Reconceiving the Symbols of Property: Universalities, Interests and Other Heresies

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Doctrinal evaluation of the *Civil Code of Québec* has tended to take one of two forms: either praise for its success in modernizing private law while maintaining a fidelity to the "civil law tradition"; or criticism for its conceptual confusions, neologistic language, overreaching ambition and disregard for Quebec's civilian heritage. This essay rejects both of these global understandings of the Code.

The author focusses on the legislature's attempt to reconcile the demands of a modern, consumer economy with the structure of property entitlements believed foundational to the Civil law. Two ideas are explored in detail: the theory of patrimony and the theory of real and personal rights. Under the *Civil Code of Lower Canada*, exceptions to these basic principles of property entitlement were so limited that inherited theory withstood the assaults of recalcitrant experience.

In the *Civil Code of Québec*, the legislature attempted to preserve these principles — attenuating them where necessary to account for previously recognized exceptions. Nevertheless, their number and importance (especially as a result of the development of the non-gratuitous trust and the hypothec on moveables, claims and universalities of property) is such that traditional principles relating to patrimony and the nature of real and personal rights can no longer serve their symbolic purpose.

The author argues for a reconception of these two symbols of property. He suggests that the idea sought to be captured in the concept of patrimony is better expressed by recognizing a more general category of juridical universalities — of which patrimony in the strict sense is only one example; and he suggests that the fundamental distinction between real rights and personal rights should be overtaken by a more general concept of property entitlement — the idea of interests. This type of reconception will ensure that the *Civil Code of Québec* is able to assume the traditional vocation of a private law codification — to serve as a civil constitution.

Toute analyse doctrinale du *Code civil du Québec* tend à prendre l'une de ces deux formes : ou bien elle reconnaît son effort à moderniser le droit privé tout en restant fidèle à la «tradition civiliste», ou alors elle lui reproche d'être conceptuellement confus, d'utiliser un langage truffé de néologismes, de viser des idéaux inatteignables et de ne pas prendre en compte l'héritage civiliste québécois. L'auteur rejette chacune de ces deux conceptions du Code.

L'auteur met l'accent sur la tentative du législateur d'accéder aux impératifs d'une économie de consommation moderne tout en maintenant la conceptualisation structurelle des droits de propriété, considérée fondamentale au droit civil. Deux approches sont analysées en détail : la théorie du patrimoine et celle des droits réels et personnels. L'auteur remarque que si les exceptions à ces principes fondamentaux du droit des biens étaient si limitées sous l'empire du *Code civil du Bas-Canada*, c'est que les théories reçues et transmises ont eu raison des attaques expérimentales et récalcitrantes qui les visaient.

Le législateur a tenté de préserver ces principes au sein du *Code civil du Québec*, en les atténuant lorsque les exceptions retenues au gré du temps le commandaient. Néanmoins, leur nombre et leur importance (particulièrement en tant que fruits du développement de la fiducie à titre onéreux et de l'hypothèque sur les meubles, les créances et les universalités de biens) sont tels que les principes traditionnels eu égard au patrimoine et à la nature des droits personnels et réels ne peuvent plus remplir leur fin symbolique.

L'auteur propose de revoir la façon de concevoir ces deux symboles du droit des biens. Il soutient que l'utilité du concept de patrimoine serait mieux servie par la reconnaissance d'une catégorie plus générale d'universalités juridiques — le patrimoine au sens strict n'en étant qu'un exemple. Il soumet que la distinction fondamentale qui oppose les droits réels aux droits personnels devrait céder le pas à une conception plus générale du droit de propriété — le concept de l'intérêt. C'est par ce type de reconception que le *Code civil du Québec* pourra assumer la vocation traditionnelle d'une codification de droit privé, celle de tenir lieu de constitution civile.

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Synopsis

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Iutroduction: Tbe Languages aud Folklore of Codal Reform

1. The promise of Law, or at least of that species of law one associates with the political State, is its vocation to establish, shape and maintain the channels through which are meant to flow the turbulent currents of everyday life.[1] The promise of the civil law, as opposed to the criminal law, is the responsiveness of its facilitative institutions to the private projects and aspirations of citizens in their daily interactions with each other.[2] To achieve this latter end, the establishment of a minimal number of imperative rules defining the scope and character of public order limitations on enforceable claims has been a preferred legislative and judicial technique. In the Civil law tradition, these imperative rules are typically complemented by a much larger body of enacted suppletive rules woven

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[1]The often understated capacity of formal legal regulation to provide facilitative institutions for the pursuit of individual human purposes is explored in L.L. Fuller, "Law as a Means of Social Control and Law as a Facilitation of Human Interaction" [1975] Brigham Young U.L. Rev. 89.

[2]See R.A. Macdonald, "Images du notariat et imagination du notaire" [1994] C.P. du N. 1.

together in a comprehensive civil code.[3] Here, in their elaboration of legal rights, these two types of rules are believed to provide a juristic solution to the fundamental spiritual need of human beings to reconcile the Word and the Deed.[4] A civil code thus mediates between the inescapable legal demand for intellectual continuity through the preservation of a time-honoured doctrinal inheritance and the equally inescapable societal demand for substantive innovation and change through law reform.[5]

For the most part, the legal demand for absolute conceptual continuity in law is accommodated and deflected by incremental legal change occurring through scholarly reformulation, judicial re-interpretation, and seemingly innocuous modifications to the quotidian practice of advocates, notaries and other like *dramatis personæ*; only subsidiarily and sporadically need it be addressed by legislative tinkering.[6] The creative power of supereminent principles of law, the presumed eternal quest to discover law's true immanent rationality, the overt embrace of equity, usage and good morals, and the covert guidance of fictions normally ensure a substantive content to legal change which preserves the perception of formal stability.[7] Similarly, the urgency of the demand for legal change is largely tempered and diffused through the stability of social, economic and political institutions and everyday normative practices within a given society. Acculturation to the democratic claims of legislative accountability and responsiveness, to the notion of the Rule of Law as the sole legitimate vehicle of legal adaptation to social evolution, and to the instrumental values sustaining incremental change to received legal doctrine, dictate the typically conservative form through which citizens press these substantive demands.[8] The Word changes in response to the Deed mostly by staying the same; the Deed retains its authority and influence by surrendering to the processes and techniques of the Word. The last century of reform of Quebec private law (including the episodic revision of the *Civil Code of Lower Canada*) confirms the subtle interplay of these apparently polar attractions.[9]

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[3]See generally J.E.C. Brierley & R.A. Macdonald, eds., *Quebec Civil Law: An Introduction to Quebec Private Law* (Toronto: Emond Montgomery, 1993) paras. 85-90.

[4]On the idea of legal rights (*droits subjectifs*) in the Civil law, see J. Dabin, *Le droit subjectif* (Paris: Dalloz, 1952).

[5]See *e.g. Commentaires du ministre de la Justice*, vol. 1 (Quebec: Publications du Québec, 1993) outside back cover [hereinafter *Commentaires*]: "Un code civil reflète la vision qu'une société a d'elle-même et ce qu'elle veut être. Il rejoint la vie de tous les individus, de leur naissance à leur décès. Il est la trame sur laquelle se construit le tissu social." See further, G. Rémillard, "Présentation du projet du Code civil du Québec" (1991) 22 R.G.D. 5. A much less deterministic assessment of codal reform is offered by J.-L. Baudouin, "Réflexions sur le processus de recodification du Code civil" (1989) 30 C. de D. 817.

[6]For a discussion of these diverse mechanisms of implicit law reform, see R.A. Macdonald, "De-Commissioning Law Reform" (Paper presented to the Round Table on Law Reform, sponsored by the Ontario Law Reform Commission, 21 September 1991) [unpublished].

[7]The counter-thesis that these legal techniques are typically insufficient to maintain the authority of law is argued, in my view unpersuasively, by A. Watson, *Sources of Law, Legal Change, and Ambiguity* (Philadelphia: University of Pennsylvania Press, 1984).

[8]This insight is brilliantly expressed in R.A. Samek, "A Case for Social Law Reform" (1977) 55 Can. Bar Rev. 409.

[9]Two representative discussions of the "evolution" of the *Civil Code of Lower Canada* are those

2. On occasion, however, professional legal lethargy in response to felt demand combines with a change in political rationality as to the relative value of existing social and economic institutions so as to nurture an intellectual climate hospitable to generalized legislative revision of the private law.[10] Over the past forty years such a "social project" has captured the imagination of politicians and jurists, and (one presumes prodded by these same politicians and jurists) claimed the allegiance of many ordinary citizens as the sole vehicle for reconciling law and society worthy of modern Quebec.[11] Yet by its very ambition, recodification of the Civil law puts into play a host of other considerations beyond those which bring the project to life, and beyond those by which either jurist or citizen seeks to circumscribe its object and scope.[12] Given that these other considerations will also exact their tribute in the legislative process, it is entirely predictable that many legal professionals should be dismayed that the resulting new Code does not meet their high expectations as to its form and technique and should lament its supposed lack of fidelity to Quebec's legal inheritance. Given these same considerations, it is also no less surprising that many of those ordinary citizens and business entrepreneurs, who saw in the endeavour of codal revision an opportunity to re-orient the policy of the private law, should also be disappointed at the substantive outcome.[13]

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of L. Perret, "L'évolution du *Code civil du Bas-Canada* ou d'une codification à l'autre : Réflexion sur le Code civil et son effet de codification" (1989) 20 R.G.D. 719; and J.-L. Baudouin, "Quelques perspectives historiques et politiques sur le processus de codification" in *Conférences sur le nouveau Code civil du Québec* (Cowansville, Que.: Yvon Blais, 1992) 13.

[10]Compare the competing visions of M. Planiol, as expressed in "Inutilité d'une revision générale du Code civil" in *Le Code civil, 1804-1904 : Livre du centenaire*, vol. 2 (Paris: Rousseau, 1904) 953; and P.-A. Crépeau, as expressed in "Foreword" in Civil Code Revision Office, *Report on the Québec Civil Code*, vol. 1 (Quebec: Éditeur officiel, 1978) [hereinafter *Draft Civil Code*]; and more generally in P.-A. Crépeau, "Civil Code Revision in Quebec" (1974) 34 Louisiana L. Rev. 921 at 930-47; P.-A. Crépeau, "La révision du Code civil" [1978] C.P. du N. 335 at 344-53; P.-A. Crépeau, "La réforme du Code civil du Québec" [1979] R.I.D.C. 269; P.-A. Crépeau, "Les enjeux de la révision du Code civil" in A. Poupart, ed., *Les enjeux de la révision du Code civil* (Montreal: Faculté d'éducation permanente, Université de Montréal, 1979) 11; P.-A. Crépeau, "Les lendemains de la réforme du Code civil" (1981) 59 Can. Bar Rev. 625. See also J.-L. Baudouin, "The Reform of the Civil Code of Quebec: Objectives, Methodology and Implementation" (1983) 52 Rev. jur. U. de Puerto Rico 149.

[11]See generally J.-L. Baudouin, "Conférence de clôture" in *Enjeux et valeurs d'un Code civil moderne* (Journées Maximilien-Caron 1990) (Montreal: Thémis, 1991) 219; J. Pineau, "La philosophie générale du Code civil" in *Le nouveau Code civil : Interprétation et application* (Journées Maximilien-Caron 1992) (Montreal: Thémis, 1993) 269; J. Chamberland, "Le discours inaugural du sous-ministre de la Justice" in *Conférences sur le nouveau Code civil du Québec*, *supra* note 9, 1.

[12]See *e.g.* A.-F. Bisson, "Nouveau Code civil et jalons pour l'interprétation : Traditions et transitions" (1992) 23 R.D.U.S. 1; P. Issalys, "La loi dans le droit : Tradition, critique et transformation" (1992) 33 C. de D. 665; J.E.C. Brierley, "The Renewal of Quebec's Distinct Legal Culture: The New *Civil Code of Québec*" (1992) 42 U.T.L.J. 484; G. Cornu, "Codification contemporaine : Valeurs et langage" in *Codification : Valeurs et langage* (Papers presented at the International Conference on Comparative Civil Law, 1-3 October 1981) (Montreal: Conseil de la langue française, 1985) 31.

[13]A typology of the different reactions of the legal community to various real and imagined threats to the conceptual continuity of the law is presented and discussed in R.W. Gordon, "Historicism in Legal Scholarship" (1981) 90 Yale L.J. 1017. For a similar discussion directed to the codification exercise, see R.W. Gordon, Book Review of *The American Codification Movement:*

Yet neither reaction is entirely justified. In law, as in life, there is a complex relationship between artifact and interpretation, in addition to that between form and substance.[14] Especially in connection with an undertaking of the magnitude of a recodification of private law, there will inevitably be conflicts between policy and principle, between principle and rule, and even among policies, principles and rules themselves. Moreover, what one sees in any given legislative product is shaped by where one stands and what one believes; standpoint and belief are all the more powerful constraints upon legal professionals.[15] When it comes to codal reform, the sightlines of jurists may be grouped into two broad categories, distinguished according to the manner of their reaction to the new libretto. Some will search the revised Code for familiar articles, concepts and institutions — and will take especial comfort in discovering that previously inexplicit doctrinal constructions of the law's deep structure have achieved textual formulation — promoting only these legacies and these explicit confirmations as the central paradigms of the new law. Secure in their belief that the vehicles identified will enable them to continue doing what they have always done, they will proclaim that the "integrity" of the Civil law has been preserved.[16] Even when the Code fails the test of doctrinal orthodoxy, the sin is pardoned as a momentary lapse of faith. Others will comb the revised Code for new articles, concepts and institutions — and will be particularly energized in discovering faithful transcriptions of both sides of jurisprudential and doctrinal controversies — trumpeting only these innovations and these explicit dualities as the predominant themes of the new law. Emboldened by the assumption that their trove will offer them novel opportunities to exploit, they will announce the success of the law reform exercise.[17] Those few occasions where the Code misses an opportunity to innovate are excused as soon-to-be-transcended atavisms.

A Study of Antebellum Legal Reform by C.M. Cook (1983) 36 Vand. L. Rev. 431.

[14]For a further development of these themes, see C. Atias, *Épistemologie juridique* (Paris: Presses Universitaires de France, 1985); and in the particular context of Quebec, C. Atias, *Savoir des juges et Savoir des juristes : Mes premiers regards sur la culture juridique québécoise* (Montreal: Quebec Research Centre of Private & Comparative Law, 1990).

[15]For an eloquent expression of the point, see M. Tancelin, "Avant-propos" in *Sources des obligations : L'acte juridique légitime* (Montreal: Wilson & Lafleur, 1993).

[16]It is, of course, easy to caricature this theme as a relic of the past. For a careful interpretation of its bearing on Quebec legal historiography, see S. Normand, "Un thème dominant de la pensée juridique traditionnelle au Québec : La sauvegarde de l'intégrité du droit civil" (1987) 32 McGill L.J. 559; J.-G. Castel, "Le juge Mignault défenseur de l'intégrité du droit civil québécois" (1975) 53 Can. Bar Rev. 544. Yet the codal project of the past decades has given it renewed life. For illustrative examples of the polemical use of the argument with respect to integrity, see the discussions in S. Normand & J. Gosselin, "La fiducie du Code civil : Un sujet d'affrontement dans la communauté juridique québécoise" (1990) 31 C. de D. 681; R.A. Macdonald, "Faut-il s'assurer d'appeler un chat un chat ?" in E. Caparros, ed., *Mélanges Germain Brière* (Montreal: Wilson & Lafleur, 1993) 527. See also J.-M. Brisson & N. Kasirer, "The Married Woman in Ascendance, the Mother Country in Retreat: From Legal Colonialism to Legal Nationalism in Quebec Matrimonial Law Reform (1866-1991)" in W. Pue & D. Gibson, eds., *Canada's Legal Inheritances* (Winnipeg: University of Manitoba Press) [forthcoming].

[17]For discussions of this genre, see the essays collected in *Conférences sur le nouveau Code civil du Québec*, *supra* note 9; especially J. Dennis, "Basic Principles of Manufacturer's Liability under the Civil Code of Quebec" in *ibid.*, 403.

3. While the whole of the *Civil Code of Québec* provides legion opportunities for jurists either to adopt one of these two perspectives, or (wishing to subscribe to one or the other) to lament the law's inability to live up to its promise, probably no field offers as much scope for so doing as the general regime of property law. Most of the law relating to the family has been carried forward verbatim from previous legislative amendments.[18] Some changes may be detected in the law of obligations, but both supporters and critics consider these as essentially cosmetic.[19] Modifications to the rules of seisin and the mechanism for the payment of debts offer somewhat greater occasion for declarations of intellectual faith in the law of successions, but here again the essential logic of the regime is broadly perceived not to have been disturbed.[20] In these fields, the raw material from which alternative visions of the conceptual underpinnings of the Civil law may be generated is less patent in the text of the Code and is, therefore, less likely to stimulate immediate exegetical reconstruction. By contrast, one can detect a certain reformulation (if not always advertent or intended) of a number of basic symbols in the law of property. The fact of this recasting being manifest, of course, suggests the truth of the observation that the rules of property are simply the fruit of politics masquerading as private law.[21] Moreover, given the foundational role of the regime of property, diverse other titles of the Code — successions, obligations, prior claims and hypothecs — rest on its conceptual edifice; and the specification and application of this abstract edifice in the above particular situations necessarily plays back into an understanding of that edifice itself.[22]

In order to suggest how the new Code might present its intellectual challenges to the traditional symbols of property,[23] it is helpful to begin with a standard doctrinal presentation of the leading ideas thought to be reflected in the

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[18]See *e.g.* M. Ouellette, "Livre deuxième : De la famille" in *La réforme du Code civil*, vol. 1 (Ste-Foy, Que.: Presses de l'Université Laval, 1993) 151 at 151: "*Le Code civil du Québec* (1980) opère l'essentiel de la réforme en droit de la famille. ... Face à l'ensemble des nouveaux Codes, le droit de la famille fait figure 'd'ancêtre'." Such is not the case, however, with certain aspects of the law of persons (see C. Bouchard, "La réforme du droit des sociétés : L'exemple de la personnalité morale" (1993) 34 C. de D. 349).

[19]See J.-L. Baudouin, *Les obligations*, 4th ed. (Montreal: Yvon Blais, 1993) at vii-x. Compare Tancelin, *supra* note 15 at ix-x.

[20]See *e.g.* G. Brière, *Les successions* (Montreal: Yvon Blais, 1990). This work was written prior to the actual enactment of the *Civil Code of Québec*, although the differences between the text of the Code in bill form and the Code as promulgated are not significant in this respect. See also M.-A. Lamontagne, "Liquidation et partage de successions" in *La réforme du Code civil*, *supra* note 18, 355.

[21]For an elaboration of this point, see M.R. Cohen, "Property and Sovereignty" (1927) 13 Cornell L.Q. 8; C.B. Macpherson, "The Meaning of Property" in C.B. Macpherson, ed., *Property: Mainstream and Critical Positions* (Toronto: University of Toronto Press, 1978) 1; J. Waldron, "What is Private Property?" (1985) 5 Oxford J. Leg. Stud. 313.

[22]See generally Brierley & Macdonald, eds., *supra* note 3, paras. 130-37.

[23]While this essay is, at one level, concerned with the fate of these symbols over time, it also raises the more general issue of whether classification of legal rights in relation to property is even possible. Compare F. Gény, *Science et technique en droit privé positif*, vol. 3 (Paris: Sirey, 1921) at 229: "[I]l apparaît qu'on n'a pas encore proposé, de l'ensemble des droits subjectifs privés, une distinction, à la fois exhaustive et efficace, qui, d'ailleurs, en présence de l'extrême diversité des situations régies, n'est, sans doute, ni possible ni même, véritablement, utile."

Civil Code of Lower Canada.[24] Even though these few ideas are familiar to most scholars, they often pass unnoticed in the daily routines of legal practice. Yet they provide the essential canvas upon which advocates, notaries and judges trace the design and evaluate the consequences of interpersonal economic relationships. Indeed, it is only when they are presented starkly that the necessary qualifications they command even become patent.

4. From the central distinction drawn between persons and property[25] derives the existence of two types of rights that, together, comprise the juristic expression of legal personality: patrimonial rights having a monetary value; and extra-patrimonial rights that, in their essence, have a moral dimension. The law of patrimonial rights, or property, comprises all rights of economic worth, whether or not these may be claimed in respect of material things. This dematerialized character of property is no better reflected than in the doctrinal grouping together of property rights and obligations into the abstract entity known as the "patrimony". Classically, because the notion of patrimony has been held to be derivable from, and necessary to, the notion of legal personality, in its most absolute expression it is said to command three consequences: every person in law has a patrimony; all patrimonies are necessarily vested in identifiable persons; and the patrimony of a person is both unitary and indivisible.[26]

Yet almost from the time of its first doctrinal exposition, the practical functioning of legal institutions revealed the limitations of this classical view. While a universal successor is considered to be the juridical continuation of a deceased person, whose patrimony is automatically merged with the succession, the succession may be accepted "under benefit of inventory" such that the succession and the patrimony of the successor are treated as separate patrimonies until the debts of the deceased have been liquidated. More radically, several universalities of property may exist within a single patrimony and a single person apparently may hold more than one patrimony. Infrequently, one even finds that purely factual universalities, such as the assets of an unincorporated business sold as a going concern, may for certain purposes acquire a juridical form.[27]

5. Despite these difficulties, in Quebec, the classical notion of patrimony has retained its central place in defining the scope of the rights and obligations of persons in the law. In the same line of thinking, the particular rights that comprise the patrimony are typically characterized as being either real rights or personal rights. Personal rights or rights *in personam* are said to be rights that per-

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[24]See, for a discussion of the former law, P.-C. Lafond, *Droit des biens* (Montreal: Thémis, 1991); and for a treatment of the new law, D.-C. Lamontagne, *Biens et propriété* (Montreal: Yvon Blais, 1993).

[25]For a brief discussion of this dichotomy, see R.A. Macdonald, "Enforcing Rights in Corporeal Moveables: Revendication and Its Surrogates – Part One" (1986) 31 McGill L.J. 573 at 575-80 [hereinafter "Enforcing Rights in Corporeal Moveables: I"].

[26]For a summary of this classical view, see *e.g.* A. Weill & F. Terré, *Droit civil : Introduction générale*, 4th ed. (Paris: Dalloz, 1979) at 353-56. A detailed historical discussion of the idea is presented in C.B. Gray, "Patrimony" (1981) 22 C. de D. 81.

[27]For discussion of these attenuations to the classical view of patrimony, see P. Charbonneau, "Les patrimoines d'affectation : Vers un nouveau paradigme en droit québécois du patrimoine" (1983) 85 R. du N. 491.

mit their titulary to claim the performance of some prestation from another person. Conceptually, the right is that which a creditor may claim as against a debtor: an obligation. By contrast, real rights or rights *in re* are analysed as rights that permit their titulary to exercise a variety of prerogatives directly in or upon corporeal property. The archetypal real right is ownership, although ownership can be dismembered into lesser real rights (commonly described as *jus in re aliena*) to the profit of others.[28]

Although this bi-partite classification pretends to exhaustiveness, it too has always been acknowledged as insufficient to capture the full variety of patrimonial rights. Some, such as intellectual property rights and personality rights, simply have no connection to the notion of personal or real rights. Others, such as the right of the lessee to enjoy the thing leased (often called a *jus ad rem trans personam*), seem to be partly real rights and partly personal rights. Still others, such as the right of the owner of property under suspensive condition in the thing prior to the occurrence of the condition, seem to be contingent real rights giving rise to remedies otherwise only open to owners. The right of the fiduciary substitute prior to the opening of the substitution (even where the underlying substituted right is ownership) is another example of a contingent right, characterized as "eventual" so as to acknowledge the ambiguity arising from its uncertainty.[29]

6. These observations about the notions of patrimony and the types of patrimonial rights are sufficient to suggest that, no matter how elegant their formulation may appear, at least some elements of the traditional doctrinal construction of property do not fully explain the legal reality which they seek to define and organize. Of course, as long as the attenuations to these two foundational premises are relatively minor, or peripheral to the daily concerns of jurists, they can be either disregarded altogether, or relegated to the domain of "inelegant statutory calques upon the general law", or even disparaged as trivial "exceptions which prove the rule". All three strategies have been deployed in connection with that altogether distinctive device, the trust — in part, one presumes, because under the *Civil Code of Lower Canada*, the trust was textually presented as a modality of gifts and wills, rather than as an alternative conception of property law of general application.[30] No such dismissive characterizations of the trust are, however, permissible under the *Civil Code of Québec* given the possibility of trusts created by onerous contracts for business as well as charitable purposes, and given the possible use of the device as a judicial remedy.[31] Furthermore, the underlying legal

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[28]See Weill & Terré, *supra* note 26 at 257-69. A more detailed exposition is developed in J. Deruppé, *La nature juridique du droit du preneur à bail et la distinction des droits réels et des droits de créance* (Paris: Dalloz, 1952).

[29]For the modern *locus classicus* raising the main difficulties with the classical theory, see S. Ginossar, *Droit réel, propriété et créance : Élaboration d'un système des droits patrimoniaux* (Paris: Librairie générale de droit et de jurisprudence, 1960). See also F. Hage-Chahine, "Essai d'une nouvelle classification des droits privés" [1982] Rev. trim. dr. civ. 705.

[30]Art. 869, and later, arts. 981*a-n* C.C.L.C. See, for three general discussions of the destiny of the trust in Quebec, Y. Caron & J.E.C. Brierley, "The Trust in Quebec" (1980) 25 McGill L.J. 421; M. Cantin Cumyn, "La propriété fiduciaire : Mythe ou réalité ?" (1984) 15 R.D.U.S. 7; Normand & Gosselin, *supra* note 16.

[31]See arts. 1262, 1266-73, 591 C.C.Q. Compare, however, M. Cantin Cumyn, "Les personnes morales dans le droit privé du Québec" (1990) 31 C. de D. 1021. See also M. Cantin Cumyn, "La

framework presupposed by the trust concept — the detachment of patrimony from legal personality,[32] and the recasting, indeed even the rejection, of the notions of real and personal rights[33] — is replicated in other institutions of the *Civil Code of Québec*.[34] It follows that, despite the success of past adaptations to the architecture of property law in accommodating conceptual counterfactuals, the magnitude of exceptions and attenuations to received ideas in the *Civil Code of Québec* is so great that progressive doctrinal interpretation and case-by-case judicial adaptation may no longer be possible or desirable.

In view of all the above, this essay will consider the problem of symbolic adaptation in codal reform by canvassing two broad substantive themes: (i) To what extent should a new general theory of universalities overtake the notion of patrimony (in any of its formulations) as the generic agglomerating concept in the regime of property? and (ii) To what extent should a new general theory of interests or entitlements overtake the distinction between real rights and personal rights as a means for characterizing the various types of prerogatives comprising the concept of property?[35] The inquiry assumes, it is acknowledged, a paradoxical tenor: if the *Civil Code of Québec* gives increased textual expression to exceptions and attenuations, it also for the first time explicitly incorporates the traditional doctrinal concepts from which they derogate into the visible, enacted law.[36] Examining these basic symbols of property does, nevertheless, provide the context for a more general evaluation of differing doctrinal reactions to the new Code.

I. Patrimonies, Legal Personality and Universalities

A. *The Invention and Re-Invention of Patrimony*

7. The term patrimony, although not uncommon in Roman law materials,[37] has generally not figured textually in modern Civil law legislation. It seldom

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fiducie et le droit civil" in *Estate Planning: Meredith Lectures, 1991* (Cowansville, Que.: Yvon Blais, 1992) 159; J.E.C. Brierley, "De certains patrimoines d'affectation : Les articles 1256-1298" in *La réforme du Code civil*, *supra* note 18, 735, for alternative visions as to how the trust should be understood and incorporated into the overall regime of property law under the *Civil Code of Québec*.

[32]Art. 1260 C.C.Q.

[33]Art. 1261 C.C.Q.

[34]See *e.g.* art. 2674 C.C.Q. for a juridical universality detached from the general or residual patrimony of its titulary, and art. 2660 C.C.Q. for an example of real rights that bear on another right rather than on a thing.

[35]Several parallel studies of a similar scope could, conceivably, also be undertaken in relation to other foundational symbols of property. These would include, for example, the apparent overtaking of the notion of obligation as a duty of debtors to perform a prestation owed to a creditor by a general theory of duties (including fiduciary duties), and the apparent overtaking of the notion of destination in connection with moveables and immoveables by a general theory of attachment. Such questions, however, lie beyond the scope of the present essay.

[36]As to references to the classical formulation of patrimony, see especially arts. 2, 614, 625 C.C.Q.; as to expressions of the classical distinction between real rights and personal rights, see especially arts. 904, 911, 912, 928, 930, 1119, 1433, 1453-56, 2660 C.C.Q.

[37]See *e.g.* Gaius, *The Institutes of Gaius*, rev. ed. (Oxford: Clarendon Press, 1904) at 123.

appears either in the French *Code civil*[38] or in the French language version of the *Civil Code of Lower Canada*,[39] and never by way of definitional specification. Indeed, until the addition to the latter Code of articles 2475 and 2540 in 1974 and article 735.1 in 1980, the term was not employed at all in English.[40] It does, by contrast, figure in several articles of both linguistic versions of the *Civil Code of Québec*, most prominently in articles 2 and 302.

In France, the modern theory of patrimony was first advanced in the mid nineteenth century[41] as a vehicle to explain the operation of two basic jural principles: (i) the universal transmission of a succession upon death, and (ii) the general and unlimited liability of debtors towards their creditors. The contemporary orthodox definition of the patrimony as a "juridical universality comprising the assets and obligations of a legal person that have a pecuniary value" reveals how it is conceived in intellectual terms — as the economic expression of legal personality, rather than in material terms — as a grouping of physical things.[42]

8. To say, first, that the patrimony comprises those rights and obligations of a person that have a pecuniary value is to affirm that only rights in external objects subject to appropriation by a juridical person (an *avoir*), and not the rights innate to juridical personality (an *être*) fall within it.[43] Political and civil rights, and other rights said to be exclusively attached to the person — such as the exercise of parental authority, or the use of one's name or image — are extra-patrimonial. Together they comprise a universality of rights that inheres in legal personality. Patrimonial rights, by contrast, comprise a universality of economic rights that are in general alienable, transmissible to heirs, and seizable by one's creditors. The parallel between the universality of extra-patrimonial rights defining the legal character of *being*, and the universality of patrimonial rights expressing the legal character of *having*, provides the rationale for the affirmation that patrimony and legal personality are complementary aspects of a singular reality.

To say also that the patrimony is a juridical universality is to emphasize its constructivist character. The patrimony is an abstraction which is to be conceived independently of the assets and liabilities of which it may be composed

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[38]See arts. 878, 881, 963, 2111 C.N. as initially codified, all usages of which are connected to the separation of patrimonies in the law of successions or gifts.

[39]See arts. 743, 744, 802, 879, 880, 886, 887, 966, 1990, 2106 C.C.L.C. Once again, in each case the reference is to the notion of separation of patrimonies in the law of successions and gifts.

[40]Wherever *patrimoine* was used in French, the term "property" was used in English. These latter-day amendments to the *Civil Code of Lower Canada* also constitute the first usage of the term *patrimoine* or patrimony in reference to the abstract universality developed in the doctrinal literature.

[41]See C. Aubry & C. Rau, *Cours de droit civil français d'après la méthode de Zachariae*, 4th ed. (Paris: Marchal & Billard, 1873) § 573. For a discussion of the history of the concept in both France and Quebec, see Gray, *supra* note 26.

[42]See *e.g.* J. Carbonnier, *Droit civil : Les biens*, vol. 3, 14th ed. (Paris: Presses Universitaires de France, 1991) at 1. But compare A. Sériaux, "La notion juridique de patrimoine" in *Mélanges Germain Brière*, *supra* note 16, 312, for a defence of a purely material conception of patrimony.

[43]See G. Marcel, *Être et Avoir* (Paris: Aubier-Montaigne, 1968).

at any given time: it is the container rather than the contents.[44] As a juridical universality, the patrimony is not defined exclusively by a factual criterion of appropriation: it may exclude some of a person's possessions or may even comprise the ostensible rights of others. Further, as a universality, the patrimony dissociates the particular assets and liabilities within it from the cause which gave rise to their inclusion (succession, gift, purchase, delictual claim and so on), and it detemporizes the enforcement of rights and obligations: for these reasons the concept of an abstract patrimony as the common pledge of creditors is thought to enhance the freedom of its titulary by minimizing external control over the use and disposition of individual items of property. To understand the patrimony as the only possible juridical universality in the Civil law is thus to deny the power of individual persons to limit this freedom (either their own or that of others) by creating a special nexus of asset and liability.

9. A number of consequences may be derived from the identification of patrimony with legal personality, the most important of which is that the patrimony is unitary and indivisible — both as a container and as contents.[45] If every patrimony must be attached to a single person of which it is the economic expression, so too each person may only have a single patrimony to reflect the unity of legal personality. While, as a matter of fact, a person may divide his or her property and group assets together as a factual universality in order to affect them to certain purposes, the patrimony as container is not thereby divided because the grouping undertaken by the debtor has no necessary bearing on the property available to satisfy creditors' claims. Conversely, while as a matter of fact, a creditor may renounce a right over certain property and choose to execute a judgment on only certain elements of a debtor's patrimony, the patrimony as container is not thereby divided because this renunciation has no necessary bearing on the asset base from which the debtor may voluntarily pay that creditor. The patrimony alone permits the grouping of both assets and liabilities within a generic universality. Although the specific assets and liabilities falling within the patrimony may, and do, vary over time, at any one moment the patrimony as contents will necessarily have a unique composition. The concept is thus singular and invariable.

10. In large measure this subjectivist theory of the patrimony attracted and retained the adherence of nineteenth century Civil law scholars not because it was free from conceptual or internal difficulties, but rather because it was erected upon assumptions that they shared, and because it was designed to promote an ideology that they found congenial. The theory presupposed that physical persons were the predominant if not exclusive representation of legal personality in the private law;[46] the theory presupposed that corporeal things, and especially immoveables, were the principal manifestation of value in the private

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[44]For a representative expression, see C. Larroumet, *Droit civil : Introduction à l'étude du droit privé*, vol. 1 (Paris: Économica, 1984) para. 412ff.

[45]For further discussion of these consequences, see G. Marty & P. Raynaud, *Droit civil : Introduction générale à l'étude du droit*, 2d ed. (Paris: Sirey, 1972) para. 288ff.

[46]See the excellent discussion in M. Cantin Cumyn, "Les personnes morales dans le droit privé du Québec" (1990) 31 C. de D. 1021, especially at 1025ff.

law;[47] and the theory presupposed an economic conception of property essentially as capital and heritage rather than as use and consumption.[48] Today, however, none of these assumptions hold, even though the individualist ideology they reflected remains a central theme of the Civil law.[49]

It is, nevertheless, not just the assumptions of classical theory which have given jurists pause. In addition to exogenous difficulties, there are numerous endogenous problems with the subjectivist theory. Most flow from institutions established by the initial texts of the French *Code civil* and the *Civil Code of Lower Canada*, although to be sure, others have arisen as a consequence of explicit codal amendment. These difficulties may be grouped around two main ideas: attenuations to the unitary and indivisible nature of patrimony; and attenuations to the explicit connection of the patrimony to legal personality.[50]

11. The first doctrinal criticisms of the subjectivist theory came with the recognition that the abstract concept of the unitary patrimony was inadequate even as an explanation of the two jural operations from which it was derived: successory transmission, and the common pledge of creditors. Apart from the principle of separation of patrimonies,[51] the regime governing the property of absentees,[52] and the technique of successory return,[53] the first two of which being expedients designed to facilitate the transmission and liquidation of successions, other attenuations to the unicity or singularity of patrimony were discovered within the normal operation of basic codal institutions, especially in relation to matrimonial regimes and successions.[54] For example, the law of testate successions in Quebec contemplated additional special universalities involving the affectation of designated assets to designated debts. A legacy by "general title" carried with it a responsibility for debts corresponding to the entitlement received.[55] Again, within the law of liberalities, prior to the opening of a fiduciary substitution, the substituted property constituted a special universality of assets and liabilities apart from the institute's patrimony,[56] as did the property vested in a fiduciary legatee.[57]

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[47]See the discussion of the theory of Aubry and Rau in Gray, *supra* note 26 at 103-104.

[48]See Sériaux, *supra* note 42 at 322.

[49]See generally the papers presented at the *VII^e Congrès international de droit comparatif: La transformation du patrimoine dans le droit civil moderne* (Stockholm: Almquist & Wiksel, 1967); and especially that of P. Catala, also reproduced in "La transformation du patrimoine dans le droit civil moderne" (1966) 64 Rev. trim. dr. civ. 185.

[50]See Weill & Terré, *supra* note 26 at 358-65, who characterize these as the internal and the external crises of the classical theory.

[51]In Quebec, see arts. 671, 879 C.C.L.C. As for the further successoral attenuations, see art. 630 C.C.L.C., governing the right of successoral return.

[52]In Quebec, see arts. 98, 101 C.C.L.C.

[53]In Quebec, see art. 630 C.C.L.C.

[54]For a general discussion see Charbonneau, *supra* note 27 at 521-23.

[55]Art. 873 C.C.L.C. This proportionate responsibility existed even if the emolument was cast not as an undivided fraction of the deceased's estate (*e.g.* one quarter of the succession), but as some other universality (*e.g.* a usufruct of the succession, or all moveable property of the succession).

[56]See *e.g.* arts. 944, 951, 955 C.C.L.C.

[57]Art. 869 C.C.L.C. Other institutions within the law of gifts and successions — property subject to a contractual institution prior to the donor's death (art. 823 C.C.L.C.), property subject to a prohibition to alienate (arts. 968-81 C.C.L.C.) — also create imperfect special patrimonies. The trust

Similarly, various problems with the theory of the unitary patrimony as an explanation of the common pledge of creditors were soon identified. The fact that creditors of a partnership were obliged to execute judgments upon the assets affected to the partnership prior to those of partners individually, and then only after other creditors of the partner had been paid, implied a special nexus of asset and liability within the overall patrimony of the partner.[58] A like implication could be deduced from certain general principles of debtor-creditor law existing at the moment of codification, such as the fact that certain exemptions from seizure were relative to certain classes of creditor,[59] and that the inopposability flowing from a successful Paulian action would profit only the Paulian plaintiff.[60]

These examples are all variations on a theme. Whatever the theoretical attraction of conceiving the patrimony as a comprehensive and unitary juridical universality, in practice the Code often specifically envisioned the possibility of lesser juridical universalities held by the same titulary. More challenging for the subjectivist theory was the fact that the composition of the patrimony — even at a single moment and even assuming the absence of a formal affectation or division by way of substitution, matrimonial regime or partnership agreement — would differ depending on the precise legal institution in respect of which it was being invoked and the specific claim by a third party under consideration. The assets and liabilities comprising a succession could well include the right to pursue and the liability to pay extra-patrimonial claims not otherwise realizable by the deceased's creditors; conversely, the effect of gifts *mortis causa* in marriage contracts, legacies by general title and successory return could reduce the effective content of the succession, even though the deceased's creditors would retain the right to seize such property. Again, the scope of the creditors' common pledge might well, by virtue of the Paulian action, comprise assets and liabilities ostensibly non-patrimonial and not transmissible to heirs upon death; yet, by contrast, the regime of exemptions from seizure could remove from the common pledge assets transmissible to heirs as a succession. As an expression of a juridical universality, therefore, the patrimony came to reveal itself as contingent upon the purposes for which it was being invoked, and neither as universal nor as singular as the orthodox theory claimed.

12. A second set of difficulties with the subjectivist theory is of more recent vintage and arose most starkly in connection with the trust. For many years, certain jurists in Quebec (following doctrinal opinion in France) assumed that their law could not accommodate the full mechanism of the Common law trust.[61] This

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under articles 981*a-n* C.C.L.C. is a post-codification example of a patrimony affected to a particular purpose (and as a consequence, the trustee's general patrimony is divided into two masses).

[58]Art. 1899 C.C.L.C.

[59]Arts. 552-53 C.C.P.

[60]Art. 1038 C.C.L.C. The responsibility of the purchaser of a going concern under a bulk sale to affect the purchase price to the creditors of the business in preference to the other creditors of the seller (arts. 1569*a-e* C.C.L.C.), and the right of debtors and creditors to agree that an obligation will be exercised only as against specified assets (art. 1980, para. 2 C.C.L.C.), are post-codification developments of the same tenor.

[61]For that opinion in France, see H. Motulsky "De l'impossibilité juridique de constituer un «Trust» anglo-saxon sous l'empire de la loi française" (1948) 37 Rev. cri. dr. internat. privé 451;

assumption persisted notwithstanding that legacies to fiduciaries had long been an accepted practice, achieving textual recognition in the *Civil Code of Lower Canada* in 1866,[62] and that after 1888 the text of the Code specifically elaborated much of the detail of the fundamental tri-partite relationship characteristic of the trust.[63] Acceptance and extension of the institution was, in some measure, impeded because the dominant doctrinal opinion had difficulty integrating the alternative attribution of benefit, burden and administration presupposed by the trust into the property regime of the Civil law. In particular, this was reflected in uncertainty as to the title of the trustee as the person to whom the trust property was apparently conveyed. Because the subjectivist theory commanded that property (and *a fortiori*, a universality of property) could not exist without a titulary who would be vested with a beneficial vocation, it was difficult to decide which of the parties within a trust relationship was the owner. In the absence of codal indication, and in order to avoid a gap in the passing of title to property whenever a future beneficiary was not yet in existence, courts ultimately came to the view that the trustee had a *sui generis* ownership title.[64]

Yet given the essential purposes of the trust, it is undesirable for the patrimony of the trustee to be confounded with the property affected to the trust. While the *Civil Code of Lower Canada* provided for the exclusion of the trustee's other assets from seizure by creditors of the trust,[65] the converse exclusion of the trust property from seizure by the trustee's creditors was not textually elaborated. Ironically, the presumed need to attach the trust patrimony to a person, thus constituted a fundamental limitation on the extension of the institution beyond the situations explicitly enumerated by the Code in the name of one element of the subjectivist theory,[66] while at the same time generating an exception to another element of this same subjectivist theory — the universal and unitary nature of the patrimony.[67]

13. The panoply of difficulties with the subjectivist conception led German jurists at the turn of the century to propose, as part of a larger theoretical reconstruction of private law, a different defining locus for the patrimony: the notion of appropriation.[68] As developed for French law in an attenuated form by Ray-

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and for a recent survey in Quebec law, see both articles by Cantin Cumyn, *supra* note 31. See generally J.H. Merryman, "Ownership and Estate (Variations on a Theme by Lawson)" (1974) 48 Tulane L. Rev. 916.

[62]See arts. 869, 964 C.C.L.C.

[63]Arts. 981*a-n* C.C.L.C.

[64]See most recently *Royal Trust Co.* v. *Tucker*, [1982] 1 S.C.R. 250, 40 N.R. 361 [hereinafter *Tucker*]. For a practitioner's defence of this decision, see Y. Pratte, "L'affaire Tucker et le rôle de la Cour suprême" (1984) 15 R.D.U.S. 25.

[65]Art. 981*i* C.C.L.C.

[66]Nevertheless, for examples where the principle that trust property might constitute an autonomous patrimony has been accepted in statutory contexts in Quebec, see Charbonneau, *supra* note 27 at 527-28.

[67]See the discussions in D.N. Mettarlin, "The Quebec Trust and the Civil Law" (1975) 21 McGill L.J. 175; Caron & Brierley, *supra* note 30; A.J. McClean, "The Quebec Trust: Role Rich and Principle Poor?" (1984) 29 McGill L.J. 312.

[68]See S. Guinchard, *L'affectation des biens en droit privé français* (Paris: Librairie générale de droit et de jurisprudence, 1976) for a discussion of the origins of this approach to patrimony.

mond Saleilles, this idea came to be seen as a viable objectivist alternative, in which the specific end (*Zweck, finalité*) being pursued became the criterion upon which the idea of patrimony as a juridical universality was to be constructed. To understand the patrimony in such terms was, of course, consistent with the general late nineteenth century intellectual trend of conceiving law as the expression of purpose rather than will. This application of Ihering's jurisprudence permitted jurists to conceive of rights as constitutive, not derivative, of the patrimony, and of the patrimony as an *ex post facto* characterization of certain rights in relation to each other rather than as an *ex ante* agglomeration of corporeal property.[69]

Once one detaches the notion of patrimony from its intellectual origins as the subjection of the external corporeal world to the will of physical persons, the distinction between a universal pre-determined juridical universality of corporeals and particular purpose-determined factual universalities of rights and obligations collapses. Patrimony becomes, like the indeterminate lesser universalities described as "community property", "acquests", "family patrimony", "property of an enterprise" and "partnership property", a current account[70] which generally has no legal significance until a relevant triggering event — death, divorce, dissolution, seizure, bankruptcy — requires its liquidation.[71] Thus, in contemporary French doctrine, if there is to be a patrimony associated with legal personality it is not because of the will of the person to reduce the external world to control, but rather because within the universe of different factual universalities affected to different purposes, legal personality is one such juridically determinate purpose.[72]

Under this purposive or objectivist notion of the patrimony there is no necessary connection between the patrimony and legal personality. For this reason, it follows that it is no longer necessary to create legal personality artificially by means of, for example, incorporation, in order for a physical person to affect certain property to a separate patrimony. The same person may mediate not only more general patrimonies affected to the transmissible succession or the common pledge of creditors, but also several specialized smaller patrimonies affected to particular purposes. For example, it becomes possible to create a true family patrimony, which groups together property from several sources, and which is specially affected to the needs of the family, however contemplated. Moreover, any such patrimony (including that affected to the common pledge of creditors) could be transmitted as a universality during the lifetime of its mediating titulary — a feature which can serve to explain the operation of juridical institutions such as bankruptcy.

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[69]As Gray, *supra* note 26 at 149, correctly notes, P. Cazelles (*De l'idée de la continuation de la personne comme principe des transmissions universelles* (Paris: Librairie nouvelle de droit et de jurisprudence, 1905)) most forcefully expresses the consequences of the theory.

[70]This formulation of the objectivist view of patrimony is derived from Gray, *ibid.* at 148-52.

[71]In some cases, however, the existence of these lesser universalities — community property, acquests, partnership property — has a reality prior to liquidation in the sense that the powers of husband and wife, or managing and non-managing partners, as the case may be, can be limited.

[72]See *e.g.* the position adopted by H., L. & J. Mazeaud, *Leçons de droit civil*, vol. 1, 4th ed. by M. de Juglart (Paris: Montchrestien, 1967).

14. While the objectivist theory of patrimony overcomes the endogenous difficulties afflicting the subjectivist theory, and better accommodates twentieth century exogenous transformations to legal personality and objects of property, many jurists reject it for ideological reasons.[73] First, the theory seems to reduce human beings to the level of mere purposes: surely, it is argued, in apparent disregard for the concept of moral personality, human beings deserve a place in the legal universe better than that afforded to animals, charities, businesses, *etc.* In addition, human beings are finite in number while purposes can be infinite: once patrimonies are to be determined by their purpose, there is no logical limit on their number and, in the end, all executory transactions will be made to be property specific (usually by means of a security device) in order to protect the claims of creditors. Finally, the objection goes, once the patrimony is dissociated from legal personality, it is difficult to maintain the intellectual coherence of legal rights: The notion of an obligation presumes titularies of rights, so how can it be possible to conceive of a universality of property in respect of which no legal person can claim rights?

B. Saving Appearances under the Civil Code of Québec

15. These competing considerations — the practical defects with the subjectivist theory and the ideological reservations about the objectivist theory — were reflected in the proposal of the Civil Code Revision Office to redefine patrimony by reconciling the two theories.[74] A cursory reading of the *Civil Code of Québec* suggests that, despite its departure from the form and substance of the proposal of the Civil Code Revision Office, the legislature of Quebec has also attempted to accomodate the inescapable attenuations to the classical concept of the patrimony through an amalgam of objectivist and subjectivist theories. Indeed, the two paragraphs of article 2 of the Code say as much:

2. Every person has a patrimony.	**2.** Toute personne est titulaire d'un patrimoine.
The patrimony may be divided or appropriated to a purpose, but only to the extent provided by law.	Celui-ci peut faire l'objet d'une division ou d'une affectation, mais dans la seule mesure prévue par la loi.

The first paragraph provides textually for the notion of the patrimony, a step which the Lower Canadian codifiers declined to take.[75] The formulation of the paragraph also indicates that the two root principles of the subjectivist theory of the patrimony are advanced as starting premises: the idea of a unitary pat-

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[73]See Marty & Raynaud, *supra* note 45, para. 290; for a less strident position in Quebec, see J.-L. Baudouin, *Les obligations*, 3d ed. (Cowansville, Que.: Yvon Blais, 1989) paras. 7-11.

[74]See, notably, *Draft Civil Code*, *supra* note 10, proposed articles I-4, IV-603.

[75]Given the date of its first elaboration in French Civil law, it is uncertain whether the Lower Canadian codifiers, in fact, were aware of the concept of patrimony at the time the Code was being prepared. Nevertheless, the technique of stating didaetic codal articles was expressly eschewed by the codifiers — see *Civil Code of Lower Canada: First, Second and Third Reports* (Quebec: Desbarats, 1865) at 8, 10 [hereinafter *Codifiers' Report]* — and it is unlikely, even had they known of the doctrinal construction of patrimony by Aubry and Rau, that they would have included an article resembling article 2 of the *Civil Code of Québec.*

rimony as the essential juridical universality; and its primary attachment to persons.[76] But, at the same time, the second paragraph of the article expressly recognizes the possibility of divisions of the patrimony and patrimonies by appropriation, two possibilities which directly contradict the theory underlying the first paragraph. In other words, by making explicit a dogmatic doctrinal principle known not to be absolute, the legislature was thereafter also required to make explicit its necessary qualifications, even where these qualifications run counter to the general theory sustaining the root principle.[77] To assess whether this amalgam of subjectivist and objectivist theories succeeds in providing a workable conception of patrimony, it is helpful to consider first what, if anything, is left of the three specific legal consequences thought to flow from the subjectivist theory, and then to examine the occasions under the *Civil Code of Québec* where the exceptions adverted to by article 2, paragraph 2 may be found.

Obviously, in view of the second paragraph of the article, it can no longer be affirmed as an unassailable principle that only physical or legal persons may have a patrimony: a patrimony by appropriation has no person as its titulary. Second, but *per contra*, article 2, paragraph 1 nevertheless provides that every legal person has a patrimony: thus, all persons have patrimonies, but all patrimonies do not have persons. Third, to the extent that a particular patrimony is attached to a person, it would appear to arise at birth, and to expire at death, subject in both cases to well-ingrained attenuations created by legal fictions relating to unborn children, and to universal successors absorbing the legal personality of the *de cujus*.[78] Finally, the principle that a person may only have one indivisible patrimony is expressly discarded by article 2, paragraph 2, which provides that the patrimony may be divided to the extent provided by law.

16. Unfortunately, the second paragraph of article 2 is not well drafted. It does, of course, provide for exceptions to both fundamental premises of the subjectivist theory, but the interrelation of the two expressed exceptions is uncertain. While it is implied by the notion of division of patrimony that the same legal person remains titulary of all the fractions of the patrimony so divided, should the same implication be drawn in respect of an appropriation, as paragraph 2 suggests?[79] Article 1260 provides that the act creating the trust is trans-

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[76]The Code provides for a similar expression of the effect of patrimony in respect of legal persons in article 302.

[77]See *Commentaires*, *supra* note 5 at 5, commentaries on art. 2.

[78]The affirmation would also be true in respect of legal persons, whose patrimony commences at the time of their constitution or incorporation (subject to the assumption of pre-incorporation contracts) and terminates at the time of their dissolution. Presumably also, where a patrimony is appropriated to a purpose, as for example through a trust, it arises (in principle) at the moment of appropriation (arts. 1264 C.C.Q.), and expires when the trust itself is terminated (arts. 1296-98 C.C.Q.).

[79]This query arises from a disparity between the English and French language versions of article 2, para. 2 — the former leaving open the possibility that a patrimony by appropriation might be created (like a corporation) with no assets transferred in the constituting act from another patrimony, while the latter more clearly suggesting that all patrimonies must initially begin as unitary attributes of legal personality and that patrimonies by appropriation must, therefore, be carved out of any existing patrimony attributed to a person in the law.

latory, and that the settlor retains no real rights (such as ownership) in the trust property. Article 2 should not, therefore, provide, as an attenuation to the notion that a patrimony must be attached to a person in the law, that the patrimony may be appropriated to a purpose. For this is to confuse the matter by identifying situations where a new patrimony is created with those where an existing patrimony is simply divided.

The article is also confusing because it may be read as suggesting that only the basic patrimony of a person referred to in article 2, paragraph 1 (or by implication, article 302) may be divided. If a patrimony by appropriation is a distinct patrimony, should it not also be capable of division? When the different codal hypotheses of divided patrimonies are examined it becomes evident that the potential for dividing patrimonies by appropriation must also be considered. This leads to the question whether either the division or the appropriation, notwithstanding the last phrase of paragraph 2, can only exist where a canonical formula for so doing is provided by law in the Code or elsewhere. That is, can there be occasions where the effect of a codal institution is to divide a patrimony, or appropriate property to a purpose as a separate patrimony, even if the terms division or appropriation do not appear, or are these restricted to enumerated situations such as matrimonial regimes, successions and substitutions?

17. Like the concept of the patrimony, the notion of a divided patrimony is *textually* new to the *Civil Code of Québec*. Unlike the concept of the patrimony, however, and despite the fact that instances of legal arrangements that could be characterized as divided patrimonies existed in the *Civil Code of Lower Canada*, it has no general doctrinal antecedents in Quebec. What exactly is the idea of a divided patrimony? The Minister's commentaries indicate that patrimonies may be divided in respect of substitutions and matrimonial regimes.[80] But as noted earlier, this is far from an exhaustive list of situations under the *Civil Code of Lower Canada*, where the notion of the unitary patrimony was partially ousted. What is more, within the *Civil Code of Québec*, several of these situations, besides those arising in matrimonial contexts or in respect of substitutions — notably the successory separation of patrimonies, the legacy by general title and the right of returned absentees to reclaim their property — continue to exist.[81] Although the requirement that liquidators pay the debts prior to distributing the succession to heirs and legatees now significantly reduces the practical bearing of these latter examples, their underlying principle — a division of patrimony — remains operative.[82]

What, exactly, is the notion meant to encompass? A useful indication is found in article 2645, which suggests that a patrimony is considered to be

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[80]See *Commentaires*, *supra* note 5 at 5.

[81]See arts. 780, 1249, 733, 738, 99 C.C.Q.

[82]The interposing of the liquidator between the *de cujus* and the heir results in the debts of the succession normally being totally paid before any legacies and before the balance is distributed to the heirs (art. 811 C.C.Q.). Nevertheless, where the estate is manifestly solvent the heirs may avoid the procedure in liquidation, on condition that their own patrimony then become liable for the debts of the succession (art. 779 C.C.Q.). In such cases the regime of separation of patrimonies retains its practical utility (art. 780 C.C.Q.).

divided whenever some property falling within it is not subject to the ordinary rules governing the common pledge of creditors. This can happen in numerous ways. Certain property otherwise transmissible to heirs may be declared exempt from seizure: here the patrimonial nexus of asset and liability is ruptured, because the content of the common pledge of creditors differs according to the nature of the object within the patrimony, and the nature of the creditor's claim upon that object.[83] A similar type of division occurs in the family setting where, once the partition is opened, acquests in a regime of partnership of acquests under article 448 are treated as a separate mass of corresponding assets and debts. An attenuated division also occurs in relation to property characterized as family patrimony under article 414. Here, however, the family patrimony is merely a mass of assets without correlative specified debt obligations.[84] Still other transactions which are contractual and which do not have as their principal object the dividing of a patrimony and which do not operate so as to limit assets transmissible by succession, do so when it comes to the common pledge: thus, articles 2221, 2235 and 2246 provide for a deferment of execution against partnership property, and article 2274 states an analogous rule for associations.[85] Again, where an enterprise or a substantial fraction of the assets of an enterprise is sold, regardless of whether the enterprise has juridical personality, the Code provides that it be treated as a separate universality of assets and liabilities.[86] Finally, a number of legal devices permit certain chirographic creditors to profit from a common pledge greater in scope than that available to satisfy other claims: for example, the Paulian plaintiff is able to have property or value made available for execution, while other creditors are not able to execute their judgments against such claims.[87]

In all the above cases, the *Civil Code of Québec* seems simply to re-characterize well-known institutions that were notionally exceptions to the idea of a unitary patrimony under the *Civil Code of Lower Canada*, as divisions of patrimony so as to accomodate the juridical operation in view. That is, by textually affirming the subjectivist notion of patrimony, the legislature is also required to affirm textually in the Code a generic category to announce its various exceptions. Yet the legal reality that these exceptions reflect is not identical since in certain cases the division occurs more as an accounting procedure than as a specific affectation of property to certain debts and liabilities. Indeed, this provokes the speculation that in the *Civil Code of Québec*, the notion of patrimony itself is essentially the accounting procedure that the objectivist theory suggests.

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[83]Thus, moveable property of the household may be seized and sold only to recover the unpaid purchase price, as may instruments of work (art. 2648, paras. 1, 2 C.C.Q.). See also art. 2649.

[84]Art. 1313, which requires the administrator of the property of another not to mingle personal and administered assets, is not an example itself of a divided patrimony since the administrator is not the titulary of the administered property. The power of administration may constitute an element of the administrator's patrimony (giving rise to an asset, if remunerated, and a liability, if the administration is badly performed), but the property administered itself never enters the administrator's patrimony.

[85]Of course, some see these provisions as evidence that the theory of moral personality is defective. See *e.g.* Bouchard, *supra* note 18.

[86]Arts. 1767-78 C.C.Q.

[87]See art. 1636 C.C.Q.

18. The most frequent practical application of a notion of divided patrimony is not even alluded to as such by the Code — namely the impact of the rules of prior claims and hypothecs on the affectation of a debtor's assets to the creditors' common pledge. Any security device will generate a preference for a creditor, but this does not necessarily have a bearing on the composition of the patrimony as a universality; the preference comes into play only upon the distribution of the proceeds of a judicial (or analogous) sale. Some security techniques, however, can serve to create separate universalities within that common pledge. For example, the principle set out in article 2645, paragraph 2, which now permits limited recourse financing even in the absence of the creditor taking security, has the effect (like any other separation or division of patrimony) of creating two distinct asset pools within the debtor's common pledge.[88] Again, while not usually seen as involving the division of a patrimony, the deployment of financing techniques involving the reservation or recapture of title — property sold under an instalment sale, property being used under a long-term financial lease, property sold under a right of redemption — all amount to cases where some property ostensibly forming part of a debtor's patrimony is subjected to a regime of assets and liabilities distinct from that of the other property of the debtor.[89]

These various disruptions to the *pari passu* regime of distribution could be explained as exceptional, or as marginal to the overall theory of patrimony, since they will typically involve only a single asset. No such characterization as exceptional is possible in respect of the hypothec over a universality of moveable property. While only theoretically possible under the regime of the *Civil Code of Lower Canada*,[90] the *Civil Code of Québec* now explicitly permits (i) the hypothecation of moveables, (ii) the hypothecation of moveables without delivery, and (iii) the hypothecation of universalities of moveables, understood not as a set which must comprise assets later specifically identified but as a true universality.[91] The determination of the scope and contents of the universality is left to the agreement of the parties. Article 2698 states that they only need specify the universality with sufficient precision that assets covered by it may be

[88]Of course, as will be explained below, because the debtor's other creditors may nevertheless exercise their rights on the property so specified, article 2645, para. 2 is an imperfect example of a distinct juridical universality.

[89]It might be said that this is a "pseudo" division since ownership or another real right in the thing is never fully vested in the debtor. But this is to take an unduly formalistic view of what constitutes property, for if the entire use-value and fruits of a thing are acquired by the person who possesses as owner but who has not yet obtained title, then the object does constitute a significant value in the hands of the debtor. A similar concern about dismemberments led certain classical theorists to deny that anything other than corporeal property could constitute assets of the patrimony. For once the usufruct is dismembered as a separate congeries of rights in the property, it may be subject to an independent regime of assets and liabilities. This, of course, is why modern conceptions of the subjectivist view of the patrimony characterize it as a universality of rights and obligations rather than a universality of things.

[90]Exceptional regimes of such universalities existed in respect of the assignment or pledge of a universality of commercial book debts (art. 1571*d* C.C.L.C.), the financing of inventory under the *Special Corporate Powers Act*, R.S.Q. c. P-16, ss. 27-31, and the *Act respecting Bills of Lading, Receipts and Transfers of Property in Stock*, R.S.Q. c. C-53, ss. 11-52.

[91]Arts. 2660, 2666, 2697 C.C.Q.

identified. That is, unlike the case of a legacy by general title, where (at least on one view) the various possibilities for determining the universality are codally given,[92] there are no limitations on the description of the universality to be hypothecated. The character of the hypothecated property as a juridical universality is further reinforced by articles 2674 and 2675, which provide for the transfer of the hypothec by real subrogation into replacement property and into proceeds of disposition in the ordinary course of business.[93]

19. The conclusion to be drawn from these different articles is that a patrimony, understood as the vehicle by which the common pledge of creditors is exercised, may sometimes be divided simply by operation of law, as in exemptions from seizure, Paulian actions, separation of patrimonies in successions, the family patrimony and the legal matrimonial regime; it may also sometimes be divided as a collateral effect of an agreement whose primary purpose is to achieve some other objective, as in partnership or association agreements, fiduciary substitutions and community matrimonial regimes; and a division of patrimony may sometimes arise by explicit act of the parties designed to isolate assets from the creditors' common pledge, as in the case of hypothecs over universalities, limited recourse financing and various title transactions. To group all these together as examples of a "divided patrimony" is to create a label for a category that, in fact, has no criterion of membership; the notion of divided patrimonies is, consequently, hardly a meaningful legal concept. This examination of how the multiple division of patrimony by contract or other juridical act has been facilitated under the *Civil Code of Québec* leads to a consideration of the second attenuation to the subjectivist theory enumerated by article 2 — the patrimony by appropriation.

20. The trust is the leading (if not the only) example of the patrimony by appropriation given by the *Civil Code of Québec*. Even though the foundation also falls within the codal title "Of Certain Patrimonies by Appropriation",[94] in fact, the universality of property appropriated to it is constituted either through its attachment to a body having juridical personality, in which case no special consequence for the theory of patrimony is generated, or by means of a trust, in which case it is the legal regime of the trust which controls the legal character of the patrimony so appropriated.[95] Indeed, one even wonders whether, in grouping the foundation and the trust together, the legislature has not here made a mistake in categorization. The foundation is a legal institution which has a patrimony and which may or may not have legal personality. The trust, on the other hand, is a true patrimony by appropriation — a juridical universality con-

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[92]Mignault believes that the codal enumeration is exhaustive (P.-B. Mignault, *Le droit civil canadien*, vol. 4 (Montreal: Théoret, 1906) at 352); others such as Turgeon believe that additional categories of legacy by general title are possible (H. Turgeon, "Essai sur les legs" (1952) 55 R. du N. 145 at 167).

[93]Again, as in the case of limited recourse financing, the affectation of the property to the universal hypothec does not exclude it from the common pledge of other creditors, and therefore, the juridical universality is "imperfect".

[94]Arts. 1256-59, 1260-98 C.C.Q. See Brierley, *supra* note 31 at 735-38.

[95]See art. 1257, para. 1 C.C.Q.

stituted into a regime for allocating the prerogatives of property — and not a juridical person.[96]

How, then, does the trust bear on the theory of patrimony in the *Civil Code of Québec*? No longer simply a modality of gifts and wills, the device has achieved a separate existence as a legal institution: it may be created by onerous as well as gratuitous act;[97] it may be created for public or private purposes;[98] it may be created for charitable or for business purposes.[99] The trust under the *Civil Code of Québec* must be detached from its historical origins as a device like the substitution, and must be reconceived as a facilitative institution, whose finalities are no longer substantive and external to it (*e.g.* the giving of a liberality) but procedural and internal (*e.g.* the management of property for the benefit of another person or for the achievement of an authorized purpose, by an independent third person, who acting as an administrator, manages the trust *corpus* or patrimony as a juridical universality).

21. The essential characteristics of the trust substantially redefine the underlying premises of both subjectivist and objectivist conceptions of the patrimony. While the language of the Code is that of purpose — thereby suggesting limitation as to form (time) as well as substance — the trust may be perpetual.[100] Moreover, the patrimony can be personalized because the three roles in a trust may be partly cumulated: both the settlor and the beneficiary may be trustees, and the settlor may also even be the sole beneficiary.[101] Where the trustee has the control and exclusive administration of the trust patrimony, and where the titles of which it is composed are drawn up in his or her name, the trustee acts as the administrator of the property of another, although the trustee's powers may be substantially varied in the constituting act.[102] In addition, because the trust *corpus* need not be fixed once and for all, it may be added to,[103] and its assets are to be treated as a fund, to which the principle of real subrogation applies.[104]

To provide that the trust is created by a settlor through the transfer of property from his or her own patrimony to another patrimony which is appropriated

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[96]See art. 1260. As noted, the concepts of limited recourse financing and the hypothec on a universality of moveables also resemble a semi-appropriated patrimony since they serve to affect certain property to specialized purposes, and to affect certain claims especially to it. However, they differ from the trust in that these agreements do not exclude other creditors from attaching the designated property. To achieve the latter result, either incorporation or a trust would be necessary.

[97]Art. 1262 C.C.Q. It may not, however, be created by judicial declaration except in the specific case of securing alimentary payments as contemplated by article 591 C.C.Q.

[98]Art. 1266 C.C.Q.

[99]Art. 1269 C.C.Q.

[100]Art. 1273 C.C.Q.

[101]Arts. 1275, 1277-78, 1281 C.C.Q.

[102]Arts. 1278, 1299 C.C.Q.

[103]Art. 1293 C.C.Q.

[104]Arts. 1293, 1306-1307 C.C.Q. See J.E.C. Brierley, "The New Quebec Law of Trusts: The Adaptation of Common Law Thought to Civil Law Concepts" in H.P. Glenn, ed., *Droit québécois et droit français : Communauté, autonomie, concordance* (Cowansville, Que.: Yvon Blais, 1993) 382 at 390-92. See also the discussion of real subrogation in this connection in J.E.C. Brierley, "Bijuralism in Canada" in H.P. Glenn, ed., *Contemporary Law; Droit contemporain* (Cowansville, Que.: Yvon Blais, 1993) 22 at 40-41.

to the purposes established by the deed of trust, is to provide that from the moment of such appropriation, any property so transferred is no longer a part of the patrimony of the settlor.[105] Any beneficial vocation to be derived from the property of the trust will result from the terms of the trust and not because the settlor retains ownership of the property appropriated to the trust.[106] Because the *corpus* of the trust, even if it is a single thing or a single right, constitutes a patrimony which is "autonomous and distinct" from those of the settlor, trustee and beneficiary, it follows that the property of the trust is ownerless.[107] Indeed, the trust is established and the settlor divested of the property, by the acceptance of the trustee, whether or not the beneficiary is actually then in existence.[108] As a distinct patrimony, the trust may be divided under the same terms and conditions as the patrimony of persons. There is, for example, no inherent restriction on a trustee's power to hypothecate property, or to agree with trust creditors to undertake a limited recourse financing arrangement, or even to affect the trust property to a substitution.[109]

22. The effort in the *Civil Code of Québec* to legislate formally a general theory of the patrimony through a reconciliation of subjectivist and objectivist conceptions would seem, above all else, designed to save appearances.[110] As noted, this reconciliation is achieved by postulating as a first principle the subjectivist view of patrimony: every person has a patrimony, and this general patrimony is cast as a residue of rights and obligations conceived as a universality, once any particular appropriations or legally authorized divisions have been accommodated. Then, as a second principle, the Code postulates the objectivist view of patrimony: in those exceptional cases permitted by law, a person may expressly divide the patrimony, or appropriate it to a particular purpose, as long as the theoretical possibility of the residual subjective patrimony is not compromised. Through such a stratagem (a stratagem not unlike that which led, in the nineteenth century, to the development of limited liability of corporations and the attribution of legal personality to them), the *Civil Code of Québec* seeks to maintain the subjectivist view of patrimony at the centre of the legal universe, and to keep up the pretense that this proves the centrality of the human person to the Civil law.[111] But the very exercise of reconciliation puts into question the utility of saving appearances in the first place. What, after all, is the theoretical and practical utility of the abstract concept of patrimony — in any of its characterizations?

Some possible answers will now be canvassed. If the idea of the patrimony is to illustrate that the Civil law recognizes the existence of certain universalities

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[105]Art. 1260 C.C.Q.

[106]Of course, should the purposes of the trust become frustrated, or should the trust be terminated for any other reason, in the absence of specific provisions dealing with the winding up of the trust, the settlor or the settlor's heirs retain a residual claim upon the assets previously appropriated to the trust (arts. 1294, 1297, para. 2).

[107]Art. 1261 C.C.Q.

[108]Arts. 1264-65 C.C.Q. In certain circumstances, the trust may even be constituted prior to the trustee's acceptance (art. 1277).

[109]Nevertheless, it is doubtful that a trustee may create a trust upon a trust, given article 1260, although, by contrast, article 1307 would suggest that trustees do have such powers.

[110]See *e.g. Commentaires, supra* note 5 at 5.

[111]See *ibid.* at 3.

understood independently of the particular assets and liabilities that comprise them at any given moment, then the true root concepts are those of the juridical universality and real subrogation, not a patrimony attached to a person. That is, if the idea of the patrimony is to highlight the distinction between juridical and factual universalities, why not use exactly these expressions? After all, the significance of many juridical universalities lies precisely in the *ex post facto* crystallization of factual universalities at the moment the question of content becomes relevant: for example, the so-called family patrimony, the partnership of acquests, the floating hypothec, the hypothec over a universality of moveables, and the property of a partnership or an absentee.

If the idea of the patrimony is to explain the traditional notions of universal successory transmission or the creditors' common pledge, why are these expressions not sufficient in themselves? Similarly, if the revised idea of the patrimony is to allow for the possibility that juridical universalities may be divided, or may be specially appropriated to certain purposes, why not so state, using concepts such as enterprise, partnership, association, hypothec on a universality, limited recourse financing, reserved property of the wife, or the trust as the adjectival theme?[112] Indeed, given the differences between property forming the common pledge, property forming the succession of a deceased, and the doctrinal notion of patrimony itself, one can only be thankful that the latter expression does not appear in article 2644.

23. In view of the above alternative formulations of the essential idea, it is possible to conclude that there is no legally significant consequence which flows from the use of the word patrimony to describe either that residual universality of property which attaches to a person, or that special type of patrimony appropriated to a purpose. Of course, symbolically, the word carries much freight within the Civil law tradition. For several generations the term patrimony has served as a pedagogical concept for the teaching of basic property law; regardless of the imprecision of the idea and the specific content that is attributed to the expression, it is perceived as part of the intellectual structure of the Civil law. Moreover, the term conjures the notion of a heritage to be received from one's ancestors and passed on to one's descendants.[113] But given that universal successory transmissibility does not now apply directly to legal persons (although corporation legislation continues to provide for amalgamations, fusions and surrender of charters), the symbolism must obviously be attenuated even under the subjectivist view.

The concept of patrimony also conjures the distinction between patrimonial character and extra-patrimonial character. Yet as has been frequently observed, the patrimonialization of extra-patrimonial rights is increasing, and the concept itself provides no specification of the distinction in any event.[114] In

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[112]The technique of deploying particular terms to describe the universality in question was that used in the English language version of the *Civil Code of Lower Canada*, where property is used as the generic agglomerating term: property of the deceased is the succession (art. 599); property of the debtor is the creditors' common pledge (art. 1980); property of the trust (art. 981*j*); reserved property of the wife common as to property (former art. 1425*a*); property of the partnership (art. 1899).

[113]See Sériaux, *supra* note 42.

[114]Gray, *supra* note 26.

all cases, the concept of patrimony has a dual content, depending on whether successory transmissibility or the creditors' common pledge is the context in which it is deployed. The symbol thus adds nothing to the general notion of persons in the law being titularies of property.

Finally, the concept is sometimes used to suggest a purely corporeal criterion for distinguishing between the titularies of different masses of property. Ordinary patrimonies belong to people (or to the physical); appropriated patrimonies belong to purposes, or ideas (or more generally to the intellectual). Yet this distinction simply collapses. Many incorporeal agglomerations are the reflection of personality. Some corporations are solely-owned. Some trusts are truly personal (those which have been called, for example, declarations of trust). Techniques such as limited recourse financing, the hypothecation of universalities of assets, and title transactions are all functional equivalents that can be deployed to adjust the scope of the creditors' common pledge. It follows either that all patrimonies — divided or appropriated — are personal (in that the rights they generate are attributable to legal persons), or that all patrimonies are appropriations to purposes (either as mediated by legal personality or directly).

24. Legal concepts are, in the final analysis, rarely just instrumental constructs. They are highly charged symbols. So it is with the concept of patrimony. Yet both instrumentally and symbolically the concept may have outlived its usefulness. No longer attached exclusively to the person, it loses much of its liberal symbolism. No longer a theoretically indivisible concept, it loses its utility in explaining the creditors' common pledge. No longer a guide to distinguish the patrimonial from the extra-patrimonial, since it is now possible to conceive of certain personality rights as having an economic pendant, it has no *raison d'être* as an abstraction linking *être* and *avoir*. The Minister's commentaries specifically recognize these difficulties with the attempt to define patrimony.[115] Why then is it appropriate to make explicit reference to a concept which was previously not specified? Are not some notions of the Civil law best left unexpressed in the text of the Civil Code? Indeed, might not the codal conceptualization of a confused notion of patrimony as a central idea of the civil law retard the doctrinal development in Quebec of the more embracing, and more analytically important category — that of perfect and imperfect juridical universalities giving rise to perfect and imperfect real subrogation?[116] These themes will be revisited in the conclusion.

II. Rights, Things and Interests

A. *The Invention and Re-Invention of Rights*

25. Central to the projection of human personality in the external world is the idea that juridical persons may invoke the power of the State to enforce civil claims having economic value. In modern times, the preferred vehicle for arti-

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[115]See *Commentaires*, *supra* note 5, discussing article 2 of the *Civil Code of Québec*.

[116]To date, the literature on these themes is underdeveloped in Quehec, although it is extensive in France. See, for a first exploration, R. Demogue, "Essai d'une théorie générale de la subrogation réelle" (1901) 30 R.C.L.J. 295; most recently, see V. Ranouil, *La subrogation réelle en droit civil français* (Paris: Librairie générale de droit et de jurisprudence, 1985), where the importance of the distinction between perfect and imperfect real subrogation is fully developed.

culating the grounds upon which this enforcement may be demanded has been the concept of a legal right (*droit subjectif*).[117] Within the Civil Code, classical doctrinal expositions categorize patrimonial rights according to their object, and especially according to whether this object is a thing or the activity of a person: those rights said to be exercisable directly in relation to corporeal property (things), whether moveable or immoveable, are termed real rights; those enabling their titulary to claim performance of an obligation (a prestation) from another are termed personal rights.[118] While the distinction between a *jus in re* and a *jus in personam* originates in Roman law,[119] just as in the French *Code civil*, the expressions real right and personal right appear only infrequently in the *Civil Code of Lower Canada*. Indeed, the adjective "personal" is invariably deployed to characterize judicial actions rather than as a description of rights themselves.[120] Similarly, the adjective "real" is most often deployed, at least in English, in connection with either "real property" and "real estate"[121] or "real servitudes"[122] — in both instances suggesting a broader connection with land than with property generally.[123] Sometimes the expression refers to the nature of a judicial proceeding — a real action[124] — but only in article 2016, which describes a hypothec as a real right, does the Code attempt to use one or the other expression to attribute specific characteristics to a given legal relationship.[125] The *Civil Code of Québec* occasionally uses the term real right, for example, in articles 911, 1119 and 2660, where a list of such rights is ostensibly provided. The expression personal right, however, appears only in connection with the elaboration of the registry system, most notably in articles 2943, 2970 and 2980.

In France, the distinction between personal and real rights is quite well articulated in doctrinal commentary, although this is less the case in Quebec.[126]

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[117]For a discussion of the origins and development of the notion of legal rights in the Civil law, see J. Ghestin & G. Goubeaux, *Traité de droit civil : Introduction générale*, 3d ed. (Paris: Librairie générale de droit et de jurisprudence, 1990) paras. 163-93.

[118]The theory is trite, although in Quebec, its analytical implications are often not well-developed. For an insightful discussion see M. Cantin Cumyn, "De l'existence et du régime juridique des droits réels de jouissance innommés : Essai sur l'énumération limitative des droits réels" (1986) 46 R. du B. 3 [hereinafter "De l'existence et du régime juridique des droits réels de jouissance innommés"]; M. Cantin Cumyn, "Essai sur la durée des droits patrimoniaux" (1988) 48 R. du B. 3. Compare, however, "Enforcing Rights in Corporeal Moveables: I", *supra* note 25, for doubts about the analytical usefulness of the distinction in determining the remedial consequences attaching to the exercise of any particular right.

[119]See *e.g.* R.W. Lee, *The Elements of Roman Law*, 4th ed. (London: Sweet & Maxwell, 1956) at 432.

[120]See arts. 739, 877, 880, 2013*d*, 2190, 2236, 2243, 2246, 2247 C.C.L.C.

[121]Arts. 379, 382, 389, 571, 1903, 1939 C.C.L.C. In French, the equivalent expressions are, respectively, "fonds", "héritage", "bien-fonds", "réellement", "immeubles" and "propriétés foncières".

[122]Arts. 414, 499, 546 C.C.L.C.

[123]This, of course, is the usage revealed in the title of W. de M. Marler, *The Law of Real Property: Quebec* (Toronto: Carswell, 1986), and the foreward by P.-B. Mignault.

[124]See *e.g.* art. 320 C.C.L.C.

[125]Even then, however, the usage was inexact. For discussion, see R.A. Macdonald, "Change of Terminology? Change of Law?" (1992) 23 R.G.D. 357 at 369-71; and text accompanying notes 188-89.

[126]One of the most detailed elaborations appears in G. Baudry-Lacantinerie, *Traité théorique et pratique de droit civil*, t. 5, supp. by J. Bonnecasse (Paris: Sirey, 1930). For a brief summary in

Traditionally it has been used to distinguish (i) the remedial structure which a given right implies — for example, in derivation from the analogous distinction of Roman law between real actions and personal actions; and (ii) the opposability which a given right is thought to command — for example, whether persons not party to a juridical act by which such rights are created or transferred will nevertheless be bound to respect them.[127] Other commentators observe that in contradistinction to personal rights, real rights are, in principle, limited in number, and that they give their titulary a right of preference. But these are secondary characteristics not necessarily true of all real rights and certainly not central to the distinction between the two kinds of patrimonial rights.[128]

26. The assertion that the distinction between personal rights and real rights is foundational compels greater specification both of the attributes of each and of their possible objects. To say that a personal right bears directly upon the activity of a legal person is, in fact, to affirm that its titulary (a creditor) is empowered to claim the performance of some prestation from another person (a debtor). Thus, the relationship between creditor and debtor constitutes an obligation, and the liability of the debtor to perform is personal. Obligations are enforced by a personal action against the debtor (or the debtor's *mortis causa* successors by universal or by general title). Given the principle that all of a debtor's property is the common pledge of creditors, enforcement may be executed by means of the seizure and judicial sale of all the debtor's property.[129]

Real rights are said to be constituted directly upon, and only upon, things. Even though all rights necessarily involve relationships between legal persons, the titulary of a real right does not normally exercise the right by requiring the performance of a prestation by another. Ownership is, within this conceptualization, the paradigmatic real right. It may, however, be fragmented into lesser rights, or dismemberments, to the profit of others. These fragmented rights (in Quebec, traditionally enumerated as usufruct, use, habitation, real servitude, emphyteusis) are, with the exception of real servitudes, grouped together as real rights of enjoyment. That is, because their titulary also is said to have a direct relationship to the thing upon which they bear, they are classified as real rights. In addition to these rights of enjoyment, some rights in things (the pledge, the hypothec) are constituted as security for a debt and are termed "accessory real rights". While the exact prerogatives attaching to any given real right will vary, classical theory holds all real rights to be of the same character: they may be set up against the whole world and are enforceable by "real actions".[130]

27. Most of the first-order consequences of conceiving patrimonial rights in such terms are drawn out in doctrinal commentary, although the best indication of the theory's basic premises can be gained by examining the narrower set —

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relation to Quebec Civil law, see Lafond, supra note 24 at 126-29.

[127]Two helpful discussions of the *raison d'être* of the distinction are those of J. Chevalier, Book Review of *Droit réel, propriété et créance* by S. Ginossar (1960) 58 Rev. trim. dr. civ. 600; and J. Dabin, "Une nouvelle définition du droit réel" (1962) 60 Rev. trim. dr. civ. 20.

[128]See Weill & Terré, *supra* note 26 at 260-62.

[129]Arts. 551-714 C.C.P.

[130]Notably petitory actions or actions in revendication under arts. 532-40, 712-14 C.C.P.

real rights.[131] If real rights can only bear on individualized corporeal things, then no real right (for example, ownership) may be asserted in respect of a personal right (an incorporeal). Traditionally, this idea has been rendered by the observation that a person may be the owner of a thing, but may only be the titulary of a claim. Yet it also means that no real right may be claimed in a universality, conceived as such.[132] Again, no real right can bear on a future thing and, in principle, no real right may be claimed on another real right. Finally, the right itself must be existing and actual. An indeterminate future right or a conditional right cannot be a real right because, whatever its vocation, it does not directly lie *in* a thing. The theory of real rights, and especially the characterization of ownership as a real right, reveals the preoccupation of the Civil law with things, seen primarily as things in themselves and not as an expression of wealth.[133]

28. To a large degree this materialist theory of property succeeded as a doctrinal construction because it reflected widely-shared intuitions about the sources of wealth. The theory presupposed that value resided in corporeal assets — especially in their attributes of *usus* and *fructus*; apart from ownership under conditions of dismemberment, all real rights of enjoyment implied the physical detention or control of things.[134] The theory also presupposed that obligations were either a rectification of a wrong (as in a delict), or the counterpart of a service rendered (as in most contracts), or a claim in restitution of value appropriated or received (as in quasi-contracts), or a mode of transferring property rights; obligations in and of themselves were not usually viewed as a species of property.[135] Today, however, neither of these assumptions still hold, even though the materialist ideology they reflect remains a dominant idea of the Civil law.[136]

Of course, it is not just the underlying assumptions of the materialist view of property that are problematic. Even at the time of codification, certain institutions of the Civil law seemed inconsistent with the premises of the theory that all patrimonial rights were either real rights or personal rights. A century of legislative and jurisprudential development and the progressive refinement of doctrinal ideas have also revealed a number of inadequacies of the theory in capturing the complexity of the relationship between rights and things. These

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[131]See, for France, F. Terré & P. Simler, *Droit civil : Les biens*, 4th ed. (Paris: Dalloz, 1992) paras. 36-40.

[132]See above, paras. 8-10.

[133]For a short comparative essay tracing the implications of these two conceptions of things, see B. Rudden, "Things as Thing and Things as Wealth" (1994) 14 Oxford J. Leg. Stud. 81.

[134]While it is theoretically possible for a usufructuary to carve out a separate right of use to the profit of another, and therefore to be the titulary of a dismemberment of ownership without at the same time having juridical possession of the object of the usufruct, in practice this is a rare event. The most frequent cases involve the owner him- or herself granting a right of emphyteusis, or usufruct, or use, and not the sub-dismemberment of a dismembered right.

[135]Modern usage in French, for example the characterization of savings bonds as "obligations d'épargne", suggests an inchoate understanding of obligations as property, although it bears notice that this usage is almost invariably restricted to debt instruments that have a corporeal character. See the definitions of "obligation" in *Private Law Dictionary and Bilingual Lexicon*, 2d ed. (Montreal: Yvon Blais, 1991) at 296.

[136]For an example of the continuing dominance of the classical view, see Lamontagne, *supra* note 24 at 1-19.

deficiencies have two general dimensions: some legally recognized patrimonial entitlements simply do not fit into the categories of either personal or real rights — they are *tertium* or *quartium quid*; and some codal usages suggest that the fundamental distinction between real and personal rights is not nearly as clear as the classical theory suggests.[137]

29. The initial scholarly critique of the materialist view came with the recognition that certain "intellectual rights", be they formally recognized as a species of property by legislation (copyright, trademark, patents)[138], or be they simply jurisprudentially acknowledged within the Civil law (goodwill, the right to a clientele, a professional monopoly or a product quota),[139] do not sit easily within the traditional framework. These intellectual rights are not personal rights because there is no identifiable debtor; that is, because an obligation presupposes a juridical bond between a specified debtor and a specified creditor, they cannot be obligations. They are also not real rights because they do not bear on material things; rather their object is some intellectual (or immaterial) endeavour.[140] The elaboration of a separate category of intellectual rights (*droits intellectuels*) by French doctrine was followed in Quebec, where the constitutional division of powers between the federal and provincial governments amplifies the apparent uniqueness (and separateness) of certain key components of the category.[141]

Doctrinal writers also soon noticed the theory's imperfections even in connection with the everyday institutions of the Civil Code. A number of rights universally opposable have no object external to their titulary. These "personality rights" (*droits de personnalité*) — a person's name, physical integrity, image, reputation, *etc.* — long relegated to the realm of the extra-patrimonial, have begun to acquire patrimonial consequences.[142] Once this possibility is admitted,

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[137]An even more serious problem with the classical theory arose because there was some evidence that the right of ownership may actually bear on incorporeals. See *Matamajaw Salmon Club* v. *Duchaine*, [1921] 2 A.C. 426 (P.C.). The correct analysis of this decision is, however, contested and some commentators argue that the Privy Council was really only recognizing the possibility that minor real rights could be created by juridical act. For a discussion of the controversy, see S. Normand, "Une relecture de l'arrêt Matamajaw Salmon Club" (1988) 29 C. de D. 807.

[138]The principal statutes are the federal *Patent Act*, R.S.C. 1985, c. P-4; the *Copyright Act*, R.S.C. 1985, c. C-42 and Quebec's *An Act respecting the Professional Status of Artists in the Visual Arts, Arts and Crafts and Literature, and Their Contracts with Promoters*, R.S.Q. c. S-32.01.

[139]See generally P. Roubier, "Droits intellectuels ou droits de clientèle" (1935) 34 Rev. trim. dr. civ. 251, for a short history of the emergence and development of the category in French law.

[140]See the recent summary, in relation to some of the problems, by Y. Gendreau, "Droit d'auteur et droits de la personnalité : Droit français, droit québécois et droit canadien" in Glenn, ed., *supra* note 104, 291.

[141]In other words, the federal statutory character of patents, copyrights and trademarks has facilitated their doctrinal treatment as a *sui generis* type of right. Unfortunately, however, this characterization has impeded the development of a more general theory of intellectual rights (as in France) and relegated analogous Civil law institutions — clientele, goodwill, market-share quotas — to relative obscurity. See *e.g.* the discussion in Lamontagne, *supra* note 24 at 45; Lafond, *supra* note 24 at 141-42; the decision of the Supreme Court of Canada in *Trudel* v. *Clairol Inc. of Canada*, [1975] 2 S.C.R. 236, 54 D.L.R. (3d) 399.

[142]For a discussion of the question in France, see P. Kayser, "Les droits de la personnalité : Aspects théoriques et pratiques" (1971) 69 Rev. trim. dr. civ. 445; for a case in Quebec in which

classical theory must conceive of them either as real rights — which they cannot be since they could only be considered as bearing on a thing if the human body itself were a thing — or as personal rights — which they cannot be since they inhere in the human personality and are opposable to everyone. More recently the scope of cognizable personality rights giving rise to compensation for their infringement has been expanded by statute.[143] Thus, like intellectual rights, at least some personality rights are both statutory and codal reflections of property that cannot easily be reconciled with the classical theory.

30. A greater challenge to the materialist view arises because the Code also sets out a number of rights that arise within the standard *patrimonial* institutions of the Civil law, but that equally clearly do not fit the traditional logic. Some are in the nature of reinforced personal rights; others are in the nature of defective real rights.[144] Instances of reinforced personal rights have always been inherent in the Civil law. For example, whenever one person is in custody of a thing belonging to another, by contract (for example, a borrower, a depositary, or a mandatary with custody) or as a result of a juridical fact (for example, a *negotiorum gestor*), but does not claim a recognized real right in the thing, the situation has been characterized as that involving a *jus ad rem trans personam.* In these cases, it is not overly difficult to maintain the categorization of the right as a personal right, even though it implies a direct material relationship with a thing, and even though its titulary is vested with certain actions normally reserved to holders of real rights.[145]

At least two of these reinforced rights, however, resist facile characterization as personal rights. The right of the lessee of an immoveable to have "enjoyment" of the thing leased is, in principle, only a personal right against the lessor. But the lessee under a registered lease may nonetheless set up the lease against third persons; and in the special case of the residential lease, a number of codal provisions practically convert the lessee's status into that of a titulary of a real right.[146] Similarly, the right of retention vests the retainer with many of the pre-

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personality rights were given monetary protection, see *Deschamps* v. *Renault Canada* (24 February 1972), Montreal 05-810-140-71 (Sup. Ct.), reproduced in (1977) 18 C. de D. 937.

[143]See, most notably, the rights set out in sections 1-10 of the *Charter of Human Rights and Freedoms* (R.S.Q. c. C-12), all of which give rise, under section 49, to an action in damages (including punitive damages) for their breach. For an insightful discussion of the causes of this modern elision of the two types of rights, see Catala, *supra* note 49, paras. 27-29. See also J. Audier, *Les droits patrimoniaux à caractère personnel* (Paris: Librairie générale de droit et de jurisprudence, 1979).

[144]The discussion that follows does not consider the question of whether the possibility of innominate real rights created by juridical act also constitutes an attenuation of the classical theory. For discussion, see Cantin Cumyn, "De l'existence et du régime juridique des droits réels de jouissance innommés", *supra* note 118.

[145]There are several reasons for this: the contract or legal situation typically is gratuitous and therefore not often the subject of contestation; the detention is temporally precarious in that the owner may, in principle, demand return of the thing at any time, and the object is invariably a moveable. For further discussion of the legal regime governing these situations, see R.A. Macdonald, "Enforcing Rights in Corporeal Moveables: Revendication and Its Surrogates – Part Two" (1986) 32 McGill L.J. 1, paras. 91-104.

[146]See the discussion in P.-G. Jobin, *Le louage de choses* (Montreal: Yvon Blais, 1989) paras. 14-15, 339-46.

rogatives of an accessory real right (including opposability to the whole world), but it confers only an attenuated right to follow and may be realized only by personal action.[147] In both cases — a reinforced personal right of enjoyment and a reinforced personal right of guarantee — the essential economic logic of the institution is protected by a real remedy, and the personal recourse only sanctions certain formal features of the right.[148] As for defective real rights, the Code provides numerous examples, usually resulting from the fact of their object being immaterial or consumable. Thus, the usufruct over a claim or other incorporeal cannot be a true usufruct since it does not bear upon a thing. Similarly, the usufruct over a consumable, such as a sum of money, is dematerialized into value. Doctrinally these are characterized as quasi-usufructs, under which title to the claim or the money is transferred to the usufructuary subject to an obligation to repay the capital upon the expiration of the usufruct.[149] This solution is analogous to that adopted in respect of the distinction between the loan for use and the loan for consumption. In the loan for consumption, the borrower is not held to have acquired a personal right in relation to the thing (an ordinary *jus ad rem trans personam*), as is the case with a loan for use, but rather to have acquired all of the lender's right in respect of the thing loaned, subject to an obligation to render a like thing at the expiration of the loan. The nature of both these types of hybrid rights — reinforced personal rights and defective real rights — is such that some scholars have even taken to characterizing them as mixed rights to highlight their bivalent features, and to explain satisfactorily their actual legal operation.[150]

The limits of the classical theory are also reached whenever a real right is only gradually perfected. For example, neither the purchaser under an instalment sale, nor the lessee with an option to purchase, nor the financial lessee, nor the owner under suspensive condition have a present real right in the thing which is the object of their rights. Yet the Code permits them to take measures conservatory of their future rights,[151] and courts have also permitted future owners in present possession to take petitory actions or to recover compensation for damage caused to the object of their future rights. Again, the successive attribution of the ownership of property over several generations in the form of the fiduciary substitution raises doubts about the entitlement of future titularies prior to the opening of the substitution. At this time the right of the substitute is not merely personal, because proprietary-like remedies are available to protect it, but it is not a complete real right of ownership because it has not definitively vested. To account for the particularity of these diverse situations of

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[147]See F. Frenette, "Le droit de rétention" in *Répertoire de droit : Sûretés*, doc. 5 (Montreal: Chambre des notaires du Québec, April 1980). The situation of the unpaid seller in possession who sets up the exception of non-performance is analogous.

[148]See S. Gaudet, "Le droit à la réparation en nature en cas de violation d'un droit personnel ad rem" (1989) 19 R.D.U.S. 473.

[149]See M. Cantin Cumyn, "De l'usufruit" in *Répertoire de droit : Biens*, 2d ed. (Montreal: Chambre des notaires du Québec, 1990) paras. 59-61.

[150]For this type of characterization, see F. Zénati, "Le droit des biens dans l'œuvre du doyen Savatier" in *L'évolution contemporaine du droit des biens* (Paris: Presses Universitaires de France, 1991) 13 at 18.

[151]For example, art. 1086 C.C.L.C.

gradual acquisition of real rights, French doctrine has elaborated yet another category of patrimonial rights — that comprising future, conditional and eventual rights.[152]

31. The above examples demonstrate that the materialist foundations of patrimoniality, as reflected in the sharp distinction between real and personal rights, no longer (if they ever did) reflect the living law. First of all, some of the most important rights of monetary worth simply do not present the features of either a real right or a personal right: that is, they do not bear on things at all but on attributes of persons (personality rights) or on ideas and other immaterial concepts (intellectual rights), or even if they seem to bear on things they are neither claims against persons nor claims in things (rights of pre-emption, rights of option). Again, some of the most common rights that do bear on things seem to present characteristics of both real rights and personal rights: that is, they are either not real rights, but only *jus ad rem* — sometimes reinforced with a character of reality (rights of lessees of immoveables, rights of retention), or they are degraded real rights because the thing is already dematerialized into its value (quasi-usufruct, loan for consumption). Finally, some of the central institutions for the transfer of wealth presuppose the gradual acquisition of the economic value of the right (or of the thing) prior to its definitive vesting (conditional, future and eventual rights). Each of these suggests the inadequacy and the incompleteness of the *summa divisio* between real rights and personal rights, although it is acknowledged, none actually presents a radical departure from the underlying conceptual structure of a legal right itself.[153]

The most telling reflection of the inadequacies of the classical conception can be seen in relation to the mechanism of the trust. Even though the notion of a legacy to fiduciaries was known to the old French law, the characterization of the tri-partite relationship within the trust resists traditional analysis.[154] Because of the need to locate an owner for property, courts have tended to the view that the trustee has a *sui generis* ownership title.[155] But because the trust is not recognized as being a person in the law, to avoid the conclusion that the beneficiary is also an owner under a *sui generis* title, courts have held that the beneficiary is a creditor of the trustee rather than of the trust itself. As a result, the beneficiary seems at best to be vested with only a personal right as against the trustee, and the remedies available to vindicate this right are only those available to ordinary creditors.[156] The fact that other statutes establish quite dif-

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[152]See J.-M. Verdier, *Les droits éventuels : Contribution à l'étude de la formation successive des droits* (Paris: Rousseau, 1955); Weill & Terré, *supra* note 26 at 344-48.

[153]On this root idea see Dabin, *supra* note 4 ; P. Roubier, *Droits subjectifs et situations juridiques* (Paris: Dalloz, 1963).

[154]The fiduciary legacy was brought forward into the *Civil Code of Lower Canada* by articles 869 and 964. Later the insertion of articles 981*a-n* into the Code in 1888 provided a more complete canvass of the rights and responsibilities of trustees.

[155]See *Curran* v. *Davis*, [1933] S.C.R. 283; *Tucker*, *supra* note 64.

[156]This, of course, does not really solve the difficulty because the trustee cannot be characterized as the beneficiary's debtor in the traditional sense: a creditor of a personal right would not normally be in a position to demand an accounting of his or her debtor or the latter's destitution; in addition, the liability of the trustee to perform the trust exists in relation to the trust property rather than upon his or her own patrimony.

ferent devices that are also characterized as "trusts"[157] creates additional difficulties because neither the Code nor any other legislation sets out a general suppletive law of trusts. Similarly, at least two federal statutes — the *Bank Act*[158] and the *Bankruptcy and Insolvency Act*[159] — appear, at least to some courts and commentators, to rest on notions of legal and equitable title alien to the framework of the Civil law.[160] In each of the above cases, neither the concept of a real right nor that of a personal right adequately captures the relationship between the various parties to a transaction and between these parties and the property in question.

The trust is, of course, a specialized instance of what may be generally characterized as the fiduciary relationship: the management of property (conceived as a fund) not belonging to the manager. Although numerous codal institutions contemplate such administration, the Code provides no general statement of the powers and obligations of such administrators.[161] In principle, fiduciaries must conduct their management with the care of a prudent administrator, may not normally acquire the property in question, and must render an account at the termination of their administration. Yet the relationships between the fiduciary and the property under administration, and between the beneficiary of the administration and the fiduciary, are difficult to describe. Answering the questions as to who may police the administration, to what extent the property administered is a fund subject to real subrogation, whether the fiduciary actually has any rights in the property or merely exercises powers that do not constitute a species of vested property right,[162] and whether the beneficiary has an independent status to exercise proprietary remedies, squarely raises the issue of whether the regime of personal and real rights is sufficient to analyse the legal entitlements flowing from fiduciary management relationships.

32. These various difficulties with the materialist (or subjectivist) conception of property and with the distinction between real and personal rights which it implies led, in France, to various attempts to re-characterize the types of patrimonial rights envisaged by the Code. Initially, these attempts were designed to collapse one category into the other. Thus, just prior to the turn of the century, some jurists such as Saleilles sought to objectify all rights as real rights. A personal right is not a right as against a person, but rather as against a thing — that

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[157]See, for two examples, the *Companies Act*, R.S.Q. c. C-38; and the former *Special Corporate Powers Act*, *supra* note 90.

[158]R.S.C. 1985, c. B-1.

[159]R.S.C. 1985, c. B-3.

[160]See R.A. Macdonald, "Security under Section 178 of the Bank Act: A Civil Law Analysis" (1983) 43 R. du B. 1007.

[161]A rudimentary regime of investment powers is, however, established by articles 981*o*-*v*. For a detailed list of examples of fiduciary administration, including those cases where the fiduciary may also have some temporary personal entitlement to benefits arising from the property in question, see Brierley & Macdonald, eds., *supra* note 3, para. 137.

[162]The notion of powers is not well-developed in Quebec. The most recent treatment of the idea is that of J.E.C. Brierley, "Powers of Appointment in Quebec Civil Law" (1992) 95 R. du N. 131, 245. This essay, of course, discusses only one type of power — the power of appointment; moreover, the power in question may be a fiduciary power or a non-fiduciary power, depending on the situation.

person's patrimony: a personal right is simply an indeterminate real right.[163] This objectivist view, which corresponds to the objectivist view of patrimony noted above, has the merit of emphasizing that a fundamental characteristic of a legal right is the economic value that it represents. Yet it was never widely accepted because, like the objectivist view of patrimony, it seemed to factor the specificity of the human person out of the notion of a legal right in the Civil law.[164]

The opposite approach to collapsing one category into the other was taken by Planiol, who argued that all rights were essentially personal rights.[165] What were traditionally called real rights were no more than personal rights affected with a "universal passive obligation". The right of ownership, for example, is conceived as a relationship between the owner (the creditor) and everyone else in the world (the debtors). For Planiol, to speak of a right as a relationship between a thing and a person was a *non-sens*; rights only exist between persons. This personalist view of legal rights parallels the subjectivist view of patrimony advanced at the same time, and properly situates all legal rights in the realm of social relationships. Yet Planiol's theory rests on a confusion of the notions of opposability and obligation in the strict sense. Critics observed that while it is true that real rights are universally opposable, they do not, of themselves, create identifiable obligations of performance that may be claimed against everyone. Moreover, even though the specific obligations of a personal right are limited to the parties to a contract, for example, the contract itself is opposable to everyone and interference with a contractual relationship constitutes a delict.[166]

Both of these revisionist conceptions of legal rights ultimately rest on the detachment of the notion of real rights (especially ownership) from things in themselves: all rights are, at one and the same time, relationships between people and relationships between patrimonies (or universalities of value); they are not either one or the other. The analytical question becomes one of assessing the relative weight of rights rather than their material object. This is the gravamen of the more recent, and more telling, critique of the classical theory advanced by Ginossar.[167] For Ginossar, the essence of ownership is the owner's ability to profit from the legal object of his or her rights: ownership describes a relationship of attachment, not the materiality of the attachment. Ownership can be established in respect of objects or claims.[168] What varies as between claims and things is not the scope of their opposability but the identity of the debtor of the specific obli-

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[163]R. Saleilles, *Étude sur la théorie générale de l'obligation d'après le premier projet de Code civil pour l'Empire allemand* (Paris: F. Pichon, 1901).

[164]Neither Ghestin & Goubeaux (*supra* note 117) nor Weill & Terré (*supra* note 26) even make reference to Saleilles' theory. See, however, F. Hage-Chahine, *supra* note 29 at 712.

[165]M. Planiol, *Traité élémentaire du droit civil*, vol. 1 (Paris: Librairie générale de droit et de jurisprudence, 1897) para. 2159.

[166]For a discussion of these problems with Planiol's theory, see *e.g.* Weill & Terré, *supra* note 26, para. 250.

[167]*Supra* note 29.

[168]While he did not specifically address the point, presumably Ginossar would hold that personality rights that are given patrimonial recognition can also be owned: either in a corporeal (the body and body parts), or an incorporeal (one's image, one's name, one's right not to suffer discrimination).

gation they impose. The central distinction is thus between owing and owning, not between personal rights and real rights.[169] Real rights of enjoyment are, in this understanding, quite different in substance than ownership itself. They are, like personal rights, simply a species of relative right; what makes an obligation a real right is only that the obligation which it comprises — for example, the obligation of an owner towards a usufructuary — rests on a specified object. Real rights less than ownership, personal rights and mixed rights are all species of claims (or relative rights) that imply a specified debtor and a specified creditor.

The schema advanced by Ginossar produces two major consequences for the theory of patrimonial rights. In the first place, it is no longer necessary to multiply categories of *sui generis* rights in order to account for intellectual rights and personality rights having a patrimonial reflection; nor is it necessary to place reinforced personal rights, degraded real rights, and conditional, eventual and future rights into one or the other category. Once ownership is separated from materiality it is easier to contemplate entitlements in respect of property in a fund — whether the property is characterized as corporeal or incorporeal. Secondly, once one accepts that all rights other than ownership are rights against persons, the differing weight of rights (for example, of a depositary, pledge, borrower, lessee, user or usufructuary) can be analysed along a continuum. Thus, what the Civil law has classically described as a patrimonial right becomes, with the exception of ownership, a legal relationship in respect of property or value.

33. While the reformulation of the categories of patrimonial rights proposed by Ginossar seems to overcome many of the difficulties caused by the purported centrality of the categories of real and personal rights and opens the way to a Civil law characterization of the trust relationship, it has failed to attract widespread adherence.[170] Moreover, many jurists explicitly reject it for what appear to be ideological reasons.[171] It is argued, for example, that the immaterialist theory advanced by Ginossar, like the personalist theory proposed by Planiol, reduces the notion of ownership to the simple questions of transmissibility and opposability regardless of the object of the right. Surely, things as things deserve a more prominent place in the theory of property rights: an object, say a work of art, a house, a wedding ring or an heirloom, is more than just a value — it has meaning in and of itself. The specificity of ownership lies precisely in the object, not the relationship. Secondly, the immaterialist theory, like that proposed by Saleilles, relativizes all rights other than ownership to simple incorporeal claims in another's property — to relationships between patrimonies, or between juridical universalities. Surely, it is argued (in complete disregard of modern institutions such as instalment sales and finance leases), effective

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[169]For a contemporary expression of this same theme, although cast in much different language, see F. Frenette, "Du droit de propriété : Certaines de ses dimensions méconnues" (1979) 20 C. de D. 439.

[170]See the discussion in Ghestin & Goubeaux, *supra* note 117, where the theory is presented summarily, discussed, not rejected, but simply passed over. See also Hage-Chahine, *supra* note 29 at 712-13. In Quebec, Ginossar's theory has not even been doctrinally evaluated.

[171]The classical statement is that of Dabin, *supra* note 127. Compare the response of Ginossar, "Pour une meilleure définition du droit réel et du droit personnel" (1962) 60 Rev. trim. dr. civ. 573.

appropriation of the "use-value" of a thing requires founding the beneficiary's rights directly in the thing. Finally, as far as the objection to Ginossar's conceptions of property goes, this schema undermines the moral component of an obligation by opening the door to legal recognition of entitlements that are not rights. Once it is possible to create entitlements in relation to property — the enforcement of which is vested in a third person against whom an entirely different claim may be exercised — the fundamental nexus of debtor and creditor which founds the law of obligations is destroyed.

B. Saving Appearances under the Civil Code of Québec

34. These various considerations — the practical defects of the regime of real and personal rights and the ideological reservations about any alternative conception of property entitlements — were reflected in the proposal of the Civil Code Revision Office to reconceptualize basic notions of patrimonial rights.[172] A cursory reading of the *Civil Code of Québec* suggests that the legislature of Quebec has also attempted, in its own way, to accommodate at least some of the deficiencies of the traditional view. This objective is pursued primarily by reconceptualizing the nature of a real right, especially the right of ownership.[173] Indeed, the definition of ownership in article 947 seems to collapse the distinction between property (*les biens*) and things (*les choses*):

947. Ownership is the right to use, enjoy and dispose of *property* fully and freely ... [emphasis added].	**947.** La propriété est le droit d'user, de jouir et de disposer librement et complètement d'un *bien* ... [emphasis added].

This article seems to provide textually for the possibility, argued by Ginossar, that incorporeals (claims) are a species of property that may be owned. Other articles of the Code also reflect this elision between property and thing.[174]

By contrast, articles 953 and 921, among others, seem to continue to contemplate a corporeal conception of ownership:

953. The owner of *property* has a right to revendicate it against the possessor or the person detaining it without right ... [emphasis added].	**953.** Le propriétaire d'un *bien* a le droit de le revendiquer contre le possesseur ou celui qui le detient sans droit ... [emphasis added].

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[172]See, notably, *Draft Civil Code*, *supra* note 10, proposed arts. IV-1, IV-2, IV-20. For a discussion of the *Draft Civil Code* see F. Frenette, "Commentaires sur le rapport de l'O.R.C.C. sur les biens" (1976) 17 C. de D. 991.

[173]Of course, other difficulties such as those flowing from the patrimonial character of certain personality rights and the conceptualization of intellectual rights, are not resolved in the new Code. Article 3 purports to announce a category of personality rights without specifying either its patrimonial content or its nature; and the Code is simply silent on whether there exists a category of intellectual rights — either arising through federal legislation or within the Civil law. An oblique reference is, however, contained in articles 458 and 909, para. 2. For a discussion of intellectual rights under the new Code, see generally, Y. Gendreau, "La nature du droit d'auteur selon le nouveau Code civil" (1993) 27 R.J.T. 85.

[174]See *e.g.* arts. 954, 1127, 1784 C.C.Q. Some commentators argue that this elision is salutary because it clears up an unnecessary confusion of the former law. See Lamontagne, *supra* note 24 at 2.

921. Possession is the exercise in fact, by a person himself or by another person having detention of the *property*, of a real right ... [emphasis added].	**921.** La possession est l'exercice de fait, par soi-même ou par l'intermédiaire d'une autre personne qui détient le *bien*, d'un droit réel ... [emphasis added].

This alternative conception of the object of the right of ownership seems to be repeated in several places, most notably in articles 905, 911, 913, 914 and 2698.

It is, however, not only in respect of the possible object of ownership that the theory of the *Civil Code of Québec* is unclear. The Code reveals a fundamental ambiguity in respect of the juridical nature of the right of ownership itself. Article 911 is drafted so that ownership appears to be a species of real right.[175] Yet article 947 does not textually announce such a characterization. This absence of specification contrasts with article 1119, which provides that various dismemberments of ownership are real rights, and article 2660, which provides that the hypothec is also a real right. Hence, it must be concluded either that ownership is a real right — the more likely hypothesis — in which case the distinction between real rights and personal rights in the *Civil Code of Québec* ultimately collapses, or that ownership is a separate species of patrimonial right that may bear indifferently on things and claims — Ginossar's view — in which case the substance of proprietary remedies, the rules relating to acquisitive prescription, and the structure of the publicity regime all need to be recast.

35. To understand the reason for these alternative conclusions it is helpful to identify which of the central tenets of the classical theory seem to have passed into the new Code. First, the Code does, nominally, retain the expressions real right and personal right, and it does purport to enumerate codal real rights in articles 1119 and 2660. Second, it does define a personal right as an obligation. Article 1373 characterizes an obligation as the right to demand a prestation, and article 2938 provides for a register of personal rights. Third, the Code contemplates real rights of enjoyment as independent rights in property whose enforcement does not depend on the exercise of a claim against another person. This is, for example, the case of the right of a usufructuary under articles 1142 and 1178. In other words, apart from the fundamental ambiguity arising out of article 947, an ambiguity replicated in article 1127 concerning usufruct and quasi-usufruct, and article 2660 on the nature of the hypothec, the rest of the *Civil Code of Québec* appears to restate traditional notions of personal and real rights — at least in respect of institutions other than the trust under article 1260 *et seq.*[176]

The above observations suggest that, presumably to account for a number of rights to which it sought to give a character of reality, the legislature has specified a definition of ownership and real rights which collapses the various dis-

[175]Compare the observations of J. Goulet, "La propriété : La perception au figuré d'un droit pourtant bien réel" (1990) 21 R.G.D. 739.

[176]It is, however, worth noting that several traditional codal institutions typically directed to things, are now codified in the language of property. See *e.g.* arts. 870, 877 C.C.Q. (return of gifts and legacies), art. 1465 C.C.Q. (act of a thing — in French, *bien*); art. 1592 C.C.Q. (right of retention); and art. 1799 C.C.Q. (giving in payment).

tinctions it is at pains to draw (or maintain) elsewhere in the Code. The Minister's commentaries in this respect are most revealing. They provide that the term property (*bien*), not thing (*chose*), is used throughout the Code in order to highlight the idea that property comprises things seen from the perspective of the law, whether they are appropriated or susceptible of appropriation.[177] But this merely transposes the difficulty from the realm of rights to the realm of property generally.[178] Indeed, the absence of any allusion to Ginossar, and the statement in the Minister's commentaries that it is not necessary to define property since everyone knows what it is, lends weight to the conclusion that the elision of the concepts property (*bien*) and thing (*chose*) was not carefully considered.[179]

36. There are numerous examples within the Code where the attempted definitional restructuring implicit in articles 912 and 947 either does not resolve difficulties with the classical theory, or cannot be sustained. Three of these are sufficiently illustrative of the general problem: mixed rights; the hypothec; and the legal relationships established within the trust. Most obviously, as under the *Civil Code of Lower Canada*, a number of personal rights elaborated by the *Civil Code of Québec* reveal certain features more characteristic of classical real rights. In Ginossar's scheme, given the specificity of the right of ownership, and given that real rights, personal rights and mixed rights are all variations on "relative rights" in another's property, there is no need to suppress this third (or fourth) category. Surprisingly, however, the new Code offers no new characterization of these mixed rights, even though the category does not square at all well with its definition of ownership. Claims for services as against persons are the paradigmatic personal (or relative) rights in that they cannot be set up against third persons.[180] Yet these *droits de créance* seem to be capable of being owned — that is, they give rise to a "real right" in their titulary.[181] Despite the fact that ordinary personal rights seem to be real rights, those personal rights of the *jus ad rem trans personam* variety continue to be labelled doctrinally as "mixed rights", which are "matiné[s] de réalité".[182]

Among rights habitually identified as "mixed" are the right of retention under articles 1592 and 1593, the priority for municipal taxes under article 2651,[183] the lessee's rights to maintenance in the premises,[184] the right to oppose employment contracts in contracts of the sale of an enterprise,[185] the rights of

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[177]See *Commentaires*, *supra* note 5 at 526, 527.

[178]See Frenette, *supra* note 172 at 997, for a discussion of the implications of choosing one or the other answer.

[179]The different motivations that might have been present in the legislature's mind when the regime of ownership was being elaborated are discussed below, para. 41.

[180]Unless, of course, the Code specifically provides for their publication. See arts. 1397, 2938, 2941, 2970, 1887, 1936 C.C.Q.

[181]Art. 1784 C.C.Q.

[182]The expression is from Zénati, *supra* note 150 at 18. For a commentary to this effect on the *Civil Code of Québec*, see Lamontagne, *supra* note 24 at 43-44.

[183]See L. Payette, "Des priorités et des hypothèques" in *La réforme du Code civil*, vol. 3, *supra* note 18, 9.

[184]See D.-C. Lamontagne, "L'opposabilité des droits du locataire et du locateur" (1991) 93 R. du N. 306.

[185]M.-F. Bich, "Le contrat de travail" in *La réforme du Code civil*, vol. 2, *supra* note 18, 741, para. 79.

substitutes prior to the opening of a substitution, and the rights of those claiming an eventual or conditional real right under, for example, an instalment sale or a lease with an option to purchase. As under the *Civil Code of Lower Canada*, the right of retention and the lessee's rights are most revealing of the problem. Independently of the prior claim which attaches to it under article 2651, the right of retention has two complementary features: it may be set up against anyone, except a hypothecary creditor who demands surrender of a moveable under article 2770, and it gives a right to follow in the case of involuntary dispossession. Article 1592 provides that the detention may be of property, and not just of a thing as under the *Civil Code of Lower Canada*, with the consequence, once again, that a personal right can generate a real right. Similarly, the lessee's entitlement to use property appears to remain, under article 1851, a personal right; the lessee may, according to articles 912, 921, 1858 and 1863, therefore compel the lessor to protect his or her rights. But article 1887 provides that a registered lease may be set up against a subsequent acquirer, and therefore the lease has a character of reality independent of the fact that the personal right itself may be owned. Is the lessee's claim a mixed right by virtue of article 1887, or is it a real right by virtue of the fact that it is also a personal right (a claim) against the lessor?

These two examples suggest that even though personal rights may be owned, traditional distinctions between ordinary personal rights, *jus ad rem trans personam* and real rights continue to exist in a number of codal purposes. Far from accomodating the challenge to the classical theory posed by the different kinds of mixed rights — reinforced personal rights, defective real rights — the reformulation of ownership in article 947 compounds the theoretical problem. In short, the procedural operation of the regime of "mixed" rights is not congruent with its substantive content.

37. One of the most interesting of the new constructions in the *Civil Code of Québec* is the hypothec. At one level, the Code seems to respond to the logic of most modern regimes of secured financing: it provides for a consolidation of creditors' recourses, and it reformulates all conventional security devices as variations on a single theme — the hypothec.[186] But these modern regimes elsewhere also provide that the deployment of title to property as a security device — by means of, for example, instalment sales, long-term leases, consignments, assignments of receivables — is subject to the same rules or regulatory system as ordinary security devices. This result is achieved by means of a general deeming clause which seeks to determine what the substance of the transaction amounts to, regardless of what the parties might subjectively have said they intended. The *Civil Code of Québec*, by contrast, attempts to generate coherence in the regime of security on property not by specifying a uniform set of formalities for, and the consequences of, constituting a security right, but rather by imposing uniformity in the legal nature of the hypothec.[187] Thus, article 2660

[186]See R.A. Macdonald, "The Counter-Reformation of Secured Transactions Law in Quebec" (1991) 19 Can. Bus. L.J. 239 at 279ff.

[187]Contrary to the recommendations of the Civil Code Revision Office, the Canadian Bankers Association, the Bar, and several other groups, however, the *Civil Code of Québec* contains no such

characterizes the hypothec as a real right, presumably in order to account for the right to follow and the right of preference accorded to it.

This characterization of the hypothec as a real right was carried forward from article 2016 C.C.L.C.[188] and was likely adopted because of the belief that the essence of security on property can only be expressed by the notion of an "accessory real right". Unfortunately, however, this characterization has always been inexact, and in the *Civil Code of Québec* it is radically deficient. By contrast with the *Civil Code of Lower Canada*, the new Code explicitly permits a hypothec to be taken over future property, indeterminate property, property not yet in existence, universalities of corporeal property, book debts, computer entries, intellectual property and intangibles such as goodwill. To take specific examples, article 2710 renders it possible to hypothecate a claim, and article 2666 provides that universalities may be hypothecated as such. According to the classical theory, it is impossible to claim a present right of ownership or even a real right in any of the above property.[189]

Surprisingly, it appears that the legislature has chosen to abandon the basic conceptual classifications of the law of property in order to achieve a false symmetry in the characterization of all hypothecs. But this is at best a Faustian bargain, for at the point of opposability and enforcement, this false symmetry shows its limitations. Two examples reveal the difficulty. Unlike the case where a hypothec charges corporeal property which can be seized and sold, a hypothec on a claim necessarily presupposes the presence of a third party — the account debtor. Moreover, the real value of the security in the creditor's eyes is not the realization value of the incorporeal should it be brought to a judicial sale or enforced through one of the four hypothecary recourses under article 2748 *et seq.*; it is the value of the unpaid account debt. The Code recognizes as much by providing, in article 2743, that from the moment of hypothecation, the creditor may enforce the hypothec and collect the revenues produced by the hypothecated claims, even if the amount collected exceeds the amount then due under the obligation secured by the hypothec.[190]

A similar intellectual confusion results from the characterization of a hypothec on a universality of moveable property as giving rise to a real right. In the case of immoveables, article 2694 requires that charged property falling within the universality be specifically identified, and article 2949 requires that the hypothec be registered against each individually. Here the traditional logic of real rights is maintained. But under article 2698, hypothecs on universalities of moveables need only describe the universality. Whether or not any parti-

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deeming provision — be it by means of a "presumption of hypothec", an "intention of the parties" rule or a "substance of the transaction" rule. See generally Macdonald, *supra* note 16.

[188]See P.-B. Mignault, *Le droit civil canadien*, vol. 9 (Montreal: Wilson & Lafleur, 1916) at 9, for the view that hypothecs always create a real right in the property charged.

[189]This suggests either that a real right may lie in a personal right, or that an ordinary claim is a real right, or that the panoply of rights the hypothec gives to a creditor cannot logically be understood as comprising a traditional real right. See Macdonald, *supra* note 125.

[190]See R.A. Macdonald & A. Stuhec, *The Law of Security on Property* (McGill University course notes, 1994) Topic 6 [unpublished].

cular asset is charged cannot be determined until the moment of enforcement, a logic of rights at odds with the conception of a real right in an identifiable thing.

There was, of course, no inescapable reason for the legislature to have specified that the hypothec constitutes a real right. Since the primary consequences that would flow from characterizing a hypothec as a real right — access to a special set of enforcement recourses, opposability under specified conditions, a unique conception of the right of preference — are each elaborated in detail (with their necessary qualifications and attenuations to account for the diversity of property that may be hypothecated) in the hypothecary regime itself, the characterization is superfluous.[191] Nevertheless, it can be inferred that the legislature's commitment to achieving a consolidation of security devices by means of definitional specification is one of the major reasons why the definition of ownership embraces both things and claims.

38. The two previous examples of attempts in the *Civil Code of Québec* to reconcile materialist (property as thing) and immaterialist (property as value) conceptions of property are, fundamentally, extensions of known problems with the theory of real rights. The various instances of the hybrids between personal and real rights can be re-characterized as a new species of mixed right without the need to define them as either personal or real rights. The hypothec can be extended, as an integrated concept of security device, to claims and universalities of property without the need to define it as a real right. In each case it is only necessary to specify the extent of the enforceability of the right, its opposability, and the recourses to which it gives rise — be these mixed security rights, mixed *jus ad rem*, mixed personal services rights, or conditional, eventual and future rights. In other words, the language of rights can still be deployed (although with some adjustment) to encompass the full range of interpersonal relationships that these patrimonial institutions presuppose.

39. Such a strategy is not, however, possible in relation to the tri-partite relationships comprising the trust.[192] However much one attempts to specify the jural relationships present in a trust, the exercise presupposes concepts other than classical legal rights. The trust is created by a settlor through the transfer of property from his or her own patrimony to another patrimony which is appropriated to the purposes established by the trust instrument.[193] It follows that any property so transferred is, from the moment of such appropriation, no longer part of the patrimony of the settlor. The *corpus* of the trust constitutes a patrimony which is "autonomous and distinct" from that of the settlor, trustee and beneficiary.[194]

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[191]Some have argued that all legal definitions are of this nature. See *e.g.* A. Ross, "Tû-tû" (1957) 70 Harv. L. Rev. 812. For present purposes, the argument is simply that patently false definitional specification should be avoided, especially when the legal regime being enacted is so different from any other that its detail has to be elaborated in any event.

[192]See the two texts by Brierley, *supra* note 104; Brierley, *supra* note 31. See also R.A. Macdonald, "The Trust and Family Breakdown" in *Colloque sur les finances de la famille lors d'un divorce* (Montreal: Institut Wilson & Lafleur, 1994).

[193]Art. 1260.

[194]Art. 1261.

The most telling definitional specification of the nature of the trust is contained in the last clause of article 1261: neither the settlor, trustee nor beneficiary has any real right in this patrimony. If the institution implies no real rights, can the various trust relationships be characterized as involving personal rights? Traditionally, a personal right could only exist with respect to a person, which the trust manifestly is not: the implication of articles 2, paragraph 2 and 1257, paragraph 2 is that the trust does not have legal personality.[195] *A fortiori*, given article 3, the relationship in question cannot be a personality right, nor can it be an intellectual right. It follows that, whatever may be the relationship between the beneficiary and the trust property, or between the settlor and the trust property, it is not a patrimonial right heretofore known to the Civil law.[196] On the other hand, the entitlement of the revenue and capital beneficiaries is clearly a species of property under articles 910 and 1254.

In order to assess the legal nature of these beneficial entitlements and the character of the trustee's relationship to the trust property, it is helpful to review the other basic elements of the trust relationship as set out in article 1260 *et seq.* First, because a trust is normally established upon the acceptance of the trustee (except where the court names a trustee under article 1277), and because articles 1264 and 1265 provide that this acceptance is sufficient to divest the settlor of ownership and to establish the right of the beneficiary, it follows that it is not necessary that the beneficiary of the trust actually be in existence for the trust to be constituted.[197] Second, according to article 1278, the administration of the trust property is exclusively vested in the trustee, and titles are in the trustee's name. Third, article 1282 contemplates that the trustee or the settlor may exercise a power of appointment even where only a class of persons is identified in the trust deed. Fourth, the trust cannot be dismissed as a temporary (even if lengthy) limitation of the residual rights of the settlor, who would thus retain a residual ownership emolument, since article 1273 provides that at least certain types of trusts may be perpetual.[198] Fifth, the various roles in a trust may be cumulated. Article 1275 provides that either the settlor or the beneficiary may be a co-trustee as long as there is one trustee who is neither settlor nor beneficiary. In addition, article 1281 contemplates that the settlor may be a beneficiary — even a sole beneficiary. It follows that while the trust arrangement envisions that there are three distinct roles, the Code expressly provides that there need only be two persons involved: the settlor *cum* sole beneficiary (and even co-trustee) and an independent trustee.

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[195]Some commentators argue that the trust has legal personality (is a *sujet de droit*). While this approach has no explicit textual support, it does permit the various relationships between trustee, settlor and beneficiary to be cast in the language of powers of administration and entitlements familiar to corporate law. See the articles by Cantin Cumyn, *supra* note 31.

[196]The Code does, however, use the word "right" to describe these relationships. See *e.g.* arts. 1272, 1279, 1281, 1284, 1285, 1286, 1289, 1296; but compare art. 1297 where the Code uses the expression "entitlement".

[197]Subject to the qualification that where the trust is constituted by gratuitous act, the beneficiary must be in existence when his or her right opens (art. 1297).

[198]Subject, however, to certain cases where the trust lapses or is terminated under article 1297, para. 2.

40. Given these foundations, it is apparent that the defining feature of the trust is not the character of the juridical act by which it is constituted, but rather is the three roles that it envisions — settlor, beneficiary and trustee. That is, the trust is, above all else, a status relationship constituted in order to pursue the purposes as set out in the trust instrument, in a manner which separates the entitlement to the benefits produced by the trust property (conceived as a fund) from the entitlement and duty to administer that property. Subject to a laconic codal regulation of its underlying structural features, the trust can largely be crafted to suit the purposes of the settlor and the beneficiary. For example, although article 1278 provides that the powers of the trustee are, in principle, those of the administrator of the property of another with full administration, article 1299 permits these powers to be varied in the trust instrument. It is possible, therefore, to relieve the trustee of a number of the obligations which are imposed under articles 1308 to 1370.[199] The entitlement of the settlor (as settlor) is, according to article 1297, paragraph 2, simply to receive the residual benefit of the trust upon its termination should no other provision have been made, and according to articles 1291 and 1292, to police the carrying out of the trust purposes. The entitlement of the beneficiaries is, according to articles 1290 to 1292, to police the administration of the trust and according to articles 1280 to 1284, to receive what is due according to the law or the trust instrument.

To conclude, the trust is designed as a facilitative institution with very few imperative rules. Those that are imperative speak primarily to the means of its establishment, policing and termination, and not to the substance of the rights which may be allocated among the settlor, beneficiary and trustee. However restrictive the general attitude of the Civil law to the prerogatives that may attach to property as thing — an attitude reflected in notions that there are a *numerus clausus* of real rights, and that the essential attributes of real rights cannot easily be modified by agreement — this approach is not carried forward into the trust. If anything, the creativity one associates with the content of private contracts seems to be reflected in the regulation of the trust. One might even suggest that the trust permits persons to create a parallel regime of property entitlements that operates more or less independently of the scheme of personal rights and real rights elaborated by the rest of the *Civil Code of Québec*. The trust, in effect, doubles the number of property relationships known to the Civil law, and it does so without reference to whether ownership may be asserted over things (*choses*) or over property (*biens*) generally.

41. Like the effort to legislate formally a general theory of patrimony, the attempt to recast the distinction between real rights and personal rights also seems designed to save appearances.[200] Even though article 947 provides that ownership is a right that attaches to property — both things and incorporeals — article 911 suggests that ownership is not a unique type of right, but remains,

[199]Some rules are, however, of public order. An example is that set out in article 1332, requiring administrators of the property of another to act by majority. Thus, while a settlor may be named a co-trustee, the trust instrument cannot provide that in case of disagreement between the settlor and another co-trustee or co-trustees, the settlor's view prevails.

[200]See *e.g. Commentaires*, *supra* note 5 at 525-28, 534-35.

as in classical theory, a species of real right. What is more, other articles of the Code maintain the traditional distinctions between real rights and personal rights: rules of possession, acquisitive prescription, publicity of rights and so on. Through such a strategem (a strategem not unlike that which led under the former law to the characterization of the trustee's rights as a *sui generis* ownership title) the *Civil Code of Québec* seeks to maintain the concept of ownership as the central property notion of the Civil law. But the very exercise puts into question the usefulness of saving the appearances in the first place. Given the possibility of creating an ownerless trust, what is the theoretical and practical utility of expanding the concept of ownership so as to comprise incorporeal property?

The Minister's commentaries suggest a possible answer. It may have been that the legislature sought to recognize the increasing importance both of incorporeal property and the notion of funds (juridical universalities less than the classical patrimony) in modern society. For example, by defining ownership as a right bearing on property, it is possible to argue not only that claims may be owned, but also that intellectual rights,[201] and more radically, that personality rights having a patrimonial character, may also be owned. This, of course, is consistent with the approach taken by Ginossar, and developed more recently by Hage-Chahine.[202] But if the purpose is to promote a unified conception of ownership, then one cannot at the same time characterize ownership as a real right. As noted, the absence of any reference to Ginossar in the Minister's commentaries, and the deployment of traditional vocabulary to describe the secondary effects of ownership suggest that the elision was not the result of a conscious effort to redefine basic concepts of property, but rather merely a linguistic device undertaken to preserve the coherence of traditional property concepts elsewhere in the Code.

If such a recasting of ownership were undertaken primarily for aesthetic purposes, the principal culprit would seem to be the new concept of hypothec. The logic of the new definition proceeds as follows. A hypothec is defined as a real right by article 2660. According to articles 2665 and 2666, a hypothec may charge both corporeal property and claims, and may charge individual property or all the property in a universality. Since, according to classical theory, a real right may not be claimed in either of these types of property, the hypothec that charges them cannot be a real right unless the classical theory is modified. Since an accessory real right is thought, like a real servitude, not to be a real right of enjoyment, but a charge on a thing reducing the economic value of the owner's entitlement, the property subject to a hypothec must be capable of being owned, and the hypothec can only be granted by a person having the capacity to alienate the property.[203] Consequently, since claims can be hypothecated, claims must be susceptible of ownership.[204] But to deduce the

[201]See Gendreau, *supra* note 173 at 102-108.

[202]See Ginossar, *supra* note 29; Hage-Chahine, *supra* note 29.

[203]See art. 2681. Surprisingly, however, article 2670 provides that a hypothec may only charge property when the grantor acquires the "right" hypothecated.

[204]A similar conclusion about the logic of a unified regime of hypothecs driving the reformu-

character of ownership in this way is to get the logic of a civil code exactly backwards. The specific application of a particular concept should not determine the definition of the concept when to do so would compromise the essential purposes for which the concept exists.

42. In view of the above observations, ought it to be concluded that no legally significant consequences flow from the redefinition of ownership in the new Code? To put the matter slightly differently, would there be any loss were courts and commentators to conclude that the use of the term *property* rather than *thing* in article 947, and *owner* rather than *titulary* in article 1784, for example, are simply mistaken? To answer these questions, it is necessary to recur to the symbolism of property. Despite a doctrinal tradition that conflates the notion with things and situates ownership as simply the most important species of real right, the concept has a psycho-social importance that transcends its legal characterization. While the new Code seems in part to recognize this symbolism by extending the concept to incorporeal as well as corporeal property, in at least two respects the *Civil Code of Québec* undermines its own achievement. Perhaps less importantly, it does not carry the logic of recognition to a dissociation between ownership and real rights: once scholars begin to develop the consequences of ownership of claims, the intellectual association of ownership with other real rights will be attenuated. The real failing of the Code, however, lies in the imperfect extension of the concept to the most fundamental codal innovation, the trust: it may well be correct to proclaim that neither the settlor, beneficiary nor trustee has a real right in the trust property, but this does not account for the status of the trust patrimony during the period the trust is operative.

To resolve the definitional conundrum, one of two approaches may be taken. One may attempt to reassert, within the traditional framework of the law of property, all the diverse types of patrimonial rights. But since the turn of the century, no particular scheme of legal rights (*droits subjectifs*) has successfully accommodated the diversity of property entitlements. Indeed, as Gény recognized, the project may be a practical impossibility.[205] Alternatively, one can, like Ginossar, recognize the centrality of ownership as a symbol, dissociating it from all other types of patrimonial entitlement, and at the same time acknowledge the diversity of its objects. Such a strategy has the advantage of better accomodating both the concept of the hypothec and the new set of roles flowing from the trust. The hypothec becomes the accessory pendant of ownership: fundamental in its symbolism and diverse in its objects. The entitlements of the beneficiary of a trust become another species of ownership in the same manner that the entitlement of the creditor of an obligation is a new species of ownership. This approach permits the doctrinal development of a new generic category of property relationship — that of an "interest" — and this category, by changing the organizing vocabulary of the law, better accomodates the now recognized extreme diversity of patrimonial entitlements otherwise sitting awkwardly in the classical framework. Refusing to define these new entitlements, but leaving

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lation of basic property concepts can be reached in connection with the hypothec over a universality of moveable property.

[205] *Supra* note 23.

them to doctrinal development, might well lead to greater attention being devoted to the more embracing, and in the modern world, more analytically important, investigation — that of the weight of patrimonial entitlements and their connection to the intensity of interpersonal relationships.[206]

Conclusion: Reconciling the Word and the Deed

43. This review of the fate under the *Civil Code of Québec* of two of the central symbols of property in the Civil law tradition puts into relief a number of perils of codal reform. But despite its apparent focus on doctrinal or substantive questions, the object of this exercise has not been to add yet another voice to the chorus of those who would ask the National Assembly to reform the newly enacted law.[207] Whatever else it may be, a civil code is not a regulation or an order-in-council that can be peremptorily and continually modified. Nor, despite the complaints about the framing of the law, has this text been concerned to characterize stylistic, linguistic and first-order conceptual incoherence as fundamental flaws in the new Code.[208] The processes of last-minute tinkering and political log-rolling that are inevitably present in late twentieth century law-making necessarily lead to confusions of vocabulary and definition. Nor, finally, has this essay been primarily concerned with methodological issues, such as the respective role of courts (*la jurisprudence*) and commentators (*la doctrine*) in making sense of the new Code.[209] There is no doubt, however, that the Code does have a scholastic tenor that will change the character of future doctrinal commentary, and a judicializing motif that will co-opt the judiciary into a more overtly legislative role.

My organizing theme has been both more instrumental and more symbolic. It is this: How, faced with a substantial effort of law reform (ostensibly the product of some forty years of collective reflection),[210] whose political purposes are obscure, and whose intellectual purposes are either contradictory or uncertain but nevertheless always strongly expressed, ought Quebec jurists — judges, advocates and notaries, law professors — to conceive of and to respond to the tasks which now confront them?[211]

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[206]This is, in a first attempt, the exercise undertaken by F. Hage-Chahine (*supra* note 29).

[207]I confess to having engaged in this largely futile exercise myself. See "The Counter-Reformation of Secured Transactions Law in Quebec", *supra* note 186; "Change of Terminology? Change of Law?" *supra* note 125; "Faut-il s'assurer d'appeler un chat un chat ?" *supra* note 16.

[208]For a critique of the new Code on these bases, see P. Legrand Jr., "Civil Law Codification in Quebec: A Case of Decivilianization" (1993) 1 Eur. Rev. Pr. L. 574. On questions of linguistic usage particularly, see J.E.C. Brierley, "Les langues du code civil" in *Le nouveau Code civil : Interprétation et application*, *supra* note 11, 129.

[209]Some excellent studies of this nature have already been published. See *e.g.* Bisson, *supra* note 12; A.-F. Bisson, "Dualité de systèmes et codification civiliste" in *Conférences sur le nouveau Code civil du Québec*, *supra* note 9, 39; Brierley, *supra* note 12; and the entire collection of essays in *Le nouveau Code civil : Interprétation et application*, *ibid.*

[210]On the tenuous intellectual links between the *Civil Code of Québec* and the work of the Civil Code Revision Office, see Brierley & Macdonald, eds., *supra* note 3, paras. 73-78.

[211]A thoughtful perspective on the complexity of this question may be found in the three essays published under the title "Les premières années d'interprétation — expériences et prospectives" in *Le nouveau Code civil : Interprétation et application*, *supra* note 11. See, in particular, A. Morel,

Implicitly in this essay I have sought to illustrate that the way in which debate about the new Code has typically been carried on does not conduce to answering this question. If the effort of the legislature can be understood as fundamentally driven by the desire to save appearances — instrumentally, the appearance of a civil code as a specific juristic technique, and symbolically, the appearance of a civil code as a reflection of French legal culture in North America — so too the effort of commentators has a familiar ring of unreality.[212] There is more to legal analysis than proclaiming newly enacted norms to be good or bad law reform. Unfortunately, the arguments of progressives and traditionalists have marched in irreconcilable pairs: the latter advance the classical theses of reaction — futility, perversity and jeopardy; the former rely on the historical necessity, the out-of-touch-with-social-reality, and the imminent danger theses as intellectual counterweights.[213] None of these arguments, however, actually speaks to what should be done once a new code has been proclaimed in force. All are framed retrospectively rather than prospectively. But the various critiques and refutations do reveal that to answer the question as to whether any particular legislative initiative is good law reform or bad law reform demands an inquiry that cuts across many dimensions.[214] Most, although not all, of those jurists whose lives are centred in the academy are wont to see the quality of law reform in terms of conceptual coherence above all else.[215] Most, although once again not all, advocates and notaries, on the other hand, are much more willing to tolerate conflict if the specific outcomes of the new law can be reconciled with the needs of practice.[216] Still others, among which group one finds a high proportion of judges for whom achieving a fair resolution for a human problem framed as a legal dispute is the fundamental value, incline to evaluate law reform by how well its symbolism mediates lived understandings of justice.[217]

These first two tendencies — the dogmatic and the pragmatic — are the Scylla and the Charybdis of the reform of private law. For neither can the living law (the Deed) be constrained to follow passively the forms which the law sets for it,[218] nor can life simply go on in complete abstraction of the prescriptions

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"L'émergence du nouvel ordre juridique instauré par le Code civil du Bas-Canada (1866-1890)" in *ibid.*, 49.

[212]In this connection it bears notice that the Civil law was held out as one of the three defining features of Quebec's distinct society in the Charlottetown Accord. See Canada, *Consensus Report on the Constitution: Charlottetown (Final Text)* (Ottawa: Supply & Services Canada, 1992) at 1.

[213]See A.O. Hirschman, *The Rhetoric of Reaction: Perversity, Futility, Jeopardy* (Cambridge, Mass.: Harvard University Press, 1991) for an elaboration of these theses.

[214]See Macdonald, *supra* note 6.

[215]For discussion of this academic predeliction, see R. Gordon, "Historicism in Legal Scholarship" (1981) 90 Yale L.J. 1017 especially at 1045-56.

[216]See the comments of Pratte, *supra* note 64.

[217]For a discussion of the special perspective of the judiciary in reconciling claims of analytical coherence, sociological efficacy and moral justness, and the impact of law reform on the judicial role, see R.A. Macdonald, *Economical, Expeditious and Accessible Civil Justice through a Better Allocation of Civil Disputes: A Framework for Inquiry* (Toronto: Ontario Law Reform Commission, 1994) [forthcoming].

[218]The obligatory citation for this insight is Portalis *et al.*, "Discours préliminaire prononcé lors de la présentation du projet de la Commission du gouvernement" in P.A. Fenet, ed., *Recueil complet des travaux préparatoires du Code civil*, vol. 1 (Paris: Au dépôt, 1827) 463. For a contempo-

of the law (the Word).[219] The instrumental power of law may indeed be limited in the face of recalcitrant social practice, but its symbolic power to control the vocabulary and metaphors of this same social practice is extensive.[220] All this is to say that whether law reform is good or bad cannot be judged uniquely by whether it is coherent (or can be made coherent), nor by whether it works (or can be made to work).[221]

44. Recodification, like codification, is a special brand of law reform that, despite the suggestions of some of its artisans to the contrary,[222] is an especially symbolic endeavour.[223] And yet, even as a symbol — as a civil (or social) constitution — a new code has its limits. To characterize a code as a "projet de société" or even as the reflection of a "mouvement de société"[224] is to forget that a civil code must in the final analysis reflect, more than construct, the values of the society for which it purports to speak.[225] This deference of the private law, over the vast bulk of its domain, to the patterns and practices of everyday human interaction is necessary because the instrumental efficacy of any rule of private law (especially those rules designed to construct or modify patterns of behaviour) is tributary to the symbolic efficacy of the entire code as a social constitution, and because a society's values are not univocal. Just as the 1866 Code was required to mediate between sharply conflicting values,[226] so too is the Code of 1991.[227] This mediation can take several forms, as the *Civil Code of Lower Canada* well illustrates: a code may simply enact, in parallel, legal institutions that rest on competing principles, leaving citizens the choice to select the desired vehicle through which to pursue their purposes;[228] or a code may largely

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rary reference in which the point is comprehensively developed, see R.C. Ellickson, *Order without Law: How Neighbors Settle Disputes* (Cambridge, Mass.: Harvard University Press, 1991).

[219]One of the most enlightening sociological studies of the replication of law in lay consciousness is S.E. Merry, *Getting Justice and Getting Even: Legal Consciousness among Working-Class Americans* (Chicago: University of Chicago Press, 1990).

[220]For a discussion of the power of legal symbols, albeit in a constitutional context, see M.A. Glendon, *Rights Talk: The Impoverishment of Political Discourse* (New York: Free Press, 1991).

[221]For an enlightening discussion of how different tendencies in legal theory highlight one or other of these ambitions, see H.J. Berman, "Toward an Integrative Jurisprudence: Politics, Morality, History" (1988) 76 Calif. L. Rev. 779.

[222]See *Draft Civil Code*, *supra* note 10 at xxiii-xxix.

[223]See the symposium, *Codification : Valeurs et langage*, *supra* note 12.

[224]See *Commentaires*, *supra* note 5, front cover.

[225]Compare the papers collected in *Enjeux et valeurs d'un Code civil moderne*, *supra* note 11, with those in *Le nouveau Code civil : Interprétation et application*, *supra* note 11 and especially that of J.-M. Brisson, "Le Code civil, droit commun ?" in *ibid.*, 292. The papers in the former are in the tradition of the Code as legislation; those in the latter are in the tradition of the Code as written common law. See also P.-G. Jobin, "Chronique du droit québécois : Le nouveau code civil" [1993] Rev. trim. dr. civ. 911.

[226]See Brierley and Macdonald, eds., *supra* note 3, paras. 36-41.

[227]See Macdonald, *supra* note 2, for a discussion of how it does so.

[228]Several examples may be found in the *Civil Code of Lower Canada*: the juxtaposition of a default regime of intestate succession, resting on the concept of an inter-generational family heritage, with the concept of freedom of willing (initially deployed to favour the successoral entitlements of surviving spouses); the juxtaposition of a default regime of community property with the concept of conventional separation as to property; the juxtaposition of a traditional regime of property entitlements with a liberal regime of contracts.

withdraw from a field of private law, leaving citizens to develop their own legal regimes;[229] or a code may even contain conflicting or contradictory articles, the resolution of which requires the counsel of experience and the wisdom of judges.[230]

45. But there are at least three important respects in which the codification project of 1991 differs from that of 1866. First, in overall timbre: the *Civil Code of Québec* has a didactic and hortatory (some might even say pedagogical) character not salient in the former Code. It has often been observed that the initial codification was primarily the work of judges — of those whose daily life consisted in applying the rules of the Civil law to the competing claims of litigants.[231] However much its substance reflected the concerns of the *petite bourgeoisie*,[232] its form was directed to solving problems that were perceived to be of daily concern.[233] By contrast, the new Code is much more the work of law professors and civil servants in the legislative policy branch of the Ministry of Justice — neither of whom are normally required to reconcile juristic logic and lived experience in the resolution of quotidian legal disputes. Hence, it is perhaps not surprising that pedagogical legal definitions proliferate.

Of course, legal concepts and legal classification are inescapable;[234] but their value depends largely on how well they express lived social relations.[235] The Minister's commentaries about the definition of patrimony repeat the wisdom of the 1866 codifiers[236] and recognize exactly these difficulties with scho-

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[229]This has, until recently, been the general attitude of the private law to pecuniary relationships within the family prior to the dissolution of marriage; it has also been the general tenor of the law of contractual obligations in non-consumer matters.

[230]Two examples suffice to show how such contradiction is inherent in the codification exercise: the interpretation of article 1054, para. 1 as being either a special exception to article 1053, or an alternative basis of civil liability is not foreordained by the Code; the interpretation of articles 1546 and 1971 as an indication either that retroactive giving-in-payment clauses could (or could not) be validly inserted into deeds of hypothec also has no conclusive explanation in codal texts.

[231]See J.E.C. Brierley, "Quebec's Civil Law Codification: Viewed and Reviewed" (1968) 14 McGill L.J. 521.

[232]Traditionally, the values of the *Civil Code of Lower Canada* have been expressed in terms of some conception of the integrity of the Civil law or the fundamental characteristics of French Catholic rural society. See, for discussion, Brierley & Macdonald, eds., *supra* note 3, paras. 61-63. More recently a class analysis of the 1866 Code has begun to emerge. See *e.g.* B. Young, *George-Etienne Cartier: Montreal Bourgeois* (Montreal: McGill-Queen's University Press, 1981).

[233]See, in particular, the remarks of the codifiers in *Codifiers' Report*, *supra* note 75 at 8, 10:

> The inexpediency of making definitions of this class part of a code is affirmed by the Roman law, and is apparent in the criticisms which they receive from the commentators on the French code. Almost all of those specified are shewn to be inaccurate, and they are declared by Toullier to be of little practical utility.

[234]Compare the remarks of Gény, vol. 1, *supra* note 23 at 155: "[L]a division ou classification sera, en droit, un instrument principalement technique, qui fasse entrer les réalités en des cadres destinés à en préciser les contours et à rendre plus aisée et plus sûre l'adaptation de la discipline juridique à la vie."

[235]See H. Motulsky, *Réalisation méthodique du droit privé* (Paris: Sirey, 1948) at 24.

[236]See *Codifiers' Report*, *supra* note 75 at 10:

> As reasons then for their rejection, it may be stated, 1st. that they are not and cannot easily be made exact, and may therefore occasion doubts and difficulties; 2nd. they are not complete, as they do not include mixed contracts, contracts principal and accessory,

lastic definitions.[237] And yet, the *Civil Code of Québec* is replete with legal concepts originating in scholastic definition more appropriate to the doctrinal mission.[238]

46. A second difference between the 1866 and 1991 Codes — the neologic vocabulary of the latter — can be traced to their ostensible juridical purposes. The nineteenth century exercise was intended as a codification above all else, not as an exercise of law reform: notwithstanding the codifiers' authority to propose modifications to the existing law, reformulation (the container) rather than reform (the contents) was the intellectual framework adopted.[239] Absent detailed evidence about whether the Code changed the practice of either lawyers, notaries and judges or the daily routine of citizens, one can only assume that the substantive intent was in fact realized. The new Code, by contrast, has been explicitly justified on the basis of a pressing need to reform the law.[240] The needed reform was threefold: sociological — closing the gap between codal rules and lived experience; methodological — consolidation and rationalization of conflicting currents in judicial interpretation; symbolic — integrating extra-codal legislation so as to reassert the centrality of the Civil Code as text. None of these, in and of themselves, justify global recodification. On the one hand, rarely do new codes embody institutions that amend the Civil law much beyond the position to which judicial interpretation, legislative amendment within or outside the Code, or the developments of practice had already arrived. On the other hand, there is no evidence of any great social clamour for general recodification of the private law.

Nevertheless, because over the past decades a variety of reforms in relation to the three or four central themes of a civil code (What is a person? What is a family? What is property? How may it be deployed? How free should contract be? How central is fault to civil liability?) were thought necessary, recodification rather than incremental readjustment could be justified. And even if the project itself has had at least three generations with quite different objectives — an initial attempt in the 1950s, based on the French precedent, to re-centre the Code so as to preserve its traditional values; a second attempt in the 1960s and

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contracts subject by law to certain forms and those not so, and other distinctions equally well founded; 3rd. they are of no practical utility even if rendered exact and complete. Moreover, they belong to a class of subjects which, by a sound philosophical adjustment, ought rather to be committed to the learning of the courts, than confined within the inflexible terms of positive legislation. The only definitions which should be adopted, are those which are imperative and sacramental, and those which involve some rule of law, or are so inseparable from a particular rule, that by their omission it would become ineffectual or obscure.

[237]See *Commentaires*, *supra* note 5, discussing article 2 of the *Civil Code of Québec*:

> Il n'a pas semblé utile de définir la notion de patrimoine; l'absence d'une telle définition dans le droit antérieur n'a pas soulevé de difficultés, et, par ailleurs, cette notion constitue une réalité complexe, difficile à exprimer dans une définition simple qui répondrait à toutes les questions théoriques.

[238]The hazards of legal definition, even in the doctrinal context of a private law dictionary, are brilliantly elaborated in the study by N. Kasirer, "Dire ou définir le droit?" (1994) 28 R.J.T. 141.

[239]On the mandate of the Commission, see Brierley & Macdonald, eds., *supra* note 3, paras. 24-32.

[240]See Crépeau, "Civil Code Revision in Quebec", *supra* note 10.

1970s to deploy the Code instrumentally in the service of the post-Quiet Revolution Quebec; and a third attempt in the 1980s and 1990s to give the Civil Code a symbolic currency for a new Quebec — as a project its achievement became irresistible. These three elements — preservation and purification of a heritage, technical rationalization and modernization, recognition and legitimation of a social project — make specific demands on the legislator. One cannot rely on a changing social function of an unchanged legal norm to reconcile practice and text or to satisfy expectations nurtured by the political process.[241] The organization, presentation and vocabulary of the *Civil Code of Québec* must be novel, even in those cases where its substance is not.[242]

47. Finally, the two codes differ in their conceptions of the foundation of private law. Whatever may have been its ancillary effects, the codification of 1866 sought to provide facilitative rules and institutions within which citizens could live their own normative lives more or less independently of the institutions of the political State. Neither administrative bodies — public curators, consumer protection offices, adoption agencies — nor the courts were seen to be fundamental to the private law. In their place, a variety of normative institutions — the church, the community, the family, even the market — each reflecting an overlapping but distinct legal order, were believed to provide the essential framework of daily life.[243] The project of 1991 is, by contrast to the explicitly pluralistic conception of the 1866 Code, a true reflection of what has come to be known as legal centralism. Law is fundamentally the prerogative of the State. It is the explicit creation of written rules generated by an authorized "legislator". Its scope is unlimited, and it can only be authoritatively interpreted and applied by the official institutions of the State.[244]

Given this ideology that even the private law is the child of the political process, and that no field of law (from the intimate decisions about the names of spouses and children to the global decisions about the definition of property) is exempt from its regulation, it is hardly surprising that the pitch of codal rules has become much more detailed. Once the enterprise of private law is seen principally as a means of social control, the degree of specificity required to impose the required control is heightened. In the *Civil Code of Québec*, much more so than in the 1866 Code, "general principles pregnant with consequences" have been abandoned in favour of regulatory ordinances directed to specific situations. Necessarily, and even in the absence of a conscious political choice to replace the existing social institutions that wield decision-making authority with the courts, a code, the text of which purports to announce solutions to legal problems rather than lines of inquiry for conceiving these problems, will make

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[241]See, for a challenging elaboration of this feature of codified private law, K. Renner, *The Institutions of Private Law and Their Social Function*, trans. O. Kahn-Freund (London: Routledge & Kegan Paul, 1949).

[242]See the discussion in Brierley, *supra* note 208.

[243]For a discussion of this view of the private law, see Macdonald, *supra* note 2, paras. 24-56.

[244]For a discussion of alternative conceptions of private law, even in modern societies, see R.A. Macdonald, "Recognizing and Legitimating Aboriginal Justice: Implications for a Reconstruction of Non-Aboriginal Legal Systems in Canada" in Royal Commission on Aboriginal Peoples, *Aboriginal Peoples and the Justice System* (Ottawa: Supply & Services Canada, 1993) at 232.

an application to the court the primary recourse for resolving interpersonal conflict.[245] That the new Code should explicitly reinforce such a tendency by enumerating a plethora of instances where any disagreement is subject to judicial mediation, is merely the logical concomitant of a statist conception of private law.[246]

48. How then do these three dominant characteristics of the *Civil Code of Québec* — its pedagogical timbre; its neological vocabulary; and its statist and judicialized forms — bear on the tasks now confronting jurists? They change technique; but they do not change objectives. As much as jurists want to believe that the Code itself is the dominant legal artifact of modern society, their day-to-day routine belies the belief. After all, codification is a wager that it is possible to use a non-technical language, cast at a level of abstraction so as to have a degree of permanence, to give a structure to legal argument that nevertheless permits life to continue as if it did not exist.

In respect of a recodification, and especially in respect of a recodification which in part is designed to eliminate conceptual confusion, this underlying objective rarely can be accomodated by taking an absolute position on one side or another of a doctrinal controversy. This is because doctrinal controversy — be it between objectivist and subjectivist conceptions of patrimony, or between materialist or immaterialist characterizations of rights in things — is not simply the product of the proclivity of scholars to argue about definitions. It is also a representation of, and surrogate for, other more enduring conflicts. These conflicts — whether epistemological or ontological — are endemic to social life. No code can resolve them, for they are generated, articulated and disputed in all facets of human interaction. How well a civil code permits jurists to conceive and to reconceive law's symbols in a manner that is both responsive to and educative of this everyday activity, and that ultimately effaces reference to a specific text as the defining characteristic of private law, is the true measure of its success.

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[245]For an examination of the effectiveness of such a strategy, see Macdonald, *supra* note 6.
[246]This is one of the themes addressed in Legrand, *supra* note 208.