incumbent on him, according to the circumstances, usage or law, so as not to cause injury to another.

Where he is endowed with reason and fails in this duty, he is responsible for any injury he causes to another by such fault and is bound to make reparation for the injury, whether it be bodily, moral or material in nature.

He is also bound, in certain cases, to make reparation for injury caused to another by the act or fault of another person or by the act of things in his custody.

The last feature in this general provision on civil liability in the Civil Code, explained further in articles 1459 onward (on act or fault of another), is the first specific difference with the law of torts in the Common Law.⁷⁸ Indeed, saved for one limited exception,⁷⁹ there is no vicarious liability as a general rule in Canadian Common Law jurisdictions.

Going back to the main broad characteristic distinguishing the law of civil responsibility in the two legal traditions, the absence of an all-encompassing principle in the Common Law means that, theoretically, there are different rules for the different torts, or causes of action. In a way, there is a parallel with criminal law, where the *Canadian Criminal Code* provides for different rules for the different offences. The legal rules applicable to each of the torts were developed by caselaw, but one must not exaggerate the complexity of this branch of private law because there are now categories, ontologically based on the tortfeasor's state of mind. It follows that the torts of battery, assault, mental suffering, trespass to land and trespass to goods, for example, are all intentional torts, while on the other hand there is a tort of negligence, where intent is not relevant, with a separate set of rules. In fact, the latter is the closest to the Civilian law of civil responsibility, as the five relevant factors – duty of care, standard of care, damages, causation, remoteness – apply to every situation where the wrong is unintentional. For the so-called intentional torts, however, there are in fact elements specific to each of them that need to be proven by the plaintiff in a cause of action. For instance, an assault requires (i) an intent to cause a harmful or offensive contact or to cause an apprehension of such a contact, and (ii) an actual apprehension of contact by someone (no injury is needed), who can be other than the intended victim. The conditions would be different for the other intentional torts, though there are indeed similar aspects due to their historical origins in the forms of action and the writs system.⁸⁰ Coming back briefly to the tort of negligence in Common Law, “duty of care” and “remoteness”, which act as restrictive elements of civil responsibility, have no obvious *alter ego* pursuant to article 1457 of the *Civil Code of Québec*; the Civilian doctrine of causation, however, seems to provide some functional equivalents both in terms of *ex ante* and a *posteriori* limitations of liability.⁸¹ Linked to the

⁷⁸ There is vicarious liability between parents and children in civil law, for instance. Some Common Law jurisdictions in Canada have legislation to that effect; see, for instance, Ontario's *Parental Responsibility Act, 2000*, S.O. 2000, c. 4.

⁷⁹ The judge-made-law exception is for the employer-employee relationship – which is distinguished from independent contractors – where the agent is liable for the servant wrongdoing: see *671122 Ontario Limited v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983. Such a basis for vicarious liability also exists in Quebec, under article 1463 *Civil Code of Québec*.

⁸⁰ This historical perspective is not essential for our purposes.

⁸¹ See S.D. Sugarman, “A New Approach to Tort Doctrine: Taking the Best from the Civil Law and Common Law of Canada,” in S. Beaulac *et al.* (eds.), *The Joy of Torts* (Toronto: LexisNexis Butterworths, 2003), 375.

duty of care, note that the Common Law has no general obligation to rescue or to assist another person, which contrasts with Quebec's statutory provision to the effect that: "Every human being whose life is in peril has a right to assistance".⁸²

The Civilian law of civil responsibility draws a significant distinction between contractual liability and extra-contractual liability, something that was not found in the Common Law given the shared historical origins of the laws of contracts and torts. Contemporarily, there is an issue with diametrically opposed solutions in the two systems: whether one can choose between alternative bases for civil responsibility and indeed whether one can cumulate both in a case. According to the Common Law theory of concurrency, "where a given wrong *prima facie* supports an action in contract and in tort, the party may sue in either or both, except where the contract indicates that the parties intended to limit or negative the right to sue in tort".⁸³ "This limitation on the general rule of concurrency arises," adds the Supreme Court, "because it is always open to parties to limit or waive the duties which the common law would impose on them for negligence".⁸⁴ Although concurrency used to be possible in Quebec,⁸⁵ the reform brought about by the *Civil Code of Québec* changed that and now forces the claim in contracts.⁸⁶ Consequently, it is not possible in Quebec to combine both contract and tort claims in the same cause of action, nor to favour the latter in a judicial proceeding if the former is open.

The whole law of civil responsibility in Quebec is based on the notion of "fault", being the most central element of a cause of action under article 1457 of the *Civil Code of Québec*. Parallel to this scheme of general application, there are a few "no-fault" regimes in the Civilian jurisdiction, the most important one for road accidents⁸⁷; thus there are no such things as motor vehicle tort cases in Quebec. Beside no-fault statutes, the Civil Law of responsibility knows no exception to the notion of fault, as was confirmed by the Supreme Court of Canada in the vaccination program case of *Lapierre*,⁸⁸ which dismissed an objective or strict liability based on a theory of risk or of necessity. Defamation in Quebec is an example where, unlike in Common Law,⁸⁹ the general liability scheme based on fault remains entirely applicable.⁹⁰ The Common Law, for its part, is more open to other bases of liability and indeed to allowing strict liability, as in the British case of *Rylands v. Fletcher*,⁹¹ where a non-natural use of land gave rise to objective liability; as well, there are many situations of statutory duties of strict liability.⁹² However, it is noteworthy that no Canadian Common Law jurisdiction, unlike in the United States, has a strict legal regime for product liability.⁹³ Quebec seems more stringent for product liability, with a combination of rules of general application, based on the Civil Code,⁹⁴ and a far-reaching consumer protection statute.⁹⁵

⁸² Quebec's *Charter of Human Rights and Freedoms*, R.S.Q., c. C-12, art. 2, paragraph 1.

⁸³ *BG Checo International Ltd. v. British Columbia Hydro and Power Authority*, [1993] 1 S.C.R. 12, at 26.

⁸⁴ *Ibid.*

⁸⁵ The authority was *Wabasso Ltd. v. National Drying Machinery Co.*, [1981] 1 S.C.R. 578. See also J.-L. Baudouin & P. Deslauriers, *La responsabilité civile*, 7th ed., vol. 1 (Cowansville: Yvon Blais, 2007), at 33 ff.

⁸⁶ See *Civil Code of Québec*, art. 1458.

⁸⁷ See Quebec's *Automobile Insurance Act*, R.S.Q., c. A-25.

⁸⁸ *Lapierre v. Quebec (Attorney General)*, [1985] 1 S.C.R. 241.

⁸⁹ Beside the common law of defamation, all Canadian Common Law jurisdictions have enacted specific statutes; see, generally, R.E. Brown, *Brown on Defamation*, 2nd ed. (Toronto: Carswell, 1994), looseleaf.

⁹⁰ See *Prud'homme c. Prud'homme*, [2002] 4 S.C.R. 633; see also M.A. Grégoire, "Atteinte à la vie privée et à la réputation", in *Personnes et famille – JurisClasseur Québec (coll. droit civil)* (Montreal: LexisNexis, 2010), loose-leaf (updated 2013), chap. 4.

⁹¹ *Rylands v. Fletcher*, (1868) L.R. 3 H.L. 330. This rule was endorsed in Canada; see *Gertsen v. Toronto (Metropolitan)*, (1973) 2 O.R. (2d) 1 (Ont. S.C.).

⁹² See K.M. Stanton *et al.*, *Statutory Torts* (London: Sweet & Maxwell, 2003).

⁹³ See S.M. Waddams, *Products Liability*, 4th ed. (Toronto: Carswell, 2002).

⁹⁴ Art. 1468 *Civil Code of Québec*.

⁹⁵ *Consumer Protection Act*, R.S.Q., c. P-40.1.

Beside those major distinguishing factors between Canada's two sets of tort law, there are more minor distinctions that are nonetheless worthy of mention. For instance, provocation is not a defense in Common Law,⁹⁶ while it is deemed an element of contributory negligence in Civil Law. There is a branch of the law of torts that deals with "pure economic loss" cases⁹⁷ – fraud, misrepresentation – things that Quebec would also sanction, but through the law of contracts. There used to be important differences in the tort defences of voluntary assumption of risk and of contributory negligence, which have disappeared in regard to the latter since all Canadian Common Law jurisdictions have now adopted statutory regimes allowing for the apportioning of responsibility.⁹⁸ Lastly, one shall note that the so-called "thin-skull" doctrine has become pretty much the same in both legal traditions.

C - Judicial Remedies, Civil Procedure and Evidence

What appears to be three subject-matters – and indeed, is generally taught in separate courses – will be covered together here because, in terms of Canada's duality of legal traditions, they overlap greatly. In fact, some topics of judicial remedies in Common Law are matters of civil procedure in Quebec (e.g. injunction), while other topics of Civil Law remedies are dealt with through Common Law procedure (e.g. limitation). With regard to evidence, including the taking of evidence, there is also considerable crossover with both remedial and procedural rules when one assesses situations in Civil Law and in Common Law.

This being said, the first thing to highlight (already mentioned in Part I of this document) is that the country's two legal systems are very much alike when it comes to judicial institutions, remedies, procedure, and evidence rules. Quebec has nothing to do with its Continental European jurisdictional cousins as far as courts are concerned (e.g. the system in Quebec is adversarial rather than inquisitory). Save important exceptions, it is fair to say that the ethos of the law covering judicial matters (remedies, procedure, evidence) is shared across Canada. In what follows, the main distinctions (general and specific) will be addressed, starting with remedies, moving to procedure and ending with evidence.

The Common Law is said to be a procedurally based or oriented system, because of the historical importance of the writs system and the forms of action in developing substantive law.⁹⁹ This characteristic is epitomized by the adage: "where there is a remedy, there is a right,"¹⁰⁰ which turns on its head the general understanding of Civilian obligations. In contrast with Civil Law and intertwined with a "laissez-faire" reasoning, Common Law is geared toward compensation discards any moral evaluation of the reasons or motivations for a civil wrong or a contract breach. In the latter case, the law of contract assumes that "a breach of contract, coupled with an offer to pay just compensation, does no harm to the plaintiff, is not morally wrong, and may be desirable on the grounds of efficiency".¹⁰¹

⁹⁶ However, provocation may be taken into account to evaluate damages, even punitive damages.

⁹⁷ See B. Feldthusen, *Economic Negligence: The Recovery of Pure Economic Loss*, 5th ed. (Toronto: Thomson Carswell, 2008).

⁹⁸ See, for instance, Ontario's *Negligence Act*, R.S.O. 1990, c. N.1. See also the suggestion that, indeed, the common law of contributory negligence has changed: *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210.

⁹⁹ See D. Poirier and A.-F. Debruche, *Introduction générale à la common law*, 3rd ed. (Brussels & Cowansville: Bruylant & Yvon Blais, 2005), at 15-17.

¹⁰⁰ *Ashby v. White*, (1703) Ld. Raym. 938, where Hold C.J. said : "it is a vain thing to imagine a right without a remedy".

¹⁰¹ S.M. Waddams, *The Law of Damages*, 2nd d. (Toronto: Canada Law Book, 1991), at 11.

Thus Common Law is commercial (or utilitarian) in nature: it generally considers compensatory damages the appropriate remedy and limits cases of remedies in nature.¹⁰² (like specific performance). Quebec Civil Law, on the other hand, is less restrictive with specific performance of a contract,¹⁰³ the choice of the remedy being up to the creditor, contrasting with the Common Law approach captured by the English adage “You can lead a horse to water, but you can’t make him drink.”

The guiding principle in judicial remedies, be it in Common Law or in Civil Law, is captured by the Latin maxim *restitutio in integrum*. The so-called “interests” that are at stake, in trying to make the plaintiff whole, have been articulated as follows by Common Law scholars:¹⁰⁴ (i) expectation interest (breach of contracts), (ii) reliance interest (torts), and (iii) restitution interest (unjust enrichment). Article 1611 of the *Civil Code of Québec*, for its part, reads as follows:

1611. The damages due to the creditor compensate for the amount of the loss he has sustained and the profit of which he has been deprived.

Future injury which is certain and assessable is taken into account in awarding damages.

The latter part of this provision is concerned with issues that would be addressed by remoteness and certainty tests developed in Common Law; mitigation of damages is an issue that both legal systems deal with in a similar fashion. Note also that there are specific provisions for contractual damages and bodily injuries, as well as for unjust enrichment, in the *Civil Code of Québec*.

A distinguishing feature of Civil Law remedies is the protection of the right to performance of obligations, in particular the oblique action¹⁰⁵ and the so-called Paulian action¹⁰⁶ (in French “*action en inopposabilité*”). In the first one, a creditor may “exercise the rights and actions belonging to the debtor, in the debtor’s name, where the debtor refuses or neglects to exercise them”; there are restrictions and conditions provided for in the Civil Code for such an action. The other one – the name of which comes from Roman Law – allows a creditor whose interests are prejudiced by a juridical act from the debtor (especially if it leads to insolvency) to “obtain a declaration that the act may not be set up against him” (in French “*peut faire déclarer inopposable à son égard l’acte juridique*”); there are different hurdles depending on whether such a prejudicial act amounts to an onerous or a gratuitous contract.

The law regarding personal injury compensation, by and large, is the same across the country, as it developed from the Supreme Court of Canada trilogy – the main case: *Andrews v. Grand & Toy Alberta*¹⁰⁷ – and was followed *mutatis mutandis* in Quebec.¹⁰⁸ Thus rules to evaluate past and future losses, special and general damages, as well as the two categories of pecuniary damages (itemized calculation) and non-pecuniary damages (global lump sum calculation), have only minor differences

¹⁰² See *Mile End Milling v. Peterborough Cereal*, [1924] S.C.R. 120.

¹⁰³ See *Joli-Coeur c. Joli-Coeur Lacasse Avocats, s.e.n.c.r.l.*, 2001 QCCA 219 (CanLII).

¹⁰⁴ See L.L- Fuller and W.R. Perdue Jr., “The Reliance Interest in Contract Damages” (1936) 46 *Yale Law Journal* 52, at 53-54.

¹⁰⁵ *Civil Code of Québec*, art. 1627-1630.

¹⁰⁶ *Civil Code of Québec*, art. 1631-1636.

¹⁰⁷ *Andrews v. Grand & Toy Ltd.*, [1978] 2 S.C.R. 229. The other two cases are *Thornton v. Prince George School District No. 57*, [1978] 2 S.C.R. 267 and *Arnold v. Teno*, [1978] 2 S.C.R. 287.

¹⁰⁸ See, for instance, *Dugal v. Quebec (Attorney General)*, [1979] C.S. 617, J.E. 82-1169 (Qc C.A.).

across the legal systems.¹⁰⁹ The only distinction to mention here is the more moderate stand, taken by Quebec case law and doctrine,¹¹⁰ with respect to the ceiling on non-pecuniary damages, essentially because the extravagant claims argument is unconvincing.¹¹¹

One particular issue of judicial remedies generates a lot of debate across the country – in fact, around the legal world – namely punitive damages, what is known in Quebec as exemplary damages. The first general thing to highlight is that Common Law is more restrictive than Civil Law with respect to punitive damages, which is not to say that Quebec courts order them generously – in fact, much less than in the United States – but only that they are even less frequent in Canadian Common Law jurisdictions. For instance, for the longest time, they were possible only in relation to tort actions, not in contract cases,¹¹² a limitation set aside only recently by the Supreme Court, as the leading decision in *Whiten*¹¹³ confirmed in 2002. The main difference in Quebec is that the situations open to exemplary damages must be statutorily based (since damages play, as a matter of principle, a compensatory function in the Civil Law tradition); this precondition is explicit in article 1621 of the *Civil Code of Québec*: “Where the awarding of punitive damages is provided for by law [...]”. The most widely used legislative basis is article 49(2) of the *Quebec Charter of human rights and freedoms*:¹¹⁴ “In case of unlawful and intentional interference, the tribunal may, in addition, condemn the person guilty of it to punitive damages”; note that there are a number of other such statutes. It is worth mentioning at this point also that, unlike Common Law jurisdictions, Quebec’s human rights act is not deemed a separate scheme, but is rather fully integrated within the general liability regime, including for exemplary damages.¹¹⁵ To help determine the quantum of exemplary damages in light of the appropriate circumstances, article 1621(2) of the Civil Code sets out a number of factors: “the gravity of the debtor’s fault, his patrimonial situation, the extent of the reparation for which he is already liable to the creditor and, where such is the case, the fact that the payment of the damages is [...] assumed by a third person [e.g. insurers].” The Supreme Court of Canada has developed similar criteria – indeed, many are more elaborated¹¹⁶ – to assess proportionality in quantifying punitive damages.¹¹⁷ No doubt this is an area of private law where much cross-fertilisation is happening between the country’s two legal traditions,¹¹⁸ as one can witness in the recent decision of our highest court in *Cinar Corporation v. Robinson*.¹¹⁹

¹⁰⁹ A minor point, more theoretical than practical, is that the so-called “functional” approach adopted by the Supreme Court in the trilogy to assess non-pecuniary damages does not sit well with the civil law idea of moral damages; see J.-L. Baudouin & P. Deslauriers, *op. cit.*, note 87, at 484 ff.

¹¹⁰ See A. Popovici, “Le droit qui s’écrit” (1995) 29 *R.J. Thémis* 565, at 584; D. Gardner, “L’indemnisation du préjudice corporel dans les juridictions de tradition civiliste” (2005) 39 *R.J. Thémis* 395, at 404.

¹¹¹ See J.C. Bouck, “Civil Jury Trials – Assessing Non-Pecuniary Damages — Civil Jury Reform” (2002) 81 *Can. Bar Rev.* 493, at 516.

¹¹² See *Thompson v. Zurich Ins.* (1984), 5 C.C.L.I. 251 (H.C. Ont.). See also the American Law Institute, in its *Restatement (Second) on the Law of Contracts* (1986), section 355: “punitive damages are not recoverable for a breach of contract unless the conduct constituting the breach is also a tort for which punitive damages are recoverable”.

¹¹³ *Whiten v. Pilot Insurance Co.*, [2002] 1 S.C.R. 595. See also S. Beaulac, “Les dommages-intérêts punitifs depuis l’affaire Whiten et les leçons à en tirer pour le droit civil québécois” (2002) 36 *R.J. Thémis* 637.

¹¹⁴ *Charter of Human Rights and Freedoms*, *supra*, note 84, .

¹¹⁵ See the Supreme Court of Canada decision in *Béliveau St-Jacques v. Fédération des employées et employés de services publics inc.*, [1996] 2 S.C.R. 345.

¹¹⁶ See S. Beaulac, “A Comparative Look at Punitive Damages in Canada” (2002) 17 *Supreme Ct. L. Rev. (2d)* 351, at 372-373.

¹¹⁷ Beside *Whiten v. Pilot Insurance Co.*, [2002] 1 S.C.R. 595, see *Fidler v. Sun Life Assurance Co. of Canada*, [2006] 2 S.C.R. 3; and *Honda Canada Inc. v. Keays*, [2008] 2 S.C.R. 362.

¹¹⁸ See *Richard v. Rime Inc.*, [2012] 1 S.C.R. 265.

¹¹⁹ *Cinar Corporation v. Robinson*, 2013 SCC 73 (23 December 2013).

Falling under either judicial remedies or civil procedure, depending on the legal system, are injunctions and other equitable remedies. The latter terminology, historically, comes from the parallel Court of Equity which, among other things, developed remedies other than compensatory damages.¹²⁰ The two main categories are injunction and specific performance; they are by nature discretionary, given their equitable origins, and they are deemed exceptional, in the sense that a court will order them only if damages are inappropriate in the circumstances. Under the *Civil Code of Québec*, specific performance is considerably different, mainly because article 1601 allows a court to enforce not only negative, but also positive contractual obligations (“obligations de faire”), in cases of service contract breach for instance.¹²¹ On the other hand, the Common Law is much less open to this equitable remedy, in fact practically only when the contract breached concerns real property, the interests in which attract special protection in the Common Law world (e.g. damages for invasion of property interests).¹²²

As far as the law of injunctions is concerned, the very notion and the categories are much the same, though the normative source is different in Quebec because the *Code of Civil Procedure* codifies the applicable rules. Indeed, article 751 provides that, prohibitive or mandatory, an injunction is a court order “not to do or to cease doing, or, in cases which admit of it, to perform a particular act or operation”. As in Common Law jurisdictions, “an injunction is an extraordinary remedy available in Quebec only from the Superior Court”.¹²³ The whole law of injunction is very similar across the country, including not only the various types (permanent, interlocutory, interim, mandatory, as well as safeguard order), but also the applications and threshold tests.¹²⁴ It was less obvious, a priori, that Quebec could have its own *Mareva* injunction,¹²⁵ *Anton Piller* order and *Norwich* relief.¹²⁶ But based on the general powers provision, found in article 46 of the *Code of Civil Procedure*,¹²⁷ Quebec courts followed their Common Law counterparts.¹²⁸ There is one noteworthy difference, concerning interlocutory injunction: as per article 755 of the *Code of Civil Procedure*, there are possible damages resulting from such orders (for which securities must be posted), but they are not automatic in the province of Quebec and, indeed, depend on whether the case gives rise to civil liability, i.e. if the applicant was at fault in seeking an injunction.¹²⁹

The law of restitution, at least in Canadian Common Law,¹³⁰ is directly linked, if not in origins at least in reasoning,¹³¹ to the Civilian concept of unjust enrichment, something that was mentioned already (in Part I, above). It was first developed at the Supreme Court of Canada in the 1977 *Viger*

¹²⁰ See J. Berryman, *The Law of Equitable Remedies*, 2nd ed. (Toronto: Irwin Law, 2000).

¹²¹ See F. Lévesque, “La libération progressive de l’octroi de l’exécution forcée en nature” (2013) 47 *R.J. Thémis U.M.* 407.

¹²² See J. Manwaring, “Les contrats”, in L. Bélanger-Hardy and A. Grenon (eds.), *op. cit.*, note 41, 259.

¹²³ *I.A.T.S.E., Stage Local 56 v. Société de la Place des Arts de Montréal*, [2004] 1 S.C.R. 43, para. 14.

¹²⁴ See C. Gervais, *L’injonction*, 2nd ed. (Cowansville: Yvon Blais, 2005).

¹²⁵ *Mareva* injunction is linked to provisional remedies at aticles 733 ff. of the *Code of Civil Procedure*.

¹²⁶ See D. Ferron, M. Piché-Messier and L.A. Poitras, *L’injonction et les ordonnances Anton Piller, Mareva et Norwich* (Montreal: LexisNexis, 2009).

¹²⁷ Article 46 *Code of Civil Procedure* reads: “The courts and judges have all the powers necessary for the exercise of their jurisdiction. They may, at any time and in all matters, whether in first instance or in appeal, issue orders to safeguard the rights of the parties, for such time and on such conditions as they may determine. As well, they may, in the matters brought before them, even on their own initiative, issue injunctions or reprimands, suppress writings or declare them libellous, and make such orders as are appropriate to deal with cases for which no specific remedy is provided by law.”

See also the Supreme Court decision in *Lac d’Amiante du Québec Ltée c. 2858-0702 Québec Inc.*, [2001] 2 S.C.R. 743, at 763.

¹²⁸ See, for example, *Thibault v. Empire (L’), compagnie d’assurance-vie*, 2012 QCCA 1748 (CanLII), para. 56.

¹²⁹ See C. Gervais, *op. cit.*, note 126, at 96.

¹³⁰ See L.D. Smith et al (eds.), *The Law of Restitution in Canada – Cases, Notes, and Materials* (Toronto: Emond Montgomery, 2004).

¹³¹ See L. LeBel and P.-L. Le Saunier, “L’interaction du droit civil et de la common law à la Cour suprême du Canada” (2006) 47 *C. de D.* 179.

decision,¹³² a case from Quebec; what is also known as an action *de in rem verso* has since been codified in articles 1493-1496 of the *Civil Code of Québec*. Restitution in Common Law, though wider than unjust enrichment,¹³³ is intertwined with it and is also linked to the restitution interest mentioned earlier. The three-prong test for unjust enrichment in Canada's Common Law – enrichment of the defendant, corresponding deprivation on the part of the plaintiff, and absence of juristic reason for the enrichment – set out in the 1980 case of *Pettkus v. Becker*,¹³⁴ borrowed from the Civilian experience.¹³⁵ This being said, it is an area of private law filled with pitfalls. Any jurist must be vigilant in handling a case in a legal tradition with which she is not socialized.

If there is a field of private law in Canada where no great divide exists between Civil Law and Common Law, it is civil procedure. To give but one example: rules on pleadings and defenses are very much the same in Ontario and in Quebec. The actual mechanics may differ, with ordinary actions, for instance, commenced by way of statements of claim in Common Law and by means of introductory motions in Quebec; in the latter, there is no equivalent to an originating application, if one looks for another broad difference. Rules on standing would be another area where, save for occasional nuances, Canadian lawyers need not worry.¹³⁶ Of course, the judicial structure and the jurisdictions of the different courts will vary from province to province (also the federal courts), but these have nothing to do with Canada's dual legal traditions. This being said, an important warning to litigators, which in fact applies whenever there is a transfer (be it across legal systems or not), is to make sure that one is aware and familiar with the applicable procedural delays and deadlines, that may vary greatly depending on the province or territory.

Issues of limitation periods, what is known in Quebec as extinctive prescriptions, are approached differently: limitations in Common Law provinces (found in various limitation acts and other statutes) would bar the remedy but leave the underlying right unaffected, while prescriptions in Civil Law (provided for, mainly, in the *Civil Code*) are normative as they extinguish the substantive obligations. Also, there exists a Common Law doctrine with no Civilian equivalent in Quebec: a tolling agreement, by which a party can actually waive the right to claim that a cause of action is statute-barred and, for all purposes, set aside the limitation period in a case.

Two areas of civil procedure and evidence must be discussed briefly: expert witnesses and class actions. The first one is straightforward because there is no major difference between recourse to expert evidence in civil cases in Canada's legal traditions. In fact, the leading case in the country, for both civil and criminal law experts, is the Supreme Court of Canada decision in *R. v. Mohan*,¹³⁷ followed in Quebec,¹³⁸ with its four-fold test: (a) relevance; (b) necessity in assisting the trier of fact; (c) the absence of any exclusionary rule; and (d) a properly qualified expert.¹³⁹

¹³² *Cie Immobilière Viger Ltée v. Lauréat Giguère Inc.*, *supra*, note 5.

¹³³ See M. McInnes, "The Canadian Principle of Unjust Enrichment: Comparative Insights into the Law of Restitution" (1999) 117 *Alberta L. Rev.* 1.

¹³⁴ *Pettkus v. Becker*, *supra*, note 4.

¹³⁵ See L.D. Smith, *loc. cit.*, note 4.

¹³⁶ See *Canada (Minister of Justice) v. Borowski*, [1981] 2 S.C.R. 575; *Chaoulli v. Quebec (Attorney General)*, [2005] 1 S.C.R. 791; *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, [2012] 2 S.C.R. 524.

¹³⁷ *R. v. Mohan*, [1994] 2 S.C.R. 9, para. 74-75.

¹³⁸ For a recent example, see *Pelchat c. Zone 3 inc.*, 2013 QCCS 78 (CanLII), para. 101.

¹³⁹ See also in Quebec, *Presse Itée (La) c. Poulin*, 20012 QCCA 2030 (CanLII).

In *White Burgess Langille Inman v. Abbott and Haliburton Co.*¹⁴⁰, the Supreme Court of Canada adds that under criterion (d), one must inquire whether the expert wants to, or can, perform his or her duties with the required independence and impartiality. This duty of impartiality is now enshrined in Quebec's new *Code of Civil Procedure* (the "new Code") which was not in force at the time of *Mohan*.¹⁴¹ Moreover, since the enactment of the new Code, parties must resort to a common expert, unless the tribunal authorizes a derogation.¹⁴² The other topic does not require much dwelling upon either because, save for a few things, the institution of class actions varies very little across the country.¹⁴³ Principally, the certification of class action is more stringent in Common Law than in Quebec;¹⁴⁴ for example, it must be established that it is the preferable procedure for the resolution of the common issues. Other obligations are imposed on the representative plaintiff, such as producing "a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding".¹⁴⁵ There are of course other more minor differences between the different provincial class proceedings acts, but nothing crucial trans-systemically.¹⁴⁶

Generally speaking, alternative dispute resolution mechanisms (ADR) are more developed and formalised in Canadian Common Law jurisdictions than in Quebec, including in regard to settlement offers, the negotiation of which is conducted in the shadow of the law. Costs awards in this country are substantially more generous outside Quebec; in the latter, save the relatively rare situations of extra-judicial costs (or the 1% rule in high-value disputes), the costs are nowhere near the amounts Common Law lawyers are used to recovering for the winning parties (be it partial or substantial indemnity). In Quebec, there is no true equivalent of a summary judgment, a procedure thriving elsewhere in the country, as confirmed by the Supreme Court of Canada in the recent case *Hryniak v. Mauldin*.¹⁴⁷ On the other hand, Quebec is the only jurisdiction to have anti-SLAPP (strategic lawsuits against public participation, a.k.a. "poursuites-bâillons") legislation.¹⁴⁸

The province of Quebec has also used the opportunity provided by the recent reform of its civil procedure to recognize the importance of alternative disputes resolution modes. It is now possible to be compensated for the payment of professional fees as a sanction for "substantial breaches noted in the conduct of the proceeding."¹⁴⁹ Moreover, a court "may order the successful party to pay the legal costs incurred by another party if it is of the opinion that the successful party did not properly observe the principle of proportionality or committed an abuse of procedure, or that such an order is necessary to prevent serious prejudice to a party or to permit a fair apportionment of the costs (...)." ¹⁵⁰ The parties are now under the obligation to "consider private prevention and resolution processes before referring their dispute to the courts"¹⁵¹, and judges must facilitate conciliation "whenever the law so requires, the the parties request it or consent to it or circumstances permit, or if a settlement

¹⁴⁰ [2015] 2 S.C.R. 182, par. 53.

¹⁴¹ *Code of Civil Procedure*, RLRQ, c. C-25.01, art. 22.

¹⁴² *Id.*, art. 232.

¹⁴³ The trilogy of cases are *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534, *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158; *Rumley v. British Columbia*, [2001] 3 S.C.R. 184.

¹⁴⁴ For a very recent class action case from Quebec, including on certification, see the Supreme Court of Canada decision in *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1 (16 January 2014).

¹⁴⁵ Ontario's *Class Proceedings Act*, 1992, S.O. 1992, c. 6, section 5(1)(e)(ii).

¹⁴⁶ See, on the similarities in the class action statutes across Canadian jurisdictions: C. Piché, *Fairness in Class Action Settlements* (Toronto: Carswell, 2011), at 25 ff.

¹⁴⁷ *Hryniak v. Mauldin*, 2014 SCC 7 (23 January 2014).

¹⁴⁸ *Code of Civil Procedure*, at article 54.1-54.6 – *Loi modifiant le Code de procédure civile pour prévenir l'utilisation abusive des tribunaux et favoriser le respect de la liberté d'expression et la participation des citoyens aux débats publics*, S.Q. 2009, c. 12.

¹⁴⁹ *Code of Civil Procedure*, art. 342.

¹⁵⁰ *Code de procédure civile*, art. 340-341.

¹⁵¹ *Code de procédure civile*, art. 1 al. 3.

conference is held.”¹⁵² The Code also contains provisions that specify the mediator’s role, and that provide a framework for mediation processes.¹⁵³ We can expect that the apportionment of the costs could be used as a sanction in case of a failure to consider private prevention and resolution processes.

With respect to the law of evidence, intertwined with rules of civil procedure, there is one major distinction between Civil Law and Common Law concerning the process of discovery. Simply put, although it exists in every provincial and territorial jurisdiction of the country, the approach is fundamentally different in Quebec, involving much more judicial oversight. Furthermore, instead of having, up front, an affidavit of documents produced by the opponent, in connection with the whole cause of action,¹⁵⁴ a litigant in Quebec needs to identify, by means of an examination for discovery, evidence held by the other party and then make a motion to obtain it; thus pre-trial discovery is both contingent and based upon relevancy. However, the new Code provides that objections raised about the relevancy of evidence do not prevent the pre-trial examination from continuing.¹⁵⁵ Moreover, the criterion for assessing relevancy is broader, because the examination “may bear on any fact that is relevant to the dispute and on the evidence supporting such facts.”¹⁵⁶ We can see that the new Code brings civil procedure in Quebec closer to that existing in common law jurisdictions, notably by facilitating disclosure of evidence, and by reducing the possibility of raising objections to the relevancy of evidence.¹⁵⁷ Yet, a lawyer trained in a Common Law jurisdiction must still be aware that the whole duty to disclose in a civil case remains less stringent in Quebec. For their part, lawyers coming from Quebec must be aware that this duty is ongoing in Common Law jurisdictions, as the obligation to disclose continues until and even during the trial, if additional relevant documents come to light.¹⁵⁸

Another minor difference between Canada’s two legal systems, in terms of civil procedure, is the doctrine of *res judicata*, what is known in Quebec as the “théorie de la chose jugée”, found in article 168(1) of the new Code. In short, the Common Law links the doctrine of estoppel with *res judicata* and is more encompassing because, not only does it apply to bar a new action on the same claim between the parties, but it also precludes a party from relitigating the same issue, decided in an adjudicated case, in a different, yet collateral cause of action.¹⁵⁹

In terms of the law of evidence, in general, suffice it to say that due to the heavy influence of the Common Law in Quebec in this regard, the rules and practices found in 2803 to 2874 of the *Civil Code of Québec* are very similar to their Common Law cousins. As Professor Royer put it: “Le caractère oral, public, accusatoire et contradictoire de la procédure civile découle aussi de la mixité des origines de nos règles de preuve et d’une conception subjective et libérale du droit”.¹⁶⁰

(Translation: The oral, public and adversarial nature of civil procedure also stems from the mixed origins of our evidence rules and a subjective and liberal perception of the law.)

¹⁵² *Id.*, art. 9 al. 2

¹⁵³ *Id.*, art. 605 et ss.

¹⁵⁴ See J. Walker *et al.* (eds.), *The Civil Litigation Process – Cases and Materials*, 7th ed. (Toronto: Emond Montgomery, 2010), at 537 ff.

¹⁵⁵ *Code of Civil Procedure*, art. 228, al. 3.

¹⁵⁶ *Id.*, art. 221

¹⁵⁷ Oliver, Éric et Atchison, Christopher, «La constitution et la communication de la preuve avant l’instruction sous le nouveau code: une étape déterminante dans le débat judiciaire», SOQUIJ, L’Express, vol. 6, no 37, 18 septembre 2015 [en ligne], p. 3.

¹⁵⁸ See L.S. Abrams and K.P. McGuinness, *Canadian Civil Procedure Law* (Toronto: LexisNexis, 2008), at 692. See L.S. Abrams and K.P. McGuinness, *Canadian Civil Procedure Law* (Toronto: LexisNexis, 2008), at 692.

¹⁵⁹ See G. Spencer Bower and A.K. Turner, *The Doctrine of Res Judicata*, 2nd ed. (London: Butterworths, 1969), at 9.

¹⁶⁰ J.-C. Royer and S. Lavallée, *La preuve civile*, 4th ed. (Cowansville: Yvon Blais, 2008), at 23.

As an example of commonality, judicial notice found in article 2806 and onward of the *Civil Code of Québec* reads the same as in Canadian Common Law jurisdictions.¹⁶¹ The whole regime of hearsay – though there are some exceptions where differences can be observed – is another instance where any Canadian lawyer will feel at home *ad mari usque ad mare*; judge-made-law elsewhere, these rules are codified in articles 2843 and 2869-2874 of the *Civil Code of Québec* (along with article 294 *Code of Civil Procedure*).

D - Property and Securities

At its most generic level, property law is about relations between persons and things. But to say this is to say nothing, at least from a juridical standpoint. What is, indeed, “property”? This type of interrogation is crucial when approaching from a comparative Common Law-Civil Law perspective the subject of property law, for property is perhaps the area of the law where the two traditions are most far apart. Moreover, it is arguably the area of the law where the different epistemologies underlying each tradition are the most salient.

The basic concepts that will be examined in this section essentially relate to the characterization of property and to the most important interests or rights associated with property law in both traditions. Prior to doing so, we will briefly comment on the origins of property law in these traditions, which will provide us with an opportunity to reflect on their significantly different epistemologies. Given the ties that bind, albeit in a contingent manner, property law and the law of securities, we will address the latter topic right after our cursory comparative study of the basic concepts of property law; however, this survey of the law of securities will admittedly be minimalist given the complexity of the legal frameworks involved. Before going further, two caveats are warranted.

The first caveat is peculiar to Canada: while the temptation to create uniform laws and modes of legal reasoning is probably felt everywhere, it must be resisted with an even greater vigour in the Canadian context, unless there is an indication to the contrary in a federal statute. It is especially so in the field of property law because of the foundational nature of many of its concepts; if the law is *inter alia* about naming the world around us, nowhere is it truer than in the field of property law, the concepts of which feed most other areas of private law. Canadian jurists – notably those working in the field of transactional law – should be aware of the risk of importing legal concepts from the other legal tradition, particularly when they rely on deeply-entrenched assumptions about categories applicable in the field of property law.

The second caveat is more generic, but it retains a specific Canadian dimension because of the country’s two official languages. It concerns the pitfalls that plague the comparative study of property law in a bijural context. At least two must be mentioned. First, legal concepts expressed through similar words may have different meanings in different legal traditions. Even if they express functional equivalents, their normative underpinnings may be different across traditions. For example, we will see that Civil Law ownership is not exactly the same as Common Law ownership. Hence, the importance of using words in the appropriate legal context. Second, jurists having to deal with property law files or with interests or rights recognized in that area of the law will realize that in some cases, the English word for a given concept comes from Old French, like *chose* as in *chose in action*.

¹⁶¹ See A.W. Bryant, S.N. Lederman and M.K. Fuerst, *The Law of Evidence in Canada*, 3rd ed. (Toronto: LexisNexis, 2009), at 1268

Yet, the normative meaning of the Common Law *chose* as in *chose in action* is different, and much narrower, than the meaning of *chose* (“thing”) in Civilian property law.

* * * *

In no area of the law is the comparison of the Common Law to an English garden, given its idiosyncrasies, and of the Civil law to a French garden more appropriate than in the law of property. The significant differences that characterize this field of law in the two traditions bear witness to the different weight of their distinct legal origins.

Property law in the Common Law tradition stems from medieval Anglo-Norman law, while its Civilian counterpart finds its origins in Roman law. The current state of the former can only be understood by reference to its particular historical trajectory, while the latter, although it retains important structural elements from Roman law, has emancipated from this source, thanks to the French revolution and codification projects. Moreover, contrary to its Common Law counterpart, Civil Law property has clearly severed its ties with feudal law, notably through a unitary conception of ownership that stands in stark contrast with the Common Law’s doctrine of estates.¹⁶² Indeed, the abolition of the feudal land holding system in France and, later, in Quebec¹⁶³ paved the way for the return of Roman law’s unified theory of ownership. Thus, as is, Common Law property remains much more indebted to its medieval origins than Civil Law property is to its Roman origins.

For instance, the basic structure of property law in the Common Law tradition is directly linked to the context in which it arose.¹⁶⁴ The central distinction as regards property, i.e. between real and personal property, arose in medieval times as a result of the obligation imposed upon claimants to ensure that their claims could satisfy the formal requirements of either one of the two categories of actions that were then recognized, that is, real and personal actions. Real actions then allowed a claimant who had been dispossessed of a property to retrieve it, while personal actions only allowed a claimant to receive a monetary compensation in lieu of the restitution of the property itself. The types of property that could be obtained or returned through real actions became “real property”, a category which then solely encompassed estates of inheritance. All other types of property that could be obtained through personal actions became “personal property”. Personal property was referred to as “chattel” because of the overwhelming importance of cattle in potential claimants’ assets. Thus, when faced with the task of characterizing property in the Common Law tradition, reference should obviously be made to the case law, but the historical sources of the two main types of property also remain relevant variables as they may influence the ultimate characterization of a particular property. It is around that core distinction that the Common Law of property evolved over centuries. Yet, it had to adapt to the transition to a liberal economy¹⁶⁵; equity’s role in supplementing the common law played an important role in that respect.

Although property law in the Civil Law tradition also remains indebted to its Roman origins,¹⁶⁶ codification has rendered the reference to the tradition’s roots less frequent. As such, while they often retain their Roman etymology, the scope and content of the basic concepts underpinning Civil Law property have often evolved. Such is the case of the crucial distinction between immovables and

¹⁶² L. Pfister, « Domaine, propriété, droit de propriété. Notes sur l’évolution du vocabulaire du droit français des biens », (2008) 38 *Revue générale de droit* 303, 333.

¹⁶³ Interestingly, feudal land tenure partly survived in Quebec until 1854 under the guise of seigniorial law.

¹⁶⁴ This paragraph draws on Gérard Snow’s account in : *Les biens. Généralités – biens personnels* (Brussels & Cowansville : Bruylant & Éditions Yvon Blais, 1998), p. 18-20.

¹⁶⁵ A.-F. Debruche, « Les biens », in : L. Bélanger-Hardy & A. Grenon (eds), *op. cit.*, note 41, p. 101, 102.

¹⁶⁶ For example in the categorization of things, things without an owner such as wild animals being *res nullius* (art. 934 *Civil Code of Québec*), things having been abandoned being *res derelictae* (art. 934ss), and common things not susceptible of appropriation being *res communes* (art. 931 *Civil Code of Québec*).

movables, which, in Roman times, covered only material things but not rights, but which was later expanded.¹⁶⁷ Moreover, as a normative project, codification presupposes a conceptual stabilization of legal categories, which does not preclude their evolution, but which certainly constrains such an evolution.

Now, what is “property”? The Common Law tradition answers this question by emphasizing the various types of rights that someone may exercise; it is concerned not so much with “things”, but with rights on such things. As such, property implies a “bundle” or “cluster”¹⁶⁸ of rights¹⁶⁹ which are part of a person’s assets and the duration of which may vary depending on their nature.¹⁷⁰ In other words, Common Law property is less concerned with the objects of proprietary rights than with the rules governing the identification, acquisition and exercise of such rights. What is to be noted, from a Civilian standpoint, is the absence at common law of a formal, predetermined definition of property.¹⁷¹ This stands in stark contrast with the Civilian approach, which enshrines such a definition. In Quebec, art. 899 *Civil Code of Québec* provides that “[property, whether corporeal or incorporeal, is divided into immovables and movables.” From this initial definition flow various precisions as to the nature of immovables and movables, to which we will return. Suffice it to observe for now that property in Quebec’s Civil Law is not only about material or corporeal things; incorporeal property, such as rights over things (“real rights”) or “rights of economic worth against other persons”¹⁷² (“personal rights”), is also recognized as property. These two types of rights are said to be “patrimonial rights” - the patrimony is the Civilian functional equivalent of the Common Law’s assets and liabilities,¹⁷³ as opposed to “extra-patrimonial rights”, such as one’s right to life or to one’s image¹⁷⁴ or to parental authority,¹⁷⁵ which are said to be inalienable.¹⁷⁶ Indeed, some things cannot be appropriated,¹⁷⁷ such as common things (“res communes”) like water or air,¹⁷⁸ or state property;¹⁷⁹ they are thus deemed not to be “objects of commerce.”¹⁸⁰

As can be seen, property law in the Civil Law tradition is closely linked to the notion of “patrimony”, which every person has.¹⁸¹ Conversely, no patrimony can, as a matter of principle, be conceived as standing alone, without being associated with a person.¹⁸² Moveable and immovable property being integrated in a person’s patrimony, we can thus gather that property refers in the Civil Law tradition to things or rights having some form of economic worth.

¹⁶⁷ D. Vincelette, « Biens meubles et immeubles en droit civil du Québec » in: L. Bélanger-Hardy & A. Grenon, *Éléments de common law et aperçu comparatif du droit civil québécois* (Scarborough : Carswell, 1997), p. 457, 458.

¹⁶⁸ See: *Stewart v. The Queen*, [1988] 1 S.C.R. 963, 975.

¹⁶⁹ The concept of rights can be understood as designating “generically and indiscriminately to denote any sort of legal advantage, whether claim, privilege, power or immunity.” See: W.N. Hohfeld, “Some Fundamental Legal Conceptions as Applied to Judicial Reasoning”, (1917) 26 *Yale L.J.* 710, 717. On the “bundle of rights” metaphor, see: N. Kasirer, “The Common Core of European Private Law in Boxes and Bundles”, (2002) 10 *European Review of Private Law* 417.

¹⁷⁰ See the classic formulation in the *Walsingham’s Case*, (1563) 2 *Plowd* 547, 555: “The land itself is one thing, and the estate in the land is another thing, for an estate in the land is a time in the land, or land for a time, and there are diversities of estates which are no more than diversities of time, for he who has a fee simple in land has a time in the land without end or the land for time without end.”

¹⁷¹ This does not preclude the existence of statutory definitions of property for the application of particular statutes.

¹⁷² R.A. Macdonald & J.E.C. Brierley (eds.), *op. cit.*, note 25, p. 266.

¹⁷³ It has been defined as “un ensemble de droits et de charges, actuels et futurs, dans lequel les droits répondent des charges.” See: J. Ghestin & G. Goubeaux, *Traité de droit civil. Introduction générale*, 3rd ed., (Paris: L.G.D.J., 1990), no. 197, p. 155.

¹⁷⁴ See: *Aubry v. Vice-Versa*, [1998] 1 S.C.R. 591.

¹⁷⁵ Art. 600 *Civil Code of Québec*

¹⁷⁶ Art. 3 *Civil Code of Québec*

¹⁷⁷ Art. 913 *Civil Code of Québec*

¹⁷⁸ See, however, the exception at art. 913, par. 2, *Civil Code of Québec*, concerning water and air not intended for public utility.

¹⁷⁹ Art. 916-919 *Civil Code of Québec*

¹⁸⁰ Art. 2876 *Civil Code of Québec*

¹⁸¹ Art. 2 *Civil Code of Québec*

¹⁸² This nexus between legal personhood and patrimony also explains, at least in part, why the Civil Law tradition had so much difficulty finding a functional equivalent to the Common Law trust, since the trust *qua* trust can be characterized as a form of patrimony, but not as a person. However, see, in section E hereunder, how the *Civil Code of Québec* now circumvents this problem with its *fiducie*.

We have already alluded to one of the most significant distinctions between Common Law and Civil Law property, that is, the *summa divisio* established between real and personal property in the former, and between immovable and movable property in the latter. While there may be overlap between the Common Law's real and personal property and, respectively, the Civil Law's immovable and movable property, it would be dangerous to assume that such overlap systematically happens. So what does real and personal property encompass in the Common Law tradition? And what does movable and immovable property designate in its Civilian counterpart? Common Law's real property (or "realities") essentially covers "corporeal hereditaments" (land, for example), and "incorporeal hereditaments" (for example, easements). For its part, personal property (or "personalities") encompasses two different types of chattels, i.e. chattels real (such as leasehold estate), and chattels personal (or "pure personalities"), which may be corporeal and called "choses in possession" (such as furniture) or incorporeal and called "choses in action" (such as corporate shares). Personal property is any property that cannot qualify as real property; it thus forms a kind of residual category.¹⁸³ As is the case with real property, subtler distinctions can be made. Moreover, chattels may in some cases become real property, for example when they are attached to the land and thus qualify as fixtures.

The Civil Law's approach to property is arguably simpler. As mentioned, the Civil Code provides for two types of property, movable and immovable.¹⁸⁴ Immovables comprise land and permanent constructions located thereon, plants and minerals not extracted from the land,¹⁸⁵ movables incorporated with an immovable and losing their individuality to form an integral part of that immovable,¹⁸⁶ movables permanently physically attached to an immovable without losing their individuality as long as they remain with the immovable,¹⁸⁷ and "real rights in immovables, as well as actions to assert such rights or to obtain possession of immovable."¹⁸⁸ For their part, movables comprise "things which can be moved either by themselves or by an extrinsic force."¹⁸⁹ The law may deem things movables, such as "energy harnessed and put to use by man."¹⁹⁰ Most importantly, movables are a residual category: all property which cannot qualify as immovable is movable.¹⁹¹

Canadian jurists risk being surprised by the breadth of the epistemological and conceptual differences existing between Common Law and Civil Law categories of property, which we barely sketched in the two paragraphs above. They thus need to avoid at all costs transplanting their assumptions about the classification of property, most often drawn from their original jurisdiction, into another legal system based on a different tradition.

Having summarized with broad strokes what property refers to in both legal traditions, let us now turn to the particular types of rights or interests persons may have in relation to it. In the Common Law tradition, three major types of relations between persons and things have emerged over the centuries: possession, ownership (or property), and encumbrances.¹⁹² In the Civil Law tradition, art. 991 *Civil Code of Québec*, par. 1, provides that "a person, alone or with others, may hold a right of ownership or other real right in a property, or have possession of the property."¹⁹³

¹⁸³ *Tucker v. Farms and General Investment Trust Ltd.*, [1966] 2 Q.B. 412 (C.A.).

¹⁸⁴ On Civil Law property, see, generally, the seminal work of P.-C. Lafond, *Précis de droit des biens* (Montréal: Thémis, 2007).

¹⁸⁵ Art. 900 *Civil Code of Québec*

¹⁸⁶ Art. 901 *Civil Code of Québec*

¹⁸⁷ Art. 903 *Civil Code of Québec*

¹⁸⁸ Art. 904 *Civil Code of Québec*

¹⁸⁹ Art. 905 *Civil Code of Québec*

¹⁹⁰ Art. 906 *Civil Code of Québec*

¹⁹¹ Art. 907 *Civil Code of Québec*

¹⁹² G. Snow, *op. cit.*, note 157, p. 6.

¹⁹³ Art. 911 *Civil Code of Québec*. This article's second paragraph further states that « a person also may hold or administer the property of others or be trustee of property appropriated to a particular purpose. » We will return to these questions when examining the comparative law of trusts and *fiducies*.

Possession is thus common to both legal traditions. In the Common law tradition, it is arguably the most fundamental concept, as it constitutes the most basic type of title.¹⁹⁴ This tradition establishes a distinction between de facto and de jure possession; the former merely designates the material fact of possession, while the latter refers to the legal recognition of that possession, from which may flow a right to possession. The main criterion used to determine effective possession (and to have it legally recognized) is effective control, which is evaluated in light of many contextual factors such as the actual level of control exercised on the thing and, most importantly, the intent to exclude a competing possessor.¹⁹⁵ This highlights the fact that de jure possession in the Common Law tradition is relative, in the sense that it seeks to recognize a right that is stronger than competing ones. A thief may arguably legally possess a thing he stole, and this in spite of the illegality of his act, but his right will be of lesser importance than the one that the person from whom he stole the thing could claim, as a result of which it is this latter person who could claim a right to possess and have her claim legally upheld.¹⁹⁶ Possession is thus relative as it can be envisaged as implying various degrees on a hierarchy going from de facto possession to the right to possess.¹⁹⁷ While this distinguishes possession from ownership, which is enforceable against third parties rather than merely relative,¹⁹⁸ possession and ownership remain close to each other.

Possession in the Civil Law tradition is not drastically different from its Common Law counterpart as far as outcomes are concerned, but the structure of reasoning differs. Possession is defined as “the exercise in fact, by a person himself or by another person having detention of the property, of a real right, with the intention of acting as the holder of that right.”¹⁹⁹ The fact of exercising control over that property is the *corpus* while the intention to assert rights over it (and the accompanying behaviour) is the *animus*.²⁰⁰ The *animus* is a functional equivalent of the Common Law’s requirement of an intention to exclude competing possessors.²⁰¹ The basic requirements for possession to be legally effective are that it be peaceful, continuous, public and unequivocal,²⁰² mere tolerance by the owner of the detention of a thing by another being insufficient to found possession.²⁰³ Importantly, a *juris tantum* presumption is to the effect that a possessor holds the real right he pretends to exercise,²⁰⁴ bearing in mind that “possession vests the possessor with the real right he is exercising if he complies with the rules on prescription.”²⁰⁵ Thus, while possession first and foremost constitutes a fact in the Civil Law tradition, it may lead to the acquisition of ownership. A very important distinction established in the Civilian regime of possession is that between good faith and bad faith possessors. A possessor is deemed to act in good faith “if, when his possession begins, he is justified in believing he holds the real right he is exercising. His good faith ceases from the time his lack of title or the defects of his possession or title are notified to him by a civil proceeding.”²⁰⁶ One of the consequences of possession in bad faith is that the possessor has no right to the revenues that he may draw from the thing he possesses and must return such revenues if required to do so.²⁰⁷ In the example cited above, a thief, being a possessor in bad faith, would not be able to invoke the effects of possession²⁰⁸ and could thus never be vested with

¹⁹⁴ G. Snow, *op. cit.*, note 157, p. 7.

¹⁹⁵ See, *inter alia*: B. Ziff, *Principles of Property Law*, 5th ed. (Toronto: Carswell, 2010), p. 118.

¹⁹⁶ We draw this example from G. Snow, *op. cit.*, note 157, p. 8.

¹⁹⁷ A.H. Oosterhoff & W.B. Rayner, *Anger and Honsberger Law of Real Property*, 2nd ed., vol. 2 (Aurora: Canada Law Book, 1985), p. 1404.

¹⁹⁸ G. Snow, *op. cit.*, note 157, p. 11.

¹⁹⁹ Art. 921 *Civil Code of Québec*

²⁰⁰ See: G. Cornu, *Vocabulaire juridique*, 8th ed. (Paris: Presses Universitaires de France, 2007), *sub nomine* « possession », p. 695-696.

²⁰¹ Y. Emerich, « De quelques invariables de la possession: la possession transsystème », (2011) 113 *Revue du Notariat* 299, p. 308.

²⁰² Art. 922 *Civil Code of Québec*

²⁰³ Art. 924 *Civil Code of Québec*

²⁰⁴ Art. 928 *Civil Code of Québec*

²⁰⁵ Art. 930 *Civil Code of Québec*

²⁰⁶ Art. 932 *Civil Code of Québec*

²⁰⁷ Art. 931 *Civil Code of Québec*

²⁰⁸ Art. 927 *Civil Code of Québec*

the real right he pretended to exercise.²⁰⁹ In spite of different patterns of reasoning, the legal position of that thief would therefore roughly be the same in both Common Law and Civil Law. Last, while possession and ownership remain conceptually distinct in both traditions, it bears noting that ownership can be acquired through acquisitive prescription (in the Civil Law tradition) or adverse possession (in the Common Law tradition), in which case possession must precede ownership.

That being said, how is ownership conceived in these traditions? In the Common Law tradition, ownership is not formally defined, but some features can nevertheless be identified.²¹⁰ Indeed, the right of ownership usually implies the right to possess the property owned, the right to use it and to draw revenue from it, and the right to dispose of that property. Moreover, the right of ownership is usually of an indeterminate duration and is residual in the sense that the owner ultimately retrieves the property in its entirety when all other rights in it are extinguished. What was a relative right of ownership then becomes an “absolute” right of ownership (subject to various legal restrictions). Sole or concurrent ownership may also be possible. Concurrent ownership may take the form of co-ownership, but also that of various “estates” on the same property coexisting with one another. Let us briefly examine the genesis of this system.

When thinking about ownership in the Common Law tradition, one has to go back in time and examine what happened after the Norman conquest of England. William the Conqueror declared himself the sole owner of the land and began allocating to the lords who had accepted his rule different kinds of “tenures” on parcels of land. The doctrine of tenures was elaborated over the centuries to characterize the quality of possession enjoyed by tenants.²¹¹ The land was granted to these tenants and their heirs. In such a context, the “estate” became an object of inheritance. In essence, the doctrine of estates presupposes the allocation by the Crown, who holds radical title, of separate rights on the same land to different persons for various slices of time. For example, someone holding fee simple in land – the proprietary interest closest to absolute ownership – enjoys the broadest possible aggregate of rights available; holders of life estates, leasehold estates, or conditional estates enjoy lesser rights, generally for shorter periods of time. This list is not exhaustive; further subcategories abound. That being said, the continuing influence of the doctrine of estates explains that in practice, there is no absolute real right (except perhaps for the Crown as regards public domain) in the Common Law tradition. This relativism contrasts with the absolutism characterizing, at least in principle, the law of property in the Civilian tradition. Let us finally recall that the interests that a person may have over a property may be founded either on the common law or on equity.

Civil Law ownership relies on different assumptions. It is defined as follows in art. 947 *Civil Code of Québec*: “Ownership is the right to use, enjoy and dispose of property fully and freely, subject to the limits and conditions for doing so determined by law. Ownership may be in various modes and dismemberments.” The conceptual structure of ownership in the Civil Law tradition comes directly from Roman law’s distinction between *usus*, *fructus* and *abusus*. *Usus* refers to the right to use the property, *fructus* designates the right to enjoy revenues or reap the fruits from it, and *abusus* refers to the right to dispose of the property. The owner has all these rights. Ownership is therefore the greatest real right one can have over things, precisely in that it confers an absolute and direct right to use and dispose of things. It reflects the Roman concept of dominium (i.e. the sovereignty over things as to which no other right is superior). Most importantly, there cannot be multiple rights of ownership coexisting over a single thing, which stands in stark contrast to the Common Law’s recognition of the possibility of multiple proprietary interests held simultaneously in the same property. This is why the Civil Law’s conception

²⁰⁹ Art. 928 *Civil Code of Québec*

²¹⁰ We draw again on G. Snow, *op. cit.* note 157, p. 11-12.

²¹¹ A. Boudreau-Ouellet, “Les biens personnels et réels”, in: L. Bélanger-Hardy & A. Grenon (eds.), *op. cit.*, note 160, p. 415, 437.

of ownership is said to be unitary. However, this absolutist representation should be nuanced. Indeed, there are multiple instances where one's enjoyment of his or her property may create negative externalities for others, which the law may, and does, seek to prevent or to offset. Beyond the general prohibition against the excessive or unreasonable exercise of rights,²¹² the *Civil Code of Québec* is replete with rules that limit the absolutism of ownership. Think, for example, of legal expropriation for public utility,²¹³ limits to neighbourhood annoyances,²¹⁴ or rights of way.²¹⁵ Ownership is also said to be "exclusive", as "it implies the ability to exclude all others from the thing owned; and the primordial relation is one of a single owner to the thing owned."²¹⁶ Finally, ownership is a foundational right in the sense that "all other principal real rights are based [on it]. All such rights are analyzed either as modifications of ownership or as rights carved out of a fundamental, all-encompassing right of ownership."²¹⁷ Modes of ownership, such as co-ownership²¹⁸ or superficies²¹⁹, and dismemberments of the right of ownership (usufruct, use, servitude, and emphyteusis)²²⁰ are indeed unthinkable without reference to ownership's conceptual foundations. For example, usufruct encompasses the rights to use the property (*usus*) and to keep the revenues from it (*fructus*). However, it does not give the holder of the usufruct the right to dispose of the property (*abusus*), which is vested in the naked owner, who at the end of the usufruct recovers all real rights in the property. The Common Law tradition would rely on the doctrine of estates to create a similar situation.

A further question is how property can be appropriated. In this respect, the Common Law and the Civil Law traditions are not that far apart. According to article 916 of the Civil Code of Québec, property can be appropriated by succession, occupancy, prescription, accession, and any other legal mode (for example, expropriation or contract). In the Common Law tradition, original title can be obtained by occupancy, accession, or invention, while derivative title can be obtained either by law or by a voluntary act (such as a contract). Adverse possession is another way to obtain rights on property, and constitutes a functional equivalent to Civil law acquisitive prescription. As well, in both traditions there are systems of publication and registration, which generally follow the principal categories of property, rights and interests applicable.

²¹²Art. 7 *Civil Code of Québec* The Common Law tradition has historically been reluctant to accept the idea of abuse of rights, firstly because doctrines such as nuisance, public policy, duress, and others refer to some extent to concerns similar to those covered by abuse of rights, secondly because the very idea that a right, often conceptualized as a valid claim, can be abused is seen as an oxymoron. For a theoretical opening to that doctrine, see, however: E. Weinrib, "Two Conceptions of Remedies", in: C. E. F. Rickett, *Justifying Private Law Remedies* (Oxford & Portland, OR: Hart Publishing, 2008), p. 3, 29-30. For a general survey of the stakes raised by the doctrine of abuse of rights in a common law setting, see: J.-F. Gaudreault-DesBiens & N. Karazivan, "The 'Public' and the 'Private' in the Common Law and Civil Law Traditions and the Regulation of Religion", in: S. Ferrari & S. Pastorelli (eds.), *Religion in Public Spaces. A European Perspective* (Farnham, U.K.: Ashgate, 2012), p. 93, 107-109.

²¹³Art. 952 *Civil Code of Québec*

²¹⁴Art. 976 *Civil Code of Québec* See: *Ciment du Saint-Laurent inc. v. Barrette*, [2008] 3 SC.R. 392.

²¹⁵Art. 997 *Civil Code of Québec*

²¹⁶R.A. Macdonald & J.E.C. Brierley, *op. cit.*, note 25, p. 273.

²¹⁷*Id.*, p. 272. It is of the utmost import to observe that contrary to "personal rights" (rights *in personam*, which allow their holder to require something from another person and which are relative) and subject to some exceptions (see, inter alia, art. 2674 & 2732 CIVIL CODE OF QUEBEC) and to rules concerning the publication of rights (art. 2934ss CIVIL CODE OF QUEBEC), "real rights" (rights *in rem*) are opposable to all - hence their "universality" - and generally entail a right to follow the property as well as a right of preference over other right holders. There are rights that, exceptionally, can be characterized as "mixed", such as the right of the tenant to remain in his or her dwelling. See: D.-C. Lamontagne, "Distinction des biens, domaine, possession et droit de propriété", in: *La réforme du Code civil. Personnes, successions, biens* (Québec: Presses de l'Université Laval, 1993), p. 467, 480. It is also important to note that the dominant doctrinal view is to the effect that the list of real rights enumerated in the Code is subject to a *numerus clausus*, which means that it is exhaustive.

²¹⁸Art. 1010ss *Civil Code of Québec*

²¹⁹Art. 1110ss *Civil Code of Québec*

²²⁰Art. 1119ss *Civil Code of Québec*

We have alluded earlier to dismemberments of the Civil Law right of ownership. This gives us the opportunity to briefly mention a third important category in Common Law property, beyond ownership and possession, i.e. that of “encumbrance”, which designates in a nutshell a real right that a person may exercise in respect of the property of another. Encumbrances, which also qualify as realties, “run with the land”, so to say, and are not lost if the property they attach to is sold or otherwise alienated. Leaving aside dower, which attaches a deceased husband’s estates of inheritance for the benefit of his widow, the other two main types of encumbrances are easements and real securities.²²¹ Easements correspond rather closely to Civil Law servitudes. For their part, real securities may take many forms; they will serve as a springboard to our very limited comparative study of securities in the two legal traditions under examination.

* * *

Securities serve the crucial purpose of protecting creditors, which is of tremendous importance in any capitalist economy. They notably play a most significant role in the field of commercial transactions. In the Common Law tradition and its Civil Law counterpart, the legal regime concerning securities had to adapt to the evolutions of such an economy. As a result, even though the foundational premises of the law of property, as expressed in each tradition’s *jus commune*, may still be relevant in some respect, significant changes were brought about by legislation in the legal regime governing securities. Actually, these legislative interventions, which took place in the last decades both in Common Law provinces or territories and in Quebec, have sought to rationalize the rules applicable to securities. Canadian lawyers must therefore imperatively inform themselves about the statutory regime in force in the province in which they intend to practice. Yet, they will note that in spite of resilient conceptual and methodological differences – the Civil Law predictably tending to emphasize a conceptual approach and the Common Law adopting a more functional approach²²² – the law of securities in the Civil Law and Common Law traditions increasingly converges.²²³

Let us begin with securities in Common Law provinces and territories, which are traditionally divided between real and personal securities. In a nutshell, real securities are a charge on a specific property which grants the creditor a right to follow that property in addition to the right to be preferred over other creditors if the property is sold. On the contrary, personal securities do not alone confer a direct right on a specific property; they are grounded on the debtor’s personal commitment to reimburse the creditor. As we will see later, the Civil Law tradition recognizes a functionally equivalent distinction. A real security can be constituted on a chattel or personal property, or on land or real property.

The archetypical real security on real property in the Common Law tradition is the mortgage, the current understanding of which stems from both common law and equity. Although there is no single definition of the mortgage, especially in a multi-jurisdictional environment such as Common Law Canada,²²⁴ it is nevertheless possible to identify some basic features of the common law mortgage: “In a mortgage transaction, (...) the mortgagee [i.e. the creditor] takes and accepts title to the property and becomes, in the case of the first mortgagee, the owner of the legal title. (...) The mortgagor, on the other hand, has a right of redemption and may claim back the property upon payment of the loan.”²²⁵

²²¹ Not all real securities can be characterized as encumbrances (G. Snow, *op. cit.*, note 157, p. 45).

²²² See, for example: R.C.C. Cuming, C. Walsh & R.J. Wood, *Personal Property Security Act* (Toronto: Irwin Law, 2005), p. 5.

²²³ On these questions, see, generally: Y. Emerich, « La nature juridique des sûretés réelles en droit civil et en common law : une question de tradition juridique ? », (2010) 44 *Revue juridique Thémis* 95.

²²⁴ See: J.E. Roach, *The Canadian Law of Mortgage*, 2nd ed. (Toronto: LexisNexis, 2010), p. 3.

²²⁵ *Id.*, p. 6.

This right of redemption is based on equity. A mortgage said to be “equitable” may arise in some cases, notably when a second mortgage is granted over a property already mortgaged, or when the constitution of a Common Law mortgage is irregular but the court can nevertheless discern “a binding intention to create a security in favour of the mortgagee (...).”²²⁶ Statutory mortgages (or charges) may also be created; in such situations, the mortgage so created does not involve a transfer of title to the mortgagee.²²⁷

Although the Common Law mortgage is often equated with the Civil Law hypothec, Canadian jurists must realize that such an equation should not be carried too far: be it only for the transfer of the legal title to the mortgagee in the Common Law tradition, the legal mortgage is quite different from the Civil Law hypothec. Moreover, jurists trained in the Civil Law must refrain from solely focusing on the archetype depicted above and examine in depth how securities on real property are actually devised in Common Law Canada, which should induce them to take stock of variations between provinces or territories. Whether a province has retained the traditional system of registration of acts, has adopted the Torrens registration system, or has instead a mixed system combining both types of registration, different legal consequences will follow.²²⁸ Quebec jurists who would settle in a Common Law province or territory should be aware of the existence of such differences and make whatever verification is needed.

As regards securities on personal property, Common Law provinces and territories have all adopted Personal Property Security Acts (PPSA).²²⁹ In a nutshell, the regime established by PPSAs revolves around a unitary concept, the “security interest”. This regime has emancipated the law of securities from the dictates of the law of property and of the various interests the latter recognizes, notably by ensuring that ownership of the property subject to the security interest remains in the debtor.²³⁰ As we will see, the *Civil Code of Québec*’s “hypothec”, on movables or immovables, is to the same effect. Yet, there are not insignificant differences between the PPSA’s regime and the Civil Code’s framework concerning movable property; they mainly concern the form of securities, the publication or perfection of interests – a common requirement which is nevertheless materialized differently in some respect -, the consequences of failure to publish or perfect, the timing of the registration, and enforcement rules.²³¹ As well, in spite of a similar philosophy and of many commonalities between the various provincial PPSAs, some differences exist between them. No Canadian jurist should overlook such differences.

Let us now give a very broad outline of the situation in Quebec. It should first be noted that article 2644 of the Civil Code posits the general rule that “[t]he property of a debtor is charged with the performance of his obligations and is the common pledge of his creditors.” Bearing that in mind, Quebec Civil Law recognizes two types of securities, personal and real. Real securities provide creditors with the possibility of directly enforcing their security on a particular property – they constitute

²²⁶ *Swiss Bank v. Lloyds Bank*, [1982] A.C. 584, 594.

²²⁷ J.E. Roach, op. cit., note 217, p. 9.

²²⁸ See generally: Y. Emerich, loc. cit., note 216, par. 96-100.

²²⁹ For example, under Ontario’s *Personal Property Security Act*, R.S.O. 1990, c. P-10, s. 1, “personal property” means chattel paper, documents of title, goods, instruments, intangibles, money and investment property, and includes fixtures but does not include building materials that have been affixed to real property.” As a matter of principle, the Act does not apply to “to the creation or assignment of an interest in real property, including a mortgage, charge or lease of real property, other than, (i) an interest in a fixture, or (ii) an assignment of a right to payment under a mortgage, charge or lease where the assignment does not convey or transfer the assignor’s interest in the real property.” (s. 4(1)e))

²³⁰ R.C.C. Cuming, C. Walsh & R.J. Wood, op. cit., note 215, p. 5.

²³¹ For an excellent summary of the similarities and differences between the Common Law and Civil Law regimes, see: id., pp. 47-56.

jus in rem -, while personal securities do not. Suretyship is the archetypical example of a personal security: under that type of agreement a person undertakes to the benefit of a creditor to perform the obligation of a debtor of that creditor if the former fails to perform it²³² – the Common Law tradition knows a functional equivalent. As for real securities, the *Civil Code of Québec* distinguishes two different types: hypothecs and prior claims.

Hypothecs are accessory real rights. Article 2660 *Civil Code of Québec* indeed defines the hypothec as “a real right on a moveable or immovable property made liable for the performance of an obligation”, with article 2261 specifying that “[a] hypothec is merely an accessory right, and subsists only as long as the obligation whose performance it secures continues to exist.” As can be noted, hypothecs can now attach moveables and immovables, which was not the case under the former *Civil Code of Lower Canada*. The reforms brought about by the *Civil Code of Québec* actually sought to expand the concept of hypothec, and to offer a regime of securities which, together with prior claims, would prove as flexible as that existing in Common Law jurisdictions, and this, in spite of the greater rigidity resulting from the unitary nature of the law of property in the Civil Law tradition. Thus, hypothecs can now attach corporeal and incorporeal property, as well as particular property or all the properties included in a universality.²³³ They can all cover existing or future property.²³⁴ The rights that a hypothec confers on the creditor are “the right to follow the property into whose hands it may be, to take possession of it or to take it in payment, or to sell it or cause it to be sold and, in that case, to have a preference upon the proceeds of the sale ranking as determined [in the Civil Code].”²³⁵ Importantly, the ownership of a property on which a hypothec is registered is not transferred to the creditor, contrary to common law mortgages as we have seen.²³⁶ As well, whenever a hypothec attaches an immovable, it must be “on pain of absolute nullity, granted by notarial act *en minute*.”²³⁷ Movable hypothecs are not subject to that requirement but they must be granted in writing.²³⁸ Whenever participating in transactions involving immoveable property, common lawyers must thus be aware of the role played by notaries in Quebec.²³⁹

For their part, prior claims are claims “to which the law attaches the right of the creditor to be preferred over other creditors, even the hypothecary creditors, (...)”²⁴⁰ As a matter of principle, prior claims are not real rights since they only confer a personal preference regarding the payment of a claim, without the right to follow the property.²⁴¹

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²³² Art. 2333 *Civil Code of Québec*

²³³ Art. 2666 *Civil Code of Québec*

²³⁴ Art. 2670 *Civil Code of Québec*

²³⁵ Art. 2260 *Civil Code of Québec*

²³⁶ However, other legal mechanisms, which are not securities strictly speaking since they qualify neither as hypothecs nor as prior claims, allow creditors to reserve ownership of a property until full payment by the debtor. Such is inter alia the case of instalment sale (art. 1745 *CIVIL CODE OF QUEBEC*), of sale with right of redemption (art. 1750 *CIVIL CODE OF QUEBEC*), and of leasing (art. 1842 *CIVIL CODE OF QUEBEC*). In Common Law provinces and territories, these types of mechanisms would prima facie qualify as “security interests” under PPSAs.

²³⁷ Art. 2693 *Civil Code of Québec*

²³⁸ Art. 2696 *Civil Code of Québec*

²³⁹ See: *Notaries Act*, supra, note 50.

²⁴⁰ Art. 2650 *Civil Code of Québec*

²⁴¹ Some prior claims can exceptionally constitute real rights, such as the prior claims of municipalities or school boards. See: art. 2654.1 *Civil Code of Québec*

We have given a cursory glance at some of the most important features and differences of the law of property and securities in the Common Law and Civil Law traditions, as they exist in Canada. Again, we stress that we had to make choices; there are thus other features that we could have addressed but did not given the limited scope of this text. As can be seen from the above, in spite of frequent commonalities as to their underlying philosophy, significant conceptual and methodological differences remain. We hope to have raised Canadian jurists' awareness as to the complexity of the law in these areas. Coupled with the technical nature of many rules (to which we barely alluded at best), this high level of complexity should certainly induce them to show the utmost care in dealing with files in these areas.

E - Trust and Fiducies

Legal historian Frederic Maitland has called the idea of trust “the greatest and most distinctive achievement performed by Englishmen in the field of jurisprudence.”²⁴² With the flexibility and creativity it allows, the trust has indeed proven to be a most resourceful legal tool; it is used in a great variety of settings, notably to organize wealth transfers in the fields of commerce and in family affairs. For good reason, Civil Law jurisdictions have long struggled to make sense of this legal institution within the constraints of their particular conceptual structure and epistemology, and many of them have now managed to find interesting alternatives in spite of these constraints.²⁴³ Because of its integration in a federation dominated by the Common Law tradition, Quebec had no choice but to be at the forefront of the Civil Law appropriation of the trust idea, which it first did in the Civil Code of Lower Canada, albeit without much concern for the fit of this institution with foundational Civil Law concepts.²⁴⁴ When Quebec reformed its Civil Code in 1991, it went further and used all the conceptual resources that the Civil Law tradition could offer to elaborate an alternative that would replicate as closely as possible the Common Law trust without, however, sacrificing the internal coherence of the Civil Law tradition. The Quebec legislator relied on the concept of fiducie to achieve this objective. We will use this French term to avoid any confusion between the Common Law trust and its Civil Law equivalent, and this even though the Civil Code itself uses, in its English version, the word “trust.”²⁴⁵ Focusing on the various categories of trusts, we will first address the essentials of the law of trusts from the perspective of the Common Law tradition, and then examine the Civil Law’s fiducie. We will finally highlight the main differences between the two.

The law of trusts in the Common Law tradition emerged as a result of the development of equity, which eventually led to the recognition of the distinction between the holder of the legal title over property and the holder of equitable ownership. In a nutshell, a trust exists when a person (the trustee) holds property qua trustee for the benefit of another person (beneficiary) or for a particular purpose, the trustee being responsible to preserve that property and to make it profitable if possible. While the trustee is the legal owner of the property in trust, it is the beneficiary who is its equitable owner. As Waters observes, this division “protects the latter against the bankruptcy of the former.”²⁴⁶ We will see later that this peculiar division of ownership raises some hurdles from a Civilian perspective.

²⁴² F.W. Maitland, “The Unincorporate Body”, in: H.A.L. Fisher (ed.) *The Collected Papers of Frederic William Maitland*, vol. 3 (Cambridge: Cambridge University Press, 1911), p. 271, 272.

²⁴³ See : M. Cantin-Cumyn, “Reflections regarding the diversity of ways in which the trust has been received or adapted in civil law countries”, in: L. Smith (ed.), *Reimagining the Trust. Trusts in Civil Law* (Cambridge: Cambridge University Press, 2012), p. 6.

²⁴⁴ See: art. 981a-981n of the former *Civil Code of Lower Canada*. The fiduciary property detained by the trustee under that regime had been characterized as a sui generis property (*Royal Trust Co. v. Tucker*, [1982] 1 S.C.R. 250), a characterization that was later rejected in the *Civil Code of Québec*.

²⁴⁵ In so doing, we follow: M. Cantin-Cumyn, loc. cit., note 236.

²⁴⁶ D.W.M. Waters, M.R. Gillen & L.D. Smith, *Waters’ Law of Trusts in Canada*, 4th ed. (Scarborough: Carswell, 2012), p. 1419.

The Common Law tradition recognizes three broad categories of trusts, distinct from one another as a result of their mode of constitution.²⁴⁷ The first category of trusts are express ones, which are created by a voluntary act on the part of a settlor (or trustor), be it a will, a contract, a gift or a declaration.²⁴⁸ An express trust can be set up for a person, i.e. a beneficiary, or for a particular purpose, which can be charitable or public, on the one hand, or private, on the other. A second form of trusts covers those the existence of which is acknowledged by courts of law. They are said to be “resulting” when, for example, the court is faced with an express trust that is not valid or with one that is incomplete, in which case the court may such fill gaps notably by relying of the presumed intent of the settlor. They can also be characterized as “constructive” when, for example, a fiduciary relation of some sort is found to exist between parties, or when a person behaves as a trustee in spite of not having been formally appointed as such,²⁴⁹ but a court uses its discretionary powers in equity to find a trust. The potential scope of constructive trusts can be quite broad: “in Canada, under the broad umbrella of good conscience, constructive trusts are recognized both for wrongful acts like fraud and breach of duty of loyalty, as well as to remedy unjust enrichment and corresponding deprivation.”²⁵⁰ The third and last type of trusts encompasses those that result from particular statutory provisions.

As mentioned, the *Civil Code of Québec* has established, relying on the concept of *fiducie*, a framework that is roughly equivalent, but not identical, to that existing in the law of trusts in Common Law Canada. Article 1260 *Civil Code of Québec* defines the *fiducie* as resulting “from an act whereby a person, the settlor, transfers property from his patrimony to another patrimony constituted by him which he appropriates to a particular purpose and which a trustee undertakes, by his acceptance, to hold and administer.” Article 1261 goes on to say that “[t]he trust patrimony, consisting of the property transferred in trust, constitutes a patrimony by appropriation, autonomous and distinct from that of the settlor, trustee or beneficiary and in which none of them has any real right.” In other words, a settlor who constitutes a *fiducie* may only exercise personal, rather than real rights over the property held in *fiducie*. Ownership being a real right, this question then arises: who is the owner, so to say, of that property? To answer it, it must first be borne in mind that the Civil Law tradition enshrines a unitary conception of ownership and does not know the distinction between common law and equity. A division of proprietary interests between legal and equitable titles, as it exists in Common Law jurisdictions, is thus impossible. In Quebec Civil Law, neither the settlor nor the trustee or even the beneficiary can be characterized as “owners” of the *fiducie* property, thanks to the legislative reliance on the notion of “patrimony of appropriation” (“patrimoine d’affectation”).²⁵¹

The use of this notion is clever but not without problems. First, it seemingly marks a rupture with the unitary conception of Civil Law ownership.²⁵² As Waters, Gillen and Smith highlight, “[t]o say, as the common law does of a trustee, that someone owns a thing but cannot take any benefit from it, risks being a contradiction in terms to a civilian.”²⁵³ Second, relying on the notion of “patrimony of appropriation” implies severing the ties between legal personhood and a patrimony that is theoretically

²⁴⁷ For this list, we draw on A. Grenon, “La fiducie”, in : L. Bélanger-Hardy & A. Grenon (eds), *op. cit.*, note 41, p.198-200.

²⁴⁸ The declaration is used by a settlor who wants to unilaterally appoint himself as sole trustee. Such a unilateral declaration and appointment as sole trustee are difficult to conceive in Quebec law: art. 1275 *Civil Code of Québec*. See: J. Beaulne, *Droit des fiducies*, 2nd ed. (Montreal: Wilson & Lafleur, 2005), p. 9; D.W.M. Waters, M.R. Gillen & L.D. Smith, *op. cit.*, note 239, p. 1433.

²⁴⁹ On various uses of constructive trusts, see inter alia: Pettkus c. Becker, *supra*, note 4; *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574.

²⁵⁰ *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217, par. 43.

²⁵¹ See, generally: J.E.C. Brierley, “De certains patrimoines d’affectation. Les articles 1256-1298”, dans: *La réforme du Code civil. Personnes, successions, biens* (Sainte-Foy: Presses de l’Université Laval, 1993), p. 735.

²⁵² For a reflection on property, patrimony and the evolutions brought about by the *Civil Code of Québec*, see: R.A. Macdonald, “Reconceiving the Symbols of Property: Universalities, Interests and Other Heresies”, (1994) 39 *McGill L.J.* 761.

²⁵³ D.W.M. Waters, M.R. Gillen & L.D. Smith, *op. cit.*, note 239, p. 1417.

envisaged as indivisible. Recall here that the patrimony encompasses all of a person's assets and liabilities, present and future, and that a person's property is the "common pledge of creditors."²⁵⁴ Thus, positing that the patrimony is indivisible serves the purpose of protecting creditors against attempts by their debtor to divert property from their "common pledge." Yet, the Quebec legislator has expressly recognized the possibility of exceptions to the principle of the indivisibility of patrimony, by stating that it "may be divided or appropriated for a purpose, but only to the extent provided by law."²⁵⁵ The *fiducie* is one such exception.²⁵⁶ Accordingly, the *fiducie* property is without an owner strictly speaking.²⁵⁷ The trustee may nevertheless exercise broad powers "pertaining to the patrimony" and, importantly, "the titles relating to the property of which [the trust patrimony] is composed are drawn up in his name,"²⁵⁸ this, in spite of not owning that property. When exercising his or her duties, the trustee "acts as the administrator of the property of others charged with full administration."²⁵⁹ Most importantly, for a *fiducie* to exist, there needs to be a genuine patrimony of appropriation, constituted by assets from which the settlor has divested himself and, most importantly, that he or she cannot control.²⁶⁰

Another significant difference between the trust and the *fiducie* lies in the criterion relied upon for characterizing them. In contrast with the Common Law, which emphasizes the modes of constitution of trust, the *Civil Code of Québec* classifies instead the *fiducies* in light of the purpose they seek to achieve.²⁶¹ Article 1266, par. 1, posits in that respect that "[t]rusts are constituted for personal purposes of private or social utility." There are some overlaps between civilian *fiducies* and common law trusts. For example, Common Law-recognized private express trusts encompass, as a matter of principle, Civil Law-recognized personal²⁶² and private²⁶³ *fiducies*. Yet, the existence of similarities should not obscure potential differences in the scope of application of various types of trusts or *fiducies*. One can think of the Common Law's private purpose trust (or, if one prefers, the non-charitable trust) which, while being close to the Civil Law's *fiducie* constituted by onerous title²⁶⁴, has an arguably narrower scope than its Civilian counterpart which may be used for commercial purposes.²⁶⁵ In the same vein, the Civil Law's social *fiducie*²⁶⁶ is also arguably broader than its Common Law counterpart, the charitable trust.²⁶⁷ The fact that Civilian private or social *fiducies* may be perpetual is also noteworthy.²⁶⁸

²⁵⁴ Art. 2644 *Civil Code of Québec*

²⁵⁵ Art. 2, par. 2, *Civil Code of Québec*. For debates on the interplay between the conceptual frameworks of *fiducie* and property, see: M. Naccarato, "La fiducie: réflexion sur la réception judiciaire d'un nouveau code", (2007) 48 C. de D. 505; Y. Emerich, "La fiducie civiliste: modalité ou intermède à la propriété", (2013) 58 McGill L.J. 827.

²⁵⁶ Actually, the *fiducie* is the only clear patrimony of appropriation currently recognized in the Code, together with foundations that are created through the use of the *fiducie* concept. There are scholarly debates as to whether patrimonies of appropriation can be recognized for legal vehicles other than the *fiducie*, such as contractual partnerships. See: J. Beaulne, op. cit., note 241, p. 37.

²⁵⁷ D.W.M. Waters, M.R. Gillen & L.D. Smith, op. cit., note 239, p. 1421.

²⁵⁸ Art. 1278 *Civil Code of Québec*

²⁵⁹ *Id.* This makes Title 7 of the Civil Code (art. 1299ss) applicable to the trustee's administration of the *fiducie* property when relevant. On this administration, see: M. Cantin-Cumyn, *L'administration du bien d'autrui* (Cowansville: Éditions Yvon Blais, 2000).

²⁶⁰ *Bank of Nova Scotia v. Thibault*, [2004] 1 S.C.R. 758. Yet, "the settlor and his heirs, like the beneficiary, have standing to supervise the administration of the trust." See: D.W.M. Waters, M.R. Gillen & L.D. Smith, op. cit., note 239, p. 1438. See: art. 1287, 1290-1291 *Civil Code of Québec*

²⁶¹ Art. 1266 *Civil Code of Québec*; A. Grenon, loc. cit., note 240, p. 199; J. Beaulne, op. cit., note 241, p. 9.

²⁶² Art. 1267 *Civil Code of Québec*

²⁶³ Art. 1268 *Civil Code of Québec*

²⁶⁴ Art. 1269 *Civil Code of Québec*

²⁶⁵ A. Grenon, loc. cit., note 240, p. 221; J. Beaulne, op. cit., note 241, p. 79. Note that a *fiducie* established by onerous title can secure the performance of an obligation (art. 1263). This makes clear, if need be, that the Quebec *fiducie* can serve as a security, which is obviously important in commerce.

²⁶⁶ Art. 1270 *Civil Code of Québec*

²⁶⁷ A. Grenon, loc. cit., note 240, p. 212. The wording of art. 1270 *Civil Code of Québec* indeed seems to support Professor Grenon's interpretation: "A social trust is a trust constituted for a purpose of general interest, such as a cultural, educational, philanthropic, religious or scientific purpose. It does not have the making of profit or the operation of an enterprise as its main objective."

²⁶⁸ Art. 1273 *Civil Code of Québec*

The ways in which trusts or *fiducies* can be constituted both overlap and diverge. Recall that article 1262 *Civil Code of Québec* posits that *fiducies* are “established by contract, whether by onerous title or gratuitously, by will, or, in certain cases, by operation of law. Where authorized by law, it may also be established by judgment.” We can draw from this provision that “express trusts”, as they are called in the Common Law tradition, exist in both traditions. However, in stark contrast with the Common Law’s position, judicially-recognized trusts are only possible in Quebec “[w]hen authorized by law”,²⁶⁹ that is, by an express provision found in a legislative enactment.²⁷⁰ This is to say that that resulting trusts and constructive trusts have no equivalents as such in Quebec.²⁷¹ The text of article 1262 *Civil Code of Québec* clearly alludes to a much narrower judicial power as regards the establishment of *fiducies* than that granted in Common Law jurisdictions with respect to trusts. This means that, in Quebec, other legal doctrines have to be relied upon to remedy a situation that, in a Common Law province, could be remedied by reliance on the doctrines of resulting or constructive trusts. One example of such an alternative could be unjust enrichment.²⁷² Realizing this highlights the importance of situating both the Common Law trust and the Civil Law *fiducie* in their respective legal traditions’ broader conceptual framework so as to understand how they interact with competing juridical concepts or instruments.²⁷³

In the end, our brief examination of some foundational questions about Common Law trusts and Civil Law *fiducies* reveals that while solutions to problems may sometimes be similar in the two traditions, the paths used to reach these solutions may often be markedly different. Precisely because of the superficial similarity of many concepts, we are actually dealing here with a field of law where seeming similarities represent potent hurdles. Canadian lawyers must be keenly aware of that. And given that the impetus for the elaboration of the *fiducie* regime in Quebec was the creation of a regime akin to that of the Common Law trust, but that would respect the conceptual framework of the Civil Law tradition, it is of the utmost importance to be cautious in resorting to Common Law precedents when construing Civilian rules.²⁷⁴ Conversely, Civilian lawyers must not rely on codal reasoning when faced with a question pertaining to the law of trusts in a Common Law jurisdiction should they have to address such a question.

F - Family

The scope of family law is very broad indeed as it encompasses all rules governing relationships between spouses, as well as between parents and their children. We shall recall, of course, that although marriage and divorce fall under federal legislative competence – thus roughly the same across the country – most of the topics are regulated by provincial laws that, not only are specific to each jurisdiction, but are considerably different in Quebec compared to the rest of Canada. In what follows, only the main cross-systemic distinctions will be red-flagged.

²⁶⁹ Art. 1262 *Civil Code of Québec*

²⁷⁰ See, for example, article 591 *Civil Code of Québec* (allowing a court to order, if necessary, the constitution of a trust to secure the payment of support in the family law context).

²⁷¹ A. Grenon, *loc. cit.*, note 240, p. 234.

²⁷² *Id.*, p. 235.

²⁷³ In the Common Law tradition, one might think of the concepts of contracts, agency, bailment, powers to act on behalf of someone else, or fiduciary relationship. See: A. Grenon, *loc. cit.*, note 240, p. 191-194. On the importance of contractarian dynamics in Common Law trust, see: J.H. Langbein, “The Contractarian Basis of the Law of Trusts”, (1995) 105 *Yale L.J.* 625. In the Civil Law tradition, one can think of the usufruct, the substitution, the foundation, or unjust enrichment. See: D.W.M. Waters, M.R. Gillen & L.D. Smith, *op. cit.*, note 239, p. 1422-1427 & 1435.

²⁷⁴ 274 J. Beaulne, *op. cit.*, note 241, p. 8, 48, 62.

Accordingly, marriage, in and of itself, as well as separation and divorce are not topics to be discussed, except three brief points. First, the *Civil Marriage Act*²⁷⁵ was enacted in 2005 and defines marriage as “the lawful union of two persons to the exclusion of all others”, thus opening the institution to same-sex couples, as the Supreme Court of Canada validated the year before.²⁷⁶ This victory for the right to equality without discrimination had the same impact in Quebec, which extends also family rights and obligations to same-sex parenting. Second, although similar to the Federal *Child Support Guidelines*, Quebec has its own rules and tables for calculating child support payments;²⁷⁷ with regard to the *Spousal Support Advisory Guidelines*, the Quebec Court of Appeal,²⁷⁸ without rejecting them in principle, cast doubts on their applicability and, as a result, they are not used in Quebec courts and seldom in negotiations or mediations. Lastly, Quebec enacted legislation in 2002 on civil unions, a new institution opened to both same-sex and different-sex couples which, in effect, provides for marital rights and duties for those married outside the church along roughly the same lines as those married in the church.²⁷⁹

The most significant differences in family law between Canada’s two legal traditions come in large part from the fundamentally different status of unmarried cohabitations, also known as de facto or “common law” relationships. Not only the availability of spousal support, but also matrimonial property protection (which we will discuss below) were confirmed as inapplicable upon the breakdown of such relationships in the high profile case nicknamed *Lola v. Eric*, formally *Quebec (Attorney General) v. A.*²⁸⁰ All Common Law provinces and territories have enacted legislation providing for an obligation of support for unmarried spouses, after a certain period of time of living together; some of these jurisdictions (e.g. British Columbia) have also extended to de facto couples “their regimes for the division of family property or the equalization of its value”²⁸¹. Simply put, this is not the situation pursuant to the *Civil Code of Québec*, as only spouses by marriage or by civil union have rights and duties under general law, a clear legal asymmetry that was held valid by the country’s highest court on 25 January 2013, albeit by a razor thin majority.²⁸² Two further points are warranted, however: this is not to say that Quebec cohabitants have no legal status because, similar to federally, numerous provincial fiscal and social laws treat all spouses on the same footing. Also, the majority in *Lola v. Eric* makes it clear, by insisting on freedom of choice and personal autonomy,²⁸³ that unmarried spouses can and should consider cohabitation agreements (spousal support, division of property), in effect the only sure way in Quebec to get protection from the possible inequitable consequences of de facto relationships.

²⁷⁵ *Civil Marriage Act*, S.C. 2005, c. 33.

²⁷⁶ See Reference re Same-Sex Marriage, [2004] 3 S.C.R. 698.

²⁷⁷ Found in the Regulation Respecting the Determination of Child Support Payments, originally enacted by Decret 484-97, 1997 G.O. II, 2117 and 2605 (modified subsequently), adopted pursuant to articles 587.1-587.3 Civil Code of Québec and articles 825.8-825.14 *Code of Civil Procedure* – see *An Act to amend the Civil Code of Québec* and the *Code of Civil Procedure* as regards the determination of child support payments, S.Q. 1996, c. 68. These were deemed non-discriminatory and thus valid by the Quebec Court of Appeal in the case *Droit de la famille – 139*, 2013 QCCA 15.

²⁷⁸ See *G.V. v. C.G.*, [2006] R.J.Q. 1519.

²⁷⁹ See articles 521.1 to 521.19 *Civil Code of Québec – Act Instituting Civil Unions and Establishing New Rules of Filiation*, S.Q. 2002, c. 6. Slight nuances between marriage and civil union exist as to the minimum age requirement and the dissolution means: see A. Roy, “Le droit de la famille – Une décennie d’effervescence législative” (2003) 105 *Revue du Notariat* 215, at 220-227.

²⁸⁰ *Quebec (Attorney General) v. A.*, [2013] 1 S.C.R. 61.

²⁸¹ R. Leckey, “Developments in Family Law: The 2012-2013 Term” (2014) 64 *Supreme Ct. L. Rev.* (2d) 241.

²⁸² The 4-4 even split, along the lines of both section 15 and section 1 of the *Canadian Charter of Rights and Freedoms*, was ultimately resolved with Chief Justice McLachlin siding in favour of the justification of the equality right infringement in a separate set of reasons.

²⁸³ See A. Roy, “L’évolution de la politique législative de l’union de fait au Québec – Analyse de l’approche autonomiste du législateur québécois sous l’éclairage du droit comparé” (2012) *C.P. du notariat* 235.

This last feature ties in well with the next, namely the doctrine of unjust enrichment with regard to common law relationships, especially in light of the Supreme Court of Canada decision in *Kerr v. Baranow*.²⁸⁴ Again, here, the limited purpose of this document does not allow us to go in any detail of the applicable law. Suffice it to say that, as it developed in Canadian Common Law as a substantial means to alleviate injustices following inhabitation breakups,²⁸⁵ it was unclear whether the spirit of constructive trusts (discussed in the previous section) could be used in the country's distinct Civilian jurisdiction. Although "Quebec courts have historically expressed hesitancy at deploying the general private law to remedy the economic fallout of *de facto union*,"²⁸⁶ the current trend seems to go towards accepting *Kerr v. Baranow* as a precedent in Quebec.²⁸⁷

Along with its elaborate regimes of matrimonial property, Quebec family law relies on the concept of family residence, that is, "the residence where the members of the family live while carrying on their principal activities" (article 395 *Civil Code of Québec*). This is a term of art that carries different legal consequences than those of "conjugal domicile" or "matrimonial home". Thus articles 401 to 413 of the *Civil Code of Québec* contain rules going from registration to limitations on alienating or charging the property, as well as some other kicking in at relationship breakdown providing for, *inter alia*, a right to stay in and use the family residence for the spouse to whom custody of the children (as the case may be) is granted. These are important restrictions to what a spouse who owns, be it in whole or in part, the actual property can do with it upon marriage or civil union end. One other concept is particular to Quebec – also applying mandatorily (though there was an opt-out period, long gone²⁸⁸) – namely family patrimony, under articles 414 to 426 of the *Civil Code of Québec*. Available to both married and civilly united couples, it means that the calculated value of certain property "is equally divided between the spouses or between the surviving spouse and the heirs, as the case may be" (article 416 *Civil Code of Québec*). In short, family patrimony includes the residences (principal and vacation), household furniture, all family motor vehicles, as well as retirement plan benefits (public, private) accumulated during the relationship. To be clear, both family residence and family patrimony protections are not contingent on one's matrimonial (or civil union) regime.

Speaking of them, the reality of matrimonial regimes is no doubt one more feature that distinguishes family law in Quebec, as Common Law jurisdictions rely on statutorily regulated domestic contracts. To give Ontario as an example, the first province to introduce a comprehensive legislative scheme, Part IV of the *1986 Family Law Act*²⁸⁹ ("Domestic Contracts") provides for marriage contracts and cohabitation agreements, as well as separation agreements. Based on the idea of contractual autonomy, it allows the spouses "to contract out of rights and obligations that would otherwise arise pursuant to the *Family Law Act*."²⁹⁰ Of course, this is linked to the practice of so-called "pre-nup" agreements, well known in the Common Law world. Note, however, that courts in these jurisdictions may be called upon to review such contracts and even to set them aside for unconscionability,²⁹¹

²⁸⁴ *Kerr v. Baranow*, [2011] 2 S.C.R. 269. See also M. McInnes, "Cohabitation, Trusts and Unjust Enrichment in the Supreme Court of Canada" (2011) 127 *Law Quarterly Rev.* 339.

²⁸⁵ Since the famous Supreme Court of Canada decision in *Pettkus v. Becker*, *supra*, note 4.

²⁸⁶ R. Leckey, "Unjust Enrichment and *De Facto Spouses*" (2012) 114 *Revue du Notariat* 475, at 477.

²⁸⁷ See the Quebec Court of Appeal case *Droit de la famille – 132495*, 2013 QCCA 15876 (CanLII), para. 55. This issue is controversial in Quebec as many scholars find it shocking to allow such a legal transplant. See also: A. Lakhdar, « Après l'affaire *Lola c. Éric*, quelles sont les tendances jurisprudentielles instaurées en matière d'enrichissement injustifié entre conjoints de fait et où en sont les tribunaux en 2016? », *Repères*, May 2016, EYB2016REP1935 (La référence).

²⁸⁸ This opting-out was possible only for spouses married before the law came into force on 1st July 1989.

²⁸⁹ *Family Law Act*, R.S.O. 1990, c. F.3.

²⁹⁰ J.D. Payne and M.A. Payne, *Canadian Family Law*, 5th ed. (Toronto: Irwin Law, 2013), at 66. Further restricting contractual autonomy, it is noteworthy observing that Quebec Civil Law prohibits resorting to private arbitration to settle matrimonial disputes.

²⁹¹ For example, see Nova Scotia's *Matrimonial Property Act*, R.S.N.S. 1989, c. 275, section 29.

among other grounds, though it is done with some level of deference.²⁹² Marriage contracts in Quebec, before a notary, have become infrequent over the years because of the popular default legal matrimonial regime known as partnership of acquests (in French “*société d’acquêts*”) and surely also given the fact that numerous matrimonial property issues are already governed by the mandatory rules of family residence and family patrimony.²⁹³ In Quebec, aside from partnership of acquests, the other matrimonial regimes, created by notarial marriage contracts, are separation as to property and community of property. All of them need to be studied in detail by jurists who are not trained in that province, if they are faced with a file in family law, in estate planning and even in other areas such as business associations and corporate law.

In terms of filiation and adoption, although Quebec compared negatively with the rest of Canada for the longest of time – e.g. only in 1982 was the concept of illegitimate children scrapped – nowadays, no major divide remains along the Civil Law versus Common Law lines (except maybe for the strict institution of *Directeur de l’état civil*). Of course, these subject-matters are provincial and territorial and may vary from jurisdiction to jurisdiction, based on the different legislative rules, including for international adoption. Thus only three brief points will suffice here. First, as regards surrogate motherhood, even though Quebec seems more restrictive as it refuses to allow such contracts,²⁹⁴ it was recently decided by the Quebec Court of Appeal that this provision does not prevent adoption orders to be granted for these children.²⁹⁵ Second, courts in Common Law jurisdictions have found ways to have parenting recognised to more than two persons on a birth certificate,²⁹⁶ something impossible in Quebec.²⁹⁷ Lastly, in terms of assisted procreation, the 2010 reference case at the Supreme Court of Canada²⁹⁸ confirmed that, save for the limited criminal law aspects, most of these questions (e.g. clinical activities) fall under provincial legislative competence and, to date, only Quebec has enacted a comprehensive scheme in that regard.²⁹⁹

Conclusion

We have focused in this document on what we have called a “red flag approach”. This choice obviously prevented us from engaging in any form of in-depth, comprehensive study. As such, the “red flags” that we raised are akin to snowflakes at the tip of an iceberg. They essentially serve as warnings against an undue reliance on reflex reactions and false assumptions. From that perspective, no document such as this one will ever replace an immersion into the “other” legal tradition, be it through formal training or through other means. Most importantly, no document such as this one should ever provide Canadian jurists with the false security that they know enough about the particular tradition that is less known to them.

²⁹² See *Hartshorne v. Hartshorne*, [2004] 1 S.C.R. 550.

²⁹³ See A. Roy, “Le contrat de mariage en droit québécois : un destin marqué du sceau du paradoxe” (2006) 51 McGill L.J. 665, at 667.

²⁹⁴ Article 541 of the *Civil Code of Québec*: “Any agreement whereby a woman undertakes to procreate or carry a child for another person is absolutely null”.

²⁹⁵ See the recent case *Adoption – 1445*, 2014 QCCA 1162.

²⁹⁶ See the Ontario Court of Appeal judgment in *A.A. v. B.B.*, (2007) 278 D.L.R. (4th) 519.

²⁹⁷ See A. Malacket and A. Roy, “Regards croisés sur la filiation homoparentale de l’enfant né d’une procréation assistée en droit québécois et comparé”, in C. Parent *et al.* (eds.), *Visages multiples de la parentalité* (Montreal: Presses de l’Université du Québec, 2008), 388, at 405.

²⁹⁸ *Reference re Assisted Human Reproduction Act*, [2010] 3 S.C.R. 457.

²⁹⁹ See *Act Respecting Clinical and Research Activities Relating to Assisted Procreation*, R.S.Q., c. A-5.01. See also *Act Respecting Medical Laboratories, Organ, Tissue, Gamete and Embryo Conservation, and the Disposal of Human Bodies*, R.S.Q., c. L-02.