

## **HARMONIZATION OF FEDERAL LEGISLATION WITH QUEBEC CIVIL LAW: SOME EXAMPLES FROM THE *BANKRUPTCY AND INSOLVENCY ACT***

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### **Introduction**

The purpose of this paper is to take stock of the work done by Justice Canada to harmonize the *Bankruptcy and Insolvency Act*<sup>2</sup> [hereinafter *B.I.A.*] with Quebec civil law. This paper deals with some of the most important and fascinating examples arising out of the harmonization process. Our work is still at a preliminary stage. In a way, then, this paper is an interim report, a series of findings and observations. It should therefore be noted that no legislative amendments are recommended in this paper, nor should any be deduced from the following remarks. We would therefore be delighted to receive any comments you might have.

Generally, harmonization consists, firstly, in reviewing all federal legislation and regulations whose application requires the use of provincial private law and, secondly, in harmonizing the content of this legislation and these regulations to ensure that it includes the concepts and terminology of Quebec civil law. Specifically, harmonizing federal legislation with Quebec civil law focuses on the interaction between federal law and provincial private law.

Private law in Canada comes from two separate legal systems: civil law and common law. The civil law tradition in Canada has its origin in French law, introduced during the French régime, eliminated with the transfer of New France to England, and reinstated by the British Parliament under the *Quebec Act*. The common law tradition is a legacy of the British colonies that, one after another, joined the Canadian federation. Under Canada's Constitution, the powers of the various legislatures in the new federation were defined, and legislative powers in private law matters were distributed between the provincial legislatures, which have general jurisdiction over property and civil law, and the federal Parliament, which has exceptional jurisdiction over certain matters including bankruptcy and insolvency. The exceptional nature of federal jurisdiction in private law matters explains, at least in part, the interdependence between federal and provincial legislation. Federal legislation, with its sources in two separate legal traditions, is bijural.

Many examples of dual legal systems are found worldwide. Most often this situation is the result of juxtaposition of two legal systems. One remarkable characteristic of the Canadian system is the interaction of the two legal traditions within a single legislative corpus. Federal legislation on private law matters can thus be described as “joint law” or, more accurately, “joint private law”. An even more remarkable characteristic of the Canadian system is that this interaction or “jointness” evolves in a bilingual context. In this context, it can be affirmed that Canada's experience in harmonization is unique.

Canadian bijuralism represents a considerable challenge. Parliament must not only consider the civil law's and the common law's respective terminology and concepts, but also reconcile the

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<sup>2</sup> R.S.C. 1985, c. B-3.

numerous changes which flowed from the civil law reform in 1994. In fact, the Quebec legislature replaced old legal concepts with new ones. With respect to terminology, some words became obsolete while some expressions were born. Hence, Parliament's decision to undertake the harmonization of the federal legislation with the Quebec civil law.

It is nonetheless possible to find legal standards derived from neither legal tradition; these standards are said to be "dissociated" from provincial private law and to constitute a form of "autonomous law". In these cases, harmonization will not be needed since the standards are not derived from either legal tradition.

This paper will provide a number of examples illustrating the complementarity between the B.I.A. and provincial private law, and consider some of the challenges of harmonizing the B.I.A. with the Quebec civil law.

## 1. Complementarity between the B.I.A. and provincial private law

### 1.1. History of the B.I.A.

If we are to understand the issues at stake in harmonizing the B.I.A. with Quebec civil law, a glance at this statute's history is of interest. This history shows the complementarity that has developed over the years between an English-based statute and a shared, civil law-based legal system. We will consider the passage of the first bankruptcy enactments in Canada; the repeal of bankruptcy enactments; the background to the passage of modern bankruptcy legislation; and the present statute.

#### *Passage of the first bankruptcy enactments in Canada (1774-1880)*

In Quebec, the 1774 reinstatement<sup>3</sup> of French customary law led to a lengthy period of legal confusion in commercial matters.<sup>4</sup> Insistence by English-speaking subjects on importing the rules of common law vied with resistance by French-speaking subjects attached to the *Coutume de Paris* and French royal edicts.<sup>5</sup> After the rebellion by the Patriotes was put down, the Special Council of Lower Canada placed at the head of the colony's legislative power passed, between 1838 and 1841, numerous English-based commercial statutes, including Canada's first bankruptcy enactment.<sup>6</sup>

<sup>3</sup> *An Act for Making More Effectual Provision for the Government of the Province of Quebec in North America*, 1774 (U.K.) 14 Geo III, c. 83. Also in R.S.C. 1985, app. II, No. 2.

<sup>4</sup> M. Greenwood, "Lower Canada (Quebec): Transformation of Civil Law, from Higher Morality to Autonomous Will, 1774-1866" (1996) 23 Man. L.J. 132. The writer also notes the decision in *Hutchinson v. Gillespie*, in which a judge stated that no law could be applied to insolvency cases since, firstly, English common law had been prohibited in private law matters since the *Quebec Act* and, secondly, no orders made under the French régime had been registered by the Sovereign Council of Quebec: *Hutchinson v. Gillespie*, [1844] 4 Moo. P.C. 378, 13 E.R. 349 (P.C.). The Sovereign Council of Quebec was an administrative legal body with powers similar to those of French legislative assemblies of the time: J.-G. Castel, *The Civil Law System of the Province of Quebec* (Toronto: Butterworths, 1962) at 15-20. See also H. Neatby, *The Administration of Justice under the Quebec Act* (Minneapolis: University of Minnesota Press, 1937) at 15-17 and 155-160; J.-M. Brisson, *La formation d'un droit mixte : l'évolution de la procédure civile de 1774 à 1867* (Montreal: Thémis, 1986) at 34-39.

<sup>5</sup> The *Coutume de la Prévôté et Vicomté de Paris* or *Coutume de Paris*, published in 1580 and recognized by Louis XIV in 1664, included four volumes devoted to commercial law and debt recovery. The *Coutume de Paris* was applied as far afield as New France, following the 1664 *Edit établissant la Compagnie des Indes orientales*. In addition to the *Coutume de Paris*, the *Edit de 1543 sur le droit commercial*, the *Code Marchand*, the *Ordonnance sur le commerce*, the *Ordonnance civile de 1667* or *Code Louis*, and the 1673 *Ordonnance sur les hypothèques* made up the rules applicable to insolvency. See J.A. Dickinson, "New France: Law, Courts, and Coutume de Paris, 1608-1760" (1996) 23 Man. L.J. 32 at 42-43.

<sup>6</sup> *Ordinance Concerning Bankrupts and the Administration and Distribution of Their Estates and Effects*, S.L.C. 1839, c. 36 (Special Council). Ten years later, the insolvency system, too, was imported from England and enacted as the *Act to Abolish Imprisonment for Debts and for the Punishment of Fraudulent Debtors in Lower Canada and for Other Purposes*, S.C. 1849, c. 42; the purposes of this statute were to organize the transfer of property and to free debtors physically.

Starting in 1843, this enactment was applied throughout the united Province of Canada.<sup>7</sup> The overhaul in 1864 of this enactment<sup>8</sup> occurred very shortly before the passage of numerous provisions of the *Civil Code of Lower Canada*<sup>9</sup> [hereinafter *C.C.L.C.*] (including Paulian action) governing bankruptcy and insolvency.<sup>10</sup> After Confederation, these provisions formed a basis for the federal Parliament's exclusive jurisdiction over bankruptcy and insolvency.<sup>11</sup> In 1875, the federal Parliament finally repealed the then existing Prince Edward Island and British Columbia bankruptcy enactments, making its own bankruptcy enactments the only ones applicable to bankruptcy and insolvency in Canada.<sup>12</sup>

#### *Repeal of bankruptcy enactments (1880-1919)*

Following an economic crisis in the 1870s, the federal Parliament decided to repeal its bankruptcy enactment.<sup>13</sup> During heated debate in the House over the passage of the related bill, the opinion was expressed that creditors whose debtors were experiencing serious financial difficulties might resort to provincial private law.<sup>14</sup> In light of this singular situation, the English Privy Council allowed the provincial legislatures to encroach on this area of exclusive federal jurisdiction.<sup>15</sup> As a result, fraudulent preferences and assignments acts<sup>16</sup> and, in Quebec, amendments to the *Code of Civil Procedure* [hereinafter *C.C.P.*] introducing the voluntary deposit were passed.<sup>17</sup>

#### *Passage of modern bankruptcy legislation (1919-1949)*

After a period of silence lasting nearly 40 years, the federal Parliament once again exercised its exclusive jurisdiction over bankruptcy and insolvency.<sup>18</sup> It should be noted that the then Minister of Justice emphasized, while speaking in the House, how important it was for the federal Parliament to

<sup>7</sup> *An Act to Repeal an Ordinance of Lower Canada Intituled An Ordinance Concerning Bankrupts and the Administration and Distribution of Their Estates and Effects, and to Make Provision for the Same Object Throughout the Province of Canada*, S. Prov. C. 1843, c. 10.

<sup>8</sup> *An Act Respecting Insolvency*, S.C. 1864, c. 17, s. 1.

<sup>9</sup> S.Q. 1865, c. 41.

<sup>10</sup> Ss. 17(23), 749, 750, 803, 1032-1040, 1092, 1118, 1119, 1175, 1497, 1754, 1755(4), 1790, 1844, 1892(4), 1946, 1947, 1953(2), 1998, 2023, 2085, 2090 *C.C.L.C.*

<sup>11</sup> *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3., subs. 91(21).

<sup>12</sup> *An Act Respecting Insolvency*, S.C. 1875, c. 16, s. 149.

<sup>13</sup> *An Act to Amend the Insolvent Act of 1875 and Amending Acts*, S.C. 1881, c. 27.

<sup>14</sup> *Debates of the House of Commons of the Dominion of Canada*, (19 February, 1880) at 76ff. These debates show that in Ontario and in New Brunswick, provincial enactments allowed creditors to seize debtors' property and turn it over to a sheriff in order to protect creditors' rights. No similar legislation existed elsewhere in Canada, with the exception of the *C.C.L.C.*

<sup>15</sup> According to the Privy Council, federal legislation on bankruptcy and insolvency could include ancillary provisions governing matters of provincial jurisdiction; the provincial legislatures would then be unable to contradict these provisions. However, given the absence of federal legislation on bankruptcy and insolvency, the Privy Council concluded that the Ontario enactment that was the subject of the dispute did not encroach on the exclusive federal jurisdiction over bankruptcy and insolvency. *Attorney General of Ontario v. Attorney General for the Dominion of Canada*, [1894] A.C. 189 (P.C.).

<sup>16</sup> While the federal Parliament exercises its competence, there are still provincial statutes in effect on these matters to this day: *Fraudulent Conveyances Act*, R.S.N. 1990, c. F-24, s. 3; *Assignments and Preferences Act*, R.S.N.S. 1989, c. 25, s. 4; *Assignments and Preferences Act*, R.S.N.B. 1973, c. A-16, s. 2; *Frauds on Creditors Act*, R.S.P.E.I. 1988, c. F-15, s. 2; *Assignments and Preferences Act*, R.S.O. 1990, c. A.33, subs. 4(1), and *Fraudulent Conveyances Act*, R.S.O. 1990, c. F.29, s. 2; *Fraudulent Conveyances Act*, R.S.M. 1987, c. F160, s. 2; *The Fraudulent Preferences Act*, R.S.S. 1978, c. F-21, s. 3; *Fraudulent Preferences Act*, R.S.A. 1980, c. F-18, s. 2; *Fraudulent Conveyance Act*, R.S.B.C. 1979, c. 142, s. 1, and *Fraudulent Preference Act*, R.S.B.C. 1979, c. 143, s. 3; and *Fraudulent Preferences and Conveyances Act*, R.S.Y. 1986, c. 72, s. 2. See also s. 1631 *C.C.Q.* (in the subsection entitled "Paulian action").

<sup>17</sup> *An Act to amend the Code of Civil Procedure with respect to the garnishment of salaries or wages*, S.Q. 1903, c. 57. These enactments were for a long time referred to as the "*Lacombe Act*", name of the minister who had proposed it. These provisions are found in articles 652ff. of the present *C.C.P.*

<sup>18</sup> Between 1880 and 1919, the federal Parliament did not exercise the jurisdiction on bankruptcy and insolvency it received in 1867, with the exception of a piece of legislation enacted in 1882, still in effect today, which only applied to insolvent corporations. *Winding-up and Restructuring Act*, R.S.C. 1985, c. W-11. However, when a debtor corporation assigns property or a court of competent jurisdiction issues a receiving order, application of this act is suspended: s. 213 *B.I.A.*

respect provincial private law, particularly Quebec civil law.<sup>19</sup> Unfortunately, the Department's nobles intentions did not find expression in the actual bill,<sup>20</sup> which was derived directly from the English bankruptcy legislation.<sup>21</sup> So it happened that many procedures foreign to Quebec civil law (including settlement of property, petitioning in bankruptcy, and receiving orders) were imported into Canadian law.

### *The present statute (1949-2000)*

Since 1949, the *B.I.A.* has been subject to a few revisions. These revisions were used to introduce new provisions including those on consumer proposals, environmental matters, recourse by secured creditors, international bankruptcy, and bankruptcy by securities firms. Traces of this common law-based structure, however, are still very much apparent today.<sup>22</sup> In the meantime, the Quebec legislature has reformed the *Civil Code of Quebec*<sup>23</sup> [hereinafter *C.C.Q.*], in particular the rules governing security.

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It can be noted from the foregoing remarks that the issues surrounding harmonization of the *B.I.A.* with Quebec civil law have marked Canada's legislative history. Although the importance of the civil law tradition has been recognized on occasion, and although the complementarity that binds federal bankruptcy legislation to provincial private law has been acknowledged, it is still true that harmonization of the *B.I.A.* presents a basic problem in the very spirit of this legislation, derived directly from the English tradition.

## **1.2. Recognition in case law of complementarity**

Case law has recognized the complementarity that binds federal bankruptcy legislation to Quebec private law. This recognition has found expression in two passages that are highly interesting and, incidentally, emanate from Canada's highest court. These passages are the remarks by Beetz J. in the *Robinson v. Countrywide Factors Ltd.* decision, and those by Pigeon J. in the *Rainville* decision.

### *Robinson v. Countrywide Factors Ltd.*<sup>24</sup>

*Robinson* dealt with the validity of a remedy sought by the trustee in bankruptcy who had relied upon provisions of the *Fraudulent Preferences Act*<sup>25</sup> to have an allegedly fraudulent payment set aside. This case was argued all the way to the Supreme Court of Canada who considered the constitutionality of the provincial act in light of the division of powers. Justice Beetz, considering this question, underlined the interaction between provincial private law and bankruptcy enactment as follows:

<sup>19</sup> *Debates of the House of Commons of Canada* (28 March 1919) at 968.

<sup>20</sup> *An Act Respecting Bankruptcy*, S.C. 1919, c. 36.

<sup>21</sup> *An Act to Consolidate the Law Relating to Bankruptcy* (U.K.), 1914-1916, c. 59 [hereinafter *English Bankruptcy Act of 1914*]. See A. Bohémier, *Faillite et insolvabilité*, t. 1 (Montreal: Thémis, 1992) at 9-18.

<sup>22</sup> *An Act to Amend the Bankruptcy Act*, S.C. 1966-67, c. 32; *An Act to Amend the Bankruptcy Act and the Income Tax Act in Consequence Thereof*, S.C. 1992, c. 27; *An Act to Amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangements Act, and the Income Tax Act*, S.C. 1997, c. 12.

<sup>23</sup> S.Q. 1991, c. 64.

<sup>24</sup> *Robinson v. Countrywide Factors Ltd.*, [1978] 1 S.C.R. 753 [hereinafter *Robinson*].

<sup>25</sup> R.S.S. 1965, c. 397.

Insolvency lies at the core of those parts of the common law and of the civil law which relate to such matters as mortgage, pledge, pawning, suretyship and the securing of debts generally which are implicitly or explicitly predicated on the risk of insolvency and which produce their full effect when the risk has been converted into reality [...].<sup>26</sup>

Beetz J. went on to state that “the primary jurisdiction of Parliament cannot easily be exercised together with its incidental powers without some degree of overlap in which case federal law prevails.”<sup>27</sup>

Relying on the wording of subsection 72(1) of the *B.I.A.*, Beetz J. concluded that, in enacting this provision “Parliament, far from intending to depart from the rule of operational conflict, did in fact aim at the highest possible degree of legal integration of federal and provincial laws [...]”<sup>28</sup>

### *Rainville*<sup>29</sup>

One of Pigeon J.'s best-known remarks is found in the Supreme Court of Canada decision in *Rainville*.<sup>30</sup> At issue in this case was whether, for the purposes of federal bankruptcy legislation, a privilege granted to the Crown under a provincial statute should be recognized. After briefly summarizing the facts and the parties' allegations, Pigeon J. went on to make an observation that is surprisingly relevant to the present federal harmonization program. He stated:

We are confronted here by major problem in the interpretation of federal legislation, and, at this juncture, it is proper to stop to consider the difficulty of the task facing our legislative draftsmen. They must not only formulate all legislative provisions in two languages, but also more often than not they must do so in terms of two different legal systems; the civil law of Quebec and the common law of the other provinces. In bankruptcy legislation, which everywhere impinges upon every area of public and private provincial law, the task is particularly difficult. It is therefore not surprising that major problems should be encountered. Moreover, it is a fact which cannot be ignored that the *Bankruptcy Act* of 1949, like the *Bankruptcy Act* of 1919, was not only derived almost entirely from English sources but was also poorly served by the authors of the French version.<sup>31</sup>

This statement was recently quoted by the justices of the Quebec Court of Appeal in the decision in *Château d'Amos*.<sup>32</sup>

### 1.3. Creation of a working group to harmonize the *B.I.A.* at Justice Canada

Justice Canada, too, recognizing the complementarity between the *B.I.A.* and Quebec civil law and faced with the complexity of the issues raised by harmonization, undertook the revision of the

<sup>26</sup> *Robinson*, supra note 24 at 804.

<sup>27</sup> *Ibid.* at 805.

<sup>28</sup> *Ibid.* at 809. Subsection 72(1) of the *B.I.A.* provides:

The provisions of this Act shall not be deemed to abrogate or supersede the substantive provisions of any other law or statute relating to property and civil rights that are not in conflict with this Act, and the trustee is entitled to avail himself of all rights and remedies provided by that law or statute as supplementary to and in addition to the rights and remedies provided by this Act.

<sup>29</sup> *Deputy Minister of Revenue (Quebec) v. Rainville*, [1980] 1 S.C.R. 35 [hereinafter *Rainville*].

<sup>30</sup> This rather long excerpt has, nevertheless, often been cited in full. See for example R. P. Simard et A. Leduc, “Affaire Château d'Amos: intégrité du droit canadien de la faillite ou du droit civil québécois, deux intérêts inconciliables dans un régime fédéral?”, in *Barreau du Québec, Développements récents en droit administratif*, vol. 131 (Cowansville, Que.: Yvon Blais, 2000) 85 at 87 [hereinafter “Deux intérêts inconciliables?”]; D. S. Goldstein et Y. Goldstein, “The Impact of the Civil Law on Bankruptcy and Insolvency Practice in Quebec or Whose *Bankruptcy and Insolvency Act* Is It Anyway?”, in *Pertinence renouvelée du droit des obligations : Back to Basics : Conférences commémoratives Meredith 1998-1999* (Cowansville, Que.: Yvon Blais, 2000) 253 at 256.

<sup>31</sup> *Rainville*, supra note 29 at 41.

<sup>32</sup> *Château d'Amos ltée (syndic de)*, [1999] R.J.Q. 2612 at 2633 (C.A.) [hereinafter *Château d'Amos*].

*B.I.A.* as a harmonized legislation pilot project. To this end, professors were consulted and a working group set up.

### *Studies by professors*

Starting in 1995, Justice Canada approached an impressive range of experts in various fields of legal study—professors Jacques Deslauriers, Albert Bohémier, Jacques Auger and Roderick A. Macdonald—in order to obtain an initial diagnosis of the harmonization work to be accomplished in the field of bankruptcy and insolvency. These experts unanimously affirmed the need to harmonize the *B.I.A.* with Quebec civil law. Professor Bohémier concluded an article on this subject by stating: “I am convinced that the enactment of appropriate solutions with regard to the matters discussed will greatly improve the current situation” [emphasis added]<sup>33</sup>

In the first pages of an article on the treatment of creditors in the *B.I.A.*, Professors Jacques Auger, Albert Bohémier and Roderick A. Macdonald were somewhat more explicit in stating that: “[c]learly, the *B.I.A.* and the Civil Code are mutually interdependent, and it is accordingly important that they be in complete harmony” [emphasis added].<sup>34</sup>

For different reasons, however, Justice Canada's first initiatives to harmonize the *B.I.A.* with Quebec's civil law, which included changes to the definition of “secured creditor”, have not found expression in legislation.<sup>35</sup> However, as Professor Jacques Deslauriers noted: [translation] “harmonization of the *Bankruptcy and Insolvency Act* with the *Civil Code of Quebec* is urgent” [emphasis added].<sup>36</sup>

These experts' opinions confirm our conviction that the task of harmonizing the *B.I.A.* with Quebec civil law is both unavoidable and pressing.

### *Creation of the bankruptcy working group*

In July 1999, the Civil Code Section created a working group of legal experts. The working group was given the mandate of revising the *B.I.A.* in its entirety, as well as the *Bankruptcy and Insolvency General Rules*<sup>37</sup> [hereinafter *B.I.G.R.*], in order to harmonize them with Quebec civil law. A partnership was also established with Industry Canada who administers this act. Following this preliminary work, the working group noted issues raised in the *B.I.A.* as well as other, equally serious, but more general issues. To these issues we now turn.

## **2. Issues raised in the *B.I.A.***

### **2.1. Definition of secured creditors**

The definition of the expression “secured creditor” is one of the most important provisions in the *B.I.A.* The harmonization of this definition with Quebec civil law clearly has appreciable economic

<sup>33</sup> A. Bohémier, “Research in Bijuralism: *Bankruptcy and Insolvency Act*”, in *Harmonization of Federal Legislation with Quebec Civil Law and Canadian Bijuralism* (Ottawa: Justice Canada, 1997) 841 at 886 [hereinafter “Research in Bijuralism”].

<sup>34</sup> J. Auger, A. Bohémier and R. A. Macdonald, “The Treatment of Creditors in the *Bankruptcy and Insolvency Act* and Security Mechanisms in the Civil Law of Quebec”, in *Harmonization of Federal Legislation with Quebec Civil Law and Canadian Bijuralism* (Ottawa: Justice Canada, 1997) 887 at 892 [hereinafter “The Treatment of Creditors”].

<sup>35</sup> On 31 January 2001, the first harmonization bill was tabled in the Senate. It may now be referred to as Bill S-4.

<sup>36</sup> J. Deslauriers, “Le projet de loi S-22 et l'harmonisation de la *Loi sur la faillite* avec le *Code civil du Québec*” (Conference of the Canadian Bar Association, Quebec, 24 October 2000) at 2 [hereinafter “Conférence sur le projet de loi S-22”].

<sup>37</sup> SOR/98-240.

repercussions for creditors involved in bankruptcies. This definition raises a number of issues: outdated terminology, the type of mechanisms that confer secured creditor status, ownership security mechanisms, trust security mechanisms. We shall also see what constituted the draft amendments contained in the initial harmonization bills.

### *Outdated terminology*

The definition of secured creditors contained in section 2 of the *B.I.A.* includes private law concepts, specifically that of security,<sup>38</sup> including hypothec and privilege. Under the *C.C.L.C.*, inclusion of the words “nantissement” and “privilege” in this definition, as well as the treatment of these terms in case law, allowed for some degree of correlation between the *C.C.L.C.* and the *B.I.A.* As well, the real security mechanisms recognized by the *C.C.L.C.* were recognized by the *B.I.A.*, subject to subsection 70(1) and section 136 of the *B.I.A.* and to the interpretation of the expression “on or against the property of the debtor or any part thereof as security for a debt”.

The coming into force of the *C.C.Q.* on January 1, 1994 significantly changed Quebec law on security. Subject to the transitional provisions contained in the *Act respecting the implementation of the reform of the Civil Code*,<sup>39</sup> privileges under the *C.C.L.C.* and special statutes were eliminated. For the benefit of certain creditors, the Quebec National Assembly introduced the new concept of prior claims, not to be confused with privileges. Prior claims, which need not be registered for holders to benefit from them, confer a right of preference that theoretically supplants the right of preference of hypothecary creditors, regardless of the registration date of the hypothec.<sup>40</sup> As a result, the terminology contained in the definition of secured creditors in the *B.I.A.* is outdated.

### *Real security*

The definition of secured creditors lists a series of security mechanisms “on or against the property of the debtor or any part thereof as security for a debt”, and thus this definition applies only to real security. Since prior claims do not constitute real rights,<sup>41</sup> holders of prior claims do not have secured creditor status. This point is made clear in the Quebec Court of Appeal decision in *Château d’Amos*.<sup>42</sup> In response to this decision, the Quebec National Assembly immediately tabled a bill to amend the *C.C.Q.* and to include in it the concept of prior claims constituting real rights for the benefit of municipalities and school boards,<sup>43</sup> for which the issue seems to be resolved.<sup>44</sup>

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<sup>38</sup> The definition reads as follows:

“secured creditor” means a person holding a mortgage, hypothec, pledge, charge, lien or privilege on or against the property of the debtor or any part thereof as security for a debt due or accruing due to him from the debtor, or a person whose claim is based on, or secured by, a negotiable instrument held as collateral security and on which the debtor is only indirectly or secondarily liable.

<sup>39</sup> L.Q. 1992, c. 57.

<sup>40</sup> Subject to the hypothecary creditor’s right to taking in payment. *Québec (Sous-ministre du Revenu) v. Banque nationale du Canada*, [1999] R.J.Q. 950 (Que.C.A.). *Contra: Château d’Amos*, *supra* note 32.

<sup>41</sup> On this point, Professor Louis Payette notes that:

[Translation] [t]he code does not define prior claims as being real rights, in the way it defines hypothecs. It confers on prior claims only some of the attributes of hypothecs; it does not provide for a right to follow regarding prior claims [...]. In this context, it must be concluded that prior claims are rights of preference *sui generis* that most likely may not be described as real rights.

L. Payette, “Des priorités et des hypothèques”, in *Barreau du Québec* and the *Chambre des notaires du Québec, La réforme du Code civil*, vol. 3 (Quebec: Les Presses de l’Université Laval, 1993) at 66.

<sup>42</sup> *Château d’Amos*, *supra* note 32.

<sup>43</sup> *An Act to amend various legislative provisions regarding municipal affairs*, S.Q. 1999, c. 90, s. 42, 43. These amendments are now provided for in art. 2654.1 *C.C.Q.*

The same cannot be said for other prior claim creditors, however. For example, it has never been clearly established in case law whether holders of a right of retention were considered as secured creditors because of the nature of the right itself or because of the result of the accompanying privilege. Professor Jacques Deslauriers describes this uncertainty as a serious problem, and goes on to say: [translation] “[a]lthough prior to 1994 holders of a right of retention were given secured creditor status in bankruptcies, following the amendments of the new *Code* this secured creditor status has become very uncertain and can even be said to have become non-existent.”<sup>45</sup>

As well, the priority of legal costs and Crown tax claims, governed respectively by section 136, 86 and 87 of the *B.I.A.*, can no longer be applied to property liquidated by trustees.

#### *Ownership security and trust security mechanisms*

In addition to prior claims and hypothecs, mechanisms involving ownership rights can also be used to secure the performance of obligations. Examples include instalment sales,<sup>46</sup> sales subject to a resolutive clause,<sup>47</sup> and sales with right of redemption.<sup>48</sup> These mechanisms are referred to as “ownership security” mechanisms.<sup>49</sup>

Subject to certain formalities prescribed by provincial private law, the procedure set out in section 81 of the *B.I.A.* allows beneficiaries of these mechanisms to claim possession of the property from trustees. In a sense these creditor-owners are unaffected by bankruptcies, even less affected than secured creditors, who are in fact subject to certain procedures that do not affect creditor-owners.

When the *C.C.L.C.* was in force, treatment of creditor-owners under the *B.I.A.* was similar to that under Quebec civil law, which did not prohibit the use of ownership rights to secure the performance of obligations and thus provided creditors with security mechanisms that were often more effective than actual security.

The coming into force of the *C.C.Q.* brought substantial change in this regard: rights resulting from instalment sales and sales with right of redemption, in the case of debtors who ran businesses, as well as rights resulting from sales of immovables subject to a resolutive clause, became subject to the rules governing the exercise of hypothecary rights. The same became true for an onerous trust established to secure the performance of obligations.<sup>50</sup> As a result, according to Professors Jacques Auger, Albert Bohémier and Roderick A. Macdonald, the gap between traditional security mechanisms on the one hand and certain ownership security and trust security mechanisms on the other hand is becoming much narrower, to the point where these writers conclude as follows:

[translation] In this context, with security ownership and security trusts being increasingly considered by the *jus commune* to be primarily security mechanisms, it may seem paradoxical that the *B.I.A.*

<sup>44</sup> On this point, there seems to be some degree of unanimity in the legal community. See “Deux intérêts inconciliables?”, *supra* note 30 at 133.

<sup>45</sup> “Conférence sur le projet de loi S-22”, *supra* note 36 at 6.

<sup>46</sup> Art. 1745-1749 C.C.Q.

<sup>47</sup> Art. 1742-1743 C.C.Q.

<sup>48</sup> Art. 1750-1756 C.C.Q.

<sup>49</sup> See “The Treatment of Creditors”, *supra* note 34 at 930.

<sup>50</sup> Art. 1263 C.C.Q.



would continue to ignore this trend by placing them under a different set of rules from those that apply to secured creditors. Harmonization between the *B.I.A.* and the *C.C.Q.* may therefore demand that the very concept of secured creditor be revisited and extended to include owner creditors and trustee creditors, who would then be subject to the same restrictions as those placed on secured creditors; the trustee could have the same rights with regard to them, with certain adjustments, as with regard to secured creditors.<sup>51</sup>

### *Harmonization Bill*

The definition of secured creditors was the subject of proposed legislative amendments in Bill C-50 in 1998 and Bill S-22 in 2000. These amendments introduced the prior claim constituting real rights for the benefit of municipalities and school boards, as well as ownership security mechanisms, trust security mechanisms, and right of retention. The purpose of these amendments was not to make new law, but to re-establish the balance that had existed before the *C.C.Q.* and to cover the situation that had prevailed since that time. Unfortunately, both these bills died on the Order Paper.<sup>52</sup>

## **2.2. Courts vested with jurisdiction in equity**

The *B.I.A.* vests certain courts with jurisdiction to hear bankruptcy and insolvency cases; these courts, which are listed in full in the *B.I.A.*, correspond generally to ordinary courts of law in the provinces and territories, whose inherent jurisdiction is recognized in the act.<sup>53</sup> The *B.I.A.* also vests these courts with jurisdiction in equity.<sup>54</sup> A number of clauses of the *B.I.A.* explicitly refer to matters in equity.<sup>55</sup>

This vesting of jurisdiction raises the question whether the Quebec Superior Court has jurisdiction over equity law matters. Indeed, some judges have turned to equity law doctrines in constructing certain *B.I.A.*'s sections.<sup>56</sup>

Section 183 of the *B.I.A.* have also been constructed as enabling “fairness” and “good conscience” discretion.<sup>57</sup> However, according to De Blois J. of the Quebec superior Court, the word

<sup>51</sup> “The Treatment of Creditors”, *supra* note 34 at 932.

<sup>52</sup> See *supra* note 35.

<sup>53</sup> This would be the meaning to be given to subsection 183(1) of the *B.I.A.* According to Justice Houlden and Mr. Morawetz, the expression “original, auxiliary and ancillary jurisdiction” would refer to the inherent jurisdiction in common law of the courts in which the *B.I.A.* vests jurisdiction in bankruptcy and insolvency proceedings: L.W. Houlden and G.B. Morawetz, *The 2000 Annotated Bankruptcy and Insolvency Act* (Scarborough: Carswell, 1999) at 636 [hereinafter *The 2000 Annotated B.I.A.*].

<sup>54</sup> S. 183 *B.I.A.*

<sup>55</sup> References to equity in the *B.I.A.* include the following:

- In subsection 2(1), the definition of “property” covers every description of property, legal or equitable;
- Under paragraph 4(3)(c), a person who has a right under a contract, “in equity or otherwise”, to acquire shares in a corporation shall be deemed to own the shares;
- Under section 84, all sales of property made by a trustee vest in the purchaser all the “legal and equitable” estate of the bankrupt therein;
- Under section 213, where a petition for a receiving order or an assignment has been filed in respect of a corporation, any proceedings that are instituted under the *Winding-up and Restructuring Act* shall abate, subject to such disposition of the costs of those proceedings as the justice (in French “équité”) of the case may require;
- Under subs. 268(5), the court, on the application of a foreign representative, may apply “legal or equitable” rules governing the recognition of foreign insolvency orders.

<sup>56</sup> *Pogany (syndic de)*, [1997] R.J.Q. 1693 at 1700 (Sup. Ct.); *Janpar Produits de bureau Inc. (syndic de)*, [1993] R.J.Q. 1907 at 1914 (Sup. Ct.); *Maestro Ltée (syndic de)* (May 25, 2000), Montreal 500-11-011474-992, J.E. 2000-1323 (Sup. Ct.); *Re Bureau (syndic de)*, [1995] R.J.Q. 1461 at 1465 (Sup. Ct.).

<sup>57</sup> *Re Alliance Credit Corp.: Gagnon v. Montreal Trust Co.* (1973), 17 C.B.R. 136 (Que. Sup. Ct.); *Fredericton Co-operative Ltd v. Smith* (1921-22), 2 C.B.R. 154 (N.-B.K.B.); *Re Stanley & Bunting* (1924-25), 5 C.B.R. 18 (Ont. Sup. Ct.); *Re Duranceau: Perras v. Cie mutuelle d'immeubles Ltée* (1954), 34 C.B.R. 198 (Que. Sup. Ct.).

“equity” used by the federal Parliament in section 183 refers solely to equity as part of the common law.<sup>58</sup>

The vesting of jurisdiction in equity and the recognition of the inherent jurisdiction of *jus commune* courts may raise some issues concerning Quebec civil law. The initial harmonization bills included proposed amendments to subsections 183(1) and 183(2) of the *B.I.A.*, the purpose of which was to indicate clearly that the *B.I.A.* did not have the effect of vesting Quebec courts with jurisdiction in equity.

Indeed, the concept of equity, derived as it is from English law, forms part of a tradition and a terminology that are foreign to Quebec civil law. All the equity proceedings referred to in the *B.I.A.* raise the issue of how a Quebec Superior Court judge may apply them without having the jurisdiction to do so. On this point, in the decision in *Castor Holding Ltd.*, Guthrie J. of the Quebec Superior Court stated:

[translation] The Superior Court is the court of original general jurisdiction; it hears at the trial level all proceedings that formal provisions of the law have not allocated exclusively to other courts (art. 31 *C.C.P.*). The Superior Court has all the powers required to exercise this jurisdiction (art. 46 *C.C.P.*). It is not necessary to import jurisdiction in equity in order to broaden this Court's jurisdiction. The purpose of subsection 183(1) of the *B.I.A.* is merely to ensure that the superior courts in the common law provinces can exercise their jurisdiction in law and in equity in exercising their general jurisdiction. This section does not give the Quebec Superior Court, in exercising its jurisdiction in bankruptcy matters, a power in addition to the power it already has [emphasis added].<sup>59</sup>

That said, although the jurisdiction in equity conferred by the *B.I.A.* is directed only at the superior courts in the common law provinces, in the decision in *Structal (1982) inc. v. Fernand Gilbert Itée*, the Quebec Court of Appeal did apply the concept of “equitable set-off” set out by the Supreme Court of Canada in *Holt v. Telford*,<sup>60</sup> a ruling strongly criticized by André Bélanger.<sup>61</sup>

### 2.3. Petitioning in bankruptcy and other procedural issues

Petitioning in bankruptcy, the procedure that initiates bankruptcy proceedings, raises a number of conceptual issues, particularly concerning the supplementary law to be applied.<sup>62</sup> We shall look first at the special characteristics of petitioning in bankruptcy, its common law derivation, and its use in the context of Quebec civil law. At the end of this part, we shall look at the special characteristics of other procedures provided for in federal bankruptcy legislation.

#### *Special characteristics of petitioning in bankruptcy*

<sup>58</sup> *Re 125258 Canada Inc. (formerly Cast North America Ltd.): Bissegger v. Banque Royale du Canada*, [1986] R.J.Q. 1666 at 1680 (Sup. Ct.), aff'd [1990] R.J.Q. 1547 (C.A.). *Voir aussi Meublerie André Viger Inc. (syndic de)*, [1992] R.J.Q. 1461 at 1467 (C.A.).

<sup>59</sup> *Castor Holdings Ltd. (syndic de)*, (29 October 1999), Montreal 500-11-001584-925, J.E. 99-2246 (Sup. Ct.).

<sup>60</sup> *Holt v. Telford*, [1987] 2 S.C.R. 193 at 206; *Structal (1982) Inc. v. Fernand Gilbert Itée*, [1999] R.J.Q. 1686 (Sup. Ct.). This case law is cited in *Nolisair International Inc. (syndic de)* (22 August 2000) Montreal 500-09-008036-998, J.E. 2000-1665 (C.A.).

<sup>61</sup> André Bélanger, “L'application en droit civil québécois de l'inapplicable equitable set-off de *common law*” (1999) 78:3-4 *Can. Bar Rev.* 486.

<sup>62</sup> Subsection 43(1) of the *B.I.A.* reads as follows:

[s]ubject to this section, one or more creditors may file in court a petition for a receiving order against a debtor if, and if it is alleged in the petition that,

(a) the debt or debts owing to the petitioning creditor or creditors amount to one thousand dollars; and

(b) the debtor has committed an act of bankruptcy within six months next preceding the filing of the petition.

Petitioning in bankruptcy is derived from a set of rules intended to be complete; the purpose of this accelerated, exceptional, quasi-criminal procedure is to obtain a receiving order.

*(i) Set of rules intended to be complete*

According to the case law indexed in the *Canadian Encyclopedic Digest*, the procedure provided for in the *B.I.A.* forms a complete set of rules adopted in order to provide quick, effective, less costly ways of settling issues raised in the administration of bankrupts' property.<sup>63</sup> Although some cases that we shall see at the end of this part may require the application of rules of supplementary law, petitioning in bankruptcy is a procedure derived from a set of rules intended to be complete.

*(ii) Accelerated procedure*

The progress through the courts of petitions in bankruptcy ought to be expeditious. In the reasons for dismissing an appeal concerning a receiving order issued by the Quebec Superior Court, Owen J. of the Quebec Court of Appeal stated as follows:

In dealing with a bankruptcy, it is necessary to keep in mind the underlying philosophy that matters should be dealt with and the assets realized and distributed as expeditiously and economically as possible. Bankruptcy proceedings are primarily for the benefit of the creditors and are not intended to be dragged out by the technicalities, procedural and otherwise, for the advantage of the debtor and the friends of the debtor.<sup>64</sup>

*(iii) Exceptional procedure*

Petitioning in bankruptcy is an exceptional procedure; its purpose is to divest debtors of their property and thus of the administration of their patrimony.<sup>65</sup> In fact, under the rules set out in the *jus commune*, insolvency is exceptional: when debtors become insolvent, in a way their relationships with others become unbalanced. In order to re-establish balance, federal bankruptcy legislation allows discharge from indebtedness so debtors can create new contractual ties with others again.

*(iv) Quasi-criminal procedure*

Bankruptcy proceedings were originally designed to penalize insolvent debtors; the debtors' prison was a byword. Later, bankruptcy laws allowed for discharge from indebtedness.<sup>66</sup> Methods gradually became more humane, and options introduced included proposals,<sup>67</sup> summary administration,<sup>68</sup> the orderly payment of debts,<sup>69</sup> and consumer proposals.<sup>70</sup> As well, just recently the

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<sup>63</sup> *Canadian Encyclopedic Digest*, vol. 2, 3th ed. (Scarborough: Carswell, 1984) at 397.

<sup>64</sup> *Pacific Mobile Corp. v. Hunter Douglas Canada Ltd.*, (16 January 1979) 200-09-000205-788 (C.A.Q.) aff'd [1979] 1 S.C.R. 842 at 843.

<sup>65</sup> *Faillite et insolvabilité*, *supra* note 21 at 111.

<sup>66</sup> *Ibid.* at 4-8.

<sup>67</sup> S. 50ff. *B.I.A.*, introduced in 1919.

<sup>68</sup> S. 155 *B.I.A.*, introduced in 1949.

<sup>69</sup> S. 217ff. *B.I.A.*, introduced in 1967. This part is not applied in Quebec.

<sup>70</sup> S. 66.11ff. *B.I.A.*, introduced in 1992.

federal Parliament introduced mediation, a procedure aimed at allowing creditors and debtors to resolve situations of insolvency without going through the legal procedure.<sup>71</sup>

Despite this slow evolution in search of kinder ways of resolving situations of insolvency, the *B.I.A.* is still considered punitive in nature, if only by courts in the common law provinces.<sup>72</sup> However, this view does not appear to be unanimously held by all common law judges. For example, we quote the remarks by Sutherland J. of the Supreme Court of Ontario in *Re Bookman*:

Proceedings under the *Bankruptcy Act* are sometimes referred to as “quasi-criminal” doubtless because they involve the state, affect status and cannot, in the case of a petition, be simply discontinued at the behest of the parties. The term “quasi-criminal” is employed in cases such as *Re Elkind*; *Samuel Hart & Company v. Elkind (1966)*, 9 C.B.R. (N.S.) 274 where strict compliance with the provisions relating to bankruptcy petitions is being insisted upon by the Court. However, in essence the proceedings under the *Bankruptcy Act* are civil proceedings and so not themselves directly affected by s. 11(c) of the Charter.<sup>73</sup>

This concept seems to be completely ignored by Quebec courts. Only one short passage by Kaufman J. of the Quebec Court of Appeal in the reasons for the decision in *Gilbert v. Gilbert* designates the *B.I.A.* as at best quasi-criminal.<sup>74</sup> In fact, according to Professor Bohémier, this concept appears to have fallen into disuse and has seemingly been replaced with the patrimonial aspect of the *B.I.A.*<sup>75</sup>

#### *Common law derivation of petitioning in bankruptcy*

Petitioning in bankruptcy is an old procedure derived from the common law tradition. The word “petition” was already used in 19th-century English law to designate the procedure under which creditors’ rights could be recognized in bankruptcy cases.<sup>76</sup> This word can also designate a procedure to initiate primary civil proceedings in the common law provinces. As such, it is one of the procedures used to initiate actions.<sup>77</sup>

Where terminology is concerned, the word “pétition” is usually used to render the word “petition”. That said, examples of the use of the word “requête” can be found in the French versions of certain statutes,<sup>78</sup> including some in the federal legislative corpus.<sup>79</sup>

<sup>71</sup> Introduced in 1997, mediation is aimed at settling disputes over the amount bankrupts must pay their creditors (excess income) and over the conditions under which persons may be discharged from bankruptcy. See the Internet site for the Office of the Superintendent of Bankruptcy: <http://strategis.ic.gc.ca/SSGF/br01083f.html>.

<sup>72</sup> *Re Dallas/North Group Inc.* (1999), 46 O.R. (3rd) 602 at 603 (Gen. Div.); *Re 307309 B.C. Ltd.* (1991), 11 C.B.R. (3rd) 187 at 191 (B.C.S.C.); *Re Whatznu Fashions (1988) Ltd.* (1989), 73 C.B.R. (N.S.) 241 (Ont. H.C.J.); *Re Saleh* (1982), 42 C.B.R. 41 at 43 (Ont. H.C.J.); *Re Consoli* (1982), 41 C.B.R. (N.S.) 203 at 205 (Ont. H.C.J.); *Re Holmes and Sinclair* (1975), 20 C.B.R. (N.S.) 111 at 112 (Ont. H.C.J.); *Re Elkind* (1967), 9 C.B.R. (N.S.) 274 at 278 (Ont. H.C.J.).

<sup>73</sup> *Re Bookman* (1984), 49 C.B.R. (N.S.), 267 at 282 (Ont. H.C.J.).

<sup>74</sup> *Gilbert c. Gilbert*, [1975], C.A. 411.

<sup>75</sup> *Faillite et insolvabilité*, *supra* note 21 at 112.

<sup>76</sup> *The Oxford English Dictionary*, 2nd ed. (Oxford: Clarendon Press, 1989) at 633. In the late 1800s, “a petition [was] a proper mode of coming before the court for the relief of insolvent debtors”.

<sup>77</sup> Actions are usually initiated by statements of claim. *Courts of Justice Act*, R.S.O. 1990, c. C-43, s.1. If there is not enough time to draft a statement of claim, the Ontario *Rules of Civil Procedure* allow for a notice of action to be filed; it is imperative that the notice of action be followed by a statement of claim. *Rules of Civil Procedure*, R.R.O. 1990, Reg 194, s. 14.01. Applications are the other judicial procedure used in Ontario civil courts. The court may not hear applications unless there is specific statutory provision for them; if there is such provision, the party making the application may file a notice of application: *Rules of Civil Procedure*, *ibid.*, s. 38.

<sup>78</sup> One example is the *Municipalities Act*, R.S.N.B. 1973, c. M-22, s. 24-25.

<sup>79</sup> Examples of the use of the word “requête” to translate the word “petition” in federal statutes include: *Companies’ Creditors Arrangements Act*, R.S.C. 1985, c. C-25, s. 10:

Although theoretically petitioning is derived from the common law tradition, in the context of bankruptcy the nature of this procedure raises some issues. In *Re Ristimaki*, the Ontario Registrar in Bankruptcy was to decide whether a third party (in this case, the Canada Customs and Revenue Agency) could obtain leave to intervene in a petitioning in bankruptcy; the Agency claimed that the receiving order would have the effect of jeopardizing its claim. At issue, then, was the application of Rule 13.01(1) of the Ontario *Rules of Civil Procedure*, which provided for an application for leave to intervene as an added party. The Registrar dismissed the application, considering that Rule 13.01(1) did not apply in the case. The Registrar added that the receiving order could not be considered a judgment within the meaning of Rule 13.01(1)(b) since the petition in bankruptcy to obtain the order was neither an action nor an application. The Registrar wrote as follows:

[...] I question whether a receiving order is a “judgment”. “Judgment” is defined in the RCP as “a decision that finally disposes of an application or action on its merits [...]” “action” in turn is defined as a proceeding that is not an application and includes a statement of claim, notice of action, counterclaim and divorce petition, among other processes. “Application” is defined as a proceeding commenced by notice of application. A petition is neither an action nor an application, by these definitions [emphasis added].<sup>80</sup>

Why did Owen J. not recognize petitioning in bankruptcy as one of the “other processes”? Are we to understand from this decision that petitioning in bankruptcy is an autonomous procedure to which no supplementary law in provincial private law applies? The above-quoted passage illustrates the issues raised by the very nature of petitioning in bankruptcy, in a common law context. We shall now consider the issues raised by the use of petitioning in bankruptcy in a civil law context.

#### *Use of petitioning in bankruptcy in Quebec civil law*

In Quebec, the word “pétition” has been used to mean a judicial proceeding, for example a “pétition de droit” or an “action pétitoire”. Today, this word is used only in the expression “pétition d’hérité”, or petition for inheritance, an application for recognition of heredity.

##### *(i) “Pétition de droit”*

The “pétition de droit” designated an application for leave, submitted to the Sovereign by a person initiating proceedings against the state.<sup>81</sup> Articles 94ff. of the *C.C.P.* now govern proceedings against the state, which must be initiated by means of declarations or motions.

##### *(ii) “Action pétitoire”*

Applications [...] shall be made by petition or by way of originating summons or notice of motion.

*Demandes [...] peuvent être formulées par requête ou par voie d'assignation introductive d'instance ou d'avis de motion.*

*Canada Business Corporations Act*, R.S.C. 1985, c. C-44, s. 248:

Application [...] in a summary manner by petition.

*Demande [...] présentée par voie sommaire sous forme de requête.*

*Canada Cooperatives Act*, S.C. 1998, c. 1, s. 347:

Application made in any summary manner by petition [...].

*Demande [...] présentée par requête sommaire [...].*

This act was proclaimed in force 31 December 1999, SI 99-69, C. Gaz. 1999.II.1917.

<sup>80</sup> *Re Ristimaki* (2000), 18 C.B.R. (4th) 246 at 249 (Ont. Bkcty).

<sup>81</sup> H. Reid, *Dictionnaire de droit québécois et canadien*, (Montreal: Wilson & Lafleur, 1994) at 425 [hereinafter *Dictionnaire de droit québécois*].

Under the *C.C.L.C.*, the purpose of an “action pétitoire” was to ensure judicial protection of property. The articles of the *C.C.P.* governing the “action pétitoire” were repealed by the Quebec National Assembly with the introduction of article 912 of the *C.C.Q.*, which provides that owners may take legal action to have their right acknowledged.<sup>82</sup>

(iii) *Petition of inheritance*

The word “pétition” is still used today in the expression “pétition d’héritité”, or petition for inheritance, designating successors' right to have their heirship recognized.<sup>83</sup> Although petitions of inheritance have the nature of claims, this expression does not designate the procedure used in court.

In Quebec law, only two types of procedures initiate primary proceedings. Under the *C.C.P.*, “[u]nless otherwise provided, every judicial proceeding is introduced by a declaration.”<sup>84</sup> This is the general procedure; injunctions, for example, are initiated by declarations.<sup>85</sup> Also under the *C.C.P.*, certain proceedings relating to persons and property are initiated by motions;<sup>86</sup> motions are used to apply for declaratory judgments<sup>87</sup> and extraordinary recourses.<sup>88</sup> Petitions of inheritance are initiated in court by motions.<sup>89</sup>

In Quebec case law, there does not seem to be a standard expression in French designating the procedure for forcing debtors into bankruptcy. A brief search of Quebec case law revealed the use of the following expressions in French:<sup>90</sup>

- “demande d’ordonnance de séquestre”,
- “demande de mise en faillite”,
- “requête pour mise en faillite”,
- “requête en vue d’obtenir une ordonnance de séquestre”,
- “requête pour obtenir une ordonnance de séquestre”,
- “requête en faillite”,
- “requête de mise en faillite”,

<sup>82</sup> Department of Justice (Quebec), *Commentaires du ministre de la Justice du Québec*, t.1 (Quebec: Les Publications du Québec, 1993) at 535 [hereinafter *Commentaires du Ministre*].

<sup>83</sup> Art. 626 *C.C.Q.*

<sup>84</sup> Art. 110 *C.C.P.*

<sup>85</sup> Art. 752 *C.C.P.*

<sup>86</sup> Art. 762 *C.C.P.*

<sup>87</sup> Art. 453 *C.C.P.*

<sup>88</sup> Art. 834ff *C.C.P.*

<sup>89</sup> G. Brière, *Le nouveau droit des successions*, 2nd ed., Bleue coll. (Montreal: Wilson & Lafleur, 1997) at 81ff.

<sup>90</sup> This case law includes: *Re Bureau (syndic de)*, supra note 56; 2751-9818 *Québec inc. (Restaurant Le Campus) v. 2150-1069 Québec inc. (Carrefour La Pocatière)*, [1996] R.R.A. 1221 (Que. Sup. Ct.); *Chronberg v. 9047-4586 Québec inc. (syndic)*, [1998] A.Q. No. 1625 (Q.L.); 2782375 *Canada inc. (Re)*, [1999] J.Q. No. 1505 (Q.L.); *Pétroles Irving inc. v. Dépanneur Danielle Comeau inc. (syndic)*, [1997] A.Q. No. 4682 (Q.L.); *Parent v. Bouchard*, [1988] R.L. 77 (Que. C.A.); *Ultramar Canada Inc. v. Québec (sous-ministre du Revenu)*, [1997] R.D.F.Q. 15 (Que. C.A.); *Québec (Procureur général) (Re)*, [1997] A.Q. No. 4582 (Q.L.); *Musée des sciences naturelles de Québec Inc. (syndic) v. Banque de Montréal* (1998), 2 C.B.R. (4<sup>th</sup>) 224 (Que. C.A.); *Banque nationale du Canada v. Nilus Leclerc inc.*, [1997] A.Q. No. 4614 (Q.L.); *Gagnon v. Desrochers*, [1989] A.Q. No. 1664 (Q.L.); *Swiss Bank Corp. (Canada) v. 124298 Canada Inc.*, [1996] R.D.J. 531 (Que. C.A.); *Walter Canada Inc. v. Banque nationale du Canada*, [1986] C.B.R. (N.S.) 144 (Que. Sup. Ct.); 146236 *Canada Inc. (syndic) (Re)*, [1993] A.Q. No. 1221 (Q.L.); *Soeurs du Bon-Pasteur de Québec v. Marché Central Métropolitain inc. (syndic)*, [1999] R.J.Q. 18 (C.A.); *Textainer Equipment Management Ltd v. Compania Argentina de Navigacion Interocéanica S.A.*, [1999] J.Q. No. 2627 (Q.L.); 2768721 *Canada Inc. v. Immeubles 1555 Provencher inc. (syndic)*, [1993] A.Q. No. 95 (Q.L.); *Renda v. Banque Canadienne Impériale de Commerce*, [2000] J.Q. No. 2723 (Q.L.); *Mont Écho Capital inc. v. Eichenberger*, [1998] A.Q. No. 3763 (Q.L.); *Tenneco Canada Inc. v. 167782 Canada Inc.*, [1992] A.Q. No. 1091 (Q.L.); *Réfrigération Mauvalin Ltée v. Société immobilière Bendwell Inc.*, [1990] R.J.Q. 2596 (C.A.).

- “requête en vue de l’émission d’une ordonnance de séquestre”,
- “requête de faillite”,
- “requête en vue d’une ordonnance de séquestre”,
- “requête pour une ordonnance de séquestre”,
- “requête présentée en vertu de l’article 43 *L.F.I.*”,
- “pétition de faillite”,
- “pétition en faillite”,
- “pétition en vue d’une ordonnance de séquestre”,
- “pétition pour mise en faillite”.

Some of these expressions are often used in the same decision by the same judge. However, use of the word “requête” is constant, a fact that indicates that this term is not repugnant to judges in the civil law tradition. Authorities also use the word “requête” and the expressions “requête de mise en faillite” and “requête en faillite”.<sup>91</sup> In fact, some points of correspondence can be established between petitioning in bankruptcy and the civil law “requête”:

- the form the procedure must take,<sup>92</sup>
- the attestation by affidavits,<sup>93</sup>
- service of petitions and affidavits,<sup>94</sup>
- the accelerated nature of procedures,
- the fact that the procedures are expressly provided for in law.<sup>95</sup>

It may be concluded from the foregoing observations that petitioning in bankruptcy in a civil law context raises a number of issues about what terminology designates this procedure. That said, bankruptcy petitions do not seem, *a priori*, to constitute autonomous proceedings; on the contrary, they are quite similar to “requêtes”. One way of learning more is to extend our analysis to supplementary law.

### *Supplementary law*

The main issue regarding the designation of bankruptcy petitions is the determination of the supplementary law. This issue is raised although petitioning in bankruptcy is said to form a complete set of rules. Indeed, the federal Parliament itself provides quite a clear indication of the opposite possibility; section 3 of the *B.I.G.R.* provides as follows: “[i]n cases not provided for in the Act or these Rules, the courts shall apply, within their respective jurisdictions, their ordinary procedure to the extent that that procedure is not inconsistent with the Act or these Rules.”

<sup>91</sup> *Faillite et insolvabilité*, supra note 21 at 111ff.; J.-Y. Fortin and B. Boucher, *Insolvabilité commerciale et personnelle : Aide-mémoire*, 1st ed. (Montreal: Wilson & Lafleur, 1990) at 52ff.

<sup>92</sup> According to Professor Albert Bohémier, a petitioning in bankruptcy must take the form of a motion, because Rule 11 of the *B.I.G.R.* provides that every bankruptcy application to the court must be made by motion: *Faillite et insolvabilité*, ibid. at 173. M<sup>e</sup> Bernard Boucher also supports Rule 11 of the *B.I.G.R.*, stating that an application to initiate bankruptcy proceedings should be made by means of a “requête”: B. Boucher, “La juridiction de la Cour de faillite : une perspective québécoise” (1994) 24 C.B.R. (3rd) 61 at 66. Rule 11 of the *B.I.G.R.* provides that “[s]ubject to these Rules, every application to the court must be made by motion unless the court orders otherwise”. See also art. 762 *C.C.P.*

<sup>93</sup> Art. 763 *C.C.P.*; subs. 43(3) *B.I.A.*

<sup>94</sup> Art. 764 *C.C.P.*, rule 70(1) *B.I.G.R.*

<sup>95</sup> Art. 110, 762 *C.C.P.*; subs. 43(1) *B.I.A.*

What is this “ordinary procedure”? In Quebec, this expression seems to refer to the preliminary exceptions for which general provision is made in the *C.C.P.*, particularly in cases where debtors contest the extrinsic legality of a motion.<sup>96</sup> The dilatory exceptions and exceptions to dismiss actions provided for in the *C.C.P.* could also be used;<sup>97</sup> other examples may exist. It should be borne in mind that, in Quebec, article 763(2) of the *C.C.P.* provides as follows:

Except to the extent provided in this Title or in other provisions of this Code applicable to applications introduced by motion, applications follow the general rules applicable to applications made by declaration, including the rules relating to service or notification and to the designation of the parties and property as well as those relating to proof.

In the common law provinces, a brief search reveals that parties actually use a wide range of rules of civil procedure, both general and specific, to supplement silence by the *B.I.A.* Examples include:

- motion to obtain an order for security for costs,<sup>98</sup>
- motion seeking an interpleader order,<sup>99</sup>
- motion to for leave to intervene in a petition for a receiving order,<sup>100</sup>
- application of rules of civil procedure governing offers to settle,<sup>101</sup>
- motion to amend petition for a receiving order,<sup>102</sup>
- motion to add the names of three additional creditors as petitioners,<sup>103</sup>
- calculation of deadlines,<sup>104</sup>
- substitution of petitioner and amendment of petition for a receiving order.<sup>105</sup>

This situation is not surprising, since the Ontario *Rules of Civil Procedure*, for example, include both general rules and rules that apply only in certain situations. As a result, the same rule is used to make motions in proceedings initiated by statements of claim and in proceedings initiated by applications. This is true in particular for:

- citations, application and interpretations,<sup>106</sup>
- non-compliance with the Rules,<sup>107</sup>
- time,<sup>108</sup>
- court documents,<sup>109</sup>

<sup>96</sup> Art. 159 *C.C.P.*; rules 74, 75 *B.I.G.R. Faillite et insolvabilité*, *supra* note 21 at 199.

<sup>97</sup> Art. 165, 168 *C.C.P.* See *Faillite et insolvabilité*, *ibid.* at 204.

<sup>98</sup> *Rules of Civil Procedure*, *supra* note 77, s. 56; *Re Towers Marts & Properties Ltd.*, [1968] 1 O.R. 605 (Ont. Bkcty.).

<sup>99</sup> *Rules of Civil Procedure*, *ibid.* s. 43; *Re S & S International Transportation Services Ltd.*, [2000] O.J. No. 4106 (Q.L.).

<sup>100</sup> *Rules of Civil Procedure*, *ibid.* s. 13; *Re Ristimaki*, *supra* note 80 (motion dismissed).

<sup>101</sup> *Rules of Civil Procedure*, *ibid.* s. 49; *Baltman v. Coopers & Lybrand Ltd.* (1997), 47 C.B.R. (3rd) 121 (Ont. Bkcty.).

<sup>102</sup> *Langret Investments S.A. v. McDonnell* (1996), 40 C.B.R. (3rd) 44 (B.C.C.A.).

<sup>103</sup> *Re Dhillon* (1997), 49 C.B.R. (3rd) 24 (B.C.S.C.).

<sup>104</sup> *Re Murray* (1995) 35 C.B.R. (3rd) 264 (N.B. Bkcty.).

<sup>105</sup> *Re Big Bud Tractor of Canada*, [1980] A.J. No. 93 (Q.L.).

<sup>106</sup> *Rules of Civil Procedure*, *supra* note 77, s. 1.

<sup>107</sup> *Ibid.* s. 2.

<sup>108</sup> *Ibid.* s. 3.

<sup>109</sup> *Ibid.* s. 4.



- joinders of claims and parties,<sup>110</sup>
- consolidation or hearing together,<sup>111</sup>
- parties under disability,<sup>112</sup>
- representations by solicitor,<sup>113</sup>
- service of documents.<sup>114</sup>

On the other hand, some rules of civil procedure apply only in certain instances depending on whether an action or a motion is involved. Examples include the rules governing written proceedings in actions, counterclaims and crossclaims, and discovery of documents applicable only to actions.

In conclusion to this part, it can be said that using the word “requête” to designate petitioning in bankruptcy does not seem to cause any more real problems in the civil law context than does use of the rules set out in the *C.C.P.* One wonders what possible repercussions in the common law provinces might ensue from a simple terminological change with no intention of changing the substance of the law.

**Other procedures raise certain conceptual issues. These procedures include the receiving order, pending litigation, and interpleader procedures.**

*Receiving order procedure*

Receiving orders are issued by courts after petitions in bankruptcy (sometimes referred to as petitions for receiving orders) are filed, and hearings held, at which creditors state that the debtors' insolvency jeopardizes their claims, and debtors may state that their financial situation does not call for them to be divested of their property. Receiving orders place debtors in bankruptcy and operate as applications for discharge from indebtedness.<sup>115</sup>

Federal Parliament borrowed the English judicial mechanism of receiving orders and incorporated it in the *Insolvency Act* of 1919. Under the 1914 English bankruptcy legislation, receiving orders gave official receivers the power to receive debtors' property, which included the right to suspend recourse by creditors.<sup>116</sup> Debtors were divested of their property, and the property transferred to trustees, only when debtors were declared bankrupt,<sup>117</sup> at which point trustees were in turn considered receivers and took possession of bankrupt debtors' property. It may be helpful to point out that receiving orders do not simply transfer the right to possess and retain bankrupt debtors' property; they divest debtors of the property.<sup>118</sup>

Since the procedure of receiving orders did not originate in civil law, it raises a number of conceptual issues. Would the expression “déclaration de mise en faillite” be more understandable in

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<sup>110</sup> *Ibid.* s. 5.

<sup>111</sup> *Ibid.* s. 6.

<sup>112</sup> *Ibid.* s. 7.

<sup>113</sup> *Ibid.* s. 15.

<sup>114</sup> *Ibid.* s. 16.

<sup>115</sup> Subs. 169(1) *B.I.A.*

<sup>116</sup> *English Bankruptcy Act of 1914*, *supra* note 21, subs. 48(2). See A. Roper, *Ringwood's Principles of Bankruptcy*, 16th ed. (London: Sweet & Maxwell Ltd., 1930) at 62.

<sup>117</sup> *English Bankruptcy Act of 1914*, *ibid.*, s. 14.

<sup>118</sup> Subs. 71(2) *B.I.A.*

civil law? Also to be considered is the concept of trustees' liability for administering the property; one may wonder what supplementary law is applicable. It should be noted in that regard that a sequestrator is, in fact, a depositary within the meaning of the C.C.Q.<sup>119</sup> Another point still to be explored is the possibility that receiving orders are a legal fiction, a vestige of an old British tradition used to describe the transfer of bankrupts' property to trustees whose role itself, as has been seen, is highly complex.

### *Pending litigation procedure*

In common law, when proceedings involve real property such as a parcel of land, applicants must file a certificate of pending litigation (*lis pendens*) with the land registry office. The purpose of this procedure is to notify the general public, and good-faith third parties in particular, that proceedings involving the property, or the outcome of the proceedings, could affect title to the property.<sup>120</sup> Briefly, third parties may purchase the property, but at their risk and peril.<sup>121</sup> Since this procedure protects the public interest, it forms an integral part of the legal process.

The federal Parliament felt it necessary to include this common law rule in federal bankruptcy legislation; section 107 of the *B.I.G.R.* reads as follows:

Where land, any structure on land, or any interest relating thereto is the object of litigation under sections 91 to 100 of the Act, the registrar may, once a copy of the statement of claim, signed by the plaintiff's legal counsel, is filed with the court, issue a certificate of *lis pendens* and, if the plaintiff is unsuccessful in whole or in part, a certificate of disallowance.

Here again, including this procedure in national legislation has the effect of introducing a rule from the common law tradition into a civil law tradition. Application of this Rule, although rare, seems to give rise to some degree of unease.<sup>122</sup>

It should be noted that since 1994 Quebec civil law has included a seemingly similar procedure:<sup>123</sup> any judicial demand concerning a real right that shall or may be published in the land register may, by means of a notice, be the subject of an advance registration. This advance registration procedure has no immediate effect; it is conditional on a possible second registration, registration of the judgment.

However, this advance registration procedure differs from the pending litigation procedure in three ways. Firstly, advance registration is optional; applicants are not required to pre-register their rights in the land register. Secondly, advance registration is a conditional priority that must be confirmed by registration of the judgment; at that point the applicant's rights to the property take effect retroactively to the date of advance registration, thus taking precedence over rights registered after that date. In comparison, registration of a certificate of pending legislation, from which no party benefits, simply notifies good-faith third parties that a decision involving the property is being made and may alter the title to the property. Thirdly, advance registration does not form an integral part of the Quebec legal process, but is merely a procedure available to applicants.

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<sup>119</sup> Art. 2305 C.C.Q.

<sup>120</sup> *Courts of Justice Act*, *supra* note 77, s. 103; *Rules of Civil Procedure*, *supra* note 77, s. 42.

<sup>121</sup> G.D. Watson and C. Perkins, *Homestead and Watson, Ontario Civil Procedure*, vol. 3 (Toronto: Carswell, 1984) at 42-1ff.; P.G. Vogel, *Cohen Melnitzer's Civil Procedure in Practice* (Toronto: Carswell, 1989) at 6-39.

<sup>122</sup> See the remarks by Brossard J. of the Quebec Court of Appeal in *Langevin v. Weinberg Bros. Inc.*, [1971] C.A. 122 at 127.

<sup>123</sup> Art. 2966 C.C.Q.

As well, use of the French word “litispendance” to designate the pending legislation procedure may give rise to some degree of confusion in the minds of civil law practitioners, since article 165 of the *C.C.P.* provides for exceptions to dismiss actions if there is “litispendance”. Here, this expression designates situations in which two proceedings involving the same facts and the same parties are initiated in two separate jurisdictions, and the purpose of exceptions to dismiss actions is to have one set of proceedings dismissed; of course, this is another procedure altogether than the pending litigation procedure.

#### *Interpleader procedure*

The interpleader procedure is an equity procedure to determine claimants' rights to property held by third parties.<sup>124</sup> The *B.I.A.* uses this concept: under paragraph 42(1)(e), if there are interpleader proceedings opposing seizure of debtors' property, time elapsed is not taken into account in determining whether debtors have committed acts of bankruptcy.

If the federal Parliament intended the *B.I.A.* to apply uniformly to all creditors, why include this provision for a strictly common law procedure? Can the interpleader procedure, deriving from an equity law doctrine, be introduced, understood and used in Quebec law by means of the *B.I.A.*? If not, why include this provision, which benefits only creditors in the common law provinces?

Would it be appropriate, regarding civil law audience, to refer to the opposition to seizure in execution, by third parties who have a right to claim any part of property seized?<sup>125</sup> We are considering these issues.

## **2.4. Application of Part XI**

Regarding harmonization of the *B.I.A.* with Quebec civil law, Part XI of the *B.I.A.* raises issues concerning the identification of receivers, and concerning the advance notice secured creditors must send debtors before their rights and receivers' obligations can be exercised in administering bankrupts' property.

#### *Identification of receivers*

Since 1992, the *B.I.A.* has included provisions governing recourse by secured creditors. In these provisions, the federal Parliament requires receivers to act honestly in administering and liquidating debtors' property.<sup>126</sup> However, these rules apply only when receivers take possession of debtors' property to administer it. Subsection 243(2) of the *B.I.A.* defines receivers within the meaning of Part XI as follows:

Subject to subsection (3), in this Part, “receive” means a person who has been appointed to take, or has taken, possession or control, pursuant to (a) an agreement under which property becomes subject to a security (in this Part referred to as a “security agreement”), or (b) an order of a court made under any law that provides for or authorizes the appointment of a receiver or receiver-manager, of all or substantially all of (c) the inventory, (d) the accounts receivable, or (e) the other property of an insolvent person or a bankrupt that was acquired for, or is used in relation to, a business carried on by the insolvent person or bankrupt.

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<sup>124</sup> J. R. Nolan, *Black's Law Dictionary*, 6th ed. (St. Paul, Minn.: West Publishing Co., 1990) at 817.

<sup>125</sup> Art. 597 *C.C.P.*

<sup>126</sup> Ss. 246, 247 *B.I.A.*

This definition has two basic components. Firstly, receivers are the persons who take possession of insolvent debtors' property. Secondly, receivers must be authorized to do so by means of an order or a security agreement. The wording of this definition is nevertheless ambiguous and allows for two contradictory interpretations.

Broadly interpreted, the wording "a person who has been appointed to take, or has taken, possession [of property]" presents an alternative, between the traditional concept and what would be a new concept of receivers. According to this definition, receivers may be persons traditionally appointed under an order or a security agreement, but may also be creditors who have taken possession of property under a security contract in order to realize the security.

Strictly interpreted, on the other hand, subsection 243(2) of the *B.I.A.* refer only to the traditional concept of receivers, and therefore receivers it defines are persons who take possession of insolvent debtors' property under a court order or a security agreement.

These arguments were made before Baynton J. of the Saskatchewan Court of Queen's Bench. After recognizing the validity of each argument, Baynton J. ruled in favour of the strict interpretation. He added, however, that in light of the purposes of Part XI of the *B.I.A.*, secured creditors could be receivers within the meaning of subsection 243(2) of the *B.I.A.* on condition that they be appointed under an order or a security agreement to take possession of their debtors' property.<sup>127</sup>

Applied in Quebec, this decision would mean that subsection 243(2) of the *B.I.A.* does not apply to hypothecs. As M<sup>e</sup> Alain Riendeau has argued, the legal basis for allowing hypothecary creditors to exercise their rights if debtors default is not found in court orders or security agreements, but in the *C.C.Q.*<sup>128</sup> Professor Jacques Deslauriers, however, is less categorical, stating as follows: [translation] "[i]n Quebec at least, there is no agreement on identifying guarantees that, if implemented, would trigger the receivership rules under Part XI."<sup>129</sup>

In fact, it seems that in Quebec, security agreements within the meaning of subsection 243(2) of the *B.I.A.* were implemented by means of trust deeds, under which debtors' businesses, inventory, accounts receivable and other property were taken possession of and liquidated. Quebec's former *Special Corporate Powers Act* provided for these trust deeds for the benefit of obligees, whose trustees ("fiduciaires") could take possession of, administer and liquidate the property of defaulting issuer debtors.<sup>130</sup> The disappearance of these trust deeds with the reform of the *C.C.Q.* may have given the impression that Part XI of the *B.I.A.* no longer applies in Quebec.<sup>131</sup>

This categorical statement, however, must be qualified: in Quebec there are creditors whose security is provided for in legislation other than the *C.C.Q.* and can be realized using receivers. Examples include security contracts between banks and their customers, which may provide for taking possession of customers' inventories. As Gonthier J. of the Supreme Court of Canada wrote

<sup>127</sup> *Farm Credit Corporation v. Corriveau* (1993) 20 C.B.R. (3rd) 124 (Sask. Q.B.).

<sup>128</sup> A. Riendeau, "L'insolvabilité et l'exécution des garanties" (Conference of the Faculty of Law, McGill University, Montreal, March 29-30, 1996) at 24 [hereinafter "L'exécution des garanties"].

<sup>129</sup> "Conférence sur le projet de loi S-22", *supra* note 36 at 15.

<sup>130</sup> S.R.Q. c. P-16, s. 27ff. These sections were amended by *An Act Respecting the Implementation of the Reform of the Civil Code*, S.Q. c. 57, s. 642ff. Before these amendments, taking possession of defaulting debtors' property had to be expressly authorized in the trust deed: L. Lévesque, *L'Acte de fiducie*, Coll. Minerve (Cowansville, Que.: Yvon Blais, 1991) at 28ff. Taking possession of property did not transfer ownership rights, which remained with the debtors: *Laliberté v. Larue*, [1931] S.C.R. 7. An interesting point is that trustees ("fiduciaires") could act directly without appointing receivers: Y. Caron, "De l'action réciproque du droit civil et de *common law* dans le droit des compagnies de la province de Québec", in J.S. Ziegel, *Studies in Canadian Company Law* (Toronto: Butterworths, 1967) at 141. See also P. Ciotola, *Droit des sûretés*, 3th ed. (Montreal: Thémis, 1999) at 251ff.

<sup>131</sup> "L'exécution des garanties", *supra* note 128.

in the decision in *Atomic Slipper*. “[...] there is nothing to prevent a bank taking possession of goods if it has acquired such a right by agreement and the debtor does not object. In that case, it does not have to seek leave of the court in order to realize on its security.”<sup>132</sup>

In case of insolvent customers, Part XI of the *B.I.A.* would probably apply. Theoretically, banks' receivers are to carry out the obligations set out in sections 246 and 247 of the *B.I.A.* They are also to administer the property “honestly and in good faith” and “in a commercially reasonable manner”. In addition, they are to prepare and provide reports describing how they have carried out their responsibilities concerning the property.

As M<sup>e</sup> Riendeau states, the *C.C.Q.* provisions governing administration of the property of others have similar purposes.<sup>133</sup> As well, as Professor Jacques Deslauriers notes: [translation] “[...] in 1992 and 1994, the legislatures had similar objectives and motivations. However, although some debtors once claimed that, where some of their creditors were concerned, the law of the jungle prevailed, we now swim in a veritable sea of notification and monitoring processes [...]”<sup>134</sup>

One may wonder whether the federal Parliament intends to rely on Quebec provincial law. If so, it might be helpful to subject receivers' taking possession of insolvent debtors' property on behalf of banks to the *C.C.Q.* rules governing the administration of the property of others.

#### *Advance notice*

Subsection 244(1) of the *B.I.A.* requires secured creditors to send an advance notice to insolvent debtors before realizing their security.<sup>135</sup> In particular, secured creditors may not realize their security until 10 days have expired. That said, the *C.C.Q.* provides for immediate surrender of debtors' property if the property may perish or if the claim may be endangered.<sup>136</sup> At first glance, this possibility of immediate surrender of debtors' property appears incompatible with the 10 days' advance notice required under subsection 244(1) of the *B.I.A.*; the latter should prevail. One can always consider the relevance of harmonizing these sections.

## **2.5. Bankruptcy of Quebec partnerships and trusts (“fiducies”)**

The recent changes to civil law trusts (“fiducies”) and the introduction of autonomous patrimonies by appropriation raise the issue of what rules apply when these patrimonies become insolvent; this issue also applies to partnerships.

#### *Partnerships' bankruptcy*

The system applicable under the *B.I.A.* assumes the existence of an insolvent or bankrupt debtor that is at least a legal entity with juridical personality.<sup>137</sup> Interestingly enough, it considers partnerships to be persons.<sup>138</sup>

<sup>132</sup> *National Bank of Canada v. Atomic Slipper Co.*, [1991] 1 S.C.R. 1059 at 1081.

<sup>133</sup> “L'exécution des garanties”, *supra* note 128 at 28ff.

<sup>134</sup> “Conférence sur le projet de loi S-22”, *supra* note 36 at 15.

<sup>135</sup> It has been recognized that the 60 days prior notice provided for in art. 2757 and 2758 of the *C.C.Q.* is equivalent to the advance notice provided for in s. 244 of the *B.I.A.* Thus, filing this prior notice discharges creditors of the obligation to file an advance notice. *Société en fiducie de la Banque de Hongkong v. Développements sociaux du Sud-ouest*, [1996] R.D.I. 331 (Que. Sup. Ct.).

<sup>136</sup> Art. 2767(1) *C.C.Q.*

<sup>137</sup> Subsection 2(1) of the *B.I.A.* defines “bankrupt” as follows:

[a] person who has made an assignment or against whom a receiving order has been made or the legal status of that person.

The same section defines “insolvent person” as follows:

[a] person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and

Under Quebec law, partnerships may take one of four forms: general partnerships, limited partnerships, undeclared partnerships, and joint-stock companies,<sup>139</sup> the last of which are moral persons.<sup>140</sup> Moral persons are endowed with juridical personality.<sup>141</sup>

Although the C.C.Q. is less clear about other forms of partnership, some indications suggest that general partnerships may have certain characteristics of juridical personality.<sup>142</sup> For example, article 2198 of the C.C.Q. on general partnerships provides, “[a] partner is a debtor to the partnership for everything he promises to contribute to it.” Article 2225 of the C.C.Q. provides, a partnership may sue and be sued in a civil action under the name it declares. Article 2199 of the C.C.Q. is somewhat more explicit:

A contribution of property is made by transferring rights of ownership or of enjoyment and by placing the property at the disposal of the partnership. [...] A contribution consisting in the enjoyment of property that would normally be required to be renewed during the term of the partnership transfers ownership of the property to the partnership, which becomes liable to return property of the same quantity, quality and value [emphasis added].

Legal entities that may hold debts, sue, and receive transferred ownership of property bear a striking resemblance to entities with juridical personality. The same may be said about limited partnerships. Article 2241 of the C.C.Q. provides as follows:

While the partnership exists, no special partner may withdraw part of his contribution in property to the common stock, in any way, unless he obtains the consent of a majority of the other partners and the property remaining after the withdrawal is sufficient to discharge the debts of the partnership [emphasis added].

If general partnerships may have debts, could it be affirmed that they have a patrimony, and therefore may become insolvent, particularly since the rules governing general partnerships apply to limited partnerships?<sup>143</sup> The Quebec *ministère de la Justice* has nevertheless commented that, although authorities and case law:

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- (a) who is for any reason unable to meet his obligations as they generally become due,
  - (b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or
  - (c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due.

<sup>138</sup> For the purpose of subsection 2(1) of the B.I.A. “person”:

[i]ncludes a partnership, an unincorporated association, a corporation, a cooperative society or an organization, the successors of a partnership, association, corporation, society or organization, and the heirs, executors, liquidators of the succession, administrators or other legal representative of a person, according to the law of that part of Canada to which the context extends.

<sup>139</sup> Art. 2188 C.C.Q.

<sup>140</sup> Art. 2188(2) C.C.Q.

<sup>141</sup> Art. 298 C.C.Q.

<sup>142</sup> Undeclared partnerships do not appear to enjoy juridical personality. According to Professor Yves Lauzon, this is due to the fact that each partner retains ownership over the property constituting his contribution to the partnership. Yves Lauzon, “Du contrat de société et d’association”, in *Barreau du Québec* and *Chambre des notaires du Québec, La réforme du Code civil*, vol. 2 (Quebec: Les Presses de l’Université Laval, 1993) 955 at 960ff. See C. Bouchard, “Le dynamisme nouveau de la notion de société : l’autonomie patrimoniale hors du cadre de la personnalité morale”, in *Les sociétés, les fiducies et les entités hybrides en droit commercial contemporain: Conférences commémoratives Meredith 1997* (Montreal: Faculty of Law, McGill University, 1997) 17 at 24ff [hereinafter “Le dynamisme nouveau de la notion de société”].

<sup>143</sup> Art. 2249 C.C.Q.

[translation] [...] have often recognized that partnerships, particularly general and limited business partnerships, have some degree of juridical personality, [...] this juridical personality has never been considered as complete as that attributed to corporations, for example.<sup>144</sup>

Still according to the Quebec *ministère de la Justice*, attributing juridical personality to partnerships would not confer any particular real advantages, and might create a disparity of treatment between partnerships formed anywhere else in North America, which do not have juridical personality.<sup>145</sup> In particular, this attribution would set partnerships created in Quebec apart from those created in the rest of Canada.<sup>146</sup>

In a recent decision on partnership law, Brossard J. of the Quebec Court of Appeal stated as follows:

[translation] In Quebec, the majority trend in both authorities and case law has been to recognize that partnerships have separate patrimony and are moral persons, although this latter characteristic has sometimes been described as incomplete. [...] Ownership rights are an attribute of persons and can therefore belong only to physical or moral persons. My argument is that partnerships do not have juridical personality separate from that of the partners and therefore may not have patrimony separate from that of the partners. [...] in the case of partnerships, what must be borne in mind is that all administrative and legal actions by a partnership (signing contracts, managing assets, owning property), which often appear to be made in the partnership's own name, are so made only in the partnership's capacity as agent for the partners, in accordance with the specific agreements drawn up among them. [...] I do not believe that the Quebec *Code* implicitly attributes juridical personality to partnerships. On the contrary, it seems to me that its provisions confirm that partnerships do not have juridical personality and cannot own property.<sup>147</sup>

According to Professor Charline Bouchard, this approach appears to be too restrictive in light of the attributes partnerships have enjoyed since 1994.<sup>148</sup> Professor Bouchard goes on to say that general partnerships and limited partnerships should constitute autonomous patrimonies, the way civil law trusts do.<sup>149</sup> Would that allow partnerships to fall into bankruptcy? Professor Bohémier notes the position expressed by authorities and case law on this point as follows:

[translation] For the purposes of the *Bankruptcy Act*, authorities and case law refuse to recognize that partnerships have juridical personality. Partnerships may be declared bankrupt only by means of bankruptcy of all the partners. Any bankruptcy proceedings must be initiated by or against the partners themselves, never by or against the actual partnership.<sup>150</sup>

<sup>144</sup> *Commentaires du Ministre*, *supra* note 82 at 1378, 1379.

<sup>145</sup> *Ibid.*

<sup>146</sup> *Huffman v. Ross*, [1926] S.C.R. 5; *Re Gillepsi* (1913), 3 W.W.R. 791 (Man. K.B.); *Re Thorne and New Brunswick Workmen's Compensation Board* (1961), 48 M.P.R. 56 (N.-B.C.A.).

<sup>147</sup> *Québec (Ville de) v. Compagnie d'immeubles Allard Itée*, [1996] R.J.Q. 1566 (Que. C.A.).

<sup>148</sup> Professor Bouchard writes:

Contrary to recent case law trends, partnerships constitute autonomous patrimonies by appropriation and enjoy juridical attributes. In fact, the external consequences of a legal person are quite similar to those of a patrimony by appropriation: general partnerships and limited partnerships have names, domiciles, may sue and be sued under civil actions and their juridical personality allows them to acquire and sell property under their names regardless of associates change.

"Le dynamisme nouveau de la notion de société", *supra* note 142 at 60-61. See art. 2189, 2197, 2225 C.C.Q.; *An Act Respecting the Legal Publicity of Sole Proprietorships, Partnerships and Legal Persons*, L.R.Q. c. P-45, ss. 10, 13, 18.

<sup>149</sup> C. Bouchard, "Le fondement du patrimoine autonome des sociétés de personnes" (1996) 2 C.P. du N. 33. Under the C.C.Q., trusts and foundations may constitute a patrimony by appropriation. See art. 1256ff C.C.Q.

<sup>150</sup> *Faillite et insolvabilité*, *supra* note 21 at 141. See also *Re Noble & Son* (1924-25), 5 C.B.R. 147 (Ont. Sup. Ct.); *Re Walkeam; Ex Parte Walkeam* (1924-25), 5 C.B.R. 821 (Ont. Sup. Ct.); L.-J. de la Durantaye, *Traité de la faillite* (Montreal: Chez l'auteur, 1934) at 80; L.W. Houlden (1952-53), 33 C.B.R. 200.

However, it should be pointed out that unincorporated associations have been recognized as having juridical personality, and may therefore become bankrupt.<sup>151</sup> Thus, if unincorporated associations may become bankrupt, what is there to prevent partnerships from doing so as well? Considering *B.I.A.* provisions governing bankruptcy of partners in a partnership, does it necessarily follow that the purpose of these provisions is to take away the right to sue the partnership itself?<sup>152</sup> We could add that Rule 109 of the *B.I.G.R.* seems to make express provision for cases in which partnerships are the subject of receiving orders.<sup>153</sup> And that the *C.C.Q.* provides for this particular situation.<sup>154</sup> We could consider the following statement by Professor Bohémier:

[translation] Because the legislation provides for and recognizes the juridical personality of partnerships, we believe that partnerships can become bankrupt in the same way as estates, executors, or unincorporated associations can become bankrupt.<sup>155</sup>

As the issue regarding partnerships' juridical personality is still open, so is the issue regarding the bankruptcy of partnerships. However, the latter raises even greater concerns since it arises in the context of federal legislation, the *B.I.A.* which is closely tied to Quebec civil law as well as the private law of other Canadian provinces and whose purpose is to treat creditors equally.

#### *Bankruptcy of Quebec trusts ("fiducies")*

Since the civil law reform of 1994, trusts ("fiducies") may constitute autonomous patrimonies by appropriation.<sup>156</sup> Because these trusts constitute patrimonies, they bring together one or more forms of property. Since they are appropriated autonomously, they are linked to no holders. Neither settlors, trustees ("fiduciaires") nor beneficiaries have any ownership rights in these trusts;<sup>157</sup> trustees themselves have only control over property transferred to these patrimonies.<sup>158</sup> As a result, bankruptcy of one of these persons cannot have the effect of transferring property from trusts' patrimonies to trustees ("syndics"). In this regard, paragraph 67(1)(a) of the *B.I.A.* is probably inapplicable.<sup>159</sup>

It should be noted that, when trustees ("fiduciaires") or beneficiaries become bankrupt, these trustees' duties as administrators of the property of others are terminated.<sup>160</sup> In addition, according to Professor Albert Bohémier, paragraph 67(1)(d) of the *B.I.A.* supports the argument that existing powers of these trustees over property constituting patrimonies by appropriation are vested in trustees ("syndics").<sup>161</sup>

<sup>151</sup> *Argus Adjusters and Appraisers Ltd. v. Assistance Loan and Finance Corporation*, [1964] B.R. 375 [hereinafter *Argus Adjusters*].

<sup>152</sup> S. 43(15), 43(16), 85, 142, 153 *B.I.A.*

<sup>153</sup> Rule 109 of the *B.I.G.R.* provides as follows:

[where a partnership is bankrupt, the creditors of the partnership and of each bankrupt partner shall be convened collectively for the first meeting of creditors. [emphasis added]

<sup>154</sup> Art. 2248 *C.C.Q.* According to Justice minister's comments, this provision applies in cases where limited partnerships become bankrupt or insolvent. *Commentaires du Ministre*, *supra* note 82 at 1417.

<sup>155</sup> *Faillite et insolvabilité*, *supra* note 21 at 142. See *Argus Adjusters*, *supra* note 151.

<sup>156</sup> Art. 1260ff *C.C.Q.*

<sup>157</sup> Art. 1261 *C.C.Q.*

<sup>158</sup> Art. 1278 *C.C.Q.*

<sup>159</sup> Paragraph 67(1)(a) of the *B.I.A.* also provides that the property of bankrupts vested in trustees ("syndics") shall not comprise property held by bankrupts in trust for any other persons. See "Research in Bijuralism", *supra* note 33 at 859.

<sup>160</sup> Art. 1355 *C.C.Q.*

<sup>161</sup> "Research in Bijuralism", *supra* note 33 at 859. Paragraph 67(1)(d) of the *B.I.A.* provides as follows:

The property of a bankrupt divisible among his creditors shall not comprise [...]

(d) such powers in or over or in respect of the property as might have been exercised by the bankrupt for his own benefit.



The issue of bankruptcy of actual trusts (“fiducies”) is worth raising. One may wonder whether introducing the concept of “autonomous patrimonies by appropriation” into Quebec civil law has not had the effect of creating a legal entity much like that of moral persons. From the concept of patrimonies by appropriation with no holders—which resemble headless horsemen—to the idea that they have juridical personality is only a short step, and one we still cannot take.

## 2.6. Roles of trustees (“syndics”)

The *B.I.A.* deals with trustees in the Part entitled “Administrative Officials”. As administrative officials, trustees are considered officers of the court.<sup>162</sup> However, the *B.I.A.* gives trustees a much more complex status: Professor Albert Bohémier writes that describing the roles of trustees is one of the most problematic subjects in bankruptcy law.<sup>163</sup> We shall therefore limit ourselves to addressing issues raised by the various roles trustees are called upon to play under the *B.I.A.*: trustees (here “fiduciaires”), grantees (here “cessionnaires”), administrators of the property of others, receivers, and owners.

### *Trustees (“fiduciaires”)*

The French version of section 15.1 of the *B.I.A.* specifically provides, “[l]e syndic est un fiduciaire au sens de l'article 2 du Code criminel.” The purpose of this designation is to make it possible to apply against trustees certain *Criminal Code* provisions on fiduciary obligations. The *Criminal Code* defines the word “trustee” by reference to provincial private law. In Quebec, this reference would make it possible to claim that the C.C.Q. provisions on trusts—including the provisions on administrators of the property of others—apply to trustees. That said, in bankruptcies it would be doubtful that debtors' property would be transferred into autonomous patrimonies by appropriation with no owners: as Professor Madeleine Cantin Cumyn notes: [translation] “Although deprived of the exercise of ownership, bankrupts retain ownership until their property is sold by trustees.”<sup>164</sup>

In fact, if the intent of Parliament is to be reflected as faithfully as possible, the French version of section 15.1 of the *B.I.A.* should specify that for the purposes of the application of the *Criminal Code*, a trustee is deemed to be a “trustee” within the meaning of section 2 of the *Criminal Code*. That said, it may be appropriate to take advantage of this point to review the reference to “trustee” contained in the *B.I.A.*

### *Grantees (“cessionnaires”)*

When debtors assign their property to trustees, the property which the assigning debtors actually owned, and which constituted the pledge shared among creditors, passes to and is vested in the trustees.<sup>165</sup> In an analysis of this specific point of describing the roles of trustees, M<sup>e</sup> J.-Michel Deschamps concluded that trustees are considered more assignees than successors to

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However, the words “for his own benefit” appear to limit the application of this provision to a situation that does not apply to Quebec trusts (“fiducies”).

<sup>162</sup> *Re Roy* (1963), 4 C.B.R. (N.S.) 275 (Que. Sup. Ct.); *Touche Ross Limited v. Weldwood of Canada Sales Ltd.* (1983), 48 C.B.R. (N.S.) 83 (Ont. H.C.J.).

<sup>163</sup> *Faillite et insolvabilité*, supra note 21 at 714.

<sup>164</sup> M. Cantin Cumyn, *L'administration du bien d'autrui* (Cowansville, Que.: Yvon Blais, 2000) at 112. Guibault J. of the Quebec superior Court seemed to agree with this view when he stated, in *Auger v. Harvey*, that bankrupt debtors are not deprived of the exercise of ownership over their property and that transferring property to trustees do not mean transferring ownership as well. *Auger v. Harvey*, [2000] R.J.Q. 2075 at 2078 (Que. Sup. Ct.).

<sup>165</sup> *Re Civano Construction Inc., Gingras v. Credit M. G. Inc.* (1962), 3 C.B.R. (N.S.) 141 at 146 (Que. Sup. Ct.); *Bank of Nova Scotia v. Perras, Fafard*, [1985] C.A. 21.

debtors or representatives of creditors.<sup>166</sup> According to Professor Bohémier, however, the term “trustee” does not easily lend itself to a single description.<sup>167</sup> And Professor Madeleine Cantin Cumyn energetically states that, where the roles of trustees are concerned, [translation] “using “assignee” as a description is a fanciful and extreme solution.”<sup>168</sup> She points out: [translation] “[w]hen bankruptcy legislation involves application of Quebec private law, trustees may be given a single description: that of administrators of the property of others.”<sup>169</sup> To this concept we now turn.

### *Administrators of the property of others*

A number of differences can be noted between the powers of trustees and the obligations of administrators of the property of others. Administrators of the property of others are responsible for the simple or the full administration of property or a patrimony not their own.<sup>170</sup> Simple administration is limited to performing all acts necessary for the preservation of the property,<sup>171</sup> collecting the fruits and revenues of the property,<sup>172</sup> exercising the voting rights pertaining to securities owned,<sup>173</sup> and continuing the operation of the property.<sup>174</sup> Full administration means preserving the property and making it productive, and increasing the patrimony or appropriating it to a purpose;<sup>175</sup> in this case administrators may alienate the property by onerous title or charge it with a real right.<sup>176</sup>

Before starting to administer debtors' property, trustees must obtain a licence from the Office of the Superintendent of Bankruptcy<sup>177</sup> and provide security covering the value of the property.<sup>178</sup> Once debtors' property has been transferred to trustees,<sup>179</sup> the *B.I.A.* authorizes the trustees to administer and to sell the property, subject to supervision by inspectors; it does not give them the power to make it productive.<sup>180</sup> The Superintendent may intervene at any time and issue directives to trustees

<sup>166</sup> J.-M. Deschamps, “Le syndic: un successeur du débiteur? Un cessionnaire? Un représentant des créanciers?”, in *Les faillites : problèmes actuels et perspectives d'avenir : Conférences commémoratives Meredith 1985* (Toronto: R. De Boo Publishers, 1986) at 245.

<sup>167</sup> *Faillite et insolvabilité*, *supra* note 21 at 718.

<sup>168</sup> *L'administration du bien d'autrui*, *supra* note 164 at 111.

<sup>169</sup> *Ibid.* It should be noted that, contrary to M<sup>e</sup> Deschamps and Professor Bohémier, Professor Cantin-Cumyn addressed this issue in the context of the *C.C.Q.*

<sup>170</sup> Art. 1299 *C.C.Q.*

<sup>171</sup> Art. 1301 *C.C.Q.*

<sup>172</sup> Art. 1302 *C.C.Q.*

<sup>173</sup> Art. 1302 *C.C.Q.*

<sup>174</sup> Art. 1303 *C.C.Q.*

<sup>175</sup> Art. 1306 *C.C.Q.*

<sup>176</sup> Art. 1307 *C.C.Q.*

<sup>177</sup> S. 13 *B.I.A.*

<sup>178</sup> Subs.16(1) *B.I.A.*

<sup>179</sup> Subs. 71(2) *B.I.A.*

<sup>180</sup> S. 30 *B.I.A.* The list of trustees' powers is quite lengthy. It reads as follows:

The trustee may, with the permission of the inspectors, do all or any of the following things:

(a) sell or otherwise dispose of for such price or other consideration as the inspectors may approve all or any part of the property of the bankrupt, including the goodwill of the business, if any, and the book debts due or growing due to the bankrupt, by tender, public auction or private contract, with power to transfer the whole thereof to any person or company, or to sell the same in parcels;

(b) lease any real property;

(c) carry on the business of the bankrupt, in so far as may be necessary for the beneficial administration of the estate of the bankrupt;

(d) bring, institute or defend any action or other legal proceeding relating to the property of the bankrupt;

concerning the exercise of their powers.<sup>181</sup> These elements, reflecting the quasi-criminal nature of bankruptcy proceedings distinguish trustees from administrators of the property of others.

### Receivers

In acquiring and retaining possession of bankrupts' property, trustees are in the same position as court-appointed receivers.<sup>182</sup> The receivership system in the *B.I.A.* is derived directly from English law.<sup>183</sup> The actual usefulness of this concept, apparently completely foreign to Quebec civil law, is debatable.

The *C.C.Q.* recognizes the existence of two types of sequestration: conventional sequestration and judicial sequestration. Conventionally chosen sequestrators are persons with whom property in dispute is deposited.<sup>184</sup> All indications are that subsection 16(4) of the *B.I.A.*, in referring to court-appointed receivers, does not mean these conventionally chosen sequestrators. According to the *C.C.P.*, judicially chosen sequestrators are court appointed depositaries put in possession of property for the duration of a dispute between two parties.<sup>185</sup> Also, according to the Quebec Court of Appeal, it should not be assumed that judicially chosen sequestrators are the same as receivers of property or trustees in bankruptcy.<sup>186</sup>

In our view, it is likely pointless to retain the reference to the receivership mechanism since, under the *B.I.A.*, debtors' property clearly passes to and is vested in trustees, who take possession of it and administer it.

### Owners

When debtors own immovables at the time of the assignment, subsection 74(2) of the *B.I.A.* allows trustees to be registered as the owners of the property, free of all encumbrances; trustees must first register the assignment.<sup>187</sup> In case of default, debtors not only remain the owners of their

(e) employ a solicitor or other agent to take any proceedings or do any business that may be sanctioned by the inspectors;

(f) accept as the consideration for the sale of any property of the bankrupt a sum of money payable at a future time, subject to such stipulations as to security and otherwise as the inspectors think fit;

(g) incur obligations, borrow money and give security on any property of the bankrupt by mortgage, hypothec, charge, assignment, pledge or otherwise, such obligations and money borrowed to be discharged or repaid with interest out of the property of the bankrupt in priority to the claims of the creditors;

(h) compromise and settle any debts owing to the bankrupt;

(i) compromise any claim made by or against the estate;

(j) divide in its existing form among the creditors, according to its estimated value, any property that from its peculiar nature or other special circumstances cannot be readily or advantageously sold;

(k) elect to retain for the whole part of its unexpired term, or to assign, surrender or disclaim any lease of, or other temporary interest in, any property of the bankrupt; and

(l) appoint the bankrupt to aid in administering the estate of the bankrupt in such manner and on such terms as the inspectors may direct.

<sup>181</sup> Subs. 5(4) *B.I.A.*

<sup>182</sup> Subs. 16(4) *B.I.A.*

<sup>183</sup> Subsection 16(4) of the present *B.I.A.* has its origin in subsection 39(2) of the 1919 *Insolvency Act*. In drafting this section, the federal Parliament, at the time, was inspired by British legislation: the 1869 *Bankruptcy Act* (U.K.), 1869, c. 71; *Bankruptcy Act*, (U.K.), 1883, c. 52, subs. 50(2); *English Bankruptcy Act of 1914*, *supra* note 21, subs. 48(2).

<sup>184</sup> Art. 2307 *C.C.Q.* In the French version, this "deposit" is also referred to as "sequestre". Art. 2305 *C.C.Q.*

<sup>185</sup> Art. 742ff *C.C.P.*

<sup>186</sup> *André Radio Ltée (syndic de) v. Compagnie de fiducie du Canada Permanent*, [1988] R.J.Q. 2327 (C.A.).

<sup>187</sup> *Gobeil v. Cie H. Fortier*, [1982] 1 S.C.R. 988 at 1002-1003.

property, but also any assignments, conveyances, mortgages, or real rights granted by trustees are null and void.<sup>188</sup>

In common law, this provision raises no conceptual issues: under trust law, trustees acquire the trust of debtors' property.<sup>189</sup> In civil law, however, it presents a conceptual ambiguity.

First of all, in a civil law system, ownership is the reunion of three elements: (1) *fructus*, the right to use; (2) *usus*, the right to enjoy; and (3) *abusus*, the right to dispose of.<sup>190</sup> This makes owners free to use, enjoy, and dispose of their property, within the limits imposed by law. As has been noted, the *B.I.A.* limits trustees' powers. Trustees must exercise ownership rights not for their own benefit but for the general benefit of the creditors. This situation is probably what led Bernier J. of the Quebec Court of Appeal to state: [translation] “[i]t is not as individuals but as trustees (“fiduciaires”) that trustees (“syndics”) become owners of assigned property; the purpose of the *Bankruptcy Act* (that is, liquidation for the creditors' benefit) governs trustees' ownership rights [...]” [emphasis added].<sup>191</sup>

As Professor Albert Bohémier points out, in civil law it is difficult to conceive of persons owning property for the benefit of others and not for their own benefit.<sup>192</sup> However, this is the view described by Durocher J. of the Quebec Superior Court and reiterated by Nuss J. of the Quebec Court of Appeal: as soon as bankruptcy is declared, [translation] “[...] debtors' property becomes both trustees' property and creditors' patrimony” [emphasis added].<sup>193</sup>

This legal situation is the one envisaged in common law, in which trustees acquire legal title and beneficiaries acquire beneficial title.<sup>194</sup> It is not the situation of trusts envisaged in civil law, in which trust property forms an independently assigned patrimony, which neither the settlor, the trustee (“fiduciaire”), nor the beneficiary owns.<sup>195</sup>

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As can be seen, describing the roles of trustees (“syndics”) means juggling with the concepts of trustees (“fiduciaires”), administrators of the property of others, grantees, receivers, and owners. From a civilist point of view, this description is even more complex given the statutory context in which these roles are defined, a context marked by common law.

<sup>188</sup> *Re J. W. Kilgour and Bros. Ltd.; Corporation municipale de la Ville de Coaticook v. Dionne*, [1997] C.S. 1082 at 83.

<sup>189</sup> D.W.M. Waters, *Law of Trust in Canada*, 2nd ed. (Toronto: Carswell, 1984) at 449ff, 574ff.; F.H. Lawson and B. Rudden, *The Law of Property*, 2nd ed. (Oxford: Clarendon Press, 1982) at. 6ff, 100 ff.

<sup>190</sup> Art. 947 C.C.Q.

<sup>191</sup> *Lefavre v. Côté*, [1975] C.A. 691 at 692.

<sup>192</sup> *Faillite et insolvabilité*, *supra* note 21 at 715.

<sup>193</sup> *Lacoursière v. Westmount (Town)*, [1998] R.J.Q. 1784 (C.A.); at the trial level, see *Kostadinova Gantcheff (syndic de) v. Westmount (Ville)*, [1996] R.J.Q. 3030 at 3032 (Sup. Ct.).

<sup>194</sup> See: *The Law of Property*, *supra* note 189 at 6ff, 100ff; J. Beaulne, *Droit des fiducies*, Coll. Bleue (Montreal: Wilson & Lafleur, 1998) at 118.

<sup>195</sup> It should nonetheless be noted that titles to property forming a patrimony to be assigned are drawn up in the trustee's name: art. 1278 C.C.Q. See J.E.C. Brierley, “De certains patrimoines d'affectation”, in *Barreau du Québec and Chambre des notaires du Québec, La réforme du Code civil*, vol. 1 (Quebec: Les Presses de l'Université Laval, 1993) 735 at 764ff.

### 3. General issues

#### 3.1. Creation of new security mechanisms

Provincial private law usually provides for rules governing the creation of security mechanisms and recourse by security holders in enforcing their rights. The federal Parliament occasionally creates new mechanisms, usually benefiting the Crown. This situation raises some issues about the creation of these mechanisms and the right of preference they confer over other security mechanisms found in provincial private law. The designation of various security mechanisms may also raise terminological issues of considerable importance.

##### *Terminology used to designate security mechanisms*

The C.C.L.C. used a variety of expressions to designate various security mechanisms. In reforming the civil law, the Quebec National Assembly jettisoned a number of these security mechanisms, making them outdated overnight.<sup>196</sup> The C.C.Q. now retains only prior claims, hypothecs and a few other mechanisms including right of retention, suretyship, and what are called “ownership security” mechanisms and “trust security” mechanisms. These changes do not yet appear in federal legislation.<sup>197</sup> In addition, the federal Parliament sometimes uses the English word “charge” to designate security mechanisms, but this word has different meanings in the common law and the civil law traditions: in common law the word “charge” is synonymous with “security”, while in civil law its meaning is limited to real rights.<sup>198</sup>

##### *Effecting security*

The C.C.Q. usually provides that legal hypothecs take effect only once they are registered in the proper register.<sup>199</sup> In the B.I.A., the federal Parliament has created security mechanisms benefiting certain creditors without requiring that these mechanisms be registered. Examples include the charges granted to farmers, fishermen and aquaculturists<sup>200</sup> and the charges granted to interim receivers.<sup>201</sup> In the latter case, civil law practitioners find the procedure for effecting the security surprising since, in order to benefit from the security, interim receivers must submit an application to the court, which in its discretion decides whether it is appropriate to grant the security.<sup>202</sup>

<sup>196</sup> Examples of French terminology that became outdated include: in the C.C.L.C., “antichrèse” (art. 1967), “nantissement” (art. 1966), “cession de créance en garantie” (art. 1571), “cession générale de créances comptables” (art. 1966), “nantissement forestier” (art. 1979(a)), “nantissement agricole” (art. 1979(a)), “nantissement commercial” (art. 1979(e)), and “privilège” (art. 1983ff.); in the legislative corpus, “cession de biens en stock” (*Act respecting bills of lading, receipts and transfers of property in stock*, R.S.Q., c. C-53), “Acte de fiducie”, “charge flottante”, “charge spécifique” (*Special Corporate Powers Act*, R.S.Q., c. P-16), and “transports en garantie de créances” (*Forestry Credit Act*, R.S.Q., c. C-78; *Act to promote forest credit by private institutions*, R.S.Q., C-78.1; *Act respecting farm financing*, R.S.Q., c. F-1.2). We note that the French expressions “charge spécifique” and “charge flottante” did not appear in the legislation itself but was currently used by the legal community. M. Deschamps, “Les sûretés sur les équipements et les stocks” (1987) 1 C.P. du N. 125 at 146-147.

<sup>197</sup> See *supra* note 35.

<sup>198</sup> *Dictionnaire de droit québécois*, *supra* note 81 at 86; G. Cornu, *Vocabulaire juridique*, 4th ed. (Paris: Presses universitaires de France, 1987) at 130; M. Filion, *Dictionnaire du Code civil du Québec* (Saint-Nicolas, Que.: Éditions associations entreprises, 1998) at 79; P.-A. Crépeau., *Dictionnaire de droit privé et lexiques bilingues*, 2nd ed. (Cowansville, Que.: Yvon Blais, 1991) at 84. In seeking to determine whether the word “charge” in the B.I.A.’s definition of “secured creditor” could include the concept of prior claim, and in dissenting from the substance of the decision in *Château d’Amos*, Brossard J. of the Quebec Court of Appeal stated that, unlike the well-known common law concept of “charge”, the Quebec civil law concept of “charge” was poorly defined: *Château d’Amos*, *supra* note 32 at 2635.

<sup>199</sup> Art. 2725(2) C.C.Q.

<sup>200</sup> Subs. 81.2(1) B.I.A.

<sup>201</sup> Subs. 47.2(1) B.I.A.

<sup>202</sup> *Re N.T.W. Management Ltd.*, (1994) 29 C.B.R. (3rd) 139 (Ont. Ct. (Gen. Div.)).

Under very specific circumstances, the *B.I.A.* also provides the Crown with a new security mechanism.<sup>203</sup> The *B.I.A.* already provides for very specific rules governing the validity of security held by the Crown.<sup>204</sup> These rules would not apply to the new security mechanism because it is specifically an interest in land;<sup>205</sup> in common law, rights in land need not be registered.<sup>206</sup> In Quebec, where a dual system of land ownership is recognized, the situation is quite different.<sup>207</sup> The rule on registering security held by the Crown would appear to be applicable in Quebec; if this is the case, there would be genuine disparity between the situation in Quebec and that in the other provinces.<sup>208</sup>

The possibility of new security mechanisms not only raises issues about creating these mechanisms; it also adds, to the structure of preferences recognized in the *jus commune*, other rights that may jeopardize the balance among creditors.

### *Rights of preference*

The *C.C.Q.* provides for only two causes of preference: prior claims and hypothecs.<sup>209</sup> When bankruptcy occurs, the *B.I.A.* supplants ordinary *jus commune* rules, and creditors are treated in accordance with a separate scheme of distribution—unless they are defined as “secured creditors”,<sup>210</sup> in which case, under sections 69 to 69.3 of the *B.I.A.*, they have recourse under the *jus commune*, and the two causes of preference set out in the *C.C.Q.* apply.

In the *B.I.A.*, the federal Parliament has created security mechanisms that give security holders a right of preference and a rank them above all other creditors. For example, subsection 14.06(7) of the *B.I.A.* provides as follows: “[...] [the charge] ranks above any other claim, right or charge against the property, notwithstanding any other provision of this Act or anything in any other federal or provincial law.”

The same is true for the claims of farmers, fishermen and aquaculturists regarding products they have delivered to bankrupts.<sup>211</sup> This upsetting of balance, among creditors with security, provided for in provincial *jus commune* may be a source of confusion. At the very least, where

<sup>203</sup> Subs. 14.06(7) *B.I.A.* The purpose of this security mechanism is to guarantee payment of Crown claims for the costs of remedying environmental damage, for example when corporations discharge large quantities of pollutants into rivers. In Quebec, when this type of environmental pollution occurs, the *ministère de l'Environnement du Québec* may clean up the pollution if it considers it necessary to do so, particularly on private immovables. The *Ministère* may then claim the cleanup costs by presenting the invoice to the property owners. If the owner of a property thus cleaned up by the *Ministère* becomes bankrupt or makes a proposal, the claim by the *Ministère* is immediately secured by a immovable security on the immovable of the debtor that is contiguous thereto; this security guarantees payment of the claim by the *Ministère*, which ranks above any other claim. The claim by the *Ministère* is enforceable “in the same way as a mortgage, hypothec or other security on real property”. *Environment Quality Act*, R.S.Q. c. Q-2, s. 115.1.

<sup>204</sup> Ss. 86, 87 *B.I.A.*

<sup>205</sup> This situation would prevail in common law: under the interest in land, the Crown could proceed to remedy environmental damage: J. Marin and A. Ilchenko, “Amendments to the *Bankruptcy and Insolvency Act*. Bill C-5, Environmental Liabilities of Trustees and Receivers” (1997) 14:2 *Nat. Insol. Review* 18 at 42.

<sup>206</sup> See *Land Titles Act*, R.S.O. c. L-5; *Registry Act*, R.S.O. c. R-20.

<sup>207</sup> In Quebec, property belongs either to persons or to the State: art. 915 *C.C.Q.*

<sup>208</sup> Nevertheless, because of a difficulty of a technical nature, one can wonder how the Crown would be able to respect their registration obligation imposed upon them. In effect, according to subsection 87(1) of the *B.I.A.*, in order for the Crown to benefit from the advantage of its security, it should be registered before one of the following listed dates: the deposit of the bankruptcy petition, of the notice of assignment, of the proposal, of the notice of intention to make a proposal. Therefore, it is good to remember that the security attributed to the Crown to guarantee the reimbursement of their compensation fees only takes birth at the moment when a proposal is deposited or at the moment when the debtor declares bankruptcy. In other words, this security only takes birth after one or the other dates listed in subsection 87(1). One can then ask how the Crown would have been able registered the security previously? How would have it registered a security that is not yet born in order to respect the delays imposed by federal legislator?

<sup>209</sup> Art. 2647 *C.C.Q.*

<sup>210</sup> S. 136 *B.I.A.*

<sup>211</sup> Subs. 81.2(1) *B.I.A.*

Quebec civil law is concerned, it would seem appropriate to harmonize these security mechanisms with those provided for under the C.C.Q.

### 3.2. The concept of “settlement/*disposition*”

“Settlement of property/*disposition de biens*” is a concept from the common law tradition that was imported into Canadian legislation, in the *B.I.A.* in particular.<sup>212</sup> This concept was imported from the British law in 1919.<sup>213</sup> According to the traditional case law, this concept refers to:

- a gift to a beneficiary
- on condition that the donated property be maintained in its original form or in a condition that allows it to be traced.<sup>214</sup>

The element of tracing, which characterizes “settlement/*disposition*”, is unknown in civil law: the civil law concept of gift does not include this element of control since gifts are made by gratuitous title.<sup>215</sup> Any juridical acts that might be subject to a “paulian action” include an element of fraud;<sup>216</sup> and hypothecs that debtors may offer as security for the performance of obligations do not include the element of tracing, since the property charged remains in the debtor’s patrimony.<sup>217</sup> Finally, even if the trust under the C.C.Q. constitutes a patrimony by appropriation, the idea of transferring property to a trust with the intent that it can be traced is foreign to civil law.<sup>218</sup>

In 1992, the federal Parliament introduced a definition of the word “settlement/*disposition*”. Strictly speaking, this provision is more a list than a definition: it provides that a settlement “includes a contract, covenant, transfer, gift and designation of beneficiary in an insurance contract, to the extent that the contract, covenant, transfer, gift or designation is gratuitous or made for merely nominal consideration”.<sup>219</sup>

As can be seen, the concept of tracing does not form part of the so-called statutory definition of “settlement/*disposition*”. Nevertheless, in our opinion the case law should maintain its traditional interpretation in accordance with English law,<sup>220</sup> particularly since this definition uses the word “includes”, which indicates that this list is neither exhaustive nor exclusive.

As well, the concept of “settlement/*disposition*” is still unknown in Quebec civil law, which applies the concept of “alienation without sufficient consideration” instead.<sup>221</sup> Clearly, some degree of harmonization of federal bankruptcy legislation and Quebec civil law is called for on this point.

<sup>212</sup> S. 91ff *B.I.A.*

<sup>213</sup> *Re Jules Beaulieu*, (1942) 24 C.B.R. 197 at 205 (Que. C.A.); *Re Évaporateur Portneuf Inc.: Angers v. Malouin*, [1962] B.R. 218 [hereinafter *Re Évaporateur Portneuf Inc.*]; *Jobin v. The Monarch Life Assurance Co.*, [1986] R.J.Q. 1755 (Que. C.A.), at 1758.

<sup>214</sup> *A. H. Boulton Co. v. Bozanich (Trustee of)*, [1942] S.C.R. 130.

<sup>215</sup> Art. 1806 C.C.Q.

<sup>216</sup> Art. 1631ff. C.C.Q. The French version of the former law referred to “action paulienne” instead of “action en inopposabilité”.

<sup>217</sup> Art. 2660ff. C.C.Q.

<sup>218</sup> Art. 1260ff. C.C.Q. In common law, it seems that the concept of tracing is in the heart of the notion of trust, at least concerning the traditional remedies under the equity regime. See *Law of Trust in Canada*, *supra* note 189 at 883ff.

<sup>219</sup> Subs. 2(1) *B.I.A.*

<sup>220</sup> See *Royal Bank of Canada v. North American Life Assurance Co.*, [1996] 1 S.C.R. 325.

<sup>221</sup> *Re Évaporateur Portneuf Inc.*, *supra* note 213.; *In Re Promoteurs inc. : Danyluk v. Franco*, (1982) 42 C.B.R. (N.S.) 2521; *Re Jobin : Blais, Fortier, Touché et Ross Ltée v. Monarch Life Assurance Co.*, [1986] R.J.Q. 1755 (Que. C.A.); *Giroux (Syndic de) v. Giroux*, [1993] R.J.Q. 1515 (Que. Sup. Ct.). See “Conférence sur le projet de loi S-22”, *supra* note 36 at 13.

In concluding this part, we point out that the British Parliament has amended its bankruptcy legislation, replacing the concept of settlement with the concept of “act for an undervalue”, which does not require demonstration of intent to maintain the property in a condition that allows it to be traced.<sup>222</sup>

### 3.3. The concept of enterprise

Unlike common law, in the *C.C.L.C.* Quebec civil law established a dual system comprising, firstly, civil matters and, secondly, commercial matters. Thus, according to case law and authorities, certain persons were “commerçants”, and certain acts “actes de commerce”. The reform of the *C.C.Q.* ended this dual system by jettisoning these concepts; the *C.C.Q.* now refers only to the concept of enterprise,<sup>223</sup> which designates “all organized economic activity” carried on by natural or legal persons.<sup>224</sup> Judge Pierre J. Dalphond lists the following characteristics of an enterprise:

[translation]

- a plan setting out the enterprise’s objectives, which determine how its activities are organized (the plan need not be complicated or even written);
- assets related to the pursuit of the objectives (assets may vary from a vast corporation’s employees, machinery, equipment and immovable to a tradesperson’s simple tool kit);
- a series of habitual, usual legal acts involving the businessperson in the pursuit of the objectives;
- other economic agents, who are receptive to the goods and services offered by the enterprise and are usually defined as the enterprise’s clients, goodwill, or market;
- economic consideration or benefit directly attributable to the businessperson’s efforts.<sup>225</sup>

Since being passed in 1919, federal bankruptcy legislation, faithful to its common law roots, has applied to everyone, businessperson or not. However, its use of the expressions “business”, “carrying on business”, “trade” and “commercial”, and particularly the wording of these expressions in the French version, are variable. For example, the expression “to carry on business” is rendered sometimes by the French expression “exercer ses activités”<sup>226</sup> and sometimes by “continuer le commerce”,<sup>227</sup> the expression “trade or business” is rendered sometimes by “métier ou commerce”<sup>228</sup> and sometimes by “commerce ou entreprise”.<sup>229</sup> As well, the *B.I.A.* continues to use the French expressions “exercer le commerce”, “faire commerce”, and “continuer un commerce”, which were accurate when the *C.C.L.C.* was in effect but have been outdated since the reform of the *C.C.Q.*

In our view, although the issue raised by the concept of enterprise is more terminological than substantive, it could lead indirectly to a substantive problem, and harmonization of the *B.I.A.* with the changes made to Quebec civil law would therefore be called for.

<sup>222</sup> *Insolvency Act* (U.K.), 1986, c. 45, s. 339.

<sup>223</sup> *Commentaires du Ministre*, *supra* note 82 at 936, 937.

<sup>224</sup> Art. 1525(3) *C.C.Q.*

<sup>225</sup> P. J. Dalphond, “Entreprise et vente d’entreprise en droit civil québécois” [1994] 54 R. du B. 35 at 43ff.

<sup>226</sup> S. 2 *B.I.A.*

<sup>227</sup> Paragraph 30(1)(c) *B.I.A.*

<sup>228</sup> S. 94 *B.I.A.*

<sup>229</sup> Subs. 137(2) *B.I.A.*



### 3.4. The concept of suretyship

When assets of bankrupt debtors are to be administered, under the *B.I.A.* trustees must provide security to the Superintendent, to ensure the due and faithful performance of their duties. This concept of security raises a harmonization issue with the Quebec civil law concept of suretyship.

#### *Suretyship in civil law*

Article 2333 of the *C.C.Q.* provides that: “[s]uretyship is a contract by which a person, the surety, binds himself towards the creditor, gratuitously or for remuneration, to perform the obligation of the debtor if he fails to fulfil it.” Suretyship contracts, then, have three parts, are ancillary and subsidiary and, since they impose no obligations on creditors, are unilateral.<sup>230</sup> Suretyship contracts are therefore distinct from insurance contracts, hypothecs, and deposit contracts.

#### *(i) Distinction between civil law suretyships and insurance contracts*

Suretyship contracts and insurance contracts share certain characteristics. The idea of risk is present in both types of contracts: in one, it is risk of failure to perform obligations; in the other, it is risk of loss resulting from accidents.<sup>231</sup> As well, the reform of the *C.C.Q.* has permitted suretyship contracts for money, which are somewhat like purchased insurance policies. These two types of contracts are fundamentally different, however, since suretyship contracts are unilateral contracts; insurance contracts, on the other hand, are principal synallagmatic contracts.<sup>232</sup>

Still, these two types of contracts are sometimes confused. The Quebec *Regulation respecting the application of the Act respecting insurance* defines the securities provided by insurance companies in Quebec as follows:

Guarantee insurance means surety insurance and fidelity insurance. Surety insurance guarantees against failure to discharge or the unfaithful discharge of an obligation, or failure to pay a penalty or an indemnity upon such default, but does not include credit insurance or mortgage insurance. Fidelity insurance means insurance against loss to the insured caused by the dishonesty of his employees, in particular in the case of theft, breach of trust or embezzlement.<sup>233</sup>

Nor does it seem that the confusion between the concepts of suretyship contracts and insurance contracts in Quebec civil law is limited to the application of this Regulation. In the decision in *Entreprises Gamelec Inc.*, the Quebec Court of Appeal stated as follows: [translation] “[t]he Regulation is administrative in nature and cannot have the effect of changing the nature of insurance contracts or suretyship contracts, which are governed by different provisions of the *C.C.Q.*”<sup>234</sup>

#### *(ii) Distinction between suretyship and hypothecs*

Similarly, suretyship and movable hypothecs share one characteristic: they both guarantee the performance of obligations. However, movable hypothecs are a form of real security, while suretyship is a form of personal security. If debtors default on their obligations to hypothecary creditors, these creditors may exercise their security claim against the property that is subject to the

<sup>230</sup> L. Poudrier-Lebel, *Le cautionnement par compagnie de garantie* (Cowansville, Que.: Yvon Blais, 1986) at 189.

<sup>231</sup> *Ibid.*, at 195.

<sup>232</sup> *Ibid.*; M. Troplong, *Le droit civil*, t. 17 (Paris: Charles Hingray, 1846) at 41.

<sup>233</sup> *Regulation respecting the application of the Act respecting insurance*, R.R.Q. 1981, c. A-32, r. 1, s. 13.

<sup>234</sup> *Entreprises Gamelec inc. v. Laurentienne générale (La), Compagnie d'assurance inc.*, [1990] R.R.A. 971 at 972.

hypothec. On the contrary, for all practical purposes the security provided under suretyship contracts makes additional patrimony available to creditors, up to the value of the initial contracts entered into by debtors.<sup>235</sup>

*(iii) Distinction between civil law suretyships and deposit contracts*

It is easy to confuse suretyship contracts with deposit contracts, particularly since many statutes use the expression “cautionnement en espèces”. As has been seen, one characteristic of suretyship contracts is that they have three parts. In comparison, deposit contracts are principal contracts under which depositors hand over movable property to depositaries, who undertake to keep the property for a certain time and to restore it to the depositors.<sup>236</sup>

*Security required from trustees under the B.I.A.*

At one time, federal bankruptcy legislation required that trustees applying for a licence provide general security. That requirement was eliminated in 1992.<sup>237</sup> Since that time, this legislation has required only specific security, in order to ensure the due and faithful performance of trustees’ duties and the fair distribution of dividends to creditors.

Subsection 16(1) of the *B.I.A.* describes the specific security trustees must provide if they are to administer assets, as follows:

[e]very trustee duly appointed shall forthwith give security in cash or by bond of a guaranty company [...] for the due accounting for [...] of all property received by the trustee as trustee and for the due and faithful performance of the trustee's duties.

This section thus gives trustees an alternative: they can provide either a cash deposit or a bond issued by a guaranty company.

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<sup>235</sup> *Droit des sûretés*, *supra* note 130 at 19.

<sup>236</sup> Art. 2280 C.C.Q.

<sup>237</sup> S.C. 1992, c. 27, s. 9; According to Justice Houlden and Mr. Morawetz: “[a] trustee was formerly required to deposit a general bond with the superintendent for the due and faithful performance of his duties. This is no longer required. A specific bond must, however, be filed under subs. 16(1)”: L. W. Houlden and G. B. Morawetz, *The 2000 Annotated Bankruptcy and Insolvency Act* (Toronto: Carswell, 1999) at 28.

*(i) Cash deposits*

The major dictionaries recognize that the word “cautionnement” can mean a cash deposit.<sup>238</sup> The Quebec National Assembly itself has recognized cash deposits<sup>239</sup> and pledges<sup>240</sup> as forms of security. That said, it appears that the use of the word “cautionnement” to designate a cash deposit is improper in civil law.<sup>241</sup> According to article 2333 of the *C.C.Q.*, the word “cautionnement” implies the intervention of a third party, the surety, whom the creditor may ask to perform the obligation in the debtor’s place.<sup>242</sup> Since cash deposits do not imply intervention by a third party, correct expressions would be “gage”, “hypothèque mobilière avec dépossession”<sup>243</sup> or “dépôt”.

Elsewhere, the *C.C.Q.* provides for presentation of sufficient security, instead of surety that might take the form of a cash deposit; the very existence of this provision points to the distinction between these two concepts.<sup>244</sup> This situation could arise in the case of defendants residing abroad, for example; in such cases, the *C.C.P.* provides for security for costs.<sup>245</sup> Trial level judges may require plaintiffs not residing in Quebec to find a person who will act as surety;<sup>246</sup> the purpose of this procedure is to cover costs that may result if an application is dismissed. However, plaintiffs wishing to avoid the trouble of finding a surety can ask the court if they may make a cash deposit as sufficient security under article 2338 of the *C.C.Q.*<sup>247</sup> As well, although subsection 16(1) of the *B.I.A.* provides for a cash deposit as a guarantee, in practice trustees post bonds issued by guaranty companies.<sup>248</sup>

*(ii) Security in the form of bonds issued by guaranty companies*

Subsection 16(1) of the *B.I.A.* allows trustees to guarantee the performance of their duties by providing security in the form of bonds. Bonds are evidence of a contract between a financial institution and an individual, under which the financial institution makes a sum of money available to

<sup>238</sup> *Dictionnaire de droit privé et lexiques bilingues*, supra note 198 at 78; *Dictionnaire de droit québécois*, supra note 81 at 78; *Vocabulaire juridique*, supra note 198 at 121; A. Rey, *Le nouveau Petit Robert* (Paris: Dictionnaires Le Robert, 1993) at 322.

<sup>239</sup> *Act respecting insurance*, R.S.Q. c. A-32, s. 225; *Regulation respecting travel agents*, R.R.Q. c. A-10, r. 1, s. 30; *Retail Sales Tax Act*, R.S.Q. c. I-1, s. 5; *Public Officers Act*, R.S.Q. c. E-6, s. 20; *Education Act for Cree, Inuit and Naskapi native persons*, R.S.Q. c. I-14, s. 306; *Highway Safety Code*, R.S.Q. c. C-24, s. 152.

<sup>240</sup> According to the regulation “[t]he securities mentioned in *this Regulation shall be in the form of a pledge or by guarantee policy in accordance with section 15 of the Public Officers Act* (R.S.Q. c. E-6)”; *Regulation respecting the application of the Act respecting detective or security agencies*, R.R.Q. c. A-8, r. 1, s. 11; *Public Officers Act*, ibid., ss. 20, 29; *Act to harmonize public statutes with the Civil Code*, S.Q. 1999, c. 40, s. 117.

<sup>241</sup> According to Louise Poudrier-Lebel, [translation] “[i]t should also be noted that the word “cautionnement” or “caution” is currently used to designate a cash deposit given as a guarantee. This usage is improper since what is meant is a form of pledge or, more specifically now, a form of movable hypothec”: L. Poudrier-Lebel, “Contrat de cautionnement”, in *Obligations et contrats*, vol. 5 (Cowansville, Que.: Yvon Blais, 1998) at 299; according to Michel Filion, [translation] “[t]he word “cautionnement” has had another meaning, that of a “cash deposit as a guarantee of a pledge”. In our view, however, this meaning is outdated since the concept referred to is that of a pledge”: *Dictionnaire du Code civil du Québec*, supra note 198 at 75; according to Pierre Ciotola, [translation] “[t]he word “cautionnement” as personal security must not be confused with the deposit of sums of money as a guarantee. “Cautionnement” is personal security; the deposit of sums of money as a guarantee is, instead, a pledge or a movable hypothec with delivery”: *Droit des sûretés*, supra note 130 at 20.

<sup>242</sup> Art. 2333 *C.C.Q.*; *Banque nationale du Canada v. Notre-Dame du Lac (Ville de)*, [1990] R.L. 339 (Que. C.A.).

<sup>243</sup> *Droit des sûretés*, supra note 130 at 20.

<sup>244</sup> Art. 2338 *C.C.Q.*

<sup>245</sup> Art. 65 *C.C.P.*: “[a] plaintiff who does not reside in Quebec must give security for the costs which may be incurred in consequence of his suit.”

<sup>246</sup> Art. 525 *C.C.P.*: the court fixes the amount of the surety, which the opposing party may challenge.

<sup>247</sup> D. Ferland and B. Emery, *Précis de procédure civile du Québec*, vol. 2, 3th ed. (Cowansville, Que.: Yvon Blais, 1994) at 83.

<sup>248</sup> According to Justice Houlden and Mr. Morawetz, “[a]lthough subs. 16(1) permits the security to be given by the trustee in cash or by bond of a guaranty company, it is the invariable practice for the trustee to post a bond of a guaranty company”: *The 2000 Annotated B.I.A.*, supra note 53 at 45. This security is “usually in the form of a state bond, for the benefit of the creditors”: Canada, Office of the Superintendent of Bankruptcy, Directive No. 13: Estate Bonding, issued October 23, 1986, reissued January 10, 1991.

the individual on certain conditions and for a certain time. Although bonds as such do not correspond to the definition of “cautionnement” set out in the C.C.Q.,<sup>249</sup> they may be used as security specifically to guarantee the performance of debtors’ obligations.<sup>250</sup> Subsection 16(1) of the *B.I.A.* probably refers to this possibility.

In any case, official receivers must appraise the security provided by trustees. The Office of the Superintendent has issued a Directive setting out the points official receivers are to consider in fixing the amount of bonds.<sup>251</sup>

## General conclusions

As can be seen, the Justice Canada harmonization program gives us an opportunity to reflect on delightfully fine points of law. Together we have considered issues raised by new forms of security in the federal legislative corpus; the concept of settlement, so foreign to civil law and the concepts of enterprise and suretyship.

The *B.I.A.* raises the richest and most fascinating harmonization issues. Issues we have considered include: the definition of secured creditors, vesting in courts of jurisdiction in bankruptcy and equity, terminology and supplementary law required in certain procedures (particularly petitioning in bankruptcy). In addition, we have reviewed the application of Part XI of the *B.I.A.* to Quebec creditors, whether Quebec partnerships and trusts have juridical personality and can become bankrupt and finally the identification of the status of trustees regarding their various roles.

Our purpose in presenting these issues at this stage is to spark discussion among you and eventually to obtain your comments. Above all, our intention was to make you aware of issues involved in the harmonization of federal bankruptcy legislation with Quebec civil law.

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<sup>249</sup> Art. 2333 C.C.Q. M<sup>e</sup> Louis Payette distinguishes among purchasing insurance, obtaining “cautionnement” and obtaining bonds: L. Payette, *Les sûretés dans le Code civil du Québec* (Cowansville, Que.: Yvon Blais, 1994) at 320.

<sup>250</sup> *Forex Leroy inc. v. Banque Mercantile du Canada*, [1989] A.Q. No. 703 (QL).

<sup>251</sup> Estate Bonding, *supra* note 248. The following points are listed:

- Other forms of creditor protection such as insurance coverage
- Consideration of risks to creditors
- Costs of the estate bond
- Anticipated amount to be realized for distribution to creditors after payment of trustees’ administrative costs
- If a range of estate bond amounts costs a fixed premium, the estate bond amount should be set at the highest amount within the range to avoid the need for later increases
- The estate bond should not be fixed at an amount in excess of the largest amount to be on hand at any one time
- If the amount required is less than \$3,000, no estate bond amount need be fixed
- If the amount required is in excess of \$25,000, other coverage such as multiple counter-signatures by principals of the corporate trustee must be added
- Under subsection 120(3) of the *B.I.A.*, the estate bond amount is reviewed by the trustees themselves and by the inspectors
- If required, official receivers may increase estate bond amounts.

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