THE NEW QUEBEC CIVIL CODE AND RECENT FEDERAL LAW REFORM PROPOSALS: REHABILITATING COMMERCIAL LAW IN QUEBEC?

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1. INTRODUCTION

When the history of Quebec commercial law is written for the 100th Annual Workshop on Commercial and Consumer Law in 2070, the early 1990s will surely rate mention as a period of substantial transformation — and this for reasons having little to do with the Constitution. To begin, the Civil Code of Lower Canada (including its Book Fourth: Commercial Law), which has formed the most important part of the private law of Quebec since 1866, will have been replaced by a new Civil Code of Québec (hereafter Bill 125).1 This revised Civil Code incorporates several new features and departs in significant ways from its predecessor, especially in relation to its treatment of matters which, broadly speaking, can be called commercial law.2 Moreover, significant aspects of federal commercial law — especially legislation relating to banking, bills of exchange, bankruptcy and interest — were under review.3 After a century of decrying (without much

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1 This is a revised version of a paper delivered by the authors at the 21st Annual Workshop on Commercial and Consumer Law held at the Faculty of Law, University of Toronto, on October 25-26, 1991, as contributors to a Symposium on “Can Canadian Commercial Law Be Rehabilitated?”

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1 Bill 125, Civil Code of Québec, 1st Sess., 34th Leg. Qué., 1990 (enacted as Civil Code of Québec, S.Q. 1991, c. 64, not yet in force). At the time of writing, the Ministry of Justice indicates that some revision and renumbering may take place and that the statutory citation may consequently be altered.


3 See, the papers in this symposium by Professors Waldron and Ziegel: M.A. Waldron, “Can Canadian Commercial Law Be Rehabilitated? A Question of Interest”, supra,
sympathy or understanding from their common law confrères and consœurs) the misfit between federal commercial law statutes and the general principles of the civil law, Quebec commercial lawyers witnessed in the 1980s the arrival of new allies. With the enactment of Personal Property Security Act regimes, many common lawyers at last began to see and appreciate the difficulties created by systemic conflict between provincial and federal law (even though these new conflicts were trivial compared to those lived with for decades in Quebec).\(^4\)

This brief paper seeks to situate the above two developments within the more general theme suggested by the title to this panel: the rehabilitation of Canadian commercial law. We review, in Section II, the theory currently underlying Quebec commercial law and discuss modifications to that theory seemingly reflected in Bill 125. We then retrace, in Section III, by way of illustration only, four specific areas where, over the years, federal legislation has produced a misfit between divergent Canadian legal traditions. Throughout, we take the position that the metaphor of rehabilitation is a descriptively inaccurate understanding of the current state of commercial law in Quebec, and (whatever may be the case federally) a normatively undesirable way of characterizing the agenda of commercial law reform in that jurisdiction.

II. QUEBEC COMMERCIAL LAW

As a Quebec jurist, when one thinks of the civil law, and the Civil Code in particular, one does not immediately think of commercial law. There are a number of reasons for this. One is the influence of European models. Several civilian jurisdictions, including the one Quebec followed most closely in its private law codification (France) consolidated their commercial laws not in the Civil Code, but in a separate Commercial Code to be administered by separate commercial courts.\(^5\) While the codifiers of the 1866 Civil Code of Lower Canada clearly rejected the dualist

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4 See, for a most recent discussion, the paper in this symposium by Professor Cuming: R.C.C. Cuming, "The Position Paper on Revised Bank Act Security: Rehabilitation of Canadian Personal Property Security Law or Curing the Illness by Killing the Patient?", supra, p. 336.

French model of a Commercial Code and commercial courts, they did not, on the other hand, establish a unitary or fused regime of private law such as that found in England. Not only did they maintain the specificity of certain aspects of commercial law by compiling a distinct Book Fourth of the Code, explicitly entitled “Commercial Law”, they also set out within the first three books of the Code a variety of specific rules applicable to “commercial transactions” which differed from those generally applicable to “civil matters”.  

Another reason is that the civil law as such is typically conceived of as a much less commercially oriented system of private law than its common law counterpart. Every Western legal system confronts the problem of reconciling the legal rules designed for the events and transactions of everyday life with the needs and practices of merchants and traders. Civil law jurists generally characterize the differences between these regimes by reference to their objectives: civil operations between individuals are those where parties seek to acquire value in order to conserve or consume it; commercial operations are those where parties seek to transform, enhance and dispose of the value acquired for profit. Hence, the civil law was seen primarily as the law of landed wealth and its titularies; commercial law was the law of circulating moveable wealth. A flavour of the essentially “non-commercial” character of the civil law is evident even in its basic theory of contracts. For the common law, the commercial bargain is the paradigm contractual relationship, and some notion of consideration is the criterion for judicial enforceability. The civil law, by contrast, is essentially voluntarist and enforces consensually based agreements such as unilateral promises and gratuitous contracts, whether or not they have a commercial element. In fact, the Civil

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Nous regardons ainsi le principe de consensualité des contrats comme la clé de voute de tout système de droit moderne. Or il est pour le moins douteux qu’un tel principe soit reconnu par le droit anglais; la doctrine de la considération nous permet de voir comment un système répondant aux exigences du monde moderne peut être bâti sur une toute autre idée que le principe solus consensus obligat.
Code of Lower Canada itself treated certain nominate contracts, such as gift (art. 776), deposit (art. 1794) and loan (art. 1763) as gratuitous.9

Nevertheless, by contrast with European civil law systems, Quebec does not have an autonomous regime of commercial law.10 Principles of commercial law clearly form part of the general civil law of Quebec, and both are administered by the same courts. In other words, despite suggestions to the contrary by certain commentators,11 in the 1866 Civil Code of Lower Canada, commercial law was seen to comprise a sub-set of Quebec civil law, which itself reflected a significant commercialization of its foundational principles of property and obligations. The commercialization of the civil law — more in line with the common law model — it will be argued below, is even more extensive in Bill 125.

A. The 1866 Civil Code of Lower Canada and Commercial Law

The Codifiers were given the task of assembling both the civil and commercial law of Lower Canada in a single document.12 The actual shape of the resulting Code was influenced by several factors: the ambition to follow the form of the Napoleonic civil law codification; the desire to produce a corpus of commercially viable substantive rules; and the impending Canadian Confederation. The first two of these factors influenced the design of the entire Code, while the third augured against the drafting of a separate Commercial Code, and in favour of assembling in a separate fourth Book certain key commercial contracts thought least likely to remain within provincial jurisdiction.

In 1866 some still thought it desirable to codify all the rules relating to commercial law, including even those relating to joint-stock companies, banks, insurance operations, negotiable instruments and security devices. However, the Codifiers recognized

9 Parties can, of course, always agree to pay a depositary or lender for his or her services but the contract created would be an innominate one governed by the general rules in the Code and not a special or nominate contract governed by the particular codal provisions applicable to that contract.
12 See the Act establishing the Codification Commission, 1857 (L.C.), c. 43, s. 4; and the Seventh Report of the Codification Commission, (1864).
the impossibility of such a task, given the absence of foreign models from which analogies for Quebec civil law could be drawn. For this reason, even in 1866, a large body of commercial law remained outside the Code to be regulated by special statutes. This was true not only of matters such as banking, railways, canals and insolvency which were later to be assigned to federal jurisdiction, but also of classically s. 92 matters such as business corporations, bills of lading, warehouse and cove receipts, and the like.

So far as the Code itself is concerned, four complementary strategies were followed. Most importantly, the fundamental rules of the civil and commercial law of contracts were mutually adapted in order to form a more or less uniform body of law in Books First to Third. As a result, the “droit commun” of the Code occasionally reflects a commercial orientation not found in other European Civil Codes. Second, scattered throughout Books First to Third are various articles which create exceptions to the general Codal regime and which apply either to “commercial matters generally” (e.g., art. 2268) or to “traders and merchants” (e.g., art. 1005). Third, among the nominate contracts of Book Third, various commercial variations were included as part of the general regime of civil law. Finally, a few commercial operations and contracts which at the time were not considered to have a civil law equivalent were grouped together in Book Fourth — Commercial Law. Article 2278 makes it clear that Book Fourth contains only certain commercial laws and does not purport to provide a codification of commercial law in general.

Quite apart from those elements of modern commercial law in Quebec which now fall under federal jurisdiction, there exists, and always has existed, an important body of statutory law and uncodified commercial practice as well as a substantial jurisprud—

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13 This is true notably in respect of the rules relating to capacity, lesion, interpretation, consensualism and enforcement in the general law of contracts, and to specific features such as consensualism in transatory contracts such as sale. See further, infra, p. 387.
15 See in addition arts. 85(3), 179 (now repealed), 323, 423, 1005, 1489, 1979e, 2200(5), and 2268, and infra, p. 389.
16 The most important of these related to sale, mandate and partnership. See, infra, pp. 389-90.
17 Book Fourth initially contained only the rules relating to Bills of Exchange and Maritime Law, including marine carriage, insurance and security, all of which were thought, by their nature, to be commercial rather than civil operations. See infra, pp. 391-2.
dence and doctrine on Quebec commercial law. Most such statutes deal with institutions — corporations, trust companies, co-operatives, credit unions, partnerships — although some deal with specific commercial transactions. In addition to these extra-Codal written sources, several articles of the Code make explicit reference to commercial usage and practice. In two places the reference to the role of custom is general: art. 2615 on the use of pre-Code law, and arts. 1016, 1017 and 1024 on the place of usage and practice in the interpretation of contracts. The Code also contains several explicit references to commercial usage, notably art. 1864 on commercial partnerships, art. 1978 on the pledge of moveables in commercial matters, and art. 2387 on maritime privileges.

A year after the Civil Code came into force, many of the subjects it treated were transferred to federal jurisdiction by the Constitution Act, 1867. Most of these excisions, marriage and divorce being the exception, related to commercial law. While existing provincial law was initially maintained by s. 133, over the years a number of matters, especially those treated in Book Fourth of the Civil Code of Lower Canada, became the subject of federal legislation. Indeed, the exercise of federal powers has been so extensive that today two competing intellectual conceptions of Quebec commercial law vie for ascendancy in the minds of jurists: the provincialist view, grounded in the concept of property and civil rights, as complemented by s. 133; and the federal view, grounded in the concept of federal power to manage the economy, as complemented by the doctrine of paramountcy. These competing views play out especially in the interpretation of federal legislation. Because most common lawyers (including those appointed to the Supreme Court of Canada) have not often seen the tension between these two views, Quebec commercial lawyers have long decried, and recently have come to fear, the ingérence of

18 See Companies Act, L.R.O. c. C-38; Savings and Credit Unions Act, L.R.O. c. C-4; Extra-Provincial Companies Act, L.R.O. c. C-46; Cooperatives Act, L.R.O. c. C-67.2; Companies and Partnerships Declaration Act, L.R.O. c. D-1; Mortmain Act, L.R.O. c. M-1; Companies Information Act, L.R.O. c. R-22; and Securities Act, L.R.O. c. V-1.1, for examples of the former. For transaction specific statutes see the Special Corporate Powers Act, L.R.O. c. P-16; Consumer Protection Act, L.R.O. c. P-40.1; Act Respecting Bills of Lading, Receipts and Transfers of Property in Stock, L.R.O. c. C-53.
19 Notably admiralty and bills of exchange. See infra, at pp. 398-9. See also amendments to arts. 1037, 1039 and 1162 (fraudulent preferences), art. 1149 (interest), arts. 1543, 1896 and 1896a (insolvency), and arts. 1887 and 1979 (banking).
federal commercial law into Quebec private law. This apprehension, we argue, is not without foundation.20

Despite the importance of the question "What is a commercial matter?" for determining which set of codal rules will apply to a given transaction, nowhere does the Code provide a definition of a "commercial matter". What is more, the meaning of the term has undergone a considerable evolution since 1866. As a result, the criteria of commerciality currently being deployed have been developed largely through the cases and by doctrinal exegesis from Codal usage. As noted, some articles employ the expression "commercial matter" to refer to the operation in view, regardless of who undertakes it; others focus on the person who acts rather than the act itself. While most commercial operations involve onerous contracts relating to moveable property, in recent years courts have extended the notion of "commerciality" to include some operations involving immoveables.

Traditionally, jurists in Quebec have elaborated three foundational criteria for distinguishing commercial from civil operations. These are the related ideas of circulation, of transitoriness and of speculation. The object of a commercial operation is to circulate value, through the hands of merchants, with the object of generating profit.21 At present, applying these traditional ideas to Codal texts, it can be said that there are three types of commercial operation: those which are objectively commercial (irrespective of the quality of the parties); those which are subjectively commercial (focusing on the merchant status of the parties); and those which are incidentally commercial operations (that is, those operations ancillary to the first two categories of operation).22

Over the century since codification, however, this traditional view has come under attack. First of all, a parallel definitional structure has developed, which focuses more on organic considerations than on transactional ones. The criterion of "enterprise" has been suggested by some as a better way of identifying commercial operations. This notion of enterprise — organization for speculation and profit — permits a distinction to be drawn on functional grounds (for example, between civil agriculture and

20 Infra, at pp. 398-405.
21 See Bohémier and Côté, supra, footnote 7, at pp. 38-46. See also L'Heureux, supra, footnote 7, at pp. 16-18.
agri-business, or between true artisanship and mass-manufactured artisanship) and also permits certain immovable transactions to be seen as commercial. Indeed, this conception of commerciality seems to have been picked up in Bill 125.

The evolution of the idea of a commercial matter is also evident in relation to immoveables. At codification, immoveables were not considered the object of commercial operations because, unlike moveables, immoveables cannot circulate, and because the Code sought stability in land transactions. Yet, beginning in the 1930s, the courts responded to the rapid turnover and development of immovable. At first they held that a person who speculates in immoveables could be a merchant, although the transaction itself remained civil. Then, between 1965 and 1980, the Quebec Court of Appeal gradually came to the view that even immovable transactions as such could be commercial, depending on the quality of the parties, their intentions and whether the transaction has the three characteristics of commerciality.

Several parts of the Civil Code reflect a substantial integration of civil and commercial law through the adoption, as civil law *droit commun*, of principles of the latter. On occasion, the codifiers simply took up already existing practice; on other occasions they made further “commercializing” suggestions. Together these two techniques resulted in a Civil Code whose substantive law of contracts (and whose special contracts such as sale, lease, mandate, pledge, partnership, suretyship) contained significant departures from the Code Napoleon.

Examples of the first technique can be seen in rules which denied the plea of lesion to persons of the age of majority (art. 1012), rules relating to the transfer of title in real contracts (arts. 1025 to 1027), fraudulent conveyances (arts. 1033 to 1040), principles governing the award of damages (art. 1065), penalty clauses (arts. 1131 to 1135) and evidence (art. 1206). Examples of the second are rules relating to the notion of consensualism in sale (art. 1472), sale of a thing belonging to another (arts. 1488 to 1490), the *pacte commissaire* in contracts of pledge (art. 1971), the principle of “ostensible authority” in the contract of mandate (art. 1730), and the commercialization of suretyship (art. 1929), as well as partnerships (arts. 1865 to 1891).

24 See Bohémer and Côté, supra, footnote 7, at pp. 70-5.
While, properly speaking, none of these provisions of Book Third of the Code can be considered as part of the commercial law in Quebec since they apply to all transactions, they are yet another reflection of how the Civil Code of Lower Canada approached the general topic of commercial law. They also illustrate how that Code takes a significantly different tack from its European civil law analogues by partially adopting the fusion model of the common law.

Notwithstanding the commercialization of certain principles of Quebec civil law as just discussed, there remains an important domaine of specifically commercial law, dealing both with commercial operations and with merchants per se, which lies on the margins of the Civil Code’s general rules as set out in Books First to Third. This régime d’exception is noteworthy for two reasons. First, it does not apply indiscriminately to transactions; it applies only to certain parties to transactions. Where both parties to a transaction are merchants, this is a distinction without a difference: all aspects of these transactions are governed by the corpus of commercial law rules. However, should one party be a non-merchant, the courts have concluded that the transaction is a “mixed transaction”, in which the operation is held to be commercial for one party (the merchant), but not the other (the non-merchant). While resting on no Codal article, this interpretation has been applied consistently by jurists and judges, with the result that different rules relating, for example, to the admissibility of evidence may apply to the same litigation.\textsuperscript{25}

Second, this régime d’exception does not constitute a complete body of commercial law. Rather, its rules are carved out of the civil law in specific domaines of the law of obligations and of persons. In the law of obligations, separate commercial law rules govern proof, solidarity, putting into default and prescription. For example, by contrast with civil matters, the general rule of proof in commercial matters is to permit oral testimony (art. 1233(1)). Similarly, the Code establishes a separate regime for business records, as these serve to make proof against a merchant.\textsuperscript{26} Again, the general rule of the Code is that the responsibility of co-debtors

\textsuperscript{25} See Bohémer and Côté, \textit{ibid.}, at pp. 67-8, for a discussion of the theory of mixed Acts.

\textsuperscript{26} They may be invoked against a merchant, and serve as a commencement of proof in order to permit oral testimony. Moreover, a commercial writing is presumed to have been made on the date it was dated and cannot be contested by signatories (art. 1226 CCLC).
is presumed joint, but not joint and several, whereas, in commercial matters the opposite presumption applies (art. 1105(1) and (3)).

27 As for default, the general rule is that a debtor must be formally put into default prior to a lawsuit being launched (art. 1970). But in commercial matters, default occurs by the mere lapse of time (art. 1969).

28 Finally, with respect to prescription, the Code establishes a uniform short prescription period of five years for all commercial matters, by contrast with the variable regime (extending up to 30 years) for civil matters (art. 2260(4)).

29 In the law of persons, this régime d'exception applies to topics such as election of domicile, capacity, and registration.

In conformity with the overall logic of a codification, Book Third of the Civil Code of Lower Canada sets out, in addition to the general regime of contracts, specific rules governing a variety of "nominate" contracts such as sale, lease, mandate, loan, deposit, partnership, suretyship and pledge. Within each of these categories of "nominate" contracts there also appears a number of rules which distinguish between civil and commercial transactions. Sometimes, notably with sale, an elaborate régime d'exception, going to the very essence of the contract in view is established. Yet with other nominate contracts, such as lease, loan, deposit and suretyship, the Code elaborates only minor deviations from the general civil law regime.

Contracts subject to these minor deviations can be briefly noted. Article 1939 CCLC provides that by contrast with civil

27 This presumption also applies to commercial partnerships (art. 1854 CCLC) and to commercial sureties.

28 For this reason, in commercial matters interest is presumed to run from the date an obligation is due, not from default, as in civil matters, at a rate set by the Interest Act.

29 See art. 2242. Moreover art. 2268(1) provides a general rule of usucapion, to which arts. 2268(3) and (4) announce exceptions which are different for commercial and civil matters. Absent the case of lost or stolen property, property passes to the acquirer immediately. As for lost or stolen things, arts. 1487, 1488 and 2268(3) and (4) provide that the owner can recover only upon re-imbursements and within the three-year delay.

30 Article 85 CCLC. Election of domicile is normally subject to formalities such as a notarial act and contractual specificity. In commercial matters, however, art. 85(3) creates an exception, which permits choice of tribunal for a contract or a series of contractual undertakings.

31 As noted, minors carrying on affairs as merchants are deemed to be of the age of majority (art. 323 CCLC) and cannot invoke lesion against co-contractants (art. 1005 CCLC).

32 As a general rule parties to civil contracts are not required to denounced their status. Under art. 1834 CCLC, however, partnerships and sole proprietorships undertaken by married persons must register a declaration of status, and others must register with the prothonotary of the local Superior Court.
matters, the net worth of a commercial surety may be calculated upon the value of moveable as well as immovable property. With respect to loan and deposit, the Code distinguishes onerous from gratuitous contracts. Since 1866, the only one of these minor contracts which has been legislatively amended is lease. On the one hand, with the increasing regulation of residential leases, a de facto regime of “commercial lease” for non-residential moveables developed. On the other hand, the use of the lease of moveables as a type of security device led to the addition of art. 1603 on finance leases in the 1970s. Nevertheless, only the second of these legislative amendments departs substantially from the general codal regime for civil matters, and creates a separate “commercial” contract.

The separation of civil and commercial transactions is, however, fundamental to several other Book Third nominate contracts, and has been since codification. The Title on Mandate contains an entire chapter on “Brokers, Factors and Other Commercial Agents” (arts. 1735 to 1754). The Title on Partnerships contains an important section entitled “Of Commercial Partnerships” (arts. 1862 to 1896a). The Title on Pledge contained, in 1866, two provisions (arts. 1778 and 1779) which identified separate regimes of pledge in, respectively, commercial matters generally, and pledges to pawnbrokers, banks and endorsees of documents of title. In addition, in 1962, a fourth chapter “Of Commercial Pledge”, was added to the Code so as to permit the non-dispossessory pledge of machinery and equipment (arts. 1799e to 1799k). This latter addition, like the finance lease addition, created within the basic structure of the civil law contract a totally distinct post-codification “commercial” variant.

33 On loan, contrast arts. 1763 and 1777, and see arts. 1785 and 1786. For deposit, contrast arts. 1795 and 1817 to 1819, as well as art. 1822.
34 For discussion, see P. G. Jobin, Traité de droit civil: Le Louage des Choses (Montreal, Editions Y. Blais, 1989), pp. 1-119; see also Bohémier and Côté, supra, footnote 7, at pp. 70-5.
36 The lease of non-residential moveables is governed by identical rules, whether the transaction is civil or commercial, but only persons carrying on commercial, or industrial businesses may make use of the finance lease.
37 See L’Heureux, supra, footnote 7, at pp. 197-224.
38 Ibid., at pp. 162-96.
It is in the realm of sale where many of the most distinctive features of Quebec commercial law can be found. The commercial law of sale is today composed of three elements: the Codal rules of 1866; special variants on codal rules enacted since then; and statutory provisions lying outside the Code. As has previously been noted, in addition to these special rules for commercial sales and for merchants, there are a number of codal rules which apply to both civil and commercial transactions, but which reflect commercial practice. In 1866, the most important specifically commercial law rules related to the sale of a thing belonging to another (arts. 1488 and 1489). As for post-1866 Codal additions, three are of importance: chapter VIA, on instalment sales (now repealed), chapter IXA on bulk sales, and art. 1571d CCLC on the sale of future accounts receivable. As for statutory regimes and modifications to the Code, the most important is the Consumer Protection Act. This Act replaced chapter VIA, on instalment sales, and created a separate “consumer” regime of instalment and other sales on the margins of a Civil Code which regained its original “commercial” orientation.

It follows that, notwithstanding the integration of many commercial contracts into Book Third of the Code, they have retained a degree of independence from the general nominate contracts out of which they are spun. One might even say that, in many cases, de facto commercial contracts, which are fundamentally distinct from analogous civil law contracts, now exist. This is true, notably of contracts of brokerage and factoring in the contract of mandate, leasing in the contract for the lease of things, limited partnerships, non-dispossessory pledge, and certain types of sale.

In 1866, Book Fourth of the Civil Code was devoted almost exclusively to Bills of Exchange and to Maritime Law — the latter including titles on “Merchant Shipping”, “Affreightment”, “Of the Carriage of Passengers in Merchant Vessels”, “Of Bottomry and Respondentia” and “Marine Insurance”. The one exception

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41 For a thorough discussion, see Y. Caron, “La vente et le nantissement de la chose mobilière d’autrui” (1977), 23 McGill L. J. 1, 421.
42 See also art. 1966(3), on the pledge of future receivables, which was added to the Code at the same time.
43 L.R.Q. c. P.40.1.
involved insurance generally, which by art. 2470 was not considered necessarily a "commercial" contract, although it was so treated in all but one of its common forms (mutual insurance). Given the specialized nature of these topics, and the fact that both negotiable instruments law and admiralty now lie within federal jurisdiction, little needs to be said here about the original assumptions of the Code.

The law of insurance does, however, merit some notice, if only for the circumstances surrounding its modernization in 1973. At that time the new provisions repealed a variety of separate damage, fire, personal and life insurance statutes, as well as the existing provisions in the Civil Code. Contrary to the initial plan to enact a separate Insurance Code (as in France), the new provisions were incorporated into the Civil Code. It is significant that these provisions were inserted, like their predecessors, in Book Fourth, commercial laws, rather than in Book Third as a separate nominate contract, even though insurance is not inherently a "commercial" contract.

A study of the current Quebec regime of commercial law would not be complete without reference to a number of statutes which create either commercial institutions (corporations, trust companies, credit unions, etc.) or commercial transactions. For the purposes of understanding the revision of the civil law contemplated by Bill 125, only two, the Special Corporate Powers Act and the Act representing Bills of Lading, Receipts and Transfers of Property in Stock, deserve mention. Interestingly, both will be repealed in the new Civil Code. The interest in these statutes lies in the fact that the legislature decided to create flexible financing devices for corporations and, latterly, for limited partnerships, by extra-Codal legislation rather than by way of enlarging Book Fourth of the existing Code. With Bill 125, this prior legislative decision to enact extra-Codal statutes, at odds with the decision taken in respect of insurance, seems to have been reversed.

46 See, for example, the Insurance Act, R.S.Q. 1964, c. 295; and the Husbands and Parents Life Insurance Act, R.S.Q. 1964, c. 296.
47 See, supra, footnote 18 for a more complete listing.
48 Ibid.
49 Ibid.
50 This is all the more curious since other commercial financing devices — commercial pledge, accounts receivable financing, the financial lease — were all incorporated into the Code during the 1960s and 1970s.
B. The New Civil Code of Quebec

An examination of Bill 125 reveals an even greater commercialization of codal law in Quebec than under the Civil Code of Lower Canada. There are several indications of this move. First, there is no longer any separate Book of the Code entitled "Commercial Law". This recognizes that commercial law has extended beyond Book Fourth in the 1866 Code, and that the majority of the other codal provisions were in fact dealing with the regulation of commercial matters. Secondly, many of the distinctions between civil and commercial matters found in the 1866 Code are simply eliminated in Bill 125 and replaced with uniform provisions applicable to all transactions. Thirdly, there are very few operations in Bill 125 that remain either purely civil or purely commercial. Fourthly, unlike the 1866 Code where commercial transactions were carved out of otherwise generally applicable regimes, in Bill 125, the tendency is to carve out special rules applicable to the non-commercial contract.

There are several instances where special rules are enacted for those who have entered into a consumer contract or a contract of adhesion, the latter referring to non-negotiated contracts entered into by parties of unequal bargaining power, neither of which involved the typical commercial bargain. It was necessary to

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51 Contracts previously restricted to a gratuitous nature, such as deposit and loan (see discussion surrounding footnote 9), will be expressly recognized as being potentially onerous or gratuitous in Bill 125. See art. 2268 Bill 125 re deposit and article 2301 Bill 125 re loan.

52 For remaining commercial contracts, see infra Part B, p. 395.

53 Defined in art. 1381 Bill 125 as a contract governed by the Consumer Protection Act.

54 The adhesion contract is defined in art. 1376 Bill 125 as "a contract in which the essential stipulations were imposed or drawn up by one of the parties, on his behalf or upon his instructions, and were not negotiable." Instances where Bill 125 carves out special rules in favour of the non-commercial contract include: art. 1398 of Bill 125, which expands the definition of fraud in a consumer contract; art. 1431 of Bill 125, which gives special protection to consumers and adhering parties regarding the enforceability of exoneration clauses; art. 1432 of Bill 125, which gives special protection to consumers and adhering parties in cases of illegible or incomprehensible clauses; and art. 1433 of Bill 125, which introduces the notion of the abusive clause but only in consumer and adhesion contracts. It should be noted that the opposite view is expressed by C. Massie in "Nouvelle approche des contrats commerciaux dans le futur Code civil du Québec" in Developments récent en droit commercial (1992) (Cowansville, Editions Yvon Blais, 1992), p. 117 at pp. 127-8. His thesis is that, while the adhesion contract is one that usually falls outside the commercial context, the definition of the adhesion contract in art. 1376 of Bill 125 is so broad that it may catch many commercial contracts, with the result that the protective devices listed above would extend to the commercial sphere.
carve out special protective devices for those who enter into consumer contracts and contracts of adhesion. This was because there are no generally applicable protective provisions in Bill 125 allowing the judiciary to intervene to aid those who may have entered into unfair and unequal contracts or those whose contractual equilibrium is changed by unforeseeable events which arise after the formation of the contract. In particular, the new Civil Code has continued the policy of judicial non-interference by not creating any general provision on lesion (the civilian equivalent to the doctrine of unconscionability) or imprévision (which may be compared to the common law notion of frustration).

The tendency in Bill 125 is to unify provisions and thereby eliminate many of the distinctions between civil and commercial matters. For instance, the distinction in the 1866 Code between rules of prescription of actions in commercial and civil matters is abolished in favour of a uniform three-year prescription period for the enforcement of all personal rights or moveable real rights. Similar unification occurs in areas of election of domicile and putting in default.

While several distinctions remain in Bill 125 for commercial transactions or in favour of parties who are operating in the ordinary course of business, the general tenor of the new Code is that the provisions are there to service commercial, as well as non-commercially oriented, relationships. This general philosophy is enunciated in art. 1374 of Bill 125 in the chapter on contracts which reads: "The general rules set out in this chapter apply to all contracts, regardless of their nature."

Given that there is no longer any separate section of the new Code entitled "Commercial Laws", the contracts that used to be classified as commercial contracts in Book Fourth of the 1866 Code (such as the contract of insurance, including marine insurance, and contracts of affreightment) have been resuscitated in Bill 125 as ordinary nominate contracts. Furthermore, the old

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56 Article 2909 Bill 125.
57 Article 83 Bill 125.
58 Article 1591 Bill 125.
59 See, for example, different rules on proof, art. 2848 Bill 125, and different rules on the presumption of solidarity of co-debtors, art. 1521(2) Bill 125. See also, C. Masse, supra, footnote 55, at p. 124, who argues that because the new Code replaces the notion of commercial matters with the notion of "enterprise", we are far from seeing uniformity between civil and commercial matters.
Civil Code had restricted several operations to commercial matters such as leasing and the assignment of book debts. These restrictions have been removed in Bill 125, and transactions of this character are now uniformly available for commercial as well as non-commercial purposes.

Despite these important changes, there are some operations which remain purely "commercial" in the new Code. For example, the contract of partnership, while not expressly designated a "commercial contract", is limited in Bill 125 to contracts in which the parties' common goal is the making of profits. The non-commercial partnership is now subsumed under a new nominate contract — the contract of association. The possibility of granting a floating hypothec over future property is also restricted to those who carry on an enterprise, commercial or professional.

Quebec commercial law has certainly become more pervasive in Bill 125 and will, once the Civil Code of Quebec is proclaimed in force, lose its character as a régime d'exception. The recognition in Bill 125 that to a large extent contracts are there to serve the commercial as well as non-commercial communities, will provide a welcome change in Quebec law. At the same time, however, one must note that protective devices are rare and that where they exist they are limited to those who operate outside the commercial context. Whether these changes constitute a "rehabilitation" of Quebec commercial law remains, one suspects, a question only the judiciary can answer.

III. FEDERAL COMMERCIAL LAW

As noted in the introduction, the fact of divided legislative jurisdiction in any federal system raises important issues relating to the integration of divergent regimes of private law. More so than in common law provinces, this jurisdictional bifurcation has affected...
the commercial law of Quebec. Its impact has been felt in three distinct ways. Most profoundly, federal commercial legislation has removed from Book Fourth (and to a lesser degree from Book Third) of the Code several matters which were part of the initial codification exercise; this removal had the effect of disturbing the overall coherence of the Code (and Quebec's unique approach to reconciling commercial and civil law). Secondly, it has often been the case that federal legislation enacted in the simple exercise of s. 91 jurisdiction has been grounded in common law theoretical assumptions, has been drafted in the manner of a common law statute, has been interpreted in accordance with those assumptions, and has compromised the coherent functioning of the rest of the codal scheme. Thirdly, and indirectly, federal legislation influences Quebec law by ricochet through interpretation, especially where it is drafted in a manner insensitive to the civil law, and produces, even within ordinary s. 92 legislation, various statutes and codal provisions which resonate badly with the civil law tradition.

The first feature can be dealt with briefly here, as it will be returned to below. The first codal articles to be excised were those on negotiable instruments. In 1866 the Codifiers generated 76 articles on Bills of Exchange out of three main sources: the 1849 Act of the Parliament of Canada, which assimilated Quebec law to English law, as amended and consolidated; certain rules of old French law; and others of English origin. These remained largely in force, despite federal legislation in 1872 and 1877, until the first comprehensive Bills of Exchange Act was passed in 1890. This Act repealed arts. 2279 to 2354, except arts. 2340 to 2342, 2346 and 2354, although there continues to be some doubt as to how much other civil law was also repealed by what is now s. 9 of the Act. Similar excisions have occurred in relation to maritime law, where increasingly the federal Parliament is exercising its constitutional jurisdiction to override sections of the Code, such as arts. 2362 to 2372 and 2435, which have been abrogated, and to modify others indirectly by federal legislation.

Secondly, federal legislation of any description is almost always drafted and interpreted without regard for the provisions of the Civil Code. This is true not only of the Bankruptcy Act provisions in relation to judicial hypothecs, the Paulian action, the Civil


67 Articles 1032 to 1040 CCLC.
Code's regime of privileges and preferences, and the notion of the deemed trust, but also of the Bank Act security under s. 178, and the relation of that security to civil law security devices.

The third notion, the indirect effect of federal legislation, is more difficult to assess. Certainly, the general federal power of trade and commerce, criminal law and the residual power has led to legislation on competition, trade marks, and product labelling, for example, each of which greatly influences the substantive law of property and civil rights in the province. Moreover, given the realities of interprovincial trade and federal paramountcy, these standards tend to oust the regime of the civil law in practice, if not always in theory. Finally, this legislation has a tendency to generate Quebec legislation such as arts. 1040a to 1040e, the transfer of property-in-stock legislation, and the Special Corporate Powers Act which are grotesque calques of the common law.

These three influences of federal legislation on commercial law in Quebec should not be underestimated. Because the Civil Code of Lower Canada and, to an even larger extent, the new Civil Code of Québec set the basic intellectual structure for organizing regimes of civil and commercial law, any attempt to revise federal commercial law must be grounded in an overall framework which is compatible with civilian concepts. Nothing we have seen or read by common law commentators convinces us that this is likely to be the case in the near future. For this reason, we offer four examples in the remainder of this section where the incompatibility of federal law has significantly complicated life for commercial lawyers in Quebec.

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71 This implicit ouster is visible, for example, in the drafting and interpretation of incorporation statutes, the partnership provisions of the Code on limited partnerships, the notion of non-recourse financing in art. 1980(2), in codal security devices such as the commercial pledge, and in aspects of consumer protection law.


73 A more detailed discussion may be found in R. A. Macdonald, “Reflections on Received
A. Maritime Law

No area of law more starkly reveals the constitutional misapprehensions, at least as these are viewed in Quebec, of Canadian common lawyers than maritime law. Here, the constant worry of the Quebec lawyer is that when "Canadian" law is being considered or developed, it is automatically assumed that this law only encompasses or reflects common law principles to the exclusion of civil law principles in force in one of Canada's provinces. One need only look to the well-known Buenos Aires Maru\textsuperscript{74} decision in which Justice McIntyre, speaking for the majority of the Supreme Court of Canada, stated that: \textsuperscript{75} "Canadian maritime law is a body of federal law encompassing the common law principles of tort, contract and bailment." This affirmation was made notwithstanding that the principles of U.K. maritime law were derived from a heavily civilian-influenced lex mercatoria.\textsuperscript{76} One commentator has described the effect of this judgment by aptly entitling his comment on the Buenos Aires Maru decision as "comment écartter l'application du droit civil dans un litige maritime au Québec".\textsuperscript{77}

Following the Buenos Aires Maru decision, jurists saw Quebec civil law being ousted in a wide variety of matters which were somehow linked to shipping activities. The Supreme Court has seemed intent on purging maritime law of its civilian heritage. Indeed, one could characterize its efforts as an admiralty equivalent of "occupying the field" — that is, "covering the waterfront". Common law rules relating to agency\textsuperscript{78} and torts\textsuperscript{79} now


\textsuperscript{75} Ibid., at p. 660.


govern the regulation of disputes arising in Quebec whenever such disputes are connected, however incidentally, to a shipping context. In the most recent Supreme Court pronouncement on this matter, a provincial law relating to contracts for the sale of goods was held to be inapplicable even though, as Justice L'Heureux-Dubé pointed out in her dissenting opinion (quoting Addy J.), "the maritime or shipping aspects of the business arrangement between the parties were minuscule or incidental." 81

It is true that this increasingly popular understanding of "Canadian maritime law" affects the laws in all of Canada's provinces. 82 It is obvious, however, that it has a disparate impact on Quebec law, given that its private law is based on civil law principles. Here, most clearly, one sees how the dual agenda of promoting a "national commercial law" and remaking this "national commercial law" along common law lines, far from rehabilitating Quebec commercial law, effectively renders it incoherent.

B. Bills of Exchange

One need only look to s. 179 of the Bills of Exchange Act 83 which deals with joint versus joint and several liability of co-makers of a promissory note in order to see the importance of this issue. The interaction between the Bills of Exchange Act and Quebec civil law on this point has created a great deal of doctrinal friction and many contradictory decisions. Confusion has resulted on three levels.

One was whether there was any room to operate the codal presumptions of joint and several liability in commercial matters and joint liability in civil matters 84 or whether one had to assume all bills of exchange were "effets de commerce". If the latter, they would therefore always be commercial (even if the underlying debt was civil), such that the liability of co-makers would always be joint and several. 85 A second level of difficulty concerned the

81 Ibid., at p. 76.
82 In fact, both the Monk decision, supra, footnote 80, and the Whitbread v. Walley decision, supra, footnote 79, did not concern Quebec law specifically.
84 See art. 1105.
meaning to be ascribed to the terms “joint” and “joint and several” liability. The civilian and common law meanings of these terms differ substantially, especially as regards the meaning of joint liability. Quebec cases have often applied the civilian meaning of the terms, despite s. 9 of the Bills of Exchange Act prescribing that the rules of the common law of England apply to bills, notes and cheques. This raises a third level of difficulty. Is there any room for civil law to apply (principally through s. 133) at all in this area, given that paramount federal legislation states that the common law should apply to bills of exchange in general?\

C. The Bankruptcy Act

While it is true that the federal Bankruptcy Act has never been particularly sensitive to the intellectual structure of the civil law, until recently most Quebec jurists were at least reconciled to its operative policy. Nevertheless, the decision of the Supreme Court of Canada in *B.C. v. Henfrey Samson Belair* has given even the most moderate commentators reason for apprehension. In *Henfrey Samson Belair* the basic question was whether the B.C. government could create a deemed trust in its favour in order to escape the scheme of priorities for government liens set out in s. 107 (now s. 136) of the Bankruptcy Act. The Supreme Court held that it could not, on the basis that the B.C. statute did not really create a trust recognizable under the Act. Justice McLachlin reached this conclusion for two reasons: first, she found that s. 47(a) of the Act was limited to “true trusts”, as these were defined

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86 In the civil law, the fact that co-debtors are jointly liable means that each individual debtor is responsible only for his or her portion of the debt. In the common law, debtors who are jointly liable may still be held responsible for the entire debt (much in the same way as is a joint and several debtor) except that the joint debtor may insist that his co-debtors be sued in the same action. See discussion of the common law and civilian meanings of joint and joint and several liability in *Crawford and Falconbridge, Banking and Bills of Exchange*, 8th ed. (Toronto, Canada Law Book, 1986), p. 1835.
88 This is a similar question to that raised in *ITO-International Terminal Operators Ltd. v. Midura Electronics Inc.*, supra, footnote 74.
89 This is evident in the refusal to recognize judicial hypothes (Royal Bank v. Larue, supra, footnote 66 and the subsequent addition of s. 50(1) to the Act), as well as in the conscious inversion of civil law execution priorities and the refusal to give full effect to the unpaid seller’s right of resolution (art. 1543 CCLC).
by the court, and that deemed trusts were simply disguised liens; second, she decided that to permit provincial legislatures to create deemed trusts would effectively strip the asset pool of the bankrupt. But on what basis are these conclusions justified?

No doubt, as a matter of constitutional law the federal government has authority to determine the meaning of the concepts it deploys in the Bankruptcy Act; no doubt also, that as a matter of paramountcy, where it does so it can thereby immunize its definition from modification by provincial legislation. But until Parliament specifies its intention, the meaning of terms such as “property” and “trust” is to be fixed by reference to provincial law in the province where the dispute arises: under s. 92 property and civil rights is a provincial head of power. Given that the Bankruptcy Act contains no explicit definition of a trust, it follows that for the court to have decided that s. 47(a) relates only to “true trusts” it must have concluded either that the Act carries its own implicit definition (a proposition which, as Professor Ziegel rightly points out, is highly contestable) or that there is some general federal common law of trusts applicable to all federal legislation. Yet this idea of a federal “common law” has already been rejected several times by the Supreme Court itself. On this basis alone the judgment of Henfrey Samson Belair is of doubtful correctness.

But even if one were to accept Justice McLaughlin’s view that the Bankruptcy Act carries its own implicit definition of a trust, or that there is a federal “common law” of trusts, it would be necessary to ask the question “Of what exactly does this implicit notion of trusts consist?” Is this federal law of trusts merely a transplanted English common law of trusts unaffected by statute? Is it an English common law of trusts as it existed in 1867? Is it a Canadian law of trusts as this existed in 1919 (when the Bankruptcy Act was first enacted) or in 1949 (when its current general structure of priorities was first enacted)? And if so, is this Canadian law of trusts strictly a common law of trusts, or is it an amalgam of the idea of the trust as reflected in the civil law as well as the common law? Similarly, if so, is it a law of trusts as only supplemented by post-Confederation statutes (say, on the winding up of trusts) and not by other statutes (say, on deemed trusts)? These are complex questions for determination by an implicit federal law of trusts found only in the interstices of the Bankruptcy Act; and, as Justice McLaughlin’s invocation of “the three
certainties" reveals, whatever the answer to them is, it appears that the civil law forms no part of it.

For a Quebec jurist this is profoundly troubling. While all acknowledge that it is permissible, as a matter of constitutional law, for the federal Parliament to define, for purposes of federal law, basic private law concepts, one would think that the constitutional presumption should be that Parliament intends to piggyback its legislation on existing provincial law (as this exists from time to time and from place to place) until it chooses explicitly to adopt its own alternative definitions. Further, based on past practice, whatever the defects of federal law, one might expect that when Parliament acts, it will no longer naively import into its legislative definition just some common law notion of the trust, but will be sensitive to the position in Quebec as well. The net effect of Henfrey Samson Belair is, therefore, to displace operative provincial private law on dubious grounds, and to substitute for this diverse provincial law a totally artificial "federal common law of trusts" which is oblivious to the conceptual apparatus of the civil law.

D. The Bank Act

The security device created under s. 178 of the Bank Act has also produced its share of "interaction of federal and provincial law" and "paramountcy" questions over the years. These have been especially acute in Quebec, although most often the courts have tried to dispose of them without invoking constitutional principles. In 1990, however, the Supreme Court threw caution to the wind in a remarkable decision, Bank of Montreal v. Hall. Asked to determine if the "seize or sue" provisions of Saskatchewan's Limitation of Civil Rights Act were applicable to a bank realizing under s. 178(3), the court answered in the negative.

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91 For a common law perspective, see most recently R.C.C. Cuming, "PPSA — Section 178 Bank Act Overlap: No Closer to Solutions" (1991), 18 C.B.L.J. 135.
Justice La Forest held not only that s. 178(3) overrode the provincial statute on the grounds of paramountcy, but also decided that the Bank Act constituted a “complete Code” which ousted provincial law for all matters relating to Bank Act security.

According to the Supreme Court’s prior jurisprudence, it was never in doubt that constitutionally valid provincial legislation is also applicable to federal statutes. In addition, it was assumed that complementary (even duplicative) federal and provincial statutes could stand together. Only where the statutes were in opposition should the court engage in constitutional nullification through the doctrine of paramountcy. Applying these principles to the Hall case, it is difficult to disagree with the decision of the Supreme Court. But to reformulate the test as a general purposive test about Parliament’s intention, rather than — as in Multiple Access — a test based on conflict in outcome, is to allow the courts to ascribe to Parliament a purpose in relation to s. 178 which can be reduced to the formula “the bank always wins”.

What is more, the further language in the judgment about the Bank Act being a “complete Code” suggests a resurrection of the “negative implication” theory of paramountcy, under which paramountcy can be easily transformed into “exclusivity”, a transformation explicitly argued for by Crawford in his comment on the decision. And, on the basis of its decisions in maritime law, bills of exchange and bankruptcy, can it be doubted that here also the Supreme Court will find this “exclusive” federal law to be “exclusively common law”?

The implications of Hall for the civil law are astounding. For if the expression “complete Code” is taken at face value, it means no less than that through s. 178, Parliament has implicitly redefined (among other things) the notion of title, the concept of real subrogation, and the theory of compulsory execution of obligations in every Canadian province so as to achieve national uniformity in the operation of s. 178. Currently, there is nothing in the Bank Act to prevent a province from granting an unpaid seller a right to dissolve a sale with retroactive effect, such that the presumed purchaser is deemed never to have acquired rights in the collateral. Nor is there anything which would prevent a province

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94 Crawford, ibid., at pp. 150-4.
95 This is the case under art. 1543, with the result that the seller has priority over a bank claiming priority under s. 179(1) of the Bank Act. See Banque Nationale v. William Nilson Ltd., [1991] R.J.O. 712 (C.A.).
from expanding or limiting the scope of real subrogation of property interests into funds generated by its disposition. Nor, finally, does the Bank Act prevent a province from enacting, as a general rule, that no private realizations of secured collateral may be undertaken. But if the Bank Act is a "complete Code" then all these existing principles of provincial law would be ousted to the extent they might be seen as inconsistent with the presumed assumptions of s. 178 security.

Fortunately, the Supreme Court seems to be backtracking from this position. First, in National Bank of Canada v. Corbeil and then in Banque Nationale du Canada v. Atomic Slipper, the court carefully canvassed provincial law in respect of the enforcement of s. 178 security, even though it does not disavow the "complete Code" language of Hall. In Corbeil the issue was whether the "additional indemnity" provided by art. 1078.1 CCLC could be awarded against a bank which had commenced realization and then abandoned its security, to the detriment of its debtor. The court explicitly held that the principles of the provincial private law of delict (tort) in force at any given time (including principles relating to punitive damages) were fully applicable to a bank exercising its s. 178 rights.

More significantly, in Atomic Slipper the court held that the law of civil procedure applicable to realizations of security granted under s. 178(1)(a) and (b), the implicit holding of Hall to the contrary notwithstanding, was provincial law. In both Corbeil and Atomic Slipper, Justice Gonthier was quite clear that the integration of Bank Act security and provincial law demanded an exercise of double cross-characterization. Where the federal Act was explicit, provincial law would have to be adapted by reference to it, and competing provincial security devices would have to be characterized according to the intellectual frame of the Bank Act; conversely, where the Bank Act was silent, the terms of s. 178 would have to be understood according to their characterization

98 In other words, the judgment in Canadian Western Millwork Ltd., Flintoff v. Royal Bank of Canada (1964), 47 D.L.R. (2d) 141, [1964] S.C.R. 631, cannot be read as standing for the proposition that the bank not only acquires rights in proceeds, but also rights opposable to bona fide purchasers for value who have registered their assignment.
97 Such provisions would be fully applicable to security given under s. 178(1)(a) and (b) of the Bank Act. See Rosemex Inc. v. Banque de Montreal, [1990] R.J.Q. 344 (C.A.).

100 For a detailed discussion see supra, footnote 97.
under provincial law, and the rights of the bank determined accordingly.

IV. CONCLUSION

The choices reflected in Bill 125 are clear evidence that the National Assembly has more or less abandoned the remaining vestiges of the civil law bifurcation of civil and commercial law. Indeed, one might well say that fusion of the two systems has been achieved, at least at the level of general principle. Under Bill 125, the régime d’exception is now consumer law. But this does not mean that the substantive policy decisions reflected in Bill 125 operate an optimal reconciliation of commercial practice and legal principle. To take but one example, the absence of a “substance of the transaction” test for determining the applicability of the publicity and enforcement regimes of provincially created secured transactions represents a significant missed opportunity. But in large measure the recodification exercise can be understood as having effected a rehabilitation of provincial commercial law in Quebec.

Such a conclusion cannot really be reached about federal commercial law. For the reasons given by Professors Ziegel, Waldron and Cuming, much legislative work needs to be done by Parliament in relation to bankruptcy, interest and s. 178 security. But for civil lawyers, the first place to begin the rehabilitation of federal commercial law is with the courts. Fortunately there are signs that at least the Supreme Court of Canada is coming to recognize how its prior jurisprudence must be reoriented. The presence of another strong commercial lawyer from Quebec such as Justice Gonthier will help to bring about a more subtle reading of the various provisions of the Bank Act and the Bankruptcy Act by common law jurists. One can only hope that when Parliament also takes up the task of reform it will show itself to be equally sensitive to the distinctive features of each of Canada’s two legal traditions.

100 For a detailed discussion see Macdonald, supra, footnote 2, especially at pp. 279-85.
101 See, supra, footnotes 3 and 4.