THE COORDINATION OF SECURED TRANSACTIONS LAW AND INSOLVENCY IN CANADA:
A SUCCESSFUL MODEL OF BIJURALISM FOR THE EU?

by

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This paper deals with the interaction of insolvency and secured transactions law in a “bi-jural” jurisdiction, composed of sub-jurisdictions that come from different legal origins. It gives an introduction to bijuralism and then examines an example, namely the interaction of Canadian insolvency law and provincial secured transactions law. It stresses the different origins of Anglo-Canadian law and Québec law, in particular the difference in property law between the two and how it affects secured transactions law. It argues that given these fundamental differences, the provinces have achieved a relatively harmonized secured transactions law. The paper goes on to compare the interaction in Canada with the interaction of European law and the law of EU member states. While the Canadian experience can serve as an example for the interaction in Europe, it also demonstrates shortcomings that need to be addressed in Canada as well as by a European insolvency legislator.
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§ 1: Introduction

In this paper, I examine the relationship between Canadian federal insolvency law and provincial secured transactions and property law.\(^1\) My focus is on the *Bankruptcy and Insolvency Act*\(^2\). Not only is this a question of coordination between two levels of government, federal and provincial, it is also a question of coordinating two distinct legal systems, the Civil Law of Québec with its *Code civil du Québec*\(^3\) and the Common Law of all other Canadian provinces and territories. Therefore, on a smaller scale, the Canadian legislator is faced with the same challenges as a legislator in the European Union (EU).

In a preliminary step, I look at the concept of Canadian bijuralism, what it means, how it developed and its current justification, including from an economic standpoint. The existence of two legal systems within Canada also necessitates a coordination of the private law systems. Otherwise, barriers to inter-provincial commerce would be created. In this respect, a comparison between the *C.c.Q.* and the provincial Personal Property Security Acts (PPSAs) may show how to achieve such coordination to a certain degree without sacrificing the particularities and origins of the respective legal systems. The coordination takes place on at least three different levels. First, provincial legislation regarding secured transactions, second, jurisprudence on provincial secured transactions law and third, on the level of federal insolvency law. Terminologically, I refer to the first two levels as “sub-levels”, whereas

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\(^1\) Albert Breton/Anne Des Ormeaux, *Coevolution as an Influence in the Development of Legal Systems* in: “Bijuralism: An Economic Approach” ed. by Albert Breton/Michael Trebilcock (Aldershot: Ashgate, 2006) at 128 point out that the differences between Common and Civil Law remain the most pronounced in the area of property law.

\(^2\) *Bankruptcy and Insolvency Act*, R.S.C. 1985, B-3 (henceforth cited as BIA).

\(^3\) *Code civil du Québec*, S.Q. 1991, c. 64 (henceforth cited as C.c.Q.).
§ 1: Introduction

the latter one is the “meta-level”, for it encompasses the two sub-levels. The lessons learned in Canada could serve as an example for European legislation and jurisprudence regarding secured transaction on the sub-levels and for a trans-European insolvency legislation on the meta-level.

In the first major part, I examine the differences between the two major constituent legal systems of Canadian bijuralism. In particular, I look at the different approaches these legal systems take towards the law of secured transactions involving personal (or movable and incorporeal property) as collateral (henceforth, any reference to secured transactions refers only to personal or movable and incorporeal property unless otherwise noted). In Canada, the federal government started a programme to harmonize the federal law with provincial private law, which led to the passing of the Federal Law-Civil Law Harmonization Act, No. 1⁴ and the Federal Law-Civil Law Harmonization Act, No. 2⁵. Because these efforts mostly focussed on harmonizing the federal law with the law of Québec, I look at Québec law in greater detail than at the law of the Common Law provinces. Then, I look at the situation of secured transaction law in Europe and how it differs from Canada. I look at Germany and France as the two archetypes of the two sub-families of Continental Civil Law,⁶ England and Wales, as Europe’s biggest Common Law jurisdiction, and finally Scotland, because the situation of Scotland as a Civil Law jurisdiction within the overwhelmingly Common Law United Kingdom produces its own peculiar results.⁷

In the second part, I look at Canadian insolvency law and how it interacts with the law

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⁶ See Konrad Zweigert/Hein Kötz, “Einführung in die Rechtsvergleichung auf dem Gebiete des Privatrechts” (Tübingen: Mohr, 1996) at 68.
§ 1: Introduction

on secured transactions. Then, I analyze whether and to what extent the interaction is successful. Its success is measured according to the criteria developed in the preliminary chapter. Then, I turn my attention at the developing trans-systemic insolvency law in Europe and how it can benefit from the Canadian experience.
§ 2: Bijuralism

I. Introduction

In this chapter, I introduce the concept of “bijuralism”. I take two different viewpoints to look at the genesis of bijuralism in Canada. First, I look at the historic origins of bijuralism in Canada and how the continued existence of one great legal system, Québec Civil Law, alongside the Common Law can be explained by reference to history. Then, I look at the economics of bijuralism.

II. The Concept of Bijuralism

The term “bijuralism” means the co-existence of two different legal systems within one jurisdiction. The term “mixed jurisdiction” is used to express a legal system which has been influenced by institutions of other legal systems; in that sense, Québec or Scotland are mixed jurisdictions to a certain extent. I use the term bijuralism in a narrower sense to refer to an overarching jurisdiction which has embraced two legal systems that co-exist within it. The obvious example for that scenario is the realm of Canadian federal jurisdiction, which has to make reference to at least two legal systems, the Anglo-Canadian Common Law system and the law of Québec. Bijuralism means that the Canadian federal legislator must address two different audiences when legislating. Its law must pertain equally to the

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9 See Tetley, *supra* n. 7, at 591–594 in particular.
§ 2: Bijuralism

Anglo-Canadian as well as Québec law. This is because the recognition of Québec Civil Law in federal legislation is an expression of Québec’s status within the federation.

III. The Historic Origin of Bijuralism in Canada

History influences the continuing existence of bijuralism on the Canadian territory. Before the British conquest, the Civil Law of France, as it was laid down in the Coutume de Paris, was the law of the land in all of New France, including Québec, but also, e.g., Louisiana. While Québec had its connection with France cut before the introduction of the Code civil des Français, French legal ideas continued to be received in Québec. The legal landscape in Québec changed with the conquest by Great Britain. English and Common Law legal concepts influenced Québec legal culture. However, Civil Law was retained in the province of Québec, a concession which Great Britain had made both in the Articles of Capitulation of Québec and the Treaty of Paris of 1763, and which was first in-

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10 See e.g. Gaudreault, supra n. 8, at 205.
12 See e.g. Gaudreault, supra n. 8, at 206.
13 See Mario Dion, Evolution of Legal Systems, Bijuralism and International Trade in: “The Harmonization of Federal Legislation with the Québec Civil Law and Canadian Bijuralism” ed. by Department of Justice (Ottawa: Department of Justice, Canada, 1997) at 41; Gaudreault, supra n. 8, at 206; Michel Morin, Introduction historique au droit civil québécois in: “Éléments de common law et aperçu comparatif du droit civil québécois” ed. by Louise Bélanger-Hardy/Aline Grenon (Scarborough, Ont.: Carswell, 1997) 59–68 at 62; Tetley, supra n. 7, at 606.
14 See Tetley, supra n. 7, at 608.
15 Code civil des Français (henceforth cited as C.civ. (Fr.)).
§ 2: Bijuralism

ternally statutorily enshrined in the An Act for making more effectual Provision for the Government of the Province of Quebec in North America. The Quebec Act (1774) pursued the goal of integrating the Canadiens into the British Empire and keeping them satisfied and thus ultimately to secure their loyalty in the upcoming struggle in British North America. Civil Law remained a source of national identity in Québec ever since.

IV. Bijuralism and Law and Economics

A. The Economics of Legal Systems

Bijuralism can be analyzed from an economic perspective. However, before one looks at the economic analysis of bijuralism, one can analyze individual legal systems from the economic perspective. For that, I focus on economic analysis of property rights in legal systems because my paper deals with property law. In recent years, research increasingly suggested that property rights are instrumental in the economic development of a country. Some authors even go so far as to suggest that, on average at least, Common Law jurisdictions will flourish more than Civil Law jurisdictions because of the different property law systems. The goal of secured lending is to increase the availability of credit, to make credit less expensive, and to minimize the risk of credit for the creditor. Thus, secured

19 An Act for making more effectual Provision for the Government of the Province of Quebec in North America (G.B.), George III. 14, c. 83 (henceforth cited as Quebec Act (1774)).
transaction seems to be largely determined by economic considerations. If these were the
only considerations in play, the research would speak for a complete abolition of Québec
Civil Law. However, this conclusion is premature for two reasons. First, as Allard argues,
an analysis of different legal systems that looks at the co-evolution and common origins
of some institutions throughout legal systems may allow a reasoned response to an attitude
that considers the Common Law as *a priori* superior to Civil Law from an economical per-
spective.\(^{25}\) In other words, whether Common Law is *a priori* economically superior is not
certain. Second, Breton and Trebilcock point out that the retention of one particular legal
system may pursue goals that transcend purely economic and transactional considerations;
one example of these goals they name is nation-building.\(^{26}\) As seen above, as a result of
history, the retention of Civil Law was aimed towards nation-building.\(^{27}\) Therefore, fol-
lowing Breton and Trebilcock’s argument, the retention of Civil Law in Québec should not
be rejected as transactionally and economically inefficient because it has a valid additional
purpose. However, it should follow as well that the Civil Law system in Québec should not
be more “inefficient” than necessary for this additional purpose.

**B. The Economics of Bijuralism**

The economics of bijuralism analyzes the interaction of two legal systems. Classical theory
in law and economics holds that a certain society or sub-group of people will reach a set
of rules that minimizes the transaction costs for this sub-group and thus be the optimal
legal system for this group.\(^{28}\) However, this model does not take into account that groups


\(^{26}\) Breton/Trebilcock, *Introduction, supra* n. 11, at 2.

\(^{27}\) See para. 7 on p. 5.

§ 2: Bijuralism

trade with each other, and that rules optimal for internal transactions are not optimal for external transactions.\footnote{29} The less dependent a group is on external trade, the more likely is its domestic law to favour internal trade, and discriminate against external agents.\footnote{30} However, a look at the US tells us that that is not the case. Louisiana, which is largely dependent on inter-state trade, has the least uniform legal system within the US, whereas California, one of the most economically self-reliant states, has made a lot more effort to harmonize its law with other US states.\footnote{31} Within the US, this is partly due to the availability of contractual choice-of-law provisions, which allow agents in inter-jurisdictional commerce to avoid the extra transaction costs of other legal systems.\footnote{32}

Bowers also points out that, in the case of the US, the constitution plays a role in minimizing the costs of inter-state trade, because the US Supreme Court in \textit{City of Philadelphia et al. v. New Jersey}^{33} held that states may not discriminate against inter-state commerce.\footnote{34} The situation is similar in the EU, where the continuing existence of the particularly private law systems of the Member States may not create an impediment to the free trade of goods.\footnote{35} This has led some scholars to argue that this principle entails that credit securities established to the laws of one Member State must be recognized in all Member States as well.\footnote{36} This in turn leads to an increased necessity of coordination between the legal systems of the different Member States.

\footnote{29} Bowers, \textit{supra} n. 28, at 70.
\footnote{30} \textit{Ibid.} at 70–71.
\footnote{31} \textit{Ibid.} at 71.
\footnote{32} With further references \textit{ibid.} at 72.
\footnote{34} Bowers, \textit{supra} n. 28, at 71.
\footnote{36} See \textit{ibid.} at 731 with further references.
§ 2: Bijuralism

Breton and Salmon note that if one accepts the premise that legislation should aim to minimize transaction costs, the complete harmonization of all law seems to be the most efficient solution. However, in their view, efficient bijuralism is another possibility. It minimizes the costs of maintaining distinct legal systems as far as possible without abolishing them.\(^{37}\) Insofar as one accepts other goals in legislation, such as the maintenance of a distinct legal culture and nation- and federation-building, which Breton and Trebilcock do,\(^{38}\) and consequently sees bijuralism as a way of pursuing these goals, it is efficient bijuralism that allows one to pursue these goals. This is even more economical if one considers these other goals not only to be worthwhile goals, but assumes that, if they were to be pursued in another manner, would create costs as well.\(^{39}\)

V. Conclusion

In conclusion, Canadian bijuralism describes the fact that Canada retained its two major constituent legal systems. This is beneficial, because the retention of Québec Civil Law in a unified Canada is a way of keeping Québec within Canada. This goal may outweigh certain economical and transactional disadvantages that result from the differences between the legal systems. The interaction between the two legal systems should nevertheless be constructed to be as efficient as possible. Therefore, the impact of differences between the legal systems has to be minimized if the disadvantages resulting from those differences outweigh the advantages of retaining a particular distinction. These minimization should take place at all three levels of bijuralism I identified.\(^{40}\)

38 See para. 8 on p. 6.
39 C.f. Breton/Salmon, *supra* n. 37, at 49.
40 See para. 2 on p. 1.
§ 3: Estate and Patrimony

After having established the framework of the analysis, I now turn to the substantive law. There are two reasons why the analysis begins with a brief look at the fundamental principle of property law in both legal systems. First, secured transactions are a modification of the property interest debtor and creditor have in the collateral. Second, it is the debtor’s estate or her patrimony which the trustee in bankruptcy administers.

I. The Estate in Common Law

In Common Law, a simple description of the estate is to see it as a bundle of rights and interests in a thing. Since, historically, there was no ownership of land besides the ownership by the crown, Common Law did not require the possibility of ownership of the property for the inclusion of the property within the estate. If the Common Law concept of “estate” would have taken ownership as its starting point, it would have excluded a large part of what is property, especially real property that could historically only be owned by the crown. Common Law therefore always allowed for a variety of different legal and equitable rights and interests to be part of the estate. This distinguishes the Common Law estate from the Civil Law patrimony. Like the term “estate”, the term “property”, from

42 Ibid.
43 Ibid. at 928.
44 See para. 15 on next page.
§ 3: Estate and Patrimony

which the estate is formed, has a flexible meaning that needs to be constructed depending on context.\textsuperscript{45}

II. Patrimony in Civil Law

The Civil Law patrimony is all property that is appropriated by the holder of the patrimony. Property itself is everything that can possibly be appropriated, that means anything in which the holder of the property can acquire an absolute right of ownership.\textsuperscript{46} The definition of patrimony is identical in Québec Civil Law and French law.\textsuperscript{47} Personality rights are a unchangeable function of the personality and thus cannot be appropriated; they are consequently not property.\textsuperscript{48}


\textsuperscript{48} Bijuralism and Drafting Support Services Group, supra n. 45, at 38–39; Lafond, supra n. 46, at 160; Lamontagne, supra n. 46, at 178.
§ 4: Secured Transactions in Anglo-Canadian Law on Personal Property

I. Historical Credit Securities in Common Law Systems

Secured transactions in personal property in all Common Law jurisdictions are governed by Personal Property Security Acts (PPSAs). To better understand the innovations of the PPSAs, I give a short overview of the historical origins of credit securities in the Common Law.49

Historically, the first recognized credit security was the pledge or pawn, whereby the debtor transferred possession to the creditor with the understanding that the latter may sell the property if the debtor defaults on her obligation.

Originally, there was a presumption of fraud if the debtor granted the creditor a security without a transfer of possession.50 However, the absence of non-possessory credit securities turned out to be an impediment for commerce. Therefore, once the law developed and and no longer associated fraud with such a transaction, non-possessory securities developed.

The first non-possessory security was the chattel mortgage, which consisted in the transfer of title to the collateral from debtor to creditor. Possession remained with the debtor. Furthermore, the debtor had a right to receive title back once she fulfilled her obligation.


§ 4: Secured Transactions in Anglo-Canadian Law on Personal Property

This right was recognized in equity. If the debtor defaulted, the creditor could either apply to the court for a foreclosure order to extinguish the debtor’s equity of redemption and take the collateral in satisfaction of the obligation, or she could sell the collateral and apply the proceeds to the debt.

The second non-possessory security was the equitable charge. It did not involve transfer of title, but rather consisted in a hypothecation of the property. That means that title (and possession) remained with the debtor, but the creditor was granted the hypothetical right to realize on the collateral in case of the debtor’s default.

Finally, the floating charge came into use. It consisted in a charge taken on all property of an undertaking. Unlike a fixed charge, the floating charge does not attach to any specific collateral unless it crystallizes. This characteristic was explicitly recognized for the first time in Re Panama, New Zealand and Australian Royal Mint Company. The charge is a floating, rather than a fixed, charge:

(1.) if it is a charge on a class of assets of a company present and future; (2.) if that class is one which, in the ordinary course of the business of the company, would be changing from time to time; and (3.) if you find that by the charge it is contemplated that, until some future step is taken by or on behalf of those interested in the charge, the company may carry on its business in the ordinary way as far as concerns the particular class of assets I am dealing with.

The floating charge thus allows the debtor to dispose of the collateral in the ordinary course of business free of the credit security. The creditor, on the other hand, potentially holds the entire property of the debtor as collateral. The floating charge is therefore beneficial for both parties.

Apart from these security devices, “quasi-security” transactions existed which were

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51 (1870), 5 Ch. App. 318.
52 Re Yorkshire Woolcombers Association [1903] 2 Ch. 284 (C.A. Civ.) at 295, per Romer L.J.
§ 4: Secured Transactions in Anglo-Canadian Law on Personal Property

based on the allocation of title. These were the conditional sales agreement, the hire-purchase and the finance lease. In all these cases, the creditor reserved title to the collateral. The difference between the hire-purchase and the finance lease is that the latter does not necessarily include the sale of the property, but the debtor may buy the property at the end of the lease period based on its residual value. In case of a hire-purchase, the debtor may not be obliged to buy the property, but she is encouraged to realize upon the buying option by a penalty she has to pay if she chooses not to buy.\(^{54}\) Provincial Conditional Sales Acts governed conditional sales and hire-purchases, but not finance leases, nor simple leases without a sales component.\(^{55}\) Accounts receivable were assignable in a security assignment.\(^{56}\) In case of a security assignment to several creditors, priority was determined according to which creditor was the first one to notify the account-debtor.\(^{57}\)

II. The Concept of a Security Interest in the PPSA

A. Concept

The PPSAs (e.g. in Ontario the Personal Property Security Act\(^{58}\)) introduced the unitary concept of a “security interest”. This concept entails both common law security devices (mortgage, pledge, charge) as well as quasi-security devices based on the allocation of title and applies the same rule to them, regardless of their formal appearance. However, the


\(^{57}\) See Dearle v Hall (1823) 3 Russ. 1, 38 E.R. 475 (H.C. Ch.) (cited to 38 E.R. 475).

\(^{58}\) Personal Property Security Act (Ontario), R.S.O. 1990, c. P.10 (henceforth cited as OPPSA).
§ 4: Secured Transactions in Anglo-Canadian Law on Personal Property

PPSAs do not touch the underlying legal concepts used to establish the security interest but instead govern the exercise of the rights used for a security purpose deriving from the security interests. Thus, allocation of title may for instance still be of interest for tax purposes, but the rights and obligations of creditor and debtor as far as the security purpose is concerned do not change based on allocation of title, and the PPSAs are based on the rejection of deriving any consequences from property law concepts. Furthermore, the PPSAs apply to certain transactions regardless of whether they are used for a security purpose or not. These are called “deemed security interests”. They are transfers of accounts and chattel paper (sec. 2 (b) OPPSA) and all long-term leases for a period of over a year (sec. 2 (c) OPPSA), as well as consignments that secure a debt (sec. 2 (a) (ii) OPPSA). If deemed security interests do not secure a debt, the part in the PPSA on rights and remedies is inapplicable (sec. 57.1 OPPSA).

B. Criticism

The PPSA concept of a unitary security interest has not been left uncriticized. Bridge et al. raise three points against the apparent break of the PPSAs with property concepts. First, PPSAs include transactions, such as long-term leases, assignment of accounts or chattel paper, that are not meant to secure credit within their scope because certain elements of these transaction approach credit securities. This may be contrary to the expectations of the parties when they contract, who thus do not expect to have secured transaction law

§ 4: Secured Transactions in Anglo-Canadian Law on Personal Property

to apply. Second, there is a logical breach within the PPSAs when they include certain ownership interests within their scope. The fact that the PPSAs had to resort to the technique of a legal fiction to include certain ownership interests within its scope shows that even under the PPSAs, ownership and security interest are different concepts. Bridge et al. critique this technique because the PPSAs purport to promote function over form. However, if interests that serve a clearly proprietary purpose (such as certain long-term leases) are included in the scope of the PPSAs for formal reasons, this puts form over function again. Against this criticism, it can be argued that the PPSAs may use a formal criterion such as the length of the lease to include a transaction within its scope. However, this formalism is not an end in itself. Rather, it lowers transaction costs by establishing a clear criterion that is foreseeable for the parties. The fact being criticized in the second point of criticism is thus nothing but an answer to the first point of criticism. The third point of criticism is that the PPSAs rely on the very concept of property because a security interest is an interest in property. Thus, property itself still needs to be defined. However, this point is addressed in the PPSAs themselves (see for instance sec. 72 OPPSA), which provide that common law and equity continue to apply for questions not governed by the PPSAs. Thus, the PPSAs still make reference to the common law to provide for a definition of property. The gap within the PSSAs is intentional.

III. Rights Deriving from a Security Interest

As a consequence of the unitary concept of a security interest, the PPSAs provide for a unitary set of rights resulting from the security. The creditor may take the collateral in

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63 Bridge et al., supra n. 59, at 575.
64 Ibid.
65 Ibid.
66 Ibid. at 575–576.
§ 4: Secured Transactions in Anglo-Canadian Law on Personal Property

satisfaction of the obligation (sec. 65 (2) OPPSA\textsuperscript{67}), but only insofar as debtor and other interested third parties do not object. If they object, the creditor may apply to the court to render the objection ineffective (sec. 65 (5) OPPSA). If the creditor does not take the collateral, she must sell and account for the collateral according to sec. 63 OPPSA\textsuperscript{68}. The statute thus deems the sale of the collateral as the default way of realizing the credit security. Cuming/Wood/Walsh see this statutory choice as an outflow of the primary hypothecary nature of the PPSA security interest.\textsuperscript{69} They seem to refer to the difference between the old Common Law chattel mortgage, which was initially based on transfer of ownership to the creditor and thus where foreclosure would have been the default realization option, and the PPSA security interest, where the default option is a power to dispose of somebody else’s property.

IV. Title Allocation

One of the problems the PPSAs face is the proper conceptualization of the conditional-sales agreement. The PPSAs do not answer the question to what the security interest of the vendor attaches. If title never passes to the debtor, the security interest cannot attach to the property sold and now owned by the debtor. There must be some other form of property to which the security interest may attach. It cannot attach to any form of equity of redemption vested in the debtor because if she has not made any payment whatsoever towards the property, she has not received such equity. However, the PPSAs allow for the security interest to attach before the assumed creation of such equity.\textsuperscript{70} Sec. 23 OPPSA, the


\textsuperscript{68} Personal Property Security Act (Ontario), R.S.O. 1990, c. P.10, version as amended by S.O. 2000, c. 26, Sched. B, s. 16 (9).

\textsuperscript{69} Cuming/Wood/Walsh, supra n. 49, at 5.

\textsuperscript{70} See ibid. at 64–67.
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general rule on perfection through registration, does not mention that payment of the first rate, and thus the existence of an equity, as a condition for perfection. And if perfection is possible, the security interest must have attached already because attachment is a condition of perfection according to sec. 20 (1) OPPSA\textsuperscript{71}. One way to avoid the problem is by accepting that the treatment of a legal event by the PPSAs is somewhat inconsistent with the characterization of the same event outside the law of secured transaction.\textsuperscript{72} Alternatively, Ziegel and Denomme suggest that the PPSAs transfer beneficial ownership of the collateral to the debtor:\textsuperscript{73}

It is intrinsic to the creation of security under the Canadian legislation that the beneficial title in property subject to a security interest is, or remains, in the debtor and that once the secured obligation has been discharged the debtor becomes the unencumbered owner of the collateral.\textsuperscript{74}

The use of the phrase “beneficial title” implies that the PPSAs convey a kind of equitable title to the property to the owner even in case of a conditional-sale agreement. This, however, would go against the equitable principle that there is no property alienation without consent.\textsuperscript{75} Another, less dogmatic analysis is to say that the PPSAs treat any substantial security agreement as a security agreement, and therefore, for the purpose of the PPSA, a conditional-sale agreement is a security agreement, not a retention of title by the seller. Therefore, under a PPSA analysis, the debtor-buyer acquires title. However, under this analysis, the PPSA go even further in that they not only transfer an equitable title, but full title without consent.

\textsuperscript{71} Personal Property Security Act (Ontario), R.S.O. 1990, c. P.10, version as amended by S.O. 2006, c. 8, s. 132.
\textsuperscript{72} See Cuming/Wood/Walsh, supra n. 49, at 66–67.
\textsuperscript{73} See para. 111 on p. 61.
\textsuperscript{74} Jacob S Ziegel/David L. Denomme, “The Ontario Personal Property Security Act: Commentary and Analysis” (Aurora, Ont.: Canada Law Book, 1994) at 63.
\textsuperscript{75} Bridge et al., supra n. 59, at 589–590.
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In this chapter, I look at the regime of credit securities in Québec. Giving an overview of how credit securities function in Québec allows me to highlight the interaction between Québec law and the federal insolvency law and how it differs from the same interaction with Anglo-Canadian law.

I. Nature of Credit Securities

A. Classification of Credit Securities

In Québec Civil Law, credit securities can be classified using the means through which security is given. Thus, they can be either personal or real credit securities. Real credit securities attach to property ("biens"). Personal credit securities on the other hand attach to the patrimony of the person giving the personal security.\(^{76}\) Real credit securities are the subject of this paper.

B. Accessory Nature

A credit security is by definition a device that secures payment of an obligation; it can thus

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not exist without a causal obligation whose execution it guarantees.\textsuperscript{77} This is referred to as the “accessory nature” of a credit security.

C. Common Pledge of Creditors

A credit security is understood to be a device by which the creditor may avoid the \textit{paripassu} rule of distribution of the proceeds of a judicial sale in execution\textsuperscript{78} The object of a regular personal action, an action to extinguish a personal obligation, is the entire patrimony of the debtor. The patrimony is the sum of the debtor’s assets (objects of ownership) and liabilities that can be assigned a pecuniary value.\textsuperscript{79} This patrimony of the debtor is referred to as the “common pledge” of the creditors (art. 2644 \textit{C.c.Q.}).\textsuperscript{80} Any real right, whether it be the ownership, a fractional dismemberment of ownership (personal servitudes), charges on land (real servitudes) or collateral rights securing an obligation (real security), on the other hand is enforced by an action in the thing itself.\textsuperscript{81} Thus, a credit security enables the creditor to take the property out of the common pledge and use it solely to satisfy her own claim.

Bridge et al. write that “much more than the \textit{Common Law, the Civil Law distinguishes between owing and owning}”.\textsuperscript{82} There they refer to the fact that as long as any property is still subject to the communal pledge, a creditor cannot yet have any property interest in the property as there is not yet any possibility of ownership of the property.\textsuperscript{83} An additional consequence of the common pledge is that in principle, any preferential treat-

\textsuperscript{77} Boudreault, \textit{supra} n. 76, at para. 1.
\textsuperscript{78} Bridge et al., \textit{supra} n. 59, at 651.
\textsuperscript{79} \textit{Ibid}.
\textsuperscript{80} See \textit{ibid}.
\textsuperscript{81} \textit{Ibid}.
\textsuperscript{82} \textit{Ibid}.
\textsuperscript{83} See para. 15 on p. 11.
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Secured transactions in Québec law on movable and incorporeal property can only arise from the securities stipulated by the C.c.Q. These are prior claims and hypothecs. However, this does not rule out *per se* any form of security working with title modification. Their consequence however is to take the property out of the debtor’s patrimony entirely and thus remove them from the common pledge.

D. No Presumption of Hypothec

While the common pledge of all creditors and the regime of the C.c.Q. in itself do not rule out any additional forms of credit securities, the *Loi sur l’application de la réforme du Code civil* prohibits certain types of quasi-security devices based on title allocation (namely the security transfer of title). However, the C.c.Q. does not prohibit the use of other types of concepts that can have the effect of being a credit security, such as the installment sale (see art. 1745 C.c.Q.).

The fact that the C.c.Q. partly maintains a distinction between the hypothec and title-allocation based on their formal differences is criticized in doctrine.

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84 “En effet, l’article 1801 C.c.Q. rend nulle toute stipulation suivant laquelle, pour garantir l’exécution de l’obligation, le créancier se réserve le droit de devenir propriétaire irrévocable du bien ou d’en disposer. Le Code réaffirme le principe que les biens, tous les biens du débiteur, sauf stipulation particulière (art. 2645 C.c.Q.), sont le gage de ses créanciers (art. 2644 C.c.Q.). Si tous les créanciers ont, règle générale, des droits égaux sur les actifs de leur débiteur, le Code prévoit que la distribution du prix de leur vente puisse avantagez ceux qui bénéficient «des causes légitimes de préférence» (art. 2646 C.c.Q.). Or, stipule l’article 2647 C.c.Q. : «les causes légitimes de préférence sont les priorités et les hypothèques». Les premières sont établies par la loi alors que les secondes sont conventionnelles ou légales, mobilières avec ou sans dépossession ou immobilières. Les sûretés sont habituellement sujettes à l’obligation de publicité.” *Boisclair (Syndic de) c. Banque de Montréal* [2001] R.J.Q. 2815 (C.A.) at para. 17, per Gendreau J.A.

85 “On aurait pu, sans doute, arguer que la cession de créance à titre de garantie collatérale pourrait trouver sa place dans ce système, n’eut été la Loi sur l’application de la réforme du Code civil qui scelle l’intention du législateur.” *ibid*. at para. 18, per Gendreau J.A.

86 See para. 31 on the preceding page.


88 See *Boisclair (Syndic de) c. Banque de Montréal*, supra n. 84, at para. 18.

four approaches with which a law-maker can react to the fact that title-allocation may create additional securities:

A first means for controlling title security would be its outright prohibition. No right in property securing performance of an obligation other than a hypothec could be taken. A second approach would be the enactment of a general deeming provision that would not prohibit title transactions, but would simply recharacterize them as hypothecs. An example is the “presumption of hypothec” suggested by the Civil Code Revision Office. Instalment sales and financial leases, for example, would automatically become ordinary sales with a hypothec back in favour of the seller, regardless of the intention of the parties to them. Third, the legislature could adopt a “substance of the transaction” principle. The transaction would remain as the parties intended, but the registration and enforcement regime would be the same as that applicable to ordinary hypothecs. In fact, this was the approach taken by the legislature in 1964. Fourth, the legislature could simply leave all forms of title transaction unregulated as security devices. Each of these four approaches purportedly regulate all transactions on the basis of their intent, their object, or their consequence.

Bridge et al. then pose the main question one has to ask when choosing between the four alternatives. They state that “[t]he question is whether non-security concepts are seen as parasitic upon the concept of security, or whether the concept of security is parasitic upon the other basic concepts of private law, notably those relating to property and obligation.”

Macdonald argued for the second approach, which in his view would have been more coherent with the Civil Law. Common Law lawyers as well have argued that the single unified security-interest found in Uniform Commercial Code, Article 9, Secured Transactions and the PPSAs is based on the Civilian concept of the hypothec and thus harmonizes

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90 Bridge et al., supra n. 59, at 657, emphasis added.
91 See para. 33 on the previous page.
92 Bridge et al., supra n. 59, at 657–658.
95 Uniform Commercial Code, Article 9, Secured Transactions (USA) (henceforth cited as Art. 9 UCC).
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very well with a Civil Law legal system.96 Under this rule, any transaction that is substantially comparable to a hypothec would have been subject to the same requirements. This was also the approach suggested by the Office de révision du Code Civil.97 It was rejected by the legislator in favour of a variant of the third approach whereby certain effects would be subject to rules similar to the ones for the hypothec.98

In favour of his approach, Macdonald argues that the C.c.Q. already partly restricts the effects of title allocation by requiring registration of title in certain cases,99 and a broader generalization of the rule would thus not introduce an incompatibility with the C.c.Q.100 Macdonald proposes that jurisprudence should adopt a substance-of-the-transaction rule even though such rule is absent in the C.c.Q. because it creates coherence between the abstract policy goals,101 and the specific rules of the C.c.Q.102

The courts however did not adopt Macdonald’s suggestion.103 Furthermore, the Supreme Court has sharply distinguished between title retention and a security interest; the

99 See para. 113 on p. 62.
101 See para. 70 on p. 38.
102 Ibid. at 372.
103 “The coming into force of the [C.c.Q.] marked an important step in the evolution of the Quebec law of real security [. . .]. The legislature reorganized this field of civil law, structuring it primarily around a single type of security, the hypothec, which applies to both movable and immovable property, although it also recognized, in [art. 2647 C.c.Q.], another type of right, the prior claim, which protects certain kinds of claims. [. . .] This solution was adopted in preference to the presumption of hypothec recommended by the Civil Code Revision Office, which would have grouped all forms of security, including ‘ownership securities’ (sûretés-propriétés), under a single concept: the hypothec [. . .]. That proposal had attracted strong objections from many critics. [. . .] Thus, instead of agreeing to organize the law of real security around the concept of presumption of hypothec, the Quebec legislature set up a simplified, unified security system that nevertheless maintained the fundamental distinction between the legal concepts of security and ownership in relation to the creation and exercise of real securities.” (citations omitted) Lefebvre (Syndic de); Tremblay (Syndic de) 2004 SSC 63, [2004] 3 S.C.R. 326, 244 D.L.R. (4th) 513, 7 C.B.R. (5th) 243 (cited to [2004] 3 S.C.R. 326) at para. 20, per LeBel J.
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former is based on ownership by the creditor, the latter on hypothecation which is dependent on ownership by the debtor.\textsuperscript{104} With language that stresses the fundamental difference between the two concepts, the Supreme Court has implicitly refused to introduce a presumption of hypothec. However, this judicial approach has been criticized again by Grenon. In Grenon’s view, the difference between title retention and hypothec in Québec Civil Law conflicts with insolvency law policy, and bringing the law regarding quasi-security devices using title-retention closer in line with the law on hypothecs would have been a way to resolve this conflict.\textsuperscript{105}

Arguments against the adoption of the presumption of hypothec can be found in the doctrine as well. The presumption of hypothec in its strictest form would change the contractual title arrangement and thus contradict contractual freedom.\textsuperscript{106} Furthermore, it may create uncertainty about where ownership is located.\textsuperscript{107} To understand this argument, it should be recalled that ownership in Civil Law is absolute, and there is no equitable ownership.\textsuperscript{108} Thus, an analysis such as the one in \textit{Giffen (in re)}\textsuperscript{109} stating that the possessory interest of the debtor can be part of his estate could not be transferred to the Civil Law patrimony.\textsuperscript{110} Lastly, the \textit{C.c.Q.} created a unitary credit security for movable and immovable property: the hypothec. Especially the law governing immovables requires a clear allocation of title with which the presumption of hypothec would conflict.\textsuperscript{111}

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\textsuperscript{104} \textit{Lefebvre (Syndic de); Tremblay (Syndic de), supra} n. 103, at para. 21; \textit{Ouellet (Syndic de)} 2004 SCC 64, [2004] 3 S.C.R. 348, 244 D.L.R. (4th) 532, 7 C.B.R. (5th) 277 (cited to [2004] 3 S.C.R. 348) at para. 9, 13.
\textsuperscript{105} See Aline Grenon, \textit{La problématique entourant les « sûretés-proprietés » au Québec: Lefebvre (Syndic de); Tremblay (Syndic de) et Oulllet (Syndic de)} (2005) 35 R.G.D. 285 passim, see also para. 113 on p. 62.
\textsuperscript{106} Payette, \textit{supra} n. 89, at para. 159.
\textsuperscript{107} \textit{Ibid.}
\textsuperscript{108} See para. 15 on p. 11.
\textsuperscript{110} \textit{Ibid.} at para. 34.
\textsuperscript{111} Payette, \textit{supra} n. 89, at para. 160.
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E. Classification of Real Credit Securities

There are several legal mechanisms in Québec civil law that can serve to secure a debt. The first kind is a credit security that gives a right of preferential satisfaction, and in certain cases following, on property. These sub-group contains the hypothec and prior claims, as well as certain credit securities deriving from federal law. The second group of debt-securing mechanisms work through the allocation of title. They are the retention of title and fiduciary ownership for security purposes (security trust), a sale under a resolutory clause, the instalment sale, the sale with the option of re-buying the property as well as leasing. However, the primary purpose of the mechanisms in the second group is not to secure credit. Therefore, the main focus of this paper will lie on credit securities from the first group, namely prior claims and hypothecs.

If classified by how the real credit securities come into existence, one can distinguish contractual securities and legal securities. The former includes the hypothec and credit securities under the Bank Act. The latter includes priorities, legal hypothecs and, at least one author argues, the title retention.

After having classified the credit securities, I will now give an overview of the two main credit securities of the first group, the hypothec and the prior claim.

II. Prior Claims

A. Nature of Prior Claims

Prior claims are legal securities. They can be defined as a right of preferential satisfaction

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112 Boudreault, supra n. 76, at para. 4.
113 See Ouellet (Syndic de), supra n. 104, at para. 9, 13.
115 Boudreault, supra n. 76, at para. 7.
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from the proceeds of sale of a good, accorded by law to a creditor by virtue of the creditor
having a claim deriving from a certain, named kind of obligation. The obligations which
make a creditor a creditor with a prior claim are listed in art. 2651 C.c.Q. I look at the
several categories listed there and their respective particularities in the next subsection.
Prior claims enjoy priority even over hypothecs. According to art. 2655 C.c.Q. prior
claims take priority even though they are not published. If several priorities attach to the
same property, their rank is determined by law, and if several hold the same rank, they share
the proceeds concurrently (art. 2651 C.c.Q. 2657 C.c.Q.).

Prior claims differ from hypothecs in two aspects. First, they do not give the creditor a
real right to action, meaning she cannot enforce her right directly into the particular prop-
erty, but rather must follow the ordinary execution procedures against the debtor. Second,
they do not contain a right to follow the property, meaning that the prior claim only attaches
to the property as long as it is the debtor’s property. That means that the creditor cannot
take possession of the property, take it in lieu of payment, and she can only force the sale
of the property if she pursues a personal action against the debtor. For these reasons, the
creditor with a prior claim is not considered to be a secured creditor for the purpose of the
BIA.

Because prior claims derive from law, the parties are not at liberty to modify, nor create

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116 Payette, supra n. 89, at para. 190, 310.
117 Code civil du Québec, S.Q. 1991, c. 64, version as amended by S.Q. 1999, c. 90, s. 41.
118 See para. 44 on next page sqq.
119 Payette, supra n. 89, at para. 190.
120 Boudreau, supra n. 76, at para. 29; Payette, supra n. 89, at para. 203.
121 Payette, supra n. 89, at para. 203.
122 Ibid. at para. 193; see also para. 117 on p. 66 sq.
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prior claims through a contractual agreement.123 Unlike a hypothecary creditor, a creditor of a prior claim cannot cede his rank.124

B. Certain Particular Prior Claims

1. Prior Claim of a Supplier

Under art. 1998 Code civil du Bas-Canada125, 1999 C.civ.B.-C. the vendor of merchandise had a privilege, a right of re-vindication to the sold merchandise, and a right to resolve the contract. According to art. 2651 C.c.Q. on the other hand, the vendor has a regular prior claim with no attached real right. She still maintains her right to resolve the contract. This right however creates one possible conflict with federal law. According to art. 1741 C.c.Q. the right to resolve requires that the property has not been surrendered to a hypothecary creditor. It is unclear whether the term “hypothecary” is used here because the hypothec is the only hypothecary credit security under the C.c.Q. or because it should specifically exclude federal credit securities such as the one under sec. 427 Bank Act. Under the old law, the supplier could take the property back regardless of a security under the Bank Act.126 Payette argues this case law should still be authority because the security under sec. 427 Bank Act is a property right,127 and not a hypothecary right.128

123 C.f. Kouri c. Ferguson and Canada Maple Exchange Ltd. (1922), 33 B.R. 208; Boudreault, supra n. 76, at para. 28.
125 Code civil du Bas-Canada (Lower Canada), 29 Victoria, c. 41 (henceforth cited as C.civ.B.-C.).
127 See para. 53 on p. 31.
128 Payette, supra n. 89, at para. 244.
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2. *Right of Retention*

Art. 2651 (3) *C.c.Q.* accords a prior claim to all creditors who have a right of retention. Art. 2741 *C.c.Q.* in turn stipulates that the debtor may not demand restitution of property owned by her but held by a hypothecary creditor (in a “pledge”129) until she has performed the secured debt. If one were to qualify the resulting right of the creditor as a right of retention within the meaning of art. 2651 (3) *C.c.Q.* the creditor of a pledge would always also enjoy priority over all other secured creditors by virtue of her prior claim. This would undermine the priority scheme set out by the registration and perfection scheme of the *C.c.Q.* Therefore, doctrine states that the right deriving from the pledge is not a right of retention in the sense of art. 2651 (3) *C.c.Q.*130 This result can also be explained by an insolvency argument. If the creditor of a pledge would enjoy a prior claim as well, other secured creditors would have an incentive to put the debtor in insolvency for the following reason. The pledgee would, by virtue of her prior claim, enjoy priority over other secured creditors.131 Insolvency would extinguish the prior claim.132 Thus, any secured creditor who had priority over the pledgee were it not for the prior claim would benefit from putting the debtor into insolvency.

As regards certain federal laws,133 that give a creditor a right to retain property, the Supreme Court has held that all further rights deriving from such a right of retention are already comprehensively determined by federal law.134 Therefore, a right of retention that derives from federal law cannot be the basis for a prior claim.

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129 See para. 57 on p. 33.
131 See para. 41 on p. 25.
132 See para. 117 on p. 66 sqq.
133 See Payette, *supra* n. 89, at para. 276.
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3. Property Taxes on Immovables

The C.c.Q. underwent one significant change regarding prior claims for municipalities. Initially, these prior claims were the same as all other prior claims. While a purchaser of an immovable would still be held liable for unpaid taxes on the immovable, she would not have been liable for the original obligation. Rather, after the purchase, a new obligation with a new prior claim would arise.135

Art. 2654.1 C.c.Q.136 now specifically provides that prior claims of municipalities and school boards for property taxes on immovables constitute a real right and give the creditors a right to follow the property. Thus, the prior claim remains attached to the property if it changes hands to a new owner. However the law does not envision any special real right of action for these creditors. Consequently, no prior claim entails any kind of real right of action. The reference in art. 2656 C.c.Q. to a real right of action thus is either without meaning or means just a reference to the execution of the personal judgment.137 The latter is real only in the sense that it is a realization of the common pledge of the creditors, but if the term were interpreted that way, all rights against a private law subject would be real rights because the common pledge is nothing but the mean of realizing a private law right.138

III. Hypothecs

The hypothec is the consensual security device established by the C.c.Q. According to Cuming/Walsh/Wood it is on fundamental level similar to the security interest governed by the PPSAs in that one underlying concept governs securities on all kinds of movable

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135 Payette, supra n. 89, at para. 303.
137 Payette, supra n. 89, at para. 203–204.
138 See para. 30 on p. 20 sq.
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property (and immovable property, albeit this is mostly outside the scope of this paper), present or after-acquired, and can secure any kind of obligation, past, current or future, determinate or indeterminate.  

A hypothec is subject to the prior claims enumerated in art. 2651 C.c.Q. Creditors of a prior claim will be preferentially satisfied over creditors of a hypothec and ordinary creditors. 

A. The Hypothec in Roman Law

The modern hypothec in Québec law derives from Roman law. In fact, the C.c.Q. has brought the hypothec closer to its origins because it once again allows the hypothecation of movables. In Roman law, there were four credit securities for movables. They are the “fiducia cum creditore” where the creditor takes title and asset. Second, there are those securities where title is with the creditor, but the debtor has possession (“pace commissoire”). Third, there is the “pignus”, where the creditor takes possession and the debtor retains title. Finally there is the “hypotheca”, where the creditor has neither title nor possession, but only a conditional “right to seize and sell the secured asset, either by judicial process or privately”. 

The hypotheca developed from the Praetorian edicts. The first cases of hypothecs were agreements between the lessor and the lessee of immovables. The lessee would grant the lessor a security on all movables that the lessee would bring onto the land of the lessor.

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139 Cuming/Wood/Walsh, supra n. 49, at 47.
140 See Boudreault, supra n. 76, at para. 470.
141 Bridge et al., supra n. 59, at 653-654.
142 Ibid. at 654.
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Unlike the *fiducia cum creditore* (security trust) and the *pignus* (pledge), the creditor thus did not take possession of the collateral. The possessory link was substituted by the fact that the debtor brought the collateral onto the creditor’s land. Later, the Praetor no longer required that the collateral be on the creditor’s land and thus allowed hypothecation in any other debtor—creditor relationship. The hypothec had *in rem* effect and included a right to follow the property.

B. Nature of the Hypothec

1. Hypothec and Patrimony

Both the *C.civ.B.-C.* and the *C.c.Q.* define the hypothec as a real right. Occasionally, the hypothec has been characterized as a partial alienation of the right of ownership. However, the Québec Court of Appeal held that the accessory nature of the hypothec contradicts any characterization of it as a (partial) alienation of the property because the real right the creditor receives depends on the existence of the underlying obligation whereas ownership is absolute and unconditional. The debtor retains the right to *usus*, *fructus* and *abusus* of the collateral (art. 2733 *C.c.Q.*). If the fruits and revenues are collected by the creditor of

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144 See *ibid*. at 115–116.
146 See Warmelo, *supra* n. 143, at 116–119.
147 Jörs et al., *supra* n. 145, at 205.
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a pledge, she must hand over the fruits to the debtor and apply the revenues to expenses, interest and main debt related to the pledge (art. 2737 C.c.Q.).

Macdonald identifies a shortcoming of the hypothec under the C.c.Q. According to him, a lesser real right such as the hypothec (an accessory real right), can only exist in something which can be subject to the absolute and foremost real right of ownership.\footnote{Macdonald, \textit{Change of Terminology? Change of Law?}, supra n. 24, at 370.} He claims that in classical Civil Law doctrine,\footnote{See para. 15 on p. 11.} only corporeals can be subject of ownership.\footnote{Macdonald, \textit{Change of Terminology? Change of Law?}, supra n. 24, at 370.} It would thus follow that a right in a thing that cannot be owned cannot be a real right. Thus, it is contradictory to consider the hypothec a real right if it can attach to all types of things. However, the Civil Law of Québec, according to Macdonald, requires that something is a real right in order for it to be recognized as having priority in insolvency.\footnote{\textit{Ibid.} at 369, with references in n. 17.} The monolithic concept of one hypothec for all kinds of property thus creates a concept of property and ownership in one section of the C.c.Q. that is incompatible with the concepts as they are used in the rest of the C.c.Q.\footnote{\textit{Ibid.} at 370.}

2. Real Subrogation

In general, the hypothec does not include an element of real subrogation, that is, if the debtor alienates the property (which she may\footnote{See para. 53 on the previous page.}), the hypothec remains attached to the original property, but the creditor does not receive a right to the property the debtor has received as proceeds of the alienation. In certain cases, a new hypothec in the proceeds
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may arise for the benefit of the creditor. This is however not a continuation of the old right.156

3. Right to Follow

The hypothec gives the creditor the right to follow the property “into whosoever [sic!] hands it may be” (art. 2660 C.c.Q.). This means that the hypothec remains attached to the property even if the ownership passes to a third party.157

C. Kinds of Hypothecs

1. Classification of Hypothecs

Hypothecs can be classified by collateral (hypothec on movables or immovables, on particular property or on all property, hypothecs on obligations, or hypothecs on property represented by an instrument), whether they occur with (a “pledge”) or without delivery, or by effect (“hypothèque ordinaire ou ouvert”).

2. Hypothecs on Immovables and Movable

There is no fundamental difference between a hypothec on movables and on immovables. Rather, both are different appearances of the same legal institution, and unless otherwise provided, the provisions governing a hypothec are applicable on both.

156 See Payette, supra n. 89, at para. 319.
157 See ibid. at para. 322–326.
§ 5: Secured Transactions in Québec Law on Movable and Incorporeal Property

3. Hypothec on Obligations

An obligation, such as an account, can be hypothecated as well. Before the *C.c.Q.* if an obligation was to be used as collateral, the security used was security assignment. The debtor would assign the account to the creditor. Except by a convention for sale and re-sale and in a security trust, the security assignment of an obligation is no longer permissible because it would allow the creditor to circumvent publicity requirements.\(^{158}\)

4. Hypothec on All Goods

A hypothec on all goods can only be entered into by a natural person, or, arguably, a corporation undertaking a business.\(^{159}\) A floating hypothec similarly can only be entered into by these debtors.\(^{160}\)

D. Opposability of the Hypothec

1. Publication

A hypothec is opposable against third parties either when it is published or if it is a hypothec with delivery of the collateral upon delivery. The hypothec on movables is registered in the “Register of personal and movable real rights” (2980 *C.c.Q.*). The register consists of two files. One file contains the name and date of birth (for natural persons) respectively postal code (for moral persons and trusts) of the debtor. The second file contains the description of the collateral if the collateral has a vehicle identification number (VIN).\(^{161}\)

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\(^{158}\) *Boisclair (Syndic de) c. Banque de Montréal*, *supra* n. 84, at para. 16–17; *Boudreault, supra* n. 76, at para. 134.1.

\(^{159}\) See for the discussion of the ability of a corporation *Boudreault, supra* n. 76, at para. 142.1.


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2. Delivery

a) Delivery and Real Hypothecs

Delivery substitutes for publication. The hypothec resulting from delivery (art. 2702 C.c.Q.\(^{162}\)) is referred to as a “real hypothec” because it contains a “real” element,\(^{163}\) the transfer of possession. The defining condition of a real hypothec is that the creditor gains control and exclusive authority over the collateral.\(^{164}\) In case of a real hypothec, the possession of the collateral by the creditor is the condition of opposability of the hypothec against third parties. Thus, possession of the collateral has a “publicity effect” for it replaces the register publicity.

b) Delivery of an Obligation

If incorporeal property represented by a negotiable instrument is hypothecated, the delivery takes place by delivery of the instrument. Initially, it was unclear whether it would be possible to “deliver” obligations not represented by negotiable instruments. The Supreme Court answered that question in the affirmative in *Caisse populaire Desjardins de Val-Brillant v. Blouin*\(^{165}\).

Above,\(^{166}\) I explained that a real hypothec requires effective control of the collateral by the creditor. In case of an obligation not represented by a negotiable instrument, it was argued that this control could be achieved if the conditions for opposability of the assignment

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163 See para. 81 on p. 44.
166 See para. 62.
vis-à-vis the debtor are met. The conditions of opposability are enumerated in art. 1641 C.c.Q. According to this provision, if the conditions are met, the assignment of an account is opposable against the debtor of the account. Payette argued against the possibility of pledging of an account through the fulfillment of the conditions of opposability. His argument goes as follows: The C.civ.B.-C. had specified that the creditor gained “possession utile” sufficient for the pledge if the conditions of the opposability of the assignment were met. The C.c.Q. lacked such a provision, and therefore, the meeting of these conditions should no longer constitute “possession utile”. This argument seems to implicitly rely on the literal meaning of “possession” being something in the physical realm. Thus, absent a statutory provision re-defining the word, “possession” only entails events in the physical realm, but not abstract legal events, such as notice to the debtor of the assigned or pledged obligation. The Supreme Court however followed the first view.

The court justified its decision by reference to the Common Law. It stated:

the approach adopted above also has the advantage of being compatible with the most recent developments in the North American law of real security. Legislation in relation to personal property security that has been enacted in the common law provinces of Canada allows individuals to grant security interests in claims that are not represented by negotiable instruments, which are considered to be intangibles.

The decision of the Supreme Court has been met with criticism from the doctrine, which can be summarized as follows. First, the court gave a too liberal meaning to the word “pos-

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167 Boudreault, supra n. 76, at para. 196.
170 Payette, supra n. 89, at para. 828.
172 Ibid. at para. 22.
§ 5: Secured Transactions in Québec Law on Movable and Incorporeal Property

session”. Second, by extending the applicability of the pledge to obligations not represented by negotiable instruments, the court undermined the publicity function of possession.173

The criticism hails back to earlier criticism made against the security assignment that was permissible under the C.civ.B.-C. Macdonald argued that the security assignment allows a security mechanism that is outside a registration or publicity regime.174 The pledging of obligations creates the same problem because there as well, the pledging may be public for creditor and debtor (first debtor) of the secured obligation, and the debtor of the pledged obligation. It is undetectable however for other creditors of the first debtor.

In 2008, with the adoption of the Loi sur le transfert de valeurs mobilières et l’obtention de titres intermédies175, the Assemblée nationale added the word “physical” to art. 2702 C.c.Q. specifically to overturn the decision of the court.176 The word physical does so in two ways. First, it clarifies that delivery can not mean the mere fulfillment of the conditions of opposability (art. 1641 C.c.Q.177), because they contain no “physical” element. Second, physical delivery seems to imply that the collateral must somehow be manifest in the physical world and not just be an abstract legal right.178

175 Loi sur le transfert de valeurs mobilières et l’obtention de titres intermédies, S.Q. 2008, c. 20 (henceforth cited as Loi no. 47 (Q.)).
177 See para. 64 on p. 35.
178 C.f. the “real” (i.e.) physical, nature of the pledge in Civil Law Payette, supra n. 89, at para. 821, 828, with further references.
§ 5: Secured Transactions in Québec Law on Movable and Incorporeal Property

IV. The Reform of Credit Securities in the New Civil Code

A. Policy Questions about Credit Securities

The reform of the secured transaction regime has been critically analyzed in doctrine. Macdonald has based his analysis on identifying the fundamental choices behind secured transactions law. He identifies five choices. First, which creditors should enjoy priority over consensually secured creditors and why? Second, the scope of the security over the patrimony of the debtor, depending on factors such as the inclusion of objective subrogation and the permissibility of a floating or universal security. Third, the decisiveness of publicity and priority. Should the first-in-time-rule and the publicity always prevail? Fourth, what is the relation between securities that are, from the standpoint of the creditor, possessory (pledge) and non-possessory (hypothec)? Fifth, should enforcement be done privately or under judicial control? \(^{179}\)

B. Policy of the Reform

The reform of the *C.c.Q.* pursued two goals regarding credit securities. One was to modernize the law of credit securities in a functionalist way, as was done with *Art. 9 UCC*. The other goal was to retain the Civilian heritage. \(^{180}\) A functionalist reform requires consideration of the policy goals behind secured credit. If the main goal is to facilitate credit by making it less expensive, \(^{181}\) it follows that secured credit legislation should minimize the transactions costs of secured lending. \(^{182}\)


\(^{181}\) See para. 8 on p. 6.

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C. Policy and Substantive Content

For Macdonald, secured lending aims at reducing transaction costs and several deductions about the substantive content of credit securities thus follow: First, the rank of the security should be clear as early as possible, preferably when the transaction is entered into. Second, once established, the security should be as firm as possible and not be defeated by later rights. Third, this should apply regardless of the form of the security.

The old C.civ.B.-C. did not meet these objectives. For this, Macdonald identifies several reasons. One of them is that the C.civ.B.-C. viewed secured transactions mostly as a mean of consumer property acquisition and not a tool of business. The other main group of reasons stems from the formalistic differences from a variety of securities, all fine-tuned to a very specific purpose. This variety of credit securities for very specific purposes prevented parties from adopting credit securities for their specific needs and limited contractual freedom.

D. Evaluation of the Reform

In Macdonald’s view, given the first policy goal of the reform, and its implication on content, the reform fails at making coherent choices for the five points he enumerated. The C.c.Q. for instance minimizes the occurrence of hidden ex post facto securities such as legal hypothecs or priorities, which make the rank of a security unclear. However, title-based transactions are still allowed and treated differently from a hypothec.

184 Ibid.
185 See para. 70 on the preceding page.
186 See para. 71.
187 See para. 69 on the preceding page.
188 Ibid. at 361–362.
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Second, the relationship between securities and the patrimony is unclear if the patrimony is modified by, *e.g.* a matrimonial regime or other forms of communal property, or statutory deemed trusts.\(^{189}\) Third, Macdonald criticizes the continued existence of unregistered preferred claims.\(^{190}\) Fourth, Macdonald maintains, the reform should have brought title transfer and hypothec closer together.\(^{191}\) A fifth criticism is that the parallels between hypothecs on movables and immovables and corporeals and incorporeals is perilous. This is to be the case because immovables are usually not as tradeable as movables. Furthermore, territory and buildings are relatively stable, whereas movables are transformed and mixed. According to Macdonald, by treating hypothecs on immovables and movables as uniform, the *C.c.Q.* imposes rules for immovables on movables more often than necessary and thus, ultimately, makes movables less likely to be usable as collateral.\(^{192}\)

V. Analysis

Looking at the credit security regime in Québec, one sees one major difference between the approach to property between Civil Law and the Common Law. Movable and immovable property are seen as being closer together in Civil Law than personal and real property in Common Law. For instance, above I mentioned that an argument against the presumption of hypothec is that the law on immovables requires clear title allocation.\(^{193}\) Thus, an argument made for immovables is used to support a conclusion for movables as well.

This different approach can also explain the outcome of *Caisse populaire Desjardins de Val-Brillant v. Blouin*\(^{194}\). The majority explained the outcome using a justification derived

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\(^{190}\) *Ibid.*
\(^{191}\) *Ibid.*
\(^{193}\) See para. 37 on p. 24.
\(^{194}\) *Supra* n. 165.
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from Common Law personal property security law, thereby forgetting the fundamental difference between corporeals and incorporeals in Civil Law. Admittedly, the introduction of a unitary security, the hypothec, has hidden that difference somewhat if one only looks at secured transactions law. This is exactly what Macdonald criticized. In other circumstances, the difference has remained quite pronounced. One instance is the conflict of laws on the assignment of obligations. Sec. 7 (1) OPPSA\footnote{Personal Property Security Act (Ontario), R.S.O. 1990, c. P.10, version as amended by S.O. 2006, c. 8, s. 126; S.O. 2006, c. 34, and S.O. 2006 c. 8, s. 126, Sched. E, s. 3 (1).} does not distinguish fundamentally between intangibles and certain tangibles. Rather, intangibles are grouped together with tangibles that change jurisdictions often. Both are treated as a sub-species of personal property, whose location is not easily identified. The \textit{C.c.Q.} on the other hand still differentiates and contains in art. 3120 \textit{C.c.Q.} a specific provision for the assignment of obligations. Noticeably, the very placement of that provision makes it clear that in Civil Law, assignment is seen as something relating to the law of obligations, not the law of property. This parallels the inclusion of the assignment in art. 12 \textit{Convention on the Law Applicable to Contractual Obligations}\footnote{Convention on the Law Applicable to Contractual Obligations (EU), OJ 1980, L 266 (henceforth cited as \textit{Rome Convention of 1980}).}.

Finally, the minority opinion in \textit{Caisse populaire Desjardins de Val-Brillant v. Blouin}\footnote{Supra n. 165.} differed in another point from the majority. All Civil Law judges pointed out that the assignment of an obligation requires the consent of the original debtor to the deed of assignment, a contract, not the assignment itself. The hypothecation of property does not know the same underlying deed, and the entire process is thus not transferable. The latter is a property law event, the former is a contractual event. A more pronounced distinction between those

\footnote{See para. 54 on p. 32.}
two kinds of events, and the separation of the validity of the contract and the property transfer is more common in many Civil Law system, deriving from Roman Law.\textsuperscript{200}

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§ 6: European Secured Transactions Law

I. Introduction

Compared to Canada, the law of secured transactions differs more widely even within a small sample of jurisdictions. Additionally, the Civil Law law of secured transactions in Europe is very different from the law in Québec, the Common Law of England different from the PPSAs.

II. Credit Securities on Movable and Incorporeal Property in Germany

The only codified credit security using movable property in Germany is the pledge (§ 1204 Bürgerliches Gesetzbuch\textsuperscript{201}). According to § 1205 BGB, it is a necessary condition of the pledge that the creditor gets possession of the collateral either directly or through an agent other than the debtor.

To circumvent the necessity of delivery, practice has developed customary credit securities that involve the transfer of title to or retention of title by the creditor. These types of security circumvent the delivery requirement of § 1205 BGB, but have been upheld by the German Supreme Court (RGH, now BGH), ever since the introduction of the BGB.\textsuperscript{202} There are three main categories of conventional credit securities apart from the pledge based on

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\begin{itemize}
\item \textsuperscript{201} Bürgerliches Gesetzbuch (Germany) (henceforth cited as BGB).
\item \textsuperscript{202} See Münchener Kommentar zum Bürgerlichen Gesetzbuch, ed. by Kurt Rebmann/Franz-Jürgen Säcker/Roland Rixecker, 5th ed. vol. 6 (München: C.H. Beck, 2009)/Oechsler (henceforth cited as MüKO-BGB/Contributor), Anhang nach §§ 929–936 Sicherungseigentum – Sicherungsübereignung, at para. 3.
\end{itemize}
§ 6: European Secured Transactions Law

title allocation. They are the security transfer of title, the title retention and the assignment for security purposes.

III. Credit Securities on Movable and Incorporeal Property in France

Current French law differs from Québec law. In France, the pledge ("gage") entails both collateralizing property with and without delivery. Thus, unlike in Roman and old French law, the pledge no longer is a real contract ("contrat réel"), meaning a type of contract which was not based on consent alone (albeit the consent itself may have had formal requirements such as notarization), but included a possessory element as well. A pledge on immovables ("gage immobilière") entails delivery of the immovable. Pledging ("nантиссement") on the other hand refers to using incorporeals as collateral.

The new regime, while not terminologically, amounts to allowing both the hypothecation (without delivery), and pledging (with delivery) of immovables and movables and more closely aligns the security regime for these two types of property. While it may have been more coherent to refer to the pledge without delivery as a hypothec on movables, and to use the term pledge solely for a security with delivery, the choice by the legislator was to use different terms for securities depending on the type of property used as collateral.

Of interest from a Canadian perspective may be that the C.c.Q. uses a different terminology. There, the term hypothec refers to both securities with and without delivery, using movables or immovables as collateral, because the hypothec is defined so broadly that it encompasses all credit securities where the debtor holds title to the collateral (art. 2660

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203 See para. 62 on p. 35.
205 See ibid., Art. 2284 à 2488, Fasc. 10, at 40.
206 See ibid., Art. 2284 à 2488, Fasc. 10, at 41.
207 Ibid., Art. 2284 à 2488, Fasc. 10, at 72.
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C.c.Q.). However, under the C.c.Q. unlike in French law, a pledge only refers to a hypothec on movables with delivery, and is in fact a synonym for this type of security (art. 2665 (2) C.c.Q.).

The title retention (“réserve de propriété, propriété retenue à titre de garantie”) has been codified for the first time with the Ordonnance n. 2006-346 du 23 mars 2006 relative aux sûretés. According to art. 2367 (1) C.civ. (Fr.) title retention means a contractual provision, whereby the conveyance of title is suspended until payment is effected. The article thus does not restrict title retention to sales contracts, a result that codifies prior jurisprudence.

The drafting committee originally envisioned that the title retention be made subject to a publicity requirement such as registration in a register, but the legislator scrapped that recommendation because it deemed it to be too drastic a departure from the French common law (droit commun). In commercial contexts, however, the creditor and debtor must have a written agreement about the title retention which has been concluded prior to the commencement of execution actions by a third party.

The renumeration of credit securities on movables in art. 2329 C.civ. (Fr.) does not mention a title transfer as a kind of transfer security. However, this was not due to the fact that the legislator did not view the transfer of title for security purposes as a valid

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209 “La propriété d’un bien peut être retenue en garantie par l’effet d’une clause de réserve de propriété qui suspend l’effet translatif d’un contrat jusqu’au complet paiement de l’obligation qui en constitue la contrepartie.”
210 JurisClasseur: Civil Code/Crocq, supra n. 204, Art. 2284 à 2488, Fasc. 10, at 127.
212 See JurisClasseur: Civil Code/Crocq, supra n. 204, Art. 2284 à 2488, at 134–137.
213 See ibid., Art. 2367 à 2372, at 57–65.
credit security, but rather because this type of security was integrated in legislation that was intended to introduce a Civil Law trust ("fiducie") into the C.civ. (Fr.)\textsuperscript{214}.

The trust was introduced by the Loi no. 2007-211 du 19 février 2007 instituant le fiducie\textsuperscript{215}. According to art. 2011 C.civ. (Fr.) the trust entails the transfer of present or future property (goods, rights, and credit securities) either separately or together to one or several trustees who keep the trust property separate from their estate (patrimony) for a pre-determined purpose benefitting one or several beneficiaries.\textsuperscript{216} Unlike the Québec trust (art. 1260 C.c.Q.), the trust property thus does not form a patrimony without an owner that is merely administered by the trustee. Rather, the trustee receives legal title to the property.

Because the trustee can be the beneficiary of the trust (art. 2016 C.civ. (Fr.)), it is possible to create a trust as a security instrument, where the property is transferred to the trust to secure payment of an obligation by the settlor-debtor. However, it is argued that the trust will not be widely used for security purposes because it is available for a limited class of parties, and it has higher requirements than a hypothecation of accounts.\textsuperscript{217} One potential advantage of the security trust could be that it facilitates the collateralization the entire property of the debtor with one transaction. A pledge of movable property, a hypothec on immovables, and a hypothecation of accounts would require at least three transactions.

\textbf{IV. Secured Transaction in Personal Property in England and Wales}

England and Wales is the last major Commonwealth jurisdiction where personal property

\begin{itemize}
\item \textsuperscript{214} JurisClasseur: Civil Code/Crocq, supra n. 204, Art. 2284 à 2488, Fasc. 10, at 122.
\item \textsuperscript{215} Loi no. 2007-211 du 19 février 2007 instituant le fiducie (France), J.O. 2007, 3052 (henceforth cited as Loi instituant le fiducie).
\item \textsuperscript{216} “La fiducie est l’opération par laquelle un ou plusieurs constituants transfèrent des biens, des droits ou des sûretés, ou un ensemble de biens, de droits ou de sûretés, présents ou futurs, à un ou plusieurs fiduciaires qui, les tenant séparés de leur patrimoine propre, agissent dans un but déterminé au profit d’un ou plusieurs bénéficiaires.”.
\item \textsuperscript{217} JurisClasseur: Civil Code/Bouteiller, supra n. 204, Art. 2011 à 2031, Fasc. 10, at 16–18.
\end{itemize}
§ 6: European Secured Transactions Law

security law still follows the common law model.218 New Zealand has passed a Personal Property Securities Act219 in 1999. In 2009 in Australia, the Commonwealth has passed the Personal Property Securities Act220, which received royal assent on December 14 and is due to take full effect between May 2011 and February 2012. In England and Wales on the other hand, according to classical analysis, all securities now used still derive from the three basic forms, the mortgage, the charge and the pledge. The former two are usually, but not necessarily, non-possessory, the latter one must be possessory.221 The number of securities is not fixed (no numerus clausus), as Common Law is usually open to contractual freedom, but rather these three types are applied in such flexible manner to encompass all varieties used in legal practice.222 Most notably, the floating charge223 developed in legal practice based on the established principles and contractual freedom until it was judicially recognized in Re Panama, New Zealand and Australian Royal Mint Company224. Furthermore, English law knows certain statutory and common law liens and the right to distrain chattel (similar to the origins of the Roman law hypotheca225), equitable liens, trust rights such as in Barclays Bank Ltd v Quistclose Investment Ltd226, and proprietary rights deriving from restitution.227 While restitutionary proprietary rights go against the principle of equal distribution among unsecured creditors, Bridge et al. argue that the equal distribution is already subverted by too easy access to securities in English law and thus these restitution-

218 See para. 16 on p. 12 sqq.
219 Personal Property Securities Act (N.Z.), Elizabeth II. 1999 (henceforth cited as PPSA (NZ)).
220 Personal Property Securities Act (Cth.), Elizabeth II. 2009, No. 130 (henceforth cited as PPSA (Cth.)).
221 See Bridge et al., supra n. 59, at 634.
222 Ibid. at 636.
223 See para. 21 on p. 13.
224 Supra n. 51.
225 See para. 52 on p. 30.
227 See Bridge et al., supra n. 59, at 634–636.
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any rights act foremost against secured creditors.228 Title retention clauses are recognized in English law,229 as are hire-purchases.230

There were shortcomings in the American and Anglo-Canadian law that contributed to the replacement of common law by Art. 9 UCC and the PPSAs which are absent from English law, such as the absence of a floating charge and a lack of uniformity of law in the US, and problems regarding registration requirements in both countries.231 Nevertheless, the Law Commission acknowledges that the current system in England and Wales has its problems. Notably, one of them is the absence of a coherent priority system that is not determined by formalistic differences.232 In case the creditor is a company, English law requires the charge to be entered into the Companies Register. However, the filing does not guarantee priority because there is a fundamental difference between current English law on the one hand and Anglo-Canadian and American law on the other hand. The difference lies in the retention of different treatment of credit securities based on formal differences. When speaking of current English law, one cannot even generally assume that the concept of a “security interest” entails title-modification devices.233 The continued focus on formal differences has two related consequences. First, priority is not only determined by a general priority rule based on publicity, but may be governed by the formal difference between credit securities.234 Second, title-modification devices can completely modify the distribution scheme between creditors while being unrecognizable to parties outside the debtor-creditor relationship of a title-modification device.235

228 Bridge et al., supra n. 59, at 636.
229 See Aluminium Industrie Vaassen BV v Romalpa Aluminium Ltd [1976] 1 W.L.R. 676.
231 Law Commission, supra n. 53, at 22.
232 Ibid. at 23.
233 See e.g. ibid. at 15–16.
234 Ibid. at 23.
235 See re this problem in current English law ibid. at 33–48.
§ 6: European Secured Transactions Law

V. Property Law and Secured Transactions in Scotland

A. Scots Law of Secured Transactions

Unlike in England and Wales, Scottish law is based on Civil Law. Apart from the trust, which has been introduced into Scottish law, but may equally derive from the Roman fidei commissum, Scottish law does not recognize a difference between equitable and legal title.

Because of its origins, the Scots law of secured transactions is different from English law. However, the English concept of the floating charge was introduced in Scotland by the Companies (Floating Charges) Act (Scotland). The Companies (Floating Charges and Receivers) Act (Scotland) introduced the possibility of appointing receivers for the collateral.

B. Sharp v Thomson

The interaction of English and Scots law played an important role in Sharp v Thomson. The facts were as follows. On 2 July 1984, Albyn Construction Ltd (Albyn) granted a float-

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240 Companies (Floating Charges) Act (Scotland) (U.K.), Elizabeth II. 1961, c. 46 (henceforth cited as Companies (Floating Charges) Act (Scotland)).

241 Companies (Floating Charges and Receivers) Act (Scotland) (U.K.), Elizabeth II. 1972, c. 67 (henceforth cited as Companies (Floating Charges and Receivers) Act (Scotland)).

ing charge over the whole property of their undertaking. Albyn concluded a sales contract with the Thomsons for a flat. The Thomsons duly paid the price. On August 9, Albyn delivered an executed disposition of the flat to Thomsons’ solicitors. On August 10, a receiver was appointed for the floating charge. On August 21, the disposition and a credit security on the flat was entered in the Register of Sasines. The litigation unfolded between the holders of the purchase credit security and the receiver of the floating charge about whose credit security enjoyed priority. In order for the floating charge to have attached to the flat, it was necessary that the flat was still Albyn’s property at the time of the crystallization and had not yet passed into Thomson’s patrimony. Under Scots law, feudal title (ownership of immovables) can only be created when the disposition is entered in the register. However, the appellants, who were the holders of the credit security that was entered on August 21, argued that Albyn had already lost its beneficial interest in the flat once the disposition was

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243 Sharp v Thomson, supra n. 242, at 605–606.
§ 6: European Secured Transactions Law

delivered and therefore the flat was no longer its property.\textsuperscript{244} Sec. 462 (1) \textit{Companies Act}\textsuperscript{245} provides:

It is competent under the law of Scotland for an incorporated company [...] for the purpose of securing any debt or other obligation [...] to create [...] a charge, in this Part referred to as a floating charge, over \textit{all or any part of the property} [...] which may from time to time be comprised in \textit{its property} and undertaking. [emphasis added]

The appellants also argued in the lower instances that Albyn held the property in constructive trust for the Thomsons, but that argument was dismissed by the House of Lords.\textsuperscript{246} However, the House of Lords accepted the main argument of the appellants that the meaning of the word property in the \textit{Companies Act (1985)} is not technical and thus excluded property in which Albyn held legal title but could no longer convey without fraud.\textsuperscript{247} Therefore, the flat was no longer held to be Albyn’s property in the sense of sec. 462 (1) \textit{Companies Act (1985)}. Thus, the floating charge could not crystallize on the flat.

The decision has been criticized because it relied very much on the distinction of beneficial and legal title, which is unknown to Scots law outside of trusts law, and because it failed to explain how these concepts can be squared with the Scots concept of absolute ownership.\textsuperscript{248}

\textbf{C. Analysis}

The decision of the House of Lord ignored the classic Civil Law principles on estate and property.\textsuperscript{249} In Civil Law, the Thomsons could not have any property right in the apartment

\textsuperscript{244} \textit{Sharp v Thomson}, supra n. 242, at 613.
\textsuperscript{245} \textit{Companies Act} (U.K.), Elizabeth II. 1985, c. 6 (henceforth cited as \textit{Companies Act (1985))}.
\textsuperscript{246} \textit{Sharp v Thomson}, supra n. 242, at 623.
\textsuperscript{247} \textit{Ibid}. at 613–614.
\textsuperscript{248} See Fenge, supra n. 238, at 419–420.
\textsuperscript{249} See para. 15 on p. 11.
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because as long as Albyn’s feudal title persisted, they could not even theoretically own the property. Thus, however pragmatical the interpretation of sec. 462 (1) Companies Act (1985), the apartment was not their property. The decision thus is precedent for ignoring a fundamental principle of Civil Law in order to achieve a certain result.

VI. Conclusion

European secured transaction law differs much more internally than Canadian secured transactions law. Whereas Canadian secured transaction law both within and outside Québece uses (at least for the majority of secured transactions) one unitary credit security, be it the hypothec or the PPSA security interest, each of the major European jurisdictions has a wide array of security mechanisms. Because these mechanisms vary in the way they function, insolvency legislation would need to find a definition of “credit security” that addresses these differences. Furthermore, allocation of title is still available for specific use as a security mechanism and there is a hesitancy to abolish it as such.\(^{250}\) Any trans-European insolvency law thus faces the challenge that property may be excluded from the estate or patrimony of the debtor.

Furthermore, the vast differences between jurisdiction constitute a barrier to trade, as securities may become un-attached if the *locus rei* changes. A creditor of a hypothec in Québece will expect similar requirements for the opposability of his security, because the hypothec and a PPSA security interest are comparable in that regard. Similarly, third parties generally know what security interests to expect and how to check for them. Regarding the

\(^{250}\) See *e.g.* Scottish Law Commission, “Registration of Rights in Security by Companies” (Edinburgh: Her Majesty’s Stationery Office, 2004) at 2.
coordination of provincial private law, the situation in Canada is vastly more efficient than in Europe.\textsuperscript{251} This was achieved all the while Québec maintained its distinct legal system.

\textsuperscript{251} See para. 9 on p. 7 sqq.
§ 7: Interaction of Insolvency Law and Provincial Law in Canada

I. Introduction

The interaction of the insolvency law with secured transactions law is determined by the way in which the trustee receives the power over the debtor’s property. The *BIA* governs this question in two ways; first, it defines what property is. Second, it determines the relationship of the trustee to the property. Regarding the first question, sec. 2 *BIA*\(^{252}\) defines property. The relevant part reads as follows:

\[\ldots\]

"property"

"bien"

"property" means any type of property, whether situated in Canada or elsewhere, and includes money, goods, things in action, land and every description of property, whether real or personal, legal or equitable, as well as obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, in, arising out of or incident to property;

\[\ldots\]

The current definition of property was introduced by the *Harmonization Act*, No. 2 in 2004. According to the intent of the drafters, as far as Civil Law property is concerned, the new definition should end after “‘property’ means any type of property, whether situated in

\(^{252}\) *Bankruptcy and Insolvency Act*, R.S.C. 1985, B-3, version as amended by S.C. 2007, c. 29, s. 91, c. 36, s. 1.
Canada or elsewhere”, because that is all that can be said about property in Civil Law.\footnote{253}{See para. 15 on p. 11.} Previously, the French version of the definition would continue to further define property using Civil Law terminology, such as “movable” and “immovable”, whereas the continuing definition now uses French Common Law terminology, because it is solely addressed to a Common Law audience.\footnote{254}{Bijuralism and Drafting Support Services Group, supra n. 45, at 40–41.}

Regarding the second question, the fiduciary ownership of the trustee in bankruptcy is a cornerstone of Canadian bankruptcy law.\footnote{255}{Alain Vauclair/Lyne Tassé, Civil Law and Common Law Balanced on the Scales of Thémis: The Example of the Bankruptcy and Insolvency Act = Droit civil et common law en équilibre sur la balance de Thémis (2003) 37 R.J.T. 5–17 = 5–17 at 15.} Sec. 71 BIA\footnote{256}{Bankruptcy and Insolvency Act, R.S.C. 1985, B-3, version as amended by S.C. 1997, c. 12, s. 67; S.C. 2004, c. 25, s. 44.} provides that the “property” of the debtor shall vest in the trustee. Under Canadian law, the trustee holds the estate in a kind of trust for the benefit of the creditors.\footnote{257}{Using the English term trust and the French term patrimoine fiducaire Jacques Auger/Albert Bohémier, The Status of the Trustee in Bankruptcy = Le statut du syndic (2003) 37 R.J.T. 57–112 = 59–114 at 65=67.} This type of trust raises some issues from a Civil Law perspective. The C.c.Q. provides for either the administration of the patrimony of another (artt. 1299 C.c.Q.–1370 C.c.Q.), or the administration of a patrimony without an owner (the “trust”, artt. 1260 C.c.Q.–1298 C.c.Q.). The latter is referred to as the trust. It does not have a category where the owner is obligated to use property for the benefit of another.

I analyze the two questions in the next two sections. Then, I turn to another feature of the BIA, its characterization of the term credit security and how it relates to provincial law.
II. The Debtor’s Property: Giffen and Lefebvre

A. Introduction

The question as to whether property subject to a security based on title-allocation is property that becomes vested in the trustee has been the subject of decisions based on both Common Law and Civil Law. The outcome in these cases however varied. The federal legislator has already partly reacted to this difference.

B. Re Giffen

1. Decision

In Common Law Canada, the leading case on the question on to what extent property becomes vested in the trustee is *Giffen (in re)*\(^{258}\). In that case, the debtor, Giffen, obtained a car from her employer under a long-term lease. Under sec. 1 *Personal Property Security Act*\(^{259}\), such a long-term lease is a deemed security interest. The employer in turn had leased the car from the respondent. The debtor then made an assignment in bankruptcy. The respondent seized the car, and sold it. The trustee subsequently sought an order declaring that it was entitled to the proceeds of the sale, because according to sec. 20 (b) (i) *BCPPSA*, an unperfected security interest (including a deemed security interest such as a long-term lease) is ineffective against the trustee in bankruptcy. In effect, the trustee claimed that the car formed part of the debtor’s estate

In its decision, the Supreme Court of Canada stressed that the PPSAs did away with traditional concepts of ownership, property and (hence) estate.\(^{260}\) Furthermore, the adopted

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\(^{258}\) *Supra* n. 109,

\(^{259}\) *Personal Property Security Act* (British Columbia), R.S.B.C. 1996, c. 35 (henceforth cited as *BCPPSA*).

\(^{260}\) *Giffen (in re)*, *supra* n. 109, at para. 25–28.
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classification of “property” in the BIA is rather broad. Under the definition in the BIA, a right to use and possession under a long-term lease is a property right.\textsuperscript{261} This right passes to the trustee.\textsuperscript{262} Sec. 20 (b) (i) BCPPSA works to limit the effectiveness of the creditor’s unperfected security interest. The creditor cannot exercise his security interest against the trustee, and since the trustee has a proprietary interest as well, she can take the car.\textsuperscript{263} The Supreme Court held that the principle that the trustee in bankruptcy cannot succeed to property rights greater than the ones enjoyed by the debtor is modified by sec. 20 (b) (i) BCPPSA.\textsuperscript{264} Finally, the Supreme Court held that sec. 20 (b) (i) BCPPSA does not disturb the distribution scheme of sec. 136 BIA because the content of what a “security interest” is for the purpose of the BIA is determined by provincial law.\textsuperscript{265} Thus, insofar as provincial law decides to limit the effectiveness of a credit security in the event of insolvency, provincial law is at liberty to do so.

2. Criticism

The decision of the Supreme Court amounts to a recognition of possession of collateral as a sufficient condition for considering the collateral to be part of the debtor’s estate. It has either done away with the necessity of title in order for property to be considered part of the debtor’s estate or recognized that the PPSAs confer a form of title to the debtor of a title-retention credit security.\textsuperscript{266} The inclusion of deemed security interests in the PPSAs extends this widening of the property concept to property which is, substantially, not subject to a

\textsuperscript{261} Giffen (in re), supra n. 109, at para. 34.
\textsuperscript{262} Ibid. at para. 35.
\textsuperscript{263} Ibid. at para. 43.
\textsuperscript{264} Ibid. at para. 50–56.
\textsuperscript{265} Ibid. at para. 60 sqq.
\textsuperscript{266} C.f. para. 26 on p. 17.
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security interest. Bridge et al. suggest that the decision’s policy is substantially unfair. They state it may be fair to require owners to register their interest in competition against individual other creditors. The decision in Giffen (in re), by putting the leased property in the estate of the debtor, amounts to a complete withdrawal of the ownership for the benefit of third parties who did not expect such a windfall (notably unsecured creditors). Against the argument that the lessor who fails to register only has herself to blame for the consequences they argue that this begs the question as to why somebody who did not want to convey ownership can be deprived of her ownership. One argument for this outcome is to say that the inclusion of true leases is efficient as it avoids legal uncertainty and thus in the end decreases transaction costs. However, in the context of a possible inclusion of long-term leases in the UCC, Mooney suggests that requiring a lessor of a true lease to register her interest would be economically inefficient because the cost associated with a filing regime for true leases surpasses the benefit associated with it. By the inclusion of long-term leases within the scope of the PPSAs, the provincial legislators have decided against this argument and chose that long-term leases are to be included. One may criticize this legislative choice, as Bridge et al. do, but it is the current law as it was applied in Giffen (in re).

268 Supra n. 109.
269 Bridge et al., supra n. 59, at 604.
270 Ibid.
272 Supra n. 109,
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C. Re Lefebvre

1. Prior Cases

It was unclear whether the ratio of *Giffen (in re)*\(^{273}\) would be applied in Civil Law cases as well and there are several decisions that led up to the decisions by the Supreme Court. Regarding the old artt. 2090 *C.civ.B.-C.* and 2098 *C.civ.B.-C.* the Court of Appeal had held that an unpublished right of ownership is effective against the trustee, because the trustee is not a purchaser for value.\(^{274}\) The court later decided that this jurisprudence is no longer applicable under the new *C.c.Q.*\(^{275}\)

The Superior Court of Québec was not unanimous in its decisions whether the same reasoning as for the opposability of a hypothec\(^{276}\) would apply to case-scenarios comparable to the *Giffen (in re)*\(^{277}\) case. In several decisions, the court had held that in cases of conditional instalment sales, the seller lost her right of ownership if it was not published according to the provisions of art. 1749 *C.c.Q.*\(^{278}\). In another decision, the court held the opposite, because while it maintained that the trustee is a third party, it is not a third party to which art. 1749 *C.c.Q.* refers.\(^{279}\) This decision was overturned by the Court of Appeal.\(^{280}\)

The Court of Appeal decided similarly in *Massouris (syndic de)*\(^{281}\) regarding long-term leases. These cases stood for the proposition that trustees had the status of third persons relative to the original owners of the property.

The judgments of the Court of Appeal were criticized in doctrine because they would

\(^{273}\) *Supra* n. 109,
\(^{276}\) See para. 116 on p. 65 sq.
\(^{277}\) *Supra* n. 109,
\(^{278}\) *Code civil du Québec*, S.Q. 1991, c. 64, version as amended by S.Q. 1998, c. 5, a. 3.
\(^{279}\) *Banque Royale du Canada c. Mervis* [2001] R.J.Q. 1885 (Sup. Ct.).
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amount to a modification of the rule in sec. 67 BIA stating that only the property owned by the debtor becomes part of the patrimony in bankruptcy, since the debtor is not the owner of property subject to a title-retention.282

2. Re Lefebvre

The case of Lefebvre (Syndic de); Tremblay (Syndic de)283 was an appeal in two similar cases. In both cases, the appellants leased their property to the debtor without registering their lease. Art. 1852 C.c.Q.284 requires that certain leases be registered and thus published in order for them to be effective against third parties. The debtors in both cases went bankrupt before the appellants registered their respective rights. The appellants argued that the C.c.Q. does not provide that a right of ownership diminishes into a security interest, unlike the PPSAs, and that Giffen (in re)285 is thus not binding. The Supreme Court agreed with that view. It held that the trustee is not a third party in relation to the property for the purpose of art. 1852 C.c.Q. and that property leased but not owned by the debtor does not form part of the property vested in the trustee.

The Supreme Court decision has been criticized by Duggan and Ziegel. According to their analysis, the situation was comparable to Giffen (in re)286. They stress that the Supreme Court in Giffen (in re)287 had characterized the issue as one of priority, not property.288 Thus, the question should not be whether the trustee or the creditor has a better right

283 Supra n. 103,
285 Supra n. 109,
286 Supra n. 109,
287 Supra n. 109,
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of ownership but rather whether the creditor’s right would have been enforceable against other creditors at the eve of bankruptcy.\(^\text{289}\)

I argue that while this criticism may be valid as to how insolvency law should be (it should not derive such consequences from formalism),\(^\text{290}\) it ignores that the reasoning of the Supreme Court in \textit{Giffen (in re)}\(^\text{291}\) also strongly relied on the possessory interest of the debtor that becomes vested in the trustee.\(^\text{292}\) In fact, I earlier quoted Ziegel’s statement that the PPSAs created an equitable proprietary interest of the debtor of a title-allocation security.\(^\text{293}\) It seems to me that the Supreme Court implicitly embraced that view in \textit{Giffen (in re)}\(^\text{294}\). However, such a view cannot be applied to current Civil Law, because it has a more rigid definition of “property”,\(^\text{295}\) and consequently there can be no proprietary interest in something that is already appropriated by another.

3. \textit{Re Ouellet}

In \textit{Ouellet (Syndic de)}\(^\text{296}\), the Supreme Court held that property bought by the debtor as part of the instalment sale does not pass into the debtor’s patrimony. Consequently, while the creditor must register her security to oppose it against third parties, the same does not apply vis-à-vis the trustee in bankruptcy because the latter only receives the patrimony of the bankrupt debtor of which the property subject to an instalment sale never formed part.\(^\text{297}\)

\begin{itemize}
  \item \(^\text{290}\) See para. 144 on p. 79.
  \item \(^\text{291}\) Supra n. 109,
  \item \(^\text{292}\) See para. 104 on p. 56 sq.
  \item \(^\text{293}\) See para. 26 on p. 17.
  \item \(^\text{294}\) Supra n. 109,
  \item \(^\text{295}\) See para. 15 on p. 11.
  \item \(^\text{296}\) Supra n. 104,
  \item \(^\text{297}\) Ibid. at para. 14.
\end{itemize}
The court noted that the result would have been different under the new *Harmonization Act, No. 1.*\(^{298}\) The definition of “secured creditor” in sec. 2 *BIA* now includes

the vendor of any property sold to the debtor under a conditional or instalment sale if the exercise of the person’s rights is subject to the provisions of Book Six of the Civil Code of Québec entitled Prior Claims and Hypothecs that deal with the exercise of hypothecary rights.

This statutory definition has three problems. First, according to art. 1749 *C.c.Q.* the exercise of the creditor’s rights is subject to said provisions if the creditor repossesses the property in case of the debtor’s default. The reference in sec. 2 *BIA* to the *C.c.Q.* is thus not entirely perfect, because possibly any instalment sale is subject to said provisions, the question is rather to what occasion the creditor reacts. Second, art. 1749 *C.c.Q.* excludes instalment sales that are consumer contracts (which is defined in art. 1384 *C.c.Q.*). Thus, if the debtor is a consumer, the creditor is not a secured creditor, but an owner, within the meaning of the *BIA.*\(^{299}\) There is no insolvency law rationale for such a distinction.\(^{300}\) Therefore, Grenon argues a better approach would have been to create a completely autonomous definition of secured creditor in the *BIA* that would have included any transaction that substantially secured credit.\(^{301}\) Third, the definition in sec. 2 *BIA* only modifies the relationship between

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\(^{298}\) “However, it should be noted that amendments made to the Bankruptcy and Insolvency Act since the relevant time would have led to a different result had they been applicable to this case. The amendments made to this federal Act’s definition of ‘secured creditor’ by ss. 25 to 28 of the Federal Law—Civil Law Harmonization Act, No. 1, S.C. 2001, c. 4, equate a reservation of ownership in an instalment sale with a security for the trustee’s purposes. In the context of a bankruptcy, this right now is of no effect against the trustee if it is not published.” *Ouellet (Syndic de)*, supra n. 104, at para. 15, per LeBel J.


\(^{300}\) Grenon, *supra* n. 105, at 320.

\(^{301}\) Grenon, *supra* n. 105, at 315–320; this was one of the alternatives suggested in a -pre-harmonization study, see Jacques Auger/Albert Bohémier/Roderick Alexander Macdonald, *The Treatment of Creditors in the Bankruptcy and Insolvency Act and Security Mechanisms in the Civil Law of Québec* in: “The Harmonization of Federal Legislation with the Québec Civil Law and Canadian Bijuralism” ed. by Department of Justice (Ottawa: Department of Justice, Canada, 1997) 911 at 986-987.
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the trustee and the creditor, not between creditor and another creditor, even in cases where the debtor is in insolvency.302

4. Ownership of the Trustee

The cases dealing with the extent of the estate passed to the trustee lead to an even bigger question. From a Civil Law perspective, the trustee should be considered to become the owner of the debtor’s property.303 However, there is no provision in the BIA that specifically states that the debtor loses her ownership and the trustee becomes the new owner. The Superior Court of Québec held in one decision that the bankrupt remains owner of the property.304 However, the Court of Appeal had already held in prior decisions that the trustee must be considered the owner of the property.305 The Supreme Court left that question open, but stressed that the trustee’s function cannot easily be described by using the

303 Auger/Bohémier, supra n. 257, at 35.
term “ownership”. Furthermore, the court held that the trustee has not the rights an owner usually has under Civil Law because she cannot use the property as she sees fit.

III. Trustee and Property: Québec Civil Law and the Trustee

As is the case regarding property subject to title-allocation quasi-security devices, Québec Civil law faces certain problems vis-à-vis the status of the trustee to the property when it relates to the question as to the effects of hypothecs in insolvency. Again, the question is whether the trustee can be considered to be a third party. Decisions regarding the status of the trustee in bankruptcy and the effect of a hypothec from Québec courts all revolve around the fact that the trustee is a third person in relationship to the bankrupt debtor and the estate, especially since the former has obligations to the creditors as well.

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306 “The strict concept of ownership accounts poorly for the nature of the trustee’s duties and the rights a trustee exercises over the bankrupt’s property following the initial bankruptcy event. The trustee’s rights are exercised only in relation to a patrimony whose content is legally defined in s. 67 B.I.A. This patrimony consists of only the property that could be liquidated for the benefit of the creditors. The trustee exercises certain statutory rights over this property that are in part similar to the rights of an owner. The trustee may dispose of the property of which he or she has seisin, but for a specific purpose, namely to pay the claims of the bankrupt’s creditors. […] The attribution and exercise of such powers do not correspond perfectly to alienation, so much so that some authors have expressed very strong criticism of the use of the assignee concept to describe the function of the trustee in bankruptcy (M. Cantin Cumyn, Traité de droit civil: L’administration du bien d’autrui (2000), at pp. 110-12).” Lefebvre (Syndic de); Tremblay (Syndic de), supra n. 103, at para. 35, per LeBel J.

307 “At any rate, the use of the concept of dévolution (vesting) in the French version of s. 71(2) B.I.A. does not eliminate the distinction between the two aspects of the trustee’s role following the initial bankruptcy event. In Mercure v. A. Marquette & Fils Inc., [1977] 1 S.C.R. 547, this Court clearly noted this distinction, which serves as a basis for characterizing the legal position of the trustee when exercising the powers and performing the obligations the law ascribes to trustees. […] The trustee’s legal position is therefore more akin to that of a third person in relation to the debtor. On the one hand, the trustee is subrogated to the bankrupt’s rights in the exercise of his or her powers to hold and dispose of property of which he or she has been granted seisin. On the other hand, the law treats the trustee as the creditors’ legal mandatary who will liquidate the property entrusted to him or her for the creditors’ benefit. The dual nature of the trustee’s duties does not therefore make it possible to regard the trustee as a third person in relation to the bankrupt, given all the powers conferred upon the trustee by law in order to preserve and liquidate the debtor’s property.” ibid. at para. 36, per LeBel J.

308 See para. 106 on p. 59 sqq.
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Unlike the *Giffen (in re)*\(^{309}\) decision,\(^{310}\) they are not based on policy decisions of the *C.c.Q.* specifically referring to the trustee, but rather because the vesting of the estate in the trustee is not envisioned by the *C.c.Q.* at all. The failure of the legislator to address the status of the trustee in insolvency is mentioned by Grenon as well. In her view, this is an example of a triumph of Civilian style over substantiveness. The Civilian style in this case means a preference for one general rule over many specific sub-rules.\(^{311}\) In this case, however, I argue it would have been better to limit the influence of the Civilian style and have at least a sub-rule that addresses the important issue of the status of the trustee in insolvency.

In *Musée des Sciences Naturelles de Québec Inc. (syndic) c. Banque de Montréal*\(^{312}\), the Court of Appeal of Québec held that publication of a hypothec is dispensable in the creditor—debtor relationship, but the trustee is a representative of the other creditors and thus a third party.\(^{313}\) The court referred to the earlier case of *Civano Construction Inc. (in re)*\(^{314}\), where the Superior Court of Québec had held that the trustee is not the successor of the bankrupt.\(^{315}\) In *Wilfrid Noël & fils ltée. c. Bouchard*\(^{316}\), the court held that a hypothec not properly published is ineffective against the trustee in bankruptcy because as far as the

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\(^{309}\) *Supra* n. 109,

\(^{310}\) See para. 103 on p. 56 sqq.

\(^{311}\) Grenon, *supra* n. 105, at 311.


\(^{313}\) “Le Code civil établit une distinction entre l’opposabilité de l’hypothèque aux tiers et son efficacité à l’égard des débiteurs des créanciers hypothécaires. L’opposabilité à l’égard des tiers est un effet de la publicité (2941 C.c.Q.) alors qu’entre les parties, l’enregistrement, sauf exception spécifique prévue par le législateur, telle la déclaration de copropriété (1062 C.c.Q.), n’est pas nécessaire pour la validité de l’acte. Le syndic cessionnaire des droits et biens du failli peut soulever l’inopposabilité de l’acte d’hypothèque publié postérieurement à la faillite au motif qu’il porte préjudice aux créanciers qu’il représente.” *ibid*. at para. 23–34.

\(^{314}\) *Supra* n. 169.

\(^{315}\) “Le syndic n’est pas le successeur du failli, il en est un cessionnaire. En effet, la faillite est une cession volontaire ou forcée d’une universalité de biens, comprenant, entre autres, les créances recevables, faites par un débiteur insolvable en faveur de ses créanciers entre les mains d’un fiduciaire, d’un cessionnaire, le syndic. Les droits du syndic ne sont pas limités par ceux qu’avait le failli et ne se confondent pas avec eux; au contraire, ils sont distincts et parfois opposables.” *ibid*. at 49.

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creditor—debtor relationship is concerned, she, as a representative of all the creditors, is a third party.\(^{317}\)

IV. Characterization of a Credit Security: Prior Claims

A. General

As shown above,\(^{318}\) prior claims under the new \textit{C.c.Q.} still do not enjoy any real right of action. There are however arguments for and against letting prior claims survive insolvency. For the survival of prior claims, the following could be argued. First, the trustee in bankruptcy is not a third-party acquirer of the patrimony of the debtor but rather a representative of all creditors.\(^{319}\) In a way, it can be said that the trustee realizes the common pledge of all creditors.\(^{320}\) Prior claims before insolvency were opposable against all creditors and their pledge. Thus, they should remain opposable against the trustee.\(^{321}\) Second, the hypothec survives insolvency. Under the \textit{C.c.Q.} a prior claim has priority over the hypothec. Thus, making an \textit{argumentum a minori ad maius}, if even hypothec survives, then the prior claims should survive as well.\(^{322}\)

On the other hand, realization of a prior claim requires a personal action against the


\(^{318}\) See para. 41 on p. 25 sq.

\(^{319}\) See para. 100 on p. 55.

\(^{320}\) See para. 30 on p. 20 sq.

\(^{321}\) Payette, supra n. 89, at para. 207.

\(^{322}\) \textit{Ibid.} at para. 208.
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debtor, however, sec. 69 BIA stays all proceedings against the debtor. Thus, the condition of realization of the prior claim can no longer be satisfied. Second, before the introduction of the C.c.Q. privileges under the C.civ.B.-C. were considered personal rights and thus the creditors were not considered secured creditors within the meaning of the BIA. Prior claims are structurally similar to the old privileges. The old privileges were general privileges and did not attach to certain property. Under the C.c.Q. the same is true for the prior claims mentioned in art. 2651 (4.) and (5.) C.c.Q. Consequently, jurisprudence has decided that prior claims are not an in rem right and do not render the creditor to be a secured creditor in the sense of the BIA.

B. State Claims

In case of state claims, sec. 86 (1), (2) (b) BIA provides the state with an equal priority as if they were entitled to prior claims, provided the state registers the claims. While registration is not a necessary condition for a prior claim, art. 3017 C.c.Q. implies that the state can voluntarily register its prior claim.

C. Supplier Claims

Regarding the prior claim of a vendor, by only giving vendors an ordinary prior claim, the C.c.Q. abolished a security right of the vendor that survived insolvency. Contrary to Ziegel’s suggestion, sec. 81.1 (1) BIA thus does not level the playing field between suppliers in

325 Payette, supra n. 89, at para. 211, there n. 333, and at para. 300–301.
Québec and elsewhere in Canada. Rather, it originally creates the right for all suppliers. The only difference is that even without sec. 81.1 BIA, a Québec supplier would have a right to resolve the entire contract.

D. Property Tax Claims

As mentioned above,327 there has been a revision of property tax prior claims. Under the old regime, case law held that the municipal prior claim does not give the municipalities secured creditor status under the BIA because the prior claim contained neither a real right of action nor to a right to follow the property.328

The effect of the new art. 2654.1 C.c.Q. remains to be seen. On the one hand, it complemented municipal prior claims with a right of following. On the other hand, Hull (Ville de) c. Tsang329 indicated that not only the absence of the right of following, but also the absence of a real right of action deriving from the prior claim is a reason not to qualify the prior claim creditor as a secured creditor within the meaning of the BIA.

327 See para. 47 on p. 29.
329 Supra n. 328,
§ 8: Interaction of European Insolvency Law and the Law of the Member States

I. Introduction

Unlike the BIA, the Council Regulation (EC) No 1346/2000 of 29 May 2000 on Insolvency Proceedings\(^{330}\) does not introduce a harmonized insolvency regime in all Member States. Rather, it determines jurisdiction, requires each Member State to recognize insolvency proceedings of another Member State, and determines the applicable law on the insolvency proceedings (that is, the *lex fori concursus*, art. 4 *Insolvency Regulation (EU)*\(^{331}\)). For the content of the applicable law, recourse is had to the national insolvency laws. However, the *Insolvency Regulation (EU)* creates a few questions regarding its use of legal concepts. Furthermore, a further harmonization of insolvency law would open questions that Canada had to deal with similarly.

II. The Debtor’s Property

The above-discussed\(^{332}\) decision of the House of Lords in *Sharp v Thomson*\(^{333}\) is one example of how the differences between Common Law and Civil Law property are confronted

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\(^{331}\) “Save as otherwise provided in this Regulation, the law applicable to insolvency proceedings and their effects shall be that of the Member State within the territory of which such proceedings are opened, hereafter referred to as the ‘State of the opening of proceedings’.”

\(^{332}\) See para. 93 on p. 49 sqq.

\(^{333}\) *Supra* n. 242.
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in a European bijural system. I argued that the decision is bad precedent because it ignored the law, namely Scottish Civil Law property principles, to achieve a certain result. Canadian jurisprudence has been much more sensitive in this regard, as shown in the cases of Ouellet (Syndic de)334 and Lefebvre (Syndic de); Tremblay (Syndic de)335.336 The result of the latter case may rightfully be criticized as having an inefficient outcome. This, however, is due to the current statutory law.

III. Trustee and Property

A. Common Law

Above337, I mentioned that under Canadian law, the trustee may be considered to hold the estate in trust. A similar formula can be found in the British sec. 306 Insolvency Act 1986338.

B. Civil Law

1. Insolvency in Roman Law

It is unclear whether the Roman law drew a distinction between the insolvency of the debtor, meaning his (the free Roman male) inability to perform his obligations, and the over-indebtedness of a patrimony. As Kroppenberg points out, most classical texts deal with semi-autonomous patrimonies, where for lack of a natural or legal person, only the

334 Supra n. 104,
335 Supra n. 103,
336 See para. 109 on p. 60 sqq.
337 See para. 100 on p. 55.
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latter could be the case.\textsuperscript{339} Certain texts indicate that Roman law drew a distinction between the two.\textsuperscript{340} At any rate, Roman Civil Law already accepted the principle that the insolvent debtor loses the power to dispose of certain property which he legally owns. One example is the case of alienable property that is part of the dower ("dos"), for instance the slave who can be freed. Setting free the slave amounts to an alienation of the ownership. If the husband were solvent, he could free the slave and the wife would retain a restitutinary claim against the husband in case of the divorce. If the husband becomes insolvent, he may no longer free the slave because in absence of a solvent patrimony, the slave is needed to secure the wife’s claim which is due when the condition, dissolution of marriage the divorce, is met.\textsuperscript{341}

2. *Divestment in Contemporary European Civil Law*

Unlike in (predominantly) Common Law systems, in European Civil Law insolvency systems, the property is usually considered to remain vested in the debtor, who is only limited in her power of disposal. The Civil Law insolvency thus retains characteristics of Roman Law.\textsuperscript{342} The “trustee” is consequently known as the administrator. This may be due to the fact that trust law is, or at least was, less developed in Civil Law systems than in Common Law systems. Recognizing that legal title may be held for the benefit for another person than the owner is a prerequisite for passing the estate to the trustee.

In German law, as an example of Continental Civil Law, there are several theories regarding the role of the administrator in insolvency and her relation to the debtor and the es-

\textsuperscript{340} Ibid. at 74, there n. 24, with references.
\textsuperscript{341} C.f. ibid. at 81–85.
\textsuperscript{342} See para. 126 on the previous page.
§ 8: Interaction of European Insolvency Law and the Law of the Member States

According to one doctrine, the administrator is an agent of the debtor. Her capacity to manage the estate derives from the fact that she acts in the debtor’s name (Vertretungstheorie = agency doctrine). The second doctrine holds that she is an organ of the debtor’s estate, which has quasi-legal personality (Organtheorie = organ doctrine). The third and prevalent doctrine holds that the administrator is an official fiduciary (“Treuhänder”) who acts in his own name but has a power of disposal (“Verfügungsbefugnis”). Accordingly, this doctrine is called the office doctrine (“Amtstheorie”) because the administrator is considered to hold office by virtue of which she receives the power of disposal. However, in all three theories, the administrator does not become the owner of the estate. Instead, as in Roman law the debtor remains the owner and is instead limited in her rights over her property.

C. Harmonization

Harmonizing the rules for the passing of the property faces the choice of using either the long-standing Civil Law principle of keeping the property with the debtor and either limiting her rights or vesting certain rights in an administrator, or using the long-standing Common Law concept of a trust. The Québec example shows that Civil Law systems may have problems when they face a trustee who administers and owns the property for the benefit of another. In Québec, the passing of the property from debtor to trustee has certain reflexive consequences which are not based on conscious policy-decisions of the legislator. A harmonization of the divestment of the debtor’s property that would abolish the deeply-

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344 Ibid., § 56 at para. 144.
345 See para. 126 on p. 70.
§ 8: Interaction of European Insolvency Law and the Law of the Member States

rooted principle that the property remains with the debtor thus would need to be undertaken in close coordination with the general private law legislators (either the Member States or the respective sub-national entities as the case may be).

IV. Characterization of a Credit Security

The main provision in the Insolvency Regulation (EU) dealing with the interaction of credit securities and insolvency proceedings is art. 5 Insolvency Regulation (EU). This provision is particularly interesting because the preamble states that the goal of the Insolvency Regulation (EU) is to minimize forum shopping by creating “provisions governing jurisdiction for opening insolvency proceedings and judgments which are delivered directly on the basis of the insolvency proceedings and are closely connected with such proceedings.” Art. 5 Insolvency Regulation (EU), read literally, however makes a substantive statement regarding the fate of credit securities in case of the commencement of insolvency proceedings. One possible interpretation of art. 5 Insolvency Regulation (EU) is to say that it only clarifies that the law applicable to credit securities is not the law applicable on the insolvency proceedings but rather determined by general private international law rules (thus either the lex rei sitae or law of the jurisdiction where the security was established); another interpretation is to see art. 5 Insolvency Regulation (EU) as an indeed substantive norm that replaces private international law and substantively prescribes that any insolvency proceedings in Europe must not infringe upon pre-existing rights of secured creditors.\(^{346}\)

Art. 5 Insolvency Regulation (EU) demonstrates a remarkable ignorance regarding the types of credit securities in European legal systems. The words mortgage and hypothèque

§ 8: Interaction of European Insolvency Law and the Law of the Member States

are used interchangeably, even though a mortgage involves the transfer of title from the mortgagor to the creditor. The same is not necessarily true for a hypothèque. In Canadian legal French at least, a hypothèque can denote a title-transfer security as well as hypothecation of the asset. Metropolitan legal French does not use the term in that sense. In German, the word Hypothek is used, which exclusively denotes a credit security where title remains with the debtor. Additionally, in German law, the Hypothek is not even the security interest most commonly used for immovable property. In German law, according to § 1113 BGB, a Hypothek is a credit security whose existence is dependent upon the existence of a personal obligation. A far more prevalent type of credit security in immovables under German law is the Grundschuld, § 1191 BGB, ("land charge"), which is more advantageous for the creditor. The particular reference to a hypothec the Insolvency Regulation (EU) therefore does not make much sense as far as German law is concerned.

The same problem arises for the use of the word lien and gage (Pfand in German). A common-law lien in England is possessory, the gage in France not necessarily (art. 2337 C.civ. (Fr.)) A German Pfandrecht, § 1373 BGB, can be attached to intangibles, a common-law lien and a French gage, art. 2337 C.civ. (Fr.) art. 2355 C.civ. (Fr.) not.

Such an indiscriminate use of over-specific terms, however, in this context is not yet harmful, because the definition in art. 5 (1) Insolvency Regulation (EU) ("rights in rem") is broad enough to include different kinds of security interests. The characterization of a right as in rem or in personam could be done under private international law principles ac-

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347 Bijuralism and Drafting Support Services Group, supra n. 45, at 37.
§ 8: Interaction of European Insolvency Law and the Law of the Member States

cording to the law of the land where the property is situated (lex rei sitae) or autonomously according to a terminology specific to the Insolvency Regulation (EU).³⁴⁹

Furthermore, art. 5 Insolvency Regulation (EU) is vague in other regards, for instance whether a trust would be included as a persisting right. This seems especially doubtful considering that a trust is characterized as a personal obligation for private international law purposes in Civil Law systems.³⁵⁰ This is a problem for secured creditors, if, as in France,³⁵¹ a trust can be used as one way of creating a floating credit security. Similar problems could arise for title-allocation securities such as the ones that are widely used in Germany.

As these examples demonstrate, the Insolvency Regulation (EU) does not give a convincing answer to the question who the “secured creditors” are it aims to protect. To suggest that the Insolvency Regulation (EU) can already be interpreted autonomously because “credit security” is a well-established term in European law,³⁵² does therefore not seem feasible because it ignores that there is no European Private Law that could give meaning to terms like mortgage or “right in personam”.

Canadian federal law leaves it to provincial law to determine the content of credit securities. EU legislation on the other hand either tries an autonomous definition of rights in rem or leaves it to private international law of the Member States to determine whether or not a right falls within the scope of art. 5 Insolvency Regulation (EU). Both alternatives of European law have their shortcomings, as the examples demonstrate.³⁵³

³⁵⁰ See generally MüKo-BGB/Wendehorst, supra n. 346, Art. 43 EGBGB, at para. 49.
³⁵¹ See para. 86 on p. 45 sq.
³⁵² Regarding the list of credit securities in Art. 5 MüKo-BGB/Kindler, supra n. 346, Internationales Insolvenzrecht, at para. 256.
³⁵³ See para. 134 sqq.
In the preliminary chapter on bijuralism, I came to the conclusion that the maintenance of two distinct legal systems within one wider jurisdiction may be justified for reasons that transcend a purely economic and transactional standpoint. The aim of good bijuralism is then to minimize the frictions that can result from having distinct legal systems. This takes place on three levels. First, within the legislative process on a sub-level. Second, within the jurisprudence on the sub-level. Third, on the encompassing meta-level.

On the first level, there exists differences between the legislation in Québec and the other Canadian provinces. However, these differences are far less pronounced than between European jurisdictions. Admittedly, European jurisdictions have in common that they all retain formal differences between securities, whereas in Canada, only Québec retains such a differentiation. However, the formal differences still in existence are incompatible amongst each other. English secured transaction law is different from Scots law, which is different from French law, which is in turn different from German law. A complete harmonization in the form of a introduction of a uniform PPSA style notice-filing system throughout Europe, including European Civil Law systems seems unlikely. For example, the Scottish Law Commission noticed, with hesitance, that an introduction of a notice-filing based system of priority based on the unitary concept of a “security interest” constitutes a major problem for a system based on Civil Law property law.\footnote{Scottish Law Commission, \textit{supra} n. 250, at 2.}

Given the unlikelihood of a uniform secured transaction law, Québec is an example of a
good approximation. It has introduced a security device, the hypothec, which is fundamentally similar to the security-interest concept used in the PPSAs. Secured transactions law in Common Law Canada and Civil Law Québec is based on very different concepts of what property and estate and patrimony mean. Historically, the Roman Law and the Common Law were very different. Starting from these different positions, secured transaction law in Canada has converged much more than in Europe. Thus, on this level, there is much more coordination within Canada compared to Europe.

Nevertheless, certain differences persist between Québec law and the law of the PPSA provinces. These differences are mainly based on the continuing importance of title allocation in Québec law. This in turn is an outflow of the rigid concept of property in Civil Law as well as a different answer to the question “whether non-security concepts are seen as parasitic upon the concept of security, or whether the concept of security is parasitic upon the other basic concepts of private law, notably those relating to property and obligation.” This difference should not be over-stressed however. Québec Civil Law does not allow a security transfer of title, only a retention. This device is most commonly used in purchase agreements. The PPSA envision a super-priority for purchase-agreement creditors as well. Admittedly, this super-priority is subject to a registration requirement which has a publicity and warning effect for third parties. In a Civil Law system such as Germany, the answer to the permissibility of such a super-priority without publicity would be to say that given the ubiquitous nature of purchase agreements, third parties are deemed to have had sufficient reason to inquire about the existence of such an agreement and thus constructive notice.

Therefore, introducing a PPSA-style system in the European Common Law systems,

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355 Bridge et al., supra n. 59, at 657–658, see above para. 33 on p. 21.
§ 9: Conclusion

alongside the Eastern European jurisdictions where they already exist,357 and a Québec-style unitary security device such as the hypothec, with the retention of title-based transaction for the benefit of the original owner of the property, in European Civil Law jurisdictions seems to be a feasible step towards harmonization based on the origins of the respective legal systems. Such an approach would be preferable to both the introduction of a PPSA system in Civil Law systems that is wholly incompatible with the foundations of Civil Law property, as well as the retention of the current state with a multiplicity of systems that are incompatible to each other, and put even more stress on formalism without justification. It is also preferable to a modernization such as the one that took place in France that replaced old formalistic differences with new ones.

However, Québec Civil Law has not completely reacted to the challenges of bijuralism. Unlike the PPSA provinces, which have made express policy choices regarding the status of the trustee to the debtor’s collateralized property, Québec Civil Law struggles with the proper characterization of the trustee in bankruptcy. Specific provisions regarding the trustee are thus desired to clarify the matter. This shows that bijuralism is not only a question for the overarching jurisdiction but for its constituent systems as well. This should be kept in mind in Europe. Any overarching insolvency legislation must be met by a corresponding secured transaction legislation on the sub-level that addresses the challenge resulting from the fact that the status of the trustee or administrator may not be fully derived from legal concepts of the own legal system.

On the second level of bijuralism, the Canadian record is mixed. On the one hand, the decisions in *Lefebvre (Syndic de)*; *Tremblay (Syndic de)*358 and *Ouellet (Syndic de)*359

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357 See Scottish Law Commission, *supra* n. 250, at 2, n. 5.
358 *Supra* n. 103.
359 *Supra* n. 104.
§ 9: Conclusion

show an awareness of the Supreme Court for the fundamental differences between Civil Law and Common Law and when they result in different outcomes. The Supreme Court put even more emphasis on these differences than the Court of Appeal of Québec had done in Banque Royale du Canada c. Mervis\(^{360}\), where the Court of Appeal justified its result with reference to Giffen (in re)\(^{361}\)\(^{362}\). On the other hand, the Supreme Court threw Civil Law principles overboard in Caisse populaire Desjardins de Val-Brillant v. Blouin\(^{363}\). The casual reference to Common Law reasoning in this case mirrors the House of Lord’s attitude in Sharp v Thomson\(^{364}\). The Canadian example here shows that the legislator on the sub-level has to carefully draft its legislation when the court of last resort for matters of the sub-level is itself placed on the meta-level.

Finally, on the third level, Canada’s record again is ambivalent. On the one hand, it has introduced a programme to make the federal law more consistent with the existence of the two legal systems. For instance, the legislator has put emphasis on having a coherent terminology that makes sense for both systems.\(^{365}\) That is something lacking in European legislation on the meta-level.\(^{366}\) On the other hand, the absence of a really autonomous definition of what a secured creditor is for the purpose of the BIA creates a problem. Duggan and Ziegel criticize the continued different treatment of title-allocation devices and hypothec if Québec law comes into play.\(^{367}\) As a point of lege ferenda, I agree with their criticism. Legal events should not be treated differently because of formal differences alone if they are substantially the same, at least if they are substantially the same as far as their

\(^{360}\) Supra n. 280,
\(^{361}\) Supra n. 109,
\(^{362}\) See Banque Royale du Canada c. Mervis, supra n. 280, at para. 20, 33.
\(^{363}\) Supra n. 165,
\(^{364}\) Supra n. 242,
\(^{365}\) See para. 99 on p. 54.
\(^{366}\) See para. 131 on p. 73 sq.
\(^{367}\) See para. 110 on p. 60 sq.
§ 9: Conclusion

legal effects are of importance for the litigation in question. Yet *de lege lata*, there was nothing the Supreme Court could have done, given the fundamental difference between Quebec Civil Law and the PPSA regarding property. However, as Grenon points out, this problem could have been avoided if the federal legislator had made an autonomous definition of what constitutes a “secured creditor” for the purpose of the *BIA*.\(^\text{368}\) Another problem is the uncertainty surrounding the status of prior claims in insolvency. Partly, this uncertainty can be blamed on the Québec legislator, who has maintained such a curious real credit security which is yet unenforceable against the property itself. However, would the *BIA* define who is to be considered a secured creditor, this uncertainty could be reduced. European insolvency legislation, being in a much more nascent state, itself is unclear as to what constitutes a credit security.\(^\text{369}\) The Canadian example here demonstrates the need for a clear definition. European legislation can also benefit from the Canadian literature written in support for a definition of secured creditor particular to insolvency law that is able to bridge the Common Law-Civil Law divide.

\(^{368}\) See para. 113 on p. 62.
\(^{369}\) See para. 133 on p. 74 sq.
Appendix A: Legislative Texts

Code civil du Québec

Art. 1384

A consumer contract is a contract whose field of application is delimited by legislation respecting consumer protection whereby one of the parties, being a natural person, the consumer, acquires, leases, borrows or obtains in any other manner, for personal, family or domestic purposes, property or services from the other party, who offers such property and services as part of an enterprise which he carries on.

[1991, c. 64, a. 1384]

Art. 1641

An assignment may be set up against the debtor and the third person as soon as the debtor has acquiesced in it or received a copy or a pertinent extract of the deed of assignment or any other evidence of the assignment which may be set up against the assignor. Where the debtor cannot be found in Québec, the assignment may be set up upon publication of a notice of assignment in a newspaper distributed in the locality of the last known address of the debtor or, if he carries on an enterprise, in the locality where its principal establishment is situated.

[1991, c. 64, a. 1641; 1992, c. 57, s. 716]

Art. 1749

A seller or transferee who, upon the default of the buyer, elects to take back the property sold is governed by the rules regarding the exercise of hypothe-

Art. 1384

Le contrat de consommation est le contrat dont le champ d’application est délimité par les lois relatives à la protection du consommateur, par lequel l’une des parties, étant une personne physique, le consommateur, acquiert, loue, emprunte ou se procure de toute autre manière, à des fins personnelles, familiales ou domestiques, des biens ou des services auprès de l’autre partie, laquelle offre de tels biens ou services dans le cadre d’une entreprise qu’elle exploite.

[1991, c. 64, a. 1384]

Art. 1641

La cession est opposable au débiteur et aux tiers, dès que le débiteur y a acquiescé ou qu’il a reçu une copie ou un extrait pertinent de l’acte de cession ou, encore, une autre preuve de la cession qui soit opposable au cédon.

Lorsque le débiteur ne peut être trouvé au Québec, la cession est opposable dès la publication d’un avis de la cession, dans un journal distribué dans la localité de la dernière adresse connue du débiteur ou, s’il exploite une entreprise, dans la localité où elle a son principal établissement.

[1991, c. 64, a. 1641; 1992, c. 57, s. 716]

Art. 1749

Le vendeur ou le cessionnaire qui, en cas de défaut de l’acheteur, choisit de reprendre le bien vendu est assujetti aux règles relatives à l’exercice des droits
Appendix A: Legislative Texts

cary rights set out in the Book on Prior Claims and Hypothecaries; however, in the case of a consumer contract, only the rules contained in the Consumer Protection Act are applicable to the exercise by the seller or transferee of the right of repossession.

If the reservation of ownership required publication but was not published, the seller or transferee may take the property back only if it is in the hands of the original buyer; the seller or transferee takes the property back in its existing condition and subject to the rights and charges with which the buyer may have encumbered it.

If the reservation of ownership required publication but was published late, the seller or transferee may likewise take the property back only if it is in the hands of the original buyer, unless the reservation was published before the sale of the property by the original buyer, in which case the seller or transferee may also take the property back if it is in the hands of a subsequent acquirer; in all cases, the seller or transferee takes the property back in its existing condition, but subject only to such rights and charges with which the original buyer may have encumbered it at the time of the publication of the reservation of ownership and which had already been published.

[1991, c. 64, a. 1749; 1998, c. 5, a. 3]

Art. 1852

The rights resulting from the lease may be published.

Publication is required, however, in the case of rights under a lease with a term of more than one year in respect of a road vehicle or other movable property determined by regulation, or of any movable property required for the service or operation of an enterprise, subject, in the latter case, to regulatory exclusions; effect of such rights against third persons operates from the date of the lease provided they are published within 15 days. A lease with a term of one year or less is deemed to have a term of more than one year if, by the operation of a renewal clause or other covenant to the same effect, the term of the lease may be increased to more than one year.

The transfer of rights under a lease requires or is open to publication, according to whether the rights themselves require or are open to publication.

[1991, c. 64, a. 1852; 1998, c. 5, a. 8].

hypothécaires énoncées au livre Des priorités et des hypothèques; toutefois, en cas de contrat de consommation, seules les règles de la Loi sur la protection du consommateur sont applicables à l’exercice du droit de reprise du vendeur ou cessionnaire.

Si la réserve de propriété devait être publiée mais ne l’a pas été, le vendeur ou cessionnaire ne peut reprendre le bien vendu qu’entre les mains de l’acheteur immédiate du bien; il reprend alors le bien dans l’état où il se trouve et sujet aux droits et charges dont l’acheteur a pu le grever.

Si la réserve de propriété devait être publiée mais ne l’a été que tardivement, le vendeur ou cessionnaire ne peut, de même, reprendre le bien vendu qu’entre les mains de l’acheteur immédiate du bien, à moins que la réserve n’ait été publiée antérieurement à la vente du bien par cet acheteur, auquel cas il peut aussi le reprendre entre les mains de tout acquéreur subséquent; dans tous les cas, le vendeur ou cessionnaire reprend le bien dans l’état où il se trouve, mais sujet aux seuls droits et charges dont l’acheteur avait pu le grever au moment de la publication de la réserve et qui avaient alors été publiés.

[1991, c. 64, a. 1749; 1998, c. 5, a. 3]

Art. 1852

Les droits résultant du bail peuvent être publiés.

Sont toutefois soumis à la publicité les droits résultant du bail d’une durée de plus d’un an portant sur un véhicule routier ou un autre bien meuble déterminés par règlement, ou sur tout bien meuble requis pour le service ou l’exploitation d’une entreprise, sous réserve, en ce dernier cas, des exclusions prévues par règlement; l’opposabilité de ces droits est acquise à compter du bail s’ils sont publiés dans les 15 jours. Le bail qui prévoit une période de location d’un an ou moins est réputé d’une durée de plus d’un an lorsque, par l’effet d’une clause de renouvellement, de reconduction ou d’une autre convention de même effet, cette période peut être portée à plus d’un an.

La cession des droits résultant du bail est admise ou soumise à la publicité, selon que ces droits sont eux-mêmes admis ou soumis à la publicité.

[1991, c. 64, a. 1852; 1998, c. 5, a. 8]
Appendix A: Legislative Texts

**Art. 2651**

The following are the prior claims and, notwithstanding any agreement to the contrary, they are in all cases collocated in the order here set out:
1) legal costs and all expenses incurred in the common interest;
2) the claim of a vendor who has not been paid the price of a movable sold to a natural person who does not operate an enterprise;
3) the claims of persons having the right to retain movable property, provided that the right subsists;
4) claims of the State for amounts due under fiscal laws;
5) claims of municipalities and school boards for property taxes on taxable immovables as well as claims of municipalities, specially provided for by laws applicable to them, for taxes other than property taxes on immovables and movables in respect of which the taxes are due.

[1991, c. 64, a. 2651; 1999, c. 90, s. 41]

**Art. 2660**

A hypothec is a real right on a movable or immovable property made liable for the performance of an obligation. It confers on the creditor the right to follow the property into whosever 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 this Code.

[1991, c. 64, a. 2660]

**Art. 2702**

A movable hypothec with delivery is granted by physical delivery of the property or title to the creditor or, if the property is already in his hands, by his continuing to physically hold it, with the grantor’s consent, to secure his claim.

[2008, c. 20, a. 131]

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**Art. 2651**

Les créances prioritaires sont les suivantes et, lorsqu’elles se rencontrent, elles sont, malgré toute convention contraire, colloquées dans cet ordre:
1° Les frais de justice et toutes les dépenses faites dans l’intérêt commun;
2° La créance du vendeur impayé pour le prix du meuble vendu à une personne physique qui n’exploite pas une entreprise;
3° Les créances de ceux qui ont un droit de rétention sur un meuble, pourvu que ce droit subsiste;
4° Les créances de l’État pour les sommes dues en vertu des lois fiscales;
5° Les créances des municipalités et des commissions scolaires pour les impôts fonciers sur les immobiliers qui y sont assujettis, de même que celles des municipalités, spécialement prévues par les lois qui leur sont applicables, pour les taxes autres que foncières sur les immeubles et les meubles en raison desquels ces taxes sont dues.

[1991, c. 64, a. 2651; 1999, c. 90, a. 41]

**Art. 2660**

L’hypothèque est un droit réel sur un bien, meuble ou immeuble, affecté à l’exécution d’une obligation; elle confère au créancier le droit de suivre le bien en quelques mains qu’il soit, de le prendre en possession ou en paiement, de le vendre ou de le faire vendre et d’être alors préféré sur le produit de cette vente suivant le rang fixé dans le présent code.

[1991, c. 64, a. 2660]

**Art. 2702**

L’hypothèque mobilière avec dépossession est constituée par la remise matérielle du bien ou du titre au créancier ou, si le bien est déjà entre ses mains, par le maintien de la détention matérielle, du consentement du constituant, afin de garantir sa créance.

[2008, c. 20, a. 131]
Appendix A: Legislative Texts

Insolvency Regulation (EU)

Note: The Insolvency Regulation (EU) has official versions in all 23 languages of the European Union, which are equally legally binding throughout the entire territory. For simplicity’s sake, only the English and French versions are given.

Article 5

Third parties’ rights in rem

1. The opening of insolvency proceedings shall not affect the rights in rem of creditors or third parties in respect of tangible or intangible, moveable or immoveable assets - both specific assets and collections of indefinite assets as a whole which change from time to time - belonging to the debtor which are situated within the territory of another Member State at the time of the opening of proceedings.

2. The rights referred to in paragraph 1 shall in particular mean:
   a) the right to dispose of assets or have them disposed of and to obtain satisfaction from the proceeds of or income from those assets, in particular by virtue of a lien or a mortgage;
   b) the exclusive right to have a claim met, in particular a right guaranteed by a lien in respect of the claim or by assignment of the claim by way of a guarantee;
   c) the right to demand the assets from, and/or to require restitution by, anyone having possession or use of them contrary to the wishes of the party so entitled;
   d) a right in rem to the beneficial use of assets.

3. The right, recorded in a public register and enforceable against third parties, under which a right in rem within the meaning of paragraph 1 may be obtained, shall be considered a right in rem.

4. Paragraph 1 shall not preclude actions for voidness, voidability or unenforceability as referred to in Article 4(2)(m).
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