REFLECTIONS ON THE CIVIL LAW AND COMMON LAW CONCEPTS OF OWNERSHIP, IN THE CONTEXT OF HARMONIZATION AND OF INTEGRATED ECONOMIES

ALINE GRENON, PROFESSOR*
UNIVERSITY OF OTTAWA

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* Professor at the Faculty of Law (French Common Law Program) of the University of Ottawa; on secondment from July 1, 2003 to June 30, 2005 to the Legislation Revision Services group, Legislative Services Branch, Department of Justice Canada. The author wishes to thank Sandra Hassan, Joseph Sirois and France Allard of the Legislation Revision Services group, who have read this text and provided comments.

INTRODUCTION

The initiative to harmonize bijural federal legislation in Canada, together with harmonization efforts currently under way in the European Union, have given rise in many sectors to a careful analysis of the differences between legal systems based on the civil law tradition and those based on the common law tradition. One of the most significant differences and one which raises extremely thorny problems, relates to the concepts of ownership in civil law and common law.

REFLECTIONS

All comparatists know that the concept of ownership is much more flexible (some would even say blured) in common law than in civil law. In common law, different persons may have different ownership rights to the same property at the same time. However, in civil law, the right of ownership is absolute. Subject to the limits and conditions determined by law, the owner is free to do as he or she wishes. Although the right of ownership can be dismembered (that is, certain components can be transferred to others), the persons who hold rights arising from such dismemberments will never be considered owners. This fundamental difference between civil law and common law has implications in a number of different areas, including trusts, taxation and secured financing.

To date, it has primarily been civilians who have attempted to adapt their concepts to those of the common law, even though the common law concept of ownership is problematic in a number of respects. It is ancient and complex, having originated with the feudal system. It has evolved along a particular continuum with no major disruptions, since the reforms introduced in this area have tended to be limited in scope. The result has been predictable:

> Conveyancers from the common law world tend to reason according to mental habits descended from the medieval law of property […]. This makes the common law path far different from the civil law. In civil law, the ideology of the French revolution has expelled most of the residues of the feudal structures from modern property law content […]. This surviving feudal subtradition in property law characterizes the greatest part of the differences between the civil law and its common law counterpart.[1]

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[1] Ugo Mattei, *Basic Principles of Property Law – A Comparative Legal and Economic Introduction* (Westport, Conn.: Greenwood Press, 2000) at 12.

In Canada's common law provinces, when the ownership of real property[2] is in issue, the doctrines of tenure and estates still apply. According to the doctrine of tenure, the Crown remains the absolute owner of the land, which means that a person who purchases real property is merely conceded tenure "in free socage" (the only form of tenure that still exists today). As a consequence, this person does not have an absolute right of ownership but rather holds only an estate or interest in the property. The importance of those doctrines has now diminished to such an extent that they could conceivably now be eliminated. For example, Scotland recently put an end to tenure, as attested by the following extract from the relevant legislation:[3]

> **1 Abolition on appointed day**
>
> The feudal system of land tenure […] is, on the appointed day, abolished.
>
> **2 Consequences of abolition**
>
> (1) An estate of dominium utile of land shall, on the appointed day, cease to exist as a feudal estate but shall forthwith become the ownership of the land […]

Although the Scottish legal system is a mixed system, like that of Quebec, and its private law is of civil law origin, the abolition of tenure gives pause for thought. Would it not be possible to do the same thing in common law jurisdictions, at least with respect to lands that have already been granted by the Crown? All it takes is a piece of legislation.[4] In addition to bringing common law and civil law closer together by eliminating one of the major differences between the two, this type of reform could also bring the common law rules governing real property in line with those that pertain to personal property. Would it not be logical for those rules, which currently

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2 For the definition of "real property" in the context of an overview of real property rights in common law, see the following paper published in this collection: Véronique Denys, "Dévolution irrévocable" (2.2, Le droit des biens réels de la common law).

3 *Abolition of Feudal Tenure etc. Act*, A.S.P. 2000, c. 5; on line: http://www.scotland.gov.uk/Topics/Justice/Civil/17975/Abolition (an explanatory note available at this site indicates that the objective of this legislation is "to abolish the feudal system of land tenure in Scotland and to replace it with a system of simple ownership which is modern and uncluttered"). See also Kenneth G.C. Reid, "Vassals No More: Feudalism and Post-feudalism in Scotland" (2003) 11 European Review of Private Law 282.

4 Such legislation would however be relatively complex. For example, the *Abolition of Feudal Tenure etc. Act*, *ibid.*, runs to 77 sections and includes 13 schedules.

constitute two distinct areas of law, to be consolidated? Real property was once the primary source of wealth, but its importance is declining in light of the increasing value in our societies of personal property. Could this shift in wealth from real to personal property not give rise to a reform of the law in this field?

The precise meaning of the terms "interest" and "rights and interests" constitutes another problematic area which gives rise to reflection. The use of the word "interest" is strongly entrenched in the common law and is used in a variety of contexts, often carelessly. It can refer to the sum paid for the use of money lent or to something that is to the advantage of one or more persons. In these contexts, the word has the same meaning as in civil law and does not normally give rise to confusion. However, in the context of the law of property, it has a specific meaning which can be problematic. In medieval times, the term "interest" was used to describe the various rights to which a property could be subject:

> [translation]
>
> The right of ownership is […] conceived of as a set of multiple rights. One does not own a parcel of land, at least not technically; one "holds" it on the Crown's behalf, which means that one holds an "interest" in the property.
>
> […]
>
> A person who acquires property receives a set of rights relating to the parcel that has been acquired, meaning that he or she obtains freehold tenure of the property. The person thus becomes the owner of an interest in the property and not of the property itself.[5]

The term "interest" is therefore closely related to the system of tenure and estates that was an integral part of English feudal law. Despite the underlying premise that still exists today in common law whereby the Crown remains the true owner of real property, those who acquire a house in the suburbs, for example, refer to themselves as owners of the house. They would no doubt be very surprised to learn that they hold only an interest, or "freehold tenure", and not an absolute right of ownership in the house.

Nowadays, in the context of property law, a number of lawyers trained in the common law tradition have lost sight of this specific meaning and

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5 Andréa Boudreau-Ouellet, "Aspects conceptuels et juridiques du 'droit de propriété'" (1990) 21 R.G.D. 169 at 172 and 175.

often use the term "interest" and the phrase "rights and interests" indiscriminately and inaccurately, thereby impeding our understanding of their true meaning. From the standpoint of harmonization, there is an additional difficulty in that civil law does not use the term "interest" with respect to the right of ownership. In civil law, there are only rights.

In the context of the right of ownership in common law, what distinction exists today between a right and an interest? According to one author, when two or more rights pertain to a single property, including the right equivalent to ownership, the term "interest" refers to the right or rights of lesser importance that apply to this property.[6] Would this not currently be the true legal meaning of the word "interest" in the context of property law? An "interest" is above all a right. That right relates to property but is of lesser importance compared with freehold tenure (the right equivalent to absolute ownership) relating to that same property. In an ideal world, it would no doubt be preferable to use the term "right" instead but it is wishful thinking to believe that such a change in legal language will occur in the near future. The most that can be hoped for is that lawyers trained in the common law tradition will become aware of the difficulties surrounding the term "interest" and will stop using it thoughtlessly, taking care instead to specify the nature and scope of the right in question (for example, right of "ownership" under a deed, right of a secured creditor, right of a beneficiary under a trust, right under a licence).

One final matter for consideration relates to the diverging visions in common law and civil law regarding the nature of the rights that apply to property and the relationship among them. In common law systems, rights relating to property can be considered as part of a continuum, ranging from the most to the least important. The right flowing from legal title is clearly of great importance but that right may be superseded, for example, by the right of a beneficiary under a trust or of a secured creditor in relation to a security. In short, there may be a spectrum or range of rights, all associated with the same property. This is one of the great strengths of the common law.

In a world in which trade has developed to an extent that was unimaginable scarcely a few decades ago, and in which agreements are often highly complex, this type of flexibility is a genuine asset. In civil law, however, it is more difficult to conceptualize the rights associated with property in this way. In this respect, Quebec's experience is highly revealing. As a result of the integration of its economy with that of North America, the

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6 Supra note 1 at 80-81.

ties linking it with the common law provinces within the Canadian federation and the work leading up to the adoption in 1994 of the *Civil Code of Québec*, legal elements merge and sometimes collide. This process, which occurs in many areas including trusts, secured financing and taxation, provides us with a clearer understanding of the dichotomy between the concept of ownership in civil law and common law.

For example, it had become essential, largely for economic reasons, to broaden the scope of application of the Quebec trust and to provide it with a proper legal framework. Since trusts are often used in the context of pension and investment funds, it is important to easily establish and administer them. However, Quebec was faced with a major problem. Because the trust originated with the common law, the trustee and the beneficiary both have rights of ownership to the property held in trust. In civil law, however, the right of ownership is absolute and cannot be divided. It was accordingly not possible under Quebec law for the trustee and the beneficiary to each have a right of ownership over trust property.[7]

The solution adopted in Quebec, although it has been the subject of some criticism, is original to say the least: "The trust patrimony, consisting of the property transferred in trust, constitutes a patrimony by appropriation, autonomous and distinct from that of the settlor, trustee or beneficiary and in which none of them has any real right" (art. 1261 C.C.Q.). Although the settlor, trustee and beneficiary have no real rights, the trustee nevertheless "has the control and the exclusive administration of the trust patrimony, and the titles relating to the property of which it is composed are drawn up in his name; he has the exercise of all the rights pertaining to the patrimony and may take any proper measure to secure its appropriation" (art. 1278 C.C.Q.). This solution is however limited in scope. The notion of an ownerless patrimony by appropriation as a means of escaping from the impasse created by the diverging concepts of ownership in civil law and common law has few if any implications in other areas.[8]

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7 For an overview of the law governing trusts in common law and civil law, see the following paper published in this collection: Sandra Hassan, "Impact du bijuridisme canadien en matière d'imposition de certains types de fiducies".

8 However, the concept of an owned patrimony by appropriation could have implications in certain areas, notably partnerships; on this subject, see the following paper published in this collection: Charlaine Bouchard, "La problématique du recouvrement contre une société de personnes, tributaire de la perméabilité de son patrimoine".

Quebec has also encountered difficulties in the area of secured financing on personal property. As in the case of trusts, it became necessary for economic reasons to better structure and modernize this area, especially in light of the fact that Quebec is surrounded by jurisdictions that have adopted the concept of "security interest". This concept lies at the heart of Article 9 of the American *Uniform Commercial Code* and of the laws governing personal property security now in effect in all of the Canadian common law provinces. These laws apply to every transaction, without regard to its form and without regard to the person who has title to the collateral that in substance creates a security interest, that is, an interest in personal property that secures payment or performance of an obligation. Since title to property is irrelevant, these laws apply to a variety of transactions, including those equivalent to Quebec hypothecs, instalment sales and leases. In certain circumstances, these laws enable secured creditors to obtain a security interest on property in the debtor's possession, even though the property belongs to a third party.

In our present context of economic integration, and given modern trade practices which require great flexibility with respect to financing, it was desirable to harmonize Quebec civil law and the personal property security legislation in effect elsewhere in North America.[9] To achieve this, however, it was necessary to make the classical concept of ownership in civil law more flexible and to accept, for example, that an owner under a contract governing an instalment sale or lease is in fact the holder of security over property, as is a hypothecary creditor. While the first remains the absolute owner and the second holds only a real right in respect of the property, in reality both of them have retained or obtained rights pertaining to the property in order to secure payment of sums owing to them. Such transactions, whether an instalment sale, a lease or a hypothec, in essence constitute security, that is, rights in property that secure payment or performance of an obligation. Accordingly, all such transactions should be subject to personal property security legislation in order to prevent some of these creditors from circumventing the rules of publication and priority established to protect third parties, including unsecured creditors. Moreover, to ensure that creditors involved in transactions such as instalment sales and leases do not gain as a result an unfair advantage over other secured creditors of the same debtor, the remedies in the event of default should be the same for both.

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[9] For an analysis of this question in a context that includes not only North America but also Costa Rica and the rest of Central America, see the following paper published in this collection: André Ouellette, "Bijuralism and International Commercial Transactions: The Case of Trade between Canada and Costa Rica".

Unfortunately, the Quebec legislature remained faithful to the classical concept of ownership under civil law and rejected the solution proposed by the Civil Code Revision Office whereby transactions such as instalment sales and leases would be treated like hypothecs, by means a statutory presumption. In addition to making Quebec personal property security law more coherent and better able to respond to current financing requirements, this solution would have created a *rapprochement* between civil law and common law in this highly important area. This is currently impossible since transactions such as instalment sales and leases are subject to imperfect hybrid schemes. As a result, difficulties remain in this area and those difficulties have been exacerbated by two recent Supreme Court of Canada decisions.[10] Legislative reform seems inevitable.

Finally, in matters involving taxation, it often happens that one person holds title to property while another holds all the other attributes of ownership. In some instances the second is said to hold a "beneficial interest" or "equitable interest" in the property in question or to be the "beneficial owner". What principles of taxation are to be used in such circumstances? Once again, the dichotomy between the concept of ownership in civil law and common law manifests itself and results in a clash between the two.[11]

Such issues in turn have implications for the federal Parliament, which must endeavour to reconcile these diverging visions of the right of ownership, in the context of its initiative to harmonise bijural federal legislation.[12]

These discrepancies not only create difficulty from the standpoint of harmonization, but also impede dialogue between the two traditions and hamper trade. It is for this reason that certain jurists are searching for a

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[10] *Lefebvre (Trustee of)*; *Tremblay (Trustee of)*, [2004] 3 S.C.R. 326, 2004 SCC 63; *Ouellet (Trustee of)*, [2004] 3 S.C.R. 348, 2004 SCC 64. These decisions are the subject of comment in the following article, which will shortly be published in volume 35 of the Revue générale de droit: Aline Grenon, "La problématique entourant les ʽsûretés-propriétés' au Québec : *Lefebvre (Syndic de)*, *Tremblay (Syndic de)* et *Ouellet (Syndic de)*".

[11] See the text by Véronique Denys, *supra* note 2, for an example of difficulties in the field of taxation (arising from the term *dévolu irrévocablement*/"vested indefeasibly").

[12] For information on the subject of Canadian bijuralism and the federal legislation harmonization initiative, see the articles published in this collection by the following authors: Véronique Denys, Sandra Hassan, André Ouellette.

common denominator or for bridges that would eliminate these discrepancies or at least reduce the gap. Various theories have been proposed, some of which challenge fundamental premises.[13] For example, do we own rights to property or do we own the property itself? Are we simply owners of rights, be they rights pertaining to property or to debts? Are not all rights, including the right of ownership and the other rights associated with property, not fundamentally personal rights, such that the distinction between various rights is relevant only in the context of remedies? In the context of a bankruptcy, rights would accordingly be ranked on the basis of the priority assigned by law. The right of ownership would be simply one right among others and, despite its relative importance, could be subordinated to other rights in certain circumstances. These questions and a number of others are the subject of reflection currently taking place in this area. Although these questions may appear to be very academic, they could in due course give rise to very practical responses. In this regard, the concept of patrimony by appropriation, previously considered to be highly academic, has been adopted by the Quebec legislature. This concept now constitutes the basis of the Quebec trust, the importance of which cannot be denied.

CONCLUSION

As part of the harmonization process currently under way in Europe, Canada and elsewhere, the civil law and common law concepts of ownership are being deconstructed in an attempt to gain a better understanding of their underlying structures. The hope is that this endeavour will make it possible to distinguish between fundamental elements and historical vestiges. Once the essential elements have been identified, it is likely that the differences between the concepts of ownership in civil law and common law will be reduced, since civil law and common law states essentially operate within the same economic framework.

In both civil law and common law, a simplified concept of ownership is desirable. As a first step in this direction, jurists must become aware of the deficiencies that exist in both systems and the practical difficulties that those deficiencies create.

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[13] For a presentation on the issue in civil law and the various theories proposed, see Jacques Ghestin and Gilles Goubeaux, *Traité de droit civil – Introduction générale*, 4th ed., Paris, Librairie Générale de Droit et de Jurisprudence, 1994, at 156-191. See also Roderick A. Macdonald, "Reconceiving the Symbols of Property: Universalities, Interests and Other Heresies" (1994) 39 McGill L.J. 761; J.H. Dalhuisen, "European Private Law: Moving From a Closed to an Open System of Proprietary Rights" (2001) 5 Ed. L. Rev. 273.